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21 June 1996

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JUN 21 1996
Federal Communications Commission
Office of Secretary

The Honorable Reed H. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

The Honorable James H. Quello, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

The Honorable Rachelle B. Chong, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 844
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

In re: **Written Ex Parte Communication**[1]
ET Docket No. 95-183 & PR Docket No. 93-253
Rules Regarding the 37.0 - 38.6 & 38.6 - 40.0 GHz Bands

Dear Commissioners:

This letter is submitted on behalf of Bachow Communications, Inc. ("Bachow"), a licensee of and applicant for point-to-point microwave facilities in the 38.6 - 40.0 GHz band at various locations around the United States.

As you know, applications for new facilities in the 38.6 - 40.0 GHz band, including pending mutually exclusive applications, are subject to a freeze pending resolution of the above-referenced rulemaking proceeding. Bachow has submitted both comments and reply comments on various aspects of the proceeding, and does not seek to revisit those issues here. Bachow does take this opportunity, however, to renew and reiterate one very important position offered in its comments, namely, that the Commission should accept and process amendments to pending applications that resolve current cases of mutual exclusivity.

Bachow is aware that other parties have made similar presentations to the Commission focused primarily on a series of amendments and settlements that were filed during the period after the Wireless Telecommunications Bureau imposed a freeze on new applications, but before the Commission adopted the Notice of Proposed Rulemaking ("*NPRM*") in this proceeding. While Bachow is an agreement with and fully supports the views of such parties, it is respectfully

[1] Pursuant to Section 1.1206(a)(1) of the FCC Rules and Regulations, 47 C.F.R. § 1.1206(a)(1), two copies of this letter are being submitted to the Commission's Secretary for inclusion in the public record for this proceeding.

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submitted that the Commission should not limit the right to settle conflicts to such "window" amendments. Those applicants who have not yet tendered any amendments should be afforded at least some period of time[2] to resolve conflicts and, if settlements can be reached, the Commission should honor and process the amendments necessary to effect such agreements.

The Commission has long had a policy of encouraging adverse parties to resolve their disputes voluntarily, thereby eliminating the need for Commission intervention. The fact that the Commission is now considering the use of competitive bidding to award 38.6 - 40.0 GHz licenses does not change this. In fact, what has always been a Commission policy under comparative hearings and lotteries is a Congressional mandate under auctions. Section 309(j)(6)(E) of the Communications Act expressly states that auction authority shall not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E). Thus, what Bachow seeks is actually required by statute.[3]

As you continue your consideration of the various issues before you in this rulemaking, therefore, Bachow respectfully urges you to implement procedures that will permit the processing and grant of those applications that were pending before the freeze, if mutually exclusive situations are resolved and the applications are otherwise in order. Bachow will be happy to meet with you or your staff to discuss this matter further if you feel that will be helpful.

Very truly yours,

Robert J. Keller

Robert J. Keller
Counsel for Bachow Communications, Inc.

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[2] The failure to resolve these other cases prior to issuance of the *NPRM* is not due to delay on the part of Bachow. Indeed, Bachow has worked diligently to negotiate with various other applicants and had, long before the freeze, managed to resolve approximately half of all of its conflicts. Settlement negotiations as to the remaining cases are complicated by the fact that one or more applicants (other than Bachow) continue to maintain requests for multiple channels and/or service areas of greater than 50 miles radius. Upon issuance of the *NPRM*, of course, settlement has been virtually precluded due to uncertainty as to what, if anything, the Commission ultimately will allow. It is hoped that the Commission will resolve these issues in a way that will allow for prompt settlement of as many cases as possible.

[3] While this is clear from the plain language of the statute, it has been recently confirmed in correspondence to the Commission from various key Congressional leaders. Representatives Tom Bliley and John Dingell, Chairman and Ranking Member, respectively, of the House Commerce Committee, noted that Congress has "directed the Commission to avoid mutually exclusive application situations." Senator Larry Pressler, Chairman of the Senate Commerce Committee and Senator Tom Daschel, the Senate Minority Leader, also expressed the view that applicants ought not be forced into auctions by being deprived of an opportunity to reach settlements.