



October 17, 2006

Filed Electronically Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte Submission of Covad Communications Group, Inc.:* Wireless Operations in the 3650-3700 MHz Band, ET Docket No. 04-151; Rules for Wireless Broadband Services in the 3650-3700 MHz Band, WT Docket No. 05-96; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, ET Docket No. 02-380; Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band, ET Docket No. 98-237

Dear Ms. Dortch:

On August 22, 2006, Covad Communications Group, Inc. ("Covad") submitted an innovative and forward-looking proposal that would resolve outstanding concerns regarding the use of the 3650-3700 MHz band (the "3.65 GHz Band"). Covad's plan would allow new entrants to rapidly build out high quality wireless broadband service networks in a way that would most fully utilize the available spectrum at the lowest cost while providing the operational reliability necessary to attract investment in those systems.

An important element of Covad's proposal is the use of an unlicensed regime in which service providers that have constructed facilities and are actually serving customers could enjoy coordination rights relative to providers seeking to construct facilities using the same frequencies in the same geographic areas of the original provider's facilities. This allowance for coordination rights would not amount to the grant of a mutually exclusive application for a commercial spectrum license, which would require that the spectrum be auctioned under Section 309(j) of the Communications Act, 47 U.S.C. § 309(j). As discussed below, Section 309(j) would not apply under Covad's proposal because the Commission would not grant a license for the exclusive use of any 3.65 GHz Band spectrum, nor would the Commission accept mutually exclusive applications.

Under Covad's proposal, a party which seeks to build a facility which utilizes frequencies in the 3.65 GHz Band would be required to register the proposed facilities with the Commission and disclose relevant engineering parameters of the facility. The party would then have 90 days in which to complete construction of the facility. If the party certified within this 90 day period that

the facility had been constructed and that service to the public had commenced, any subsequent party seeking to construct a facility utilizing the same frequencies within the predicted service contours of the previously constructed facility would be required to coordinate with the party operating the earlier constructed facility to avoid harmful interference to the operations of that facility.

It is critical to note that the first party to construct a facility and provide service would not enjoy exclusive rights to use the frequencies associated with that initially constructed facility. Rather, subsequent registrants would be able to use the fully panoply of engineering techniques to avoid interference with the prior registrant's facilities. These registration and coordination requirements would be facilitated by the other features of Covad's proposal, including the specification of a uniform channelization plan for the band, the requirement of sectorized antennas in large markets where demand for use of the spectrum may be high, the requirement of streamlined dispute resolution processes, and technical standards specifying minimum spectral efficiency requirements. Moreover, when contention based technology matures, use of contention based technology, as originally contemplated by the Commission's Order in this proceeding, could serve as the basis for a registrant to demonstrate that it will not cause harmful interference to an earlier registrant already using the frequencies it proposes to employ in the same geographic area.¹⁷ In short, far from specifying exclusive use of the 3.65 GHz Band by individual licensees in particular areas, Covad's proposed framework simply incorporates into the Commission's rules the types of sound frequency engineering practices that wireless operators currently employ to avoid mutually destructive interference.

Nothing in Section 309(j) limits the adoption of such spectrum management rules. Section 309(j)(1) provides that:

If, consistent with the obligations described in paragraph 6(E), mutually exclusive applications are accepted for any initial license or construction permit, then...the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

First, the plain language of the statute addresses only situations where the Commission "accept[s]" "mutually exclusive applications." Under Covad's proposal, parties who register facilities using 3.65 GHz Band frequencies merely gain coordination rights with respect to subsequent registrants. There is no process for multiple parties to simultaneously apply for use of the same frequencies to the exclusion of each other – rather, later registrants' use of the same frequencies in the same geographic area is simply conditioned on successful coordination with the earlier registrant.

¹⁷ See, e.g., *Ex Parte* Letter from Mary Brown, Cisco Systems, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated August 21, 2006 (discussing current development of standards for 802.11 operations in the 3650-3700 MHz band that will allow near-term rollout of equipment that complies fully with the contention-based controls anticipated by the Order).

Second, Congress made clear that this grant of auction authority was in no way intended to substitute for other spectrum use rules that facilitate shared use of spectrum. The Commission is only directed to use auctions “consistent with the obligations described in paragraph 6(E),” which in turn states that:

Nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the 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[.]

Congress’ intent is clearly stated in the legislative history of Section 309(j). Section 309(j)(6)(E) was added by Congress because it was “particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.” H.R. Rep. No. 105-217, at 572 (July 30, 1997) (“Conference Report”).

Taken as a whole, Covad’s proposed combination of specified “engineering solutions” and “service regulations” is exactly the sort of spectrum utilization regime that Congress intended to carve out from the requirement of auctions. In the case of the 3.65 GHz Band, the Commission’s initial decision appropriately favored an unlicensed approach that will foster rapid development of widespread broadband networks through a registration mechanism that did not involve mutually exclusive applications. Covad’s proposal does not change this regime, but rather provides a coordination framework and supporting rules for shared, unlicensed use of the band. Therefore, Covad’s proposal would not transform the Commission’s favored regime into a licensing scheme subject to Section 309(j).

Covad respectfully submits that its proposed framework is also fully consistent with the Commission’s public interest obligation to maximize efficient use of spectrum, which Section 309(j) expressly acknowledges. The key benefit of this regime is that parties who construct facilities using unlicensed spectrum may invest in deploying these facilities and providing service to the public with a reasonable measure of certainty that available means of coordination will be utilized and that they will not be subject to harmful interference which could disrupt existing customer relationships. Similarly, the investors who fund such deployments will gain heightened confidence that companies will be able to provide service in a stable, predictable environment.

As Commissioner Adelstein stated upon release of the *70/80/90 GHz Order*, in which the Commission determined that the public interest would best be served by the issuance of non-

exclusive licenses outside of the auction process in those bands, “the public interest is not always served by adopting a licensing scheme that creates mutual exclusivity.”^{2/} In the present instance, as in the *70/80/90 GHz Order*, the public interest would best be served by the coordinated, non-exclusive use of the 3.65 GHz Band by unlicensed users, subject to service rules that promote accelerated rollout of service in the band.

Very truly yours,

/s/ James A. Kirkland

James A. Kirkland
Senior Vice President, Strategic Development and General Counsel

Of Counsel:

Russell H. Fox
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
202-434-7300

cc: James Schlichting
David Furth
Tom Stanley
Paul Murray
Jennifer Salhus
Nese Guendelsberger
Won Kim
Marty Liebman
Eli Johnson
Julius Knapp
Alan Scime
Gary Thayer
Jamison Prime
Ira Keltz
Jeff Dygert
Ronald Chase
Ahmed Lahjouji
Rashmi Doshi
Geraldine Matisse

^{2/} *Allocations and Service Rules for the 71-76 GHz, 81-86 GHz, and 92-95 GHz Bands*, Report and Order, 18 FCC Rcd. 23318, 23383 (2003) (“*70/80/90 GHz Order*”).