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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of:	)	
	)	
Amendment of the Commission's Rules	)	ET Docket No. 95-183
Regarding the 37.0 - 38.6 GHz and	)	RM-8553
38.6 - 40.0 GHz Bands	)	
	)	
Implementation of Section 309(j) of	)	PP Docket No. 93-253
the Communications Act -- Competitive	)	
Bidding, 37.0 - 38.6 GHz and	)	
38.6 - 40.0 GHz	)	

To: The Commission

JOINT PETITION FOR RECONSIDERATION

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March 9, 1998

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SUMMARY

By this Joint Petition for Reconsideration, several concerned parties seek modification of defects in the policies relating to 38.6 - 40.0 GHz Point-to-Point Microwave Radio Service ("39 GHz") made final by the November 3, 1997 Report & Order in this proceeding. As a result of these policies, more than 250 applications filed by the Petitioners, as well as a number of applications filed by others, The vast majority of which are free of mutual exclusivity, have been needlessly withheld from processing and grant.

The 39 GHz processing regime made final by the Report & Order in this proceeding violates Section 309(j)(7)(A) of the Communications Act, because its sole operative purpose, if not the principal underlying intent of the Commission, is to preserve spectrum for auction in the expectation of increased Federal revenues. By distorting the legal significance of cut-off rules, and by otherwise blocking the processing of applications for which already lodged submissions of right have solved mutual exclusivity conflicts, the processing policies also contravene Section 309(j)(6)(E) of the Communications Act. Because the processing policies affirmatively prevent the grant of licenses to applicants who have made significant contributions to the development of a new telecommunications service or technology, they violate Section 309(j)(6)(G) of the Communications Act. These policies also contravene processing regulations adopted pursuant to Section 309(b) of the Communications Act, clear precedent established by a solid chain of applicable case law, and the Commission's professed objectives in exercising its competitive bidding authority.

The Petitioners, along with other bona fide applicants who also filed their applications under the pre-existing rule structure, have a legitimate expectation that their processing rights will

not be subrogated. Of course, this does not mean that the Commission may not transition to a system of competitive bidding in the instant case; *only that it must not prejudice the vested rights of pending applicants in doing so.*

As fully demonstrated in this petition, the Commission must find on reconsideration that:

(1) The commission *has not* completed the processing of applications eligible for grant in accordance with the policies adopted in the Rulemaking.

(2) The Commission erred in ordering the as yet to be conducted dismissal of all pending 39 GHz applications, and such mass dismissal would clearly *not* be "without prejudice".

(3) All 39 GHz applications pending as of November 13, 1995 have achieved cut-off status and are "ripe" for processing.

(4) A reasonable time period must be allowed upon issuance of an Order on Reconsideration for the filing of amendments or voluntary dismissals to remove mutual exclusivity; at a minimum, submissions resolving mutual exclusivity conflicts that were filed prior to the release of the Report & Order must be processed.

(5) Licenses must be issued to all non-mutually exclusive applicants that filed prior to the effective date of the November 13, 1995 filing freeze and otherwise possess the necessary threshold legal qualifications under the pre-existing rule structure.

(6) The portions of the Report & Order and the rule provisions appended thereto relating to license terms, facilities build-out, and the protection of "incumbent" operations with respect to licenses that may be issued under the new competitive bidding regime should be modified, such that all 39 GHz licensees are afforded the same ten-year license term in which to meet substantial service requirements, and to make clear that "incumbent" service areas, *not just individual links* will be protected from the operations of licensees that may obtain their licenses through the contemplated competitive bidding process.

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To: The Commission

JOINT PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AA&T Wireless Services, Cambridge Partners, Inc., Linda Chester, HiCap Networks, Inc., Paul R. Likins, PIW Development Corporation, SMC Associates, Southfield Communications LLC, and Wireless Telco (collectively referred to herein as the "Petitioners"), together through their undersigned counsel, hereby submit the following Joint Petition for Reconsideration. The instant Joint Petition seeks reconsideration of certain elements of the Report & Order (the "Report & Order") portion of the November 3, 1997 Report & Order and Second Notice of Proposed Rulemaking in the above-captioned proceeding (the "Rulemaking").[1/]

Specifically, the decision to conduct a mass dismissal of long-pending 38.6 - 40.0 GHz Point-to-Point Microwave Radio Service ("39 GHz") applications lacks sufficient legal justification and should be reversed. Instead, a reasonable time should be allowed to resolve remaining

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[1/] See Report & Order and Second Notice of Proposed Rulemaking, ET Docket No. 95-183 & RM 8553, PP Docket No. 93-253, FCC 97-391, (released November 3, 1997), 63 Fed Reg 6079 (February 6, 1998).

conflicts, and licenses should be immediately issued in all cases where no *actual* mutual exclusivity exists and applicants otherwise meet the threshold licensing qualifications under the Communications Act of 1934 (as amended) (the "Communications Act") and the pre-existing 39 GHz licensing rules. Petitioners also seek the correction of inconsistencies between the Report & Order and the revisions to Part 101 appended thereto relating to license terms, the build-out of facilities, and the protection of incumbent operations with respect to licenses that may be issued under the new competitive bidding regime.

I. INTRODUCTION

Petitioners are 39 GHz applicants and licensees that entered the 39 GHz business several years ago to facilitate the rapid introduction of a wide range of competitive *facilities-based* local wireless broadband services in accordance with key FCC and Congressional public policy objectives. Paradoxically, however, because of unjustifiable policies promulgated through the Rulemaking and the underlying adjudicatory process, more than 250 of Petitioners long-pending 39 GHz applications, as well as many of those filed by other pioneering companies, have been needlessly withheld from processing. As a result, the commendable efforts of Petitioners and others to rapidly deliver valuable new competitive services to the public have been frustrated.

Instead, the actions of the Commission over *more than four years* have improperly delayed the introduction of important new services to the public. The draconian processing policies adopted in the Rulemaking, which have *now* been made "final" by the Report & Order, cannot be reconciled with the Communications Act, regulations adopted pursuant thereto, controlling case

law, or the Commission's professed objectives in the Rulemaking, all of which clearly establish that:

(1) The commission *has not* completed the processing of applications eligible for grant in accordance with the policies adopted in the Rulemaking.

(2) The Commission erred in ordering the as yet to be conducted dismissal of all pending 39 GHz applications, and such mass dismissal would clearly *not* be "without prejudice".

(3) All 39 GHz applications pending as of November 13, 1995 have achieved cut-off status and are "ripe" for processing.

(4) A reasonable time period must be allowed upon issuance of an Order on Reconsideration for the filing of amendments or voluntary dismissals to remove mutual exclusivity; at a minimum, submissions resolving mutual exclusivity conflicts that were filed prior to the release of the Report & Order must be processed.

(5) Licenses must be issued to all non-mutually exclusive applicants that filed prior to the effective date of the November 13, 1995 filing freeze and otherwise possess the necessary threshold legal qualifications under the pre-existing rule structure.

(6) The portions of the Report & Order and the rule provisions appended thereto relating to license terms, facilities build-out, and the protection of "incumbent" operations with respect to licenses that may be issued under the new competitive bidding regime should be modified, such that all 39 GHz licensees are afforded the same ten-year license term in which to meet substantial service requirements, and to make clear that "incumbent" service areas, *not just individual links* will be protected from the operations of licensees that may obtain their licenses through the contemplated competitive bidding process.

II. BACKGROUND

The instant Joint Petition is the unfortunate result of a consistent and longstanding pattern of disregard for the substantive rights of Petitioners and other similarly situated parties. This pattern of unjustifiable treatment emanates from the 39 GHz processing policies for "incumbent"

applicants that were initially imposed by the Notice of Proposed Rulemaking and Order in the Rulemaking that was adopted shortly after the imposition of the "freeze" on the filing of new 39 GHz applications.[2/]

Among other things, the Processing Order improperly: (1) removed the substantive right of applicants to remove mutual exclusivity conflicts; (2) imposed an arbitrary and capricious cut-off requirement creating a legally unsupportable fiction of processing "ripeness" tied to the effective date of the Freeze Order; and (3) blocked the processing of 39 GHz applications and the issuance of licenses to properly qualified applicants.[3/]

On January 17, 1997, the Commission released an order in response to two petitions for reconsideration of the Processing Order that had been pending for *one full year* prior to that time.[4/] The First Reconsideration Order correctly recognized that, without first completing the requisite notice and comment rulemaking, the Commission lacked the legal authority to remove the substantive rights of applicants to amend or dismiss applications for the purpose of resolving mutual exclusivity conflicts. However, the First Reconsideration Order only sanctioned the

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[2/] See Notice of Proposed Rulemaking and Order, ET Docket No. 95-183, 11 FCC Rcd 4930 (1996) (adopted December 15, 1995) (the "NPRM"). The Order component of the NPRM at ¶¶ 121 - 124 is referred to herein as the "Processing Order". See, also, Order, 11 FCC Rcd 1156 (1996)(the "Freeze Order").

[3/] See Processing Order, at ¶¶ 121-124.

[4/] See Memorandum Opinion and Order, ET Docket No. 95-183 & RM 8553, PP Docket No. 93-253, 12 FCC Rcd 2910 (1997) ("First Reconsideration Order"); see, also, Petition For Reconsideration of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation (the "Commco Petition"); Petition For Partial 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). See, also, Emergency Request For Stay of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation, ET Docket No. 95-183 (filed January 16, 1996).

processing of 39 GHz amendments and dismissals that were filed as a matter of right prior to December 15, 1995.[5/]

Without any legitimate justification, the First Reconsideration Order failed to allow processing of a substantial number of other identical submissions filed as a matter of right that were received after December 15, 1995. The First Reconsideration Order also improperly dismissed cogent arguments presented on the record concerning the cut-off effect of the Freeze Order. Similarly, the First Reconsideration Order failed to adequately address arguments concerning the Commission's corresponding mis-application of non-statutory cut-off procedures to determine the processing "ripeness" of applications that had appeared on public notice less than sixty days prior to November 13, 1995. The First Reconsideration Order repeatedly relied on the interlocutory nature of the processing policies under examination as the principal justification for summarily dismissing opposing arguments relating to the above-described defects in the 39 GHz processing policies.[6/]

On April 1, 1997, a petition for reconsideration of the First Reconsideration Order was filed that further addressed these matters in great detail.[7/] On November 3, 1997, *seven more months* after the BizTel Petition was filed, and *almost two years* after adoption of the NPRM and the Processing Order, the Commission released the Report & Order. Despite the fact that many of the issues raised in the instant Joint Petition were addressed in detail in the BizTel Petition (and in

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[5/] First Reconsideration Order, at ¶ 17.

[6/] Id., at ¶¶ 19-22.

[7/] See Petition For Reconsideration of BizTel, Inc., ET Docket No. 95-183 (filed April 1, 1997), FCC Public Notice, Report No. 2193 (released May 7, 1997) (the "BizTel Petition"); see, also, e.g., Comments of DCT Communications, Inc. In Support of BizTel Petition For Reconsideration, ET Docket No. 95-183 (filed May 27, 1997).

a number of other submissions to the record of the Rulemaking), the Report & Order somehow entirely fails to treat these issues.[8/]

Instead, the Report & Order restates the same unsubstantiated arguments that the Commission has previously set forth in the Rulemaking as if the timely and coherently presented reconsideration arguments to the contrary *simply do not exist on the record.* The Report & Order goes on to conclude that the "appropriate" course of action is to dismiss "without prejudice" all remaining 39 GHz applications. Petitioners hereby seek reconsideration of those portions of the Report & Order that deal with the disposition of pending 39 GHz applications. Petitioners also seek to correct inconsistencies between the Report & Order and the rules appended thereto relating to license terms, the build-out of facilities, and the protection of "incumbent" operations with respect to operations that may be licensed pursuant to the new competitive bidding regime.

III. THE COMMISSION *HAS NOT* COMPLETED THE PROCESSING OF APPLICATIONS ELIGIBLE FOR GRANT IN ACCORDANCE WITH THE POLICIES ADOPTED IN THE RULEMAKING

The Report & Order incorrectly asserts that the Commission's Microwave Branch has *completed* the processing of all applications that were deemed "eligible" for processing under the interim procedures adopted in the Processing Order and First Reconsideration Order.[9/] This was

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[8/] In contravention of the provisions of Section 405 of the Communications Act, the Report & Order, which has the effect of a Final Order in the Rulemaking, also failed to properly dispose of the BizTel Petition. While this procedural failure may have been due to an inadvertent oversight, this seems quite unlikely given the number of *ex parte* presentations on the matter that are evident in the record. See, e.g., Ex Parte Notices of BizTel, Inc., ET Docket No. 95-183 (filed June 10, 1997 & June 16, 1997).

[9/] Contra., Report & Order, at ¶ 87.

not the case at the time that the Report & Order was released, and is still not the case at present, *more than four months later.*

At least eighty (80) of Petitioners' pending applications that should have been deemed "eligible" for processing and grant under the procedures already adopted by the Commission have *not* been processed. In fact, Commission staff readily acknowledge that processing under the regime set forth in the Processing Order and the First Reconsideration Order has not in fact been completed, and express a desire to accomplish this. Nonetheless, repeated offers of assistance to complete this task have been turned down.

The Commission should take immediate steps to ensure that processing that was ordered *more than one year ago* is in fact completed as soon as possible. Petitioners hereby renew their offers through undersigned counsel to provide whatever assistance is necessary to accomplish this effort.

IV. THE COMMISSION ERRED IN ORDERING THE AS YET TO BE CONDUCTED MASS DISMISSAL OF REMAINING 39 GHz APPLICATIONS, AND SUCH DISMISSAL WOULD CLEARLY *NOT* BE "WITHOUT PREJUDICE"

The decision to order the mass dismissal of all remaining 39 GHz applications and the scant supporting arguments underlying this action are arbitrary and capricious.[10/] Moreover,

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[10/] Report & Order, at ¶¶ 87-91. In the interest of avoiding the litigation that will ensue if the yet to be conducted dismissals called for in the Report & Order are in fact carried out and the corresponding strain on the Commission's limited resources that will result therefrom, Petitioners urge the Commission to voluntarily forebear from taking such action, *at least* until such time as all avenues of review of the underlying issues have been exhausted.

given the facts in the instant case, the contemplated mass dismissal cannot be credibly characterized as "without prejudice", and thus, must not be carried out.

A. The Decision to Conduct a Mass Dismissal is Without Merit

The Commission's line of argument resulting in its decision to conduct a mass dismissal of 39 GHz applications is grounded in two premises: (1) Resolving the remaining mutual exclusivity conflicts would likely require comparative hearings; and (2) Dismissing all pending applications and proceeding with a new regime of licensing by competitive bidding will lead to a more efficient and intensive use of the spectrum.[11/] Both of these premises are wholly unsupported by the facts before the Commission.

First, the *only* truly operative barrier to the resolution of mutual exclusivity among 39 GHz applicants is the Commission's policy of barring the processing of submissions that resolve these conflicts. Even a cursory review of the actual facts reveals that the process of resolving mutual exclusivity among 39 GHz filers is an ongoing activity. In fact, this ongoing process, which has been orchestrated by Petitioners and other applicants without *any expenditure of Commission resources whatsoever*, has successfully resolved a vast majority of all conflicts that exist among pending applicants.

During the period of regular 39 GHz filing activity, which began in early 1994 and ended on November 13, 1995, *more than 350* mutual exclusivity resolution submissions affecting *more than 700* applications were filed with the Commission. In addition, since December 15, 1995, there have been *at least 125* submissions of right filed with the Commission that have rendered

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[11/] See Report & Order, at ¶¶ 87-91.

almost 250 additional applications free of mutual exclusivity conflicts.[12/] A vast number of these submissions are essentially "self-processing", due to the fact that applications affected by the conflict resolutions are clearly identified in the filings.

It is eminently clear from the foregoing that there is simply no legitimate basis whatsoever to support the Commission's contention that the resolution of mutual exclusivity conflicts is unworkable, or that it would *ever be necessary* to employ comparative hearings to accomplish this goal. Had it not been for the ambiguity and confusion caused by the Commission's *own* actions, it is more likely than not that virtually all mutual exclusivity among 39 GHz applicants would have been resolved two or more years ago. Contrary to the speculative statements in the Report & Order, most if not all of the few remaining mutual exclusivity conflicts could be readily resolved without further Commission action other than establishing a reasonable deadline (e.g., 30-60 days after the release of an order on reconsideration) for the completion of such efforts.[13/]

Second, rather than spurring the delivery of innovative new competitive local services to the public, the issuance of licenses to bona fide 39 GHz applicants has *actually* been needlessly delayed in the process of shifting to competitive bidding. There is absolutely no evidence presented in the record of the Rulemaking by the Commission or any other party demonstrating that the professed policy goals of the Rulemaking are not being met by licensees that receive

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[12/] The number of applications cleared by conflict resolutions filed since December 15, 1995 constitutes roughly half of the remaining mutual exclusivity conflicts that exist. Due to the fact that the Commission has failed to place virtually all 39 GHz conflict resolution submissions filed after December 15, 1995 on public notice, it is difficult to arrive at an exact count of filings. Nonetheless, the tally of 125 is based on a review of FCC date-stamped documents that are in undersigned counsel's possession, and is likely to constitute a low-end estimate of actual total number of submissions.

[13/] See, e.g., Report & Order, at ¶¶ 90-91.

authorizations under the pre-existing rule structure. In truth, the pre-existing rule structure was more than adequately meeting these goals.

No matter how the Commission manipulates the facts before it, it is undisputable that the actual effect, if not the actual principal underlying intent, of the current 39 GHz policies is to deny licenses to qualified applicants, and preserve as much spectrum as possible for distribution under the contemplated new competitive bidding regime. Based on the well-documented spate of business failures by auction "winners" in many services, it is quite clear that spectrum auctions are no panacea. Nonetheless, Petitioners readily acknowledge that the Commission has the requisite statutory authority to implement competitive bidding. In doing so in the instant case, however, the Commission has no legitimate basis whatsoever to justify its decision to not to process, but to dismiss all remaining "incumbent" 39 GHz applications.

B. The Contemplated Involuntary Dismissals Would Prejudice the Rights of Existing Applicants

The assertion that the contemplated dismissals of 39 GHz applications would be "without prejudice" is indefensible.[14/] Applicants that applied under the pre-existing rule structure *would clearly be prejudiced* if they are forced to re-apply under a system of competitive bidding. Assuming *arguendo* that a dismissed applicant did in fact re-enter under the new competitive bidding regime, the applicant would be deprived of its former cut-off status and subject to overfiling by all latecomers. Furthermore, if the re-entering applicant was *actually able to prevail* in the bidding, the applicant would be forced to *pay* the Federal Government for a license that it would have obtained *at no charge* had its earlier application not been dismissed by the Commission. The summary dismissal of 39 GHz applications called for in the Report & Order

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[14/] See Report & Order, at ¶¶ 87 & 91.

would severely prejudice Petitioners' rights as bona fide 39 GHz applicants, and there is absolutely no legitimate basis for the Commission to conclude otherwise.

V. THE PROCESSING POLICIES AFFIRMED AND MADE FINAL BY THE REPORT & ORDER CONTRAVENE THE COMMUNICATIONS ACT

The Report & Order is but the latest link in a long chain of impediments imposed on 39 GHz applicants by the Commission that seek to block the grant of licenses to qualified applicants under the pre-existing rule structure. These actions contravene the Communications Act, relevant case law, and the public interest.

First, the 39 GHz processing regime made final by the Report & Order violates Section 309(j)(7)(A) of the Communications Act, because its sole operative purpose, if not its intent, is to preserve spectrum for auction in the expectation of increased Federal revenues. The clear overall objective of the Rulemaking is the intent to modify the applicable licensing and technical rules to facilitate the future issuance of licenses by competitive bidding.[15/] Given this clearly stated principal objective, the only conclusion that can be reached is that the underlying effect, in not the principal purpose, of the processing procedures in the Rulemaking has been to impede the grant of licenses to eligible applicants for the purpose of retaining spectrum for subsequent sale at auction. It is the Commission's failure to process amendments and voluntary dismissals filed as a matter of substantive right that is responsible for a vast majority of the mutual exclusivity conflicts that exist today. The Commission's professed concerns relating to the difficulty of resolving the few

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[15/] See, e.g., NPRM, at ¶¶ 2 & 104.

remaining 39 GHz mutual exclusivity conflicts are unsupported by the record and entirely misplaced.

Second, by distorting the legal significance of cut-off rules, by otherwise blocking the processing of applications for which already lodged submissions of right have solved mutual exclusivity conflicts, and by manufacturing and using the fiction of mutual exclusivity to block the processing of both new amendments resolving mutual exclusivity *and* non-mutually exclusive applications,[16/] the Commission's actions in the Rulemaking also contravene Section 309(j)(6)(E) of the Communications Act.[17/] This fiction of "unripeness" must be eliminated on reconsideration.

Third, because the processing regime in the Rulemaking affirmatively prevents the grant of licenses to applicants who make significant contributions to the development of a new telecommunications service or technology, it violates Section 309(j)(6)(G) of the Communications Act. Petitioners and others that invested scarce seed capital and diligently filed applications to launch an important new service in bands that had previously been of little use must not be forced to shed their legitimate processing rights under Ashbacker Radio Corp. v. FCC in favor of the next generation of 39 GHz applicants.[18/]

[16/] See Report & Order, at ¶ 90; see, also, First Reconsideration Order, at ¶ 15; Processing Order, at FN 197.

[17/] Under Section 309(j)(6)(E) of the Communications Act, the Commission is required to continue to use engineering solutions, negotiation, service regulations, and other means to avoid mutual exclusivity in licensing proceedings.

[18/] See Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945).

VI. THE REPORT & ORDER SHOULD HAVE FOUND THAT ALL PENDING 39 GHz APPLICATIONS WERE CUT-OFF FROM THE FILING OF FURTHER COMPETING APPLICATIONS AS OF NOVEMBER 13, 1995 & SUBJECT TO IMMEDIATE PROCESSING

The Report & Order should have found that the Freeze Order established November 13, 1995 as the operative cut-off date for all pending 39 GHz applications that were not already sixty days past public notice as of that date. Throughout the Rulemaking, the Commission has improperly relied on a fiction of processing unripeness that has improperly foreclosed the processing of many of Petitioners' pending applications.[19/] The decision in the Report & Order to dismiss rather than process 39 GHz applications that were not 60 days past public notice prior to the effective date of the Freeze Order is arbitrary and capricious, and must be reversed.

A. Completion of A 60-day Cut-Off Period For The Filing Of Mutually Exclusive Applications Is Not A Proper Legal Pre-Requisite For Processing Eligibility

Under Section 309(b) of the Communications Act and Section 101.37(c) of the Commission's Rules, a 39 GHz application may be granted at *any time* after the passage of thirty days from its appearance on public notice, so long as no petition to deny is pending.[20/] Section 309(b) is the only statutory threshold required to be met for an application to be eligible for processing and grant. Furthermore, Section 309(b) is solely intended to allow for the filing of petitions to deny by interested parties, and does not bestow upon would-be applicants any legal or equitable right to file competing applications. Given that neither the Freeze Order or the Processing Order precluded the filing of petitions to deny with respect to any pending application,

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[19/] See, e.g., Report & Order, at ¶ 93; see, also, First Reconsideration Order, at FN 52; Processing Order, at FN 197.

[20/] 47 U.S.C. § 309(b); see, also, 47 C.F.R. § 101.37(c).

the thirty-day statutory protest period clearly has run for all pending 39 GHz applications and, thus, the only statutory pre-requisite for processing has been satisfied.[21/]

B. Cut-Off Rules Are A Construct Of Administrative Convenience, And Vest No Right To File Competing Applications

The sole purpose of cut-off rules, as narrowly construed by repeated review of the Courts, is to provide administrative convenience in establishing finality in determining which applications make up a processing group.[22/] It is well-settled that cut-off provisions, in and of themselves, neither vest nor divest any absolute legal right on the part of a putative applicant to file a competing application.[23/] Furthermore, cut-off rules are procedural and, thus, may be established or modified by the Commission without resort to formal rulemaking under the Administrative Procedure Act.[24/]

By definitively foreclosing the further filing of 39 GHz applications, the Freeze Order defined the universe of pending applications and, thus, modified the relevant cut-off rules that were

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[21/] See 47 U.S.C. § 309(d)(1); see, also, Reuters Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986), at 946; Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1320 (D.C. Cir. 1995). Even in the very few cases where petitions to deny were lodged, there is *still* a basis for adjudication.

[22/] See Ranger v. FCC, 294 F.2d 240, 243 (D.C. Cir. 1961); see, also, McElroy Electronics Corp. v. FCC, 86 F.3d 248, 253 (citing Florida Institute of Technology v. FCC, 952 F.2d 549, 550 (D.C.Cir. 1992)). See, also, City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 663 (D.C. Cir. 1984).

[23/] In fact, no party has *ever* claimed that its right to file a competing application has been trampled by the Commission's failure to accept applications tendered for filing after the effective date of the Freeze Order. See Kessler v. FCC, 326 F.2d 673, 686 (D.C. Cir. 1963); see, also, Reuters Ltd. v. FCC, at 951; Committee for Effective Cellular Rules v. FCC, at 1320.

[24/] See 5 U.S.C. § 553(b)(3)(A). See, also, Kessler v. FCC, at 682 (citing Ranger v. FCC, at 244).

in force prior to that time. In doing so, the Commission unambiguously created the administrative finality for processing purposes that is the exclusive legal relevance of cut-off rules.

Moreover, because the Report & Order constitutes a Final Order in the Rulemaking, the Commission's previous reliance on the specious argument that the Freeze Order was somehow interlocutory, and thus could not have constituted a *de facto* accelerated cut-off of all then pending applications is now clearly moot.[25/] The facts of this case clearly demonstrate that the Freeze Order did, in fact and by law, constituted a *de facto* accelerated cut-off. Accordingly, all applications that were on file as of the effective date of the Freeze Order must be processed.

C. The Use Of Cut-Off Rules To Restrict Processing Eligibility And Preserve Or Recapture Spectrum For Subsequent Sale At Auction Contravenes The Communications Act

Because the sole *operative* objective of the Rulemaking is to implement a system of competitive bidding to replace the pre-existing licensing approach, it must be concluded that the Commission's distorted interpretation of its cut-off rules, and its decision to dismiss rather than process all pending 39 GHz applications serves to preserve or recapture spectrum for auction in the expectation of increased Federal revenues. This result is a clear violation of Section 309(j)(7)(A) of the Communications Act.

The alternative justifications for refusal to process and instead dismiss pending 39 GHz applications offered in the Report & Order lack credibility and are wholly unsupportable. Rather than "inhibiting the development of new and innovative services" as alleged in the Report & Order[26/], and despite the repeated obstructions put in place by the Commission, the 39 GHz

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[25/] See First Reconsideration Order, at ¶ 17; see, also, Processing Order, at ¶ 122.

[26/] See, e.g., Report & Order, at ¶ 91.

industry is a stunning example of entrepreneurial success. Instead of speeding the development of new services, the Commission's policies in the Rulemaking have consistently ignored or distorted facts and stalled the efforts of 39 GHz companies to move forward with their innovative service plans. Unless the processing decisions made final by the Report & Order are reversed, the only true effect of these policies will be to recapture spectrum for subsequent sale at auction in contravention of Section 309(j)(7)(A) of the Communications Act. Failure by the Commission to recognize that the Freeze Order constituted an accelerated cut-off of applications that were not sixty days past public notice at the time, and the resulting cessation of processing of the affected applications has precluded the issuance of licenses to duly qualified applicants such as Petitioners, who make significant contributions to the development of new telecommunications service or technology. These actions are a clear violation of Section 309(j)(6)(G) of the Communications Act.

D. The Controlling Case Law Also Affirms The Existence Of An Accelerated Cut-Off

Under McElroy v. FCC, the fact that the Freeze Order did not explicitly state that an accelerated cut-off date had been established is irrelevant to the cut-off acceleration effect of the Freeze Order.[27/] In that case, the cut-off date for applications for cellular telephone licenses for unserved areas was established by operation of law, notwithstanding that the relevant Commission release did not contain language indicating that a cut-off date had been established. Id. Although the same circumstances apply in the instant case, the Report & Order, and all previous treatments of this issue by the Commission in the Rulemaking, ignored the implications of McElroy.

[27/] See McElroy Electronics Corp. v. FCC, at 255.

Likewise, the Commission has improperly disregarded Kessler v. FCC as a basis for a cut-off acceleration in the instant case.[28/] The Freeze Order relied exclusively on Kessler as the controlling precedent for implementation of the freeze in the instant case.[29/] As the Commission itself explained in Kessler,

> ... ***we amended our procedural rules to establish, in effect, a new 'cut-off date' for most pending [AM broadcast] applications [except those not subject to the freeze], this new date acting to supersede all previous cut-off lists.***(emphasis added).[30/]

The Freeze Order is indistinguishable in operation from the freeze imposed in Kessler, and the Commission has failed to offer any legitimate justification for deviating from the cut-off acceleration result that arose from implementing the freeze in that case.[31/] Therefore, the precedent for establishing an accelerated cut-off through the adoption of an application filing freeze created by the Commission in Kessler should control in the instant case.

Even assuming, *arguendo,* that Kessler does not compel a finding that an application freeze establishes an accelerated cut-off in *all* cases, the Commission must be able to show a legitimate

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[28/] See Kessler v. FCC, at 685; see, also, First Reconsideration Order, at ¶¶ 20-21.

[29/] See Freeze Order, at 1156. The *only* difference between the facts in Kessler and the instant case is that the new rules here involve the implementation of a system of competitive bidding. In Kessler, the Commission found that its adoption of a freeze on the acceptance of new AM Broadcast applications pending possible revision of the applicable licensing rules served to establish a cut-off date for all pending applications on the date the freeze became effective. The Court of Appeals noted in Kessler that it had previously found that the Commission's acceleration of the closing of an application processing group to be well within requisite procedural constraints. See Kessler v. FCC, 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)).

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

[31/] See Motor Vehicle Manufacturers Association v. State Farm Insurance Co., 463 U.S. 29 (1983).

legal or public policy basis for disregarding the precedent established by its own actions in Kessler. Id. The Commission's failure in the Rulemaking to acknowledge the controlling precedential effect of Kessler only serves to underscore the violations of the Communications Act created by the processing policies adopted in the Rulemaking.[32/]

E. The Controlling Statutory And Case Law Compels A Finding That All Pending 39 GHz Applications Are Eligible For Processing

As set forth above, the legal rationale in the instant case for a finding that the Freeze Order imposed an accelerated cut-off is clearly compelled by the Communications Act and the controlling case law. Petitioners and other bona fide applicants who filed their applications under the pre-existing rule structure have a legitimate expectation that their processing rights will not be subrogated due to a misinterpretation of the legal significance of cut-off rules.[33/] Accordingly, the arbitrary and capricious determinations as to cut-off status and processing eligibility made final by the Report & Order must be modified to acknowledge that all 39 GHz applications pending as of the effective date the Freeze Order are cut-off from the further filing of competing mutually exclusive applications and, thus, are ripe for immediate processing.

[32/] Because the Freeze Order imposed an accelerated cut-off for all pending 39 GHz applications that had not yet achieved cut-off status as of its effective date, and because potential applicants do not have a right as a matter of law to file mutually exclusive applications when a filing window is established, the Commission is barred from altering its policies in the Rulemaking to allow the re-opening of filing windows. See Reuters Ltd. v. FCC, at 951; Committee For Effective Cellular Rules v. FCC, at 1320; BizTel Petition, at 12-16.

[33/] See Reuters Ltd. v. FCC, at 951; Committee for Effective Cellular Rules v. FCC, at 1320; see, also, Ashbacker Radio Corp. v. FCC, at 333.

VII. A REASONABLE PERIOD OF TIME MUST BE ALLOWED FOR THE FURTHER FILING OF MUTUAL EXCLUSIVITY RESOLUTIONS; AT A MINIMUM, SUBMISSIONS THAT WERE FILED PRIOR TO THE RELEASE OF THE REPORT & ORDER MUST BE PROCESSED

Consistent with its obligation under Section 309(j)(6)(E) of the Communications Act to continue to use, among other things, engineering solutions and service regulations to avoid mutual exclusivity when attempting to implement a new system of competitive bidding, the Commission must permit a reasonable time period (e.g., 30-60 days) following release of a Order on Reconsideration in the Rulemaking for the filing of amendments to resolve the few remaining mutual exclusivity conflicts among pending 39 GHz applicants. Given the ambiguity and uncertainty created thus far in the Rulemaking with respect to the ability of applicants to resolve mutual exclusivity conflicts, additional time for the filing of responsive amendments of right is merited to ensure adherence to Congress' intent in implementing the Commission's competitive bidding authority. At a minimum, the Commission must issue a finding that *all* submissions resolving mutual exclusivity that were filed before the release of the Report & Order must be processed.

The rights to amend and voluntarily dismiss for the purpose of removing mutual exclusivity are substantive rights that the Commission may not revoke without the completion of notice and comment procedures in the context of a rulemaking.[34/] There is simply no rational distinction

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[34/] See 5 U.S.C. § 553; see, also, Radio Phone Communications, Inc., 5 R.R.2d 52, 61 (1965); Answerite Professional Telephone Service, 41 R.R.2d 552, 557 (1977). Rescission of an agency rule -- even if temporary -- is subject to the same standard of review as promulgation of a rule. See Public Citizen v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984). See, also, Commco Petition, at 9; DCT Petition, at 3; Petition for Partial Reconsideration of Elar Cellular, ET Docket No. 95-183 (filed February 18, 1997), FCC Public Notice Report No. 2178 (released March 6, 1997).

that can be made between amendments or voluntary dismissals filed as a matter of right on or before December 14, 1995, and those filed thereafter. The clear finding in the First Reconsideration Order that amendments of right are considered effective when filed without any further staff action must be applied to *all* submissions on file that resolve mutual exclusivity.

Even assuming, *arguendo,* that the suspension of processing of mutual exclusivity resolutions filed after December 14, 1995 can somehow be reconciled with the notice and comment provisions of the Administrative Procedure Act and the Commission's Rules relating to the immediate effectiveness submissions made as a matter of substantive right, the Commission has articulated no legitimate reason for *not* processing these filings. The Report & Order simply reiterates unfounded speculation previously raised by the Commission in the Rulemaking that comparative hearings may be necessary to resolve outstanding mutual exclusivity among applicants, and that the further issuance of licenses to "incumbents" could limit spectrum availability for the contemplated auctions.[35/] As previously discussed supra, these lines of reasoning are entirely without merit.

It is also important to note that a substantial percentage of pending 39 GHz applications are free of mutual exclusivity conflicts. In addition, the vast majority of few remaining mutual exclusivity conflicts involve only two or three parties. In many cases, adjacent service areas have only very minor overlaps. These conflicts are readily amenable to engineering solutions, as demonstrated by the fact that several hundred similar conflicts have already been resolved in a like fashion without *any* expenditure of Commission resources. The Commission's decision not to accept and process mutual exclusivity filings made by "incumbent" 39 GHz applicants must be

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[35/] See, e.g., Report & Order, at ¶ 90.