

while some would have us believe that a great deal of these applications may be from speculators, I continue in my belief that the government should not prejudge any applicant's intention with respect to the provision of service. Again, I emphasize that not every applicant that does not acquire a license through the competitive bidding process should be deemed suspect.

Barrett Separate Statement at 1. Additionally, on December 5, 1995, in supplementing its Petition for Rulemaking initiating the subject proceeding, TIA stated that:

the Section and its member companies have made it a point to follow closely the applications and plans of those companies seeking to develop 39 GHz point-to-point networks in numerous metropolitan areas across the country. The Section believes there is a clear and immediate need for the services those companies are offering. The Section would observe that a vast majority of 39 GHz companies appear to have substantial backing and technical expertise. This is evidenced in part by investments of money, time, and expertise in prosecution of their 39 GHz applications and efforts to move forward with implementation of system.

TIA Supplement at 2 (emphasis added). Thus, there is not a shred of evidence in the record to substantiate the Commission's proposition that 39 GHz applicants are speculators. In fact, the evidence supports a conclusion quite to the contrary. In any event, it is impossible to discern any rational nexus between the Commission's perceived problem of speculation and a freeze on conflict-resolving amendments.

Second, the Commission cites to the fact that it has tentatively concluded to employ Basic Trading Areas ("BTAs") to license 37 GHz and 39 GHz systems in the future. 39 GHz Order at ¶28. "[B]ecause BTAs are large areas, we believe that defining service areas by BTAs will likely result in the filing of mutually exclusive applications." Id. (footnote omitted). However, the

Commission's 39 GHz Order is completely devoid of any explanation why, if the FCC is so concerned about the fact that adoption of BTA service areas will invite mutual exclusivity in the future, it is necessary to remove pending applicants' ability to resolve mutual exclusivity today.

Finally, as described above, the Commission's rationale for adopting the 39 GHz Order is its intention to preserve this spectrum for future PCS and cellular backhaul use. Id. at para. 13. This assertion is diametrically opposed to the Commission's position in its September Public Notice which precluded 39 GHz applicants from demonstrating a need for the requested spectrum based on the CMRS market segment. If PCS, cellular and other CMRS providers require access to this spectrum, there is simply no record basis to conclude that such carriers will not be able to obtain access themselves or through third party providers such as Petitioners.

Clearly, the Commission has failed to articulate any rational basis to justify its retroactive freeze on conflict-resolving amendments. Therefore, consistent with well established precedent, this aspect of the freeze must be vacated.

IV. CONCLUSION

As established above, the Commission's interim 39 GHz licensing policy is in direct contravention of Congress' statutory mandates, violates its own rules and policies, and is an impermissible retroactive rulemaking in violation of Petitioners' substantive and procedural due process rights. Thus, the

Commission's policy must be vacated. At a minimum, pending applicants should have been afforded actual notice of the imposition of the processing freeze prospectively. Therefore, if the Commission does not vacate the interim 39 GHz policy in its entirety, it must release a Public Notice from which date the processing of pending mutually exclusive applications may be frozen. All conflict resolving amendments tendered until that date must be processed.

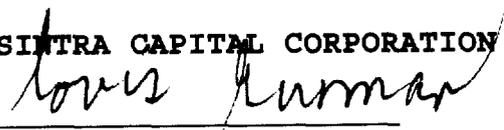
Respectfully submitted,

COMMCO, L.L.C.

PLAINCOM, INC.

SINTRA CAPITAL CORPORATION

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Dated: January 16, 1996

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1270 FAIRFIELD ROAD
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JUN 21 1995

**IN REPLY REFER TO:
7140-12
1700B**

**Commco LLC
POB 85208
Sioux Falls, SD 57118**

Attn: Rosemary Reardon

Dear Ms. Reardon:

In accordance with Rule 21.32(d) the Wireless Telecommunications Bureau is granting your application in part. That portion of your application, FCC file number 9409604, which requested authorization on frequencies 38450-38900/39950-39600 MHz in the Point-to-Point Microwave Service is granted and your license is enclosed. The remainder of the frequencies requested on your application have been dismissed.

Rule 21.701(i) states that 38 GHz frequencies will be assigned only where it is shown that the applicant will have a reasonable projected requirement for a multiplicity of service points or transmission paths within an area. A careful review of your application and your communications requirements fails to demonstrate a compelling need or sufficient justification for more than the authorized frequencies shown on your new license. You may direct any questions or responses you may have to Mary Stultz, who is familiar with this matter, at 717-337-1421 x 193 between 8:30 AM and 4:30 PM EDT, or by email on the Internet at mstultz@fcc.gov, or myself at mhayden@fcc.gov.

Sincerely,



**Michael B. Hayden
Chief, Microwave Branch**

**Enclosure
/commco18.cms**