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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Rules Regarding the 37.0-38.6 GHz)
and 38.6-40.0 GHz Bands)
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding, 37.0-38.6 GHz)
and 38.6-40.0 GHz)

ET Docket No. 95-183
RM-8553

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PP Docket No. 93-253

To: The Commission

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EMERGENCY REQUEST FOR STAY

Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation (collectively referred to as "Petitioners"), pursuant to Section 1.43 of the Commission's Rules, 47 C.F.R. §1.43, respectfully request that the Commission immediately stay its interim freeze on the processing of mutually exclusive applications, including amendments thereto, to establish new facilities in the 38.6 - 40 GHz (hereinafter "39 GHz") frequency band. The subject stay is requested pending action on Petitioners' Petition for Reconsideration (hereinafter the "Petition"), which is incorporated herein by reference, of the Notice of Proposed Rulemaking and Order, adopted December 15, 1995 in the above-captioned proceeding (hereinafter "39 GHz Order").^{1/} The interim freeze violates Congress' prerequisites for competitive bidding, and the FCC's own rules and previously operative 39 GHz licensing policy, all in violation of Petitioners' substantive and procedural

^{1/} Petitioners are filing, simultaneously herewith, a Petition for Reconsideration of the 39 GHz Order.

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due process rights. Thus, for the reasons set forth below, and detailed in the Petition, Petitioners' request for stay is justified.

I. INTRODUCTION

A detailed statement of facts upon which Petitioners rely for the subject stay request is set forth in the Petition and is incorporated herein by reference. The following is a brief summary of those facts:

On September 16, 1994, a Public Notice, Mimeo No. 44787, was released entitled "Common Carrier Bureau Established Policy Governing the Assignment of Frequencies in the 38 GHz and Other Bands to be Used in Conjunction with PCS Support Communications" (hereinafter "September Public Notice"). The Commission decided that "all current and future applicants seeking authority to use any spectrum in conjunction with PCS support communications" were required to provide the Commission with four categories of supplemental information to be associated with their applications. Id.^{2/} The problem with the September Public Notice was that, in effect, it barred applicants, such as Petitioners, who wished to offer an array of "last mile" or wireless fiber services, including but not limited to backhaul and link services to PCS and other commercial mobile radio service ("CMRS") carriers, from

^{2/} Insofar as public need was concerned, there were three categories of supplemental information described in the September Public Notice: (1) consideration of non-RF solutions; (2) clear and present need; and (3) frequencies and efficiency.

demonstrating a public need to serve the CMRS segment of the market.

In the wake of the September Public Notice, Petitioners voluntarily began to file numerous amendments reducing channel requests and resolving frequency conflicts. The latest such effort occurred on November 13, 1995 when Petitioners and other 39 GHz applicants, filed hundreds of minor amendments pursuant to Section 21.23 of the Commission's Rules. 47 C.F.R. §21.23. These minor amendments either reduced proposed service areas and/or reduced pending channel requests. Moreover, certain of these parties filed similar minor amendments on November 22, November 28 and December 8, 1995. These minor amendments were filed with the Commission to reduce channel requests to resolve frequency conflicts with other pending 39 GHz applicants or licensees and did not create any new or additional frequency conflicts. See, 47 C.F.R. §21.31(e)(2).

On November 13, 1995, the Bureau adopted a freeze on the acceptance of applications for licensing new 39 GHz frequency assignments pending Commission action on the petition for rulemaking filed on September 9, 1994 by the Point-to-Point Microwave Section of the Telecommunications Industry Association ("TIA"), concerning use of the 37.0 - 38.6 GHz (hereinafter "37 GHz") and 39 GHz bands. Order, DA 95-2341 (hereinafter the "Freeze Order").^{3/}

^{3/} Although the text of the Freeze Order had a release date of November 13, 1995, it is not clear if the document was actually made available to the public on that date, and the Commission was

On December 15, 1995, the Commission adopted the 39 GHz Order proposing to amend Parts 1, 2, 21 and 94 of its rules to provide a channeling plan and licensing and technical rules for fixed point-to-point microwave operations in the 37 GHz and 39 GHz frequency bands. The Commission also announced its interim 39 GHz licensing policy. 39 GHz Order at ¶¶121-124.^{4/}

II. A STAY OF THE COMMISSION'S INTERIM 39 GHz LICENSING POLICY IS JUSTIFIED IN THIS CASE

Entry of a stay pending the outcome of another proceeding is appropriate when (1) the party seeking the stay is likely to prevail on the merits of its appeal (or upon later reconsideration of its case by the Commission); (2) the party seeking the stay will be irreparably injured without the stay; (3) the issuance of the stay will not substantially harm other interested parties; and (4) grant of the stay is in the public interest. LeFlore Broadcasting Co., Inc., 43 RR 2d 807 (1978); see also Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Petitioners satisfy each of these four showings and are, therefore, entitled to a stay.

closed the following day. The public was not widely afforded notice of this action until November 20, 1995. See, Daily Digest, Vol. 14, No. 216, dated November 20, 1995. The Freeze Order has not yet been published in the Federal Register.

^{4/} As detailed in the Petition, although the text of the 39 GHz Order has a release date of December 15, 1995, it is not clear whether this order was actually released in accordance with the Commission's Rules.

A. Likelihood of Success on the Merits

As detailed in the Petition, in adopting the interim 39 GHz licensing policy in the 39 GHz Order the Commission violated Congress' statutory prerequisites for competitive bidding set forth in Sections 309(j)(6)(E) & (j)(7)(B) of the Communications Act of 1934, as amended (the "Act"), violated its own rules and previously operative 39 GHz licensing policy, and engaged in an impermissible retroactive rulemaking. Each of these violations alone demonstrates that the interim freeze on the processing of mutually exclusive applications and conflict-resolving amendments should be stayed. Taken together, however, Petitioners have established the likelihood of success on the merits of their Petition.

B. Absent the Requested Stay, Petitioners, and Other Pending 39 GHz Applicants Will Be Irreparably Harned

The determination whether a petitioner will suffer irreparable injury, absent a stay, is made in context with the determination whether the petitioner is likely to succeed on the merits of its petition for reconsideration. Virginia Petroleum at 925. Thus, where petitioners have established a compelling case for reconsideration of the agency's underlying decision, the degree to which Petitioners are injured, absent a stay, is diminished. The U.S. Court of Appeals for the D.C. Circuit has held that:

injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.

Id.

As stated above, and detailed in the Petition, Petitioners have compelling evidence to justify reconsideration of the Commission's 39 GHz Order. However, if the subject stay is not granted during the pendency of that reconsideration, the Petitioners are likely to suffer irreparable harm. Specifically, there is legislation pending in Congress which will, if enacted, expand the Commission's auction authority. Language contained in the Seven-Year Balanced Budget Reconciliation Act of 1995 (the "Budget Act"), which President Clinton vetoed on December 6, 1995, may survive in any new budget bill and would expand the Commission's auction authority in a manner which could potentially subject Petitioners' uncontested 39 GHz applications -- if deemed mutually exclusive at the time of enactment -- to competitive bidding. In particular, Section 3001(a)(1)(A) of the vetoed Budget Act would amend Section 309(j) of the Act, 47 U.S.C. § 309(j), to require that the Commission use competitive bidding to award licenses for which it has accepted mutually exclusive applications.

As detailed in the Petition, the Commission attempted to characterize its interim 39 GHz licensing policy as a processing freeze (i.e. a measure that would preserve the status quo during its rulemaking proceeding). 39 GHz Order at ¶¶123-124. However, in reality, the Commission's interim 39 GHz licensing policy completely changed the status quo by transforming previously uncontested 39 GHz applications (i.e. applications that had been amended as of right on or after November 13, 1995 to resolve mutual exclusivity) waiting for grant into contested applications. Thus,

if the 39 GHz licensing policy is allowed to stand at the time the proposed Budget Act amendment is adopted, Petitioners will have applications unfairly subjected to competitive bidding procedures when in fact, they are entitled to grants. The uncertainty of the outcome of such a process may well cause irreparable injury to implementation of Petitioners' business plans.

C. The Issuance of the Subject Stay Will Not Substantially Harm Other Interested Parties

No interested party will be substantially harmed if the subject request for stay is granted. In fact, all 39 GHz applicants, that have mutually exclusive applications pending with the Commission, will benefit from a grant of the subject stay. In particular, those parties will be afforded an opportunity to continue to resolve frequency interference conflicts through technical and negotiated resolutions, as well as to file minor amendments to resolve mutual exclusivity. Moreover, these applicants will be afforded prospective notice of any modifications to the Commission's licensing rules. Such results are in the public interest.

D. Grant of the Subject Stay is in the Public Interest

For the reasons discussed above, grant of the requested stay is in the public interest. First, Congress, speaking on behalf of the public at large, has said that the Commission should avoid creating incidents of mutual exclusivity in its licensing processes. 47 U.S.C. §§309(j)(6)(E) & 309(j)(7)(B). The FCC has thwarted Congress' expression of the public good by adopting an

impermissible retroactive freeze. Thus, if the Commission's offending policy is stayed, the public interest will be served.

III. CONCLUSION

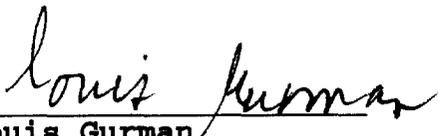
As established above, the Commission's interim 39 GHz licensing policy is in direct contravention of Congress' statutory mandates, violates its own rules and the September Public Notice policy, and is an impermissible retroactive rulemaking, all in violation of Petitioners' substantive and procedural due process rights. Thus, the Commission's policy must be stayed immediately pending action on Petitioners' Petition.

Respectfully submitted,

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