

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

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DEC 4 - 1997

In the Matter of)	
)	ET Docket No. 95-183
Amendment of the Commission's)	RM-8553
Rules Regarding the 37.0-38.6 GHz and)	
38.6-40.0 GHz Bands)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive)	
Bidding, 37.0-38.6 and 38.6-40.0 GHz)	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RECONSIDERATION

No Wire LLC ("No Wire"), by its attorneys, hereby requests that the Commission reconsider in part its recent Report and Order in the above referenced proceeding.¹ Specifically, No Wire requests the Commission to reconsider Section IV(E)(3) of the 39 GHz Order entitled "Disposition of Pending 39 GHz Band Applications," to permit mutually exclusive applicants to resolve, to the extent possible, such mutual exclusivity through usual and customary amendment procedures. To the extent parties are not able to resolve such mutually exclusive situations within a reasonable time frame to be specified by the Commission, the applications should be subject to dismissal and the channels auctioned as proposed. We note that granting this relief is consistent with actions recently taken by Congress and the Commission in an analogous situation involving mutually exclusive broadcast applications. Adopting the relief herein requested would prevent the undue

¹ Report and Order and Second Notice of Proposed Rulemaking in ET Docket No. 95-183 and PP Docket No. 93-253, FCC 97-391, released November 3, 1997 (hereinafter "39 GHz Order").

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disruption of applicants' business plans formulated in good faith reliance upon the rules as they then existed and would permit the parties to try to avoid the forfeiture of the resources already invested in their pending applications and the time and energy spent in prosecuting them. To avoid the patent lack of fairness in merely dismissing these applications, the Commission's decision in the 39 GHz Order should be reconsidered and revised as proposed herein.

I. The Commission's Reliance on Hypothetical Benefits of the Auction Process to Justify the Dismissal of Pending Applications is Misplaced.

In its 39 GHz Order, the Commission represented that it has processed 39 GHz applications which were not mutually exclusive as of December 15, 1995, and were cut-off from competing applications as of November 13, 1995. As to all other applications which were mutually exclusive on December 15, 1995, or which had not been cut-off by November 13, 1995, the Commission held that the public interest compels their dismissal. 39 GHz Order at ¶ 87. In rejecting suggestions that parties be provided an opportunity to settle their cases prior to there being an auction of contested frequencies, the Commission found that its proposed procedures would allow the pending applicants to submit new applications and participate in an auction and that dismissal would "optimize the public's interest by promoting fair and efficient licensing practices." 39 GHz Order at ¶ 90. The Commission's stated rationale is that "competitive bidding allows spectrum to be acquired by the parties who value it most highly and increases the likelihood that innovative competitive services would be offered to consumers." *Id.* The Commission further concludes, without discussion, that "these benefits will be lost, in part, if we were to process pending mutually exclusive applications under our old rules." *Id.* If true, these same considerations should have led the

Commission to dismiss all pending applications, not just mutually exclusive ones. We perceive no way to reconcile the Commission's decision to process applications which were not mutually exclusive on December 15, 1995, with its decision not to provide an opportunity for applicants then pending to eliminate application conflicts so they would no longer be mutually exclusive. The Commission's recent debacle in PCS licensing suggests, moreover, that the benefits cited by the Commission do not necessarily flow from the auction process. Ordinarily, use of an auction procedure to license unused spectrum would be administratively efficient, although not as efficient as permitting parties to themselves resolve mutual exclusivity conflicts. In addition to efficiency, it is obvious that an auction procedure permits the public to realize an immediate monetary benefit for the use of spectrum. While these are real advantages, even they are subject to the explicit requirement of the Communications Act which provides that the grant to the Commission of authority to use auctions in the licensing process shall not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation . . . and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 209(J)(6)(E) (emphasis added).

The "benefits" which the Commission believes would be lost "in part" if it permitted an opportunity for eliminating conflicts between pending mutually exclusive applications rather than dismissing them immediately are exceedingly hypothetical. As is now obvious from the recent PCS auction, awarding licenses to the person "valuing it most highly" does not always serve the public interest as they may not be able to pay for their licenses or may be too indebted to provide a viable service. It is equally reasonable to conclude that those parties who first recognized the opportunity and spent the time and effort to apply for

available frequencies are the ones with the highest interest in turning them into a business to service the public. Can it honestly be said, moreover, that cellular licensees who received their licenses by lottery are providing service inferior in terms of innovation or competitiveness to that offered by PCS operators who obtained their frequencies by auction? Reliance on similar hypothetical but unproven criteria led to the Court's overturning of the procedures by which the Commission formerly awarded broadcast licenses. Bechtel v. F.C.C., 957 F2d 873 (D.C. Cir. 1992); Bechtel v. F.C.C., 10 F3d 875 (D.C. Cir. 1993).

The Commission notes as an additional reason for dismissing pending mutually exclusive applications that, were not to do so, it would be required to conduct comparative hearings for those applications. This concern, however, has no relevance to the relief requested by No Wire and many others who have suggested that the Commission permit a period of time within which existing mutual exclusive applicants could attempt to resolve the inconsistencies between their applications so that one or more might be granted. If at the conclusion of that period, accommodations between conflicting applications cannot be reached, then it would be appropriate to dismiss the applications, conditioned on a refund of fees paid, and proceed to an auction. This approach both respects the equities of existing applicants and avoids any burden on the Commission or the public from conducting comparative hearings.

II. The Commission Has Not Properly Considered the Equities of the Pending Applicants.

The hypothetical benefits that the Commission purports to perceive in changing to an auction format should be weighed against the lack of fairness to those parties who, in good faith, filed and pursued applications for these frequencies in compliance with the

Commission's rules. The Commission has given short shrift to this consideration in its decision. In a perfunctory attempt to address the equities of existing applicants, the Commission states that those urging a further opportunity to amend their applications to avoid mutual exclusivity "already have had ample opportunity to file such amendments prior to the commencement of this rulemaking." *Id.* at ¶ 91. This is simply false. No Wire and numerous other parties were actively engaged in settlement discussions at the time the Commission halted all activity on November 13, 1995, by its freeze order. Under the Commission's rules resolving mutual exclusivity problems cannot commence until the universe of potentially mutual applications is known. For any particular application, that determination cannot be made until the appearance on public notice of applications filed within 60 days of the first application's public notice accepting it for filing. For some of No Wire's applications, for example, the 60-day period expired in early November of 1995. Because of the time it takes for applications to appear on public notice as accepted, it is no simple matter to determine which new applications are inconsistent with existing applications (particularly since the Commission's public notices do not give the full coordinates of the service areas).

Nevertheless, many parties with existing mutually exclusive applications were able, in many instances, to resolve their conflicts prior to the freeze and amended their applications to do so. Other applications in pending status at the time of the November 13 freeze order were in the process of resolution when interrupted by the freeze. As the Commission notes in the 38 GHz Order, it announced on January 17, 1997, that amendments to pending applications filed before December 15, 1995, would be processed despite the earlier freeze order. The Commission, however, did not provide "ample opportunity" to resolve conflicts

in applications by, in effect, opening an additional one-month filing window for resolution of inconsistencies where it did not advise all applicants in advance that such an opportunity would be provided.

The Commission also states, without further explanation or support, that "[w]e are not convinced that parties who have not already entered into such agreements will successfully accomplish such agreements now." *Id.* at 91. Of course, there can be no guarantee that parties will be able to resolve conflicts between their applications, although the absence of hearings to resolve conflicts in the past suggests that parties have been able to reach accommodations. In any event, the possibility that conflicts may not be resolved in no way suggests that an opportunity to attempt such a resolution should be denied, particularly where the authorizing statute specifically provides that removal of conflicts between mutually exclusive applications is an obligation imposed on the Commission. 47 U.S.C. § 309(J)(6)(E). Neither Congress nor the Commission has required any guarantee of settlement in providing a settlement window for pending mutually exclusive broadcast applications where, if they fail to settle, the disposition of the frequencies also will be governed by auction procedures.

The Commission also seems to feel that the fact that existing applicants will have an opportunity to participate in the auction eliminates any unfairness and is a substitute for reaching agreements on resolving mutual exclusivity. *Id.* How partitioning, disaggregation or forming joint ventures would be comparable to a negotiated resolution of conflicts is not explained and certainly is not apparent, at least to No Wire. Mutual exclusivity in many cases can be resolved by simply reducing the service area of one or both applications so that their service contours no longer overlap. The Commission fails to explain how the auction

process would result in similar relief. The incentive for the parties to reduce their service areas and thus eliminate exclusivity is based on the prospect of a grant of their respective applications. This incentive is entirely lacking where the parties are engaged in an auction proceeding for a larger or different area. Mutual exclusivity between pending applications also can be resolved where an applicant in one market will dismiss its application for a frequency that is mutually exclusive with another party's application in that market in return for the other party dismissing a conflicting application in a different market thus permitting each of the parties to obtain a grant in one of the markets for which they have applied. Again, it is not apparent how partitioning, disaggregation or joint venture arrangements would yield the same result. Allowing an existing applicant to participate in an auction does not repay the applicant for the money, time and energy expended in pursuing its applications, especially coming as it does two years after the initial freeze.

The Commission also notes that permitting resolution of the conflicts between pending applications so they could be granted would deprive other entities of an opportunity to apply and bid on that spectrum. *Id.* The Commission's statement is obviously correct, but granting this relief is in no way unfair to the "other entities." Every entity which would participate in any future auction had an opportunity to file an application for these frequencies if it desired to do so. The only persons foreclosed from applying were those foreclosed by the Commission's cut-off rules. There is thus no element of unfairness to entities who might now wish to belatedly apply for this spectrum. Indeed, the Commission's decision to process rather than dismiss non-mutually exclusive applications also foreclosed "other entities" from applying for that spectrum.

The Commission indicates that permitting pending applicants to resolve conflicts through amendments, thus foreclosing other entities who would otherwise apply for that spectrum, might "inhibit the development of new and innovative services in the spectrum." Again, the Commission fails to explain how this result would flow from a grant of pending applications. True, the area within such grants would not be subject to competitive bidding, but there is no basis on this record for concluding that the party receiving a grant for such areas would be less likely to offer innovative services than another applicant operating on a different frequency obtained through auction in the same market. Competition is much more likely to result in the provision of new and innovative services than granting licenses through an auction proceeding.

The Commission's ultimate conclusion that "existing applicants have a reasonable avenue of relief for their concerns in the procedures we adopt herein," *id.*, simply has no justification on this record. The Commission has failed to address in any meaningful way why the equities of existing applicants must be sacrificed to obtain the very hypothetical benefits, if any, of an auction, especially where doing so is inconsistent with the governing statute.

III. The Commission Should Adopt Procedures for 39 GHz Applications comparable to Those Used for Pending Broadcast Applications.

Faced with a decision to auction broadcast spectrum where there were pending mutually exclusive applications for numerous frequencies, Congress recently provided a period of time within which pending mutually exclusive applicants would have an opportunity to resolve the conflicts between their applications and only failing such resolution would the

spectrum there at issue be auctioned.² While the frequencies there were broadcast frequencies, the concerns underlying the Congressional action do not appear to be materially different. It would be at least incongruous were Congress to recognize incumbent's equities in one area while the Commission suggests they do not exist in the instant proceeding. The same assumptions and hypothetical benefits upon which the Commission relies here would presumably also justify the dismissal of all such pending broadcast applications without an opportunity to resolve inconsistencies so that everyone with any interest in obtaining those frequencies would have an opportunity to bid for them. They then might go to the user who values them most highly and who would be most likely to provide new innovative services using that spectrum. Yet Congress has taken a very different tack which recognizes the basic fairness of permitting existing applicants who have applied in conformity with the rules, as No Wire and other applicants have done here, to attempt to resolve conflicts prior to an auction. Indeed, in its recent Notice of Proposed Rulemaking in connection with these broadcast frequencies,³ the Commission noted that many of the parties applied at a time when they were aware that the Commission's comparative criteria for deciding these applications had been struck down in part by the Court of Appeals as being based on unproven hypotheses. Thus in the instant case, the equities of the applicants are even stronger as at the time they applied they had no knowledge that there was any infirmity with respect to the Commission's procedures regarding their applications.

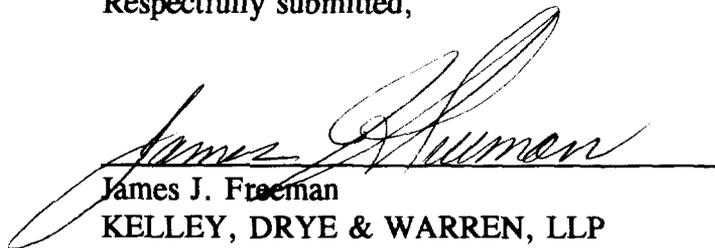
² Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1977); 47 U.S.C. § 309(l)

³ FCC 97-397, released November 26, 1997.

CONCLUSION

In accordance with the foregoing, it is respectfully requested that the Commission reconsider the 38 GHz Order with respect to the disposition of pending applications and provide that those mutually exclusive applications which had passed the cut-off date be provided a reasonable opportunity to resolve conflicts causing mutual exclusivity. Since the instant the 39 GHz Order has been released nearly two years after the issuance of the Commission's freeze order, a short additional period for resolving mutually exclusive applications should not be contrary to the public interest.

Respectfully submitted,



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