Before the
Federal Communications Commission
Washington DC 20554

In the Matter of	)	
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Amendment of Part 101 of the Commission's	)	
Rules to Accommodate 30 Megahertz	)	
Channels in the 6525-6875 MHz Band	)	WT Docket No. 09-114
	)	RM-11417
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on Additional Channels in the 21.8-22.0 GHz	)	
and 23.0-23.2 GHz Band	)	

PETITION FOR LIMITED RECONSIDERATION

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PETITION FOR LIMITED RECONSIDERATION

Pursuant to Section 1.426 of the Commission's Rules, the Fixed Wireless Communications Coalition ("FWCC")[1] files this Petition for Limited Reconsideration in the above-captioned proceeding.[2]

A. SCOPE OF REQUEST

The FWCC does not challenge the *Report and Order* as originally released. We filed the Petitions for Rulemaking that led to both the 6 GHz and 23 GHz rule amendments. The *Report and Order* granted our requests in full.

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[1] The FWCC is a coalition of companies, associations, and individuals interested in the fixed service -- *i.e.*, in terrestrial fixed microwave communications. Our membership includes manufacturers of microwave equipment, fixed microwave engineering firms, licensees of terrestrial fixed microwave systems and their associations, and communications service providers and their associations. The membership also includes railroads, public utilities, petroleum and pipeline entities, public safety agencies, cable TV and private cable providers, backhaul providers, and/or their respective associations, communications carriers, and telecommunications attorneys and engineers. Our members build, install, and use both licensed and unlicensed point-to-point, point-to-multipoint, and other fixed wireless systems, in frequency bands from 900 MHz to 95 GHz. For more information, see www.fwcc.us.

[2] *Amendment of Part 101 of the Commission's Rules*, WT Docket No. 09-114, Report and Order, FCC 10-109 (released June 11, 2010) (*Report and Order)*.

Our problem, rather, is with a subsequent *Erratum* released on July 7, 2010.[3] The *Erratum* added a footnote call to the 23 GHz channels newly made eligible for conditional authorization, for bandwidths of 10 and 50 MHz. The footnote reads: "These frequencies may be assigned to low power systems, as defined in paragraph (8) of this section."[4] Paragraph (8), titled "Special provisions for low power, limited coverage systems in the 21.8–22.0 GHz and 23.0–23.2 GHz band segments," applies to systems having a maximum EIRP of 55 dBm and a maximum rated transmitter output power of 0.1 watts.[5] Among other provisions, Paragraph (8) allows the use of antennas whose beams are wider, more diffuse, and less focused than the rules otherwise require.[6]

The FWCC asks that the *Erratum* be rescinded, so the newly-listed 23 GHz conditional channels are not available for use by low power systems.[7]

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3 *Amendment of Part 101 of the Commission's Rules*, WT Docket No. 09-114, Erratum (no release number) (released July 7, 2010) (*Erratum*).

4 47 C.F.R. § 101.147(s)(1)-(6) n.2.

5 47 C.F.R. § 101.147(s)(8)(i).

6 A low-power system is permitted a 4 degree beamwidth, rather than the 3.3 degrees required for other 23 GHz antennas. *Compare* 47 C.F.R. § 101.147(s)(8)(iii) *with* 47 C.F.R. § 101.115 (b) (table). The front-to-back ratio need be only 38 dB, reduced from 55 or 50 dB (Categories A and B, respectively). *Compare* 47 C.F.R. § 101.147(s)(8)(iv) *with* 47 C.F.R. § 101.115 (b) (table). And a low power antenna has no requirements at all for sidelobe suppression, 47 C.F.R. § 101.147(s)(8)(iv), where other 23 GHz antennas have suppression requirements ranging from 17 to 55 dB, depending on angle and category. 47 C.F.R. § 101.115 (b) (table).

7 The Federal Register published its own *erratum* in the same docket that changed the typography of the footnote call numbers at issue. *Amendment of Part 101 of the Commission's Rules*, 75 Fed. Reg. 45496 (Aug. 3, 2010). We do not challenge that *erratum*, although it will become irrelevant if the Commission grants this petition.

B. THE LOW-POWER ANTENNA PROVISIONS ARE OUTDATED AND CONTRARY TO THE PUBLIC INTEREST.

Prior to 2002, conditional authorization was widely thought to be permitted on any 23 GHz frequency, so long as the link operated with an ERP of 55 dBm or less.[8] Low-power operation was permitted on four specified frequency pairs.[9]

A Commission order in 2002 limited conditional authorization to four frequency pairs – the same pairs as those previously authorized for low-power operation – subject to a 55 dBm EIRP power limit.[10] More precisely, the order explained that conditional authorization had always been limited to the low-frequency channel pairs.[11] This came as a surprise to the industry, much of which had read the rule as permitting conditional authorization across the entire 23 GHz band.[12]

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[8] *See* 47 C.F.R. § 101.31(b)(1)(vii) (as of 2000). ERP is a measure of the power emanating in the main beam of the antenna. The value 55 dBm is equivalent to 316 watts.

[9] 47 C.F.R. § 101.147(a)(26) (as of 2000). The relaxed antenna requirements for low-power operation were the same as they are today. 47 C.F.R. § 101.147(s)(4) (as of 2000).

[10] *Amendment of Part 101 of the Commission's Rules to Streamline Processing of Microwave Applications*, Report and Order, 17 FCC Rcd 15040 at ¶ 24 (2002) (*2002 Order*). This order also changed the limit from ERP to EIRP, which had the practical effect of increasing the permissible power by 2 dB. *Id*. at ¶ 72.

[11] *Id*. at ¶ 24.

[12] Under the rule then in force, an applicant was eligible for conditional authorization so long as, among other requirements, "[t]he filed application(s) does not propose to operate in the 21.2-23.6 GHz band with an E.R.P greater than 55 dBm pursuant to § 101.147(s) . . . ." 47 C.F.R. § 101.31(b)(1)(vii) (as of 2000). The *2002 Order* (at ¶ 24) argued that the reference to Section 101.147(s), which identified four channel pairs for low power operation, limited conditional authorization to those pairs. Many in the industry had instead read the reference to Section 101.147(s) as the source of the 55 dBm power limit for conditional authorization.

The 2010 *Report and Order* added two more pairs for conditional authorization, with the same maximum 55 dBm EIRP.[13]

As noted above, the *2002 Order* was premised on the proposition that conditional authorization must be limited to channels previously designated for low power operation.[14] The *Erratum* seems to rest on the converse: that a channel listed for conditional authorization must, for that reason, also be designated for low power. Nothing in the history, or in the record of this proceeding, justifies that conclusion.[15]

We oppose the low power designation because it permits the use of inferior antennas whose relatively less directional beams impede frequency coordination and threaten interference to other users. The need to give these antennas a wide berth in frequency coordination impairs efficient use of the spectrum. Whatever justification may once have excused this type of operation no longer exists. While the Commission cannot, in the context of this proceeding, remove the low power designation for other 23 GHz conditional authorization pairs, it can refrain from worsening the problem by rescinding the *Erratum*.

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[13] *Report and Order* at ¶ 25.

[14] "Because the cross-referenced section – Section 101.147(s) – is limited to four frequency pairs, only those applications that specify one of the four frequency pairs listed in Section 101.147(s) can operate within the power limitations 'pursuant' to Section 101.147(s) and, thus, can qualify for conditional operation under Section 101.31(b)." *2002 Order* at ¶ 24 (footnote omitted).

[15] The *2002 Order*'s main rationale for limiting 23 GHz conditional authorization to four channel pairs seems to have been the lack of an agreement with NTIA as to other frequencies. *2002 Order* at ¶ 24. NTIA signed off on the two recently added pairs. *Report and Order* at ¶ 25. Adding the low power designation to those pairs is of no conceivable benefit to NTIA.

C. ADOPTION OF THE *ERRATUM* VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

Incorporation of the *Erratum* into the rules is unlawful because it was never proposed, as required by the APA, and has no support in the record.

The Administrative Procedure Act (APA) provides:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --
>
> [* * *]
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . .[16]

The Commission did not publish notice of the low-power designation in accordance with these requirements. There was no opportunity for public comment.

Legal precedent on the APA notice provisions is clear. Notice of a proposed rule must include sufficient detail on its content and basis in law to allow for meaningful and informed comment.[17] As the D.C. Circuit has explained, "The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process."[18] The court went on:

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16 5 U.S.C. § 553.

17 *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (remanding for adequate notice and comment).

18 *Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) , *cert. denied,* 459 U.S. 835 (1982).

> If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making.[19]

There are two exceptions to the notice-and-comment requirement, neither of which is relevant here. The statute provides:

> Except when notice or hearing is required by statute, this subsection [on notice and comment] does not apply --
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> (B) when the agency for good cause finds *(and incorporates the finding and a brief statement of reasons therefor in the rules issued)* that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[20]

Paragraph (A) is inapplicable. The *Erratum* applies a regulatory provision to frequencies that were previously not subject to it. This is a substantive change, not an interpretation[21] or

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[19] *Id*. *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (notice must provide sufficient information to permit "adversarial critique"), *cert. denied*, 434 U.S. 829 (1977).

[20] 5 U.S.C. § 553(b)(3) (emphasis added). Separately excluded from all rulemaking requirements are "(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § Sec. 553(a). These are plainly irrelevant.

[21] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (interpretive rule typically reflects construction of statute; interpretation of agency's own rule likely requires notice and comment).

general statement of policy.[22] Paragraph (B) imposes a procedural obligation (in the italicized language) that the Commission has not complied with.[23]

Finally, the D.C. Circuit "will not uphold an agency's action where it has failed to offer a reasoned explanation that is supported by the record."[24] Other circuits agree.[25] There being no support whatsoever for the *Erratum* in the public record, it cannot stand.

Under the precedents that bind the Commission, the *Erratum* is unlawful. The Commission must rescind it.

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[22] *Id*. at 94 (agency policy statement does not seek to impose or elaborate or interpret a legal norm, merely represents agency position on how it will treat governing legal norm), *citing Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

[23] Moreover, the D.C. Circuit construes paragraph (B) as limited to "emergency situations." *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992). The Commission has not (and could not) claim an emergency here.

[24] *American Tel. & Tel. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir 1992).

[25] *E.g.*, *Cincinnati Bell Tel. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (FCC must provide at least some support for predictive conclusions); *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-1486 (10th Cir. 1995) (agency decision may be arbitrary and capricious if there is no rational connection between the facts found and the choice made); *People of California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990) (agency action in violation of APA if agency explanation runs counter to evidence).

CONCLUSION

Because the *Erratum* impedes frequency coordination, threatens interference, and reduces spectrum efficiency, it is contrary to the public interest. The Erratum, moreover, was adopted in violation of the APA. The Commission should rescind it and return the rules to those laid out in the original *Report and Order*.

Respectfully submitted,

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