

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Spectrum Sharing Plan Among	)	
Non-Geostationary Satellite Orbit Mobile	)	IB Docket No. 02-364
Satellite Service Systems in the 1.6/2.4 GHz	)	
Bands	)	
	)	
Amendment of Part 2 of the Commission's	)	ET Docket No. 00-258
Rules to Allocate Spectrum Below 3 GHz for	)	
Mobile and Fixed Services to Support the	)	
Introduction of New Advanced Wireless	)	
Services, including Third Generation Wireless	)	
Systems	)	

**JOINT MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
MOTION FOR LEAVE TO FILE REPLIES**

The Wireless Communications Association International, Inc. (“WCA”), Sprint Corporation (“Sprint”) and Nextel Communications, Inc. (“Nextel”) (collectively, the “BRS Parties”) hereby move the Commission to deny the Motion for Leave to Accept Late-Filed Opposition (“Motion”) and dismiss the associated Consolidated Opposition to Petitions for Reconsideration (“Opposition”) submitted on January 21, 2005 by Fusion UV Systems, Inc. (“Fusion”) in the captioned proceeding.<sup>1</sup> As shown below, Fusion’s Opposition is grossly untimely and should be rejected as such. In the alternative, should the Commission elect to grant the Motion and accept Fusion’s untimely Opposition, the BRS Parties request that the Commission specify that, consistent with section 1.429(g) of the Rules, the BRS Parties have

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<sup>1</sup> See Motion for Leave to Accept Late-Filed Comments filed by Fusion UV Systems, Inc., IB Docket No. 02-364 (filed Jan. 21, 2005); Consolidated Opposition to Petitions for Reconsideration filed by Fusion UV Systems, Inc., IB Docket No. 02-364 (filed Jan. 21, 2005).

ten days from receipt of notice of such grant to reply. Such relief is essential to ensure that the BRS Parties have a full and fair opportunity to address the issues raised for the first time in Fusion's untimely Opposition.

In their respective petitions for reconsideration ("Petitions") of the Commission's *Report and Order* in IB Docket No. 02-364 and *Fourth Report and Order* in ET Docket No. 00-258 (collectively, the "*Reallocation Order*"),<sup>2</sup> the BRS Parties requested, *inter alia*, that the Commission take reasonable measures to mitigate the interference Broadband Radio Service ("BRS") channel 1 licensees involuntarily relocated from the 2150-2156 MHz band to the 2496-2502 MHz band will suffer from unlicensed industrial, scientific and medical ("ISM") devices operating in the 2496-2500 MHz band.<sup>3</sup> As made clear in the Petitions, the source of the problem is Section 18.305(a) of the Commission's Rules, which does not impose any limit on the power an ISM device may emit in the 2496-2500 MHz band and thus threatens all licensed BRS operations with a substantial risk of co-channel interference. Accordingly, WCA and Sprint asked that the Commission require all Part 18 ISM devices marketed in the United States after December 31, 2006 to restrict their emissions in the 2496-2500 MHz band to 500

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<sup>2</sup> *Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands and Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Report and Order, Fourth Report and Order, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 13356 (2004).

<sup>3</sup> See Petition for Partial Reconsideration of the Wireless Communications Ass'n Int'l. IB Docket No. 02-364 *et al.*, at 23-26 (filed Sept. 8, 2004) ["WCA Petition"]; Sprint Petition for Partial Reconsideration, IB Docket No. 02-364 *et al.*, at 6-7 (filed Sept. 8, 2004) ["Sprint Petition"]; Petition for Reconsideration of Nextel Communications, Inc., IB Docket No. 02-364 *et al.*, at 9-11 (filed Sept. 8, 2004) ["Nextel Petition"].

microvolts/meter, measured at 3 meters.<sup>4</sup> In an effort to fairly accommodate the legitimate needs of ISM interests, WCA and Sprint proposed that the Commission grandfather any ISM devices marketed on or before December 31, 2006. Nextel recommended similar relief, stating that “new ISM emissions limitations into the 2495-2500 MHz band should allow sufficient time for ISM developers to transition product lines; two years should provide ample time for manufacturers to transition product lines, if necessary.”<sup>5</sup> While these proposals will not leave relocated BRS licensees as well off as they are today (since they will be subject to higher levels of interference from ISM equipment sold prior to December 31, 2006), the BRS Parties are willing to accept this compromise because, over time as ISM devices reach the end of their useful life and are replaced, it will reduce the interference relocated BRS channel 1 licensees will suffer.

The Commission issued a public notice announcing the Petitions filed by the BRS Parties on October 5, 2004,<sup>6</sup> and a summary of that notice was published in the *Federal Register* on October 12, 2004.<sup>7</sup> Hence, under Section 1.429(f) of the Commission’s Rules, any opposition to the Petitions was to be filed no later than October 27, 2004, a deadline specifically noted in the *Federal Register* notice.<sup>8</sup> Yet, Fusion submitted nothing on or before

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<sup>4</sup> See WCA Petition at 25; Sprint Petition at 7. This is the emission limit applicable to unlicensed intentional radiators under Section 15.209(a) of the Commission’s Rules, and is the maximum emission level to which BRS licensees have been subjected in the 2150-2156 MHz band.

<sup>5</sup> Nextel Petition at 11 n. 31.

<sup>6</sup> See “Petitions For Reconsideration And Clarification Of Action In Rulemaking Proceedings”, *Public Notice*, Report No. 2675 (rel. Oct. 5, 2004).

<sup>7</sup> *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, 69 Fed Reg. 60626 (Oct. 12, 2004).

<sup>8</sup> See 47 C.F.R. § 1.429(f) (“Oppositions to a petition for reconsideration shall be filed within 15 days after the date of public notice of the petition’s filing . . .”).

that date opposing the BRS Parties' proposals for limiting the maximum permissible power level of ISM devices within the 2496-2500 MHz band.

Now, belatedly requesting leave to do so, Fusion has submitted its Opposition to the BRS Parties' Petitions over three months late. Fusion's justification for its grossly untimely filing is slim to say the least – citing no exigent circumstances, Fusion merely claims that “it was only recently that the Petitions and related filings in this matter came to Fusion's attention.”<sup>9</sup> It is well settled, however, that parties in Commission proceedings are responsible for complying with the Commission's filing deadlines, and that late-filed oppositions to petitions for reconsideration are subject to dismissal.<sup>10</sup> Consistent with that precedent, the Commission should deny Fusion's Motion and dismiss Fusion's Opposition, since Fusion has offered no legitimate justification for its failure to oppose the BRS Parties' Petitions by the October 27<sup>th</sup> deadline.<sup>11</sup>

Should the Commission nonetheless decide to grant the Motion and accept Fusion's Opposition notwithstanding its untimeliness, the BRS Parties request that the Commission make clear that they may reply no later than ten days after notice of the grant of such relief. Section 1.429(g) of the Rules affords petitioners at least ten days to reply to timely filed oppositions, and there is no reason to deny the BRS Parties a similar opportunity here. Indeed,

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<sup>9</sup> Motion at 1.

<sup>10</sup> See, e.g., *Applications Of Mobile Radio Service*, Order on Reconsideration, 17 FCC Rcd 1520, 1521-22 n. 21 (2002). Although it is somewhat unclear from its Motion, Fusion appears to be suggesting that its lack of actual notice of the Petitions is relevant here. That, of course, is wrong – Section 1.429(f) of the Rules clearly states that the deadline for oppositions to petitions for reconsideration in rulemaking proceedings falls 15 days after the date of “public notice” of the filing of such petitions. In this case, notice occurred on October 12, 2004, *i.e.*, the date on which the Federal Register published notice of the filing of the Petitions. See 47 C.F.R. § 1.4(b)(1).

<sup>11</sup> See, e.g., *Dave's Communications, Inc.*, Order, 16 FCC Rcd 21343, 21345 (WTB, 2001).

it is essential that the Commission provide the BRS Parties a full and fair opportunity to address Fusion's arguments, all of which were raised for the first time in Fusion's Opposition. Section 1.429(g) of the Commission's Rules is designed to assure that those petitioning for reconsideration of a Commission decision are permitted to respond to those opposing their proposals. Under the circumstances here, where Fusion waited until months after the close of the pleading cycle to advance its opposition to the BRS Parties' proposals, the only way in which the Commission can provide the BRS Parties with their formal opportunity to respond is to grant the BRS Parties a 10-day reply period. This will provide the Commission with a complete record on the merits of the BRS Parties' proposals, without prejudicing the interests of Fusion or any other participant in this proceeding.<sup>12</sup>

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<sup>12</sup> The Commission's staff has previously granted the BRS Parties similar relief in this proceeding. On November 24, 2004, the BRS Parties filed a "Joint Motion to Dismiss or, Alternatively, Motion for Leave to File Surreply," asking the Commission to dismiss the filings of various microwave oven vendors as untimely oppositions to the BRS Parties' Petitions under Section 1.429(f), or, if the vendors' filings were accepted, to grant the BRS Parties leave to file surreplies to the vendors' untimely oppositions. *See* Joint Motion to Dismiss or, in the Alternative, Motion for Leave to File Surreply submitted by Wireless Communications Ass'n Int'l, Sprint Corporation and Nextel Communications, Inc., IB Docket No. 02-364 (filed Nov. 24, 2004) ["Joint Motion"]. On December 7, 2004, the Joint Motion was granted in part and the BRS Parties afforded leave to submit surreplies on December 17, 2004.

WHEREFORE, for the foregoing reasons, the Commission should deny Fusion's Motion and dismiss its Opposition or, in the alternative, grant leave to WCA, Sprint and Nextel to file replies to Fusion's Opposition as requested above.

Respectfully submitted,

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February 3, 2005

**CERTIFICATE OF SERVICE**

I, Karla Huffstickler, hereby certify that on this 3rd day of February, 2005 I served the foregoing Joint Motion to Dismiss or, in the Alternative, Motion for Leave to File Replies by depositing true copies thereof with the United States Postal Service, first class postage prepaid and addressed to the following:

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*/s/ Karla Huffstickler*  
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