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Federal Communication Commission
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

EXPEDITED ACTION REQUESTED

In the Matter of Aeronautical Radio Inc. Experimental License Modification To Expand Limited Market Study	))))))	File No. 0029-EX-ML-2004, Call Sign WC2XPE

In the Matter of Aeronautical Radio Inc. Experimental License Renewal	)))))	File No. 0130-EX-RR-2004, Call Sign WC2XPE

To: Chief, Office of Engineering and Technology

ARINC'S CONSOLIDATED OPPOSITION TO THE INFORMAL OBJECTIONS OF BOEING AND ROCKWELL COLLINS

Aeronautical Radio, Inc. ("ARINC") hereby responds to the informal objections of The Boeing Company ("Boeing") and Rockwell Collins Inc. ("Rockwell Collins").

On September 13, 2004, Boeing and its equipment manufacturer, Rockwell Collins, filed informal objections to the June 2004 modification[1] of the experimental license for ARINC's SKYLink[SM] system, in which they challenge the increase of the number of authorized aircraft

[1] Aeronautical Radio Inc., Experimental Radio Station Construction Permit and License, File No. 0029-EX-ML-2004, Call Sign WC2XPE (effective June 16, 2004 to Nov. 1, 2004) ("Current ARINC Experimental License").

from fifteen to 120.[2] Prior to learning of these objections, however, ARINC filed an application to renew that same experimental license, in which it informed the Commission that "ARINC tests its SKYLink[SM] service on up to *fifteen* aircraft."[3] In response, Boeing filed another informal objection on October 1, 2004.[4]

I. THE BOEING AND ROCKWELL OBJECTIONS ARE MOOT

Boeing and Rockwell ask the Commission to renew or limit ARINC's limited market study authority to no more than *fifteen* aircraft.[5] Indeed, Boeing's objection to ARINC's renewal application explicitly asks that the Commission grant ARINC's renewal *on the same terms that*

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[2] *See* Informal Objection of The Boeing Company, File No. 0029-EX-ML-2004, Call Sign WC2XPE, at 2 (filed Sept. 13, 2004) ("Boeing Modification Objection") ("Boeing requests that the Commission immediately reduce the number of SKYLink[SM] terminals that ARINC may operate and charge for service to the 15 permitted under ARINC's prior experimental license."); Informal Objection of Rockwell Collins Corporation, File No. 0029-EX-ML-2004, Call Sign WC2XPE (filed Sept. 13, 2004) ("Rockwell Modification Objection").

[3] *See* Aeronautical Radio Inc., Application for Renewal of Experimental Radio Station License, File No. 0130-EX-RR-2004, Call Sign WC2XPE, Narrative Statement at 2 (emphasis added) ("ARINC Renewal Application").

[4] *See* Informal Objection of The Boeing Company, File No. 0130-EX-RR-2004, Call Sign WC2XPE (filed Oct. 1, 2004) ("Boeing Renewal Objection").

[5] *See* Boeing Renewal Objection at 1 ("[T]he Commission should renew ARINC's limited market study authority for no more than 15 aircraft."); *id.* at 2 (requesting that the Commission "reduce the number of SKYLink[SM] terminals that ARINC may operate and charge for service to the 15 permitted under ARINC's prior experimental license"); *id.* at 5 ("[T]he Commission should permit ARINC to continue its limited market study under experimental authority with no more than 15 aircraft."); Boeing Modification Objection at 2 ("Boeing requests that the Commission immediately reduce the number of SKYLink[SM] terminals that ARINC may operate and charge for service to the 15 permitted under ARINC's prior experimental license."); *id.* (arguing that "the Commission should immediately reduce the number of aircraft that may participate in ARINC's market study to 15"); *id.* at 5 (concluding that "the Commission should limit the number of aircraft in ARINC's limited market study to the 15 previously authorized"); *id.* at 8 (asking the Commission "to limit ARINC's market study to 15 total aircraft"); Rockwell Modification Objection at 6 (requesting that the Commission "immediately rescind the modification as granted to ARINC in June 2004," which would have the effect of reducing the number of authorized aircraft to fifteen).

ARINC has requested. Specifically, Boeing requests that the Commission "should renew ARINC's limited market study authority for no more than 15 aircraft."[6]

ARINC has never used more than fifteen aircraft in the limited market study for its SKYLink[SM] service. Nor does ARINC currently plan to use more than fifteen aircraft in that study. ARINC's application for renewal of its experimental license thus specifically provides that "ARINC tests its SKYLink[SM] service on up to fifteen aircraft."[7] There is therefore no controversy regarding the renewal of ARINC's experimental license to continue to conduct its limited market study on up to fifteen aircraft. Accordingly, ARINC's renewal should be granted forthwith and the various objections should be rejected as moot.

II. THE FCC RAPIDLY SHOULD RENEW ARINC'S EXPERIMENTAL LICENSE

Boeing also argues that, in the event the Commission is unable to act on ARINC's renewal application before it expires on November 1, 2004, the Commission should "exercise its authority under Section 1.62(b) and grant a temporary extension for ARINC to provide service to no more than 15 aircraft during the pendency of the renewal application."[8] For once, ARINC agrees with Boeing: the Commission should renew ARINC's experimental license immediately. Nonetheless, renewal should be routine, *not* temporary.

ARINC's experimental license authorizes a market study for a "maximum of 120 aircraft."[9] There is no basis in logic to suggest that ARINC's experiment with broadband AMSS service is not an "activity of a continuing nature" solely because it has not deployed the full 120 aircraft authorized by its license. The test under Section 1.62 is whether the underlying

[6] Boeing Renewal Objection at 1.

[7] ARINC Renewal Application, Narrative Statement at 2.

[8] Boeing Renewal Objection at 3.

[9] Current ARINC Experimental License, Special Condition 6.

"activity" is "of a continuing nature" and the relevant "activity" here is the provision of SKYLink^{SM} broadband communication service—not whether that service is being provided to five, fifteen, seventy-two, 120 or some other random number of aircraft. Boeing effectively concedes this point by not quarreling with ARINC's experimental activities to the extent they do not involve more than fifteen aircraft.[10]

In any event, Boeing misstates settled law. ARINC's limited market study is ongoing and uninterrupted.[11] Nothing further is required to be considered "continuing."[12] Therefore, pursuant to Rule 1.62(a)(1), ARINC's experimental license "shall continue in effect" until the Commission makes a final determination on ARINC's renewal application.[13]

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[10] Boeing Renewal Objection at 4 (arguing that "ARINC's experimental license operations *beyond 15 aircraft* cannot be considered 'activity of a continuing nature' because such operations do not exist" (emphasis added)).

[11] ARINC received authority to charge users for SKYLink^{SM} service provided pursuant to its limited market study *less than four months ago*—when the most recent modification to its experimental license was granted on June 16, 2004. As ARINC made clear in its renewal application, more time is necessary for ARINC to determine whether the SKYLink^{SM} service is economically sustainable and whether there is a viable market for the service. Moreover, ARINC continues to collect information regarding the frequency and duration of use during the flight, data rates achieved to and from each aircraft, and aggregate data rates achieved through the transponder.

[12] The federal courts have made clear that activities like the provision of ARINC's SKYLink^{SM} broadband communication service—even when conducted under non-permanent arrangements such as a developmental license—constitute "activit[ies] of a continuing nature" under Section 9(b) of the Administrative Procedures Act. *See, e.g.*, *Petrocom License Corp. v. FCC*, No. Civ. A. 00-3405, 2001 WL 46880, at *4 (E.D. La. Jan. 19, 2001) (holding that "the activity authorized by Petrocom's developmental license—providing wireless telecommunications services to offshore customers—is more similar to the continuing nature of 'radio broadcasting' than it is to the one-time activity of building a telecommunications facility").

[13] Section 1.62(c) of the Rules provides that "*all licenses* issued by the Commission *shall be deemed to be related to an activity of a continuing nature*," except where the "instrument of authorization *clearly states on its face* that it relates to an activity not of a continuing nature, or where the non-continuing nature is *otherwise clearly apparent* upon the face of the authorization." 47 C.F.R. § 1.62(c) (emphasis added). ARINC's provision of SKYLink^{SM} broadband communication services under its experimental license is part of an ongoing and continuous program of system and service development, and the Commission chose not to clearly designate on the face of the license that it is not of a continuing nature. Therefore, the license must be "deemed to be related to an activity of a continuing nature" under Section 1.62(c).

III. ARINC IS IN FULL COMPLIANCE WITH THE TERMS OF ITS EXPERIMENTAL LICENSE AND WITH THE LIMITED MARKET STUDY RULES SET FORTH IN 47 C.F.R. § 5.93

Finally, Boeing and its equipment manufacturer cite to various ARINC press releases and marketing puffery, and allege that ARINC has violated the conditions of its experimental license and Section 5.93 of the Commission's Rules.[14] ARINC's internal investigation of this matter has determined the following. Gulfstream, an early partner in the development of the SKYLink℠ system, advanced certain monies to ARINC as a co-developer of the system. In connection with those advances, ARINC provided Gulfstream with two AESs. The title to the two units was mistakenly transferred to Gulfstream in early 2004.

ARINC has since rescinded the title transfers and refunded all monies related thereto to Gulfstream. ARINC therefore currently has full title to and ownership of the two SKYLink℠ units in Gulfstream's possession that are being used in the limited market study.[15] ARINC regrets the error,[16] and rescinded the title transfers, refunding all monies, as soon as possible after discovery of the error. ARINC has fully discussed this issue with its engineering and marketing groups, so that this mistake will not be repeated.

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[14] *See, e.g.*, Boeing Modification Objection at 5-8; Rockwell Collins Modification Objection at 3.

[15] The third and final SKYLink℠ unit that is currently deployed in the limited market study—a unit installed on third-party-owned Gulfstream aircraft—continues to be owned by ARINC and the party who owns the aircraft is fully informed that the SKYLink℠ service is for experimental purposes only and can be cancelled at any time.

[16] Gulfstream is, as mentioned above, a development partner for the SKYLink℠ system and, apart from that, is a sophisticated party with serious business acumen. ARINC informed Gulfstream that the AESs were operating for experimental purposes only under a non-permanent license. And ARINC has refunded all monies related to the mistaken (and now rescinded) title transfers. Thus, in the present circumstance, there has been no harm to Gulfstream, and certainly none of the harm that the retention-of-ownership requirement is designed to guard against—namely, "that [the] market trial[] may involve investments by members of the public who, unlike the licensee, may not be fully aware of the risks associated with an experimental license." Proposed Rules, *Amendment to Diminish Restrictions on the Licensing and Use of Stations in the Experimental Radio Service (Other Than Broadcast)*, 47 Fed. Reg. 35,535, Gen. Docket No. 82-469, FCC 82-330, ¶ 28 (August 16, 1982).

ARINC will continue to retain ownership to all SKYLink[SM] units that are currently deployed, and that are deployed in the future, in its limited market study and will continue to inform all future aircraft owners that the SKYLink[SM] service is for experimental purposes only and can be cancelled at any time. Accordingly, ARINC's mistake should have no effect on the renewal of ARINC's experimental license, because ARINC has fully and promptly rectified that mistake and is in full compliance with its experimental license and the Commission's Rules.

IV. CONCLUSION

Boeing's and its equipment manufacturer's charges that ARINC should not be allowed to deploy its SKYLink[SM] system on more than fifteen aircraft are moot, both because ARINC has never exceeded that number of aircraft in its limited market study and because ARINC's renewal application requests authority to continue that study on only up to fifteen aircraft. Furthermore, ARINC's experimental license—which supports "activity of a continuing nature"—should promptly be renewed. Accordingly, ARINC respectfully requests that the Commission renew ARINC's experimental license for up to fifteen aircraft, and with all other terms remaining the same (including the ability to charge for SKYLink service provided pursuant to the limited market study).

Respectfully submitted,

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October 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Consolidated Opposition to the Informal Objections of Boeing and Rockwell Collins was served via hand delivery, this 12th day of October 2004, upon the following:

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