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**VIA MESSENGER**

Magalie Roman Salas
Secretary
Federal Communication Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

RECEIVED

JUL 28 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Notice
ET Docket No. 95-183/PP Docket No. 93-253

Dear Ms. Salas:

On July 27, 1998, Carl W. Northrop and the undersigned, counsel for Astrolink Communications, Inc. and for Columbia Millimeter Communications, L.P. met with Dan Phythyon, Mark Bollinger, Laura Smith, Josh Roland, and John Borkowski of the Wireless Telecommunications Bureau to discuss the above-referenced proceeding involving microwave services in the 38.6 - 40.0 GHz frequency band.

The purpose of the meeting was to discuss issues related to the Commission's decision in the Report and Order in the above-referenced docket to dismiss all pending mutually exclusive 39 GHz applications. Attached is a handout which includes the principal topics discussed.

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Pursuant to Section 1.1206 (b) of the Commission's Rules, enclosed are two copies of this notice. In the event there are questions regarding this matter, please contact the undersigned.

Very truly yours,

E. Ashton Johnston
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

EAJ:mah
Enclosure

c: Daniel Phythyon
Mark Bollinger
John Borkowski
Josh Roland
Laura Smith

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**Amendment of the Commissions Rules Regarding the 39 GHz Band/Competitive Bidding**
**ET Docket No. 95-183/PP Docket No. 93-253**

# Presentation on 39 GHz Application Processing

**July 1998**

## EXECUTIVE SUMMARY

**The Relief Sought** — Columbia Millimeter Communications, L.P. and Astrolink Communications, Inc., applicants for authorizations in the 39 GHz frequency band, seek a brief opportunity to implement settlements with other applicants to resolve mutual exclusivities, which will allow service to the public to commence at the earliest practicable date in additional markets.

**Who Is Opposing This Relief?** — There is no opposition in the record to the relaxation of the interim processing rules as proposed by Columbia, Astrolink, and others.

**Public Interest/Consumer Issues** — Sound spectrum management policy disfavors radical mid-stream changes of application processing procedures which prejudice long-pending applications. Auction policy should not be implemented in a manner that frustrates the prompt initiation of service to the public.

**Political Considerations** — The current policy was adopted to implement the congressional policy that spectrum should not be "given away". However, congressional policy as embodied in the FCC's statutory auction authority also supports the continued use of engineering solutions to resolve mutual exclusivities and expedite service to the public. The total number of applications that would benefit from a brief settlement window would not likely be material.

## 39 GHz LICENSING BACKGROUND

| | |
|---|---|
| September 16, 1994 | FCC announces new policies for future applications, including a limit of one channel per application, and requires that pending applications be amended to request a single channel. *Public Notice*, Mimeo No. 44787. |
| November 13, 1995 | FCC announces freeze on new applications. *Order*, DA 95-2341. |
| December 15, 1995 | FCC proposes to auction previously applied for spectrum, and announces a new "interim processing policy," consisting of a retroactive freeze on the processing of pending MX applications and of amendments that resolve MXs filed after November 13, 1995, and a freeze on the acceptance of amendments that resolve MXs. ET Docket No. 95-183, *Amendment of the Commission's Rules Regarding the 37.0 - 38.6 and 38.6 - 40.0 GHz Bands*, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 4930 (1995), paras. 121-124. |
| January 16, 1997 | FCC revises its December 1995 "interim policy" and announces that it now will process amendments that resolve MXs and were filed between November 13 and December 15, 1995. FCC states that "all applications that are dismissible because of noncompliance with our rules and policies will be dismissed regardless of how we ultimately decide to treat frozen applications." ET Docket No. 95-183, *Memorandum Opinion and Order*, FCC 96-486, footnote 34. |
| November 3, 1997 | FCC announces that it will dismiss all pending applications that were MX as of December 15, 1995, and announces yet another new policy of processing "partially MX" applications. ET Docket No. 95-183, *Report and Order*, FCC 97-391, para. 97. |
| March 1998 | Petitions for Reconsideration of *Report and Order* filed; pending MX applications (filed in 1995) remain unprocessed. |

## THE COMMISSION HAS APPLIED ITS RULES AND POLICIES INCONSISTENTLY

- The "one-channel-per-application" policy has not been applied consistently. Contrary to the September 1994 *Policy Statement*, the Commission has granted some multiple-channel applications, has partially granted and partially dismissed others, and has taken no action on others.

- Contrary to the December 1995 "interim policy," the Commission in fact has granted applications that were MX as of December 15, 1995. No explanation has been given about why these applications were granted or why others have not been granted.

- Contrary to the policy announced in January 1997, the Commission has not dismissed "all applications that are dismissible because of noncompliance with our rules and policies...."

- The Commission never has explained what it means by its most recent policy of processing "partially MX" applications, or how such applications can be distinguished from other MX applications.

## THE DISMISSAL OF CUT-OFF APPLICATIONS VIOLATES SOUND SPECTRUM MANAGEMENT POLICY

It is unfair to force applicants to file new applications and participate in an auction with new applicants; this simply rewards parties that did not timely file under the original rules.

- Most pending MX applications were cut-off from the filing of competing applications at the time they were frozen.

- "[A]s against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the cut-off rules." *McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996).

The FCC has a statutory mandate to accept application amendments that resolve mutual exclusivity.

- The FCC has not processed engineering amendments to resolve MXs, including minor overlaps of service areas, that were filed as of right under the Commission's rules.

- Congress expressed a "particular[] concern[] that the Commission might interpret its expanded auction authority in a manner that minimizes its obligations under Section 309(j)(6)(E) [of the Communications Act of 1934, as amended], thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity." H.R. Rep. No. 109, 105th Cong., 1st Sess., at 6173 (1997).

The decision to dismiss all pending MX applications cannot be reconciled with the FCC's own prior decisions.

- The FCC earlier processed pending MX applications under existing rules after deciding to hold auctions to issue future licenses, because such a decision was fair, efficient, and in the public interest. *See, e.g.,* MM Docket No. 94-131, *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, para. 88.

## DISMISSAL OF PENDING APPLICATIONS IS NOT IN THE PUBLIC INTEREST

No party benefits from the FCC's decision.

- Businesses that wish to launch new competitive telecommunications services are being denied additional licenses needed to expand their services. Already, two-and-one-half years have been lost to Commission inaction and delay.
- Consumers are harmed by a decision that thwarts the ability of new entrants to provide competitive services.
- Substantial, meritorious legal challenges to the FCC's actions have been raised. The agency needlessly will spend additional resources litigating the merits of its decision, with no certainty as to the outcome.

No party would be harmed by processing the remaining applications.

- The record evidences no opposition to allowing applicants to resolve the remaining applications, and further demonstrates that a large number of MX applications already have been resolved.
- No additional FCC resources are required.
- In light of the extensive licensing of the 39 GHz spectrum that already has occurred, revenues garnered by an auction of the spectrum at issue are likely to be insubstantial.

Auctions are intended to expedite service to the public, not delay it.

- The prior 39 GHz processing rules resulted in new entrants providing competitive access, local exchange, and other services throughout the U.S.
- The applications of Columbia and Astrolink have been pending for nearly three years. Had the FCC applied its rules and not instituted a processing freeze, conflicts would have been resolved, resulting in authorized service to the public in additional markets.

## CONCLUSION

The failure to allow amendments that resolve MX applications is not in accordance with sound public policy. Moreover, the FCC has not fully abided by its own 39 GHz processing rules and policies. To remedy its actions, the FCC should allow applicants to resolve MXs, and should announce a brief period — 30 to 60 days should be sufficient — for applicants to do so.