

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
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Amendment of the Commission's) ET Docket No. 95-183
Rules Regarding the 37.0-38.6 GHz) RM-8553
and 38.6-40.0 GHz Bands)
)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act --)
Competitive Bidding, 37.0-38.6 GHz)
and 38.6-40.0 GHz Bands)

To: The Commission

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COMMENTS OF NO WIRE L.L.C.

NO WIRE L.L.C.

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SUMMARY

In these Comments, No Wire L.L.C. urges the Commission to reevaluate its proposals with respect to the 39 GHz band. In this band, auction procedures should be used only to resolve situations of mutual exclusivity. There is no need for the proposed BTA auctions nor would they be effective considering the numerous existing licenses. The FCC's auction proposal, moreover, would be applied retroactively to require the dismissal of all pending mutually exclusive applications even though they were filed in accordance with the rules. This works a great hardship on those applicants with no countervailing justification.

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COMMENTS OF NO WIRE L.L.C.

No Wire L.L.C. ("No Wire") is a newly formed company created to operate facilities in the 39 GHz band and to that end has filed numerous applications for licenses in various market areas in accordance with the rules applicable to the Part 21 Point-to-Point Microwave Service.

No Wire is submitting these comments in response to the Commission's Notice of Proposed Rule Making and Order, FCC 95-500, released December 15, 1995 ("Notice") because it would be directly and adversely affected by the Commission's proposal to auction off frequencies in the 39 GHz band and to dismiss all pending applications which are mutually exclusive while prohibiting amendments which could resolve

such mutual exclusivity.¹ As discussed below, No Wire believes that it is appropriate to auction off the newly available 37 GHz band on a BTA basis and to use auctions in the 39 GHz band where mutually exclusive applications cannot otherwise be resolved. No Wire submits, however, that the Commission's proposal also to auction the 39 GHz band on a BTA basis after dismissing pending applications and canceling some licenses is bad policy, unsupported by any facts of record, unfair to existing applicants and licensees and contrary to basic legal principles.

1. The 39 GHz Band Has Potential Uses Beyond the "Backhaul" and "Backbone" Functions Discussed by the Commission

In the Notice, the Commission described the principal use of these frequencies as the provision of "backhaul" and "backbone" links for cellular, PCS and other mobile radio operations. Notice ¶ 1. As reflected in its applications, No Wire does not regard these as sole uses of such licenses, but rather believes that a variety of uses are likely. For example, these facilities would be useful for linking hotels, banks, department stores and other businesses wishing to provide joint training for their employees where the number of employees in a particular job function at a single site would not be sufficient to warrant providing such training separately. Similarly, local universities

¹ No Wire is also seeking reconsideration of certain of the Commission's actions "freezing" pending applications.

might use these facilities to link their individual campuses to provide unique courses to the students of other schools without the need for students to travel from campus to campus. These facilities may also be extremely useful for temporary video and data connections for conferences or large events taking place in multiple locations. No Wire believes a market also exists for these facilities in connection with business data transmission requirements and the linking of local area networks and wide area networks. They are also a candidate for providing point-to-point routing and interconnection services for local access, local exchange, long distance and enhanced service providers. Because these services are only now commencing operations, it is impossible accurately to forecast what the ultimate range of uses of these frequencies will be, but there is no reason to attempt to force these facilities into any particular mold or to formulate rules based on the assumption that they predominantly will be used for any one purpose.

2. The Commission's Auction Scheme May Be Appropriate for the 37 GHz Band But Not for the 39 GHz Band

No Wire's applications are limited to the 39 GHz band, and it has no specific comments or suggestions relating to the Commission's proposals for the 37 GHz band. Because those frequencies are becoming available for the first time, it appears to No Wire that they may be appropriate for the type of BTA structure and auction procedures proposed. No Wire does not believe, however, that the new procedures

proposed by the Commission for the 39 GHz band are appropriate or are justifiable based on the information in the Notice.

The lack of justification is highlighted by the fact that the Commission's proposal here treats those who have applied for facilities in the 39 GHz band with utter disdain and proposes to simply dismiss their pending applications, even though they were filed in accordance with the Commission's rules and the parties have incurred substantial expenses in preparing and filing the applications and trying to develop a business. The Commission, moreover, is proposing to take these actions in the 39 GHz band even though the request for rule making filed by the Telecommunications Industry Association ("TIA") and the comments on that petition for rule making did not propose or suggest any such action with respect to the 39 GHz band.

a. The Commission's Proposed Construction Criteria for 39 GHz Band Licenses Is Unreasonable

The Commission has noted that few licenses are now available in the 39 GHz band in most metropolitan areas Notice at ¶ 28, but it nevertheless proposes immediately to auction BTA service areas for the 39 GHz band where those BTAs do not have incumbent licenses in a particular channel block. Notice at ¶ 104. While this proposal may be poor policy, at least the auction of unoccupied channels does not trample on the rights of others.

The Commission, however, proposes to augment the facilities available for auction through the confiscation of incumbent licenses. It would accomplish this through an utterly unreasonable requirement that existing licenses adhere to an arbitrary build-out schedule which would result in them forfeiting the geographic areas for which they had been granted licenses if they fail to construct and place in operation a communications link for every 10 square miles of area. Notice at ¶ 105. This would require the construction of hundreds of links in a typical service area within 18 months and at enormous cost for services which are only now beginning to develop and one of whose prime customers, as envisaged by the Commission, may be PCS, which is still in the early stages of development in most areas. No rationale is given for this onerous requirement, and its arbitrariness is underscored by the fact that the Commission was unable to specify any build-out requirement in connection with the 37 GHz band. Notice at ¶ 98.

The Commission does suggest an alternative construction requirement which, by contrast, appears almost reasonable. No Wire believes that a build-out requirement based on market size is the most logical approach. In the 39 GHz band, parties typically have chosen one city or two closely related cities as the hub of the market area proposed. The population ratings of these cities might therefore be an appropriate basis for a graduated construction requirement. A minimum requirement of 10 operational links in the top 10

markets and 5 in all service areas containing at least one city with a population in excess of 200,000 people would be more appropriate than the 15/10/5 criteria discussed in Paragraph 107 of the Notice. Because of the newness of this service and the short period prescribed for construction, this proposal would ensure that meaningful service is being rendered without unfairly forcing investment before the market develops. No Wire does not believe that any loading factor should be included as part of the build-out requirement since the time period is short, and the types of service to be offered over these facilities are only now developing.

**(b) Existing Licenses Render the 39 GHz Band
Unsuitable for BTA Auctions**

Because much of the 39 GHz band has already been licensed, especially in more significant communities, it does not appear to No Wire that an attempt to auction off the remaining areas is necessary or desirable. The BTAs where the need for this spectrum presumably would be greatest are precisely those major markets where the frequencies have already been licensed. Auctioning off the remnants of those BTAs outside the licensed area is unlikely to generate significant revenue, which seems to be the sole reason for the Commission's proposal, and could serve no other useful purpose.

Even in smaller markets, many channels will be occupied in some portions of the BTAs and trying to value the remaining portions is problematic. The current SMR auctions

reflect the difficulty in dealing with partially licensed BTAs. As there is no showing of any need for BTA licensing in the 39 GHz band, the Commission's sole purpose appears to be to raise money. This might not be so objectionable if the price being paid by existing 39 GHz band licensees and applicants was not so high.

**(c) Dismissal of Existing Applications
in the 39 GHz Band Is Insupportable**

Nowhere in the Notice has the Commission ever identified any reason why existing applications should be dismissed without further consideration other than to raise money in an auction.

The Commission's proposal involves the wholesale dismissal of applications which were filed in good faith and in accordance with its rules. Basic concepts of equity and fairness suggest that the Commission may not dismiss such applications arbitrarily.² While there may be situations

² The only authority cited by the partial dissents of Chairman Hundt and Commissioner Ness is Private Operational Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983). Those applications were filed after a rulemaking but before petitions for reconsideration had been considered. The Commission never processed any of the applications because it was not "prudent" to do so "until the regulatory scheme we were adopting was clarified on reconsideration," and because questions regarding the applicable technical standards had not been resolved. *Id.* at ¶ 24. Other unique factors are discussed at paragraphs 33-34. No comparable circumstances exist with the pending 39 GHz band applications which were filed in accordance with final rules. The Commission decision was appealed and the Commission's action was affirmed by the D.C. Circuit on May 8, 1985 in an unpublished judgment. Such judgments, however, have no precedential value whatsoever and may not be construed as confirming the

where the legitimate needs of the public might require such action, no such record is evident here. Apart from the Commission's professed desire to raise money through auctions, they have not pointed to any impropriety or inefficiency in the current system which would mandate such drastic retroactive action.

In his partial dissent, Chairman Hundt expresses the view that all pending applications should be dismissed to maximize the spectrum available for auction. He notes that "existing applicants have paid only a \$180 application fee which would be returned if the applications were dismissed. Notice, Partial Dissenting Statement of Chairman Hundt, at 2. No Wire has paid approximately \$9,000 in application fees in connection with its 39 GHz applications, but this is a small fraction of the more than \$75,000.00 it has expended for engineering, consulting and legal services in connection with this project. And these out-of-pocket costs include nothing for the substantial time and effort spent developing a business strategy and analyzing the potential market for this new service. Thus, even for just this one applicant, the decision to dismiss mutually exclusive applications would be devastating and No Wire is far from unique. One might expect that there would be some compelling public interest reason supporting such drastic action but none has

Commission's authority to dismiss applications filed in accordance with its rules.

been offered in the Notice other than a preference for requiring payment for the use of spectrum.

The partial dissent notes that this spectrum might be useful for PCS but many PCS licenses have not yet been granted. No one, however, has suggested that use of the 39 GHz spectrum is necessary or uniquely suited to support PCS. All of the 37 GHz band, moreover, is available for this purpose.

As the D.C. Circuit has noted, the decision to make a new policy retroactive must be justified carefully as "courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature. When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief." Yakima Valley Cablevision v. F.C.C., 794 F.2d 737, 745-46 (D.C. Cir. 1986). The Commission must consider alternatives and ultimately justify any retroactivity only after weighing the harm against any salutary effects. Id.³ Here the only justification is the desire to make applicants pay for frequencies but reliance principally on raising revenue is inconsistent with the Communications Act. 47 U.S.C. §309(j)(7).

³ See Also, McElroy Electronics Corp. v. F.C.C., 990 F.2d 1351, 1364-65(D.C. Cir. 1993) (reinstating dismissed cellular applications filed consistently with the rules).

The far better course would be the continued processing of these applications, with a declaration by the Commission that auctions would be utilized to resolve all mutually exclusive applications if the involved parties have been unable through technical or other means to resolve their conflicts as provided in Section 309(J) of the Communications Act, 47 U.S.C. § 309(j)(6)(E). Even if the Commission adopts a BTA overlay for unused channels in "vacant" areas, they should nevertheless permit additional applications on the other channels under the existing rules so that licensees may expand their service as they develop it, so long as it does not conflict with the rights of a BTA licensee.

3. The Proposed Alternative Licensing Scheme Must be Modified

As an alternative to licensing 39 GHz facilities through competitive bidding, the Commission proposes a modification of the current licensing scheme incorporating the staff's Public Notice released September 16, 1994. (Mimeo No. 44787.) That Public Notice, which improperly modify the procedures specified in the Commission's rules, is based on certain assumptions not appropriate for this new service. If the 39 GHz band applications were merely for the build-out of existing services such as paging or cellular or other currently well-established uses, requiring consideration of non-RF solutions or that clear and present need be specifically identified prior to assignment of facilities might be reasonable. However, the Commission has

recognized that this is a service in the process of development, and, as noted at the beginning of these comments, the uses for these frequencies are still being identified.

As a result, it may be inappropriate to treat applications for these facilities in the same manner as those in an already well-developed service. It is the essence of the entrepreneur to anticipate the need for service and to have it available as it is needed. The entrepreneur also "creates" demands by marketing the availability of the service to potential users who might not otherwise think of it. Because the Commission has already concluded in this Notice that there is demand for these frequencies, there is no justification for including a requirement that an applicant make a specific showing regarding non-RF solutions or to identify in a particular application a proposed customer. To the extent the Commission is concerned about warehousing spectrum, the build-out requirement discussed above should eliminate that concern. In addition, due to the amount of spectrum available in both bands, warehousing would not appear to be a viable strategy or likely to occur.

With respect to the use of more than one channel in a particular area, the Commission's proposal is too confining. Operators should be permitted to acquire an additional frequency, once they can demonstrate that they have constructed and placed in operation all of their previously

licensed facilities in the same areas. All businesses must plan ahead to meet expected need and cannot rely upon the initiation of expansion until their current facilities are fully utilized. This is particularly true where the service provided is part of a building block relied upon by others as part of a larger program. Rather than relying on loading and other factors, which have been rejected in such services as paging, we believe that the most and only appropriate showing for a request for additional facilities is a demonstration that previously authorized facilities have been constructed and are in operation.

Finally, No Wire does not believe that trying to push the 39 GHz band into a BTA mold at this juncture would be desirable or feasible. Parties have had little difficulty in selecting service areas based on the Commission's current rules, and we see no benefits to be obtained by changing those rules, particularly since they have formed the basis of the current market structure for this service. Moreover, applying on a BTA basis may well create unnecessary conflicts with other applicants as each may be interested in only part of a particular BTA.

In its alternative proposal for licensing in the 39 GHz band, the Commission does not discuss its treatment of mutually exclusive applications, but it is likely that there will continue to be numerous such applications in the future. No Wire believes that auctions would be an appropriate way to resolve such mutually exclusive situations for

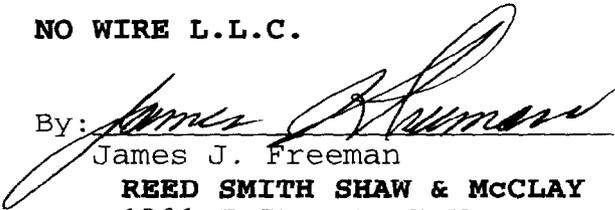
all the reasons stated in the portion of the Notice dealing with the 37 GHz proposals. However, it should be noted that the enabling legislation makes it clear that auctions are not to replace the resolution of mutual exclusivity through technical means, such as changing frequencies or service areas, or through negotiated settlements. 47 U.S.C. § 309(j)(6)(E). Where the interests of the parties preclude other solutions, auctions provide a viable and efficient means of resolving such situations.

Conclusion

No Wire respectfully suggests the Commission needs to rethink its proposals for the 39 GHz band. Its current proposals are not only unfair to incumbents and applicants, but are likely to be immensely inefficient in view of the large number of licensed facilities already outstanding. There is no basis in this record for the kind of draconian approach adopted by the Commission with respect to the 39 GHz band and the proposals should be modified as suggested above.

Respectfully submitted,

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