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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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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	)	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

REPLY COMMENTS OF
WINSTAR COMMUNICATIONS, INC.

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April 1, 1996

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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

THE COMMISSION MUST RESOLVE:

- MOTOROLA'S REQUEST THAT FIXED SATELLITE SERVICES SHARE THE BAND WITH FIXED SERVICES

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WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"),[1] by its attorneys, hereby submits its comments in the above-captioned proceeding.[2]

I. INTRODUCTION

This proceeding presents an opportunity for the Commission to espouse the marketplace-based approach adopted by Congress in the Telecommunications Act of 1996. To that end, the licensing

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[1] WinStar is a publicly traded company which develops, markets, and delivers telecommunication services in the United States. WinStar has received approval from various states to use its 39 GHz licenses to operate as a CLEC (competitive local exchange carrier) and/or as a CAP (competitive access provider). For a more detailed description of the Company, see WinStar Comments at 2-3.

[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").

of the 37-40 GHz band should be guided by market forces and regulatory forbearance. Jointly, those principles are more than sufficient to ensure that the band is used efficiently and to provide for its continued growth and advancement. To ensure that market forces have their intended effect, the Commission must give licensees the flexibility to determine how their spectrum should be used. And, there must be parity between incumbents and new licensees; neither group should be subjected to different rules.

A limited number of commenters proposed that the Commission allocate the 37-40 GHz band, regulate its permissible uses, and mandate the speed with which licensees build out their systems. Contrary to their views, there is no need for extensive government regulation of the 37-40 GHz band. Regulation of this band would instead inhibit growth and create inefficiencies, especially if incumbents and new licensees are treated differently. As demonstrated below, none of the commenters has presented any rationale sufficient to warrant such inefficient outcomes.

II. SPECTRUM SHOULD NOT BE SET ASIDE FOR PCS LICENSEES; RATHER COMPETITIVE FORCES SHOULD DETERMINE USE OF THE 37-40 GHz BAND

Several commenters maintained that the Commission should reserve portions of the band for PCS licensees.[3] Their primary justification for the reserve was the need to provide PCS

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[3] See, e.g., AT&T Comments at 5-6; PCIA Comments at 5-6; TIA Comments at 19; Alcatel Comments at 2; Harris Corp. Comments at 3; TDS Comments at 8.

backhaul/backbone services. In its comments, WinStar detailed the advantages of allowing the marketplace to allocate spectrum and the problems and inefficiencies associated with the government making service-by-service spectrum allocations.[4] WinStar also pointed out that a PCS set-aside is unnecessary because PCS licensees will be able to obtain needed spectrum in the market.[5] A PCS set-aside would seem particularly inefficient in light of the fact that only a few PCS licensees filed comments in this proceeding. Moreover, as made clear by WinStar and other licensees, the 37-40 GHz band can and will be used for far more than PCS backhaul services.[6] Given the competing demands for the 37-40 GHz band, the Commission should allow market forces to allocate the band to its highest and best use.[7]

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[4] See WinStar Comments at 3-9. Several other commenters opposed a PCS set-aside for similar reasons. See, e.g., Milliwave Comments at 32-33; GHz Equip. Comments at 7; Microwave Partners at 12-13.

[5] See WinStar Comments at 8-9; ART Comments at 27. As a common carrier, WinStar reiterates its readiness to provide backbone/backhaul services to PCS providers. WinStar also notes that there are, in the majority of situations, viable non-spectrum based alternatives for PCS licensees.

[6] See, e.g., WinStar Comments at 6-9 & 38-40; Milliwave Comments at 26-27 & 32-33; TGI Comments at 9; GHz Equip. Comments at 3 & 7; ART Comments at 43; Altron Comments at 1; Ameritech Comments at 8-9; Angel Comments at 5; Microwave Partners Comments at 3-4; Bachow Comments at 7-8; BizTel Comments at 11-14.

[7] See WinStar Comments at 6-9; BizTel Comments at 11-14. See also 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."). If the FCC decides to reserve spectrum to ensure that PCS infrastructure needs are satisfied, such channels should not be afforded full

(continued...)

III. LICENSES SHOULD BE AWARDED BY AUCTIONS; THE 37 AND 39 GHz BANDS MUST BE AUCTIONED SIMULTANEOUSLY

The record contains declarations by several commenters that auctions are unlawful.[8] The Commission has previously adopted a different view.[9] WinStar reiterates its belief that a unified auction in which the 37 GHz band and the 39 GHz band are auctioned simultaneously is the most efficient means of awarding spectrum swiftly.[10]

WinStar recognizes that the presence of incumbents and the existence of pending applications filed under then-existing rules create issues that must be resolved prior to auction. For that reason, WinStar previously outlined a plan that essentially settles the incumbency issues by auctioning the 39 GHz band on an

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[7](...continued)
flexibility, but instead should be limited solely to the provision of PCS backhaul/backbone services. It would be inequitable and contradictory to limit bidding to PCS users who are then permitted unlimited utilization.

[8] See, e.g., DCR Comments at 2-6; PCIA at 6-7; TIA Comments at 15-16; DCT Comments at 16-25.

[9] The Commission had earlier concluded that auctions would not be used for intermediate PCS links. However, the Commission is allowed to change its policies provided it supplies a reasoned explanation for so doing. See Achernar Broadcasting Co. v. FCC, 62 F.3d 1441, 1449 (D.C. Cir. 1994). The NPRM listed five distinct reasons for revisiting its earlier conclusion not to auction "intermediate links," including the fact that the band would be used to provide a broad range of services. See NPRM at ¶ 28.

[10] See WinStar Comments at 14-18. Most commenters generally supported auctions. See, e.g., Columbia Comments at 19-20; Altron Comments at 3; BizTel Comments at 14; Commco Comments at 8-9; GHz Equip. Comments at 7; GTE Comments at 6-7; Milliwave Comments at 9-11; Spectrum Comments at 3; PCS Fund at 6-10.

MTA basis exclusive of incumbents' service areas.[11] That should allow the entire 37-40 GHz band to be licensed with minimal delay. WinStar agrees with those commenters asserting that many of the issues concerning pending applications could -- and must -- be resolved by resort to Rule 21.100(e), 47 C.F.R. 21.100(e).[12] Under that rule, once an initial application is filed for a frequency channel, it is the "obligation" of subsequent applicants for that channel to amend their applications to remove the frequency conflict or "show" that the conflict cannot be eliminated reasonably. If the showing is not made, the rule empowers the Commission to grant the channel pair to the initial filer and to dismiss all subsequent applications. Consequently, WinStar believes the incumbency and pending application issues may be settled easily.[13]

WinStar also believes, however, that "repacking" must not be a facet of any solution to the incumbency or pending application issues. Forced channel changes impose unnecessary costs upon incumbents (who must move) and needlessly invites contentions --

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[11] See WinStar Comments at 17.

[12] See, e.g., DCT Comments at 23-25 & 34-36. See also Milliwave Comments at 28-29 (FCC should dismiss applications failing to "properly follow the Commission's prior frequency coordination rules which were designed to avoid mutual exclusivity among point-to-point microwave applications.).

[13] One other issue which must be settled concerns the legality of the Commission's Public Notice of September 16, 1994. WinStar believes that Notice is unlawful as it was released without following proper notice and comment procedures. Consequently, it must be rescinded. See United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994); Neighborhood TV Co. v. FCC, 742 F.2d 629, 639 (D.C. Cir. 1984).

and accompanying delays -- over the scope of incumbents' rights.[14] More importantly, repacking will not accomplish any useful purpose and will restrict the uses to which spectrum can be put. For example, high capacity DS-3 applications would be limited. As WinStar has demonstrated[15] and as the Commission has indicated in the NPRM, neither the consuming public nor the competitive process will suffer any damage from the grant to a single licensee of multiple channels in any geographic market.[16] In other words, repacking incumbents would not lead to greater competition and efficiency in the provision of services that use the 37-40 GHz band.[17] Regardless of whether the Commission adopts WinStar's plan, incumbents must be given an opportunity to comment on whatever plan the Commission adopts concerning resolution of their rights.[18]

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[14] See WinStar Comments at 52-53. See also Milliwave Comments at 29.

[15] See Steven R. Brenner & John R. Woodbury, Competitive Market Considerations in the Licensing of the 37 to 40 GHz Band (March 4, 1996) at 59-62 ("Competitive Considerations Report"), appended to WinStar's Comments. See also Section VII., infra.

[16] In fact, multiple channel holders are able to use more applications and therefore have greater incentive to maximize efficient use of the channels which will benefit consumers.

[17] For the same reasons, repacking is not an appropriate penalty for failing to meet build out requirements.

[18] As the Commission has not articulated any conclusions concerning resolution of the issues surrounding incumbents and the licensing of the 39 GHz band, WinStar -- like other 39 GHz licensees -- is unable to review and provide comments on those issues or proposals.

Finally, the Commission must correct its formula for upfront payments. As explained by WinStar and several other commenters, the proposed formula leads to deposits that are unnecessarily high.[19]

IV. THE 37-40 GHz BAND SHOULD BE LICENSED ON AN MTA BASIS

None of the comments submitted in this proceeding contradict WinStar's showing that the 37-40 GHz band should be licensed on an MTA basis.[20] In general, those commenters favoring BTAs simply repeated the Commission's statement that BTAs were adopted for licensing PCS and that BTAs would be more orderly than the current regime of licensee-specified areas.[21] WinStar, in contrast, explained in detail -- supported by citations to FCC precedent and economic texts -- the advantages of licensing on an MTA basis.[22] Such advantages include increased efficiencies for the Commission (as compared to BTA licensing) and for licensees who would be able to capture economies of scale unavailable on a

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[19] See WinStar Comments at 20-21; BizTel Comments at 17; Pacific Bell Comments at 2; PCS Fund Comments at 6-8.

[20] See WinStar Comments at 11-13.

[21] See NPRM at ¶ 22; BizTel Comments at 15; AT&T Comments at 4-5; ART Comments at 47-48; DCR Comments at 6; GTE Comments at 4; Milliwave Comments at 8; Pacific Bell at 4; PCIA Comments at 5; TIA Comments at 9. Other commenters supporting BTAs did so without providing any rationale. See No Wire Comments at 3; Columbia Comments at 19.

[22] See WinStar Comments at 11-13.

BTA basis.[23] WinStar also demonstrated that MTAs would allow licensees to avoid "costly" consolidation expenses which might occur from the aggregation of the smaller BTAs.[24]

The record fails to support those commenters endorsing RSAs.[25] Contrary to their beliefs, the 37-40 GHz band will be used for much more than "shorthaul traffic"[26] and licensing the band -- even areas containing incumbents -- should present little difficulty for the Commission.[27] Nor does the record sustain

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[23] See WinStar Comments at 11-13. Bachow errs in asserting that RSAs are a better reflection of market forces than geographic areas, such as MTAs. See Bachow Comments at 11-12.

[24] See WinStar Comments at 12 (citing Commission orders). Those commenters asserting that a licensee could consolidate various BTAs avoided any discussion concerning consolidation costs. See Commco Comments at 9; TDS Comments at 5.

[25] See, e.g., TGI Comments at 11; TIA Comments at 9-10.

[26] See, e.g., WinStar Comments at 6-9 & 38-40; Milliwave Comments at 26-27 & 32-33; TGI Comments at 9; GHz Equip. Comments at 3 & 7; ART Comments at 43-44; Altron Comments at 1; Ameritech Comments at 8-9; Angel Comments at 5; Microwave Partners Comments at 3-4; Bachow Comments at 7-8; BizTel Comments at 11-14.

[27] The Commission has previously licensed geographic areas containing incumbent licensees. See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands, *Second Report and Order and Second Further Notice of Rule Making*, PR Docket No. 89-553, 10 FCC Rcd 6884, 6899-6901, ¶¶ 42-47 (1995). See also 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 ¶ 22 (rel. February 9, 1996) ("it is essential that the incumbent's rights to operate under its existing authorizations not be diminished").

claims for licensing on a link-by-link basis.[28] Such small uses could be satisfied by obtaining spectrum from other common carrier licensees in economic arrangements utilizing all or a portion of a 50 MHz channel.[29] MTA licensing is therefore the preferred method for licensing the 37-40 GHz band.[30]

V. LICENSEES IN THE 37-40 GHz BAND SHOULD BE GIVEN MAXIMUM FLEXIBLE USE OF THEIR SPECTRUM

WinStar, along with almost every commenter, supported flexible use of the band.[31] WinStar disagrees with those commenters who contend that mobile services should be proscribed in the 37-40 GHz band.[32] Like any service in the band, those services should be permitted so long as they do not cause harmful interference with other licensees. If harmful interference does

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[28] See, e.g., TDS Comments at 5-8; Pacific Bell Comments at 5; TIA Comments at 21; Comsearch Comments at 3-6. We also believe that ART's single link suggestion is unnecessary and would be counterproductive to resolution of incumbency issues. See ART Comments at 4-5.

[29] See WinStar Comments at 11; BizTel Comments at 42.

[30] Should the Commission choose not to utilize MTAs, WinStar believes that the next best option would be to license the 37-40 GHz band on a BTA basis.

[31] See, e.g., WinStar Comments at 37-40; ART Comments at 43-45; Ameritech Comments at 8-9; AT&T Comments at 9; Columbia Comments at 12; Milliwave Comments at 26-27; ALTS Comments at 2; BizTel Comments at 11-14; GEC Comments at 3; Bachow Comments at 8, Spectrum Comments at 2, Innova Comments at 2, Altron Comments at 1; Angel Comments at 5. See also Pacific Bell Comments at 5-7 (supporting full flexibility for certain channels).

[32] See, e.g., PCIA Comments at 4; TIA Comments at 21-23; TGI Comments at 14; Harris Corp. Comments at 4; Alcatel Comments at 2.

not occur, (due to technological advances, etc.) there is no reason to bar mobile services.[33]

VI. THE SPECTRUM CAP SHOULD BE REMOVED OR RAISED SIGNIFICANTLY

None of the commenters provided sufficient basis to support imposition of a spectrum cap. Spectrum cap supporters' belief that unchecked accumulation of spectrum in the 37-40 GHz band will lead to market power[34] is misguided in that the band is not a discrete market.[35] Indeed, WinStar's comments and its attached economic analysis by Charles River Associates established that the band was a small part of a much larger, competitive market and that accumulation of licenses in the 37-40 GHz band would not confer market power, even if the market were defined more narrowly.[36] In that regard, WinStar notes that its market

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[33] See, e.g., WinStar Comments at 37-40; ART Comments at 43-45.

[34] See Pacific Bell Comments at 4-5; Ameritech Comments at 7-8; TDS Comments at 8-9. TGI's claim (Comments at 12) that spectrum caps are needed to deter speculation is at odds with the fact that spectrum aggregation leads to efficiencies and permits a broader variety of applications to be used. See, NPRM at ¶ 28 (auctions prevent speculation); In the Matter of Amendment of Part 95 of the Commission's Rules to Modify Construction for Interactive Video and Data Service (IVDS) Licenses, *Report and Order*, FCC 95-506, WT Docket No. 95-131, at ¶ 2 (released Jan. 16, 1996) (same).

[35] See WinStar Comments at 24-35 & 40-43 & Competitive Considerations Report, appended to WinStar's Comments. Many other commenters shared WinStar's conclusion. See, e.g., ART Comments at 27-32 & attached Statement of Larry F. Darby; Altron Comments at 3; GHZ Equipment Comments at 6; Milliwave Comments at 31; BizTel Comments at 16-17.

[36] See WinStar Comments at 24-35 and 40-43; Competitive Considerations Report, appended to WinStar's Comments. See also Statement of Larry F. Darby, attached to ART's Comments.

definitions are based on utilization of the Department of Justice/Federal Trade Commission 1992 Merger Guidelines[37] and that the Commission recently tentatively concluded that it should follow the Guidelines when defining markets.[38] In any event, there is no need for the Commission to impose spectrum caps on licensees, such as WinStar, which lack the ability to exert market power.[39]

VII. INCUMBENT LICENSEES SHOULD NOT BE REQUIRED TO BUILD OUT THEIR SYSTEMS ACCORDING TO AN ARTIFICIAL GOVERNMENT TIMETABLE

WinStar and the vast majority of commenters objected to the NPRM's proposed build out plan on the grounds that it is unnecessary, unreasonable, and unachievable.[40] First and foremost, efficiency concerns dictate that build out should be based on market forces and not on artificial government

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[37] See WinStar Comments at 24-31; Competitive Considerations Report, appended to WinStar's Comments.

[38] See Policies and Rules Concerning the Interstate, Interexchange Marketplace, FCC 96-123, CC Docket No. 96-61, *Notice of Proposed Rulemaking*, at ¶ 41 (tentatively concluding that Guidelines should be used as they "offer important insights and substantially improved formulations of relevant market issues").

[39] Should the FCC choose to impose spectrum caps, WinStar reiterates its position that the cap should be higher than that proposed in the NPRM. See WinStar Comments at 40-43.

[40] See WinStar Comments at 45-57; Columbia Comments at 17-19; Milliwave Comments at 20-23; Altron Comments at 2; Microwave Partners Comments at 9-11; Bachow Comments at 11; BizTel Comments at 27-32; Commco Comments at 4-8; DCT Comments at 2-15; GHz Equip. Comments at 4; No Wire Comments at 4-6; Sintra Comments at 3-4; Spectrum Comments at 2; TIA Comments at 20-21.

schedules.[41] Second, the proposed build out plan is unduly harsh as it imposes needless expenses on licensees, and places substantial costs on consumers.[42] Indeed, AT&T, the sole commenter to endorse the build out plan argued strenuously that the plan should not apply to PCS licensees, such as itself.[43] If the Commission concludes that some type of build out requirement is necessary, it must be reasonable, and achievable from both a technological and economic perspective.[44] Furthermore, parity concerns require that any build out requirements apply equally to incumbents and new licensees, regardless of whether the licensee intends to use the band for PCS infrastructure. There is no logical basis -- technical, engineering, or otherwise -- to distinguish among licensees.[45]

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[41] See, e.g., WinStar Comments at 45-50; Bachow Comments at 11.

[42] See, e.g., WinStar Comments at 50-54; Milliwave Comments at 21-22; Microwave Partners Comments at 9-11; Altron Comments at 2; Spectrum Comments at 2; Commco Comments at 6-7; DCT Comments at 5, GHz Equip. Comments at 4.

[43] AT&T Comments at 6-8 & 11-12.

[44] WinStar does not believe that ART's proposed build out plan fits either criteria. See ART Comments at 17-18. Build out should not be tied to specific customers or specific types of uses. Moreover, the types of time-consuming and expensive notification procedures proposed by ART are unnecessary, unworkable, and require ongoing thorough review by the Commission's staff.

[45] See, e.g., Columbia Comments at 15-16; Milliwave Comments at 13.

VIII. TECHNICAL RULES SHOULD BE LIMITED TO THOSE NECESSARY TO MINIMIZE INTERFERENCE BETWEEN LICENSEES' SYSTEMS

The majority of commenters, including WinStar, agreed with the NPRM's tentative conclusion that "only those technical rules required to minimize interference [between licensees' systems] . . . are needed."[46] In its comments and in an attached engineering study,[47] WinStar demonstrated that, except to protect other radio systems, there is no need for minimum standards of spectral efficiency, frequency tolerance, emission masks, adjacent channel interference, or antenna characteristics. Specifying such standards would impose needless costs and arbitrarily distort technology choices.[48] Additionally, any technical rules adopted by the Commission must not hamper licensees from making new uses of the band in accordance with technological innovations.

IX. LICENSEES SHOULD NOT BE REQUIRED TO SHARE SPECTRUM WITH THE GOVERNMENT

WinStar and other commenters opposed sharing the 37-40 GHz band with Federal government fixed operations.[49] WinStar remains convinced of that position. However, if such sharing is to

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[46] See, NPRM at ¶ 115; WinStar Comments at 57-63; AT&T Comments at 9; Columbia Comments at 13-14; Milliwave Comments at 15; Altron Comments at 1; Microwave Partners Comments at 11; ART Comments at 35-36; Commco Comments at 9; Spectrum Comments at 2.

[47] See Competitive Considerations Report, appended to WinStar's Comments.

[48] See WinStar Comments at 57-64.

[49] See WinStar Comments at 64-66; TIA Comments at 10-12.

occur, WinStar agrees with PCIA's position that the Federal government should be subject to the same prior coordination procedures as other licensees.[50]

X. MOTOROLA'S REQUEST THAT SATELLITE SERVICES SHARE THE BAND IS INTEGRAL TO THE COMMISSION'S LICENSING DECISION

The Commission's effort to license the 37-40 GHz band has been complicated by Motorola Satellite Communications, Inc.'s ("Motorola") recent request to allocate domestically the 37.5-38.6 GHz band on a co-primary basis to fixed Satellite Services ("FSS").[51] Motorola's pleadings raise difficult issues concerning the possibility of shared use of the 37-40 GHz band. It is incumbent upon the Commission to resolve those issues prior to licensing the band. Motorola does not explain clearly how sharing would be accomplished. WinStar's engineers harbor serious doubts concerning the possibility of shared use of this spectrum. Due to the short reply period and the complexity of the issues, WinStar was unable to conduct a thorough investigation into the feasibility of sharing. Equity requires that licensees be given a full opportunity to explore the matter.

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[50] PCIA Comments at 4.

[51] Motorola also asked that certain power flux density limits be adopted for the entire 37.5-40.0 GHz band, that existing terrestrial uses be "subject to the implementation of future satellite systems" and that such future satellite systems receive protection from any space research permitted by the Commission. See Motorola Comments at 1-3; Motorola Pet. for Rulemaking at 1-3.

XI. CONCLUSION

For the foregoing reasons, WinStar respectfully urges the Commission to (1) allow market forces to allocate the 37-40 GHz band; (2) grant licensees' maximum flexibility in the use of their spectrum; and (3) treat incumbents and new licensees equally.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Reply Comments of Winstar Communications, Inc. was served via hand delivery on this 1st day of April, 1996 to the following:

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