

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of)
)
WIRELESS COMMUNICATIONS) Auction No. 30
ASSOCIATION INTERNATIONAL)
)
Regarding Applications and Licenses)
Of Winners of the 39 GHz Auction)

ORDER

Adopted: October 31, 2001

Released: November 7, 2001

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* On September 28, 2000, the Wireless Communications Association International (WCA) filed an Emergency Petition for Clarification concerning two issues that arose from the grant of licenses included in the 39 GHz band (namely, 38.6-40.0 GHz frequencies) auction (Auction No. 30).¹ First, WCA requests correction of licenses granted to 39 GHz band auction winners to properly indicate that the buildout deadline is ten years from the date the license was granted.² Second, WCA requests the addition of a statement to the face of each 39 GHz band authorization acquired via competitive bidding indicating whether an incumbent holds a license for territory within the 39 GHz band auction winner’s service area, and if so, to expressly state that the incumbent licensee retains the exclusive right to use its channels within its self-defined rectangular service area.³ For the reasons set forth below, we dismiss WCA’s request to correct the buildout deadline as moot, and we deny WCA’s request to add an express statement on the face of the 39 GHz band auction winners’ licenses.

2. *Background.* WCA, a trade association that represents fixed wireless licensees operating in the 39 GHz band, including both incumbent licensees and winning bidders in the 39 GHz band auction, filed a petition seeking clarification of two issues that have arisen from the initial grant of licenses to winners in the 39 GHz band auction.⁴ First, the initial 39 GHz band auction licenses granted contained a

¹ Wireless Communications Association International, Emergency Petition for Clarification (filed Sept. 28, 2000) (Petition).

² *Id.* at 2.

³ *Id.* Service areas in the 39 GHz band auction were based on Economic Areas (EAs). The fifty states and the District of Columbia comprise 172 EAs. Additionally, Guam and Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands, and American Samoa and the Gulf of Mexico comprised three EA-like areas. A total of 175 authorizations were issued for each channel block in the 39 GHz band. 47 C.F.R. § 101.64.

⁴ Petition at 1.

“1st Buildout Date” of eighteen months after the license was granted.⁵ WCA contends that this date is contrary to Section 101.17 of the Commission’s Rules,⁶ which requires that a 39 GHz band licensee “demonstrate substantial service at the time of license renewal.”⁷ According to the Commission’s Rules license renewal is ten years from the date the license was granted.⁸ Second, WCA notes that the 39 GHz band auction licenses do not, on their face, contain an express condition stating that auction winners are restricted from operating in incumbent licensees’ service areas.⁹ WCA contends that this omission creates the appearance of two licensees holding licenses purporting to give each an exclusive license for the same area.¹⁰ WCA believes that this confusion could lead to disputes and impair or delay the ability of both auction winners and incumbent licensees to obtain financing for buildout.¹¹

3. *Discussion.* When the Public Safety and Private Wireless Division (Division) became aware that a “1st Buildout Date” of eighteen months after the date the license was granted was indicated on some of the 39 GHz band licenses acquired by auction winners, the Division issued corrected licenses removing the eighteen month buildout date. Thus, 39 GHz band licenses acquired via competitive bidding now conform to the requirements of the Commission’s Rules, which require a demonstration of substantial service at the time of license renewal. Because the inconsistency noted by WCA has been corrected, we dismiss this portion of WCA’s request as moot.

4. With regard to WCA’s second request, we decline to include the statement requested by WCA on the 39 GHz band licenses acquired via competitive bidding. We disagree with WCA’s argument that restrictions on licensee operations must be expressly contained in the license itself.¹² To the contrary, it is well settled that “[a]n FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission’s regulations and in the license. Acceptance of a license constitutes accession to all such conditions.”¹³ We believe that an express condition on the face of the license is unnecessary because the service rules specifically require 39 GHz band auction licensees to protect incumbents. Specifically, Section 101.149(a) of the Commission’s Rules states that 39 GHz band licensees may not cause interference to a previously existing station operating in another authorized service area.¹⁴ Moreover, the Commission has stated that “[w]here an incumbent licensee’s rectangular service

⁵ *Id.* at 2.

⁶ 47 C.F.R. § 101.17.

⁷ Petition at 2.

⁸ *See* 47 C.F.R. § 101.67.

⁹ Petition at 2-3.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 1-2.

¹² *Id.* at 3, citing *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 373 (D.C. Cir. 1977).

¹³ *P & R Temmer d/b/a Mobile Communications v. FCC*, 743 F.2d 918, 928 (1984).

¹⁴ 47 C.F.R. § 101.149(a).

area occupies only a portion of a . . . [service area]¹⁵ the incumbent will retain the exclusive right to use those channels within its rectangular service area.”¹⁶ The Commission further stated that any person or entity seeking to obtain a 39 GHz band license through partitioning, disaggregation, transfer or assignment “must comply with our current technical rules with respect to service area boundary limits and protections.”¹⁷ Additionally, we believe that an express condition is not necessary in this context because the existence and location of 39 GHz band incumbent licensees can be ascertained using the Commission’s Universal Licensing System. We note that our decision here is consistent with our decision in other auctioned services in which the auction winner was required to protect the incumbent but its license was not expressly conditioned on doing so.¹⁸ Thus, we conclude that the exercise of due diligence will show the location of incumbent operations and the associated limitations on the 39 GHz band auction winner’s licenses within their EA service areas. We therefore deny as unnecessary WCA’s request that we add an express statement to the face of licenses of the 39 GHz band auction winners concerning the existence or rights of incumbents.

5. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) that the Emergency Petition for Clarification concerning the issuance of licenses to winning bidders in Auction No. 30 filed by the Wireless Communications Association International on September 28, 2000 is DISMISSED IN PART and DENIED IN PART.

6. This action is taken under delegated authority pursuant to 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D’wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

¹⁵ Although the 39 GHz band was to be auctioned by Basic Trading Areas, the Commission decided, on its own motion, to auction the 39 GHz band by EAs. *See* Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12430 ¶ 2 (1999).

¹⁶ Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18637 ¶ 79 (1997).

¹⁷ *Id.* at 18636 ¶ 74.

¹⁸ *See, e.g.* Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, GN Docket No. 93-252, PP Docket No. 93-253, 11 FCC Rcd 1463 (1995).

