BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

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WINSTAR COMMUNICATIONS, INC.

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SUMMARY

THE 37-40 GHZ BAND SHOULD BE:

- CONTROLLED BY MARKET FORCES AND NOT GOVERNMENT REGULATION
- ALLOCATED BY AUCTION
- SUBJECT TO MAXIMUM REGULATORY FORBEARANCE

LICENSES SHOULD BE:

- GRANTED ON AN MTA BASIS PER THE PROPOSED CHANNELIZATION PLAN

WITH RESPECT TO AUCTIONS:

- NO PCS SET ASIDE IS NECESSARY
- SIMULTANEOUS MULTIPLE ROUNDS ARE BEST
- THE UPFRONT PAYMENT MUST BE LOWERED

GIVEN THE COMPETITIVE NATURE OF THE MARKET:

- NO RESTRICTIONS ON USE OF THE BAND SHOULD BE IMPOSED
- THE SPECTRUM CAP SHOULD BE RAISED OR REMOVED
- ATTRIBUTION LIMITS SHOULD BE RAISED
- THE BUILD OUT REQUIREMENTS SHOULD BE LIFTED
- TECHNICAL RULES GENERALLY SHOULD NOT BE ADOPTED
- SPECTRUM SHOULD NOT BE SHARED WITH THE GOVERNMENT

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COMMENTS OF
WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"),[1] by its attorneys, hereby submits its comments in the above-captioned proceeding designed to: (1) provide a channeling plan and licensing and technical rules to allow for point-to-point microwave operations in the 37.0-38.6 GHz ("37 GHz") band; (2) amend the licensing and technical rules in the 38.6-40.0 GHz ("39 GHz") band; and (3) disseminate unlicensed spectrum

[1] WinStar Communications, Inc. ("WinStar" or "the Company") is the parent corporation of WinStar Wireless Fiber Corporation ("WWFC") and WinStar Wireless, Inc. ("WWI"). WinStar filed its Motion for Extension of Time and related Petition for Reconsideration under WWFC's name.

in both bands (the "37-40 GHz band") through competitive bidding procedures.[2]

I. BACKGROUND

WinStar is a publicly traded company on the NASDAQ. It develops, markets, and delivers telecommunication services in the United States. Over the last five years, WinStar has grown rapidly.[3] The Company's local telecommunication services are offered in 43 of the nation's largest metropolitan statistical areas.[4] WinStar has been approved for competitive local exchange carrier service ("CLEC") operations in California, Florida, New York, Washington, and Tennessee and has applications pending in five other states. WinStar has also received authority to operate as a competitive access provider ("CAP") in twenty-one states[5] and has applications for intrastate authority pending in an additional seven states.[6] The passage of the

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[2] See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, FCC 95-500, ET Docket No. 95-183, RM 8553, (rel. Dec. 15, 1995) ("NPRM").

[3] WinStar has over 300 full-time employees and expects to hire an additional 200 in 1996.

[4] WWFC holds 30 licenses and WWI holds 13 licenses in the 37-40 GHz band.

[5] California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New York, Ohio, Pennsylvania, Texas, Washington, Wisconsin, Michigan, Indiana, and Tennessee.

[6] Arizona, Louisiana, New Jersey, North Carolina, Oklahoma, Oregon, and Virginia.

Telecommunications Act of 1996 should hasten WinStar's ability to provide such services.[7]

In addition, WinStar owns several other communications-related entities. These include WinStar Gateway Network, Inc., which supplies switchless and switched long distance services on a resale basis as well as other enhanced services including 800 service and prepaid phone cards to over 100,000 customers throughout the United States, and WinStar New Media Company, Inc., which accesses information services in concert with the company's other telecommunication capabilities and produces non-fiction video product primarily for the educational and historic content markets.

II. INTRODUCTION

It is axiomatic that welfare is maximized when market forces -- as expressed through competition -- are used to allocate resources. The efficiency benefits of market-based allocations are well-known: assets are pushed to their highest and best use; prices are driven toward costs; resources are allocated and employed productively; new products, services, and technologies are pursued and brought to market; and cost-reducing innovations are sought and adopted.[8] All of

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[7] Section 253 of the Act preempts States from imposing any requirements that prohibit or have the effect of prohibiting an entity's ability to provide interstate or intrastate telecommunications service. See Telecommunications Act of 1996 § 253 (1996).

[8] F.M. Scherer, Industrial Market Structure and Economic Performance 13-14 (2d ed. 1980) ("Industrial Economics"). See also FCC News Release, "Chairman Hundt Says Telecom Bill Will Spur Genuine Competition; Urges More Uses of New Spectrum and Information Technology" (Feb. 2, 1996) ("competition brings better products at lower prices").

this adds up to efficient outcomes.[9] In contrast, government regulation (in the absence of market failure) typically hampers asset allocation and yields inefficient outcomes.[10] Because the government does not rely on forces of supply and demand, its allocation and other decisions effecting the market may be considered "artificial." An additional problem with government regulation is its susceptibility to political forces.[11] In recognition of the above, the FCC has increasingly chosen to rely on market forces and to refrain from regulating unduly.

The 39 GHz band is competitive: in providing services, a licensee must compete with other licensees in the same band as well as with licensees of other spectrum bands and non-spectrum service

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[9] See, e.g., Scherer, Industrial Economics 21. See also FCC News Release, "Chairman Hundt Says Telecom Bill Will Spur Genuine Competition; Urges More Uses of New Spectrum and Information Technology" (Feb. 2, 1996) ("market forces and flexible uses . . . foster innovation and competition, . . . stimulate infrastructure investment, job creation, and efficient spectrum use").

[10] See, e.g., Herbert Hovenkamp, Marginal Utility and the Coase Theorem, 75 Cornell L. Rev. 783, 784 (1990) (citing Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972)); see also In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *Notice of Proposed Rule Making*, FCC 96-17, WT Docket No. 96-6, at ¶ 13 (released Jan. 25, 1996) ("CMRS Flexibility NPRM") (restrictions on use of channels "hinders carriers from quickly and economically using channel capacity to meet charging market demand").

[11] See, e.g., Scherer, Industrial Economics 12-13. See also Chairman Reed Hundt, Speech Delivered at Artists Rights Foundation Digital Technology Symposium, Los Angeles, California (February 15, 1996) (transcript available from the Commission) (with auctions, "government doesn't pick the winners of the licenses according to who has the best lobbyists or the most congressional influence").

providers. The licensing of the 37 GHz band -- and the remainder of the 39 GHz band -- will only increase the extent of competition. Given the competitive nature of the market, there is no need for the Commission to impose many of the proposed restrictions on licensees. Nor is there any need for the agency to impose restrictions on only the incumbent licensees. As recognized by the Commission, where workable competition exists, government regulation often serves to inhibit -- rather than promote -- resources from reaching their highest and best use.[12] The Commission should regulate only to the extent that it fears market failure, e.g., situations where competition is insufficient to push licensees to lower prices, improve quality, and make maximum efficient use of their spectrum.

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[12] See In the Matter of Streamlining the Commission's Rules and Regulations For Satellite Application and Licensing Procedures, *Notice of Proposed Rule Making*, IB Docket No. 95-117, 10 FCC Rcd 10624, 10631 ¶ 35 (1995) ("[W]e recognize that government interference with market forces through unnecessary regulation is costly. Such costs include the actual out-of-pocket costs incurred by industry in complying with various regulatory requirements as well as by government in administering these regulatory schemes."); In the Matter of Streamlining the International Section 214 Authorization Process and Tariff Requirements, *Notice of Proposed Rulemaking*, FCC 95-286, IB Docket No. 95-118 at ¶ 1 (released July 17, 1995) ("[B]ecause regulation can interfere with market forces, it may also have an adverse impact on economic efficiency and consumer welfare."). See also In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (released Oct. 23, 1995) (statement of Commissioner Chong) ("As a fundamental matter, I believe that competition should trump regulation. If a market is competitive, let market forces work. With competition on the rise, the Commission should reduce outdated regulation as much as possible and as quickly as possible.").

III. COMPETITIVE FORCES SHOULD DETERMINE THE USE OF THE 37-40 GHz BAND

A. A set aside for PCS users may prevent the spectrum from reaching its highest and best use

The Commission should not set aside a portion of the 37-40 GHz band for PCS use. Market forces and not the Commission's estimates of demand should allocate the 37-40 GHz spectrum.

Agencies are inherently ill-equipped because of their lack of market information to make allocative decisions.[13] Professor Ronald Coase, who received the Nobel Prize for economics in 1991, notes that the FCC, like any administrative agency, is handicapped when attempting to allocate resources:

> First of all, [the FCC] lacks the precise monetary measure of benefit and cost provided by the market. Second, it cannot, by the nature of things, be in possession of all the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for various goods and services in the production of which radio frequencies could be used. In fact, lengthy investigations are required to uncover part of this information, and decisions of the Federal Communications Commission emerge only after long delays.[14]

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[13] See In the Matter of Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, *Report and Order*, FCC 96-14, IB Docket No. 95-41, at ¶ 23 & ¶ 68 (rel. January 22, 1996) (recognizing that in the absence of market failure, market forces are better than the Commission at making allocative decisions).

[14] Ronald H. Coase, The Federal Communications Commission, 2 J.L. & Econ 1, 18 (1959) (citation omitted).

Instead of conjecture, the FCC should, as suggested by Chairman Hundt, allow "market forces to guide [] spectrum to its highest-valued use."[15]

Reliance on market forces is particularly appropriate because competing demands exist for the spectrum.[16] The NPRM makes much of the fact that the 37 GHz band may be used to provide broadband PCS infrastructure.[17] However, there is no evidence that PCS users value the spectrum more highly than other prospective users. To the contrary, WinStar believes that a major use of the spectrum will be for wireless local loop services. WinStar has already been authorized to provide competitive local exchange and access services in many jurisdictions. The Commission has recognized that the 37 GHz band will be used to provide similar services: "[it could] facilitate the development of competitive wireless local telephone service."[18] The

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[15] See FCC News Release, "Chairman Hundt Says Telecom Bill Will Spur Genuine Competition; Urges More Uses of New Spectrum and Information Technology" (Feb. 2, 1996).

[16] See In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rule Making*, FCC 96-52, WT Docket No. 96-18, PP Docket No. 93-253, at ¶ 66 (rel. February 9, 1996) ("Part 22 Rewrite NPRM") ("key purpose of competitive bidding is to let the marketplace determine the level of demand for licenses").

[17] See, e.g., NPRM at ¶ 13 (proposing to harmonize rules for the 37-40 GHz band so it is "made more suitable for supporting broadband PCS"); ¶ 20 (FCC "anticipate[s] that many operations in the [37 GHz] band will provide infrastructure links for broadband PCS operations"); ¶ 112 ("Our goal is to ensure that there are an adequate number of licenses available to meet the needs of broadband PCS licensees.").

[18] See NPRM at ¶ 1. The Indiana Regulatory Commission recently reached a similar conclusion in granting WinStar's (continued...)

37 GHz spectrum will therefore be desirable -- and demanded by bidders -- for uses much broader in scope than PCS support. In light of the above, a PCS set aside will most likely result in one of two evils: PCS providers do not receive enough spectrum to adequately support their service; or, they receive too much, in which case the reservation for PCS would prevent other prospective service providers from making more valuable use of the spectrum.[19]

The inefficient outcomes resulting from a PCS set aside may be avoided by use of the Commission's proposed auction which would force PCS and other prospective service providers to compete (by bidding) against each other to determine who receives the spectrum. To the

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[18](...continued)
request to provide intrastate services:

> The WinStar system will provide Indiana customers with the option of selecting from a wide range of innovative, customized services, designed to meet specific customer needs, which in turn should serve to enhance the state's ability to facilitate economic development. The evidence demonstrated that the public should benefit both directly through the use of high-quality and reliable microwave transmission services, . . . and indirectly because the expanded presence of WinStar in this market will increase the incentives for other telecommunications providers to operate more efficiently, offer more innovative services, reduce their prices, and improve their service quality.

See Petition of WinStar Wireless of Indiana, Inc. for a Certificate of Territorial Authority, Indiana Util. Reg. Comm. Cause 4082, *Order*, at 5 (Jan 31, 1996).

[19] See R.H. Coase, The Interdepartment Radio Advisory Committee, 5 J. Law & Econ. 17, 45 (1962) ("[A] frequency should not be used for a particular purpose if it prevents the accomplishment of some other purpose of greater value or if the same purpose could be achieved by the use of another resource which would mean a smaller fall in the value of production than the use of the frequency.").

extent they value the spectrum most highly, PCS licensees will be able to obtain all the needed spectrum in the 37-40 GHz band.[20] Because the market is competitive, even if PCS licensees are uncertain about the value of the spectrum and choose not to bid, they will nonetheless be able to obtain spectrum in the market. In sum, there is no basis to believe PCS licensees will be unable to obtain needed spectrum and/or services either by purchases at auction or through aftermarket transactions.

B. Alternatively, the Commission may wish to reserve a small portion of the 37-40 GHz band to ensure that all PCS licensees have an opportunity to bid for the band

As discussed below, WinStar believes that the 37 and 39 GHz bands should be allocated simultaneously by auction. WinStar also notes that the PCS auctions may not be concluded at the time competitive bidding begins for the 37 and 39 GHz bands. WinStar does not believe spectrum should be reserved for PCS. PCS licensees will be able to secure 37-40 GHz channels and other backbone transmission services in

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[20] Professor Coase notes that use of an auction will allow a prospective purchaser to obtain all the frequencies it needs provided that it is willing to pay a price equal to the contribution the frequencies could make elsewhere. See, Coase, The Federal Communications Commission, 2 J.L. & Econ 17-35. In other words, if prospective non-PCS applicants were willing to pay $100,000 for a license in the 37-40 GHz band, PCS licensees could obtain that same license by paying a price greater than $100,000. If PCS licensees were unwilling to pay that sum, the license would end up in the hands of non-PCS applicants as they placed a higher value on the license. In that circumstance, a PCS set-aside would prevent the license from reaching its highest and best use.

a competitive marketplace.[21] Thus, there is no reason to set aside or otherwise reserve spectrum solely for their use. If, nevertheless, the Commission wishes to set aside part of the 37-40 GHz band, it should reserve no more than 12 channels for an auction to be held after PCS licensing is concluded. And that auction should be open to all, not simply PCS licensees. This would accommodate PCS licensees by giving them an opportunity to compete for spectrum in the 37-40 GHz band. At the same time, use of an auction open to all would allow market forces to allocate spectrum as opposed to the Commission.[22] Given the size of the relevant market and the short duration between the two auctions, a spectrum reserve pending conclusion of the PCS licensing process would not result in unacceptable welfare or efficiency losses. Furthermore, a short-term reserve would be preferable to, and plainly more efficient than, having the agency set aside a portion of the bands only for PCS use.

IV. WINSTAR SUPPORTS THE COMMISSION'S CHANNELIZATION PLAN

The NPRM tentatively adopts a channelization plan for the 37 GHz band, dividing it into fourteen 50 MHz blocks with 700 megahertz separation between transmit and receive frequencies and four unpaired 50 MHz channels. WinStar agrees with the Commission that by harmonizing the 37 GHz channelization plan with the 39 GHz plan,

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[21] This is particularly true given the FCC's proposal to allow CMRS licensees to provide fixed point-to-point services. See CMRS Flexibility NPRM.

[22] See Section III.A. An open auction would allow other services to meet their interconnection needs.

equipment manufacturers should be able to provide equipment quickly.[23] In turn, that should speed the new licensees' ability to provide service and compete for customers. For those reasons, WinStar supports the FCC's proposed channelization plan and opposes TIA's revised plan. That plan seeks to set aside smaller portions of spectrum for licensing on an individual link basis.[24] The use of such small blocks would be unnecessarily inefficient; it could slow competition and, in any event, TIA has not shown that such small uses could not be obtained from other common carrier licensees in economic arrangements utilizing all or a portion of a 50 MHz channel.

V. LICENSES SHOULD BE GRANTED ON AN MTA BASIS AS THAT ALLOWS LICENSEES TO CAPTURE SCALE ECONOMIES NOT AVAILABLE WITH BTA LICENSING

A. Licenses should be issued using MTAs

Contrary to the NPRM's proposal, the 37-40 GHz band should be licensed using MTAs or some other relatively large service area.[25] From an administrative perspective, the smaller number of MTAs should be more efficient for the Commission to license than either BTAs or its current practice of allowing licensees to define their own service area.[26] More critically, MTAs would allow licensees to capture

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[23] See NPRM at ¶ 19.

[24] See id.

[25] The Commission has used MTAs to license the PCS A and B blocks and, most recently, has proposed their use for certain paging systems. See Part 22 Rewrite NPRM at ¶ 34.

[26] See In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7733 ¶ 75 (1993) ("PCS Second Report and Order"); Part 22 Rewrite NPRM, at ¶ 34.

certain economies of scale and therefore to compete more effectively with LECs whose service areas are more akin to MTAs than BTAs.[27] For example, licensees could concentrate their marketing efforts throughout a larger region and thereby maximize the efficient use of their marketing dollars as well as most rationally deploy installation and maintenance forces.[28] Given their large size, MTAs may allow licensees to realize equipment and cost savings by obtaining quantity discounts. In a competitive market, those savings pass through to the end user. MTAs would also allow licensees to avoid future consolidation costs which might occur from the aggregation of the smaller BTAs.[29] Additionally, MTAs may assist licensees in serving rural areas because licensees could take advantage of both scale and scope economies. BTAs, on the other hand, would cause licensees to forego realization of various scale economies (thereby potentially underserving rural areas) and would handicap them in competing with

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[27] See PCS *Second Report and Order*, 8 FCC Rcd at ¶ 75 (recognizing that MTAs will provide economies of scale).

[28] For example, licensees could realize promotional economies of scale in the form of lower costs from media discounts as well as economies of scale at the sales and service level. See F.M. Scherer & David Ross Industrial Market Structure and Economic Performance, 134-36 3d ed. 1990).

[29] See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GEN Docket No. 90-314, ET Docket No. 92-100, 9 FCC Rcd 4957, 4987 ¶ 76 (1994) (larger service areas minimize the need for "costly post-auction transactions").

LECs.[30] In light of the above, the FCC should license the 37-40 GHz band using MTAs.

B. Reserved spectrum could be licensed on a BTA basis

Assuming that the FCC determines it to be necessary to reserve some spectrum for an auction to be held after the PCS bidding is complete, WinStar would not object to those blocks being licensed on a BTA basis. The underlying rationale behind a delayed auction apparently would be that PCS licensees must be given an opportunity to purchase needed spectrum at auction. At the time of this delayed auction, WinStar expects that the bulk of the 37-40 GHz band would already have been auctioned. Consequently, the newly-licensed providers in the C-F blocks would seem to be the most interested parties in the licenses. As those blocks are granted on a BTA basis, efficiency concerns favor licensing the reserved spectrum on that basis as well.

C. Individually licensed links are unnecessary

WinStar supports the NPRM's proposal not to set aside any channels for individually licensed links.[31] As discussed above, such set asides are inefficient. Moreover, WinStar believes that common

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[30] The additional expenses associated with BTAs could represent the type of entry barrier that the Commission seeks to remove. CMRS Flexibility Order at ¶ 8 ("The federal government as well as state governments are interested in removing barriers to competitive provision of local exchange service throughout the United States."). Thus, choosing BTAs would run contrary to the Commission's longstanding efforts "to increase[] opportunities for competitive provision of local telecommunications service." Id.

[31] NPRM at ¶ 24.

carrier licensees in the 37-40 GHz band will be able to satisfy the demand for individual links.

VI. AUCTIONS ARE A MORE EFFICIENT MEANS OF AWARDING LICENSES THAN OTHER METHODS PROPOSED IN THE NPRM

A. Auctions will result in a more efficient distribution of licenses than would the agency's proposed alternative plans

Auctions, unlike the NPRM's alternate administrative allocation plans, will tend to place licenses in the hands of those who value them most highly.[32] Auctions will also promote the statutory goal of recovering for the public a portion of the value of the 37-40 GHz

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[32] The Commission has noted the public benefits resulting from the award of licenses via auctions in numerous decisions. See Part 22 Rewrite NPRM, at ¶ 66; In the Matter of Allocation of Spectrum Below 5 GHz Transferred From Federal Government Use, *Second Report and Order*, ET Docket No. 94-32, 78 RR 2d (P&F) 1173, 1188 ¶ 62 (1995) ("GWCS"); In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*", FCC 95-507, IB Docket No. 95-168, PP Docket No. 93-253 at ¶ 153 (released December 15, 1995) ("DBS Report and Order"); Redesignating the 27.5-29.5 GHz Frequency Band, Reallocating the 29.5-30.0 GHz Frequency Band, and Establishing Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Third Notice of Proposed Rulemaking*, FCC 95-287, CC Docket No. 92-297, 60 Fed. Reg. 43740, 43745 (1995). Conversely, both economists and the FCC have recognized that government regulation -- in a competitive environment -- leads to inefficient outcomes. See Sections II & VII.b. See also R.H. Coase, The Interdepartment Radio Advisory Committee, 5 J.Law & Econ. 43 (1962) ("[A]ny governmental authority which undertakes the allocation of radio frequencies is bound to find itself without most of the information it would like to have about the way in which radio frequencies are, or would be, used by the various claimants between which it is choosing."). Consequently, efficiency concerns favor the use of auctions as opposed to other less efficient assignment mechanisms. See DBS Report and Order, ¶ 153 ("more than any other method of awarding construction permits, auctions are likely to foster the rapid deployment of new technologies and products and the efficient use of spectrum."). See also Statement of Chairman Reed Hundt, News Release, Dec. 1, 1994 (Auctions "award licenses efficiently and quickly to those who value them most highly and who will compete most aggressively.").

spectrum.[33] For these reasons, and as explained more fully below, WinStar supports the Commission's preference for an auction mechanism for allocating additional spectrum in the 37-40 GHz band.

With respect to the 37 GHz band, the alternative plan proposes two different spectrum reservations.[34] Such reservations may prevent licenses from reaching their highest and best use. Associated efficiency gains -- lower prices, technological innovation, new services -- would be lost to the public.[35] The restrictions on the use of spectrum would also decrease the number of bidders (and therefore new competitors) who might otherwise bid for the spectrum.[36]

The alternative plans for both bands basically require licensees to demonstrate "a need for each channel requested."[37] A licensee is permitted to apply for additional channels in its service area "only when it is operating its previously authorized channel(s) at or near expected capacity."[38] Given the benefits of auctions and the

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[33] See 47 U.S.C. § 309(j).

[34] See NPRM at ¶ 102 (reserving certain spectrum blocks for broadband PCS and limiting certain other blocks for either cellular, broadband PCS, or wide-area SMR licensees).

[35] Section III.A details the inefficiencies associated with spectrum reservations.

[36] Requiring spectrum to be used to provide only certain services eliminates bidders wishing to acquire the spectrum to provide some other service.

[37] See NPRM at ¶ 103.

[38] See id. The alternative plan for the 39 GHz band is actually harsher as it requires: that previously authorized channels be loaded to 100% capacity; that frequency re-use be impossible; that non-radiofrequency solutions have been given detailed consideration; and that the applicant have a "real need" for the channel. NPRM at ¶ 111.

consequences of competition, there is no basis to choose the alternative plans. Aside from the fact that the alternative plans assign spectrum in a time consuming and inefficient way, the need and capacity showings required by those plans would result in spectrum lying fallow and unassigned rather than in the hands of licensees willing and able to use it. In addition, the alternative plans would not allow the public to recover a portion of the value of the spectrum as would auctions.[39] Allocating the 37-40 GHz band by auction will avoid the problems associated with the NPRM's alternate plans.[40]

B. The 37 and 39 GHz bands should be auctioned together

The NPRM proposes to auction the 37 GHz band along with all unencumbered 39 GHz spectrum, which is defined as those geographic blocks not containing incumbent licensees. At the culmination of an 18-month build out period following adoption of the NPRM, the Commission would hold a second auction for those geographic areas containing incumbent licensees to the extent that "build out" had not occurred.[41] WinStar believes that there are several reasons why this

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[39] See 47 U.S.C. § 309(j).

[40] See R.H. Coase, The Interdepartment Radio Advisory Committee, 5 J.Law & Econ. 40-41 (1962) ("Since the amount which a user will pay for a resource reflects the value of that resource in whatever employment he is contemplating using it, the pricing system tends to result in that allocation of a resource between its various uses which maximizes the value of production.").

[41] See NPRM at ¶¶ 104-105.

bifurcated approach should be abandoned in favor of a unified series of auctions.[42]

A unified series of auctions would decrease the amount of time that spectrum lies fallow. Under the proposal, the amount of spectrum available in encumbered areas will not be known until at least 18 months after the release of the Report and Order in this proceeding.[43] The earliest the spectrum could be auctioned would be some months after that. Not bifurcating, conversely, would allow the FCC to auction efficiently the entire spectrum. Admittedly, there would be some delay as the agency determines how to treat the encumbered areas. However, that time period should be de minimis because the Commission has the resources to resolve quickly any issues concerning encumbered spectrum. One solution which would enable the FCC to auction the spectrum both efficiently and swiftly would be for the MTA license to be exclusive of any incumbent's service areas; the license would cover the entire MTA except for incumbents' authorized service areas.

Moreover, a unified auction would provide bidders with information and a degree of certainty essential to effective bidding. Bidders would know the amount of spectrum available. They also would know (subject to resolution in this proceeding of such matters as build out requirements and spectrum caps) the obligations and opportunities attending use of the spectrum.

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[42] By "unified," WinStar means that the 37 and 39 GHz bands should be auctioned together.

[43] See NPRM at ¶¶ 104-105.

Unlike the proposed bifurcation, a unified auction conserves administrative resources and removes regulatory uncertainty. In light of the Commission's added responsibilities stemming from passage of the 1996 Telecommunications Act, it would be particularly inefficient to expend resources on two separate auctions when it is possible to auction the entire spectrum at once.

Finally, the NPRM's proposal would harm severely existing 39 GHz licensees for apparently no reason other than that they were issued licenses outside of the auction process. Existing licensees have followed the Commission's requirements and pronouncements and specified service areas that are smaller than those contemplated in the NPRM. It would be inequitable to allow new licensees to exploit spectrum throughout the entire MTA while confining incumbents -- for a minimum of 18 months -- to their small service areas. As noted, WinStar and other incumbents intend to use their licenses to provide a variety of services including competitive local exchange services. They would be particularly handicapped in their competition with LECs were the FCC to restrict opportunities to bid for presently licensed frequencies covering the rest of the MTA. Moreover, if a spectrum cap is imposed, incumbents' original channels presumably would count against the cap to the same extent as an MTA channel even though incumbents could not use their original channels to provide service outside of their service area. Incumbent licensees, like prospective licensees, should be given an opportunity to acquire at auction additional spectrum on their channels.

C. Auctions should be conducted as a series of simultaneous multiple rounds with the spectrum divided into more manageable channel blocks

Given the large number of licenses available at auction, WinStar believes that the Commission should conduct a series of auctions of several channels at a time, much like the agency did with broadband PCS. Use of MTAs would result in over 1,500 licenses being made available (47 MTAs x 32 channels in the 37-40 GHz band). In putting broadband PCS licenses up for auction, the Commission expressly noted that "[i]n light of its experience with narrowband auctions, . . . auctioning [] 986 licenses . . . simultaneously could create excessive administrative complexity for the Commission and for bidders."[44] For that reason, the Commission chose to hold two separate auctions, one for the 493 licenses in block C and one for the 493 licenses in block F. Although the Commission subsequently has had some experience with auctions containing approximately 1,000 licenses, WinStar believes that the larger number of licenses present here militates against the use of only a single auction.[45] Rather, the FCC should auction the spectrum in smaller blocks in order to create administrative efficiencies for both the Commission and bidders.[46] That should help prevent bidders from making the kind of errors -- and suffering the

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[44] Broadband PCS Auction Rules Modified in Three Respects, Report No. DC-2683 (Nov. 17, 1994).

[45] Cf. Part 22 Rewrite NPRM, at ¶ 77 (soliciting comment on whether auction of 1,800 MTA-based licenses using simultaneous multiple rounds would be "too burdensome to implement from an administrative perspective").

[46] For example, the Commission could use a simultaneous multiple round auction to auction all of the markets for a single channel or group of channels simultaneously.

accompanying penalties -- that occurred in both the broadband PCS C block and 900 MHz SMR auctions.[47]

Provided that the 37-40 GHz band is divided into a series of auctions, WinStar supports the Commission's proposal to use simultaneous multiple rounds as that should provide bidders with information concerning other bidders' valuation of the licenses.[48] WinStar also believes that the Commission should enact a rule to alleviate the potentially tremendous penalties which presently accompany mistaken bids.

D. The proposed upfront payment should be lowered as it could constitute a significant entry barrier

The NPRM proposes that prospective bidders pay an upfront payment of $.02 per MHz-pop.[49] That payment was adopted as a general rule, presumably when 30 MHz PCS licenses were contemplated as being on the high-end of license awards.[50] Here, the Commission has proposed to auction the spectrum in 50 MHz paired blocks (i.e., a total of 100 MHz). Consequently, the standard upfront formula results in payments which are far larger than the payments for the A and B block broadband

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[47] See Public Notice, "Comment Sought on Requests to Waive Bid Withdrawal Payments and General Enforcement Guidelines," DA 96-145 (rel. Feb. 7, 1996) (noting various bidding errors that occurred in broadband PCS and 900 MHz SMR auctions).

[48] See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2360 ¶ 61 ("Competitive Bidding Second Report and Order").

[49] See NPRM at ¶ 54.

[50] See Competitive Bidding Second Report and Order at ¶¶ 171-73 & n.133 (1994) (adopting $0.02 per MHz-pop as a general formula for upfront payments and using 30 MHz broadband licenses as examples of how to calculate the payment).