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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)

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 BIZTEL, INC.

Walter H. Sonnenfeldt

Walter Sonnenfeldt & Associates
4904 Ertter Drive
Rockville, Maryland 20852
(301) 770-3299

Its Attorney

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SUMMARY

As set forth in detail in the comments of BizTel, Inc., and as fully corroborated by the record developed in this proceeding through its initial comment phase, a rush to spectrum auctions without full prior attention to critical policy concerns would contravene the Communications Act of 1934, as amended, and would clearly not serve the public interest. The principal policy objectives of the final rules adopted in this proceeding should be to: (i) promote the timely and flexible deployment of a *full range* of fixed wireless local telecommunications services; (ii) encourage efficient spectrum utilization without requiring co-channel sharing between Fixed Service systems and any Fixed Satellite Service or other non-terrestrially based systems that may materialize in the future; and (iii) deter the real prospect of anti-competitive behavior by well-entrenched local exchange service providers with monopoly power. Moreover, all of the rules adopted in this proceeding must be applied uniformly, regardless of whether licensees obtain their authorizations through the pre-existing rule structure or through the proposed system of competitive bidding. Accordingly, prior to conducting any spectrum auctions, the Commission must adopt final rules that properly resolve all issues -- those involving incumbent 38.6 - 40.0 GHz Microwave Radio Service applicants and licensees as well as all future applicants and licensees in the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz bands.

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REPLY COMMENTS OF BIZTEL, INC.

BizTel, Inc. ("BizTel"), through its undersigned counsel, hereby submits the following reply comments in the above-captioned rulemaking proceeding (the "Rulemaking").^{1/} The record developed thus far in the Rulemaking, together with the extensive record established through the 38.6 - 40.0 GHz ("39 GHz") licensing process, clearly substantiates the detailed

^{1/} See Notice of Proposed Rulemaking & Order, ET Docket No. 95-183 & RM 8553, PP Docket No. 93-253, FCC 95-500, 61 Fed Reg 2465 (adopted December 15, 1995) (the "NPRM"). On March 29, 1996, the Chief of the Private Wireless Division denied the motion of Bachow and Associates, Inc. (the "Bachow motion") for an extension of the reply period in the Rulemaking. See Order Denying Extension of Time, DA-_____ (released March 29, 1996). BizTel agrees with the views expressed in the Bachow motion that the complexity of the issues implicated by the Rulemaking and logistical delays experienced by many parties in obtaining copies of initial comments merit the extension of time requested. Nonetheless, BizTel will not challenge the denial of the Bachow motion, and is filing these reply comments within the previously established deadline. BizTel does anticipate, however, that because of the complexity of several issue areas in the Rulemaking, BizTel will provide further input to the record subsequent to the submission of the instant reply comments.

assessments, concerns, and recommendations set forth in BizTel's March 4, 1996 comments in the instant proceeding (the "BizTel Comments"). These reply comments provide specific recommendations with respect to certain policy issues implicated in the Rulemaking and raised in the initial comments.^{2/}

I. INTRODUCTION

As set forth in detail in the BizTel Comments, and as fully corroborated by submissions of other parties, holding spectrum auctions without full prior attention to critical policy concerns would contravene the Communications Act of 1934, as amended (the "Communications Act"), and would clearly not serve the public interest.^{3/} The emphasis in the Rulemaking on the auction process, and the Commission's apparent salivation over potential revenues to be received by the Federal Government must be subjugated to promoting the competitive and efficient provision of innovative services to the public. Such an approach is clearly mandated by the Commission's statutory authority.^{4/}

^{2/} BizTel also addresses a new proposal forwarded by one commentor seeking adoption of licensing and service rules to accommodate future, as yet undefined, commercial Fixed Satellite Service ("FSS") systems, as well as a proposal by another commentor relating to the possible future implementation of so-called "high altitude long operation" systems.

^{3/} 47 U.S.C. §§ 151 et seq.

^{4/} See 47 U.S.C. § 309(j)(7).

As set forth in more detail below, the principal objectives of the final rules adopted in this proceeding should be to: (i) promote the timely and flexible deployment of a *full range* of fixed wireless local telecommunications services; (ii) encourage efficient spectrum utilization without requiring co-channel sharing between Fixed Service systems and any FSS or other non-terrestrially based systems that may materialize in the future; and (iii) deter the real prospect of anti-competitive behavior by well-entrenched local exchange service providers with monopoly power. Moreover, all of the rules adopted in this proceeding must be applied uniformly, regardless of whether licensees obtain their authorizations through the pre-existing rule structure or through the proposed system of competitive bidding. Accordingly, prior to conducting any spectrum auctions, the Commission must adopt final rules that properly resolve all issues -- those involving incumbent 38.6 - 40.0 GHz Microwave Radio Service applicants and licensees as well as all future applicants and licensees in the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz bands.

II. FINAL RULES SHOULD BE BASED ON A PROPER RECOGNITION OF THE DIVERSITY OF POSSIBLE DEPLOYMENT MODELS

The record developed to date is replete with evidence supporting the assessment in the BizTel Comments that the principal use of 37 GHz and 39 GHz is for a wide range of local broadband distribution services other than backhaul for PCS or

other CMRS systems.^{5/} Contrary to the mistaken emphasis on PCS and CMRS backhaul apparent in the NPRM,^{6/} initial commentators representing the full range of industry interests clearly confirm that PCS and other CMRS backhaul applications are by no means the principal service requirements in the 37 GHz or 39 GHz bands.^{7/} Instead, the record undisputedly indicates that mobile network backhaul applications are ancillary to the rich menu of customer-specific local distribution services now offered or planned by existing 39 GHz licensees and other companies, the vast majority of whom possess extensive experience in the wireless telecommunications industry and have demonstrated full commitment in all regards to the timely deployment of facilities and services.^{8/}

^{5/} See BizTel Comments, at 6-7. See, also, e.g., Comments of No Wire L.L.C., at 2; Comments of Columbia Millimeter Communications, L.P., at 3-4; Comments of GHz Equipment Co., Inc., at 2; Comments of Milliwave Limited Partnership, at 2.

^{6/} See, e.g., NPRM, at ¶¶ 1 & 20.

^{7/} In fact, the comments of the Personal Communications Industry Association, the principal advocate of the collective interests of the PCS industry, indicates that the *most optimistic estimate* of the spectrum requirement for PCS backhaul services is only six out of the available thirty channel pairs in the 37 GHz and 39 GHz bands (20% of the available capacity), and a total of eight channel pairs for all projected CMRS backhaul demand combined. See Comments of the Personal Communications Industry Association, at 5-6. Based on the input to the record in this proceeding from actual PCS and CMRS licensees (or, more properly, the lack thereof), this estimate of demand for PCS and CMRS backhaul clearly appears to be excessive.

^{8/} Despite the overwhelming evidence to the contrary, a small number of commentators still attempt to further the well-debunked myth of "speculation" on the part of 39 GHz applicants and
(continued...)

In stark contrast, the extreme paucity of interest on the part of actual PCS licensees in millimeter wave backhaul spectrum clearly appears to contradict the ambitious and unsupported estimates of the spectrum needed for such purposes. Even more puzzling is the fact that virtually all of the reports of the purported demand for PCS backhaul spectrum have been promulgated by parties *other than PCS licensees*; a situation that is, to say the least, suspect.

This lack of interest is evidenced by the fact that only a few PCS licensees have actually filed 39 GHz applications, even though substantial numbers of 39 GHz channels were available following the close of the initial PCS auctions. Moreover, two

2/ (...continued)

licensees. These shallow endeavors are completely unconvincing and appear to be self-serving. See Comments of DCR Communications, Inc., at 5; Comments of the Personal Communications Industry Association, at 2,8. As fully demonstrated in the BizTel Comments and elsewhere in the record of the Rulemaking, rumors of speculation in the 39 GHz band are wholly unfounded. See, e.g., Separate Statement of Commissioner Rachelle B. Chong, at 2; Separate Statement of Commissioner Andrew C. Barrett, at 1; Telecommunications Industry Association Supplement to Petition For Rulemaking, at 2 (filed December 5, 1995); BizTel Comments, at 4-5, Comments of Milliwave Limited Partnership, at 10; Comments of DCT Communications, Inc., at 4, Comments of Columbia Millimeter Communications, L.P., at 5. In fact, as confirmed in the Separate Statement of Commissioner Chong appended to the NPRM, the vast majority of incumbent 39 GHz licensees and applicants are headed by principals with significant telecommunications industry experience. BizTel and these other innovative and well-experienced pioneers have invested substantial financial and in-kind resources to develop and implement business plans entailing the rapid deployment of systems that provide a fully feasible competitive alternative to wireline services that currently face little or no viable competition. The divisive fable of speculation among 39 GHz companies is wholly unsupported by any evidence whatsoever and must be disregarded by the Commission.

major PCS interests, MCI and GTE, voluntarily dismissed more than seventy-five (75) pending applications for major market 39 GHz service area authorizations across the country, many of which contained channel authorization requests that were past cut-off and free of mutual exclusivity conflicts at the time of dismissal. Additionally, only three out of more than fifty current 39 GHz applicants and licensees indicate that backhaul applications are a principal spectrum utilization priority. Finally, only a very small number of the many current PCS licensees even bothered to file comments in the Rulemaking.

While the existence of any substantial demand for 37 GHz or 39 GHz backhaul spectrum is highly questionable, BizTel and a number of other leading 39 GHz companies are simultaneously pursuing multiple service objectives that often entail different facilities deployment models, sometimes even within the same service area. BizTel anticipates that this sort of diversified deployment and marketing approach will be characteristic of most if not all successful 37 GHz and 39 GHz service providers.

The vast majority of the system deployment models being implemented by BizTel and most other current 39 GHz licensees entail the provision of "last mile" service. Under this deployment scenario, *there is no legitimate business justification* for building an extensive wireless infrastructure without specific customer requirements. Rather, most facilities will be constructed on an "on-demand", customer-specific basis. This deployment model, which is typical of most 39 GHz systems

that are in the operational or planning stages, differs vastly from a public mobile system model such as PCS or cellular (or the associated backhaul model) where a virtually seamless wireless network infrastructure covering an entire service area is necessary to offer service to the first customer in that area.

It is **extremely important** that the Commission acknowledge the realities of the marketplace. The record of the Rulemaking clearly debunks the myth that PCS backhaul services are a priority requirement in the 37 GHz and 39 GHz bands. For this reason, in developing the final rules in the Rulemaking, the Commission must take account of a range of possible deployment concepts, and not make the mistake of skewing regulations towards a backhaul deployment model. Among other things, as demonstrated fully in the BizTel Comments, any minimum construction thresholds that are ultimately adopted *must not* penalize licensees who do not rely on prior construction of their own extensive infrastructure to initiate substantial service to the public.^{2/}

III. OPPOSITION TO THE PROPOSED MINIMUM CONSTRUCTION THRESHOLD FOR INCUMBENT LICENSEES IS VIRTUALLY UNANIMOUS

The vast majority of commentors echo BizTel's legitimate opposition to the unjustified and unattainable one link-per-ten-square-mile construction proposal for incumbent 39 GHz licensees

^{2/} See BizTel Comments, at 27-35.

set forth in the NPRM.^{10/} Commentors overwhelmingly confirm that this proposal appears to be designed solely as a punitive measure intended to confiscate previously licensed 39 GHz spectrum for the principal, if not the sole, purpose of generating revenue for the Federal Government through auctions.^{11/} Numerous commentors also confirm BizTel's assessment that the proposed minimum construction threshold for incumbent 39 GHz licensees is in no way supported by available

^{10/} NPRM, at ¶¶ 105-108.

^{11/} See, also, e.g., Comments of Milliwave Limited Partnership, at 20-23; Comments of Commco, L.L.C., at 4, 5-7; Comments of Bachow and Associates, at 13; Comments of GHz Equipment Co., Inc., at 4; Comments of Winstar Communications, Inc., at 16-18. It is not at all surprising that AT&T Wireless Services, Inc. ("AT&T"), who clearly is interested in and financially capable of bidding for 39 GHz spectrum that may become available at auction through recapture, supports the Commission's minimum construction threshold for incumbent licensees. See Comments of AT&T Wireless Services, Inc., at 11-12. It is equally unsurprising that AT&T attempts to carve out an exemption for itself by arguing that *incumbent 39 GHz operators that are broadband PCS licensees* should be allowed to comply with a five-year substantial service standard. Id. AT&T's proposal is a thinly veiled attempt to "gerrymander" the rules to segregate certain classes of licensees for its own benefit, and, consequently, lacks any merit or credibility and should be disregarded. Similarly, because they clearly stand in stark contrast to the well-informed views of a majority of other companies with extensive experience in the industry, the incumbent licensee minimum construction threshold proposals of Advanced Radio Telecom Corp. and Telco Group, Inc. lack merit and credibility, and, thus, must also be disregarded. See Comments of Advanced Radio Telecom Corp., at 14; Comments of Telco Group, Inc., at 6-7. While the numerical proposals forwarded by Winstar Communications, Inc. may have merit if applied over a reasonable timeframe, the proposed six month period appears to be designed with the intent of eliminating competitors who obtained their licenses much more recently than those controlled by Winstar. See Comments of Winstar Communications, Inc., at 56-57.

market data regarding current or projected demand for services.^{12/} Additionally, commentors voice ample support for the legitimate contention that, even if demand sufficient to justify the proposed minimum construction threshold standard existed, the cost to a typical licensee of constructing a number of links sufficient to retain its authorized service area would be astronomical, and would constitute nothing more than unjustified punitive treatment.^{13/} Furthermore, it appears clear from the record that the proposed minimum construction threshold would impose a totally unrealistic demand on the production capacity of domestic equipment manufacturers.^{14/} The virtually unanimous opposition to the Commission's proposed construction thresholds for incumbent 39 GHz licensees clearly underscores the fact that the Commission proposals must be modified to more accurately reflect marketplace conditions.

^{12/} See Comments of BizTel, Inc., at 27-29; see, also, e.g., Comments Bachow and Associates, at 10-11; Comments of Commco L.L.C., at 4-7; Comments of DCT Communications, Inc., at 7; Comments of Winstar Communications, Inc., at 45.

^{13/} See, e.g., Comments of Commco L.L.C., at 6-7; Comments of Winstar Communications, Inc., at 50-51.

^{14/} See, e.g., Comments of Milliwave Limited Partnership, at 22; Comments of Advanced Radio Telecom Corp., at 13. This fact raises the real possibility that 39 GHz licensees would be forced to deal with foreign equipment manufacturers if the Commission persists in imposing an unrealistic minimum construction threshold. This would be extremely unfortunate, since, to date, the 39 GHz equipment industry has been completely dominated by domestic manufacturers. Even under these undesirable circumstances, it is not at all clear that sufficient equipment supplies could be obtained.

IV. THE COMMISSION SHOULD IMPOSE A "SUBSTANTIAL SERVICE" CONSTRUCTION THRESHOLD THAT IS EQUALLY APPLICABLE TO ALL 37 GHz AND 39 GHz LICENSEES

As demonstrated fully in the BizTel Comments, the Commission should impose a "substantial service" construction threshold that is applied equally to all 37 GHz and 39 GHz licensees, regardless of whether they obtain licenses through the pre-existing rule structure or through competitive bidding.^{15/} BizTel's position in this regard clearly has merit, as evidenced the substantial support voiced by many other commentors.^{16/}

There is simply no legitimate justification for subjecting incumbent licensees and auction winners to different, incongruent minimum construction standards.^{17/} The assumption that a payment to the Federal Government resulting from an auction will ensure that services will actually be delivered to the public clearly fails to take account of the competitive realities of the current marketplace for local telecommunications services.

In fact, in the case of 37 GHz and 39 GHz spectrum, absent the imposition of appropriate safeguards to prevent anti-competitive abuses, the highest use of the subject spectrum could very likely be the withholding of the spectrum from the

^{15/} See BizTel Comments, at 24-27.

^{16/} See, e.g., Comments of Commco L.L.C., at 3; Comments of Columbia Millimeter Communications, L.P., at 15; Comments of GHz Equipment Company, at 4; Comments of Milliwave Limited Partnership, at 12-13.

^{17/} Compare NPRM, at ¶¶ 105-108 with NPRM, at ¶98.

marketplace by well-financed local exchange service providers with monopoly power seeking to preserve their market dominance.^{18/} Scenarios can easily be envisioned whereby these entities could use their market power to buy up spectrum at auction in order to keep it out of the hands of their competitors. Furthermore, in the absence of a reasonable construction requirement applicable to spectrum purchased through auctions, there would be nothing to prevent local exchange carriers with monopoly power from delaying the construction of facilities, or failing to make efficient use of the subject spectrum, and, thus, depriving the public of valuable services. Either of these results would clearly be contrary to the public interest and contravene the specific intent of Sections 157 and 309(j)(4)(B) of the Communications Act, as well as the overall intent of the new provisions to the Communications Act implemented by the Telecommunications Act of 1996.^{19/}

The Commission should foreclose the threat of anti-competitive behavior by, among other things, holding all 37 GHz or 39 GHz licenses to the same minimum construction standard, regardless of whether they obtain their licenses through an auction or through the pre-existing rule structure. While adoption of these minimum precautions might not, by themselves, negate anti-competitive abuses, the failure to adopt these

^{18/} See, e.g., NPRM, at ¶ 28.

^{19/} See Comments of BizTel, Inc., at 20-22. See, also, Comments of Columbia Millimeter Communications, L.P., at 18.

precautions will surely invite such abuses, and, absent the adoption of appropriate safeguards in the Rulemaking, they are quite likely to actually occur.^{20/}

As indicated by many of the commentors in this proceeding, a uniformly applied requirement of "substantial service", such as that adopted for "C Block" PCS licensees, with a compliance showing deadline of at least five years from license grant, would constitute a reasonable and workable minimum construction standard that would reduce the potential for anti-competitive abuses and ensure the timely deployment of systems and delivery of services to the public.^{21/}

The record also supports BizTel's recommendation that licensees be afforded the option within the same five-year timeframe to comply with alternative square mileage or service area-wide fixed minimum installation benchmarks.^{22/} If any such

^{20/} To further ensure that anti-competitive abuses will not occur, BizTel urges the Commission to structure the 37 GHz and 39 GHz auction rules so as not to permit any local exchange carrier with monopoly power from bidding on a 37 GHz or 39 GHz license covering any portion of its home territory. At a minimum, any local exchange carrier with monopoly power should be required to certify full compliance with the "Competitive Checklist" set forth at Section 271(c)(2)(b) of the Telecommunications Act of 1996 as a prior condition to participation in an auction for 37 GHz or 39 GHz licenses covering any portion of its home territory. See Telecommunications Act of 1996, H.R. Rep. No. 104-458, 104th Cong., 2d Sess (1996). See, also, BizTel Comments, at 21-22.

^{21/} See 47 C.F.R. 24.303(b). See, also, e.g., Comments of Milliwave Limited Partnership, at 17; Comments of Columbia Millimeter Communications, L.P., at 19; Comments of Commco L.L.C., at 8.

^{22/} See BizTel Comments, at 32-35.

alternative minimum benchmarks are ultimately adopted, they should be flexible, taking account of population density or other applicable service density factors in a given market, such as the concentration of certain classes of business locations.

Additionally, any such specific benchmarks should be consistent with the nature of service provided by the subject carrier (i.e., not just based on a backhaul model).

BizTel submits that adoption of its proposed uniform construction threshold is necessary to ensure the timely implementation of service to the public by all 37 GHz and 39 GHz licensees. BizTel's proposal properly balances the interests of all affected parties, including those of the Commission and the public at large. For this reason, BizTel urges the Commission to adopt the construction threshold recommendations contained herein.

V. THE INTERIM LICENSING POLICY SHOULD BE MODIFIED

BizTel notes the strong opposition voiced by numerous commentators to the interim 39 GHz processing policies set forth in the NPRM.^{23/} These strenuous objections are echoed in the

^{23/} See NPRM, at ¶¶ 121-124. See, also, e.g., Comments of the Telecommunications Industry Association, at 10-15; Comments of Ameritech Corporation, at 3-5; Comments of Columbia Millimeter Communications, L.P., at 5-12; Comments of Commco, L.L.C., at 3. Among the thirty-two parties of record that filed initial comments in this proceeding, only one commentator voices any substantial support for the interim processing policy. See (continued...)

BizTel Comments and the recommendations contained therein for modifying the interim processing policies.^{24/}

By refusing to process pending amendments, the Commission's 39 GHz interim processing policy improperly preserves mutual exclusivity conflicts in contravention of Section 309(j)(6)(E) of the Communications Act. Similarly, the arbitrary adoption of the effective date of freeze on the filing of new 39 GHz applications as the effective cut-off date for processing of previously filed 39 GHz applications, and the Commission's refusal to process uncontested applications that had not been on file for more than sixty days prior to the arbitrary cut-off clearly contravenes

^{23/} (...continued)

Comments of GTE Service Corporation, at 7. This extremely limited support for the Commission's draconian interim processing procedures appears to be driven, at least in large part, by GTE's self-serving desire to obtain licenses on channels in service areas for which the "cut-off" period for previously filed applications has passed, at the expense of parties who timely filed their applications in compliance with, and reliance on, the Commission's Rules. GTE's argument is, to say the least, capricious, given the fact that GTE previously voluntarily dismissed at least thirty-five (35) 39 GHz applications for major markets across the country. See, e.g., Application File Nos. 9402786-9402792, FCC Public Notice Report No. 1090. As GTE well knows, the availability of 39 GHz authorizations was no secret to any party during the period prior to the imposition by the Commission of the freeze on the filing of new applications. The relevant Public Notices showed regular 39 GHz filing activity over a period of almost two years. Furthermore, as is fully evident in the record of the PCS rulemaking, and as set forth in detail at page of the BizTel Comments, the entire PCS industry has been fully aware of the 39 GHz licensing opportunity since 1990. It is, at best, disingenuous for any party to now argue that it was somehow improperly foreclosed from filing for 39 GHz authorizations, or that processing windows should be re-opened.

^{24/} See BizTel Comments, at 36-40.

Sections 309(j)(6)(G) and 309(j)(7)(A) of the Communications Act and well-settled case law.^{25/}

The record of this proceeding also provides ample support for the need to loosen the restriction on 39 GHz modification applications, consistent with the recommendations set forth in the BizTel Comments. Specifically, the restriction on modification applications should be vacated. In its place, the Commission should allow all modifications of existing 39 GHz authorizations that reasonably relate to the licensee's ability to provide service to its customers within the currently allowable maximum service area radius, so long as any proposed modification does not result in mutual exclusivity with another licensee or timely filed applicant. Also as set forth in the BizTel Comments, the Commission should extend the license terms of incumbent 39 GHz licensees to the full ten year period provided for in the Commission's Rules.^{26/} It is abundantly

^{25/} See, e.g., *Ranger V. FCC*, 294 F 2d 240, 244. As set forth in detail at page 37 of the BizTel Comments, the freeze on the filing of new applications clearly creates finality for processing purposes. See Order, DA 95-2341 (adopted November 13, 1995) 61 Fed Reg 8062. Thus, there is a definite and clear date from which the Commission can determine for processing purposes whether applicants that filed prior to the freeze are mutually exclusive. Furthermore the only absolute requirement for grant of a Point-to-Point Microwave Radio Service application is that it appeared on public notice more than 30 days prior to grant. 47 C.F.R. § 21.27(c). There is no legitimate reason to penalize applicants that filed under existing rules, and it appears that the only motivation for not processing all pending applications filed prior to the freeze is to maximize proceeds of planned spectrum auctions.

^{26/} See BizTel Comments, at 38.

evident from the record and the merits of the issues at hand that the Commission must take immediate action to modify the interim 39 GHz processing policy consistent with the views of BizTel and virtually every other party to the rulemaking. Such modifications should comport with all relevant provisions of the Communications Act and the Commission's own rules, and provide the equitable treatment that incumbent 39 GHz applicants and licensees are clearly entitled to.

VI. FSS OPERATIONS SHOULD NOT BE PERMITTED IN THE 39 GHz BAND

Motorola Satellite Communications, Inc. ("Motorola") seeks the adoption of new rules to facilitate co-channel sharing in the 37.5 - 40.0 GHz band between as yet undefined future FSS systems and Fixed Service systems.^{27/} Because the rulemaking issues raised in the Motorola petition are undisputedly intertwined with the terrestrial licensing and service rule issues implicated by the NPRM, and because the resolution of these issues are likely to have a substantive effect on the outcome of the Rulemaking, the Commission should treat the Motorola petition as comments to the NPRM and deal with FSS sharing issues in the instant proceeding.

^{27/} See Comments of Motorola Satellite Communications, Inc.; Petition for Rulemaking of Motorola Satellite Communications, Inc. (filed March 4, 1996) (the "Motorola petition").

As a preliminary matter, BizTel notes that, other than cursory references to the temporary international power flux density limits that are generically applied in the International Radio Regulations to FSS systems in wide range of frequency bands, there is no evidence whatsoever in the record of this Rulemaking that co-channel sharing between FSS space-to-Earth operations and Fixed Service systems is feasible in the 37 GHz or 39 GHz bands. Moreover, it is difficult at this time to conduct a technically complete analysis of the feasibility of FSS/Fixed Service sharing in the subject frequency bands because there are no 37 GHz or 39 GHz FSS system proposals from which to draw actual technical parameters.^{28/} However, preliminary analysis that assumes system characteristics similar to those proposed for Ka-band FSS systems indicates that unacceptable interference will occur if Motorola's proposal for co-channel FSS and Fixed Service operations in the 37 GHz and 39 GHz bands is adopted. Of particular concern to BizTel are the cases of unacceptable interference that are likely to result from interference into Fixed Service receivers from low-elevation spacecraft transmitters, as well as from Fixed Service emissions interfering with victim FSS earth station receivers. Accordingly, BizTel opposes Commission implementation of licensing or service rules for FSS systems in any portion of the 39 GHz band. Because of BizTel's and other incumbent licensees' status as first in time,

^{28/} Indeed, there is a substantial question as to whether any new spectrum for FSS operations is warranted at this time.

BizTel and other incumbents licensees should enjoy full protection from FSS interference, and can not be compelled to protect any future FSS systems from interference. If the request for activation of the FSS allocations contained in the Motorola petition can be sufficiently substantiated with a legitimate service requirement, BizTel would not be opposed to allowing use of a portion of the 37.5 - 38.6 GHz band for FSS operations.^{29/}

VII. CONSTRUCTION STANDARDS & INTERIM PROCESSING AND FSS ISSUES MUST BE RESOLVED BEFORE ANY AUCTIONS ARE HELD

BizTel does not oppose the use of spectrum auctions to resolve mutual exclusivity conflicts between future 37 GHz or 39 GHz applicants, so long as final rules are adopted in the Rulemaking beforehand that address all of the concerns set forth in these reply comments and in the BizTel Comments. Specifically, prior to initiating any auctions in the 37 GHz or 39 GHz bands, the Commission must resolve issues and adopt appropriate rules to govern a uniform construction standard for

^{29/} One other commentor proposes to allow use of 37 GHz and 39 GHz spectrum to facilitate the operation of communications platforms supported by an exotic technical concept referred to as "high altitude long operation", and baldly asserts that its proposed service concept is compatible with terrestrial operations. See Comments of Angel Technologies Corporation. Absent submission on the record in the Rulemaking of a detailed showing that conclusively demonstrates the feasibility of co-channel sharing between such systems and terrestrial Fixed Service systems, and the opportunity for BizTel and other interested parties to respond, BizTel opposes any use of the 39 GHz band by the type of systems proposed by Angel Technologies.

all 37 GHz and 39 GHz licensees. The Commission must also modify the interim 39 GHz processing procedures as set forth by BizTel, process all pending applications and amendments thereto, and grant licenses to applicants with applications that are free of mutual exclusivity conflicts. Additionally, the Commission must reach a final resolution of the FSS sharing issues raised by Motorola. All of these pre-conditions should be met to ensure that no party is unduly prejudiced, to maximize the effectiveness of the auctions, and to ensure that auction winners obtain spectrum rights that are free of uncertainty.

VIII. CONCLUSION

For all of the above-stated reasons, the Commission should adopt final rules in this proceeding that: (i) promote the timely and flexible deployment of a *full range* of fixed wireless local telecommunications services; (ii) encourage efficient spectrum utilization without requiring co-channel sharing between Fixed Service systems and any FSS or other non-terrestrially based systems that may materialize in the future; and (iii) deter the real prospect of anti-competitive behavior by well-entrenched local exchange service providers with monopoly power. Moreover, all of the rules adopted in this proceeding must be applied uniformly, regardless of whether licensees obtain their authorizations through the pre-existing rule structure or through the proposed system of competitive bidding. Accordingly, prior

to conducting any spectrum auctions, the Commission must adopt final rules that properly resolve all issues -- those involving incumbent 38.6 - 40.0 GHz Microwave Radio Service applicants and licensees as well as all future applicants and licensees in the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz bands. BizTel respectfully requests that the Commission take full account of the views expressed in these reply comments and the BizTel Comments in implementing each of the above-stated policy objectives.

Respectfully submitted,

BIZTEL, INC.

By: 

Walter H. Sonnenfeldt

Walter Sonnenfeldt & Associates
4904 Ertter Drive
Rockville, MD 20852
(301) 770-3299

Its Attorney

April 1, 1996

CERTIFICATE OF SERVICE

I, Michelle Holly, a secretary in the offices of Walter Sonnenfeldt & Associates, hereby certify that on the 1st day of April, 1996, a true copy of the foregoing "REPLY COMMENTS OF BIZTEL, INC." was mailed, first-class postage prepaid, to the following:

W. Theodore Pierson, Jr.
Executive Vice President and General Counsel
Advanced Radio Telecom Corp.
1667 K Street, N.W., 8th Floor
Washington, D.C. 20006

Robert J. Miller
Gardere & Wynne, L.L.P.
1601 Elm Street, Suite 3000
Dallas, Texas 75201

Counsel for Alcatel Network Systems, Inc.,
Telecommunications Industry Association

O. James Klein
President and Manager
Altron Communications, L.C.
2038 East Kael Circle
Mesa, Arizona 85213

Michael K. Owens
Senior Member Technical Staff
Ameritech Corporation
2000 West Ameritech Center Drive
Location 3C46
Hoffman Estate, IL 60196-1025

Robert A. Mazer
Albert Shuldiner
Vinson & Elkins, L.L.P.
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for Angel Technologies Corporation

David C. Jatlow
Young & Jatlow
2300 N Street, N.W., Suite 600
Washington, D.C. 20037

Counsel for AT&T Wireless Services, Inc.

Robert J. Keller
Law Office of Robert J. Keller, P.C.
2000 L Street, N.W., Suite 200
Washington, D.C. 20036

Counsel for Bachow and Associates, Inc.

Jonathan D. Blake
Kurt A. Wimmer
Catherine J. Dargan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044

Counsel for Columbia Millimeter Communications, L.P.

Louis Gurman
Andrea S. Miano
Gurman, Blask & Freedman, Chartered
1400 16th Street, N.W., Suite 500
Washington, D.C. 20036

Counsel for Commco, L.L.C., Sintra Capital Corporation

Christopher R. Hardy
Comsearch
2002 Edmund Halley Drive
Reston, Virginia 22091

William R. Richardson, Jr.
Lynn R. Charytan
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Counsel for DCR Communications, Inc.