Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of	)	
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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

REPLY COMMENTS OF COMMCO, L.L.C.

Commco, L.L.C. ("Commco"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits reply comments in response to the Commission's *Notice of Proposed Rulemaking and Order*, adopted December 15, 1995 in the above-captioned proceeding (hereinafter "*NPRM*").[1/]

I. INTRODUCTION

Commco is submitting Reply Comments to underscore the considerable amount of support, on the record, for the positions it put forth in the Comments it filed in this proceeding on March 4, 1996. In its Comments, Commco urged the Commission to adopt rules and technical standards that would govern the licensing of both the 37 and 39 GHz bands, as well as incumbent 39 GHz licensees and those that receive spectrum at auction, in an even-handed and impartial manner. Almost every commenting party agrees that this approach is essential to

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[1/] By Order, released February 9, 1996, DA 96-144, the Commission extended the date for filing reply comments to April 1, 1996.

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the development of a robust wireless fiber market as it will allow a competitive equipment market to develop, as well as enable these bands to be made available for a wider array of services.

II. DISCUSSION

A. Processing of Pending 39 GHz Applications

For the reasons detailed in Commco's Petition for Reconsideration and Emergency Request for Stay, which were not opposed by any party, the Commission must continue processing 39 GHz applications that are pending and mutually exclusive, affording pending applicants an opportunity in which to resolve mutual exclusivity through technical and other negotiated settlements. Moreover, without in any way limiting this request for relief, the Commission must at a minimum adhere to the metes and bounds of Section 21.23(a)(1) of its rules and honor minor conflict resolving amendments which were filed on or prior to December 15, 1995. In comments filed in response to the *NPRM*, there was significant support for the positions advanced in Commco's Petition for Reconsideration and Emergency Request for Stay. See, e.g. Comments filed by Alcatel Network Systems, Inc. at 2; Ameritech Corporation ("Ameritech") at 4-6; AT&T Wireless Services, Inc. ("AT&T") at 12-13; Biztel, Inc. ("Biztel") at 36-39; Columbia Millimeter Communications, L.P. ("Columbia") at 5-12; DCT Communications, Inc. ("DCT") at 29-34; Digital Microwave Corp. at 2; GHz Equipment Co. ("GEC") at 5; Harris Corporation - Farinon Division at 2; Microwave Partners at 7-9; Spectrum Communications, L.C. at 2-3; and the Telecommunications Industry Association ("TIA") at 10-12. In fact Biztel, GEC and TIA filed separate pleadings specifically to express their support

for Commco's Emergency Request for Stay.[2]

In opposing adoption of the Commission's retroactive freeze, Commenters emphasized the fact that the Commission's imposition of the freeze without actual notice to affected parties was unlawful, inequitable, and unjustified. Id. Commenters also focused on the fact that affording pending applicants the ability to resolve mutual exclusivity is consistent with the Commission's Rules, as well as Congress' mandates set forth in Section 309(j)(6)(E) of the Communications Act of 1934, as amended (the "Act"). Id.

AT&T recommended that the FCC:

> clarify its [freeze] policy by expressly allowing parties with mutually exclusive applications which were placed on public notice prior to September 14, 1995, to eliminate the mutually exclusive situations by voluntary agreement. To ensure that such voluntary negotiations are carried out quickly and do not delay Commission action on the processing of 39 GHz applications in general, AT&T asserts that parties be required to resolve any mutually exclusive situations and to amend their applications within 120 days of the adoption of a Report and Order in this proceeding.

AT&T Comments at 12-13. Similarly, Ameritech requested that the Commission:

> resume without delay the processing of applications in the 39 GHz band . . . To dismiss such applications after applicants have expended much time and effort in preparing them, paid the fees of attorneys and frequency coordinators, and also paid filing fees to the FCC would be unfair and contrary to settled principles of administrative law.

Comments of Ameritech at 3-4. Columbia, in urging the Commission to resolve this processing issue, noted that an order vacating the portion of the *NPRM* that imposed a freeze on the processing of 39 GHz applications "should be released as quickly as possible and certainly before a full First Report is adopted in this docket, a result that could be obtained by granting

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[2] Biztel's Comments were filed on February 1, 1996, GEC's Comments were filed on January 29, 1996, and TIA's Comments were filed on January 31, 1996.

the petition for reconsideration and emergency request for stay filed by Commco, L.L.C." Comments of Columbia at n.1. Biztel noted that:

> [r]umors of speculation, warehousing, and other 'abuses' that are purported to have occurred are wholly unsubstantiated and patently false. There is absolutely no concrete information in the record or anywhere else that any improprieties or illegal acts have been or are being committed by incumbent 37 GHz and 39 GHz applicants and licensees.

Comments of Biztel at 39.

Therefore, in light of the fact that there is considerable support for, and no opposition to, Commco's Emergency Request for Stay and Petition for Reconsideration, the Commission must act, without further delay, to grant Commco the relief it requested.

B. Construction/Build-Out Requirements for 39 GHz Licensees

There was almost unanimous opposition to the Commission's proposed "transition" rules whereby licensees of rectangular service areas would be given 18 months from the adoption of a Report and Order in this proceeding to file with the Commission a certification that they have constructed a minimum average of four permanently installed and operating links per hundred square kilometers of their licensed service area for each licensed channel block. *NPRM* at ¶105. Commenting parties agreed with Commco that the marketplace for services in this frequency band should define the infrastructure. Moreover, the commenting parties emphasized that all licensees -- incumbents as well as those who acquire spectrum through auction -- should be subject to the same regulatory treatment, including construction obligations. See e.g., Comments of Bachow & Associates, Inc. ("Bachow") at 14; Biztel at 25 and 32; Columbia at 17-19; DCT at 7-15; Milliwave at 16-17; No Wire L.L.C. at 6; and Winstar Communications, Inc. at 45-56. These parties generally agreed that the FCC's proposal is based on an unfounded

apprehension of speculation, which is not supported by the record,[3] and that the proposed disparate treatment of incumbents versus auction winners is arbitrary and capricious.[4]

As detailed in its Comments, Commco strongly opposes adoption of this "transition" regime for three reasons. First, this proposal is a transparent attempt by the Commission to augment the amount of spectrum it will have available to auction. Second, this proposal will have the effect of placing incumbent 39 GHz licensees at a competitive disadvantage to those 37 and 39 GHz licensees that receive spectrum at auction. If the Commission adopts its proposed build-out rules, it will be defining the manner in which 39 GHz networks are to be built-out, before the uses for this spectrum, and the specifications for equipment, have been fully developed. Therefore, while incumbent 39 GHz systems will be required to operate in an artificially imposed straight jacket now, those that receive spectrum at auction will have the flexibility to design and build systems using this spectrum in any number of unique and innovative ways. Third, this "transition" regime will force 39 GHz operators to build out their systems to comply with arbitrary benchmarks rather than actual evolving demand at specific locations.

Commco believes that there is merit in the argument put forth by Columbia opposing the Commission's build-out proposal. In particular, Columbia suggests that:

> [i]t is much more likely that auction winners -- particularly if they are in-region landline telephone companies -- would have a direct incentive to warehouse 37-40 GHz spectrum to prevent new entrants from obtaining it and challenging them in the marketplace. Accordingly, if the Commission is legitimately concerned about 'warehousing,' it should focus its attention on auction winners rather than on

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[3] See e.g., Comments of DCT at 2-4 and Biztel at 27-32.

[4] Id.

current 39 GHz licensees.

Comments of Columbia at 18 (footnote omitted).

Rather than adopting its proposed build-out rules, Commco urged the Commission in its Comments to adopt a more flexible approach as it has done for spectrum expected to be used for other niche services, such as PCS blocks D, E and F. In particular, Commco supports a standard whereby licensees would be required to make a showing of "substantial" service in their licensed service area at a five-year benchmark. This approach will ensure that carriers are building-out their markets, and that actual customer demand is being met, thereby creating stability in this marketplace. Many other commenters supported the adoption of a "substantial service" standard. See e.g., Comments of Bachow at 14; Biztel at 25; Columbia at 19; and Milliwave at 16-17.

C. Channeling Plan and Technical Rules

There was considerable support for adoption of minimal technical rules, and a channelling plan, which would be applied uniformly to operations in the 37 and 39 GHz bands. Many of the Commenters view this approach as essential to the development of a hardy market in both bands. See e.g. Comments of Biztel 40-41; Winstar at 57; and TIA at 23. Commco reiterates its support for the adoption of flexible technical and licensing rules that will allow yet undefined uses of this spectrum to develop. In this regard, the Commission should allow carriers to provide mobile operations on a secondary basis in these spectrum bands. Additionally, Commco urges the Commission to expeditiously (i.e. within six months) adopt guidelines for the provision of point-to-multipoint services in this frequency band.

D. Comments of Motorola Satellite Communications, Inc.

In its Comments, Motorola Satellite Communications, Inc. ("Motorola") petitioned the Commission to allocate the 37.5-38.6 GHz band to Fixed Satellite Service ("FSS") downlinks. Comments of Motorola at 2. Additionally, Motorola requested that the Commission adopt limits on power flux density that apply to the 37.5-40.5 GHz bands to ensure sharing between satellite downlinks and terrestrial services in this spectrum. Id. at 2-3. Finally, Motorola requested that the Commission ensure that:

> any terrestrial non-government uses in the 37 and 39 GHz bands remain subject to the implementation of future satellite systems under the existing allocations; and that NTIA's request for a Space Research allocation in the 37-38 GHz band does not compromise the ability of future satellite systems to provide FSS in the 37.5-38.6 GHz band.

Id. at 3. In response to Motorola's comments, Commco submits that there is no record evidence that domestic sharing is feasible in this band.

III. CONCLUSION

For the reasons discussed above, Commco urges the Commission to adopt rules in this proceeding that will allow the continuing growth and development of services in the 37 and 39 GHz frequency bands.

Respectfully submitted,

COMMCO, L.L.C.

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Date: April 1, 1996

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