

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Requested Amendment of the)
Commission's Rules to Allocate)
the 37.5-38.6 GHz Bands to the)
Fixed-Satellite Service and)
to Establish Technical Rules for)
the 37.5-38.6 GHz Band)

RM No. 8811

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REPLY OF
WINSTAR COMMUNICATIONS, INC.

Philip L. Verveer
Michael F. Finn
Gunnar D. Halley
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Its Attorneys

Timothy R. Graham
Leo I. George
Joseph M. Sandri, Jr.
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Washington, D.C. 20036
(202) 833-5678

July 5, 1996

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**REPLY OF
WINSTAR COMMUNICATIONS, INC.**

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby submits its Reply to the Comments and Oppositions filed in the above-captioned Petition for Rulemaking filed by Motorola Satellite Communications, Inc. ("Motorola").¹

I. INTRODUCTION

The Comments reflect the differing interests between incumbent Fixed Service licensees -- such as WinStar -- and prospective Fixed Satellite Service licensees such as Motorola. On one hand, WinStar and other incumbent licensees have invested, and continue to invest, many millions of dollars developing their wireless business in the 38.6-40.0 GHz band. Also, WinStar and

¹ See Requested Amendment of the Commission's Rules to Allocate the 37.5-38.6 GHz Bands to the Fixed-Satellite Service and to Establish Technical Rules for the 37.5-38.6 GHz Band, Public Notice, Rpt. No 2132 (May 21, 1996).

similar firms are offering service within the frequency now. On the other hand, Motorola and Lockheed Martin -- which have apparently made no investment in the band -- seek an FSS allocation for the entire 37.5-40.0 GHz band in order to allow them to provide an undetermined type of FSS service at some undetermined point in the future when all other bands are exhausted.² WinStar urges the Commission to deny Motorola's Petition for Rulemaking or, alternatively, to consolidate the Petition in the Commission's ongoing 37-40 GHz Rulemaking.³

II. MOTOROLA'S PETITION FAILS TO MEET THE BURDEN OF PROOF FOR A RULEMAKING.

A. The Motorola Petition Does Not Contain Sufficient Information

None of the comments submitted in this proceeding contradict WinStar's showing that Motorola's Petition lacks sufficient information for the Commission or interested parties to meaningfully analyze Motorola's proposal.⁴ As the Telecommunications Industry Association correctly noted,

² In its initial Opposition, WinStar explained that although Motorola's Petition was limited on its face to the 37.5-38.6 GHz band, Motorola actually sought an allocation for the entire band as evidenced by its statement that if the "37.5-40.0 GHz bands are used exclusively for terrestrial services then it would be difficult, if not impossible, to implement certain types of satellite systems in this band as well as in adjacent bands." See WinStar Opposition at 2 (filed June 20, 1996) (quoting Motorola Petition at 1-2).

³ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Notice of Proposed Rulemaking and Order, FCC 95-500, ET Docket No. 95-183, RM 8553 (rel. Dec. 15, 1995) ("37-40 GHz Rulemaking").

⁴ See WinStar Opposition at 7-11 (detailing essential information missing from Motorola's Petition).

Motorola's Petition fails to meet the requisite burden of proof for the Commission to issue an NPRM.⁵ Specifically, the Commission's rules require that a Petition for Rulemaking contain "the text . . . of the proposed rule" and "all facts . . . [and] arguments . . . to support the action requested."⁶ As explained in WinStar's Opposition, Motorola's Petition is completely devoid of any such information. Indeed, Motorola's Petition is nothing but a restatement of its skeletal comments in the 37-40 GHz Rulemaking.⁷ Therefore, in accordance with its rules, the Commission must reject Motorola's Petition.

B. The Motorola Petition Is Premature

The Motorola Petition seeks allocation of spectrum for satellite systems for which Motorola indicates no present intention to deploy. Motorola effectively requests the Commission to hold spectrum in reserve for it until Motorola is ready to deploy its FSS system, at some unspecified future date.⁸

⁵ See Opposition of the Telecommunications Industry Association at 2.

⁶ See 47 C.F.R. § 1.401(c).

⁷ See 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, PP Docket No. 93-253, *Comments of Motorola Satellite Communications, Inc.* (filed March 4, 1996) ("Motorola's Comments in the 37-40 GHz Rulemaking").

⁸ See Motorola Petition at 2 ("Lower bands allocated to satellite services are becoming rapidly congested, as evidenced by the numerous applications for Ka-band satellite systems now pending before the Commission. Thus, the 37.5-40 GHz bands, in conjunction with the contiguous spectrum allocated to FSS, are the next available bands for the implementation of domestic and international satellite systems."). The identical language is contained in Motorola's Comments in the 37-40 GHz Rulemaking at 3-4.

Similarly, Lockheed Martin, which supported the Motorola Petition, requested that the 37-40 GHz band be reserved for future FSS services.⁹ It is unclear whether either company has even developed detailed plans concerning the technical parameters of the proposed system.

The Commission's rules permit the Commission to dismiss petitions which are premature¹⁰ and the Commission has denied Petitions for Rulemaking on the basis of their premature status.¹¹ Motorola's petition fails to indicate an immediate need for the requested allocation. WinStar is offering service now. Yet, Motorola has not offered any basis for either holding spectrum in reserve or for putting a cloud on 38 GHz terrestrial service by indicating that its capacity and/or quality one day may be impaired by a sharing obligation. Therefore, the Motorola

⁹ See Comments of Lockheed Martin at 2 ("Thus, the Commission and the U.S. satellite industry must take steps now to provide for sufficient spectrum to accommodate the next generation of FSS satellite systems expected to be deployed in only a few years' time.")

¹⁰ See 47 C.F.R. § 1.401(e).

¹¹ See, e.g., Motion Picture Association of America, Inc. Petition for Rulemaking to Take Measures Limiting the Distribution of Television Broadcast Signals to Cable Television Systems Via Satellite, 68 F.C.C.2d 57, RM-2952, Memorandum Opinion and Order at ¶ 7 (released May 2, 1978) (The Commission denied a Petition for Rulemaking to consider restrictions upon the dissemination of broadcast signals to cable systems via satellites because the Certificate of Public Convenience and Necessity for satellite operation was limited to five year period so that the Commission could reevaluate the Certificate at that time. Because the Petition attempted a review of the proper scope of authorization under the Certificate before the expiration of the five-year period, the Petition was dismissed as premature.)

Petition is premature. The Commission cannot permit entities to request allocations far in advance of their ability to utilize the spectrum. The resulting race to the Commission for spectrum allocations would dampen technological innovation and lead to inefficient spectrum use. Because the Motorola Petition is premature, and because the Commission must enforce a policy of efficient spectrum utilization, the Commission should dismiss the Motorola Petition.

III. WINSTAR SUPPORTS THE BIZTEL MOTION TO CONSOLIDATE THE MOTOROLA PETITION WITH THE 37-40 GHz RULEMAKING.

If the Commission determines that Motorola's proposal should be considered, it should consolidate the Motorola Petition with the ongoing 37-40 GHz Rulemaking. The resolution of the issues in the 37-40 GHz Rulemaking and those contained in the Motorola Petition are related inextricably. Their simultaneous resolution is the most logical and efficient means of administering the spectrum. Further, the engineering analysis performed by Gene Ax and Dale Hatfield indicates that the Motorola proposal, if implemented, could result in severe interference with Fixed Service systems.¹² The potential for interference devalues the band for bidding purposes. As BizTel notes in its Motion to Consolidate, the simultaneous resolution of the Motorola Petition and the 37-40 GHz Rulemaking will provide certainty and thereby

¹² See Gene G. Ax and Dale N. Hatfield, Technical Considerations in Sharing Spectrum in the 37-40 GHz Band Between Fixed Satellite Service Downlinks and the Fixed Service, Attachment to the Opposition of WinStar Communications, Inc., at 4.

encourage bidders in the Commission's spectrum auctions to avoid undervaluing the band.¹³ Therefore, the Commission should consolidate the Motorola Petition and the ongoing 37-40 GHz Rulemaking if it determines that the Motorola "proposal" is worthy of consideration.

IV. CONCLUSION

The Commission should dismiss Motorola's Petition for Rulemaking as premature and failing to provide sufficient information. Alternatively, should the Commission wish to consider the vague proposal of Motorola, it should do so within the context of the 37-40 GHz Rulemaking wherein it can request additional information from Motorola to enable a meaningful and serious engineering and economic analysis.

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

Timothy R. Graham
Leo I. George
Joseph M. Sandri, Jr.
WINSTAR COMMUNICATIONS, INC.
1146 19th Street, N.W.
Washington, D.C. 20036
(202) 833-5678


Philip L. Verveer
Michael F. Finn
Gunnar D. Halley
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ITS ATTORNEYS

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¹³ See Partial Opposition of BizTel, Inc. at 6; see also Motion to Consolidate of BizTel, Inc. at 5.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of WinStar Communications, Inc. was served either by hand delivery or first class, prepaid, U.S. mail on this 5th day of July, 1996 to the following:

William Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

D'Wana Speight, Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, DC 20554

Michele Farquhar, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, DC 20554

David Horowitz, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8010
Washington, DC 20554

Jonathan Stern
Acting Legal Advisor
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, DC 20554

Michael D. Kennedy
Vice President and Director/Regulatory Relations
Barry Lambergman
Manager/Satellite Regulatory Affairs
Motorola, Inc.
1350 I Street, N.W., Suite 400
Washington, DC 20005

Philip L. Malet, Esquire
Alfred Mamlet, Esquire
Pantelis Michalopoulos, Esquire
Pamela S. Strauss, Esquire
Steptoe & Johnston, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Robert J. Miller, Esquire
Gardere & Wynne, L.L.P.
3000 Thanksgiving Tower
1601 Elm Street
Dallas, TX 75201-4761

Leonard Robert Raish, Esquire
Eric Fishman, Esquire
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Rosslyn, VA 22209

James P. Tuthill, Esquire
Betsy Stover Granger, Esquire
4420 Rosewood Drive
4th Floor, Building 2
Pleasanton, CA 94588

Denis Coulliard, Chairman
Eric Schimmel, Vice President of TIA
2300 Wilson Boulevard, Suite 300
Arlington, VA 22201

Walter H. Sonnenfeldt, Esquire
Walter Sonnenfeldt & Associates
4904 Ertter Drive
Rockville, MD 20852

Mr. Gerald C. Musarra
Senior Director, Commercial Programs
Space and Strategic Missiles Sector
Lockheed Martin Corporation
1725 Jefferson Davis Highway
Arlington, VA 22202-4127

Debra A. Smilley-Weiner, Esquire
Deputy General Counsel
Lockheed Martin Astro Space Commercial
Post Office Box 800
Princeton, NJ 08543-0800

Raymond G. Bender, Jr., Esquire
Thomas K. Gump, Esquire
Dow, Lohnes & Albertson
A Professional Limited Liability Company
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036-6802


Gunnar D. Halley

Counsel for WinStar
Communications, Inc.