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TELECOMMUNICATIONS LAW UPDATES

FCC Completes Rulemaking Clearing the Way for 39 GHz Auctions

In late July, the FCC released a Memorandum Opinion and Order completing the rulemaking process for the 38.6-40.0 GHz ("39 GHz") band. In its decision, the FCC addressed various petitions for reconsideration of earlier actions in this proceeding, and revisited its licensing and service rules for 39 GHz licensees. This action paves the way for the first auction of licenses in this service, which will likely commence in the second quarter of 2000.

Interest in the 39 GHz band has grown significantly since the FCC first began assigning licenses in the band in the 1970's, due to technological advancements and increased regulatory flexibility. Although 39 GHz licenses originally were for fixed services, in 1997 the FCC expanded the regulatory framework for the 39 GHz band to permit the provision of mobile operations. Under current FCC rules, incumbent and future 39 GHz licensees may provide fixed and mobile communications, including point-to-point and point-to-multipoint applications. As with the Local Multipoint Distribution Service ("LMDS"), Multipoint Distribution Service ("MDS" or "wireless cable") and "24 GHz" services, 39 GHz will allow carriers to provide a variety of broadband services to their customers, such as wireless local loop and high speed Internet access.

Historically, the FCC awarded 39 GHz licenses on a first-come, first-served basis, and used comparative hearings when competing applications could not be accommodated through alternative frequencies. In 1995, the FCC decided to revisit this licensing scheme and proposed to award all future 39 GHz licenses by auction. At

the same time, the FCC placed a "freeze" on the filing of new applications for 39 GHz licenses, which remains in effect today. It also dismissed the majority of applications that were pending when the freeze was adopted. These actions had the effect of increasing the piecemeal value of the licenses already held by 39 GHz incumbents, such as Winstar Communications, AT&T (via its acquisition of Teleport Communications), and Advanced Radio Telecom.

Several parties challenged the FCC's decisions to auction future 39 GHz licenses and dismiss pending applications. In its July action, the FCC upheld its earlier decisions on these issues, stating that, with limited exceptions, the Balanced Budget Act of 1997's amendments to the FCC's licensing authority require it to use auctions to resolve competing applications for all categories of spectrum licenses. Significantly, the FCC rejected arguments that the statute requires it to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in 39 GHz licensing proceedings, once it determines that licenses should be awarded by auction. (This action also may signal that the FCC is determined to hold the line on its auction proposals as they apply to wireless services in general, despite the controversy over those proposals.)

The FCC will auction a total of 175 authorizations for each of the 14 paired 39 GHz channel blocks, covering the continental United States; Guam and the Northern Mariana Islands; Puerto Rico and the U.S. Virgin Islands; and American Samoa. Each block is comprised of 50 MHz of

spectrum in a given geographic area. The 175 license service areas are based on the U.S. Department of Commerce's Economic Areas ("EAs"). There is no limit on the number of licenses an applicant may acquire; thus, applicants whose business plans require more capacity than one channel block may aggregate spectrum within a given service area. Nor is there any limit on the number of service areas that may be acquired. The FCC will issue initial licenses for a ten-year term. As with most other FCC licensed services, licensees that are able to demonstrate that they are providing "substantial service" to their covered service areas can expect that their licenses will be renewed.

Because of the large number of licenses available (approximately 2450 licenses in total), the FCC may decide to hold a series of 39 GHz auctions, rather than a single auction. Once a final date for the first 39 GHz auction is established, the FCC will release a series of public notices setting forth application and filing instructions. In addition, the FCC's Wireless Telecommunications Bureau will seek comment on proposed up-front payment and minimum opening bid amounts, as well as on specific auction procedures. Consistent with previous auctions, the FCC will require that prospective bidders file an application to participate in the auction and pay an up-front payment based on the number of licenses on which they intend to bid. Winning bidders must file detailed ownership information at the close of the auction for review by the FCC, and may be subject to petitions to deny before they are entitled to the licenses. They must pay the balance of their winning bids once their licenses are granted. "Small businesses" (businesses with average annual gross revenues of not more than \$40 million for the preceding three years) are eligible for a 25 percent bidding credit; "very small businesses" (businesses with average

annual gross revenues of not more than \$15 million for the preceding three years) are eligible for a 35 percent bidding credit.

As noted above, several existing 39 GHz licensees, including Winstar, Teleport and Advanced Radio Telecom, already are using this spectrum to supply high-capacity voice and data services. Because FCC rules require that new licensees avoid causing harmful interference to incumbents, the FCC is encouraging potential bidders to conduct due diligence studies to determine any restrictions on their ability to use certain portions of the spectrum, or to provide service in any given geographic license area.

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

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