

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Notice Of Initial 39 GHz Reconfiguration Procedures	)	GN Docket No. 14-177
	)	
Preparation For Incentive Auction of Upper Microwave Flexible Use Service Licenses In The 37 GHz, 39 GHz, and 47 GHz Bands (Auction 103)	)	AU Docket No. 19-59
	)	

To: Wireless Telecommunications Bureau  
Office of Economics and Analytics

**COMMENTS OF VERIZON**

**I. INTRODUCTION.**

With this proceeding, the Federal Communication Commission (“FCC”) continues to aggressively move forward to unleash spectrum for 5G and other advanced wireless services. The FCC is poised to add additional millimeter wave, high-band spectrum to the marketplace in Auction 103, the auction of the Upper 37 GHz (37.6–38.6 GHz), 39 GHz (38.6–40 GHz), and 47 GHz (47.2–48.2 GHz) bands expected to occur on December 10.<sup>1</sup> A critical step in advance of Auction 103 involves reconfiguring the 39 GHz band to rationalize the band to advance efficient spectrum use by incumbent 39 GHz license holders and new entrants, and to promote a robust auction.

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<sup>1</sup> *Incentive Auction Of Upper Microwave Flexible Use Service Licenses In The Upper 37 GHz, 39 GHz, And 47 GHz Bands For Next-Generation Wireless Services Comment Sought On Competitive Bidding Procedures For Auction 103*, Public Notice, AU Docket No. 19-59, FCC 19-35 (adopted Apr. 12, 2019).

The *Reconfiguration Procedures PN* issued by the Wireless Telecommunications Bureau (“Bureau”), in cooperation with the Office of Economics and Analytics, should help implement the directives of the *Spectrum Frontiers Fourth R&O* so that the reconfigured 39 GHz spectrum is put to its highest and best use.<sup>2</sup> But the reconfiguration proposal should be amended in a few, important ways. Specifically, the Bureau should use only auctions for Partial Economic Areas (“PEAs”) licenses in its price index for Auction 103. There is no reason to devise a complex, artificial approach for PEA-based MHz-pops values that could produce perverse results, when actual PEA data already exists. And to avoid adverse tax consequences that could impact the value of spectrum at auction, the Bureau should allow an auction participant to designate commonly controlled entities that contributed 39 GHz spectrum usage rights for reconfiguration to receive modified 39 GHz licenses or incentive payments at the end of the auction. Finally, the Bureau should clarify that any effort to update ULS data involving the expansion of a Rectangular Service Area (“RSA”) must be accompanied by a well-documented showing supporting the clarification.

With these targeted modifications, the process by which the 39 GHz band will be reconfigured to prepare for Auction 103 should be fair and reasonable, and the outcome of this carefully constructed and groundbreaking process will be to maximize opportunities for competitive access to wide swathes of spectrum for 5G services.

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<sup>2</sup> *Notice of Initial 39 GHz Reconfiguration Procedures; Preparation for Incentive Auction of Upper Microwave Flexible Use Service Licenses in the 37 GHz, 39 GHz, and 47 GHz Bands (Auction 103); Order Of Modification; 39 GHz License Transfer and Assignment Freeze*, Public Notice, GN Docket No. 14-177 & AU Docket No. 19-59; DA 19-196 (rel. Mar. 20, 2019) (“*Reconfiguration Procedures PN*”); *Use of Spectrum Bands above 24 GHz for Mobile Radio Services*, Fourth Report and Order, GN Docket No. 14-177, FCC 18-180 (rel. Dec. 12, 2018) (“*Spectrum Frontiers Fourth R&O*”).

## **II. THE BUREAU SHOULD RELY ON DATA FROM AUCTIONS FOR PARTIAL ECONOMIC AREA LICENSES TO DEVELOP AN INDEX FOR AUCTION 103.**

The Bureau should rely only on direct evidence from past auctions for PEA-sized spectrum licenses to create a price index for Auction 103. With PEA-based, apples-to-apples data available, there is no sound reason to set a PEA-based price index using data from auctions of different license configurations that may reflect over- and under-inclusive MHz-pops values. Here, the Bureau should rely on data from two nationwide auctions with generic PEA licensing – Auction 1002 (600 MHz) and Auction 102 (24 GHz) – and not rely on Auction 97 (AWS-3) results from both larger and smaller license size areas.

The Commission specified previously that it will measure an incumbent's total 39 GHz licensed spectrum usage rights by adding up the MHz-pops for each of the incumbent's licenses in each PEA and then, to compare MHz-pops across PEAs, the incumbent's MHz-pops in each PEA will be weighted using an index calculated using the relative prices for spectrum licenses in other auctions.<sup>3</sup> This process essentially establishes the “exchange rate” expressed on a per MHz-pop basis to facilitate incumbent 39 GHz licensees' exchange of their current spectrum holdings and the 39 GHz license reconfiguration. To do that, the Bureau should use MHz-pops data from PEA-based auctions to set the price index for Auction 103.

The Bureau should not use price per MHz-pop data from Auction 97, as it would have to convert data from larger- and smaller- sized licenses that could distort the MHz-pops values within the individual PEAs by including or excluding lesser or more valuable areas. Auction 97 used two license sizes – 176 Economic Areas (“EAs”) and 734 Cellular Market Areas

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<sup>3</sup> *Spectrum Frontiers Fourth R&O* ¶ 20.

(“CMAs”),<sup>4</sup> as compared to 416 PEAs. Any attempt to assign a MHz-POP value to a PEA-sized license based on the MHz-POP value of an EA or CMA, by definition, would require a subjective judgment regarding which part of the geographic area drove the MHz-POP value for a particular EA or CMA. For example, the Bureau could base this assessment on population density, interstate highway miles, business locations, industrial parks, or numerous other ways. This subjective assessment is wholly unnecessary given the presence of auction data for PEA-sized licenses. The Bureau should thus reject the unnecessary and complicated proposal to convert data from Auction 97 to a PEA basis to compute an average price for each PEA as part of its index; instead it should use existing auction data for PEA-sized licenses.<sup>5</sup>

The reconfiguration proposal correctly avoids using results from Auction 101, another millimeter wave auction because, as the *Reconfiguration Procedures PN* observes, Auction 101 “consist[ed] of a partial set of mostly smaller, less densely populated markets licensed on a county basis,” in stark contrast to auctions for licenses auctioned by PEA on a nationwide basis.<sup>6</sup> The Bureau should refrain from consideration of alternatives that would use a statistical regression approach to incorporate the partial data from Auction 101<sup>7</sup> as such an approach is neither workable nor necessary.

Any methodology for converting data from these auctions to use in Auction 103 is inherently subjective and unnecessarily complex. That is particularly the case since data will be readily available from two auctions that utilized PEAs on a nationwide basis. Instead, the

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<sup>4</sup> *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014 Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97*, Public Notice, 29 FCC Rcd 8386 (WTB 2014).

<sup>5</sup> *Reconfiguration Procedures PN* ¶¶ 27, 29.

<sup>6</sup> *Id.* ¶ 30.

<sup>7</sup> *Id.* ¶ 32.

Bureau should utilize only the data from Auctions 102 and 1002 to create the index for Auction 103. Using data from these auctions will also allow auction participants to easily and reliably recreate and validate these indexes.

**III. AN AUCTION PARTICIPANT SHOULD BE ABLE TO DESIGNATE SPECIFIC COMMONLY CONTROLLED ENTITIES FOR AWARD OF MODIFIED LICENSES OR INCENTIVE PAYMENTS.**

The Bureau should modify the *Reconfiguration PN*'s proposal to issue modified licenses or incentive payments only to a single incumbent licensee; modified licenses and incentive payments should instead be issued to the commonly controlled entities that contributed the 39 GHz licenses. Issuing modified licenses or incentive payments to a single licensee could have adverse tax implications that would drive down the value of spectrum in Auction 103, contrary to the public interest.<sup>8</sup> The Bureau can deem the holdings of commonly controlled entities to be combined for the 39 GHz reconfiguration process and/or as bidders in Auction 103, as the *Spectrum Frontiers Fourth R&O* directed,<sup>9</sup> while still permitting an auction participant to designate specific commonly controlled entities to receive modified licenses or incentive payments upon completion of the auction. This approach is similar to the process the Commission used in the Connect America Fund Phase II auction, as discussed below.

The proposal to combine holdings for all incumbent 39 GHz licenses into one entity for the issuance of modified 39 GHz licenses or of one incentive payment could have potentially adverse tax consequences. For example, a commonly controlled entity that started with licenses

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<sup>8</sup> *Id.* ¶ 35 (“[W]e will issue modified licenses based on reconfigurations of combined holdings to a single incumbent licensee, even in the case of consolidated holdings held by a group of incumbents that are commonly controlled entities. Likewise, we will make a single incentive payment for relinquished combined spectrum usage rights regardless of . . . the number of licensees relinquishing licenses.”).

<sup>9</sup> *Spectrum Frontiers Fourth R&O* ¶ 22.

but winds up with no licenses could be treated for tax purposes as having transferred its original licenses to another entity within the commonly controlled group – which could result in gain recognition to the original holder and dividend income for other group members. Similar adverse tax consequences could be triggered if Auction 103 results in an incentive auction payment to a single group member rather than to each of the commonly controlled entities that contributed licenses.

For federal income tax purposes, the inter-group transfers of value that would result under the *Reconfiguration PN's* proposal, regardless of whether from an issuance of licenses or a cash payment to a single group member, will likely be characterized as the end product of a deemed constructive transaction or series of constructive transactions.<sup>10</sup> If the original licensee, let's say *X*, and the resultant licensee or cash payment recipient, let's say *Y*, are brother-sister members<sup>11</sup> of a group of commonly controlled corporations, these constructive transactions could be deemed to be dividends up the *X* ownership chain to the common parent of *X* and *Y*, followed by capital contributions from that parent down the *Y* ownership chain. Or the transfer could be treated as sale from *X* to *Y*. In the case of either deemed dividends or a deemed sale, *X* would realize gain on licenses that had appreciated in value while held by *X*.<sup>12</sup> If *X*, *Y*, or other members of their respective ownership chains are partnerships, different rules apply—*e.g.*,

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<sup>10</sup> See generally Bittker & Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 8.06[10], “Corporations Under Common Control: Triangular Distributions” (Thomson Reuters/Tax & Accounting, 7th ed. 2015 with updates through March 2019) (accessed on Checkpoint ([www.checkpoint.riag.com](http://www.checkpoint.riag.com)) Apr. 8, 2019).

<sup>11</sup> That is, each is controlled by the same ultimate parent, but in separate, parallel, ownership chains under that parent.

<sup>12</sup> See generally *id.* ¶ 8.21 “Corporate Gain or Loss on Distributions of Property” (describing I.R.C. § 311(b) and related rules requiring gain recognition on in-kind dividends of appreciated property).

partnerships do not distribute dividends—but constructive sale treatment is still possible, and even partnership distributions may carry adverse tax consequences. Ultimately, this approach could impose significant tax consequences on incumbent licensees and create uncertainty for groups of incumbent licensees because there would be multiple possibilities for the constructive transactions that could be deemed to apply.

As a result, the proposed auction application and licensing process may depress the value of incumbent 39 GHz spectrum by forcing incumbents to factor in tax consequences that could easily be avoided by modifying the proposed administrative process. The Commission has previously recognized the importance of tax consequences for businesses that participate in incentive auctions.<sup>13</sup> The Bureau should apply the same perspective here.

The Bureau should use a process similar to the process the Commission used in the Connect America Fund Phase II auction (Auction 903) for Auction 103.<sup>14</sup> There, commonly controlled applicants were permitted to “submit a single short-form application and qualify to bid as one applicant[.]”<sup>15</sup> Thereafter, if the parent company was announced as a winning bidder, the Commission permitted the entity to “designate at least one operating company controlled by the holding/parent company [] that will be authorized to receive Phase II support for the winning

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<sup>13</sup> See, e.g., Letter from Janine Cook, Internal Revenue Service, to Howard Symons, FCC, Re: Reference: Federal Tax Principles Concerning Tax Exempt Organizations Applicable to the FCC's Proposed Broadcast Incentive Auction (July 14, 2015), [https://www.nab.org/repacking/documents/IRS\\_Guidance\\_Regarding\\_Tax-Exempt\\_Broadcasters.pdf](https://www.nab.org/repacking/documents/IRS_Guidance_Regarding_Tax-Exempt_Broadcasters.pdf).

<sup>14</sup> *Connect America Fund Phase II Auction Scheduled for July 24, 2018 Notice and Filing Requirements and Other Procedures for Auction 903*, Public Notice, 33 FCC Rcd 1428, 1441-1443 ¶¶ 35-37 (2018) (“CAF II Procedures PN”).

<sup>15</sup> *Id.* at 1442 ¶ 36.

bids[.]”<sup>16</sup> The Commission classified the designation of an operating company that is commonly controlled by the applicant during the long-form application process as a *pro forma* transaction that was not a major modification otherwise prohibited by the Commission’s rules.<sup>17</sup> The operating company was then responsible for filing the long-form application and making the required certifications, since that entity would be responsible for meeting the public interest obligations.<sup>18</sup>

The Bureau can—and should—adopt a similar process for commonly controlled entities in Auction 103. Specifically, the Bureau should allow applicants to identify in their short-form applications which affiliated companies may ultimately be authorized to obtain the licenses and/or incentive payments. Then upon close of Auction 103, the Bureau should permit applicants to designate which companies are to receive incentive payments and/or modified licenses and how much and/or which licenses or payments each designated company should receive. For administrative convenience, the Bureau could require each parent company to communicate these designations, and the procedures could provide that if no designation is made, then the Commission would make payments or convey modified licenses to the parent company or applicant directly.

#### **IV. THE BUREAU SHOULD FURTHER CLARIFY THE OPPORTUNITY TO UPDATE ULS DATA.**

The Bureau should clarify that in preparation for the 39 GHz reconfiguration, any material changes to ULS data on existing 39 GHz licensed holdings should be accompanied with

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1442 ¶ 37 n.75.

<sup>18</sup> *Id.* at 1442 ¶ 37.



well-documented support. As the *Reconfiguration Procedures PN* observes, incumbent licensees are responsible for ensuring the accuracy of the ULS data the Commission will use to reconfigure 39 GHz spectrum holdings, for example ownership information or administrative corrections.<sup>19</sup> The *Reconfiguration Procedures PN* notes further that licensees should contact the Bureau if they discover any discrepancies in the data that are not administrative in nature or cannot be addressed by filing an FCC form. More broadly, the Bureau should make clear that any material change to license operations, for example any effort to expand the contour of an RSA, would not be permitted without a showing to demonstrate existing operations beyond the existing RSA contours.

## V. CONCLUSION.

In this proceeding, the Bureau is taking important steps toward reconfiguring the 39 GHz band in preparation for Auction 103. With the few tweaks proposed here, this process will leave incumbent and new entrants better able to provide 5G services in the 39 GHz band.

Respectfully submitted,

/s/

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<sup>19</sup> *Reconfiguration Procedures PN* ¶¶ 17-18.