

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF 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

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COMMENTS OF BIZTEL, INC.

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SUMMARY

BizTel, Inc. ("BizTel") endorses Commission efforts to promote the timely and flexible deployment of competitive new fixed wireless local telecommunications services and to encourage efficient spectrum utilization. These key objectives should be the driving force behind the ultimate outcome of the proceeding. This proper focus must not be subverted by inappropriate attention to alternative motives, such as the generation of revenues through the auction process, or the self-serving views of special interest groups.

The final rules adopted in the proceeding should indiscriminately accommodate all technically feasible service applications, and should *not place any inequitable priority or preference* on a single narrowly-defined service requirement or class of licensee (e.g., companies that are licensed pursuant to auctions, as opposed to companies licensed pursuant to the pre-existing rules). Such an approach is fully consistent with well-developed Commission policies. Any other approach clearly contravenes the express provisions of the Communications Act, and, in particular, the Commission's authority to employ competitive bidding procedures for the issuance of radio licenses.

Equity demands that the disposition of currently pending applications and the status of incumbent licensees must be resolved prior to the auctioning of any spectrum in the frequency

bands that are the subject of the proceeding. Arbitrary and punitive treatment of existing applicants and licensees entailed in the proceeding thus far must be abandoned and replaced with a uniform licensing and service rule structure that is equally applicable to all affected parties. Additionally, all pending incumbent applications and amendments thereto should be processed.

The rulemaking proposals fail to establish adequate safeguards against potential anti-competitive abuses in the proposed auctions by local exchange service providers with monopoly power. At a minimum, any local exchange carrier with dominant or monopoly power in a given market should be required to comply with the "Competitive Checklist" set forth at Section 271(c)(2)(B) of the Telecommunications Act of 1996 as a prior condition to its participation in an auction for a license in the subject market. Absent Commission recognition of the new competitive realities, and appropriate Commission attention to incumbent applicant and licensee concerns, long efforts by BizTel and others to rapidly introduce important new competitive local telecommunications services could all be squandered for no good reason.

The Commission's proposals to revise and update technical standards are prudent. In addressing final rule decisions relating to technical standards, the Commission should take adequate measures to ensure that any new standards that are adopted are practical, and can be met at a reasonable cost to

users, within any timeframes ultimately designated by the Commission. The Commission should allow the industry to develop its own procedures for precluding interference to and from adjacent licensees. Service flexibility and the preclusion of interference should be the primary forces driving any revision of the technical rules.

If the above-stated concerns are adequately addressed beforehand, and it is ultimately confirmed that the Commission has the requisite statutory authority, BizTel is not opposed to the use of spectrum auctions for the future issuance of licenses to mutually exclusive applicants in the subject frequency bands, with licenses issued for BTA-based service areas. BizTel believes that the Commission should allow market forces to determine the amount of channel capacity that is ultimately aggregated by any one licensee, whether through simultaneous multiple round bidding in the auction process, or through assignments or transfers of control.

Imposition of unrealistic construction obligations that do not reflect the realities of the marketplace, and do not treat all licensees equally will serve no legitimate public interest purpose. A single, reasonable, uniform minimum construction threshold standard based on a showing of substantial service with a threshold of a minimum of five years from the date of licensing should be implemented to ensure that services to the public are made available by all licensees in a timely fashion.

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COMMENTS OF BIZTEL, INC.

BizTel, Inc. ("BizTel"), through its undersigned counsel, hereby submits the following comments in response to the Notice of Proposed Rulemaking & Order (the "NPRM") in the above-captioned proceeding (the "Rulemaking").^{1/} As a pioneer in the development of local wireless broadband services, BizTel enthusiastically endorses Commission efforts to promote the timely and flexible deployment of competitive new fixed wireless local telecommunications services, to streamline applicable regulations, and to encourage efficient spectrum utilization. BizTel supports the emphasis in the Rulemaking on these well-settled fundamental Commission policy objectives. The related public interest implications, and the Communications Act of 1934,

^{1/} See Notice of Proposed Rulemaking & Order, ET Docket No. 95-183 & RM 8553, PP Docket No. 93-253, FCC 95-500, 61 Fed Reg 2465 (adopted December 15, 1995). On February 9, 1996, the NPRM comment and reply comment dates were extended by the Commission to March 4, 1996 and April 1, 1996, respectively. See Extension of Time, DA 96-144 (released February 9, 1996).

as amended (the "Communications Act"), dictate that these issues should be the driving force behind the ultimate outcome of the Rulemaking. BizTel's comments provide observations, analyses and recommendations intended to ensure that this proper focus is not subverted by inappropriate attention to alternative motives or to the self-serving views of special interest groups.

I. INTRODUCTION

By the NPRM, the Commission proposes to open the 37.0 - 38.6 GHz band (the "37 GHz band") to licensing, and to revise long-established licensing and service rules applicable to Fixed Service operations in the 38.6 - 40.0 GHz band (the "39 GHz band"). Among other things, the NPRM proposes to utilize competitive bidding to issue licenses in instances where mutual exclusivity exists between future applicants. The NPRM also proposes to define service areas for licenses that will be subject to auction as Rand McNally basic trading areas ("BTAs"). Finally, the NPRM considers the adoption of new or revised technical rules relating to channelization, radiated power, modulation efficiency, frequency tolerance, antenna performance, and interference protection. BizTel generally supports the Commission's proposals relating to each of these licensing or service rule issues, and offers more specific comments on these and other issues of concern in this submission.

Of particular concern to BizTel, however, is the way in which the NPRM unjustly singles out existing 39 GHz applicants and licensees for what amounts to "cruel and unusual punishment". Specifically, the NPRM orders the implementation of draconian "interim" application processing procedures and proposes the adoption of construction requirements that are radically disparate from those proposed for licensees that may obtain authorizations through the competitive bidding process. This punitive treatment is unsupported by the record in this or any other Commission rulemaking or adjudicatory proceeding, not rationally related to any legitimate public interest objective, and, thus, clearly contravenes the Communications Act.^{2/}

Also of paramount concern to BizTel, the licensing and service rules proposed in the NPRM raise a strong prospect of potential anti-competitive abuses by large well-capitalized, firmly entrenched local exchange service providers, and establish

^{2/} BizTel is aware of two pending petitions for reconsideration and one emergency motion for stay relating to the order component of the NPRM. See Joint Petition of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation, Petition of DCT Communications, Inc. (filed January 16, 1996), Public Notice Report No. 2120 (released February 9, 1996), 61 Fed Reg 5773 (February 14, 1996); Joint Emergency Request For Stay of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation (filed January 16, 1996); see also, Comments of BizTel In Support of Emergency Motion For Stay (filed February 1, 1996). While issues relating to the order component of the NPRM are more properly dealt with in the context of pending review proceedings, because of the inextricable link between the order component of the NPRM and the proposals for future treatment of incumbent applicants and licensees, BizTel is compelled to address these issues here. BizTel respectfully requests that its comments in this regard be taken account of in the Commission's disposition of the above-mentioned petitions and motion.

absolutely no safeguards to shield against the real threat of occurrences of such behavior.

The following comments respectfully offer BizTel's views regarding these and other issues raised in the NPRM.

II. BACKGROUND

BizTel and its principals are pioneers in the development of local wireless broadband distribution services. BizTel's management has participated extensively in the wireless telecommunications business over the past 25 years, playing leading roles in the development and marketplace introduction of a number of innovative wireless services -- CARS, MDS, MMDS, DTS, LMDS -- and a host of related market-specific service offerings. They have a well-proven track record of entrepreneurial success and actual system implementation. Accordingly, BizTel and its principals can hardly be described as neophytes or speculators. Based on BizTel's dealings with other 39 GHz companies, BizTel believes that the same is true of all other 39 GHz applicants.^{3/}

^{3/} Contra, NPRM, e.g., at ¶ 7. BizTel vigorously disputes allegations in the NPRM and in the accompanying separate statements by two other Commissioners regarding supposed speculative actions or motives of incumbent 39 GHz applicants or licensees. See Separate Statement of Commissioner Andrew C. Barrett, at 1; Separate Statement of Commissioner Rachelle B. Chong, at 2; contra, Partial Dissenting Statement of Chairman Hundt, at 2 & 5; see, also, Separate Dissenting Statement of Commissioner Susan Ness, at (continued...)

BizTel was formed in 1993 to develop and pursue commercial implementation of a range of innovative competitive wireless local telecommunications services that exploit the unprecedented transmission capacity available in the millimeter wave portion of the radio spectrum. Since March of 1994, BizTel has filed and prosecuted approximately 280 applications for authority to construct and operate and/or modify existing authorizations for 39 GHz Point-to-Point Microwave Radio Service systems covering metropolitan areas throughout the nation.

^{3/}(...continued)

2. BizTel is quite familiar with virtually all of other approximately sixty 39 GHz applicants and licensees, the vast majority of which are well-established telecommunications concerns or entrepreneurial start-up companies like BizTel, comprised of principals with substantial telecommunications industry experience. Unlike other services where speculation was indeed rampant and "filing mills" generated *truckloads* of "cookie cutter" applications for *thousands* of applicants, most of whom had absolutely no connection to telecommunications industry, all incumbent 39 GHz applicants appear to have well-established ties with the industry, application "filing mills" are not in evidence, and applications have not appeared in anything approaching "truckload" proportions. BizTel would be hard-pressed to characterize any of these companies as speculators, and the record lacks any specific evidence of speculation by any incumbent 39 GHz applicant or licensee. At best it is premature for the Commission to characterize any 39 GHz company as a speculator, because the recent round of licenses only began to issue in late February of 1995, and no construction deadline has been missed by any licensee. Accordingly, BizTel agrees with the findings expressed by Commissioners Barrett and Chong in their separate statements relating to the NPRM that no speculation is evident and that "entrepreneur" is *not* a dirty word. In fact, it is well-recognized that entrepreneurs have been responsible for many of the major innovations in the telecommunications industry. The size and financial resources of a company do not guarantee a commitment to innovation, as evidenced, for example, by the more than twenty year delay in the introduction of cellular telephone service prior to the 1984 breakup of the Bell System monopoly.

Since its inception, BizTel and its parent company Video/Phone Systems, Inc. have invested more than \$1.5 million of very scarce seed capital, much of which was provided by BizTel's principals themselves. These precious funds, small by large company standards, but not insignificant to the individuals involved, have been effectively used in developing BizTel's nationwide presence. These efforts are in full accordance with a carefully prepared business plan that is intended, among other things, to meet economies of scale in the deployment of facilities that BizTel believes necessary to accomplish its defined market objectives. To date, BizTel has received authorization to construct and operate 39 GHz systems in 156 designated service areas.

BizTel is aggressively pursuing deployment of facilities in its authorized service areas, and expects to commence commercial service shortly. These licensed systems, as well as those for which authorization is sought in BizTel's 119 still pending applications, form fundamental building blocks for BizTel of a long-planned nationwide presence in the local wireless broadband services market.

BizTel believes that the service applications for 37 GHz and 39 GHz systems will evolve over time. Currently, applications for the carriage of voice, data, and video traffic include but are not limited to:

- point-to-point local connectivity
- narrow and broadband data transmission
- local exchange services
- local long-distance access services
- backhaul and/or PSTN interconnect for terrestrial and satellite-based mobile communications networks
- narrowband and broadband wireless connectivity of fixed local area and wide area networks
- digital video services
- telemedicine
- education-related services
- network redundancy and emergency restoration services

BizTel's market entry objectives, and the resulting nationwide system deployment plan, were originally formulated in 1993, when initial competition in the marketplace for local telecommunications services was just becoming a reality. Today, with the recent passage of the Telecommunications Act of 1996,^{4/} it appears that the local telecommunications services market may actually be more fiercely competitive than even the most liberal assessments had previously indicated.

BizTel remains quite confident in the principles of its business plan and in its ability to execute that plan. BizTel is concerned, however, that, absent Commission recognition of the

^{4/} See Telecommunications Act of 1996, H.R. Rep. No. 104-458, 104th Cong., 2d Sess (1996).

new competitive realities, and appropriate Commission attention to incumbent 39 GHz applicant and licensee concerns in the Rulemaking, substantial capital and human resource investments and long efforts by BizTel and others to rapidly introduce important new competitive local telecommunications services could all be squandered for no good reason.

III. BIZTEL GENERALLY SUPPORTS THE PROPOSALS SET FORTH IN THE NPRM

BizTel generally supports the proposals set forth in the NPRM. BizTel believes that the demand for wireless broadband transmission capacity in the current environment of ever-expanding user requirements for high speed connectivity services is analogous to the continually expanding demand for random access memory and processing speed that has driven the evolution of the personal computer as a tool for businesses, governments, educators, and individuals.^{2/} In the last several years as a result of aggressively competitive entrepreneurial innovations, the telecommunications industry has experienced an explosion of growth in the use of the Internet and other virtual network services by all sectors of users, with an ever-increasing demand

^{2/} It is important to note that absent the elimination of entrenched monopoly power in the personal computer industry through vigorous competition, the proliferation of highly capable low-cost personal computing devices may never have materialized to the extent that it has.

for higher and higher speed connectivity. Similarly, there has been a phenomenal expansion of single-location multiple switched circuit demand in various business sectors, including home-based enterprises. There has also been a substantial increase in the demand for circuits to interconnect backhaul traffic generated by terrestrial and satellite-based mobile communications systems, as well as for circuits to facilitate a host of services related to mobile communications, such as wide-area number portability and mobile voice mail. Additionally, the steady expansion of videoconferencing and other innovative broadband services has created yet another segment of potential demand for reliable wireless broadband transmission services.

While all of these applications appear to be developing in the marketplace today, BizTel estimates that it will take at least 3 - 4 years for 37 GHz and 39 GHz service providers to achieve any significant market penetration, and, on the order of ten years to become generally accepted throughout the marketplace.

The recent passage of the Telecommunications Act of 1996 will serve to reduce or eliminate many regulatory barriers that appear to have impeded the expansion of the local telecommunications services industry to date. Increased competition and innovation spurred by the relaxation of artificial regulatory barriers is likely to substantially intensify growth in the demand for local telecommunications

services, which in turn should correspond over time to supplement the already growing demand for fixed wireless broadband transmission capacity.

Accordingly, the Commission and the Telecommunications Industry Association ("TIA"), the petitioner in the Rulemaking, have demonstrated solid foresight in proposing to open the 37 GHz band for licensing and to implement service rules affecting the 37 GHz and 39 GHz bands that promote more flexible and efficient use of the scarce spectrum resource.

A. Availability of Additional Spectrum Will Expand Possible Service Offerings, Promote Competition & Enhance Service Offerings

Given the market realities discussed above, the Commission's initiation of efforts to make 37 GHz band spectrum available for licensing appears prudent. The availability of additional millimeter wave spectrum for the provision of local fixed wireless services will help to promote competition, enhance marketplace offerings and create new jobs.

It is clear from BizTel's assessment of the market for wireless broadband services summarized above that there is a rich menu of services well-suited to the 37 GHz and 39 GHz bands. This diversity of demand is indisputably confirmed by the detailed service demand assessments provided in applications and subsequent submissions filed by the vast majority of incumbent 39

GHz applicants and licensees, as well as the record of this proceeding.

The availability of additional spectrum will allow successful operators an opportunity to expand their service offerings by obtaining authorizations in markets not currently served or by obtaining additional channels to augment capacity in their existing markets. If the licensing process is properly managed to avoid anti-competitive behavior, as further discussed infra, opening additional spectrum will also serve to promote new entry and expanded competition among wireless broadband service providers, a result consistent with long-established Commission policies.

B. Final Rules Should Recognize The Broad Diversity of Service Demand

As demonstrated above, a wide range of possible fixed wireless services can be provided by operators of 37 GHz and 39 GHz systems. This fact is further substantiated by a review of the various 39 GHz service proposals on file, and the character of the systems in operation or in the process of being deployed.

The facts indisputably contradict the mistaken view expressed in the NPRM that PCS backhaul is the primary application for the subject spectrum. The Commission should

abandon this erroneous and unsubstantiated assumption.^{6/} The reality of the matter is that, over time, *PCS backhaul is likely to constitute only a very modest portion of the total demand for channel capacity in the 37 GHz and 39 GHz bands.* This conclusion is fully consistent with the Commission's repeated findings in the PCS rulemaking proceedings in CC Docket No. 90-314, where several successive PCS industry proposals requesting that substantial blocks of spectrum be dedicated for use as PCS backhaul were explicitly rejected after careful consideration by the Commission.^{7/} In fact, even though the A & B Block PCS auctions were completed a year ago, and system design and implementation efforts are reportedly well underway, to date, there has been only *extremely limited* participation in the 39 GHz

^{6/} See, e.g., NPRM, at §§ 1 & 20. The obviously mistaken assumption that PCS backhaul is the *primary* service application for the 37 GHz and 39 GHz bands clearly skews the reasoning contained in the NPRM in several major respects. Among other things, this is particularly true with regard to the assessment in the NPRM of the most likely characteristics of system deployments. As discussed in more detail *infra*, at FN 6, mistaken assumptions in the NPRM about the character of probable system deployments lead, at least in part, to further confusion for the Commission, as evidenced by the incumbent licensee construction thresholds proposed at § 105 of the NPRM, and the discussion relating thereto. Even TIA, the petitioner in the Rulemaking has abandoned an earlier view that implied a priority requirement for PCS backhaul. See Ex Parte Comments of the Telecommunications Industry Association on Petition Rulemaking, RM-8553 (filed December 5, 1995).

^{7/} See, e.g., Amendment of The Commission's Rules To Establish New Personal Communications Services, Notice of Proposed Rulemaking & Tentative Decision, 7 FCC Rcd 5676 (1992), at § 55; see, also, Amendment of The Commission's Rules To Establish New Personal Communications Services, Second Report & Order, 8 FCC Rcd 7700 (1993), at § 96.

licensing process by entities seeking to use spectrum solely for PCS backhaul purposes. Just as is the case with BizTel, virtually every 39 GHz applicant proposing to provide backhaul services of any type has proposed to provide services along with a larger suite of offerings.^{8/}

Because of the clear diversity of demand for 37 GHz and 39 GHz services, the final rules adopted in the Rulemaking should indiscriminately accommodate all technically feasible service applications, and should *not place any undue priority or preference* on a single narrowly-defined service requirement.^{9/}

^{8/} Contrary to some wholly unsubstantiated rumors, this lack of participation to date in the 39 GHz licensing process (and in the preliminary stages of the Rulemaking) by PCS entities simply cannot be blamed on a shortage of available channels. All major PCS concerns have been fully aware of the availability of 39 GHz spectrum for backhaul purposes since 1990, when the first petition seeking to dedicate the 39 GHz band for PCS backhaul was filed in the PCS rulemaking. Furthermore, there was substantial 39 GHz spectrum available after the A & B Block PCS auctions concluded in March of 1995, but it appears that only one PCS licensee has filed any new 39 GHz applications since that time. This may be an indication that it is not financially practical at this time to construct dedicated PCS backhaul networks in the subject frequency bands, particularly when implementation costs are compared with the economies of scale that can be achieved by employing capacity that can be readily provided on a multi-use system. The lack of interest in 39 GHz spectrum on the part of PCS operators may also be attributable to the fact that many such operators appear to be opting for wireline backhaul configurations of lieu of 39 GHz or other RF backhaul alternatives. In fact, GTE and MCI, two major companies who were contemplating the use of 39 GHz capacity for PCS backhaul, and had filed multiple applications, many of which were past cut-off and unopposed, decided to withdraw their applications and pursue other alternatives.

^{9/} There is no evidence of any industry interest in the use of the 37 GHz or 39 GHz bands for mobile service links. Propagation characteristics of these bands appear to render mobile services
(continued...)

Instead, the Commission should allow market forces to determine the highest and best uses of the subject spectrum. Such an approach to future 37 GHz and 39 GHz licensing is fully consistent with well-developed Commission policies that encourage flexible service concepts and robust shared use of spectrum for as many uses as technically feasible.^{10/}

C. If Auctions Are Conducted, The Proposed Ground Rules Are Generally Acceptable

As a general matter, BizTel is not opposed to the use of spectrum auctions for the issuance of licenses to mutually exclusive applicants, so long as any such action is consistent with the Commission's statutory authority, promotes the prospect of true competition for entrenched local exchange service providers, and otherwise addresses the concerns of BizTel set forth in these comments. It is crucial that any final rules adopted in the Rulemaking relating to spectrum auctions in the 37 GHz and 39 GHz band be consistent with these essential conditions.

^{9/} (...continued)
impractical. Moreover, it is questionable whether mobile services could coexist on a co-primary basis with other uses of the subject spectrum. For these reasons, if provision is made in the Rulemaking to license any mobile service uses, such uses should be authorized on a secondary basis only.

^{10/} See, e.g., Allocation of Spectrum Below 5 GHz Transferred From Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, Second Report And Order, 60 FR 40712 (August 9, 1995).

1. BTAs Are Appropriate To Define Service Area Boundaries for Auction Purposes

BizTel agrees with the finding in the NPRM that BTA service areas are the appropriate licensing unit to be used in any resulting auctions.^{11/} BTAs properly relate operations in a given geographic area to demand for all currently contemplated 37 GHz and 39 GHz services.

2. Simultaneous Multiple Round Bidding Is In The Public Interest

BizTel also supports the Commission's proposal to utilize simultaneous multiple round bidding in the auction process.^{12/} Such an approach is well proven, and will allow the marketplace to determine the ultimate aggregation of spectrum that is subject to auction, both within a given BTA, and among multiple BTAs. Accordingly, the proposed structural approach to auctions will serve the public interest.

^{11/} NPRM, at ¶ 22.

^{12/} Id., at ¶ 30.

3. Spectrum Caps Are Unnecessary

BizTel believes that the Commission should allow market forces to determine the amount of channel capacity that is ultimately aggregated by any one licensee in a given market, whether through auctions or through assignments or transfers of control. There does not appear to be any sufficient justification for imposing artificial constraints on the ability of licensees to obtain additional channels, if they deem such action necessary to accomplish their service objectives and they can muster the resources to do so.

Even a cursory examination of the current situation in the telecommunications industry indicates that competitive forces created by a range of wireline and wireless delivery mediums, and the attendant availability of services from sources other than 37 GHz and 39 GHz facilities will be substantial. For example, established local exchange carriers already have substantial broadband service capabilities, and are rapidly deploying enhanced network capabilities that are likely to dramatically increase their competitiveness in this service sector. Cable television operators are currently in the process of deploying high speed customer premises modems that can deliver services competitive to those that BizTel and other 37 GHz and 39 GHz operators are or will soon be offering. There are also a number of efforts underway to implement local wireless broadband

services in the 28 GHz band and in bands above 40 GHz. In sum, it appears quite clear that there will be no shortage of marketplace offerings that are competitive to 37 GHz and 39 GHz services. For this reason there is no legitimate justification for Commission imposition of artificial spectrum caps in the 37 GHz or 39 GHz bands.

4. The Proposed Upfront Payment Should Be Re-Evaluated

The proposed upfront payment of \$2,500 or \$0.02 per MHz "POP", whichever is greater,^{13/} appears to be too high. Based on a conservative national population estimate of 250 million, and taking account of only the 1600 MHz of spectrum in the 37 GHz band, the total upfront payment proposed in the NPRM would be on the order of \$8 billion - more than the total amount of final payments collected in the PCS A & B Block auctions. This level of upfront payment is illogical, given the difference in the scope of PCS services as compared to 37 GHz and 39 GHz services, and given the stark difference in coverage and obstruction penetration capabilities at 2 GHz versus 37 GHz or 39 GHz. The Commission should re-evaluate its upfront payment proposal in light of these facts and significantly reduce the upfront payment to reflect the realities of the situation.

^{13/} NPRM, at ¶ 54.

D. Incumbent Applicant & Licensee Issues Must Be Resolved Prior To Auctions

Equity and basic logistical considerations demand that the disposition of currently pending 39 GHz applications and the status of incumbent licensees must be resolved prior to the auctioning of any spectrum in the 37 GHz or 39 GHz bands.

Of particular relevance to the prospect of auctions for the remaining available spectrum in the 39 GHz band, issues relating to incumbent applicants and licensees must be resolved prior to the commencement of auctions. Without definitive information as to the status of pre-existing applicants and licensees, bidders will have no way of determining the extent to which the spectrum they are bidding on might be encumbered. For example, the Commission has proposed that each incumbent licensee be required to meet a construction threshold requirement or reduce its service area to meet a construction threshold requirement or relinquish its area-wide deployment authorization.^{14/} Absent resolution of the status of the scope of authorized operations of incumbent licensees beforehand, potential bidders for open areas surrounding any pre-existing license will be faced with an unsolvable valuation dilemma that could easily result in no bids or low bids.

^{14/} NPRM, at ¶¶ 105-108.

Similarly, there are a substantially large number of situations affecting BizTel and other 39 GHz pioneers where their pending 39 GHz applications are past cut-off, free of mutual exclusivity conflicts, but held in abeyance as a result of the interim processing policy adopted in the NPRM. A bidder for a BTA in which one or more of these applications exists has no legitimate right to overturn the earlier filer's cut-off. Unless the earlier filed application is processed before an auction (and the construction threshold issues are settled), any bidders will be forced to bid contingent on the possibility that a previously pending application could be granted and the licensee may or may not have interference protection in its originally designated service area.

The occurrence of either of the above-described situations is not only possible but probable, and is likely to cause a material failure of the auction process. These problems can be readily avoided by resolving all pending applicant and incumbent licensee issues prior to initiation of any auctions.

It would be patently unfair for any party to receive a license at auction in the 39 GHz or the 37 GHz band while there is still some question as to the ultimate resolution of the incumbent applications and licenses. BizTel and the other pioneer applicants and licensees filed their applications or received authorizations pursuant to a long-established licensing and service rule structure. Moreover, BizTel and other similarly