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

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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. ~~85~~ 95-183
	)	
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
	)	
Applications of Bachow Communications, Inc. for 39 GHz facilities in various markets throughout the United States	)	File Nos. 9409306, 9409308, 9409309, 9409310, 9409312, 9409313, 9409314, 9409316, 9409320, 9409322, 9409323, 9409326, 9409327, 9409328, 9409330, and 9409411

To: The Commission

PETITION FOR RECONSIDERATION

Bachow and Associates, Inc. ("Bachow") and Bachow Communications, Inc. ("BCI"), by their attorneys pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Sections 1.106 and 1.429(a) of the Commission's Rules and Regulations, 47 C.F.R. §§ 1.106 & 1.429(a), hereby respectfully seek reconsideration of the Report and Order ("*R&O*") portion of the *Report and Order and Second Notice of Proposed Rulemaking* (FCC 97-391; released November 3, 1997), ___ FCC Rcd ___, 8 Com. Reg. (P&F) 3002, 63 Fed. Reg. 6079 (February 6, 1998).[1]

[1] The Second Notice of Proposed Rulemaking portion was published in the Federal Register on January 21, 1998. 63 Fed. Reg. 3075 (January 21, 1998).

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Bachow filed comments in this proceeding on March 4, 1996, and reply comments on April 1, 1996. BCI, an affiliate of Bachow, holds 39 GHz authorizations for fifteen markets throughout the U.S., and has pending applications for another sixteen markets, fifteen of which are mutually exclusive with filings by other applicants.[2] Bachow and BCI thus have a direct interest in this proceeding.

A. Dismissal of Pending, Timely-Filed, Mutually Exclusive Applications in Anticipation of New Parties' Applications Violates Section 309(e) of the Communications Act and Dismissed Applicants' Due Process Rights.

Petitioners seek reconsideration of the *R&O* insofar as it undertakes to dismiss timely filed pending mutually exclusive applications. Specifically, the Commission "determined that the best approach for processing pending mutually exclusive applications is to dismiss them without prejudice, and to allow these applicants to submit new applications under the competitive bidding rules established in this proceeding." *R&O* at ¶ 88. BCI has 39 GHz applications pending in sixteen markets, and fifteen of them are mutually exclusive and therefore subject to dismissal pursuant to the *R&O*. Each of the BCI applications was timely under the rules in effect at the time of filing, and the applicable cut-off window for each such application has long since closed.[3] The Commission's proposal to dismiss BCI's applications without prejudice to refiling in a future auction is, for all significant purposes, the equivalent of reopening the cut-off window and accepting new mutually exclusive applications. This violates BCI's comparative

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[2] The file numbers for BCI's applications are listed in the caption. Although it appears that these such applications have not yet actually been dismissed, out of an abundance of caution BCI also seeks reconsideration of the *R&O*, pursuant to Section 1.106 of the Rules, 47 C.F.R. § 1.106, to the extent it is deemed an action dismissing these applications.

[3] When these applications were filed, the applicable cut-off period for mutually exclusive applications was sixty days from the date of public notice of the first-filed application (or at least one day prior to the grant of the first-filed application if it was granted prior to the sixtieth day). 47 C.F.R. § 21.31(b). Attachment A hereto is a listing demonstrating the timeliness of each of BCI's captioned applications under this rule.

consideration rights under Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), as interpreted by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945), and must be changed.

The Commission's sole justification for dismissing pending applications is its finding that auctions the preferable method for choosing from among competing applicants:

> [T]he use of a competitive bidding system for licensing the 39 GHz band constitutes the best method for choosing among mutually exclusive applicants. Competitive bidding allows spectrum to be acquired by the parties who value it most highly and increases the likelihood that innovative, competitive services will be offered to consumers. These benefits will be lost, in part, if we were to process pending mutually exclusive applications under our old rules.

Id. at ¶ 90. But this is a *non sequitur*. Changing the method by which mutual exclusivity is resolved does not require dismissal of timely filed mutually exclusive applications. The question of what method should be used to choose from among several mutually exclusive applications is an entirely separate issue from the question whether timely filed mutually exclusive applicants may be subjected to new mutually exclusive applications after the cut-off date. While the Commission may change the method for resolving mutual exclusivity between pending applications, *see Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) (upholding the Commission's application of lotteries to mutually exclusive applications that had been filed in anticipation of comparative hearings), it may not, in the process, negate the cut-off rights of timely filed applicants.

The proposed dismissal of the pending mutually exclusive applications is violative of the applicants' statutory due process rights. This very issue was addressed by the United States Court of Appeals for the District of Columbia Circuit in *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) ("*McElroy*") and *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) ("*McElroy II*"). The Court evaluated the Commission's attempts to deal with the

transition as it changed the rules and procedures for "fill-in" or "unserved area" cellular applications. A recitation of the pertinent facts of the McElroy cases, and the Court's decisions, will make clear that the action proposed by the Commission here is improper and unlawful.

Cellular rules provide for the issuance of hybrid applicant-defined / geographic licenses, giving the initial licensee exclusive rights to an FCC-defined market area for a period of five years, thereby affording the initial licensee time to "build-out" its system. The regulations originally provided that, at the end of the five year build-out period, third parties were free to apply for authorizations to fill-in any areas in the market not being served by the initial licensee. The rules further provided that such applications would be processed under a sixty-day public notice cut-off window, *i.e.*, to be entitled to comparative consideration with such a fill-in application, any mutually exclusive application must be submitted within sixty days of the public notice announcing the first filed application.

In reliance on these rules, several parties filed fill-in applications in several markets upon the expiration of the applicable five-year for an MSA or an RSA. These fill-in applications were listed on public notice as accepted for filing, prompting the timely filing of some mutually exclusive applications from additional parties. Long after the sixty-day cut-off window had closed, the Commission dismissed all of these applications on the theory that they were premature, insofar as the Commission had not yet developed specific rules for processing such applications. The Court disagreed, holding that the applications were filed in justifiable reliance on the rules in effect at the time of filing. Accordingly, the matter was remanded to the Commission with instructions to reinstate the fill-in applications. *McElroy I*.

In the meantime, the Commission adopted new regulations for what it decided to call "unserved area" applications. There were some marked differences between the new "unserved area" procedures and those that had previously applied to "fill-in" applications. First, the Commission decided to move to a geographic licensing scheme for unserved area filings, so that an application for any portion of an unserved area in a given market would be deemed mutually exclusive with any other application for any other unserved area in that market, regardless of actual conflict. Under the older rules, fill-in applications were deemed mutually exclusive only if their applicant-defined CGSAs overlapped. Second, the Commission replaced the public notice and sixty-day cut-off window procedure with date-specific filing windows to be announced for each market. Third, the Commission decided to use random selection procedures (lotteries), rather than comparative hearings, to choose among mutually exclusive applicants.

Pursuant to these new rules, the Commission accepted numerous unserved area applications, including many for markets in which the older fill-in applications at issue in *McElroy I* had been filed. Having now received these newer applications and having scheduled a lottery, and faced with the Court's mandate in *McElroy I*, the Commission reinstated the fill-in applications and included them in the scheduled lottery along with the newly-filed unserved area applications. The fill-in applicants objected and sought a judicial writ of mandamus. In *McElroy II* The Court rejected the Commission's approach, holding that the fill-in applicants were entitled to the protection of the cut-off procedures with which they had fully complied and upon which they had reasonably relied:

> The notice and cut-off procedure serves the public's interest in administrative finality and prompt issuance of licenses. Furthermore, as against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the cut-off rules. *Florida Inst. of Tech.*, 952 F2d at 554; *City of Angels*, 745 F2d at 663. To serve these purposes, the court has frequently affirmed the Commission's strict enforcement of its rules.

> *See Florida Inst. of Tech.*, 952 F2d at 550 (*citing Salzer v. FCC*, 778 F2d 869, 875 (DC Cir 1985)). Moreover, the Commission may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors of a mutually exclusive application. *Reuters*, 781 F2d at 949-51 & n.5.

McElroy II, 86 F.3d at 275.

The situation here is indistinguishable in any significant sense from that addressed in *McElroy II*. Here, as in *McElroy II*:

- the Commission has before it pending applications that were timely filed in justifiable reliance on established cut-off rules, and the applicable cut-off windows under those rules have closed;
- the Commission has moved from applicant-defined service areas to geographic licensing;
- the Commission has decided to change the method of choosing among mutually exclusive applicants; and
- the applications to be filed pursuant to the new rules would be mutually exclusive with the prior-filed applications and, under the old cut-off rules, untimely.

Here, as it was in *McElroy II*, the Commission is faced with the problem of attempting to accept new mutually exclusive applications under a new set of licensing procedures without improperly violating the rights of parties with prior-filed applications under the old procedures.

In *McElroy II* the Commission attempted to avoid this dilemma by simply including the old applications in the lottery along with the new applications, an approach rejected by the Court. Here the Commission attempts a slightly different tack. It proposes to dismiss the old applications, but to allow the dismissed applicants to refile for the future auction along with an indeterminate number of new applicants. This distinction is without meaningful difference.

Whether the Commission (a) retains the pending applications on file, changes application processing rules, and then accepts additional mutually applications, or (b) changes the application processing rules, dismisses the pending applications without prejudice, and then accepts new applications from all interested parties, the end result is the same. The pending applications are being subjected to new competing applications after the cut-off date. The gravamen of the *McElroy II* holding is that those applicants who have relied in good faith on duly adopted public notice and cut-off procedures may not have their justifiable rights and expectations dashed simply because the Commission has decided to change the way it does things in the future. It is violation of vested reasonable expectations under the cut-off rules that is prohibited; the Commission may not avoid this by finding a more clever method of violating the applicants' rights.[4]

[4] Even if the proposed dismissals were not unlawful *per se*, it would nonetheless be incumbent upon the Commission to explain and justify why it is reaching a decision here that is markedly different from the one it reached in similar circumstances in another matter. Specifically, when recently confronted with precisely the same issue in the wireless cable (MMDS) proceeding, the Commission decided to retain pending mutually exclusive applications on file and to process them under the rules in effect at the time they were filed, even deciding to retain lotteries rather than using the newly-adopted auction procedures. *Report and Order in MM Docket No. 94-131 & PP Docket No. 93-253* (FCC 95-230), 78 RR 2d 856 at 87-93 (1995). Most of the reasons cited by the Commission for its decision there (fairness to the applicants, previous processing delays, potential further delays in processing and implementation of service, *etc.*) are equally applicable here.

B. Failure to Facilitate Settlements and Refusal to Provide a Meaningful Opportunity for Resolution of Mutually Exclusive Proceedings Violates the Commission's Statutory Auction Authority.

The Commission further stated in the *R&O* that:

> We also find that those who believe that they should be afforded the opportunity to amend their pending applications to avoid mutual exclusivity had ample opportunity to file such amendments prior to the commencement of this rule making. We are not convinced that parties who have not already entered such agreements will successfully accomplish such agreements now. ... If ... we permitted pending mutually exclusive applicants to resolve their conflicts outside the structure of the competitive bidding process, other entities would be foreclosed from an opportunity to apply for 39 GHz spectrum under the flexible rules we adopt herein. This would have the result of limiting the pool of potential applicants to those who have already filed under the current, more restrictive rules, and may inhibit the development of new and innovative services in this spectrum. Accordingly, we find that existing applicants have a reasonable avenue of relief for their concerns in the procedures we adopt herein, and we deny their requests.

R&O at ¶ 91. This represents and erroneous legal conclusion based on an inaccurate factual premise. The efforts of many applicants, including BCI, to reach settlement were in fact hampered by the actions and inactions of the Commission. Moreover, the Commission's refusal to accommodate further settlement efforts because it wants to accept additional mutually exclusive applications is logically absurd and legally at odds with the Commission's statutory auction authority.

As Bachow explained in its comments and reply comments in this proceeding, BCI was able to resolve multiple mutually exclusive situations in half of the thirty two markets in which it filed 39 GHz applications. Its inability to resolve conflicts in the remaining markets is primarily due to the refusal of applicants there to conform to the Commission's directives. BCI reduced its initial requests for four channels in each market to requests for a single channel in each market in compliance with the Commission's September 19, 1994 Public Notice directing applicants to reduce their channel requests and service area sizes. Such reductions greatly facilitated the

settlement process. In virtually all of the markets where BCI still has pending applications, it is in conflict with an applicant who failed to comply with the Commission's directive. BCI has been unsuccessful in convincing the other applicant to reduce its requests for multiple channels in an effort to resolve the conflict.[5]

Bachow proposed in its comments and reply comments that the Commission dismiss all nonconforming applications, but it has decided instead to dismiss all applications. The unfairness of this approach is manifest. BCI took great pains to comply with the Commission's request, and in those markets where other applicants did likewise, settlements were reached. In some markets some applicants refused to comply, thereby thwarting settlement efforts. For the Commission to foreclose further settlement efforts without first insisting that all pending applications be brought into conformance is discriminatory and inequitable.

Moreover, the Commission's action is in direct violation Section 309(j) of the Communications Act of 1934, the very statutory provision that gives the Commission auction authority. The Commission's refusal to facilitate settlement by applying its application acceptability directives on a nondiscriminatory basis, and its refusal to provide further opportunity to resolve mutually exclusive conflicts is contrary to the Commission's statutory obligation to "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E). Despite this statutory directive the Commission refuses to facilitate and provide for resolution of mutually exclusive proceedings. The mere failure to do so is violative of the statute, but to refuse

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[5] *See Comments of Bachow and Associates, Inc.* (filed March 4, 1996) at p. 6; *Reply Comments of Bachow and Associates, Inc.* (filed April 1, 1996) at pp. 5-6.

for the express purpose of accepting even more mutually exclusive applications smacks of direct defiance by the Commission of its Congressional mandate.

WHEREFORE, good cause and justification having been show, it is respectfully requested that the Commission reconsider the Report and Order; that it retain the mutually exclusive applications on file; that it provide further opportunity for settlements; that it facilitate settlements by enforcing its application acceptability directives on a non-discriminatory basis; that it not accept any further applications in any proceeding in which the applicable cut-off window has closed; and that it afford full comparative consideration (regardless of method chosen for resolution) to all timely filed mutually exclusive applicants.

Respectfully submitted this 9th day of March, 1998,

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The following list demonstrates the timeliness of each pending Bachow Communications, Inc. ("BCI") application. For each entry, the first line shows the market and the channel specified in the BCI application. The second line shows the applicable cut-off date. The third line shows the name, file number, and public notice date for the application that established the cut-off date. Finally, the fourth line shows the file number of the BCI application and the date it was filed with the Commission. In each case, the BCI application was filed prior to the applicable cut-off date.

- **Chicago, IL** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404169 (Public Notice 6 July 1994)
  BCI File Number 9409312 (Application filed 26 August 1994)

- **Cleveland, OH** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404171 (Public Notice 6 July 1994)
  BCI File Number 9409328 (Application filed 26 August 1994)

- **Dallas, TX** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 28 August 1994[1]
  BizTel File Number 9404223 (Public Notice 29 June 1994)
  BCI File Number 9409316 (Application filed 26 August 1994)

- **Denver, CO** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404173 (Public Notice 6 July 1994)
  BCI File Number 9409309 (Application filed 26 August 1994)

- **Detroit, MI** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404174 (Public Notice 6 July 1994)
  BCI File Number 9409322 (Application filed 26 August 1994)

- **Kansas City, MO** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404176 (Public Notice 6 July 1994)
  BCI File Number 9409314 (Application filed 26 August 1994)

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[1] Even if established by reference to Avant Garde File Number 9404172 (Public Notice 6 July 1994), the applicable cut-off date would be 4 September 1994, and BCI's application is still timely filed.

- **Minneapolis, MN** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404180 (Public Notice 6 July 1994)
  BCI File Number 9409323 (Application filed 26 August 1994)

- **New York (Long Island), NY** (Channel 12: 39,150-39,200/39,850-39,900 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404181 (Public Notice 6 July 1994)
  BCI File Number 9409327 (Application filed 26 August 1994)

- **New York (Manhattan), NY** (Channel 12: 39,150-39,200/39,850-39,900 MHz)
  Cut-Off Date 20 March 1995[2]
  Domencich File Number 9407957 (Public Notice 18 January 1995)
  BCI File Number 9409327 (Application filed 26 August 1994)

- **New York (New Jersey), NY** (Channel 12: 39,150-39,200/39,850-39,900 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404182 (Public Notice 6 July 1994)
  BCI File Number 9409326 (Application filed 26 August 1994)

- **Philadelphia, PA** (Channel 12: 39,150-39,200/39,850-39,900 MHz)[3]
  Cut-Off Date 28 August 1994[4]
  American File Number 9403777 (Public Notice 29 June 1994)
  BCI File Number 9409308 (Application filed 26 August 1994)

- **Phoenix, AZ** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404185 (Public Notice 6 July 1994)
  BCI File Number 9409310 (Application filed 26 August 1994)

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[2] BCI's Manhattan application also conflicts with a previously granted Avant Garde authorization. BCI has challenged the Avant Garde authorization on the grounds that the grant was intended to be for a temporary-fixed rather than a regular point-to-point microwave authorization.

[3] BCI's Philadelphia application is no longer mutually exclusive with any other timely filed application, and the mutual exclusivity was resolved prior to 13 November 1995. Accordingly, this application is eligible for processing and grant.

[4] Even if established by reference to Avant Garde File Number 9404184 (Public Notice 6 July 1994), the applicable cut-off date would be 4 September 1994, and BCI's application is still timely filed.

- **Pittsburgh, PA** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404186 (Public Notice 6 July 1994)
  BCI File Number 9409330 (Application filed 26 August 1994)

- **San Francisco, CA** (Channel 8: 38,950-39,000/39,650-39,700 MHz)
  Cut-Off Date 28 August 1994
  BizTel File Number 9404237 (Public Notice 29 June 1994)
  BCI File Number 9409330 (Application filed 26 August 1994)

- **Seattle, WA** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 28 August 1994[5]
  BizTel File Number 9404244 (Public Notice 29 June 1994)
  BCI File Number 9404244 (Application filed 26 August 1994)

- **St. Louis, MO** (Channel 2: 38,650-38,700/39,350-39,400 MHz)
  Cut-Off Date 4 September 1994
  Avant Garde File Number 9404190 (Public Notice 6 July 1994)
  BCI File Number 9409411 (Application filed 26 August 1994)

[5] Even if established by reference to Avant Garde File Number 9404164 (Public Notice 6 July 1994), the applicable cut-off date would be 4 September 1994, and BCI's application is still timely filed.