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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE 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

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION OF REPORT AND ORDER

Advanced Radio Telecom Corp. ("ART"), by its attorneys and in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations,[1] respectfully submits this Opposition in response to the Petitions for Reconsideration of the Commission's Report and Order in the above-entitled proceeding.[2] ART has reviewed and considered the Petitions for Reconsideration and urges the Commission to deny the request of TRW Inc. ("TRW")[3] by affirming the adopted channelization plan. In addition, ART offers its support to that portion of the petition filed by Columbia Millimeter Communications, L.P. ("Columbia")[4] requesting reconsideration of the renewal period and to

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[1] 47 C.F.R. § 1.429(f).

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

[3] Petition for Reconsideration of TRW Inc. (filed Feb. 20, 1998)("TRW Petition").

[4] Petition for Reconsideration of Columbia Millimeter Communications, L.P. (Mar. 9, 1998)("Columbia Petition").

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WinStar Communications, Inc.'s ("WinStar") Petition for Reconsideration[5] seeking clarification that the interference measures adopted are interim in nature. In support thereof, ART submits the following:

I. TRW's Petition Should Be Denied and the Channelization and Assignment Plan Adopted Affirmed.

1. TRW urges the Commission to reconsider the overall channelization and assignment approach for this band to ensure that this spectrum is available for various types of global satellite services.[6] According to TRW, the Commission's channelization plan "needlessly encumbered spectrum that could still be preserved for global satellite use."[7] It further asks the Commission "to clarify" that licenses issued in this band will not confer exclusive rights to the spectrum and that licensees will be expected to maximize spectrum efficiency in order to facilitate sharing.[8] ART submits that TRW's arguments have already been carefully considered and rejected by the FCC. ART urges the Commission to affirm the its licensing structure for this band.

2. The gravamen of TRW's complaint is its contention that the Commission's decision failed to consider adequately the interests of the global satellite industry in maximizing potential opportunities for shared use of this band by terrestrial fixed and commercial satellite systems. In fact, however, the Commission addressed this issue specifically and in detail, and appropriately balanced the interests of the existing, operational terrestrial fixed industry with

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[5] Petition for Clarification/Reconsideration of WinStar Communications, Inc. (Mar. 9, 1998).

[6] TRW Petition.

[7] TRW Petition at 7.

[8] Id. at 8.

prospective satellite uses. Supported by the clear record in this proceeding, the FCC determined that this band is already heavily populated with operational, wireless fixed systems. The Commission noted further that it previously had underestimated the variety of terrestrial service offerings available in this spectrum, many of which were likely to offer viable competition to the incumbent local exchange carriers, consistent with the express directive of Congress in its 1996 revisions to the Communications Act.[9] The FCC correctly concluded that the public interest would be served by spectrum policies that facilitated the continued operation and growth of these systems.

3. At the same time, however, and despite their still nascent status, the Commission carefully refrained from taking actions that would foreclose future use of segments of this band by the commercial satellite industry. The FCC specifically concluded:

> Current allocations for this segment of the 39 GHz band contain both fixed and satellite services. The actions we take here today do not alter those allocations.[10]

It further acknowledged:

> ...should future events dictate that a different course of action with respect to the 39 GHz band is warranted, nothing that we have done here will prevent us from taking the appropriate action at that time.[11]

4. The record in this proceeding does not support TRW's request that the FCC place the existing, operational terrestrial 39 GHz industry on hold in anticipation of as yet undefined and unsubstantiated satellite requirements. The Commission has properly concluded that such an approach would be antithetical to the pro-competitive environment it is attempting to foster,

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[9] R&O at ¶ 33.

[10] Id. at ¶ 7.

[11] Id. at ¶ 11.

and that conclusion should be affirmed.

5. The Commission should also maintain its decision with respect to exclusivity and spectrum efficiency. By its Petition, TRW requests the FCC "to clarify" that licenses issued in this band will not confer exclusive rights to the spectrum and that licensees will be expected to maximize spectrum efficiency in order to facilitate sharing with prospective satellite systems.[12] ART submits that no clarification is necessary. The R&O was unambiguous when it specifically found that license assignments would be exclusive and that a mandatory efficiency standard need not be adopted:

> [A] mandatory efficiency standard is not necessary. Given that the 39 GHz assignments will continue to be exclusive, other licensees will be denied any 'free ride' from a gain in increased efficiency.[13]

II. The Commission Should Reconsider Its Acceleration of the Deadline for Incumbent Licensees to File License Renewal Applications.

6. In its Petition for Reconsideration, ART urged the Commission not to change the renewal application deadline for licensees in the 38.6-40.0 GHz band.[14] The general Part 101 rules provide that renewal applications be filed within 90 days, but not later than 30 days, prior to the end of the license term.[15] The amended rules adopted by the R&O maintain that time frame for all renewal applications except for 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.[16] ART

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[12] TRW Petition at 8.

[13] Id. at ¶ 62.

[14] ART Petition for Reconsideration (filed Mar. 9, 1998).

[15] 47 C.F.R. § 101.15(d).

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

again urges the Commission to reconsider these amendments.

7. As detailed by Columbia in its Petition,[17] this radical acceleration in deadline for incumbent licenses to file license renewal applications contravenes 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."[18] 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."[19] As neither the NPRM nor the proposed rules associated with the NPRM make any mention of the accelerated renewal period, its adoption does not comply with the APA.

8. Further, the accelerated renewal deadline, in conjunction with the "substantial service" showing required to support an incumbent's renewal expectancy, is inconsistent with the Commission's stated policies in this rule making. Throughout the proceeding, the FCC has emphasized that licensees should have flexibility to secure and deploy capital in an economically prudent and publicly beneficial manner. Indeed, in the R&O the Commission specifically acknowledged an incumbent's need for adequate time to demonstrate its ability to implement its system:

> We recognize that licensees must be given a reasonable amount of time to meet a performance requirement.[20]
>
> To establish a viable operation, we recognize that licensees must have sufficient time in which to develop market plans, secure necessary financing, develop and

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[17] Columbia Petition.

[18] 5 U.S.C. § 553(b).

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

[20] R&O at ¶ 47.

> incorporate new technology in their systems, accommodate equipment manufacturers production schedules, and build a customer base.[21]

Consistent with this finding, the R&O specifically acknowledged that its construction requirement proposals were "unduly restrictive and burdensome",[22] and concluded that a showing of substantial service would be applied to both incumbent and new licensees in the band.[23] ART submits that without a revision in the renewal deadline, the "substantial showing" method will not permit flexibility in system design and market development. Indeed it will harm "existing 39 GHz licensees who are responsibly developing the spectrum they have been assigned,"[24] in direct contravention to the Commission's stated objective. There is no valid reason for altering the expectations of incumbent licensees whose business plans will be adversely affected by an accelerated renewal deadline.

9. An acceleration of the renewal filing date, and thus of the substantial showing deadline, would be particularly disadvantageous to those operators interested in deploying the point-to-multipoint technology approved by the FCC in this same R&O. Companies such as ART already are working with equipment manufacturers in beta testing this technology and are highly confident that it will enable the industry to deploy systems capable of providing a complement or competitive alternative to existing wired and wireless operations. ART has been advised that 39 GHz point-to-multipoint equipment is expected to be commercially available in the First Quarter of 1999, a date close to which ART would need to make its first substantial

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[21] Id. at ¶ 48.

[22] Id. at ¶ 43.

[23] Id. at ¶ 46.

[24] Notice of Proposed Rule Making and Order, ET Docket No. 95-185, 11 FCC Rcd. 4930 ¶ 106 (1995) at ¶ 106.

service showings if the filing date for renewals is not reconsidered. As a practical matter, this would adversely affect ART's deployment strategy including economics in order that ART act to preserve its renewal expectancy. That result would be entirely inconsistent with the FCC's determination to permit the use of point-to-multipoint facilities in this band[25] and with the public's interest in having access to this competitive alternative.

10. For the foregoing reasons, ART joins with Columbia in urging the Commission to revise its amended rules to eliminate the distinction between 39 GHz licensees and other licensees with respect to renewal application deadlines.

III. The Commission Should Clarify that the Inter-License Interference Rules Adopted are Interim in Nature.

11. WinStar's Petition asked the Commission to consider the interference rules adopted by the 39 GHz Order as interim in nature.[26] ART agrees with WinStar and recommends that the FCC clarify that the measures adopted are provisional in nature pending both the National Spectrum Management Associations's ("NSMA") issuance of interference procedures and real world licensee experience with interference issues relating to large scale, point-to-multipoint deployment.

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[25] R&O at ¶ 10.

[26] WinStar Petition.

IV. CONCLUSION

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

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April 6, 1998

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 6th day of April, 1998, caused to be hand carried a copy of the foregoing Opposition to Petition for Reconsideration and Report and Order to the following:

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