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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

March 4, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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**Re: Comments on NPRM & Order**
**ET Docket No. 95-183**
**PP Docket No. 93-253, FCC 95-500**

Dear Mr. Caton:

Transmitted herewith, on behalf of DCT Communications, Inc., are an original and nine (9) copies of its Comments on the *Notice of Proposed Rule Making and Order*, FCC 95-500 in the above-referenced dockets.

If any questions should arise with regard to these comments, please contact the undersigned counsel.

Respectfully submitted,

Thomas J. Dougherty, Jr.
Counsel for
DCT Communications, Inc.

Enclosures

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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. 95-183<br>RM-8553 |
| | ) | |
| 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 |

Directed To: The Commission

# COMMENTS OF DCT COMMUNICATIONS, INC.

Thomas J. Dougherty, Jr.

GARDNER, CARTON & DOUGLAS
1301 K Street, N.W., Suite 900 East
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March 4, 1996

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## Summary

DCT Communications, Inc. ("DCT") is unsettled by some of the proposals suggested by the NPRM. The NPRM has set forth very little justification for the dramatic changes it would implement. Some of those proposals would bring great harm to parties that have relied on the Commission's previous allocation policies, licensing procedures, and service rules for the 39 GHz band. Moreover, several of the proposals run contrary to provisions in the Communications Act related to the use of competitive bidding.

DCT disagrees with the proposed construction standard for existing licenses in the 39 GHz band. The proposed construction standard is premised on the belief that the 39 GHz band is rampant with speculators, although the NPRM does not cite sufficient evidence to demonstrate speculation. As such, the proposed construction standard appears as an attempt to recapture already-licensed spectrum. The construction standard is irrational, and only related to the licensee's geographic service area, with no consideration given to the nature of the area, or the type of service to be offered. In addition, the construction standard violates the Communications Act, because the auctioned licenses would have a more lenient standard than existing licenses in the same service. Finally, the construction standard constitutes a retroactive application of new service rules on existing licensees, causing great disruption in licensee's already-formulated business plans, and imposing additional, unplanned-for costs on licensees.

The proposal to auction licenses in the 39 GHz band violates the Communications Act because no mutual exclusivity exists as a necessary predicate to employ competitive

bidding. The Commission's proposed licensing scheme would use a window filing system which has the effect of manufacturing mutual exclusivity in order to provide for auction allocation. By contrast, the Communications Act places an affirmative obligation on the Commission to avoid mutual exclusivity. If the Commission enforced its already established processing rules, there would be no incidents of mutual exclusivity in the 39 GHz band.

The Commission's newly announced processing procedures for pending 39 GHz applications are unfair to applicants and lack a rational basis. The Commission's freeze on amendments to pending applications is not well justified because many of the amendments were filed to eliminate mutual exclusivity, thus reducing the Commission's processing burden. In addition, the Commission should process pending applications that had not passed the 60-day Public Notice period by the date of the freeze. The decision not to process these applications runs counter to the Commission's processing rules which require later-filing applicants to eliminate mutual exclusivity.

The NPRM's proposals in this proceeding could severely hurt existing 39 GHz licensees and pending applicants alike. These entities would be subjected to onerous service rules and processing standards without sufficient justification. In an effort to move toward a perceived more efficient allocation system, the Commission should not punish those entities that relied on the rules and procedures in place at the time of their entry into the 39 GHz service.

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| **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** |

**Directed To: The Commission**

## COMMENTS OF DCT COMMUNICATIONS, INC.

DCT COMMUNICATIONS, INC. ("DCT"), pursuant to Rule 1.415, hereby submits its comments on the Notice of Proposed Rulemaking and Order (the "NPRM") in the above-captioned docket.

## I. BACKGROUND: DCT COMMUNICATIONS, INC.

DCT is a company dedicated to delivering innovative wireless telecommunications services. DCT was formed in 1991 by Richard Neustadt, James Wiesenberg and James Baumann. Mr. Neustadt's background was as a communications attorney and a policy adviser for the Carter White House. Prior to his death last summer, Mr. Neustadt was active in the Democratic Party, several successful business ventures and a variety of charitable organizations. Mr. Wiesenberg graduated from Harvard Business School and worked for Viacom, General Instrument, Mattel and Microband Corporation of America in executive positions relating to cable television and wireless

cable. Mr. Baumann worked with Mr. Wiesenberg at Microband and has 20 years of microwave engineering experience.

DCT has built and operated interconnected Los Angeles area MDS transmitters to deliver local news service that reaches cable systems with over one million subscribers. In conjunction with this project, DCT operates private and common carrier point-to-point systems at 6 and 23 GHz. DCT also holds a license for a MDS station which has been used for digital data delivery in Seattle.

DCT is one of the pioneers of 39 GHz. DCT first became active in the band in early 1994. Since that time, DCT has dedicated its resources to 39 GHz development. DCT is not a "speculator," as demonstrated by its history of placing spectrum in public service. DCT has not speculated in 39 GHz channels. Indeed, DCT only first received 39 GHz conditional licenses last March. All of DCT's profits have been plowed back into its businesses.

DCT intends to actively pursue its 39 GHz business as its primary business. For that reason, DCT is vitally interested in the NPRM.

## II. DISCUSSION

### A. THE PROPOSED CONSTRUCTION STANDARD FOR INCUMBENT 39 GHZ LICENSEES IS OPPRESSIVE AND UNLAWFUL.

#### 1. The Construction Standard Is Not in the Public Interest

The NPRM proposes a requirement for the installation of permanent 39 GHz links by incumbent 39 GHz licenses designed "to minimize speculation without harming existing 39 GHz licensees who are responsibly developing the spectrum they have been

assigned." NPRM, at ¶ 106. But, the proposed construction requirement would be an extraordinary burden on existing 39 GHz licenses. It would be a burden which has no antecedent, which addresses no demonstrated problem, which actually serves to thwart the offer of service to the public, and which is arbitrary and discriminatory.

That is not to say that DCT would not accept a construction standard beyond the standard that has existed for years for point-to-point microwave, which is the standard that now applies to DCT's 39 GHz licenses. But, any new standard should recognize three facts. First, as acknowledged by the NPRM, the markets for 39 GHz services are yet to be defined. Second, the NPRM neither shows a history of speculation in 39 GHz spectrum, nor offers reasons to suspect that there will be speculation in the band. Third, construction regulation must be reasonable if the Commission expects potential users and investors to be attracted to a new service like 39 GHz.

The markets for 39 GHz services, we trust, will develop. But, it is difficult to forecast what markets will develop because 39 GHz is virgin spectrum. If the purpose of the proposed construction standard is to ensure good faith attempts to place the frequencies to productive use, then the Commission must define a line between those who have not used good faith efforts to employ the spectrum and those who have used good faith efforts. But, without a market definition, that "line" becomes arbitrary.

Thus, no matter where the Commission draws the line to define speculation, the line will have to be re-drawn at a later date when experience with 39 GHz shows who is and who is not speculating in the spectrum.

And that leads to our second fact: the NPRM neither points to a history of, nor gives reason to anticipate, speculating in 39 GHz spectrum.

The 39 GHz channels have been available for licensing for 21 years.[1] Yet, until recently, they have laid fallow. FCC Rule Section 21.39 exists to deter license speculation, but the Commission has yet to make a finding that any application activity violates or could violate that Rule. Where, then, is the channel speculation? The only evidence the NPRM proffers to suggest speculation is the unspecified claim that some 39 GHz licensees "have offered to sell or lease their licenses to broadband PCS operators." NPRM, ¶ 28. But, even assuming the accuracy of that claim, the NPRM fails to note one critical fact--the approached PCS operators did not agree to buy the licenses. Moreover, we find it odd that the Commission would label as speculation the act of leasing spectrum to a subscriber by a common carrier who has a duty to do just that.

The NPRM offers no evidence any license speculation will occur. In fact, the evidence is to the contrary. We understand channel speculation as the act of acquiring spectrum in the hope that it will command a higher value through outright sale of the license rather than through the offer of public service. For channel speculation to make any sense, the demand for channels must exceed the supply. With a total of **28** channel pairs at 37 and 39 GHz, it is difficult to imagine that a licensee will actually find a market for "speculating" in licenses. That volume of spectrum exceeds any evidence of demand in the foreseeable future.

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[1] Frequencies - DPMR Service, 30 R.R.2d 1314 (1974) (Docket No. 18920).

For all we know, operators in this band could go broke trying to serve subscribers. If a significant speculation problem is not present or predictable, then it makes no sense to adopt a burdensome construction standard which will only harm legitimate operators.

And harm to operators will be the result. Under the proposed construction standard, the licensee of a rectangular service area would be required to install an average of four permanent links per 100 square kilometer area. That equals 256 links per 6,400 square kilometer rectangular service area. Currently, the two 39 GHz radios required to form a link (including only antennas, cabling, transceivers and installation) costs on the order of $20,000. Thus, to meet the proposed construction standard in just 1 rectangular service area, the licensee would have to make a capital investment of approximately $5,120,000 in just 18 months. That enormous figure does not include the additional money that would be required for ancillary equipment, such as switches, towers, equipment housing, power supplies, employees, marketing, sales, electricity, maintenance, offices, billing systems, debt service and other infrastructure costs that are inescapable. Indeed, to attract enough customers in all previously licensed service areas to be able to install the requisite number of links for each such license in just 18 months would require a Herculean marketing effort, unprecedented market acceptance and manufacturing output way beyond current production line capabilities.

Thus, DCT and other legitimate 39 GHz operators will approach investors and users with a major problem. DCT will not be able to assure them that the license for any area will remain in existence for any length of time. As a result, less service--not more service--is the ironic but anticipated product of the harsh proposed construction standard.

If the Commission truly desires to see the 39 GHz spectrum developed, it cannot saddle the operators with unrealistic life-or-death requirements.

As stated above, the proposed 39 GHz construction requirement has no antecedent. Indeed, no other radio service has been saddled with construction requirements even remotely as severe as those proposed in the NPRM. The most comparable radio service to have a build-out requirement is the cellular mobile radio service. They are comparable because they involve service to subscribers via multiple transmitter sites in discrete areas. But in contrast to the NPRM proposal, the Commission granted cellular carriers 5 years to serve their areas before cutting them back to the area where service can be provided. Compared to the NPRM's proposal of 18 months to load a service area with links, the grant to cellular of a 5 year build-out period would appear extraordinarily generous. For it would be truly remarkable if a cellular carrier did not fill out virtually all of its populated service area. There was and remains an established market for cellular service, and cellular carriers were authorized in the face of a pent-up service demand unheralded in the radio services. 39 GHz, by contrast, is seeking to compete with established competitive access service providers and others already in the point-to-point transmission business. 39 GHz providers must establish their markets; they will not have them thrown to them like the case of cellular. In further contrast to the cellular mobile radio service where 2 carriers have owned the market, there are fourteen 39 GHz channel pairs and the proposal to add fourteen new 37 GHz channel pairs that can be authorized in any area to 28 different common carriers.

Further, the Commission allows cellular carriers, paging carriers and other mobile radio systems to satisfy their service requirement with as little as service to one subscriber, regardless of the size of the service area granted to them. Revision of Part 22, 76 R.R.2d 1, 11 ¶ 33 (1994). We cannot rationalize that decision with the oppressive service requirement proposed in the NPRM for incumbent 39 GHz licensees.

The proposed construction standard for incumbents cannot be reconciled with the proposed standards for other users of the same spectrum. The only suggestion of a standard for spectrum awarded by auction is a showing of "substantial service." NPRM, at ¶¶ 98 and 103. That standard is a far cry from the burden incumbents would shoulder. Moreover, if the spectrum were licensed for PCS backhaul, no construction schedule would be imposed because PCS licenses have construction schedules. NPRM, at ¶ 103 n.177. That is no standard at all because it offers no assurance that the spectrum will be used.

We believe that there is too little knowledge of how the markets for 39 GHz services will actually develop to impose construction standards at this time which will serve the goal of stopping speculation and protecting legitimate incumbents. We believe that a construction standard risks harming the marketplace, and offers no palpable offsetting rewards.

Finally, the proposed construction standard offers an "all or nothing" approach to frequency usage which fails entirely to recognize that, "even at low levels of use, the frequency is being used more efficiently than if it were left unassigned." Paging Systems--DPLMRS, 89 F.C.C.2d 1337, 1352 (1982).

The Commission is required to take a "hard look" at all relevant factors and to consider reasonable alternatives. Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) (agency must consider reasonable alternatives); Action for Children's Television v. FCC, 564 F.2d 458, 478-79 (D.C. Cir. 1977) (agency must give relevant factors a "hard look"). Considering the foregoing, we believe that the merits of service should be judged at license renewal time, when the Commission should have a better idea of who is speculating in licenses and can do something about it.

### 2. The Proposed Construction Requirement Violates the Administrative Procedure Act

For the foregoing reasons, the proposed construction standard is unlawful.

A fundamental concept of administrative law is that regulation must have a rational basis. Section 706 of the Administrative Procedure Act makes unlawful agency action which lacks a rational basis. Temple University v. Associated Hospital Service of Philadelphia, 361 F. Supp. 263, 270 (E. D. Pa. 1973). To avoid unlawfulness, agency action must have an end, a means and a rational nexus between the two. Further, the Communications Act requires that the agency action serve the public interest. The proposed channel construction requirement is unlawful because it fails all of those requirements.

First, there is no end that has been articulated as being in the public interest. Presumably, the construction requirement is designed to preclude channel speculation. But, as explained above there is neither a history of speculation nor any reason to expect

that it would occur. So, where is the problem the agency action seeks to redress? To promulgate a rule to address a problem that has not been demonstrated lacks a rational basis.

Second, the requirements of the construction rule are not a rational means toward preventing channel speculation. Under the proposed construction rule, a licensee who had spent millions marketing the 39 GHz spectrum--and who had not sought to sell a license--could very well lose its license. If construction benchmarks are to be used to define speculation, then the Commission should have evidence of what markets the channels will seek, the extent of competition in those markets and the level of market penetration 39 GHz providers could expect. The construction rule would require an extent of construction beyond any evidence before the Commission of a market potential. Indeed, the NPRM acknowledges that the market potential for 39 GHz is unknown.

Third, the proposed construction rule arbitrarily assumes that the number of links that could be installed in service of customers is related to square mileage, and no other variable. While we understand that mileage is defensible ingredient, we also recognize that a service area of National Park land or desert has virtually no potential for service while New York City has a great potential. Thus, to focus the construction rule solely on links per geographic area is irrational.

Fourth, the Commission should balance the benefits and detriments of proposed regulation(s).[2] In this case the balance weighs decidedly toward categorizing the proposed

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[2] See Executive Order No. 12866, Section 1(b)(6) (Sept. 30, 1993) ("Each agency shall assess both the costs and the benefits of the intended regulation . . . .").

construction standard as against the public interest. Indeed, the NPRM recognizes this duty by stating the purpose of the construction standard: "to minimize speculation without harming existing 39 GHz licenses . . . ." NPRM, at ¶ 106. The only benefits the Commission may consider are those that are tangible and palpable.[3] On the benefit side, there is little of concern. 39 GHz is an untried service based upon frequencies which have laid fallow for years. The NPRM offers no evidence of speculation in these frequencies and there is no evidence that their supply is less than their demand. Indeed, WinStar, the first company able to offer 39 GHz service in major markets throughout the United States, proactively built each of its grants and in October raised $225,000,000 for further 39 GHz radios and switches that will allow it to become a competitive LEC in many areas. On the detriment side, forcing 39 GHz licensees to meet burdensome construction requirements to keep their licenses merely adds a regulatory risk to business which detracts from fund raising, detracts from the ability to attract customers who want assurance of longevity, and incentivizes the building of uneconomic links. We believe that WinStar would not be able to raise such funds in the face of the NPRM's proposed construction requirements.

Fifth, the proposed construction standard is discriminatory. It is arbitrary and capricious to treat similarly situated entities differently. Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965). Yet, the NPRM would place incumbents under an onerous standard that it does not propose for either auction-authorized entities or PCS

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[3] National Welfare Rights Organization v. Mathews, 533 F.2d 637, 648-49 (D.C. Cir. 1976) (agency must articulate basis for factual determinations).

providers. A "substantial service" requirement is proposed for the former and just meeting PCS construction requirements is proposed for the later. In each case the Commission has adopted a requirement to provide service, it has not specified the extent of service that must be provided. These prior experiences in MDS, point-to-point. cellular radio and common carrier mobile stand in stark contrast to the proposed 39 GHz construction rule. Why is it rational to state that an area-authorized cellular company serving just 1 subscriber meets the construction/service rule and also to state that an area authorized 39 GHz company must serve more than one subscriber? Why is it rational to allow 39 GHz carriers just 18 months to meet a build-out requirement when cellular carriers (who have a pent-up demand and virtually no competition) were granted 5 years to build out their systems? To impose a different standard upon 39 GHz licensees simply cannot be justified.

### 3. The APA and the Communications Act Prohibit the Retroactive Application of the Proposed Construction Standard to Previously Licensed Facilities.

#### a. The 5-Part Retroactivity Analysis Prohibits the Application of a New Construction Standard to Incumbents

The proposed construction rule unfairly applies substantive requirements retroactively. The Commission may adopt new requirements with a retroactive application. But, it must consider the burden of the new requirements on the regulated and the need for the new requirements. The courts, and the Commission, have adopted a five part test to determine whether retroactive rules (even if rational) are lawful. The elements of the test are:

> "(1) whether the particular case is one of first impression..."
> "(2) whether the new rule presents an abrupt departure from well established practice or merely attempt to fill a void in an unsettled area of law..."
> "(3) the extent to which the party against whom the new rule is applied relied on the former rule..."
> "(4) the degree of burden which a retroactive order imposes on a party..."
> "(5) the statutory interest in applying a new rule despite the reliance of a party on the old standard...."

NLRB v. Oakes Machinery Corp., 897 F.2d 84, 90-91 (2d Cir. 1990).

The proposed construction rule is not a case of first impression. Indeed, there is no "case." The Commission, moreover, has had long experience with construction or "need" standards. This history has shown that it is against the public interest, at least for a single channel, to adopt more than minimal construction requirements. Paging Systems--DPLMRS, 89 F.C.C.2d 1337, 1357 (1982); Revision of Part 22, 76 R.R.2d 1, 11 ¶ 33 (1994); 47 C.F.R. 21.303(d)(must merely offer service); 47 C.F.R. 94.51(must merely place station in operation during construction period) To avoid the problem in paging, the Commission authorized a large number of frequencies and allowed competition to work freely. As a result of the number of paging frequencies, speculation in paging licenses was rendered non-existent. Indeed, it was years before the first instance of mutual-exclusivity of 931 MHz paging channels and that case, which arose 5 years after the channels were authorized, turned out to be a mistake because there were enough frequencies to satisfy all applicants. Similarly, with a total of 28 channel pairs at 37 and 39 GHz, there is no reason to suspect that channels will have a speculative value in the foreseeable future. The Commission is not new to the concern, and it is addressed already by the service requirement in Rule 21.303(d).

For the same reason, the proposed rule would be an abrupt departure from well established practice; there is no void to fill.

The burden of retroactively applying the proposed construction rule would be huge. DCT and others similarly situated have allocated or raised funds, crafted business plans and made commitments based upon the existing rules, which do not saddle licensees with severe and uneconomic construction burdens. Further fund raising will be very difficult and marketing to users who will not know whether the licensee will continue to hold the license is rendered all the more difficult. Indeed, the severity of the proposed construction standard would have the ironic effect of reducing service orders.

Finally, there is no statutory interest in applying the proposed construction rule retroactively despite the reliance of incumbents on the former rule. Thus, it is unlawful to apply the proposed construction standard to incumbent licensees.

**b. Section 316 Would be Violated.**

DCT has 39 GHz licenses. Those licenses require the certification of completion of construction within 18 months of their grant date. Under existing rules, DCT can certify with 1 link in place. The NPRM would modify that scheme; existing licenses would be subject to the multiple link construction standard.

That proposal would violate Section 316 of the Communications Act by modifying DCT's existing licenses without the procedures and findings required by Section 316 and Rule 1.87. Section 316 and Rule 1.87 require notice to the licensee and the provision of an opportunity to protest the modification. Those requirements are not satisfied by a notice and comment rulemaking proceeding.

The NPRM cites Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309 (D.C. Cir. 1995) for the proposition that the application of the new construction standard is not a prohibited license modification. That case, however, is inapposite to this situation. The Petitioners in Committee were prospective applicants for the remaining unserved cellular area. They challenged the Commission's decision to effectively expand the service areas of incumbent cellular licensees by redefining the area by the 32 dBu contour. The Petitioners in Committee never argued that Section 316 was an issue. Indeed, it was not the Committee whose non-existent licenses were modified, but the incumbent cellular operators, none of whom appealed the Commission's redefinition of reliable service area contour.

To determine whether Commission action constitutes a license "modification" requiring the protections of Section 316, reviewing courts have looked "beyond the form of the license document and beyond the language employed by the FCC to described the action." Mobile Communications Service Co. v. FCC, 56 R.R.2d 1269, 1276 (D.C. Cir. 1984). Conditions on the license are part of the license and, in this case, the license is styled as a "conditional license" to refer directly to the condition that construction of a link occur within the 18 month construction period. Public Fixed Service (Revision of Part 21), 63 R.R.2d 1334, 1356-59 (1987). To modify that condition is to modify all licenses bearing that condition. This the Commission cannot do without employing the procedures and affording the protections required by Section 316.

### c. Section 312 Would be Violated.

Moreover, the construction standard, in effect, would revoke DCT's licenses in violation of Section 312 of the Communications Act. The construction standard is so onerous that best efforts to meet it can be expected to be futile. Thus, under the proposed rule, DCT would likely lose its licenses. That result is license revocation. If the Commission desires to revoke a license, then it must accord the licensee the procedural protections of Section 312 and make the affirmative findings required by Section 312. Under the proposal, DCT would likely lose its licenses summarily; i.e., the required procedures would not be observed. Further, we submit that it would be impossible for the Commission to make the findings required by Section 312 as a prerequisite to license revocation.

### 4. The Communications Act Will Not Allow the Commission to Apply One Construction Standard to Incumbent 39 GHz Licenses and Another to Auctioned Licenses.

Section 309(j)(6)(D) does not allow the Commission "to convey any rights . . . that differ from the rights that apply to other licenses within the same service that were not issued" by auction. If 37 GHz licenses and auctioned 39 GHz licenses are given a "substantial service" standard, then incumbent 39 GHz licenses cannot be saddled with any higher standard.

Accordingly, the Commission cannot impose an onerous construction requirement on incumbent licensees, and a more lenient requirement on those who obtain use of the spectrum through auctions.

## B. AUCTIONS ARE AN UNLAWFUL LICENSING MECHANISM FOR THE 39 GHZ SERVICE.

The NPRM explains why point-to-point spectrum has, until now, been licensed outside of the auction procedure. Contrary to the NPRM's preliminary conclusion, nothing has changed which would destroy the rationality of that decision. The auctioning of 39 GHz spectrum would violate (i) Section 309(j)(1), which requires the existence of application mutual-exclusivity before auctions may be used, (ii) Section 309(j)(6)(E), which requires the Commission to use various means to avoid mutual-exclusivity before turning to auctions, and (iii) Section 309(j)(3), which requires the Commission to make 4 determinations of fact before using auctions.

### 1. There Is No Reason That There Should Be Mutually Exclusive Applications at 39 GHz and, Thus, a Necessary Predicate for the Use of Auctions at 39 GHz Is Absent.

The NPRM finds that point-to-point bands have not experienced application mutual-exclusivity in large part through frequency coordination. NPRM, at ¶ 27. Thus, the Commission would not find a likelihood that there would be mutually exclusive applications. Now the NPRM states that there will be a likelihood of mutually-exclusive applications because defining service areas by BTAs will have that result. NPRM, at ¶ 28.

This likelihood of mutually-exclusive filings, however, would not be the product of filings made under the existing Rules, but of a proposed wholesale abandonment of existing procedures designed to avoid mutual-exclusivity and the adoption of an auction system designed to encourage mutual-exclusivity. This change directly violates "***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." 47 U.S.C. 309(j)(6)(E) (emphasis supplied).

Absent (i) freeing applicants from the prior coordination requirements of Rule 21.100(d) and (ii) freeing later filed applicants from the obligation imposed by Rule 21.100(e) to amend their applications to remove application conflicts, there would be no likelihood of application mutual-exclusivity.[4] Indeed, while some application conflicts have developed in the 39 GHz band, most of the conflicts have been removed voluntarily by amendments to delete channel pair requests or to reduce proposed service area. All such conflicts would be eliminated if the Commission would enforce the Rule 21.100(e) "obligation" of later filers to amend applications to remove conflicts and would utilize its Rule 21.100(e) authority to grant the first filed application and to dismiss the later filed application. The whole point of the frequency coordination system established for point-to-point microwave radio is to avoid application mutual-exclusivity. In the Matter of Common Carriers -- Competition for Specialized Services, 22 R.R.2d 1501, ¶ 135 (1971) (First Report and Order in Docket No. 18920). The Commission's auction system would purposely abandon the well-functioning frequency coordination system so that mutual-exclusivity would be more likely.

But, the conversion from an applicant-specified service area to BTAs does not justify abandoning frequency coordination. The utility of the system of coordination is

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[4] These service Rules are discussed in greater detail in subsection C., below.

not affected by the size of the proposed service area. Indeed, with a total of 28 channel pairs per BTA, there is no reason to suspect that the current system will not function satisfactorily.

### 2. The Proposed Auction System Manufactures Application Mutual Exclusivity in Violation of the Commission's Duty to Use Means to Avoid Application Mutual Exclusivity.

The NPRM would further encourage application mutual-exclusivity by a window filing approach for all frequencies, expanding eligibility to four channels per service area. minimum service areas of such size that application conflicts are more likely, and an auction activity rule which promotes filing for service areas the applicant has no interest in serving.

The simultaneous multiple round auction proposal of the NPRM would give applicants one opportunity to file for any or all channels. If a business has even a remote and speculative interest in 39 GHz spectrum, it will see the absolute necessity of filing a simple and inexpensive FCC Form 175 because, otherwise, the business may not have a second chance to apply for the channels. Thus, the window filing approach proposed by the Commission creates an urgency to file for channels that the applicant would not otherwise seek, thereby fostering application mutual-exclusivity.

The expansion of the number of channels which a filer may receive from a *de facto* one channel to four channels also encourages application mutual-exclusivity. Proposed Rule 21.701(j)(3). At present, the Wireless Telecommunications Bureau is dismissing applications to the extent they request more than one channel pair in a service area. Further, the NPRM itself would maintain the existing strict one pair-per-service

area Rule as an alternative to auctions. NPRM, at ¶ 111. The comparison of these alternative proposals demonstrates that the allowance of four channels per area for auction winners is not in the public interest, but solely promotes application mutual-exclusivity. DCT questions the public interest in changing this policy. The NPRM provides no guidance on why the Commission would change from its policy of not granting a filer more than one channel pair in a market to a policy of allowing a filer to obtain 4 channel pairs in a market. The Administrative Procedure Act will not condone unexplained departures from past practices and policy.[5]

Using BTAs as service areas can only increase application conflicts. The NPRM admits this much. NPRM, at ¶ 28. Still, the NPRM seeks to support this proposal by

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[5] While it is axiomatic that agencies are permitted to change their programs and policies, such changes must be adequately explained and must have a sound basis in the law. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insur. Co., 463 U.S. 29, 42 and 57, 103 S.Ct. 2856, 2866 and 2874, 77 L.Ed.2d 443 (1987) ("an agency changing its course must supply a reasoned analysis"), citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 806-817, 93 S.Ct. 2367, 2374-2379, 37 L.Ed.2d 350 (1973); Puerto Rican Cement Co., Inc. v. U.S. EPA, 889 F.2d 292, 298-299 (1st Cir. 1989) (J. Breyer) (The purpose of the "consistency" doctrine in administrative law is ... to prevent the agency itself from significantly changing those policies without conscious awareness of, and consideration of the need for, change); Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36-37, 41 (1st Cir. 1989) (J. Breyer) ("Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action."); National Black Media Coalition v. FCC, 775 F.2d 342, 355 (D.C. Cir. 1985) ("if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction"); Hatch v. FERC, 654 F.2d 825, 834-835 (D.C. Cir. 1981) (judicial remand for failure to adequately explain change in agency interpretation); Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977) (per curiam) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); and Chisholm v. FCC, 538 F.2d 349, 364 (D.C. Cir.) (It is, of course, incumbent upon an agency reversing its own policy to provide "an opinion or analysis indicating that the standard is being changed and not ignored," citing Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971), cert. denied, 429 U.S. 890 (1976)).