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

Federal Communications Commission
Office of Secretary

In the Matter of)

SkyWave Mobile Communications, Corp.)
Application for Blanket License to)
Operate Mobile Earth Terminals with)
Inmarsat 4F2 at 52.75° W)

File No. SES-MFS-20051207-01709
(Call Sign E030055)

To: International Bureau

REPLY TO MSV OPPOSITION TO SKYWAVE MOTION TO STRIKE

SkyWave Mobile Communications, Corp. ("SkyWave") hereby files this Reply to the Opposition to Motion to Strike ("MSV Opposition") filed by Mobile Satellite Ventures Subsidiary LLC ("MSV") in the above-referenced application ("SkyWave Modification Application").

MSV claims that the Bureau should deny SkyWave's Motion to Strike Portions of the MSV Petition ("Motion to Strike") because: (1) SkyWave has no right of access to the confidential materials relied on by MSV in its Petition to Hold in Abeyance Or to Grant With Conditions ("MSV Petition"); and (2) SkyWave's interests would not be prejudiced by the Bureau's consideration of the confidential material in the MSV Petition. MSV's first claim is unavailing. The relevant issue is not whether SkyWave has a right of access to that confidential information, but whether the Bureau can rely on information challenging SkyWave's application when SkyWave is not even given an adequate opportunity respond to the information. The MSV Opposition fails to demonstrate that the Bureau can rely on such confidential information. MSV's second claim is inconsistent with SkyWave's rights under the Communications Act and

the APA. Indeed, the Bureau's consideration of the confidential material in the MSV Petition would prejudice SkyWave's interests.

I. DISCUSSION

A. *The Bureau Must Not Rely on Confidential Material That Has Been Withheld from SkyWave*

MSV claims that SkyWave has no right of access to the confidential material included in the MSV Petition. However, the issue is not whether SkyWave has a right of access to the confidential information in the MSV Petition, but whether the confidential information can serve as a basis for a decision on the SkyWave Modification Application if SkyWave is never given access to such information. As discussed in the Motion to Strike, the Commission has held that the "Administrative Procedures Act and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings."¹

MSV, however, contends that license applications are not subject to the requirements for adjudications under the APA² and therefore by implication that it is permissible

¹ See *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, Order, 10 FCC Rcd 1619, 1621, ¶ 13 (1995). See also *In re applications of Mobile Communications Holdings, Inc.; ICO Global Communications (Holdings) Limited for Transfer of Control; Constellation Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited for Transfer of Control*, Disclosure Order, 18 FCC Rcd 133, 134, ¶ 5 (2003) ("The Commission has inferred from judicial precedent that petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications ..."); and *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24837, ¶ 33 (1998) (Specifically, the Commission indicated "that petitioners to deny generally must be afforded access to all information submitted by licenses that bear upon their applications."). While the Commission was addressing information supplied by the applicant for a Title III license, the rationale is equally applicable to information supplied to challenge a license application.

² See MSV Opposition at 3-4.

to block SkyWave's effective participation in its own license proceeding.³ But the cases cited in the MSV Opposition do not hold that it is permissible to deny SkyWave a meaningful opportunity to respond to claims made against its license application.⁴ In fact, in one of the decisions cited by MSV, the Commission states "our paper [license] proceeding satisfies the general hearing requirements set forth in the APA and the Communications Act."⁵ Thus rather than saying that the Commission does not follow the hearing requirements of the APA in a licensing application, the Commission states that it does follow those procedures.

In the present case, relying on the confidential material in the MSV Petition without allowing SkyWave an opportunity to examine and respond to this information would satisfy neither the requirements of the APA nor the requirements of the Communications Act. The APA provides that a "party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required

³ It is worth noting that MSV appears to ignore the first section of the Motion to Strike, which discusses why it would be inconsistent with SkyWave's rights under the Communication Act to prevent SkyWave from effectively replying to the MSV Petition. Thus even if MSV were correct that it is permissible under the APA to prevent SkyWave from effectively participating in its own licensing proceeding (which as discussed below is not the case), MSV has not shown that denying SkyWave an opportunity to prepare an effective response is permissible under the Communications Act.

⁴ See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, ¶ 67 (1981) ("Cellular Licensing Order") (addressing whether an oral hearing is required for cellular licenses); *AT&T Corp.*, 16 FCC Rcd 13636, ¶ 29 (2001) (again addressing the requirement for an oral hearing); and *Long Island Lighting Company*, 14 FCC Rcd 16521, ¶ 15 (addressing burden of proof in a licensing proceeding).

⁵ *Cellular Licensing Order* at ¶ 67. Further the Commission specifically stated that its "paper hearing procedures satisfy the general statutory provisions relevant to hearing procedures to be employed in adjudicative administrative proceedings as set forth in Sections 554 and 556 of the Administrative Procedure Act (APA) ..." *Id.*

for a full and true disclosure of the facts.”⁶ The Communications Act provides that applicants are entitled to file a reply to petitions against their license application.⁷ Both of these provisions would be violated, if SkyWave is not given the opportunity to respond to the confidential materials, because, as discussed in the Motion to Strike, SkyWave cannot effectively reply to claims made by MSV if it does not even know what claims MSV has made against the SkyWave Modification Application.

MSV further claims that “[SkyWave] ignores the confidential nature of the Mexico City MoU, and consequently relies on precedent that is inapplicable to the instant proceeding.”⁸ However, this claim misses the point. The precedent cited in the Motion to Strike goes directly to the issue of whether confidential information that is not subject to adversarial comment by the applicant can serve as basis to deny an application. For example, in *CPUC Report and Order*, discussed in the Motion to Strike, the Commission struck a study submitted by CTIA to support its challenge to California’s petition to retain rate regulation over CMRS because CTIA failed to provide the underlying confidential data to California.⁹ Further in *U.S. Lines v. Federal Maritime Commission*, the D.C. Circuit stated that it has “required information in agency files or reports identified by the agency as relevant to the proceeding to be disclosed to the parties for adversarial comment” because such requirements “ensure that parties to agency

⁶ 5 U.S.C. § 556(d).

⁷ See 47 U.S.C. § 309(d)(1).

⁸ MSV Opposition at 5.

⁹ See *In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, 7508, ¶ 43 (1995) (“*CPUC Report and Order*”) (stating that the “study relies on materials not made part of the record or provided to other parties, and to that extent will not be considered.”).

proceedings are afforded the opportunities guaranteed them by statute [APA] meaningfully to participate in those proceedings”¹⁰

Nothing cited by MSV demonstrates that the Bureau can rely on information challenging a license application where the applicant is not given a meaningful opportunity to respond to that information. MSV states that the Mexico City MoU is protected by the FOIA.¹¹ However, even if true, this does not show that this makes it permissible to contravene SkyWave’s right to meaningfully reply to the MSV Petition. As discussed in the Motion to Strike, the Commission typically balances the need to protect information that is confidential under its FOIA rules¹² and providing parties an opportunity to fully respond to that information by employing a confidentiality agreement.¹³ It should either do that here or strike the redacted portions of the MSV Petition.

B. SkyWave Would Be Prejudiced By the Bureau’s Consideration of the Confidential Materials

MSV argues that “[SkyWave] can safely rely on Inmarsat, the entity that provides the space segment of the service proposed by [SkyWave], to address the issues presented in the

¹⁰ See *U.S. Lines, Inc. v. Federal Maritime Comm.*, 584 F.2d 519, 533 (D.C. Cir. 1978) (“*U.S. Lines*”).

¹¹ See MSV Opposition at 5. MSV also cites several FOIA request cases in fn 11. None of these cases hold that information that is protected under FOIA can be used to deny an applicant a meaningful opportunity to respond to a petition against its application.

¹² See 47 C.F.R. §§ 0.457 and 0.459.

¹³ See Motion to Strike at fn 13. The Commission has recognized that “release of confidential information under a protective order or agreement can often serve to resolve the conflict between safeguarding competitively sensitive information and allowing interested parties the opportunity to fully respond to assertions put forth by the submitter of confidential information.” *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406, 12424, ¶ 36 (1996).

Redacted Materials.”¹⁴ However, this claim is inconsistent the Communications Act, which provides that “[t]he applicant shall be given an opportunity to a reply [to a petition against its application].”¹⁵ It is also inconsistent with Section 556(d) of the APA.¹⁶ SkyWave is not able to effectively reply to the MSV Petition because it does not even know what claims are being made against the SkyWave Modification Application. For example in Discussion Section I, the MSV Petition provides: [Redaction of two and half lines of text] (i) it is not replacing another satellite; (ii) it will cause greater interference to other L band operators, even when being used exclusively to provide earlier-generation services; and (iii) it will require greater protection from other L band operators, even when being used exclusively to provide earlier-generation services.”¹⁷ Similarly, MSV claims that “SkyWave states that Inmarsat 4F2 will have inefficient global L band beams, [rest of sentence and footnote redacted].”¹⁸ It is simply not possible for SkyWave to effectively respond to such arguments and other parts of the MSV Petition, in contravention of its rights under Section 309 of the Communications Act and Section 556(d) of the APA, without knowing what specific assertions MSV is making against the SkyWave Modification Application.

The fact that Inmarsat can respond to the issues raised in the redacted portions of the MSV Petition is not relevant. Inmarsat is not the applicant and its ability to respond to the

¹⁴ MSV Opposition at 6.

¹⁵ 47 U.S.C. § 309(d)(1).

¹⁶ See 5 U.S.C. § 556(d) (“A party is entitled to present his case or defense by oral or documentary evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”).

¹⁷ MSV Petition at 10 (citations omitted).

¹⁸ MSV Petition at 10. In addition, the footnote associated with this sentence is redacted as well.

redacted portions of the MSV Petition does not satisfy the Communications Act requirement that the applicant is provided an opportunity to respond to petitions against its application. Further, MSV's claim that "it is unlikely that [SkyWave] could provide any relevant information with the respect to the Redacted Materials that Inmarsat has not already provided,"¹⁹ only serves to demonstrate that the agreed upon mechanism for international coordination established under the Mexico City MoU, and not the SkyWave Modification Application, is the appropriate forum to address MSV's concerns.

II. CONCLUSION

For the foregoing reasons, SkyWave respectfully requests that the Bureau strike the MSV Petition Discussion Sections I and parts of the Background section that rely on confidential information that has not been provided to SkyWave.

Respectfully submitted,

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¹⁹ MSV Opposition at 7.

CERTIFICATE OF SERVICE

I, Marc A. Paul, an attorney with the law firm of Steptoe & Johnson LLP, hereby certify that on this 28th day of February, 2006, served a true copy of the foregoing Reply by first class mail, postage pre-paid (or as otherwise indicated) upon the following:

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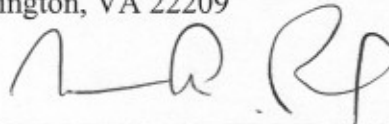
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