

reversed, and a reasonable time must be allowed for applicants to conclude the resolution of remaining mutual exclusivity conflicts.

**VIII. LICENSES MUST BE ISSUED TO ALL NON-MUTUALLY EXCLUSIVE APPLICANTS THAT ARE OTHERWISE QUALIFIED**

There is no legitimate legal or public policy basis to support the rulings in the Report & Order relating to the processing of pending 39 GHz applications. Therefore, rather than summarily dismissing the remaining "incumbent" 39 GHz applications, the Commission must specifically instruct the Wireless Telecommunications Bureau to complete processing of *all* pending 39 GHz applications and to issue licenses to all non-mutually exclusive applicants that are otherwise qualified under the pre-existing licensing rule structure. Any other treatment of non-mutually exclusive applications would contravene the Commission's competitive bidding authority and cause irreparable harm to Petitioners and similarly situated parties.

**IX. INCONSISTENCIES BETWEEN THE REPORT & ORDER AND THE RULES APPENDED THERETO SHOULD BE CORRECTED**

An examination of the Final Rules appended to the Report & Order reveals at least two problem areas that should be corrected by the Commission on reconsideration. First, the Report & Order correctly adopts a "substantial service" standard as a benchmark performance demonstration requirement to for a licensee to obtain an authorization renewal.<sup>36/</sup> However,

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<sup>36/</sup> Report & Order, at ¶¶ 38-50.

ambiguity as to the application of this build-out standard is created by Report & Order's affirmation of the Commission's earlier ruling in a separate proceeding (WT Docket No. 94-148) that microwave licensees authorized after August 1, 1996 should receive full ten-year license terms, while those authorized prior to that date will remain subject to a fixed renewal date of February 1, 2001.<sup>37/</sup> This ambiguity points out a serious inequity in the renewal expectancy afforded to all 39 GHz licensees by the Report & Order.<sup>38/</sup> No justification is offered, no can one be, for the differential treatment afforded to 39 GHz licensees that received their authorizations prior to August 1, 1996 and those that were licensed after that date.

The appropriate remedy to this arbitrary differential treatment of 39 GHz licensees is to modify the Report & Order on reconsideration to apply a ten-year license term to all 39 GHz licensees. Applying a uniform license term will treat all 39 GHz licensees on an equal footing, and avoid totally unnecessary comparative determinations with respect to substantial service showings that will be filed on renewal.

Second, the Report & Order clearly states the proper decision of the Commission to protect incumbent *service area operations* (as opposed to individual links) with respect to new operations that may be authorized through the contemplated competitive bidding process. However, the Final Rules treat this matter in an ambiguous and inconsistent fashion. To remedy this problem, the second sentence of Section 101.147(2) should be modified on reconsideration to read as follows:

"Applications filed pursuant to Section 101.1206 shall identify any pre-existing rectangular service area authorizations that are located within, or are overlapping with, the BTA for which a license is sought, and the provisions of Section 101.103 shall apply for purposes of frequency coordination between any authorized

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<sup>37/</sup> Report & Order, at ¶ 36.

<sup>38/</sup> Id., at ¶ 49.

rectangular service area(s) and BTA service area(s) that are geographically adjoining or overlapping."

## X. CONCLUSION

As fully demonstrated herein, the policies governing the disposition of "incumbent" 39 GHz applications made final by the Report & Order lack any legitimate legal or public policy justification, and clearly contravene the applicable statutes, regulations, and case law. Modification of the Report & Order in the manner set forth in the instant petition is fully consistent with the public interest objectives that form the fundamental core of the Communications Act and the public's interest in the rapid introduction of innovative new telecommunications services. The changes called for are also fully consistent with the intent of Congress in establishing the Commission's competitive bidding authority.

First, the policy modifications sought in the instant petition will simplify and expedite the proper processing of all remaining "incumbent" 39 GHz applications. Second, Commission action consistent with the instant petition will provide an unambiguous basis for determining the availability and market value of 39 GHz spectrum by participants in the contemplated competitive bidding process. Third, the remedies sought herein are *compelled* by the Communications Act, the Administrative Procedure Act, the controlling case law, and the public interest. Fourth, grant of the instant petition will avoid extensive further litigation and delay that will otherwise inevitably ensue.

For all of these reasons, grant of the instant petition, and the resulting modification of the Report & Order in the manner set forth above will serve the public interest, convenience, and necessity.

Respectfully submitted,

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