



OFFICE OF CHIEF COUNSEL FOR ADVOCACY

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Satellite and
Radiocommunications Division
International Bureau

In re Application of)

MOBILE COMMUNICATIONS)
HOLDINGS, INC.)

For Authority to Construct, Launch, and)
Operate a Low-Earth Orbit Satellite System)
In the 1610-1626.5/2483.5-2500 MHz Bands)

) File Nos. 11-DSS-P-91
) 18-DSS-P-91
) 11-SAT-LA-95
) 12-SAT-AMEND-95

**OPPOSITION OF THE OFFICE OF ADVOCACY TO TRW'S
MOTION TO STRIKE UNAUTHORIZED PLEADING**

The Office of Advocacy of the U.S. Small Business Administration respectfully submits this opposition to the motion of TRW Inc. ("TRW") to strike from the record of the above-referenced proceeding a presentation submitted by the Office of Advocacy by its Chief Counsel, the Honorable Jere W. Glover, to the Honorable Reed E. Hundt, Chairman of the Federal Communications Commission (the "Commission"), dated April 24, 1996 (the "Office of Advocacy presentation"). The Office of Advocacy herein asserts that TRW's motion fails to assert an adequate claim for relief and should therefore be denied.

I. **TRW Wrongly Contends that the Office of Advocacy Presentation Was an "Untimely Pleading."**

The TRW motion attempts a two-pronged procedural argument. TRW's first procedural contention is that the Office of Advocacy presentation was untimely under the Commission's rules for pleadings. TRW cites two rules from Part 1, Subpart A of the Commission's rules concerning "general rules of practice and procedure." This argument mistakes the Office of Advocacy presentation for a pleading made in the course of the normal pleading cycle. Rather, the Office of Advocacy presentation explicitly asserts that it is a presentation under the Commission's Part I, Subpart H rules for *ex parte* communications.¹ These two categories of filings play conceptually distinct roles in the Commission's efforts to ensure a full and complete record from which to determine policy and issue regulations.

The Commission's *ex parte* rules are designed to "ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process."² Section 1204(b) lays out a limited series of exemptions from these rules each of which is justified on compelling public policy

¹Footnote three of the Office of Advocacy presentation states: "The Office of Advocacy submits this correspondence pursuant to Part 1 section 1204(b)(5) of the Commission's rules. 47 C.F.R. section 1.1204(b)(5)."

²47 C.F.R. section 1.1200(a).

grounds. The Office of Advocacy presentation was filed pursuant to the 1204(b)(5) exemption for presentations "to or from an agency or branch of the Federal Government or its staff..."³

Apart from the Commission's Sunshine rules, the *ex parte* rules generally do not establish explicit timeframes for *ex parte* presentations. TRW's concern with the timeliness of the Office of Advocacy presentation is therefore misplaced.

II. TRW Wrongly Contends That the Office of Advocacy Presentation is Too "Narrowly Focuse[d]" to be Considered an Exempt *Ex Parte* Presentation.

TRW's second procedural contention is that the Office of Advocacy presentation is too narrowly focused to qualify under section 1204(b)(5) of the Commission's *ex parte* rules.⁴ It asserts that the Office of Advocacy's presentation "narrowly focuses upon the licensing of MCHI's Big LEO system rather than upon a matter in which the FCC and SBA 'share jurisdiction.'"⁵ It is mystery how TRW conceived this distinction. TRW makes no effort to cite any reference to

³47 C.F.R. section 1.1204(b)(5). The Office of Advocacy also served copies of its presentation to the parties in accordance with the Commission staff's counsel and in order to bring the important public policy arguments contained therein to the attention of all parties.

⁴TRW rightly does not contend that the SBA's jurisdiction does not allow it to intervene in proceedings before the Commission generally.

⁵TRW Motion at p.3.

this distinction in the Commission's rules. Clearly, nothing in the Commission's rules makes any reference to restricting the scope of an agency's presentations under 1204(b)(5). Furthermore, it would be highly unusual and contrary to the Commission's own interest in developing a full and complete record in its proceedings for the Commission so artificially to constrain the valuable expertise and input of another federal agency. Of course, federal agencies that share jurisdiction must submit comments that pertain to their jurisdiction. This is unquestionably the case with the Office of Advocacy presentation which focuses on the impact of the Commission's implementation of its financial qualification rules on small businesses.

Apart from the unexplored implications of this novel line of reasoning, TRW's second procedural argument is, on its face, simply mistaken. The Office of Advocacy presentation clearly identifies the broader public policy concerns that prompted its submission. The Office of Advocacy presentation states, *inter alia*:

"The Office of Advocacy has had a long history of concern with unequal and burdensome financial qualification standards for small businesses set by the Commission in the satellite industry."⁶

"The Office of Advocacy is deeply concerned, however, that this order represents a case in point of the Commission's *de facto* unequal financial qualification standards for smaller companies."⁷

⁶Office of Advocacy presentation at p.1.

⁷Id. at p.2.

"To uphold the Bureau Order would establish further precedent for the Commission's overly stringent financial qualification standards and erect a artificial market entry barrier to virtually all small competitors."⁸

"In sum, there is a *de facto* two-tier financial qualification system, favoring larger companies and handicapping smaller ones."⁹

Each of these statements addresses small business concerns generally and references no individual party. It is clear from these references that the principal intent of the Office of Advocacy presentation is a broad policy concern with unfair financial qualification standards for small businesses generally.

The Office of Advocacy has had a longstanding concern with the burden financial qualification rules imposes on small satellite competitors. The Office of Advocacy raised similar concerns as early as 1985 in the Commission's proceeding on satellite systems. See Letter from Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration, to the Federal Communications Commission, dated June 27, 1985. The same concerns have arisen in the Commission's recent order to modify its policies governing domestic and international satellite systems.¹⁰

The Office of Advocacy also plans to file a reply to the opposition to the Petition to Reconsider in that docket to address these same concerns.

⁸Id.

⁹Id. at p.3.

¹⁰Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, Report and Order, IB Docket No. 95-41, FCC 96-14 (rel. January 22, 1996).

Moreover, contrary to TRW's assertion, the Office of Advocacy's presentation specifically distances itself from the outcome of the license application in question here. It states, "the Office of Advocacy expresses no opinion as to the adequacy of MCHI's financial showing in the instant application."¹¹ It goes on to say, "It is worth giving the Bureau Order closer scrutiny, not so much to judge the adequacy of MCHI's financial showing but to highlight the burden it places on smaller applicants like MCHI."¹² There is no reasonable way to read the Office of Advocacy presentation as "narrowly focuse[d] upon the licensing of MCHI's Big LEO system." Finally, although the Office of Advocacy presentation does urge the reversal of the International Bureau Order in question, it is for the sole purpose of reversing the overall direction of the Commission's financial qualification standards. This is made abundantly clear at the conclusion of the presentation.¹³

III. Motions to Strike Communications by Federal Agencies Should Be Rarely, If Ever, Granted

The TRW motion is a rare motion by a private party to exclude a presentation made by an agency of the federal government. It is not clear that

¹¹Office of Advocacy presentation at p.2.

¹²Id. (emphasis added).

¹³ The concluding passage of the Office of Advocacy presentation requests the remanding of the International Bureau Order in order to "require the Bureau to reexamine its overly stringent financial qualification standards for smaller companies, in general." Id. at p.4.

there is any precedent for striking a communication from a federal agency. Certainly, none is cited by the TRW motion. In fact, precedent suggests just the opposite.¹⁴

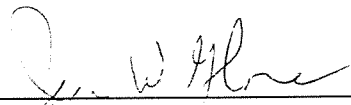
Motions to strike should normally be granted only in rare situations, for they effectively curtail the debate that is necessary to establish a full and complete record for the Commission's decisional processes. Motions to strike presentations by federal agencies should be granted in only the rarest of cases given that such agencies act on the basis of objective policy considerations, not narrow private interest. Any communication from a federal agency, by its nature, contributes significantly to the policy debates that occur in any proceeding. Such a motion, if granted, would frustrate the working of a major agency of the federal government and would set a harmful precedent that would curtail the effectiveness of all agencies of federal government.

¹⁴In 1977, the Commission denied AT&T's motion to strike an untimely petition by the State of Hawaii. In the Matter of American Telephone & Telegraph Company (Long Lines Department) Revisions to Tariff FCC No. 259, Wide Area Telecommunications Service (WATS), 66 F.C.C. 2d 9, 58-59 (1977).

For the foregoing reasons, TRW's motion to strike unauthorized pleading should be denied.

Respectfully submitted,

THE OFFICE OF ADVOCACY
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By: 

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CERTIFICATE OF SERVICE

I, Jeanne K. Bishel, hereby certify that a true and correct copy of the foregoing document was sent by first-class mail, postage prepaid, or hand-delivered, on this 22 day of May, 1996, to the following persons:

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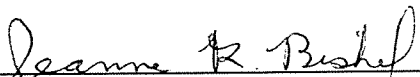
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