

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

In the Matter of)	
)	
Utilities Telecom Council and Winchester)	
Cator, LLC)	
)	RM - 11429
Petition for Rulemaking to Establish Rules)	
Governing Critical Infrastructure Industry)	
Fixed Service Operations in the 14.0-14.5)	
GHz Band)	

REPLY

The Utilities Telecom Council (“UTC”) and Winchester Cator, LLC (“Winchester”) (together, “UTC/Winchester”) hereby reply to the Oppositions to its Application for Review (“Application”) of the Satellite Industry Association (“SIA”) and EchoStar and Hughes Network Systems (“EchoStar”) in this proceeding. UTC/Winchester also notes and is gratified by the supporting Comments of the Fixed Wireless Communications Coalition (“FWCC”) and the Edison Electric Institute (“EEI”).

I. THERE IS NO JUSTIFICATION FOR THE DISPARATE TREATMENT OF THE UTC/WINCHESTER AND QUALCOMM PETITIONS.

UTC/Winchester focused their Application on the Bureaus’ failure to give reasoned explanation, much less a justification, for the disparate treatment of the UTC/Winchester Petition and Qualcomm Petitions.¹ Both FWCC and EEI express this same concern.²

¹ Notice of Proposed Rulemaking, RM-11640, FCC 13-66 (May 9, 2013) (“Qualcomm NPRM”).

² EEI Comments at 1 and 3; FWCC Comments at 2.

SIA's response to this issue is curious: Far from disputing it, SIA seeks to defend the fundamental inconsistency of the decisions by asserting that the judicial standard for review of an agency's action is so lax as to make their failure to apply a consistent standard essentially non-reviewable.³

SIA is wrong both as a matter of Commission rule and policy and as to judicial review. The Commission's rules do not grant its Bureaus the power to change Commission policy,⁴ here as reflected by the *Qualcomm NPRM* issued less than a week before the Bureaus' *Order*.⁵ More broadly, sound Commission policy cannot rest upon an unexplained stance that what may be fact today may be false tomorrow.

Further, the cases cited by SIA support only the proposition that when an agency engages in a reasoned decision-making process in considering a rulemaking petition, the courts are reluctant to substitute their judgment for that of the agency. But, as the court explained *in remanding a matter back to the agency* in one of the very cases relied upon by SIA, deference to agency reasoning does not extend to a failure of the agency to engage in a reasoned decision-making process:

*"we must consider whether the agency's decisionmaking was "reasoned." See Professional Drivers Council (the court must assure itself that the agency considered the relevant factors, that it explained the "facts and policy concerns" relied on, and that the facts have some basis in the record)."*⁶

³ SIA Opposition at 3.

⁴ See 47 C.F.R. §§ 0.241(a), 0.261(b), and 0.331(a)(2).

⁵ *Order*, In the Matter of Utilities Telecom Council and Winchester Cator, LLC, RM-11429, DA 13-1093.

⁶ *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 13 (D.C. Cir. 1987) (citations omitted).

II. REPEATING ARGUMENTS THAT WERE NOT ADDRESSED BY THE BUREAUS OR THE BUREAUS' CONCLUSORY STATEMENTS IS NOT A SUBSTITUTE FOR REASONED DECISION-MAKING.

Much of the remainder of the SIA's Opposition is confined to statements asserting its agreement with the conclusions of the Bureaus relative to claims of potential interference. SIA's agreement is not a substitute for the lack of Bureau analysis of the evidence to the contrary that was presented by UTC/Winchester.

Further, with respect to the other issue given most play by SIA, the appropriate percentage threshold noise floor standard to be used in the calculation of aggregate interference, SIA ignores that the Bureaus made no decision on this issue. As demonstrated in UTC/Winchester's earlier Reply⁷ to SIA, Commission precedent does not support SIA's insistence upon a 1% aggregate allowance. Specifically as to that standard, the Commission has stated: "We find the protection criterion proposed by SIA to be overly conservative and unsupported by either measurement or operational experience."⁸ Nothing in the record presents any evidence to overturn that conclusion.

That, in an effort nevertheless to assuage the concerns of the satellite industry, UTC/Winchester offered to modify their proposal so as to operate under this conservative threshold limit, does not take away from the extensive non-interference showing presented by UTC/Winchester under the Commission's heretofore accepted threshold aggregate interference standard. If the Commission were now to reverse

⁷ See UTC/Winchester, Replies to Oppositions and Reply Comments, RM-11429 (Aug. 11, 2008), at 7-13, and attached Technical Response at 2-3.

⁸ Wireless Operations in the 3650-3700 MHz Band; Rules for Wireless Broadband Services in the 3650-3700 MHz Band, *Report and Order and Memorandum Opinion and Order*, ET Docket No. 04-151, WT Docket No. 05-96, FCC 05-56, at 25, ¶ 63 (rel. Mar. 16, 2005).

course and accept the SIA 1% threshold standard – which, to date, it has not done – UTC/Winchester should be permitted in the course of a rulemaking proceeding to adjust its technical showing to reflect such a new lower aggregate interference standard. Denying the UTC/Winchester Petition, based upon a standard that neither the Commission nor its Bureaus has ever adopted, is not an exercise in reasoned decision-making.

The remainder of SIA's Opposition and the limited substance of the EchoStar Opposition, like the Bureaus' Order, ignore the methods proposed by UTC/Winchester to avoid interference with primary satellite operations, including a five degree exclusion angle, that are more protective of primary satellite operations than currently imposed upon secondary operations in the band. Their objections to secondary operations essentially boil down to this: no matter what limitations may be imposed, no matter how restrictive, some station could operate so far outside of authorized parameters potentially to interfere. But on such a theory, no secondary operation could ever be permitted in this or any other frequency band.

Similarly, EchoStar's reading of the *Order* to suggest that every terrestrial station must be individually coordinated with every operating satellite to take into account its "particular sensitivities" would undermine the very notion of an aggregate interference threshold. This would also impose new coordination obligations that are not reflected in the Commission rules for sharing of bands between satellite and terrestrial services, most particularly at C-band where no such coordination is required.

Whether EchoStar's interpretation is what is meant by the cryptic discussion of coordination in the *Order* is another matter. As to this, like the matter of the appropriate aggregate interference standard, and the supposed availability of other spectrum (or pole attachments) to meet the CII requirements, the Bureaus' *Order* is crafted in a way so as to raise, but not decide, any material issue associated with UTC/Winchester Petition, other than that the Bureaus would rather not consider it.

Respectfully, the Bureaus' rationale, and the limited support for the *Order* offered by SIA and EchoStar, is not a sufficient basis for rejecting out of hand the proposal before it for addressing essential CII emergency responder communications and other requirements, all the more so while going ahead to consider a comparable technical proposal for providing more bandwidth for leisure airline traveler services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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