DOCKET FILE COPY ORIGINAL

RECEIVED

MAR - 9 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

PETITION FOR RECONSIDERATION
OF
REPORT AND ORDER

Advanced Radio Telecom Corporation ("ART") by its attorneys and in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations,[1] respectfully requests reconsideration of the Commission's Report and Order in the above-entitled proceeding.[2] Although ART is pleased that the Commission has adopted rules which will permit the further deployment of the 39 GHz band, and generally supports the licensing structure defined for this service, it believes that minor modifications of the rules adopted will better serve the interests of the public and the 39 GHz industry.

I. Introduction

1. ART is a nationwide telecommunications company providing rapidly deployable, reliable, wireless broadband local communications services which can connect customers to fiber optic and other telecommunications networks. ART is addressing the growing demand for high-

[1] 47 C.F.R. § 1.429.

[2] Report and Order and Second Notice of Proposed Rule Making, ET Docket No. 95-183, 12 FCC Rcd 18600 (1997)("R&O").

No. of Copies rec'd 0+10
List ABCDE

capacity, high-speed data communications services for business and government customers who need cost-effective, high bandwidth local access to voice, data, video, and Internet services. ART wholly owns ART Licensing Corp. which holds multiple 39 GHz authorizations. ART has reviewed and considered the R&O and urges the Commission to reconsider its rules with respect to the time period in which a licensee must demonstrate substantial service and the time in which a party must respond to a coordination notice.

II. The Existing License Renewal Deadline Should Not Be Changed.

2. The R&O acknowledges that under former Part 101 an incumbent 39 GHz licensee was required to construct at least one link in its geographic service area within eighteen months of the date of license grant. The R&O explains that the NPRM in this proceeding proposed three basic construction build-out options for incumbent 39 GHz licensees, each of which depended upon a specific number of fixed stations to be built within the licensees' geographic service area.[3] The R&O specifically found that its proposals were "unduly restricted and burdensome",[4] and concluded that a showing of substantial service would be applied to both incumbent and new licensees in the band.[5] ART applauds this approach and agrees with the Commission that this method will permit flexibility in system design and market development, while ensuring that service is being provided to the public; however, ART urges the Commission to reconsider the time frame within which a licensee must demonstrate compliance with this performance requirement.

3. In the R&O the Commission "recognize[d] that licensees must be given a

---

[3] Notice of Proposed Rule Making and Order, 11 FCC Rcd 4930, 4979-81 (1995)("NPRM").

[4] R&O at ¶ 43.

[5] Id at ¶ 46.

reasonable amount of time to meet a performance requirement."[6] For that reason and its desire to "impose the least regulatory burden on licensees as possible", it combined the showing traditionally required for build-out and the showing required to acquire a renewal expectancy into one demonstration at the time of renewal.[7] Upon first examination this solution seems to be a sound one. However, an examination of Appendix C which lists the final rules reveals an unexplained accelerated renewal filing deadline.

4. Under former Part 101, the Commission made clear that renewal applications should be filed within 90 days, but not later than 30 days, prior to the end of the license term. The amended rules maintain that time frame for all renewal applications except for those authorizations in the 38.6-40.0 GHz band. Amended Rule Sections 101.13(d), 101.15(c) and 101.17(a) all specify that renewals in the 38.6-40.00 GHz band must be filed eighteen months prior to the end of the license term.[8]

5. The Commission gave no warning of this change. Consequently, the agency did not comply with the Administrative Procedure Act ("APA"). The APA mandates that an agency include in a notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[9] The notice or a subsequent release "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which the rule is based."[10] As neither the NPRM nor the proposed rules associated with the

---

[6] Id. at ¶ 47.

[7] Id.

[8] Appendix C: 47 C.F.R. §§ 101.13(d), 101.15(c) and 101.17(a).

[9] 5 U.S.C. § 553(b).

[10] Home Box Office Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977), cert. denied, 434 U.S. 829.

NPRM make any mention of the accelerated renewal period, its adoption does not comply with the APA.

6. In the NPRM, the Commission stated that its intent regarding performance requirements was to avoid "harming existing 39 GHz licensees who are responsibly developing the spectrum they have been assigned."[11] The accelerated renewal deadline is not consistent with that intent. There is no valid reason for altering the expectations of incumbent licensees whose business plans will be disturbed by an accelerated renewal deadline. Incumbents also will be at a disadvantage compared to future licensees who acquire licenses at auction, because future licensees will receive a ten-year license term with eight-and-one-half years to meet the performance requirements, compared to the two- to five-year period for incumbents, depending upon the grant date of the license.[12]

7. For the foregoing reasons, ART urges the Commission to revise Sections 101.13(d), 101.15(c) and 101.17(a) to eliminate the distinction between 39 GHz licensees and other licensees subject to these rules.

III. The Commission Should Reduce the Coordination Response Time to 5 Business Days.

8. Under former Rule Section 101.103(d), each party that received a coordination notification was given 30 days within which to respond to the notice. In the R&O the Commission recognizes that the record in this proceeding indicates that 30 days is an

---

[11] NPRM at ¶ 106.

[12] All common carrier 39 GHz licensees who were licensed before August 1, 1996, the effective date of the Part 101 Report and Order, (i.e., those licensed previously under Part 21) are subject to a fixed license term ending February 1, 2001, regardless of the grant date of their individual licenses. Private carrier 39 GHz licensees authorized before August 1, 1996 (i.e., those licensed previously under Part 94), received a five-year license term which runs from the date of license grant. Both private and common carrier licenses granted on or after August 1, 1996, have a license term not to exceed ten years. 47 C.F.R. § 101.67.

inappropriately long time frame. Accordingly, the R&O mandates that neighboring BTA licensees and incumbent licensees within the BTA service area that are notified of proposed service must respond to the notification within 10 days.[13] ART submits that such a time frame is still too long. ART submits that a 5 business day response time strikes a more appropriate balance between allowing a potentially impacted licensee time to determine whether potential interference problems exist and allowing the licensee seeking coordination to rapidly respond to customer needs.

IV. CONCLUSION

9. For the reasons described above, ART urges the Commission to grant the relief requested herein.

ADVANCED RADIO
TELECOM CORPORATION

Marilyn S. Mense

By Its Attorneys
Elizabeth R. Sachs
Marilyn S. Mense

Lukas, Nace, Gutierrez & Sachs
1111 19th Street, NW 12th Floor
Washington, DC 20036
(202) 857-3500

March 9, 1998

[13] R&O at ¶ 69.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 9th day of March, 1998, caused to be hand carried a copy of the foregoing Petition for Reconsideration to the following:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Linda J. Evans