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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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 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

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SUPPLEMENTAL COMMENTS OF BIZTEL, INC.

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SUMMARY

By these Supplemental Comments, BizTel, Inc. augments previous submissions to the record seeking appropriate modifications to policies adopted in this rulemaking proceeding that unlawfully obstruct the processing of long-pending 38.6 - 40.0 GHz Point-to-Point Microwave Radio Service ("39 GHz") applications. This filing results from recent discussions with Commission staff, where specific requests were made for further more detailed elaboration of previous BizTel submissions relating to the inevitable conclusions that must be reached in the Commission's disposition of the Processing Order reconsideration. Accordingly, BizTel hereby supplements its earlier submissions, demonstrating that the controlling statutory and case law dictates that:

(1) All pending 39 GHz applications have achieved cut-off status;

(2) The Commission is precluded from re-opening filing windows for pending 39 GHz applications;

(3) All pending 39 GHz applications and any pending amendments thereto must be processed;

(4) 39 GHz applicants must be afforded a reasonable period after action on the pending reconsideration to file amendments to eliminate the few remaining mutual exclusivity conflicts; and

(5) 39 GHz licensees must be permitted to obtain all license modifications that are normally allowable under the Commission's Rules, so long as a modification application does not expand a service area to greater than a 50 mile radius (100 x 100 miles), and does not result in a mutual exclusivity conflict with any other bona fide 39 GHz applicant or licensee.

Action on reconsideration adopting the five above-stated policy revisions will result in the most administratively efficient transition from the pre-existing licensing rule structure to the system of competitive bidding proposed in this proceeding. Implementation of these recommended modifications will also allow BizTel and other pioneering companies to rapidly deliver important new competitive local services to the public without undue restrictions and prohibitions. Such a result is consistent with long-established public interest standards that generally guide the Commission's action. It is also *compelled* by the statutory underpinning of the Commission's competitive bidding authority.

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SUPPLEMENTAL COMMENTS OF BIZTEL, INC.

BizTel, Inc. ("BizTel"), through its undersigned counsel, hereby submits the following Supplemental Comments for inclusion in the record of the above-captioned rulemaking proceeding (the "Rulemaking").[1/] By these Supplemental Comments, BizTel augments previous submissions to the record seeking appropriate modifications to policies adopted in the Rulemaking that unlawfully obstruct the processing of 38.6 - 40.0 GHz Point-to-Point Microwave Radio Service ("39 GHz") applications and amendments thereto filed by BizTel, and other similarly situated

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[1/] See Notice of Proposed Rule Making and Order, ET Docket No. 95-183, 11 FCC Rcd 4930 (1996) (the "NPRM"). The Order component of the NPRM set forth at ¶¶ 121 - 124 is hereinafter referred to as the "Processing Order". As set forth in BizTel's concurrently filed Motion To Accept Supplemental Comments & Request For Expedited Action, the public interest will be well-served by inclusion of the instant Supplemental Comments in the formal record of the Rulemaking, by expedited Commission review of this submission, and by prompt action on the long-pending reconsideration of the Processing Order.

incumbent 39 GHz applicants and licensees.[2] As set forth in BizTel's previous submissions in the Rulemaking and further elaborated below, the adjudicatory policies annunciated in the Processing Order are wholly unsupported by the controlling statutory and case law, serve no legitimate public interest objective, and, thus, must be modified as set forth herein below.[3]

I. INTRODUCTION

BizTel is a pioneer and industry leader in the development and deployment of innovative 39 GHz fixed wireless broadband

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[2] See, e.g., Petition For Reconsideration of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation (the "Commco Petition"); Petition For Reconsideration of DCT Communications, Inc. (the "DCT Petition"), ET Docket No. 95-183 (filed January 16, 1996), Public Notice Report No. 2120 (released February 9, 1996), 61 Fed Reg 5773 (February 14, 1996); Emergency Request For Stay of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation, ET Docket No. 95-183 (filed January 16, 1996); see, also, Comments of BizTel, Inc. In Support Of Emergency Request For Stay, ET Docket No. 95-183 (filed February 1, 1996). BizTel has supported the Commco & DCT Petitions and the Commco Emergency Request For Stay in several submissions to the record of the Rulemaking. See, e.g., Comments of BizTel, Inc., ET Docket No. 95-183 (filed March 4, 1996) (the "BizTel Comments"), at 36-30 & FN 2; Reply Comments of BizTel, Inc., ET Docket No. 95-183 (filed April 1, 1996) (the "BizTel Reply Comments"), at 13-16; BizTel Ex Parte Presentation to the Wireless Telecommunications Bureau, ET Docket No. 95-183 (filed August 15, 1996).

[3] BizTel has addressed a range of other important issues in the Rulemaking that are of continuing concern. However, these Supplemental Comments focus exclusively on processing issues affecting BizTel and other similarly situated 39 GHz applicants and licensees.

systems and services. In accordance with its long-standing business plan, BizTel is aggressively pursuing facilities deployments in all of its 156 currently authorized 39 GHz service areas. BizTel has made tremendous progress to date in accomplishing its defined objective of developing a nationwide presence as a provider of local fixed wireless broadband services. The facilities and services that BizTel and other 39 GHz operators make available to their customers place BizTel and these other companies in the forefront of providing the first viable *facilities-based* competition to entrenched local wireline telephone service providers -- a remarkable accomplishment that embodies the most crucial and decisive new public policy objective defined by the Commission and the Congress in recent years.

Paradoxically, however, as a result of the misguided procedures adopted in the Processing Order, more than 120 pending BizTel applications, as well as the pending applications of a number of other pioneering 39 GHz companies, have been unlawfully suspended from processing. As a result, the full realization of the visionary business plans of BizTel and other companies has been needlessly impeded, and efforts to rapidly introduce innovative new competitive services to the public have been frustrated. BizTel and other similarly situated parties clearly have a substantial interest in the outcome of the long-pending

reconsideration action in the Rulemaking (the "Processing Order reconsideration").

BizTel has addressed 39 GHz application processing issues in detail several times in its submissions to the record of the Rulemaking.[4] These Supplemental Comments result from recent discussions with Commission staff, where specific requests were made for further more detailed elaboration of previous BizTel submissions in the Rulemaking relating to the inevitable conclusions that must be reached in the Commission's disposition of the Processing Order reconsideration. The instant submission is also appropriate in light of the recent ruling of the Court of Appeals in McElroy Electronics Corp. v. FCC, 86 F.3d 248 (D.C. Cir. 1996), which was decided several months after the close of the formal comment cycle in the Rulemaking. As set forth below,[5] the controlling statutory and case law clearly establishes that:

(1) All pending 39 GHz applications have achieved cut-off status;

(2) The Commission is precluded from re-opening filing windows for pending 39 GHz applications;

(3) All pending 39 GHz applications and any pending amendments thereto must be processed;

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[4] See, e.g., BizTel Comments, at 36-40; BizTel Reply Comments, at 13-16.

[5] Id.

(4) 39 GHz applicants must be afforded a reasonable period after the adoption of a modified Processing Order to file amendments to eliminate the few remaining mutual exclusivity conflicts; and

(5) 39 GHz licensees must be permitted to obtain all license modifications that are normally allowable under the Commission's Rules, so long as a modification application does not expand a service area to greater than a 50 mile radius (100 x 100 miles), and does not result in a mutual exclusivity conflict with any other bona fide 39 GHz applicant or licensee.

Modifying the Processing Order in the manner set forth above will result in the most administratively efficient transition from the pre-existing licensing rule structure to the system of competitive bidding proposed in the NPRM.[6/] Implementation of the recommended modifications to the Processing Order will also allow BizTel and other pioneering companies to rapidly deliver important new competitive local services to the public without undue restrictions and prohibitions. Such a result is consistent with long-established public interest standards that generally guide the Commission's action. It is also *compelled* by the statutory underpinning of the Commission's competitive bidding authority.

[6/] As is fully demonstrated in the DCT and Commco Petitions, the Processing Order, rather than being interlocutory in nature, constitutes a final action by the Commission and is thus ripe for immediate review. See DCT Petition, at 3; see, also, Commco Petition, at 18.

II. BACKGROUND

Four years ago, although licensing and service rules had been in place for many years, the 39 GHz band lay fallow, and was considered of little or no value for commercial use. It was readily apparent at that time, however, that a substantial bandwidth resource existed in the millimeter wave spectrum. It was also quite apparent that the rapidly building demand for viable competitive broadband service alternatives could not be satisfied by existing wireline offerings or by wireless systems operating in the congested lower bands. These factors drove concerted industry efforts that rapidly transformed high-cost military technologies into viable cost-efficient "short-hop" commercial millimeter wave transmission systems, with performance and reliability comparable to that provided by fiber optics. These early ground-breaking developments, in combination with a clear marketplace demand for a variety of competitive local broadband services, persuaded BizTel and a number of other pioneering companies to develop business plans, and to invest scarce seed capital to form 39 GHz service ventures and advanced technology development companies.

After more than a year of careful planning and preparation, BizTel filed its first 39 GHz applications in early March of 1994. These first applications were the forefront of BizTel's coordinated plan to develop a nationwide presence as a premier

provider of local fixed wireless broadband services. BizTel's first group of applications were accepted for filing and placed on public notice on June 29, 1994, but for some unexplained reason were not processed by the Commission.[7]

Finally, on September 16, 1994, noting an "increase" in the volume of 39 GHz applications, the Commission issued a policy statement containing new 39 GHz filing and processing guidelines.[8] The new guidelines were made immediately applicable to all pending and future 39 GHz applicants, and were ostensibly intended to quash rumored "speculation" and to preserve 39 GHz spectrum for "legitimate" uses. BizTel and other pending applicants were perplexed by these unprecedented rigorous new guidelines, and many questions loomed as to their legality and underlying purpose. Nevertheless, hoping to avoid further processing delays and to finally achieve initial marketplace entry, BizTel and a number of other 39 GHz applicants expended substantial financial and in-kind resources to file responsive amendments to their applications. Almost five more months lapsed before the first few 39 GHz licenses were finally issued under the new guidelines. 39 GHz processing continued from that time, albeit at a *very* slow pace, through the summer of 1994. Because

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[7] See FCC Public Notice Report No. 1089 (released June 29, 1994).

[8] See Public Notice re: Policy Governing the Assignment of Frequencies In The 38 GHz And Other Bands To Be Used In Conjunction With PCS Support Communications, FCC Public Notice No. 44787 (released September 16, 1994).

of the persistent delays in processing, BizTel's planning and financing milestones had to be repeatedly slipped, and market entry was needlessly postponed.

On November 13, 1995, citing a burden on scarce Commission resources and concerns over treatment of a pending petition for rulemaking requesting the opening of the 37.0 - 38.6 GHz ("37 GHz") band for additional fixed service licensing, the Acting Chief of the Wireless Telecommunications Bureau adopted a freeze on the filing of new 39 GHz applications.[9/] There was no mention in the Application Freeze Order of a cessation of processing. Nonetheless, for no apparent reason, the 39 GHz processing line once again ground to halt.

Then, on December 15, 1995, the Commission adopted the NPRM and the Processing Order.[10/] Among other things, the Processing

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[9/] See Order, 11 FCC Rcd 1156 (1996)(the "Application Freeze Order"). While the Application Freeze Order carried a purported release date of November 13, 1995, there is some question as to whether there was legally effective public notice of the item on that date. See Commco Petition, at 7. In fact, the Application Freeze Order was not generally available to the public on its alleged release date. Moreover, the Application Freeze Order was not obtained by the Commission's official copy contractor, listed in the Commission's Daily Digest, or clearly released to the public until November 20, 1995, the date that the Federal Government re-opened after a shut-down that began at the close of business on November 13, 1995.

[10/] Just as is the case with the Application Freeze Order, there is a definite question as to whether there was legally effective public notice of the NPRM & Processing Order on its supposed December 15, 1995 release date. See Commco Petition, at 8. The NPRM & Processing Order was not made generally available to the public on its purported release date. Furthermore, NPRM & Processing Order was not obtained by the Commission's official

(continued...)

Order implemented an unprecedented program of draconian processing procedures for incumbent 39 GHz applicants. These included: (i) the retroactive removal of substantive amendment rights; (ii) the retroactive imposition of arbitrary processing restrictions relating to pending applications and amendments thereto; and (iii) the placement of severe limitations on an incumbent licensee's ability to modify its authorization. This punitive treatment of BizTel and other pioneering 39 GHz applicants and licensees was "justified" by the Commission with a fleeting reference to the "objectives of the proceeding".[11/] The extraordinary unprecedented incumbent processing measures adopted in the Processing Order clearly contravened the Communications Act of 1934, as amended.[12/]

On January 16, 1996, two petitions for reconsideration were filed seeking modification of the misguided processing procedures adopted in the Processing Order.[13/] An Emergency Request For

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[10/](...continued)
contractor, listed in the Commission's Daily Digest, or clearly released to the public until January 11, 1996, the date that the Federal Government re-opened after a shut-down that began at the close of business on December 15, 1995.

[11/] See, e.g., Processing Order, at ¶ 123. It is revealing to note that the *only* defined objective of the Rulemaking is to implement a system of competitive bidding for the future issuance of licenses in the 37 GHz and 39 GHz bands. NPRM, at ¶ 2.

[12/] See Communications Act of 1934, as amended (1996), 47 U.S.C. §§151 et seq. (the "Communications Act"), at §§ 157, 309(j)(6)(E), 309(j)(6)(G), 309(j)(7)(A) & 309(j)(7)(B).

[13/] See FN 2, supra.

Stay of the Processing Order was also filed concurrently with the petitions.[14] Now, ten months later, Commission action on the Processing Order reconsideration is still pending.

III. ALL PENDING 39 GHz APPLICATIONS HAVE ACHIEVED CUT-OFF STATUS

The Commission must acknowledge in its disposition of the Processing Order reconsideration that all currently pending 39 GHz applications have achieved cut-off status as a result of the 39 GHz Application Filing Freeze. This result is clearly dictated by the Commission's actions to date in the Rulemaking and by the controlling case law.[15]

The Commission relied upon Kessler v. FCC as its legal authority to issue the Application Freeze Order.[16] In Kessler, the Court of Appeals affirmed the Commission's rationale for imposing a freeze on the further acceptance of AM radio broadcasting applications pending possible revision of the rules governing AM broadcast assignments.[17] The Court's opinion in

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[14] Id.

[15] BizTel has consistently maintained throughout the Rulemaking that the Application Freeze Order constituted a cut-off for all pending 39 GHz applications that had not achieved cut-off status prior to its adoption. See, e.g., BizTel Comments, at 37; BizTel Reply Comments, at FN 25.

[16] See Application Freeze Order, at 1; see, also, Kessler v. FCC, 326 F.2d 673 (1963).

[17] See Kessler v. FCC, at 678.

Kessler makes pointed reference to the Commission's own explanation of the principal underlying intent that motivated the imposition of the filing freeze in that case:

> ... "***we amended our procedural rules to establish, in effect, a new 'cut-off date' for most pending applications [except those not subject to the freeze], this new date acting to supersede all previous cut-off lists.***" (emphasis added).[18]

In affirming the Commission's actions in Kessler, the Court of Appeals clearly stated that it had previously found valid a Commission action accelerating the close of a filing window for competing applications, thereby precluding the overfiling opportunity of potential applicants who had no notice of the acceleration.[19] As was also affirmed by the Court of Appeals in Kessler, cut-off rules are procedural, and, thus, may be established by the Commission without resort to formal rulemaking under the Administrative Procedure Act.[20]

Because the Commission relied on Kessler as the controlling authority in adopting the Application Freeze Order, which is

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[18] See Kessler v. FCC, at 685 (citing the Commission's own Memorandum Opinion & Order in the case).

[19] Id., at 685 (citing Federal Broadcasting System v. FCC, 225 F.2d 560, 565-567 (D.C. Cir. 1955), cert. denied, sub nom. WHEC, Inc. v. Federal Broadcasting System, 350 U.S. 923 (1955)).

[20] Id., at 682 (citing Ranger v. FCC, 294 F.2d 240, 244 (D.C. Cir. 1961)). See, also, City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656 (D.C. Cir. 1984).

indistinguishable in operation from the freeze order in Kessler, the Court-affirmed Commission interpretation of the cut-off acceleration effect of the freeze order in Kessler ***must apply with equal force to the Application Freeze Order***. This result is indisputable, even taking account of the fact that the Application Freeze Order failed to explicitly state that a new cut-off date had been established.[21] There is simply no legitimate basis to maintain that the justification used for the freeze implemented by the Commission in Kessler -- imposition of a new cut-off date for the filing of mutually exclusive applications -- is somehow *not applicable* in the instant case -- the underlying facts are identical in all material respects. The Commission cannot be heard to argue otherwise.

Thus, it is eminently clear that the Application Freeze Order did indeed create a new cut-off deadline for all pending 39 GHz applications that had not achieved cut-off status under the cut-off provision that was in effect for 39 GHz applications prior to that time.[22] Because the Application Freeze Order was made effective by the Commission upon its adoption, the new cut-off date established thereby for all pending 39 GHz applications that had not achieved cut-off status prior to that time was November 13, 1995 -- the adoption date of the Application Freeze Order.

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[21] See McElroy Electronics Corp. v. FCC, at 257.

[22] See 47 C.F.R. § 21.31(b)(1995).

Accordingly, the arbitrary determinations as to cut-off status and processing eligibility set forth at paragraphs 122-123 of the Processing Order must be redrawn on reconsideration to specify that *all 39 GHz applications pending as of the date the Application Filing Freeze was adopted are cut-off from the further filing of competing mutually exclusive applications.* There is no other result that would yield consistency with the well-settled precedent set by the case law. Veiled references to the "objectives of the proceeding" simply do not provide any legitimate legal or public interest basis to distinguish the facts in the Rulemaking from those present in Kessler.

In fact, the only definable objective of the proceeding that is clearly delineated in the NPRM is the intent to modify the applicable licensing and technical rules to facilitate the future issuance of licenses by competitive bidding.[23/] Given this clearly stated sole objective of the Rulemaking with respect to the 39 GHz band, the only conclusion that can be reached is that the real purpose of the convoluted and arbitrary cut-off and processing procedure set forth in the Processing Order was to impede the grant of licenses to eligible 39 GHz applicants for the purpose of retaining spectrum for subsequent sale at auction. This result is in clear contravention of Sections 309(j)(6) and 309(j)(7) of the Communications Act. This result is also an arbitrary and capricious departure from the clear precedent set

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[23/] See, e.g., NPRM, at ¶ 2.

in Kessler -- the very case relied on by the Commission to justify the legality of the Application Freeze Order.

Thus, for all of the above-stated reasons, the Commission must act in the Processing Order reconsideration to modify the Processing Order such that November 13, 1995 is established as the applicable cut-off date for all pending 39 GHz applications that had not achieved cut-off status prior to the adoption of the Application Filing Freeze.

IV. THE COMMISSION IS PRECLUDED FROM RE-OPENING THE FILING WINDOWS FOR PENDING 39 GHz APPLICATIONS

By making reference to "fairness to potential applicants" who were precluded by the 39 GHz Application Filing freeze from filing competing applications that would have entitled them to mutually exclusive status vis-a-vis other previously pending applicants, the Processing Order suggests that there may somehow be a basis to reopen filing windows and allow the overfiling of pending 39 GHz applications at some time in the future.[24/] The Commission's professed concern over fairness to potential applicants is misplaced.

The controlling case law clearly establishes that "potential applicants" have no substantive right to file mutually exclusive

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[24/] Processing Order, at FN 197.

applications.[25] The Commission's attempt to protect this non-existent right is as sadly misguided today as it was when Reuters was decided. The well-settled substantive rights *that attach upon the acceptance* by the Commission of an application that is mutually exclusive with a previously filed application do not somehow apply during the period prior to the actual filing of such an application.[26]

In the instant case, under the authority established by Kessler, the Commission legitimately halted the acceptance of 39 GHz applications for purposes of administrative finality in order to effect a change in licensing rules.[27] The record clearly demonstrates that the Commission also complied with public notice requirements for the subject pending 39 GHz applications. Additionally, as set forth in Section II supra, it is indisputable that the Commission also established an accelerated cut-off date for pending 39 GHz applications not cut-off prior to

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[25] See Reuters Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986); see, also, Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). In pronouncing its concern for the non-existent rights of putative applicants, the Commission has attempted to make way for the convenient resurrection of what was aptly referred to and struck down by the Court of Appeals in Reuters as "the Ashbacker muse". The Commission's creative but rather obvious attempt to cloak an effort to frustrate the processing and grant of legitimate applications, and, thus, to generate the availability of more spectrum for auction under the guise of a professed concern for the non-existent rights of putative applicants clearly cannot withstand scrutiny under Reuters or Section 309(j)(6)(e) of the Communications Act.

[26] Id.

[27] See Kessler v. FCC, at 681.

adoption of the Application Freeze Order. Accordingly, under Kessler, Reuters, and McElroy, the Commission must enforce the accelerated cut-off date for all pending 39 GHz applications, and may not allow the submission of new mutually exclusive applications at some future date.[28]

V. ALL PENDING 39 GHz APPLICATIONS AND AMENDMENTS THERETO MUST BE PROCESSED

All pending 39 GHz applications and currently lodged amendments thereto must be processed immediately. Incumbent applicants who filed their 39 GHz applications in accordance with and reliance on a long-established existing Commission rule structure must not be subjected to punitive treatment as a reward for their foresight and entrepreneurial initiative. Pending 39 GHz applications that meet the threshold processing criteria that were used by the Commission prior to the adoption of the Processing Order, and which are not subject to mutual exclusivity conflicts after the completion of processing must be granted. Any other result would contravene Sections 309(j)(6)(G) and 7 of the Communications Act.

Other than the pre-existing threshold processing criteria relating to basic legal and technical qualifications of a 39 GHz applicant and its proposed service implementation, the only

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[28] See McElroy Electronics Corp. v. FCC, at 257.

absolute requirement for grant of a Point-to-Point Microwave Radio Service application is that at least 30 days from the appearance of the application in a public notice must pass prior to grant.[29] There is no legitimate reason to penalize applicants that filed under the pre-existing 39 GHz rules through the artificial processing selection criteria adopted in the Processing Order. It appears that the only motivation for the decision in the Processing Order not to process *all* pending applications filed prior to the Application Filing Freeze is to maximize the availability of spectrum to increase proceeds of a planned auction. This result is clearly in contravention of Section 309(j)(7)(A) of the Communications Act, and the underlying intent of Congress.

The Processing Order's ban on further processing of pending 39 GHz amendments is also a clear violation of the Commission's affirmative statutory duty to take all measures to resolve mutual exclusivity conflicts prior to instituting a system of competitive bidding for a given class of applicants.[30] The substantial number of minor amendments to pending 39 GHz applications that were filed as a matter of right prior to the issuance of the Processing Order for the purpose of resolving mutual exclusivity conflicts should have been determined by the Commission to be effective upon filing instead of suspended by

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[29] See 47 U.S.C. 309(b); see, also, 47 C.F.R. § 101.37(c).

[30] See 47 U.S.C. §309(j)(6)(E).

the arbitrary and retroactive operation of the Processing Order.[31]

It is clear that the reasons advanced by the Commission for adopting the draconian processing policies set forth in the Processing Order serve no legitimate public interest objective and are arbitrary and capricious. Rather than achieving the purported goal of administrative efficiencies through the cessation of processing, the Processing Order effectuated the reverse result, which is anything but administratively efficient. In reality, the cessation of processing capriciously preserved mutual exclusivity and frustrated the grant of non-mutually exclusive applications in a thinly veiled effort to preserve spectrum to increase potential auction revenues; an activity that is barred by Section 309(j)(7)(B) of the Communications Act.

The contention in the Processing Order that the halt of 39 GHz processing was necessary to conserve Commission resources that were purportedly necessary to process mutually exclusive applications is belied by the fact that a substantial number of pending 39 GHz applications placed on public notice on or after September 14, 1995 are not in fact subject to mutual exclusivity conflicts.[32] Moreover, the Commission presents absolutely no

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[31] See 47 C.F.R. 101.29(a); see, also, Commco Petition, at 13.

[32] See, e.g., Applications of BizTel, Inc., File Nos. 9510336 - 9510342; 9510344 - 9510370, FCC Public Notice Report No. 1156 (released October 11, 1995). BizTel's analysis indicates that a substantial percentage of the other still pending 39 GHz applications are, in fact, free of mutual exclusivity conflicts.

persuasive evidence to support its contention at paragraph 123 of the Processing Order that continued processing of mutually exclusive applications and pending amendments thereto that resolve conflicts would require any substantially greater effort than the processing of non-mutually exclusive applications -- *in either case, a determination of the mutual exclusive status of an application must be made.*

In light of the foregoing, it is eminently clear that the Commission failed to articulate any rational justification for suspending the processing of 39 GHz applications filed prior to the Application Filing Freeze. Given the facts at hand, it is also apparent that the actual underlying motivation in halting processing was to preserve spectrum so as to increase potential auction revenues in contravention of the Commission's statutory competitive bidding authority. Accordingly, the Commission must act to immediately resume processing of all pending 39 GHz applications and currently lodged amendments thereto.

VI. 39 GHz APPLICANTS MUST BE AFFORDED A REASONABLE PERIOD AFTER ACTION ON THE PROCESSING ORDER RECONSIDERATION TO RESOLVE ANY REMAINING MUTUAL EXCLUSIVITY CONFLICTS

The Commission's clear obligation to avoid mutual exclusivity also requires that the Commission accept for filing and immediately process additional minor amendments that resolve the few remaining mutual exclusivity conflicts among pending 39

GHz applications.[33] To effectuate the Commission's duty in this regard, 39 GHz applicants should be granted a reasonable period of time, e.g., 30 days from the date of the Commission's reconsideration decision, in which to file minor amendments that eliminate mutual exclusivity conflicts and allow processing of as many pending 39 GHz applications as possible before any 39 GHz auctions are held. Such action is compelled by the Commission's auction authority, and failure to allow a reasonable period for the resolution of mutual exclusivity conflicts would directly contravene the Communications Act.[34]

VII. RESTRICTIONS ON MODIFICATIONS TO EXISTING LICENSES MUST BE REMOVED

The Processing Order restricted modification applications to those closely tied to the reduction of service area size or other changes that would allow compliance with the punitive minimum threshold construction requirements proposed for incumbents.[35] This restriction on license modifications is a violation of Section 309(j)(6)(G) of the Communications Act. There is no reasonable basis on which to conclude that the restriction on processing 39 GHz modifications set forth in the Processing Order

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[33] See 47 U.S.C. 309(j)(6)(E).

[34] Id.

[35] See Processing Order, at ¶ 124.

in any way advances legitimate objectives of the rulemaking. In addition, the Processing Order's restriction on modifications, particularly the reference to *reducing* service areas to meet minimum construction thresholds, is much more onerous than a policy recently adopted in a virtually identical situation, entailing the modification of similar incumbent licenses in the 929 MHz and 931 MHz paging services pending the implementation of auctions.[36]

In the Paging NPRM, the Commission provided that incumbent licensees would be permitted to expand service offerings by, among other things, adding sites or modify existing sites, provided that the interference contour of any given licensee was maintained.[37] The rationale for the paging modification policy applies equally to license modifications for 39 GHz operations. The Commission's disparate treatment of 39 GHz licensees is clearly arbitrary, unnecessarily impedes the delivery of important new competitive services to the public, and thus contravenes the Communications Act.[38] Therefore, the Processing Order policy on the filing of modification applications by 39 GHz licensees must be amended to allow all modifications of existing 39 GHz authorizations that reasonably

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[36] See Notice of Proposed Rulemaking and Order, WT Docket No. 96-18, 11 FCC Rcd 3108 (1996)(the "Paging NPRM"), at ¶ 140.

[37] Id.

[38] See 47 U.S.C. §§ 157, 309(a), 309(j)(6)(F), 309(j)(6)(G), 309(j)(7)(A).