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November 5, 1996

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Federal Communications Commission
Office of Secretary

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

DOCKET FILE COPY ORIGINAL

Re: Reply Comments to Supplemental Comments
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 Reply Comments in Support of Supplemental Comments of Biztel, Inc. 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 this matter, please contact the undersigned counsel.

Respectfully submitted,

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

Enclosures

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Federal Communications Commission
Office of Secretary

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

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**
	)	
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

REPLY COMMENTS OF DCT COMMUNICATIONS, INC.
IN SUPPORT OF SUPPLEMENTAL COMMENTS OF BIZTEL, INC.

DCT COMMUNICATIONS, INC. ("DCT"), by its counsel, respectfully submits these reply comments to the "Supplemental Comments of Biztel, Inc." filed on October 17, 1996 in the above-captioned proceeding. DCT understands that Biztel's supplemental comments were prepared and filed at the request of the Commission's Staff. These reply comments were not requested. But, nonetheless, these reply comments should be accepted and considered to serve the Commission's interest in due process, procedural evenhandedness, and rule making grounded in the meaningful participation of all interested parties.

I. CUT-OFF APPLICATIONS ARE IMMUNE FROM NEW FILINGS

The suggestion that the Commission is considering allowing competing filings against cut-off 39 GHz applications is troubling. In essence, the Commission would be waiving the application cut-off rule. The notion that cut-off rules may be waived to allow a late-comer to file an application has been considered in various contexts by the Commission over a long period of

time. Consistently, the Commission has held that the cut-off rules are "strictly-applied" and has steadfastly resisted their waiver. See, e.g., McElroy Electronics Corp. v. FCC, 86 F.3d 248, 257 (D.C. Cir. 1996); State of Oregon, 11 F.C.C. Rcd. 1843 (1996). Their purposes are to advance administrative finality, to aid timely filed applicants by giving them protected status, and to further the public interest in expediting the provision of new service. Id. at para.12.

To open cut-off 39 GHz applications to new, competing applications, there must be some lawful rationale -- which we cannot find -- which outweighs the strong interest in enforcing cut-off dates. Moreover, such action must be consistent with the Commission's Section 309(j)(6)(E) "obligation ... to use ... means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E) (1996). We suggest that the bar of this hurdle has been placed too high for even the most nimble attempts at justification.

II. ALL PENDING 39 GHZ APPLICATIONS ARE CUT-OFF

We also support Biztel's position that all pending 39 GHz applications are cut-off from competing filings, even those that had not been on public notice for 60 days preceding the imposition of the application filing freeze. In our Petition,[1] we urged the conclusion urged by Biztel. We found support in the language of Rule 21.100(e). Rather than repeat that discussion, a copy of our Petition is attached hereto for the convenience of the Staff.

Moreover, Biztel correctly points out that the Commission cannot rely upon Kessler to freeze 39 GHz application filing without adopting its rationale. Stated otherwise, if the Commission did not intend the 39 GHz freeze order as an acceleration of the cut-off date, then there is no basis for the freeze.

---

[1] DCT filed a "Petition for Partial Reconsideration of Freeze Order" in the above captioned dockets on January 16, 1996.

III. AMENDMENTS MUST BE ACCEPTED AND PROCESSED

In our Petition, we urged the Commission to lift its freeze on the filing and processing of 39 GHz application amendments. We stressed that refusing applicants the opportunity to amend their applications was rule making without the observance of required procedures. We also offered that the amendment ban lacked any rational basis.

Biztel's Supplemental Comments observe that the Commission justified the amendment ban as necessary to conserve Commission resources to process mutually-exclusive applications. But Biztel rightly concludes that amendments which terminate application mutual-exclusivity cannot be barred under the Commission's resource conservation theory. Indeed, there is a higher authority which commands the acceptance and the processing of minor amendments which eliminate application conflicts -- Section 309(j)(6)(E) recites the "obligation ... to use ... negotiation, ... and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E) (1996).

IV. AN AMENDMENT PERIOD SHOULD BE ANNOUNCED

That mandatory directive also supports Biztel's suggestion that 39 GHz applicants be afforded a period of time after the Commission reconsiders the processing order in which to resolve application conflicts.

V. CONCLUSION

DCT, Biztel and others have worked hard to develop competitive businesses with spectrum which had been available for application for 20 years but which had no apparent use. Those efforts have been hampered by an application and amendment freeze which has produced nothing of benefit to the public or the Commission. From our perspective, all we see is freeze for

freeze's sake. We urge the Commission to seriously consider Biztel's supplemental comments and to act as requested in those comments.

Respectfully submitted,

DCT COMMUNICATIONS, INC.

By: _____
Thomas J. Dougherty, Jr.
Its Counsel

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November 5, 1996

ATTACHMENT

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

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**
	)	
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

PETITION FOR PARTIAL RECONSIDERATION OF FREEZE ORDER

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(202) 408-7164

January 16, 1996

SUMMARY

The freeze on amending and processing 39 GHz applications violates the Administrative Procedure Act's notice and comment requirements and lacks a rational basis.

Even applications that had not passed a 60-day cut-off window as of the date of the freeze should be processed as required by Rule 21.100(e).

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Before the
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Directed To: The Commission

PETITION FOR PARTIAL
RECONSIDERATION OF FREEZE ORDER

DCT COMMUNICATIONS, INC. ("DCT"), pursuant to Rule 1.106, and by its counsel, hereby petitions the Commission to reconsider that portion of the *Notice of Proposed Rule Making and Order*, FCC 95-500 (rel. December 15, 1995)(the "*NPRM*") in the above-captioned dockets which refuses to give effect to minor amendments filed on or after November 13, 1995 to pending applications in the 38.6-40 GHz band (the "39" GHz band). DCT believes that it has retained and should retain the right granted it by Rule 21.23(a) to file minor amendments, at least those which terminate application mutual-exclusivity. Further, DCT believes that the Commission should process applications which had not had a 60-day public notice period before the imposition by the Wireless Telecommunications Bureau of the application filing freeze on November 13, 1995.

I. Standing

DCT is a company dedicated to delivering innovative wireless telecommunications services. DCT was formed in 1991 and developed by Richard Neustadt, James Wiesenberg and James Baumann. Mr. Neustadt's background was as a communications attorney and 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 received thirteen 39 GHz grants between March and June of 1995 and has 100 applications for new 39 GHz authorizations pending. The majority of those pending applications were filed on or before June of 1995. Many of those applications are cut-off, but mutually-exclusive with other applications. Other of those applications are not mutually-exclusive, but had not appeared on a Public Notice released at least 60-days

before the Wireless Telecommunications Bureau imposed its freeze on the acceptance of new applications.

DCT has sought to eliminate application mutual-exclusivity between its 39 GHz applications and those of other filers through engineering amendments filed on November 13, 1995 and thereafter. DCT and other applicants had engaged in this process many months before the issuance of the application freeze order by the Wireless Telecommunications Bureau on November 13, 1995. When the *NPRM* was released, DCT was in the process of eliminating other instances of such mutual-exclusivity. The *NPRM* freezes the amendment of 39 GHz applications. The freeze extends to DCT's various November 13, 1995 amendments, its amendments filed between that date and December 15, 1995 and to amendments filed thereafter. Because the freeze includes a refusal to process applications as amended on or after November 13, 1995, DCT's amended applications which have been rendered not mutually-exclusive will not be processed until sometime (if ever) after the conclusion of the above-captioned proceeding. *NPRM*, at §§ 121-124. DCT's efforts to free other applications from mutual-exclusivity will be thwarted. As a result, DCT may not receive the grants of 39 GHz authorizations to which it is entitled under existing rules. Further, because the *NPRM* freezes the processing of uncontested applications which had not appeared on a Public Notice for 60-days before the application freeze, DCT will not receive the grant of these applications even though DCT is entitled to their grant. Accordingly, DCT has standing to contest the amendment freeze and processing portion of the *NPRM*.[1]

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[1] The due date for this Petition has been extended to the date of its filing due to the closure of the U.S. Government for lack of funding and because of inclement weather.

II. The Freeze on the Acceptance and Processing of Amendments to Pending 39 GHz Applications Is Unlawful Rule Making and Lacks a Rational Basis

A. 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.

The contested Commission action is not interlocutory. As explained in the body of this Petition, the freeze on the acceptance and processing of new station application amendments and uncut-off applications is unlawful rule making and an immediate violation of applicant's rights, ripe for review. To couch the freeze as interlocutory is to deny review and to foreclose all means of redressing the wrong.

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.

B. 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.[2]

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.[3] 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 awarding licenses in MX situations "could lead to results that are inconsistent with the goals of this proceeding."[4] Essential to both reasons is the existence of mutual-

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[2] 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").

[3] 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).

[4] 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

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 para. 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.

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

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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.

Carriers -- Competition for Specialized Services, 22 R.R.2d 1501, para. 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.[5] 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.

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[5] 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.

III. 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 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.

IV. Conclusion

WHEREFORE, the foregoing premises considered, DCT Communications, Inc. respectfully requests the Commission:

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

Respectfully submitted,

DCT COMMUNICATIONS, INC.

By: /S/
Thomas J. Dougherty, Jr.
Its Counsel

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January 16, 1996

CERTIFICATE OF SERVICE

I, Natalie Hughes, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 5th day of November, 1996, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing Reply Comments to the following:

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