

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rulemaking To Amend Parts 1, 2, 21, and 25)
Of the Commission's Rules to Redesignate)
The 27.5 GHz Frequency Band, To)
Reallocate the 29.5-30.0 GHz Frequency)
Band, To Establish Rules and Policies for)
local Multipoint Distribution Service)
And for Fixed Satellite Services)
)
Petitions for Reconsideration of the)
Denial of Applications for Waiver of the)
Commission's Common Carrier Point-to-)
Point Microwave Radio Service Rules)
)
Suite 12 Group Petition for)
Pioneer Preference)

CC Docket No. 92-297

To: The Commission

**OPPOSITION AND COMMENTS OF ZIP COMMUNICATIONS CORPORATION
ON PETITIONS FOR RECONSIDERATION**

Zip Communications Corporation ("Zip"), by its undersigned counsel, hereby submits its Opposition and Comments on certain Petitions for Reconsideration of the *Second Report and Order*^{1/} in the above-captioned proceeding.^{2/}

1/ *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services*, FCC 97-82, released March 13, 1997 (*Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking* in CC Docket No. 92-297) ("*Second Report and Order*").

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List A B C D E

Zip is a start-up company formed exclusively for the purposes of bidding on Local Multipoint Distribution Service ("LMDS") licenses at auction and constructing and operating LMDS systems. Zip generally is satisfied with the rules adopted in the *Second Report and Order* and commends the Commission for creating a flexible regulatory environment for LMDS. For this reason, Zip opposes the requests made in the Petitions filed by WebCel, Cook Inlet and CellularVision. However, in one narrow respect, Zip supports WebCel's Petition. Specifically, Zip, joins in WebCel's request that the Commission impose an "asset test" on those small business entities receiving preferential bidding status at auction.

The Petitions by WebCel, Cook Inlet, and CellularVision clearly attempt to tailor the FCC's rules to favor their own individual circumstances. Contrary to the Petitioners' claims, the majority of the proposals they advance would only create uncertainty in the auction process and serve to delay the commencement of the LMDS auction. Small business eligible bidders are best served by certainty in the FCC's rules and adherence to those rules. As discussed more fully below, the Commission should reject the majority of the requests made by these Petitioners and move towards beginning the LMDS auction as expeditiously as possible.

2/ Eight parties filed petitions for reconsideration of the *Second Report and Order*: Cook Inlet Region, Inc. ("Cook Inlet"); The Independent Alliance ("Alliance"); LBC Communications, Inc. ("LBC"); CellularVision USA, Inc. ("CellularVision"); WebCel Communications, Inc. ("WebCel"); LDH International *et al.* ("LDH"); Sierra Digital Communications, Inc. ("Sierra Digital"); and Rural Telecommunications Group ("RTG"). Zip limits its comments herein to the petitions ("Petitions") filed by Cook Inlet, CellularVision and WebCel.

Of most concern to Zip is CellularVision's proposal to defer principal payments until year seven.^{3/} If adopted, this proposal would create a clear incentive for bidders to engage in speculation in the auction by eliminating the immediate material financial obligations which constrain irresponsible bidding. Accordingly, CellularVision's proposal should be rejected by the Commission.

Similarly, in light of recent precedent in other services,^{4/} Zip is also concerned that companies such as CellularVision may bid at auction based on the expectation that the FCC will forgive their debt obligations if the winning bidders later find they have overreached. Such behavior would distort the value of LMDS licenses and may drive legitimate small businesses out of the auction.

An example of such speculative bidding occurred in the PCS C block auction, where prices for licenses were driven up by certain bidders to the point that several well-capitalized bidders bowed out of the auction rather than pay the severely inflated prices necessary to win licenses. The unfortunate result of this situation is evident now, as winning bidders, several of whom were instrumental in driving up auction prices, seek, through threat of default, to reduce their payment obligations to the federal government.^{5/} To prevent such a situation from occurring in the LMDS auction, the Commission should reject CellularVision's proposal to defer principal payments until year seven.

^{3/} Petition for Partial Reconsideration of CellularVision at 4-5.

^{4/} See, e.g., *In the Matter of Installment Payments for PCS Licenses*, DA 97-649, released March 31, 1997, *Order*.

^{5/} See, Bryan Gruley and Quentin Hardy, *Wireless Bidders Ask to Restructure Debt*, WALL ST. J., June 26, 1997, at A3.

While CellularVision's proposal would promote speculative bidding, Cook Inlet's proposal to abolish installment payment plans for small businesses and instead require a 100% cash payment for licenses^{6/} would curb such abuses. Unfortunately, however, it also would eliminate any meaningful opportunity for small business to participate in the LMDS auction. Zip believes that generally, the FCC's rules for LMDS have set a proper balance between allowing small business participation in LMDS without fostering excessive speculation at auction, and therefore Cook Inlet's proposal should also be rejected.

Zip also opposes the majority of the proposals made by WebCel. However, Zip believes that WebCel raises a valid concern about abuse of the FCC's rules designed to promote small business participation.^{7/} While Zip believes that the FCC's revenue thresholds of \$40 million in revenue for small business benefits and \$40 million to \$75 million for medium-sized business benefits are sound, we also believe that these revenue thresholds should be accompanied by asset thresholds. Under the current rules, a company with over \$1 *Billion* in assets could receive the "small business" benefits of a 25% bidding credit and a ten-year installment payment plan for its licenses. It is difficult to believe that such an asset-rich corporation was what Congress had in mind when it directed the FCC to use its auction authority to "ensure that small businesses . . . are given the opportunity to participate in spectrum-based services"^{8/} and to avoid "excessive

6/ Cook Inlet Petition for Reconsideration at 5.

7/ WebCel Petition for Partial Reconsideration at 11.

8/ 47 U.S.C. § 309(j)(4)(D).

concentration of licenses . . . by disseminating licenses among a wide variety of applicants, including small businesses."^{9/}

Lack of an asset test for small business qualification discriminates against those companies truly in need of financial assistance. Similarly, lack of an asset test for a well capitalized firm which is experiencing very rapid revenue growth but still has less than \$40 million or \$75 million in average revenue over the last three years would discriminate against more mature companies that have similar problems accessing sufficient capital but exceed the FCC's revenue thresholds. Such a company would be just as much in need of financing benefits as a rapidly growing company with large assets but with low revenues.

As the FCC has found on numerous occasions, small businesses lack access to sufficient capital to allow them to compete effectively in the provision of telecommunications services.^{10/} The small business eligibility criteria should address this concern and not allow well-capitalized corporations to profit from rules which were clearly not intended for their benefit. The Commission did not even discuss its decision not to adopt an asset threshold test in the *Second Report and Order*. However, new section 101.1109(c) of the LMDS rules adopted in the *Second Report and Order*, requires winning bidders who qualify as small businesses or businesses with between \$40 million and \$75 million in revenue are required to maintain records of, *inter alia*, their asset

^{9/} 47 U.S.C. § 309(j)(3)(B).

^{10/} See e.g., *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, GN Docket No. 96-113, ¶ 42 (released May 8, 1997).

information.^{11/} This inconsistency suggests that the absence of an asset test may have been an oversight. The Commission should take this opportunity to correct this omission.

Due to these concerns with the potential for abuse of the small business rules, Zip supports WebCel's petition on this matter and suggests that the FCC adopt an "asset test" of \$250 million for small businesses with less than \$40 million in annual revenues, and an asset test of \$500 million for medium-sized businesses with \$40 million to \$75 million in annual revenues.

Finally, while Zip does not qualify for rural telephone benefits, it would support a narrow exemption of the in-region eligibility restrictions for the rural telcos to help ensure that LMDS systems are built out ubiquitously in the United States.

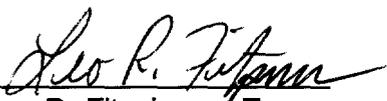
CONCLUSION

For the foregoing reasons, the ZIP urges the Commission to rule on the Petitions for Reconsideration in a manner that is consistent with the views set forth herein.

Respectfully submitted,

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^{11/} See, 47 C.F.R. § 101.1109(c).

CERTIFICATE OF SERVICE

I, Tina Harris, a legal secretary with the law firm of Verner, Liipfert, Bernhard, McPherson & Hand, hereby certify that on this 2nd day of July, 1997, I placed in the mail via first class, postage prepaid, copies of the foregoing **Opposition and Comments of Zip Communications Corporation on Petitions for Reconsideration in CC Docket No. 92-297**, to the following:

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