stating that (1) BTAs are the basic licensing areas used for broadband PCS, and (2) BTAs provide a "more orderly structure for the licensing process . . . ." NPRM, at ¶ 22.

But, that rationale assumes that 39 GHz will serve just as PCS backhaul and that the spectrum would not be made available to PCS licensees for that purpose through lease if a BTA method were not employed. Both of those assumptions are false.

Further, the orderliness of licensing presented by BTAs ignores that the use of BTAs create mutually exclusive situations while Section 309(j)(6)(E) commands the Commission to avoid them. Moreover, how can the licensing process which will require first an auction and then the existing application process for each frequency pair be more orderly than the existing system in which applicants must frequency coordinate to avoid application mutual-exclusivity? The term "orderly" begs the issue of what areas applicants wish to serve. If applicants are forced to apply for areas they do not wish to serve, then the service area definition imposed by the Commission is not orderly.

To this, the proposed auction structure adds an incentive to apply for service areas the applicant really does not care to serve, thus further encouraging application mutual exclusivity. The NPRM proposes to use the Milgrom-Wilson activity rule. Under that rule, an applicant in an auction must remain active in each round of the auction by bidding upon a certain quantity of BTAs or remaining the high bidder. If not, the number of BTAs an applicant may bid upon in subsequent bidding rounds is permanently reduced. The NPRM also proposes to halt bidding on all service areas simultaneously. As a result of the activity and simultaneous stopping rules, it is a common strategy for

bidders to apply for service areas they do not desire in order to spread bidding credits over those service areas to avoid a bidding war in their desired service areas.

3. The NPRM Does Not Make the Findings the Commission Must Make as a Condition to Auctioning 39 GHz Spectrum.

Aside from violating the requirement to use means to avoid mutual-exclusivity. the proposal to auction 39 GHz spectrum does not make the findings required by Section 309(j)(2) & (3) as a precondition to the use of auctions.

Section 309(j)(2) does not allow the Commission to use auctions unless it makes certain affirmative findings, including that "(B) a system of competitive bidding will promote the objectives described in paragraph (3)."

Paragraph (3) consists of 4 findings. While one finding is that revenue will result from the auction (finding (C)), the other three findings are unrelated to revenue generation. They are:

> "(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delay;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses to a variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; and . . .
>
> (D) efficient and intensive use of the electromagnetic spectrum."

Aside from the portions of paragraph (3) related to bidding preferences, paragraph (3) can be condensed into a legislative concern with the development and rapid deployment of new technologies and services, avoiding processing delays, promoting

economic opportunity and competition, avoiding excessive concentration of licenses, and efficient and intensive use of spectrum. The NPRM addresses those concerns, other than administrative efficiency, by concluding that, because "a review of licenses in the 39 GHz band reveals that few channels are now available in most metropolitan areas," . . . "making more channels available through competitive bidding will likely promote . . ." those concerns. NPRM, at ¶ 28. But, that logic begs the issue of why the existing licensing system should be abandoned in favor of auctions. If making more 39 GHz licenses available will further that goal, then why was a freeze on the filing and the processing of new 39 GHz applications imposed and why did the Commission not just continue to use the existing licensing process? "Rapid deployment" is certainly more likely under the existing one step licensing process than it is under the two step procedure of first conducting an auction of all available channels, then processing license applications.

The NPRM addresses the required finding that the use of auctions will not cause "administrative delay..." by merely citing to experience with other auctions as evidence that auctioning 39 GHz spectrum will not cause administrative delay. But, a simple, frequency coordination based process now exists. That process is much faster and less burdensome than the two step process auctions would require. Indeed, a simultaneous multiple round auction delays the issuance of licenses--even those that received only one bid--until after the bidding has concluded for all licenses. In addition, the use of BTAs as the minimum service area will, contrary to the NPRM's finding (¶ 28), delay the provision of 39 GHz services to the public. Whereas, before, applicants could define the

area they needed and apply, now, they will be forced to take areas for which they have some interest but containing large masses which they do not want. Others who want that undesired area will not receive it immediately, but will be forced to negotiate a partition agreement with the auction-selected licensee of the area.

Finally, the idea that "some of the licensees in the 39 GHz band have offered to sell or lease their licenses to PCS operators" (¶ 28) strikes us as untrue and irrelevant. What specific examples of this are there? And, what is wrong with leasing transmission capacity? These are, after all, common carrier channels. Certainly, the quoted language does not support the conclusion that "these licensees may not have ever intended to serve the public . . . ." NPRM, at ¶ 28. Moreover, the idea that an offer to sell had been made, but was not accepted, does not support the conclusion that incumbents are depriving "the public of those revenues."

In sum, the NPRM does not offer an adequate rationale for reversing the Commission's earlier decision not to auction point-to-point spectrum and proposes an auction system that would violate the Communications Act.

C. AUCTIONS CANNOT BE EMPLOYED TO PROCESS PENDING APPLICATIONS.

Even assuming that the Commission has authority to auction 39 GHz spectrum, the Commission would violate the Communications Act by auctioning spectrum subject to pending applications.

The Commission cannot auction licenses unless "mutually exclusive applications are accepted for filing . . . ." 47 U.S.C. § 309(j)(1). Rule 21.31(a) defines mutual

exclusivity as the situation where the grant of one application would effectively preclude, because of harmful interference, the grant of another application. Further, to be entitled to comparative consideration, each of the applications must be acceptable for filing. 47 C.F.R. § 21.31 (1995).

Under Rule 21.100(e), such effective preclusion cannot occur unless there is only one channel left to license. But, even then, the later filed applications can be dismissed, thus obviating any mutual exclusivity. In the event of frequency conflict, "it ***shall be the obligation*** of the later filing applicant to amend his application to remove the conflict, unless he cannot make a showing that the conflict cannot be reasonably eliminated." 47 C.F.R. § 21.00(e) (emphasis supplied). When that obligatory showing is not made, the Commission is empowered by Rule 21.100(e) to grant the channel pair to the first filer and to dismiss the second filed application.

It is incumbent upon the Commission to employ Rule 21.100(e) to grant pending applications outside of an auction whenever possible. Section 309(j)(6)(E) states "the obligation in the public interest to continue to use . . . service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings . . . ." The procedure of Rule 21.100(e) would eliminate all application conflicts.

Our conclusion applies even for applications which had not had a 60-day cut-off period before the application filing freeze was imposed on November 13, 1995. As more fully explained in **Section F**, below, all that the Communications Act requires is the 30-day petition to deny period. Because of Rule 21.100(e), no prospective applicant has the right or the expectation to over-file any of these applications.

Pending applications were filed while Rule 21.100 applied to them. They must be processed under that Rule. Otherwise, applying a new standard retroactively would violate the "elementary fairness" required in such matters. McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993). This point is discussed at more length in **Section F**, below.

D. THE PROPOSED AUCTION ALTERNATIVE OF STRINGENT APPLICATION NEED SHOWINGS IS INCONSISTENT WITH THE GOALS OF RAPIDLY EMPLOYING 39 GHZ TECHNOLOGY AND SPURRING COMPETITION.

Section 7 of the Communications Act establishes a Federal policy "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. Further, a consistent Commission goal in licensing, and one embodied in the Communication Act, is the promotion of competition.[6] The NPRM's alternative proposal to strengthen application showings as announced in a September 22, 1994 Public Notice could hamper the ability of entrepreneurs to promote those policies with 39 GHz channels.

The proposed requirement of a "clear and present need" for the spectrum produces a fundamental marketing problem. Until an applicant receives a license, its efforts to develop a market for services are extremely inefficient. Potential customers are not interested in tying satisfaction of communications requirements to the uncertain prospect that a provider will obtain a license and the definite reality that months if not years will lapse before a license is issued. Communications services providers must be in a position to promise customers that the service will be delivered soon. To market 39 GHz services

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6 See H.R. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

efficiently, the provider must hold the license. If the Commission requires marketing success before licensing, 39 GHz spectrum will lie fallow. The result will be less service innovation and less competition. Moreover, we find it difficult to understand how the NPRM would propose to allow auction winners to receive up to four channel pairs without any showing of need and how the NPRM could also propose such an onerous need standard if auctions are not employed.

The proposal to require a "consideration of non-radio frequency (non-RF) solutions" appears antithetical to the goals of service innovation and increased competition. Indeed, it serves no appreciable goal. The requirement would be a showing that alternative transmission means are "technically unacceptable, not just economically preferable." Certainly, telephone lines, fiber optic cable and other hard wire means exist to carry the same communication traffic that 39 GHz radios would carry. Such means rarely are "technically unacceptable," rather they may be "less economically preferable." Thus, this proposed application showing would result in 39 GHz spectrum lying fallow. This proposal seems to ignore that 39 GHz alternatives offer beneficial economic results, such as greater competition, wider service choices, greater responsiveness to customer requirements and innovation.

As for the proposed "full disclosure" showing, DCT believes it serves useful purposes and presents no meaningful burden for applicants.

E. TECHNICAL RULES.

1. Frequency Tolerance.

The proposed 0.001% frequency tolerance standard may prove unnecessarily strict. In a point-to-point environment, co-channel and adjacent channel interference is easily controlled through the use of Standard A antenna designs. A strict frequency tolerance may offer little spectrum efficiency while increasing the cost of radio systems.

The alternative of maintaining operations within the spectrum mask obviates the need for a tight frequency tolerance. But, the mask should not be so strict that radios become expensive. Just like the frequency tolerance proposal, a strict mask is less necessary in a point-to-point environment.

Still, DCT recognizes that, eventually, 39 GHz deployment could develop to the point that greater efficiency in adjacent channel suppression could allow the establishment of new links that would otherwise receive interference from existing systems. When that happens, that is the time to require more efficient equipment. Thus, DCT believes that a licensee with a real need to establish a link which could not operate interference-free without changes to an established adjacent channel link should be able to force the established link to convert to 0.001% frequency tolerance or to employ a more strict mask if one or both of those changes would allow the newcomer to establish the link. The cost of such changes should be borne by the incumbent.

2. Frequency Coordination.

DCT agrees that 39 GHz frequency coordination remains the best way to control harmful interference. DCT supports the concept of a coordination "threshold" power flux density. NPRM, at ¶ 118.

The problem is the lack of a consensus in the engineering community on path loss at 39 GHz. Until more studies are conducted, this critical factor in setting a coordination threshold will be unknown.

That is not to say that a coordination threshold PFD cannot be adopted on an interim basis. But, it should be revised when the pertinent technical data and operational experience provide a better concept of what PFD is acceptable.

DCT finds the concept of obtaining the consent of another licensee to exceed the PFD threshold potentially unsettling. Proposed Rule 21.711(a)(3). DCT believes that the adjacent market licensee should have an affirmative obligation to consent to a proposed link, even if the PFD limit is exceeded, so long as the proposed link will not interfere with existing or proposed links in the adjacent market. Otherwise, perverse considerations (such as anticompetitive intent) will have strong influence on the link establishment process.

To this end, we believe that the Commission should establish desired -to-undesired signal ratio standards based upon Category A antennas. Further, the Commission should be ready, willing and able to arbitrate coordination disputes. Finally, those willing to upgrade adjacent market antennas to avoid adjacent market interference

should have the right to involuntarily upgrade adjacent market antennas at the expense of the proponent of the upgrade.

3. Antenna Quality.

In a point-to-point service, transmission antenna efficiency is directly related to efficiency in spectrum use. Category B antennas are inherently inefficient. They cause interference that can be avoided by antennas have better side lobe performance. Standard A 39 GHz antennas are available and cost only $150 more than Standard B antennas. Given these facts, Standard A antennas should be required for 39 GHz stations and, for that matter, 37 GHz stations.

F. THE FREEZE ON THE ACCEPTANCE AND PROCESSING OF AMENDMENTS TO PENDING 39 GHZ APPLICATIONS IS UNLAWFUL RULE MAKING AND LACKS A RATIONAL BASIS

1. The Freeze on Amendment Filing and Processing Violates the Rule Making Requirements of Section 553 of the Administrative Procedure Act

The Commission's refusal to process 39 GHz amendments during the rule making initiated by the adoption of the NPRM is unlawful rule making. Section 553(b) of the Administrative Procedure Act (the "APA"), with some inapplicable exceptions, prohibits rule making unless it is preceded by a notice of proposed rule making, its publication in the Federal Register, the allowance of a public comment period, a written statement of the agency adopting the rule and explaining its basis and reasons, and the publication of the written statement and rule in the Federal Register. Section 551(5) of the APA defines "rule making" to include "repealing a rule." The interim freeze on the acceptance and the processing of amendments to pending 39 GHz applications suspends the operation of

Rule 21.23(a) which allows such amendments as a "matter of right." The interim suspension of that Rule is, in effect, its repeal. Accordingly, that Rule cannot be suspended until after the full rule making procedures required by Section 553 of the APA have been completed.

An "indefinite suspension" of a rule lasting until a rule making is completed does not differ from a rule repeal simply because the agency chooses to label it a "suspension," a "freeze" or anything else. Public Citizen and Center for Auto Safety v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984) (additional cases cited therein). Simply stating that amendments on file can remain on file, but will not be processed during the pendency of a rule making proceeding is no different. Unless amendments are given effect by the Commission, the right granted by Rule 21.23(a) to amend is effectively removed.

While the Commission may change its regulations, it must do so in accordance with Section 553 of the APA and, pending the employment of those procedures, the regulations have the force and effect of law and must be obeyed by the Commission. Chrysler Corp. v. Brown, 441 U.S. 281, 296 (1979); U.S. v. Nixon, 318 U.S. 683, 695 (1974); Safety-Kleen Corp., infra. Thus, the Commission cannot suspend Rule 21.23(a) and prohibit minor amendments to pending 39 GHz applications before deciding to do so after completing a rule making proceeding for that purpose.

2. The Suspension of Amendment Filing and Processing Violates Section 706 of the Administrative Procedure Act Because It Lacks a Rational Basis

Section 706(2) of the APA holds "unlawful ... agency action ... found to be--(A) arbitrary, capricious...." An arbitrary decision of an agency is one lacking in rational

basis. Temple University v. Associated Hospital Service of Philadelphia, 361 F. Supp. 263, 270 (E. D. Pa. 1973). Courts typically grant some deference to an agency under this standard. But, administrative agencies should be bound by their own regulations, so that an agency's power to suspend rules must be closely scrutinized, especially where substantive rights of a party may be adversely affected. Safety-Kleen Corp. v. Dresser Industries, Inc., 518 F.2d 1399, 1403 (Ct. Cus. & Pat. App. 1975). Thus, in Steed, supra, the Court required an agency to "cogently explain" why its suspension of a regulation is rational. Steed, supra, at 98. Further, the Commission is bound to take a "hard look" at all relevant factors and to consider reasonable alternatives.[7]

The freeze on amendments and their processing suspends Rule 21.23(a) which affects the substantive "right" granted to applicants by that Rule to amend applications.[8] That freeze, therefor, is subject to close scrutiny and must be supported by a cogent explanation showing its rational basis.

The Commission has not supplied a cogent explanation for not processing minor amendments which eliminate mutual-exclusivity between pending 39 GHz applications. The reasons for not processing such amendments proffered by the NPRM are (1) that processing MXed applications requires a greater dedication of resources, and (2) that

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[7] 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. 1997) (agency must give relevant factors a "hard look").

[8] The ban on amendments is not procedural and, therefore, it is not exempt from the notice and comment procedures because it has a substantive impact on the rights of applicants. See Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 669 (4th Cir. 1977) (rule is substantive when it has substantive impact on the rights or duties of the regulatee); see also Brown Express, Inc. v. United States, 607 F.2d 695, 702 (5th Cir. 1979).

awarding licenses in MX situations "could lead to results that are inconsistent with the goals of this proceeding."[9] Essential to both reasons is the existence of mutual-exclusivity. Those reasons do not apply if a minor amendment has the effect of eliminating mutual-exclusivity and, accordingly, there is no explanation for not allowing such amendments.

Indeed, the NPRM finds that processing non-MXed applications "will not impede the goals of this proceeding and can be accomplished without significant burden on Commission resources." NPRM, at ¶ 122.

Further, the Commission cannot reconcile its decision not to accept the very category of amendments to pending applications which result in terminating their mutual exclusivity (i.e., those that do not enlarge service area or change frequency blocks, except to delete them) with its decision to allow the same category of amendments to modification applications.

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[9] DCT questions both the Commission's forecast of the difficulty of processing MXed applications and the Commission's conclusion that processing MXed applications leads to results inconsistent with the goals of the proceeding. Apparently, the Commission has ignored Rule 21.100(e) which allows the Commission to process MXed microwave situations by granting the first filed application. DCT submits that there are many instances of "over-filing" beginning in July of 1995 where this procedure would be appropriate. It is not an unduly burdensome method of processing if one compares its simplicity to the time taken already by the Wireless Telecommunications Bureau to review pending applications and to write letters to those proposing more than 1 channel pair to inform them that the extra channel pairs had been summarily deleted from their applications. Indeed, in effectuating this involuntary cut-back, the Bureau made no attempt to cut-back competing applications so that they would be rendered non-competing. As for the goals of the proceeding, we note that the Commission has not considered that a primary goal of the Commission--required by Section 309(j) of the Communications Act--is to encourage the elimination of mutually-exclusive application situations through settlement, engineering solutions and service regulations.

The Commission's decision not to process amendments which eliminate application conflicts represents a radical policy change which runs against time-honored and consistent Commission policy to encourage applicants to settle MX situations. In adopting the point-to-point microwave rules, the Commission specifically encouraged applicants to file amendments to eliminate frequency conflicts. 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 whole point of the frequency coordination system established for point-to-point microwave radio is to avoid application mutual-exclusivity.

In addition, that decision not to process such amendments violates the Communications Act. The Communications Act affirmatively requires the Commission to accept and to give effect to amendments which eliminate application mutual-exclusivity. Section 309(j)(6)(E) states that the Commission's competitive bidding authority shall not 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." (emphasis supplied). This statutory command is a relevant factor which the Commission is required to consider, but did not consider. In effect, not allowing amendments that eliminate application conflicts violates this factor and makes the Commission's ban on those amendments unsustainable.

As for amendments filed before the adoption of the NPRM, the freeze on their consideration is impossible to defend. That portion of the order imposes the freeze

retroactively to November 13, 1995.[10] There can be no rational basis for processing amendments received by November 10, 1995, but not processing amendments received between November 13, 1995 and the date of adoption of the NPRM. Indeed, the NPRM ignores this critical lack of distinction.

3. The Commission Should Process Applications That Had Not Passed the Sixty-Day Public Notice Period By the Date of the Application Filing Freeze

There is no reason why the Commission should not process applications which had not appeared on Public Notice for 60-days by the date the Wireless Telecommunications Bureau imposed its freeze on the filing of new 39 GHz applications.

All such applications have been or should have been placed on a public notice announcing their susceptibility to petitions to deny as required by Section 309 of the Communications Act. If that is done, the processing requirements of the Communications Act are met.

To require such applications to be susceptible to competing filings for 60 days or any period of time is unreasonable unless it would have been impossible, absent the freeze, to file an application for a vacant channel pair in the service area proposed by the first applicant. As stated above, the policy of the Commission, embodied in the frequency coordination requirements set forth at 47 C.F.R. 21.100, is for applicants to coordinate their frequency requests to avoid frequency conflicts. Indeed, the process is first-come-first-serve. In the event of frequency conflict, "it ***shall be the obligation*** of the later filing applicant to amend his application to remove the conflict, unless he cannot

[10] The Wireless Telecommunication Bureau's November 13, 1995 freeze order froze the acceptance of new applications. It did not apply to amendments to pending applications.

make a showing that the conflict cannot be reasonably eliminated." 47 C.F.R. § 21.00(e) (emphasis supplied). When that obligatory showing is not made, the Commission is empowered by Rule 21.100(e) to grant the channel pair to the first filer and to dismiss the second filed application. If an applicant had applied for a channel pair by application that had not run the 60-day Public Notice period, and another channel pair remained vacant in the first applicant's service area, then the first applicant has an expectation of receiving the grant of its requested channel pair (if otherwise qualified as a licensee). The fact that a new applicant's desire to obtain a channel pair is frustrated is the product of the application freeze; in no event (absent no other frequencies in the market) does the late-comer have any interest in the first filer's requested channels. Thus, that late-comer has no recognized interest to protect. The prospective filer is not harmed by the early cut-off of the first filed application because the prospective filer has an obligation to frequency coordinate to protect the prior filer's proposal.

Not to process the first filer is to, once again, engage in rule making without first following the mandatory procedures of Section 553(b) of the APA. In effect, Rule 21.100 would be repealed, and the repeal of a Rule (even its suspension) requires those procedures. See Section II, A, supra. We reach this conclusion because that Rule requires the later filer to engage in frequency coordination and to avoid frequency conflicts with the earlier filer. By stating that DCT's applications that were cut-off by the freeze cannot be processed, the Commission is protecting an interest in over-filing DCT which Rule 21.100 states the new filer does not have.

Processing such applications would not be inconsistent with the Commission's goals in this proceeding. It is simple. Further, Section 309(j) of the Communications Act commands the Commission to use its "service rules" to avoid application conflicts. Not giving effect to Rule 21.100 violates that statutory direction.

Finally, we note that deferring the processing of pending applications violates the Communications Act. Section 309(a) makes application processing mandatory. It states, in pertinent part, that "the Commission shall determine ... whether the public interest, convenience, and necessity will be served by the granting of such application, and ... [if so] ... it shall grant such application."

III. CONCLUSION

WHEREFORE, the foregoing premises considered, DCT Communications, Inc. respectfully requests the Commission to consider these comments and to issue a Report and Order in the above-captioned dockets consistent with these comments. Further, the Commission is respectfully requested:

> (1) to give effect to amendments to pending 39 GHz applications which terminate their mutual-exclusivity with other applications; and
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> (2) to process applications which, as of the application freeze effective date, had not appeared on Public Notice for more than 60 days.

Respectfully submitted,

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