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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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 )

ET Docket No. 95-183 /  
RM-8553

PP Docket No. 93-253

To: The Commission

**REPLY COMMENTS**

**MICROWAVE PARTNERS**

James S. Eaton  
John P. Erlick  
4215 50th Street, N.W.  
Washington, D.C. 20016

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**TABLE OF CONTENTS**

I. OVERVIEW ..... 1

II. THE COMMISSION SHOULD ADOPT COMPARABLE RULES FOR ALL LICENSEES IN THE 37 AND 39 GHZ BANDS ..... 5

III. THE BUILDOUT REQUIREMENT FOR ALL LICENSEES SHOULD BE REASONABLE ..... 7

IV. THE COMMISSION SHOULD PARTIALLY LIFT THE APPLICATION PROCESSING FREEZE ..... 13

V. REGULATORY FORBEARANCE IS APPROPRIATE IN LIGHT OF THE DISAGREEMENT OVER THE FUTURE OF THE 37 AND 39 GHZ BANDS ..... 16

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To: The Commission

### **REPLY COMMENTS**

Microwave Partners d/b/a Astrolink Communications hereby submits its reply comments in the above-captioned proceeding to adopt new rules for radio spectrum at 37,000 - 40,000 MHz. The following is respectfully shown:

#### **I. Overview**

Thirty-four parties submitted comments in response to the Notice of Proposed Rule Making ("NPRM") and Order, FCC 95-500, released December 15, 1995. Eighteen commenters, including Microwave Partners, identified themselves either as applicants for or licensees of facilities in the 38.6 - 40.0 GHz ("39 GHz")

frequency band.<sup>1/</sup> A handful of additional commenters expressed an interest in utilizing spectrum in either the 37.0 - 38.6 GHz ("37 GHz") band or the 39 GHz band to provide infrastructure support for cellular and personal communications services,<sup>2/</sup> or to offer services utilizing alternative technologies.<sup>3/</sup> Comments also were filed by microwave engineering and manufacturing firms,<sup>4/</sup> and by associations representing the interests of various industry groups.<sup>5/</sup> The range of experience and

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- 1/ See Comments of Advanced Radio Telecom Corporation ("ART"); Altron Communications, L.C. ("Altron"); Ameritech Corp. ("Ameritech"); AT&T Wireless Services, Inc. ("AT&T Wireless"); Bachow & Associates, Inc. ("Bachow"); BizTel, Inc. ("BizTel"); Columbia Millimeter Communications, L.P. ("Columbia"); Commco, L.L.C. ("Commco"); DCT Communications, Inc. ("DCT"); GHz Equipment Co. ("GEC"); Microwave Partners; Milliwave Limited Partnership ("Milliwave"); No Wire L.L.C. ("No Wire"); Pacific Bell Mobile Services ("Pacific Bell"); Sintra Capital Corp. ("Sintra"); Spectrum Communications, L.C. ("Spectrum"); Telco Group, Inc. ("TGI"); and WinStar Communications, Inc. ("WinStar"). According to BizTel, approximately 60 different entities presently have authorizations or pending applications for 39 GHz facilities. Thus, at least one-quarter of the industry is represented in this proceeding. See also Comments of ART at pp. 11, 31 & n.41 (stating that the actual number of applicants and licensees may be lower because of affiliations among and between certain entities, such as a dozen applicants with ties to BizTel).
- 2/ See Comments of DCR Communications ("DCR"); GTE Service Corp. ("GTE"); Telephone and Data Systems, Inc. ("TDS"); and the PCS Fund. Two commenters -- Ameritech and AT&T Wireless -- already hold both PCS licenses and 39 GHz licenses.
- 3/ See Comments of Motorola Satellite Communications ("Motorola") and Angel Technologies Corp. ("Angel").
- 4/ See Comments of Alcatel Network Systems ("Alcatel"); Digital Microwave Corp. ("DMC"); Harris Corporation/Farion Division ("Harris/Farion"); Innova Corp. ("Innova"); and ComSearch.
- 5/ See Comments of Association for Local Telecommunications Services ("ALTS"); National Spectrum Managers Association ("NSMA"); Personal Communications Industry Association ("PCIA"); and the Telecommunications Industry Association ("TIA").

expertise indicate that a broad cross-section of interested parties are represented in this proceeding.

No commenter supports all of the tentative conclusions and proposals in the NPRM, and a few commenters oppose virtually all of the major aspects of the Commission's plan to auction licenses for the 37 and 39 GHz bands.<sup>6/</sup> Despite the divergent opinions and interests of the commenters, however, consensus has emerged on a number of critical issues:

- There is general agreement that rules for the entire 37-40 GHz band should be consistent, particularly with respect to channel plans and technical standards.<sup>7/</sup>
- There is no substantial support for the Commission's proposal that incumbent licensees will lose their licenses if they fail to construct at least four links per 100 square kilometers within 18 months from the adoption of final rules. In fact, the proposal was rejected by virtually all who commented on it.<sup>8/</sup>
- A majority of commenters support a buildout requirement that is based on a reasonable standard (for example, "substantial service" to the public), and that allows service to develop in response to the demands of

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<sup>6/</sup> See Comments of Bachow; DCT; and No Wire.

<sup>7/</sup> See Comments of ART at 24-25, 50; Altron at 2; BizTel at 23-27; Columbia at 15-16; Commco at 3; GEC at 3; Milliwave at 6-7, 11; Spectrum at 2; WinStar at 10-11, 57; GTE at 3; PCIA at 3; Innova at 2; TDS at 2.

<sup>8/</sup> See Comments of ART at 12-13; Altron at 2; AT&T Wireless at 11-12 (opposing proposal for PCS licensees); Bachow at 10; BizTel at 27-32; Columbia at 19; Commco at 4-6; DCT at 12-15; GEC at 4; Microwave Partners at 9; Milliwave at 19-23; No Wire at 6; Pacific Bell at 6 (opposing proposal for PCS licensees); Sintra at 3; Spectrum at 2; WinStar at 45-56; PCIA at 8.

the marketplace.<sup>9/</sup> Although various parties define "reasonable" differently,<sup>10/</sup> and some do so in a manner calculated to gain a competitive advantage,<sup>11/</sup> the unmistakable conclusion is that a rule of reason should prevail.

- A substantial record now exists to support a finding that the relevant product market is sufficiently broad that the Commission should not impose a limit on the amount of 37/39 GHz spectrum for which a single entity may be licensed.<sup>12/</sup>
- Excessive technical standards are not warranted.<sup>13/</sup>
- The freeze on the processing of pending, cut-off applications, and the freeze on amendments that resolve pending mutually exclusive cut-off applications, are unlawful and unfair.<sup>14/</sup>

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9/ See Comments of ART at 13-14, 15; Altron at 2; Bachow at 14; BizTel at 32-33; Columbia at 19; Commco at 8; DCT at 7; GEC at 4; Microwave Partners at 9-11; Milliwave at 16-17; No Wire at 6; Sintra at 4-5; Spectrum at 2; WinStar at 56; ALTS at 2; PCIA at 8; TIA at 12; Alcatel at 2; DMC at 2; Harris/Farionon at 3. See also discussion at Part III, infra.

10/ See Part III, infra.

11/ See Comments of AT&T Wireless at 8 (urging a more relaxed standard only for incumbents who also hold PCS licenses); Pacific Bell at 6 (same).

12/ See Comments of ART at 26-31; BizTel at 16-17; Milliwave at 31-32; WinStar at 40-45 and Attachment, "Competitive Market Considerations in the Licensing of the 37-40 GHz Band".

13/ See Comments of ART at 35; Altron at 3; AT&T Wireless at 9; BizTel at 40; Columbia at 13; Commco at 9; GEC at 3; Microwave Partners at 11-12; Milliwave at 23-25; Spectrum at 3; WinStar at 57-63; ALTS at 2; TIA at 23; Alcatel at 2; DMC at 2; Innova at 3-5.

14/ See Comments of Altron at 3; Ameritech at 4-6; AT&T Wireless at 12-13; Bachow at 6; BizTel at 36-38; Columbia at 5-12; Commco at 3; DCT at 39-34; GEC at 5; Microwave Partners at 6-9; No Wire at 7-10; Sintra at 2; Spectrum at 3; TIA at 10-12; DMC at 2; Harris/Farionon at 2.

- Sharing with government users, or between fixed and mobile users, is unworkable.<sup>15/</sup>

Microwave Partners' responses to the positions of the various commenters on issues of significance are set forth below.

## **II. The Commission Should Adopt Comparable Rules For All Licensees In the 37 and 39 GHz Bands**

The NPRM proposed "harmonizing" licensing and technical rules for the 37 and 39 GHz bands, finding that comparable rules for the entire band will make the spectrum more suitable for a range of communications services and will lead to increased economies and efficiencies.<sup>16/</sup> Based on these findings in the public interest, the NPRM proposed adopting consistent service areas for new licenses in both bands,<sup>17/</sup> awarding new licenses by auction and utilizing comparable auction methodologies for both bands,<sup>18/</sup> and, for 37 and new 39 GHz licenses, adopting only those technical rules required to minimize interference between channel blocks and between service areas.<sup>19/</sup> These commendable proposals all received broad support.

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<sup>15/</sup> See Comments of BizTel at 45; Pacific Bell at 3; WinStar at 64-66; ComSearch at 2-3; TIA at 22-26; Alcatel at 2; DMC at 3; Harris/Farion at 2-4.

<sup>16/</sup> NPRM, paras. 13, 16.

<sup>17/</sup> NPRM, paras. 22, 104.

<sup>18/</sup> NPRM, paras. 28, 104.

<sup>19/</sup> NPRM, para. 115.

In two instances, however, the Commission deviated from its stated intent to adopt consistent rules for the 37 and 39 GHz bands. First, the Commission proposed disparate construction obligations, based on the manner in which a licensee obtained its authorization. Specifically, the Commission proposed that licensees who acquire spectrum at auction would be subject to an (undefined) "substantial service" obligation, while incumbent licensees in the 39 GHz band would be required to construct and place into operation four links per 100 square kilometers of their service area, within 18 months of the adoption of final rules.<sup>20/</sup> Second, the Commission proposed to impose additional technical requirements on "new assignments" in the 37 and 39 GHz bands not acquired through auction.<sup>21/</sup>

Microwave Partners strongly agrees with WinStar that, consistent with the "spirit of regulatory parity,"<sup>22/</sup> the Commission should reject these two proposals, and should adopt comparable rules for all licensees in the 37 and 39 GHz bands. No public interest is served by imposing more stringent regulations on one class of licensees; moreover, regulation in this manner plainly violates applicable law.<sup>23/</sup>

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<sup>20/</sup> NPRM, paras. 98, 105.

<sup>21/</sup> NPRM, para. 119. Specifically, the Commission proposed requiring the use of Category A antennas only, and requiring a minimum equivalent digital efficiency standard of 1 bps/Hz. Id.

<sup>22/</sup> Comments of WinStar at 56.

<sup>23/</sup> See Comments of Milliwave at 14-17. See also Comments of ART at 24-25; BizTel at 23-27; Columbia at 16-17; WinStar at 55-56.

### **III. The Buildout Requirement For All Licensees Should Be Reasonable**

With only three exceptions, which will be addressed below, all of the commenters who discussed the issue rejected the Commission's proposal to require incumbent licensees to construct and place in operation, within 18 months of the adoption of final rules in this proceeding and at the risk of loss of license rights, at least four links per 100 square kilometers of their authorized service area.<sup>24/</sup> The Commission indicated that it "ma[d]e these proposals in order to minimize speculation without harming existing 39 GHz licensees who are responsibly developing the spectrum they have been assigned."<sup>25/</sup> However, no existing 39 GHz licensee supported the proposal, and the only current operators of facilities in the 39 GHz band -- both presumably "responsible developers" whom the Commission wishes to avoid harming -- specifically stated that they would be harmed by it.<sup>26/</sup>

WinStar calls the proposal "unreasonably strict and costly" and states that it "appears to be designed primarily to achieve 'reclamation' of channels."<sup>27/</sup> ART, which states that it and WinStar are the only two 39 GHz licenses presently providing service,<sup>28/</sup> calls the proposal "far too drastic" and adds that it "would ...

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<sup>24/</sup> NPRM, paras. 2, 105.

<sup>25/</sup> NPRM, para. 106.

<sup>26/</sup> See Comments of WinStar at 45 ("adoption of such a plan may have a negative impact on those licensees 'who are responsibly developing [their] spectrum"); ART at 12 (proposal "is unattainable and unacceptable").

<sup>27/</sup> Comments of WinStar at 50, 45. See also Comments of Columbia at n.10.

<sup>28/</sup> Comments of ART at 31.

entail a heroic installation plan substantially in excess of what the Commission has required in other services ... and would require an absurd amount of capital."<sup>29/</sup> ART further notes that it and WinStar would have to install some 95,000 radios within 18 months to satisfy the requirement -- a number that "appears to be beyond the current production capacity of domestic manufacturers."<sup>30/</sup>

The comments of WinStar and ART, which are echoed by all other incumbent licensees,<sup>31/</sup> plainly indicate that the Commission cannot and should not attempt to fashion rules that "do no harm" to some while openly attempting to inflict harm on others. As Columbia cogently points out, the proposal is based on a faulty premise: that incumbent licensees and applicants are attempting to warehouse spectrum.<sup>32/</sup> Columbia, which has a proven track record of launching new spectrum-based businesses,<sup>33/</sup> states that new and small entrants have no incentive to warehouse spectrum. Microwave Partners agrees.<sup>34/</sup> Microwave Partners -- which,

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<sup>29/</sup> Comments of ART at 12.

<sup>30/</sup> Comments of ART at 13. Notably, no equipment manufacturer expressed support for the proposal. Instead, they encouraged the Commission to adopt a reasonable requirement. See Comments of Alcatel at 2; DMC at 2; Harris/Farinon at 3.

<sup>31/</sup> See, e.g., Comments of Bachow at 10; BizTel at 27-32; Columbia at 19; Commco at 4-6; DCT at 12-15; GEC at 4; Microwave Partners at 9; Milliwave at 19-23.

<sup>32/</sup> Comments of Columbia at 17-18. See also Comments of WinStar at 50 (proposal is predicated on arbitrary assumptions about who is a "responsible licensee").

<sup>33/</sup> See Comments of Columbia at 2.

<sup>34/</sup> The Commission should distinguish between warehousing -- i.e., acquiring and not utilizing spectrum that competitors seek to obtain and utilize -- and  
(continued...)

like most other 39 GHz licensees, is a new entrant into the market -- has made substantial capital investments in the process of acquiring its licenses, and desires to offer services that meet customer demand. With no record of warehousing in the 39 GHz band, the Commission's Draconian proposal is purely punitive and serves no purpose.

Microwave Partners recognizes that the public interest is served by requiring licensees to satisfy some construction obligation. But the requirement must be reasonable and must have some relation to relevant market factors, should be consistent for all licensees, and should not be influenced by a desire to reclaim spectrum for auctions.

The common ground for nearly all commenters is that a buildout requirement should be reasonably related to the characteristics and demands of the marketplace. Thus, Microwave Partners supported,<sup>35/</sup> and continues to support, the Commission's alternative proposal to require at least 15 links in top 10 markets, at least 10 links in markets 11-25, and at least 5 links in all other markets.<sup>36/</sup>

However, the benchmark for meeting this standard should be the date of license

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<sup>34/</sup>(...continued)

simple greed -- i.e., seeking to acquire as much spectrum as possible through the filing of applications. The latter certainly may lead to warehousing, and the Commission already has in place appropriate policies and rules to deter such practices.

<sup>35/</sup> Comments of Microwave Partners at 11.

<sup>36/</sup> Accord Comments of PCIA at 8. See also Comments of WinStar at 56-57 (proposing a minimum of 5 links in top 10 markets, 2 links in markets 11-25, and 1 link in all other markets); Comments of No Wire 6 (proposing a minimum of 10 links in top 10 markets and 5 links in markets with more than 200,000 population).

renewal, rather than 18 months from adoption of final rules, as proposed, because the costs of meeting any standard in such a short period of time would be crippling.<sup>37/</sup> Moreover, an 18-month benchmark unfairly gives a headstart to incumbents who received their licenses first. For this reason, the Commission should reject WinStar's proposal of a six-month benchmark,<sup>38/</sup> inasmuch as many licenses WinStar holds were among the very first 39 GHz licenses to be granted by the Commission.

Nearly two-thirds of the commenters urge the Commission to adopt some form of a "reasonable" buildout standard,<sup>39/</sup> albeit with different interpretations of reasonableness. For example, Milliwave believes a licensee should demonstrate that it is providing substantial service to the market as of the license renewal date, with substantial service defined as a reasonable number of stations constructed and available for service, based on relevant factors such as service area population.<sup>40/</sup> Other commenters express support for similar "substantial service" tests.<sup>41/</sup> TIA and various equipment manufacturers agree that licensees should be afforded an appropriate period of time to meet a construction standard that is based on

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<sup>37/</sup> See Comments of ART at 12; WinStar at 6; Milliwave at 21-22; DCT at 5; Commco at 6-7.

<sup>38/</sup> Comments of WinStar at 56-57.

<sup>39/</sup> A discussion of these different interpretations follows. Nine commenters express no position on this issue. See Comments of Ameritech; Angel; DCR; GTE; Motorola; ComSearch; NSMA; Innova; Rand-McNally.

<sup>40/</sup> Comments of Milliwave at 16-17.

<sup>41/</sup> See, e.g., Comments of Altron at 2; BizTel at 32-33; Columbia at 19; Commco at 8; GEC at 4; Sintra at 4-5; Spectrum at 2. See also Comments of Bachow at 14 (proposing a showing of "efficient and substantial use to provide public service in response to market demand").

service area population or population density.<sup>42/</sup> Even ART, which opposes both the Commission's proposal and a substantial service standard,<sup>43/</sup> concedes that a buildout standard must take into account differences in the size of each license area and its demand characteristics, as represented by its population density. ART proposes a "stringent" standard,<sup>44/</sup> but ultimately believes that this standard should be modified if circumstances warrant.

Only three commenters -- AT&T Wireless, Pacific Bell, and TGI -- express any support for the Commission's primary construction proposal for incumbent licensees. However, AT&T Wireless and Pacific Bell argue that incumbents who also are PCS licensees should be exempt.<sup>45/</sup> Not surprisingly, both are PCS licensees. Therefore, they seek for themselves a reasonable buildout schedule tied to their five-year construction obligation as PCS licensees.<sup>46/</sup> It is apparent that even AT&T Wireless and Pacific Bell recognize the unreasonableness of a forced 18-month buildout schedule.

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<sup>42/</sup> Comments of TIA at 12; Alcatel at 2; DMC at 2; Harris/Farinon at 3.

<sup>43/</sup> Comments of ART at 12, 24.

<sup>44/</sup> Microwave Partners rejects the approach suggested by ART as unnecessarily complicated and ultimately no less "vague" than a "substantial service" test. Compare Comments of ART at 24. By contrast, the Commission's alternative proposal of a reasonable fixed number of links based on the population of the service area is likely to be less cumbersome, more readily enforceable, and achievable by both equipment manufacturers and incumbent licensees.

<sup>45/</sup> Comments of AT&T Wireless at 12; Pacific Bell at 6.

<sup>46/</sup> At the same time AT&T Wireless argues that it should have flexibility to use the spectrum to provide numerous services, and not be restricted to PCS support. Comments of AT&T Wireless at 9.

For its part, TGI claims to favor a stricter standard than that proposed by the Commission.<sup>47/</sup> Its proposal, however, like the Commission's, appears to be based on a misperception of the market and a desire to penalize incumbents. On the one hand, TGI argues that demand for 39 GHz spectrum is illusory; in the next breath, TGI indicates its own eagerness to acquire 39 GHz spectrum in order to compete with local exchange carriers, and asserts that "the potential for these channels is too great to squander...."<sup>48/</sup> TGI's implicit assertion that it has a superior right to provide these and other services is not supported. Like the Commission's attempt to distinguish between "responsible developers" of spectrum and others, there is no basis for such arbitrary line-drawing.

In sum, having reviewed all of the comments on the Commission's construction proposals, Microwave Partners continues to support as reasonable the Commission's alternative proposal, with a benchmark date of February 1, 2001, rather than 18 months from the adoption of final rules in this proceeding. Such a buildout schedule should ensure that a licensee is providing substantial service.

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<sup>47/</sup> Comments of TGI at 5-6.

<sup>48/</sup> Comments of TGI at 8, 10.

#### **IV. The Commission Should Partially Lift the Application Processing Freeze**

The comments indicate substantial support for (and little opposition to) lifting the freeze on the processing of pending applications that are cut-off.<sup>49/</sup> After reviewing the comments, Microwave Partners believes that while the Commission need not process all pending applications, the present wholesale freeze unlawfully and unfairly subjects applicants to indiscriminate treatment.

Microwave Partners does not agree that the record supports processing applications that were not cut-off at the time the freeze was imposed, as some commenters assert.<sup>50/</sup> The rights of an applicant to be processed free of competing applications, and to resolve mutual exclusivities with competing applications, accrue only after an application has passed the end of the cut-off period.<sup>51/</sup> Thus, the Commission's decision to freeze the processing of applications for which such rights have not accrued does not violate any rights.

Nor does the Commission have any obligation to process applications that were filed in flagrant disregard of the Commission's own rules and policies

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<sup>49/</sup> Comments of Altron at 2-3; Ameritech at 3-6; AT&T Wireless at 12-13; Bachow at 6; BizTel at 36-38; Columbia at 5-12; Commco at 3; DCT at 29-34; GEC at 5; Microwave Partners at 6-9; No Wire at 10; Sintra at 2; Spectrum at 2-3; TGI at 12; TIA at 10-12; DMC at 2; Harris/Farinon at 2.

<sup>50/</sup> See, e.g., Comments of DCT at 34-36.

<sup>51/</sup> 47 C.F.R. §§ 21.31-21.35.

governing the prior coordination and application process.<sup>52/</sup> Rather, as Microwave Partners and others have argued,<sup>53/</sup> the Commission should apply and enforce its own rules and policies, which were widely known, and should dismiss applications that ignored those rules and therefore are defective.<sup>54/</sup> This should occur promptly, inasmuch as the Commission's processing staff already has determined which applications are not grantable. Then, the Commission should partially lift the freeze to allow applicants with valid pending mutually exclusive applications to amend their applications to eliminate mutual exclusivity. The period of time afforded to applicants to resolve MX applications should be brief. Microwave Partners agrees with TIA that a 60-day period is sufficient.<sup>55/</sup>

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<sup>52/</sup> As ART noted in its Comments, "[t]here are several groups of permittees who coordinated applications for 'friends and family' in a carefully (and successfully) orchestrated scheme to obtain grants of multiple channels in the same market." Comments of ART at 11. For example, applicants SMC Associates, HiCap Networks, Inc., Linda Chester, and numerous others have ties to BizTel and its parent Video/Phone, Inc. While ART suggests a strict construction requirement as a remedy for these schemes, Comments of ART at 11, Microwave Partners believes that enforcement of existing rules provides at least a partial remedy. For example, a large number of "friends and family" applications created mutual exclusivities with previously-filed applications and ignored the Commission's rules governing the prior coordination process. The Commission should enforce its rules which give accord superior rights to the first-filed applicant in such situations. See 47 C.F.R. § 21.100(e).

<sup>53/</sup> Comments of DCT at 24; Milliwave; at 28-29; Ameritech at 3-4; Bachow at 6.

<sup>54/</sup> Applicants with pending multiple-channel applications, could, as an alternative, be required to amend down to one channel within 30 days.

<sup>55/</sup> Comments of TIA at 15. Compare Comments of Commco at 5-7 (90 days); GEC at 5 (90 days); AT&T Wireless at 13 (120 days after final rules); Bachow at 6 (six months).

Only one commenter appears to expressly oppose lifting the freeze to the extent necessary to allow pending cut-off mutually applications to be resolved.<sup>56/</sup> However, GTE's primary concern appears to be to ensure that PCS licensees and others have an adequate opportunity to obtain 37-40 GHz spectrum licenses.<sup>57/</sup> There plainly will be adequate spectrum available among remaining 39 GHz channels and in the entire 37 GHz band, and the lack of opposition to processing cut-off applications and accepting amendments that resolve mutual exclusivity among such applications indicates that potential competitors are not concerned that all available spectrum will be licensed.

The comments suggest that the Commission will face continuing legal challenges to the freeze.<sup>58/</sup> Members of Congress also have expressed an interest in the unfair treatment of applicants.<sup>59/</sup> By proceeding in the suggested manner, the likelihood of time-consuming and resource-draining litigation should be reduced.

Microwave Partners also agrees generally with ART that the freeze should be modified in one additional respect. ART proposes that the Commission

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<sup>56/</sup> See Comments of GTE at 7.

<sup>57/</sup> Id. See also Comments of DCR at n.14, supporting continuing the freeze on new 39 GHz applications for the same reason.

<sup>58/</sup> See Petition for Reconsideration and Emergency Request for Stay of freeze Order, both filed January 16, 1996 by Commco; Petition for Reconsideration of freeze Order filed January 16, 1996 by DCT.

<sup>59/</sup> See Comments of Commco at Appendix 1, Letter from Senator Larry Pressler and Senator Thomas Daschle to Chairman Reed E. Hunt, February 9, 1996 ("By virtue of already completing the application process or amending already submitted applications to eliminate mutual exclusivity concerns, applicants have in essence established a fairly reasonable expectation that they would not be subjected to the competitive bidding process.").

accept applications and grant licenses on a link-by-link basis for paths in unlicensed areas where the applicant demonstrates that there is an immediate customer need.<sup>60/</sup> Such links would be grandfathered for as long as the customer requires service. ART's proposal has merit, because the Commission should not allow the needs of the market to go unmet while it considers new rules for those seeking to serve that market. However, any applicant should be allowed to seek such an exception to the freeze, and not, as ART suggests, only "licensed carriers".<sup>61/</sup>

**V. Regulatory Forbearance Is Appropriate  
in Light of the Disagreement Over  
the Future of the 37 and 39 GHz Bands**

Many of the rules proposed in the NPRM appear to be premised on the Commission's perception that 37 and 39 GHz facilities will primarily be used to provide backhaul and backbone support for CMRS.<sup>62/</sup> The Comments reflect strong disagreement with this premise from licensees with existing operations in the 39 GHz band and new entrants who will begin offering service shortly, who stress the variety of services that will be offered, including wireless local loop.<sup>63/</sup> Similarly, one

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<sup>60/</sup> Comments of ART at 3-5.

<sup>61/</sup> Comments of ART at 4-5. It is not clear from ART's comments why only licensed carriers should be allowed to make such a showing, and whether, under ART's proposal, the license must be for an area adjacent to the "unlicensed" area as a prerequisite for seeking such authority, or may hold a license for any area.

<sup>62/</sup> NPRM, para. 13.

<sup>63/</sup> See Comments of ART at 7-8; WinStar at 6-9. See also Comments of Milliwave at 31-32; Columbia at 3; GEC at 3; BizTel at 12.

trade association representing competitive local exchange companies believes that the principal demand for 37/39 GHz spectrum is last-mile distribution of broadband services.<sup>64/</sup> Other commenters, however, appear to agree with the Commission.<sup>65/</sup>

The lack of agreement about the future uses of 37/39 GHz spectrum supports the public policy rationale for minimal regulatory intrusion set forth by WinStar and others.<sup>66/</sup> The Commission, instead of attempting to impose a regulatory structure that could skew the market, should instead let market forces guide licensees to utilize the spectrum in the manner most responsive to customer needs.

To accomplish this result, the Commission's rules:

- should, to the maximum extent possible, reflect parity between the 37 and 39 GHz bands.
- should not include a set-aside of channels for licensing only to CMRS providers or for licensing on a link-by-link basis. CMRS infrastructure support needs can be satisfied using 37/39 GHz spectrum. However, in light of the fact that only a handful of CMRS licensees have participated in this proceeding, the record does not justify such set asides, as some commenters request.<sup>67/</sup> Because most PCS licenses have not yet been issued, however, the Commission could set aside a single 37 GHz channel pair for licensing on a link-by-link basis.
- should not restrict who is eligible to acquire licenses for 37/39 GHz spectrum.

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<sup>64/</sup> Comments of ALTS at 1; accord Comments of ART at 7-8.

<sup>65/</sup> See, e.g., Comments of TIA at 18; PCIA at 3; DCR at 2-3.

<sup>66/</sup> As WinStar and other commenters demonstrate, the relevant market for regulatory purposes is broader than the 37/39 GHz bands, and the market is competitive. Comments of WinStar at 24-31, 31-36; Milliwave at 31-33.

<sup>67/</sup> See Comments of TIA at v; PCIA at 5-6; TGI at 10; TDS at 4-6.

- should provide licensees maximum operational flexibility, subject to compliance with standards governing interference with co-channel licensees.<sup>68/</sup>

In sum, the record supports a flexible, even-handed, and minimal regulatory approach for the developing 37 and 39 GHz bands. Such an approach will ultimately result in the growth of a host of new competitive wireless services in response to market demands.

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<sup>68/</sup> Microwave Partners agrees with Comsearch that it is desirable to foster an exchange of technical information between 39 GHz licensees and applicants in order to improve the frequency coordination process. Comments of Comsearch at 7-8. As suggested by Comsearch, such a database should contain only technical information, and should not include any confidential or proprietary information. The information should be provided to the Commission on a regular basis and should be available to other licensees and potential applicants at any time.

WHEREFORE, Microwave Partners respectfully requests that the Commission adopt rules in this proceeding consistent with the foregoing.

Respectfully submitted,

**MICROWAVE PARTNERS**

By: 

James S. Eaton  
John P. Erlick

4215 50th Street, N.W.  
Washington, D.C. 20016

April 1, 1996

CERTIFICATE OF SERVICE

I, James S. Eaton, hereby certify that I have on this 1st day of April 1996, caused copies of the foregoing Reply Comments of Microwave Partners to be mailed to all parties of record in this proceeding.

  
James S. Eaton