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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

ERRATUM TO
PETITION FOR RECONSIDERATION AND CLARIFICATION

The "Petition for Reconsideration and Clarification" of Commco L.L.C., PLAINCOM, INC., Sintra Capital Corporation and Eric Sterman filed by their attorneys in the above-captioned proceeding on March 9, 1998 is hereby corrected as follows:

The Table of Contents Page is corrected to reflect accurate page numbers. Under heading II.A. of the Table of Contents page, insert the following: "1. The Commission Did Not Modify its Rule Governing Amendments Filed As of Right."

On the Summary page, fifth line from the top, delete the phrase "pending as of November 13, 1995."

On page 2 of the body of the pleading, ninth line of the first full paragraph, change the word "has" to "have."

On page 3, first line of the first full paragraph, change the word "release" to "released."

On page 4, second line of the first full paragraph, delete the phrase, "the summer of." Also on page 4, in footnote 9, change the date "June 21" to "November 22" and delete the phrase "and letter from Michael B. Hayden to ELAR Cellular dated November 22, 1995."

On page 5, third line from the top, underline the word "See" and insert a period at the end of the line. Also on page 5, in footnote 13, insert the word "and" before the word "Sintra."

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On page 7, thirteenth line from the top, change the word "Freeze" to "39 GHz." Also on page 7, in footnote 20, insert the word "to" after the word "add."

On page 8, in footnote 23, add the letter "d" to the end of the word "replace."

On page 9, in footnote 27, change the phrase "at ¶11" to "12 FCC Rcd at 2915."

On page 10, second line of the first full paragraph, change the word "Freeze" to "39 GHz."

On page 11, third line from the top, change the phrase "Freeze NPRM" to "39 GHz Order." Also on page 11, seventh line from the top, change the word "Freeze" to "39 GHz." In footnote 32, change the word "Freeze" to "39 GHz" and underline "39 GHz Order." Also in footnote 32, change the phrase "Freeze Order at ¶122" to "39 GHz Order, 11 FCC Rcd at 4988."

On page 12, in footnote 33, underline the word "See" and after the word "FCC" insert the phrase "781 F.2d 946 (D.C. Cir. 1986)."

On page 14, fifteenth line of the first full paragraph, change the word "fact" to "face." Also on page 14, in footnote 39, insert the phrase "F.2d" after the number "745."

Substitute chart labeled "Pending Pleadings" for Attachment B.

A copy of the corrected "Petition for Reconsideration and Clarification" is attached hereto.

Respectfully submitted,

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Dated: March 10, 1998

Their Attorneys

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PETITION FOR RECONSIDERATION AND CLARIFICATION

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TABLE OF CONTENTS

SUMMARY i

I. BACKGROUND 3

II. THE COMMISSION MUST PROCESS PENDING APPLICATIONS WHICH ARE NOT MUTUALLY EXCLUSIVE 8

A. The Commission Violated its Statutory Obligation and its Own Rules by Not Processing Amendments Filed as of Right to Eliminate Mutual Exclusivity 8

1. The Commission Did Not Modify its Rule Governing Amendments Filed as of Right 8

B. The Commission Must Adhere to its Own Rules and Process Uncontested Applications, Particulary Those That Completed the 30-Day Public Notice Period 10

1. The Cut-off Rule is Designed to Afford the FCC with an Administratively Viable Mechanism for Protecting the Ashbacker Rights of Applicants 12

2. By Operation of Law, the Competitive Bidding Order Has Established That The Terminal Date For Any Uncompleted Cut-off Period Was November 13, 1998 13

3. Applicants Who Timely File under the Cut-off Rule Have Legitimate and Protectable Reliance Interests 14

III. THE COMMISSION MUST FORESTALL ANY AUCTION UNTIL FUNDAMENTAL PROCESSING ISSUES HAVE BEEN RESOLVED AND APPLICANTS HAVE BEEN AFFORDED A FINAL OPPORTUNITY TO RESOLVE FREQUENCY CONFLICTS 15

A. To Ensure Equity and to Preserve Integrity of the Auction, Commission Should Allow a Reasonable Time for Applicants to Resolve Mutually Exclusive Applications 15

B. The Commission Should Resolve All Pending Petitions for Reconsideration Prior to Auction 16

IV. CONCLUSION 17

SUMMARY

Commco, L.L.C., PLAINCOM, INC., Sintra Capital Corporation and Eric Sterman (collectively referred to as "Petitioners"), hereby request that the FCC reconsider that portion of its Report and Order and Second Notice of Proposed Rulemaking, released November 3, 1997 (Competitive Bidding Order) in the above-captioned proceeding dismissing pending mutually exclusive applications and applications that had not been placed on public notice or completed a 60-day cut-off period as of November 13, 1995, to establish new facilities in the 39 GHz band.

The Commission's order to dismiss such pending applications violates the Congressional mandate as articulated in Sections 309(j)(6)(E) and 309(j)(3) of the Communications Act of 1934, the notice and comment provisions of the Administrative Procedure Act, and contravenes court precedent that applicants have a protectable interest in the Commission following its own cut-off rules. Moreover, the Competitive Bidding Order fails to promote the Commission's stated goals to foster competition, promote efficient use of the spectrum, provide efficient service to the public and to promote fair and efficient licensing. As such, the Commission must process all amendments of right and grant non-mutually exclusive applications which completed the 30-day cut-off period as of November 13, 1995. The Commission must also postpone the commencement of the auction until it affords pending applicants a reasonable period (i.e., 90-days) for the filing of amendments of right to resolve mutually exclusive situations. Otherwise, there will be a continuing spiral of litigation between auction winners and dismissed applicants.

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To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Commco, L.L.C., PLAINCOM, INC., Sintra Capital Corporation and Eric Sterman (collectively referred to as "Petitioners"), pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, request that the Federal Communications Commission ("FCC" or "Commission") reconsider that portion of its Report and Order and Second Notice of Proposed Rulemaking, released November 3, 1997 in the above-captioned proceeding defining mutual exclusivity and ordering the dismissal of pending mutually exclusive applications to establish new facilities in the 38.6 - 40 GHz (hereinafter "39 GHz") band.[1/] In those respects, the Commission's order violates Sections 309(j)(6)(E) and 309(j)(3) of the Communications Act of 1934,[2/] the Commission's rules, the notice

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1/ Report and Order and Second Notice of Proposed Rulemaking, FCC 97-391, ET Docket No. 95-183; RM-8553; PP Docket No. 93-253 (rel. Nov. 3, 1997) ("Competitive Bidding Order").

2/ Communications Act of 1934, as amended, 47 U.S.C. §§309(j)(6)(E) and 309(j)(3) ("Communications Act").

and comment provisions of the Administrative Procedure Act,[3] and court precedent holding that timely filed applicants under an agency cut-off rule have a protectable equitable interest in the enforcement of such rules. Moreover, the Competitive Bidding Order fails to promote the Commission's stated goals to foster competition, promote efficient use of the spectrum, provide efficient service to the public and to promote fair and efficient licensing.[4]

As Petitioners show below, the Commission must process all amendments of right eliminating mutual exclusivity, regardless of when filed, and grant all non-mutually exclusive applications which otherwise comply with the Commission's Rules. This is especially true of those applications which completed the 30-day public notice period as of November 13, 1995.[5] In order to carry out the objectives of the Communications Act and the objectives advanced in the Competitive Bidding Order, the Commission should also postpone the commencement of the auction until it affords pending applicants a 90-day period for the filing of amendments of right and/or reciprocal voluntary dismissals to resolve remaining mutually exclusive situations. The agency's 39 GHz application processing procedures over the last several years have been a morass of inconsistency and unfairness. To name just a few examples, the Commission has applied a "one-to-a-market" channel allocation policy (adopted without a notice and comment rulemaking) to some but not others, dismissed applications for service area size violations, which were never adequately defined or adopted, and permitted reciprocal dismissals of applications to resolve frequency conflicts

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[3] Administrative Procedure Act, 5 U.S.C. §553.

[4] Competitive Bidding Order at ¶87; see also Communications Act, 47 U.S.C. §309(j)(3)(A)-(D).

[5] Communications Act, 47 U.S.C. §309(b) and (d).

after the freeze but not amendments as of right intended to achieve the same effect. In light of this history, the Commission should make available every opportunity for applicants to resolve frequency conflicts and avoid further litigation. In support hereof, the following is respectfully shown.

I. BACKGROUND

On September 16, 1994, the Common Carrier Bureau released a public notice,[6] which advised that the Commission would examine more closely multichannel requests for use of the 39 GHz band to ensure that such requests are justified and that the spectrum is used efficiently. The September Public Notice requested three categories of supplemental information: (1) consideration of non-RF solutions; (2) clear and present need; and (3) frequencies and efficiency. The problem with the September Public Notice was that, in effect, it barred applicants, such as Petitioners, who wished to offer an array of short hop or wireless fiber services, including but not limited to backhaul and link services to PCS and other commercial mobile radio service ("CMRS") carriers, from demonstrating a public need to serve the CMRS segment of the market. For example, under the "frequencies and efficiency" category, the Common Carrier Bureau indicated that "[n]ormally, only one frequency or pair of frequencies will be authorized per application per geographic area. . . . Current applicants must modify their applications accordingly."[7] This category imposed very stringent requirements to demonstrate need which were clearly directed to CMRS providers seeking to apply for 39 GHz spectrum rather than entities such as Petitioners who were seeking the spectrum

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[6] "Common Carrier Bureau Established Policy Governing the Assignment of Frequencies in the 38 GHz and Other Bands to be Used in Conjunction with PCS Support Communications," Public Notice, mimeo no. 44787 (rel. Sept. 16, 1994) ("September Public Notice").

[7] Id. at 1.

to develop the so-called wireless fiber or short hop services market. Notwithstanding the artificial constraint of the September Public Notice, those among Petitioners with applications then pending demonstrated multi-channel need or provided the requested information with new applications as best they could.[8]

For those 39 GHz applicants who attempted to demonstrate a need for multiple channels, the response was no FCC processing. Then in 1995, the Wireless Telecommunications Bureau (the "Bureau") began to dismiss channel requests beyond a single channel.[9] The justification provided for this action was "[a] careful review of your application and your communications requirements fails to demonstrate a compelling need or sufficient justification for more than [one channel]."[10] There was no explanation as to what showing would make the grade. In the wake of the September Public Notice and the ensuing dismissal letters, a number of Petitioners voluntarily began to file numerous amendments reducing channel requests and resolving frequency conflicts. Ironically, in the Competitive Bidding Order, the Commission has come full circle, suggesting that the presence of only four links in a population of one million might demonstrate "substantial service" years after grant of a construction authorization.[11] Such a showing on a per channel basis would never have

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[8] Some applicants chose to amend their applications to reduce to one channel at the same time they responded to the September Public Notice. Other pending applicants submitted detailed information justifying the need for more than one channel and, therefore, did not then amend their requests to one channel at that time.

[9] See, e.g. Letter from Michael B. Hayden to Commco, L.L.C., dated November 22, 1995.

[10] Id.

[11] Petitioners believe that this more relaxed standard is in the public interest, and only point to the change to highlight the arbitrary nature of the harm they suffered while the agency was still attempting to formulate a spectrum assignment policy.

justified a multi-channel grant during the period that the September Public Notice was being applied. In the same vein, the Commission just recently granted multichannel requests in major markets of WinStar Wireless Fiber Corp., the largest incumbent licensee which already has multiple channels. See Public Notice, Report No. 1975 (rel. Feb. 10, 1998).

On November 13, 1995, the Bureau adopted a freeze on the acceptance of applications for licensing new 39 GHz frequency assignments pending Commission action on the petition for rulemaking filed on September 9, 1994 by the Point-to-Point Microwave Section of the Telecommunications Industry Association ("TIA"),[12] concerning use of the 37.0 - 38.6 GHz (hereinafter "37 GHz") and 39 GHz bands.[13] Although the text of the Freeze Order had a release date of November 13, 1995, it is not clear if the document was actually made available to the public on that date, and the Commission was closed the following day. The public was not widely afforded notice of this action until November 20, 1995.[14]

On December 15, 1995, the Commission adopted the 39 GHz Order proposing to amend Parts 1, 2, 21 and 94 of its Rules to provide a channeling plan and competitive bidding and technical rules for fixed point-to-point microwave operations in the 37 GHz and 39 GHz frequency bands.[15]

12/ See also, Public Notice, Report No. 2044 (rel. Dec. 1, 1994).

13/ Notice of Proposed Rulemaking and Order, 11 FCC Rcd 1156 (Wire. Telecom. Bur. 1995) ("Freeze Order"). Commco L.L.C. ("Commco"), PLAINCOM, INC. ("PLAINCOM") and Sintra Capital Corporation ("Sintra") raised the issue of no actual notice in a petition for reconsideration filed January 16, 1996, but the Commission never adequately responded to the specific facts raised. See Memorandum Opinion and Order, 12 FCC Rcd 2910, 2923 (1997) ("Reconsideration Order").

14/ See Daily Digest, Vol. 14, No. 216, dated November 20, 1995.

15/ Notice of Proposed Rulemaking and Order, 11 FCC Rcd 4930 (1995) ("39 GHz Order").

The Commission also announced its interim 39 GHz licensing policy. Specifically, the Commission stated that, "pending applications will be processed if (1) they were not mutually exclusive with other applications at the time of the [Freeze Order], and (2) the 60-day period for filing mutually exclusive applications expired prior to November 13, 1995."[16] The Commission went on to state that:

> [w]ith respect to all other pending applications (i.e., those that were subject to mutual exclusivity or still within the 60-day period as of November 13), we conclude that processing and disposition should be held in abeyance during the pendency of this proceeding. . . Therefore, we will not process these applications (or any amendments thereto filed on or after November 13, 1995) at this time . . . .[17]

Although the text of the 39 GHz Order has a release date of December 15, 1995, it is not clear whether this order was actually released in accordance with the Commission's Rules.[18]

On January 16, 1996 Commco, PLAINCOM and Sintra filed a Petition for Reconsideration and an Emergency Request for Stay, requesting the Commission to vacate that portion of the 39 GHz Order imposing an interim freeze on the processing of mutually exclusive applications, including amendments thereto, pending as of November 13, 1995. At a minimum, Commco, PLAINCOM and

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16/ 39 GHz Order, 11 FCC Rcd at 4988 (citations omitted).

17/ Id. at 4989 (emphasis added; citations omitted).

18/ As Commco, PLAINCOM and Sintra alleged in the January 16, 1996 Petition for Reconsideration, Section 1.4(b)(1) requires that documents in rulemaking proceedings be printed in the Federal Register to be "released." To Petitioners' knowledge there has been no such Federal Register publication. 47 C.F.R. §1.4(b)(1). Even assuming that the freeze aspect of the 39 GHz Order was deemed to be a non-rulemaking document, Petitioners were not able to obtain a copy of the 39 GHz Order at the Office of Public Affairs by 5:30 P.M. E.S.T. on December 15, 1995, and thus question whether the document was, in fact, "released" by that date within the meaning of Section 1.4(b)(2) of the Rules. Finally, a copy of the 39 GHz Order was not available through the International Transcription Service ("ITS") until January 11, 1996, when the order was finally disseminated with the FCC's Daily Digest. The Commission has yet to reconcile these facts with its summary conclusion that the order was released.

Sintra requested that the Commission issue a new public notice clarifying that its freeze on the acceptance and processing of amendments that eliminate mutual exclusivity was prospective only, running from the date that such a clarifying pubic notice would be issued. BizTel, Inc. GHz Equipment Company, Inc. and TIA filed comments in support of the stay request. Also on January 16, 1996, DCT Communications, Inc. filed a Petition for Partial Reconsideration, requesting that the Commission process minor amendments that eliminate mutual exclusivity and uncontested applications for which the 60-day cut-off period had not expired by November 13, 1995. On January 17, 1997, the Commission addressed the petitions and request for stay and decided to lift the processing freeze on amendments of right filed before December 15, 1995.[19] However, the Commission failed to articulate with any reasoned analysis whether the 39 GHz Order violated Sections 309(j)(6)(E) and 309(j)(7)(B) of the Communications Act. Since January 17, 1997, Petitioners have submitted numerous petitions for reconsideration of the Commission's dismissal and return of various applications which, due to amendments of right, are ripe for grant. At a minimum, according to the 39 GHz Order, the applications should have been held in abeyance. Many of the petitions remain pending. A list of such petitions is attached hereto as Attachment B.

On November 3, 1997, the Commission announced that it would dismiss all pending applications subject to the processing freeze,[20] so that the freed spectrum may be sold at auction.

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[19] Reconsideration Order, 12 FCC Rcd 2910 (1997).

[20] Competitive Bidding Order, FCC 97-391 (rel. Nov. 3, 1997); 63 FR 6097 (1998). To add to the processing confusion, the FCC stated that it would dismiss all amendments of right filed after December 15, 1995, yet the FCC itself stated that it would amend certain multichannel application that were partially mutually exclusive by dismissing the mutually exclusive channel requests but granting non-mutually exclusive portions of the applications. Id. at ¶97.

II. THE COMMISSION MUST PROCESS PENDING APPLICATIONS WHICH ARE NOT MUTUALLY EXCLUSIVE

A. The Commission Violated its Statutory Obligation and its Own Rules by Not Processing Amendments Filed as of Right to Eliminate Mutual Exclusivity

Petitioners have been denied the substantive right to amend their pending 39 GHz applications, to resolve mutual exclusivity, pursuant to Sections 101.29 and 101.45 of the Commission's Rules.[21] Section 101.29 provides that an applicant can amend its application "as a matter of right" prior to designation for hearing, paper evaluation or random selection.[22] The Commission has recognized that "Section [101.29][23] of [its] Rules is clear in that any application may be amended as a matter of right prior to the designation of such application for hearing."[24]

1. The Commission Did Not Modify its Rule Governing Amendments Filed as of Right

In contravention of 47 C.F.R. §§101.29(a) and 101.45(f)(2), the Administrative Procedure Act and Section 309(j)(6)(E) of the Communications Act, the FCC has failed to process amendments of right. Sections 101.29 and 101.45 of the Commission's Rules provide applicants with the right to file amendments of right.[25] Indeed, the Commission recognized this right in the Reconsideration

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21/ 47 C.F.R. §§101.29 and 101.45.

22/ 47 C.F.R. §101.29(a)

23/ Section 101.29 replaced the former Section 21.23 of the Commission Rules in 1996. Report and Order, 11 FCC Rcd. 134449 (1996). The relevant language remained the same.

24/ Radio Phone Communications, Inc., 5 Rad. Reg. 2d 52, 61 (1965); See also Answerite Professional Telephone Service, 41 Rad. Reg. 2d 552, 557 (1977). Amendments are effective upon filing, without any specific staff action. Dial-A-Page, Inc., 75 FCC 2d 432, 437 (1980); American Cellular Network Corp. of Nevada, 60 Rad. Reg. 2d 1460, 1461, n.3 (Com. Car. Bur. 1986).

25/ Section 101.29(a) provides, "Any pending application may be amended as a matter of right (continued...)

Order, "[A]n amendment that cures a mutually exclusive situation without creating a new one is an amendment of right. Amendments of right are considered effective when filed, without any further staff action."[26] The Commission further acknowledged, "[W]e recognize that such amendments were in fact effective upon filing."[27] However, in the Reconsideration Order, the Commission held that such amendments filed after December 15, 1995 would continue to be held in abeyance, pending a final decision in the rulemaking. That final decision, the Competitive Bidding Order, dismisses such amendments without any consideration, thereby unlawfully creating a new "rule" wherein amendments to eliminate mutual exclusivity filed pursuant to Sections 101.29 and 101.45 are not effective upon filing. The right to amend is a substantive right which the Commission may not revoke without the completion of a notice and comment procedures in the context of a rulemaking.[28] The Commission never instituted such a procedure. Because the Commission, in the Competitive Bidding Order, improperly amended its amendment rules, the clear finding in the Reconsideration Order that amendments of right are considered effective when filed without any further staff action must be applied to all 39 GHz amendments of right. The Commission must process all amendments of right filed to date. Moreover, as explained more fully in Section III below, prior to the

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25/ (...continued)
if the application has not been designated for hearing, or for comparative evaluation . . . or for the random selection process . . . ." 47 C.F.R. §101.29(a).

26/ Reconsideration Order, 12 FCC Rcd at 2918 (citing Dial a Page, Inc., 75 FCC 2d 432, 437 (1980).

27/ Reconsideration Order, 12 FCC Rcd at 2915.

28/ 5 U.S.C. §553; See Radio Phone Communications, Inc., 5 Rad. Reg. 2d 52, 61 (1965); Answerite Professional Telephone Service, 41 Rad. Reg. 2d 552, 557 (1977). Recission of an agency rule, even if temporary, is subject to the same standard of review as the promulgation of a rule. See Public Citizen v. Steed, 773 F.2d 93, 98 (D.C. Cir. 1984). Here, the recission of the rule is no longer temporary.

implementation of an auction, the Commission should allow a reasonable period of time for applicants to file amendments to eliminate mutually exclusive situations.

The failure to process amendments of right does not further any articulated goals of the Commission. In the 39 GHz Order, the Commission stated that the processing of applications would result in comparative hearings thereby creating greater expense and delays for the Commission and applicants. However, the Commission's inexplicable refusal to process amendments of right exacerbates the condition the FCC claimed it wanted to eliminate. By refusing to process such amendments, the Commission prevented applicants from utilizing the one method available to them to eliminate mutual exclusivity. Such action violated the Commission's Congressional auction mandate. Congress clearly provided that nothing in the Commission's auction authority shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[29]

B. The Commission Must Adhere to its Own Rules and Process Uncontested Applications, Particulary Those That Completed the 30-Day Public Notice Period

"A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations."[30] By ordering dismissal of applications which had not completed a 60-day cut-off period prior to November 13. 1995, the Commission created the fiction of mutual exclusivity as a pretext for dismissal and auction. In the Competitive Bidding Order, the

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[29] Communications Act, 47 U.S.C. §309(j)(6)(E).

[30] Reuters Limited v. FCC, 781 F.2d 946, 946 (D.C. Cir. 1986); Gardner v. FCC, 530 F.2d 1086, 1089 (D.C. Cir. 1976); and Teleprompter Cable Systems v. FCC, 543 F.2d 1279, 1387 (D.C. Cir. 1976).

Commission verified that it would dismiss all pending applications for which the 60-day public notice period had not passed (regardless of whether mutual exclusivity existed) as of the date of the release of the 39 GHz Order, so called "unripe" applications.[31] However, there is no public interest objective underlying the Communications Act which is correlated to the agency's notion of "ripeness." An application is fully grantable 30 days after it appears on public notice as accepted for filing. See 47 U.S.C. §309(b) and (d). And the act of grant itself creates the cut-off (one day prior thereto) under the Commission's Rules. The 39 GHz Order concocted its "ripeness" concept from the 60-day cut-off of former Section 21.31(b), now Section 101.45(b).[32] However, Section 101.45(b) clearly provides for two possible terminal dates, not solely a 60-day window. Although, for administrative convenience, the rule provides that the Commission will accept mutually exclusive applications for 60 days after appearance of the first application on public notice, the rule clearly specifies that there is no right to file a mutually exclusive application after 30 days. If the Commission grants an application on day 31, any mutually exclusive applications filed between day 31 and day 60 will be dismissed.[33]

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[31] Competitive Bidding Order at ¶¶92-93.

[32] In the 39 GHz Order, the Commission stated, "Pending applications will be processed if . . . the 60-day period for filing mutually exclusive applications expired prior to November 13, 1995." The Commission then cited 47 C.F.R. §21.31(b). 39 GHz Order, 11 FCC Rcd at 4988.

[33] Section 101.45(b) provides:

> An application will be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications only if: . . . the application is received by the Commission . . . by whichever "cut-off" day is earlier: (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing; or (ii) One (1) business day preceding the day on which the Commission takes final action on

(continued...)

1. The Cut-off Rule is Designed to Afford the FCC with an Administratively Viable Mechanism for Protecting the Ashbacker Rights of Applicants

The purpose of cut-off rules is to establish deadlines by which applications must be filed if the applicants wish to receive simultaneous consideration under Ashbacker.[34] The rule establishes the eligible pool of applicants.[35] However, the Commission's Competitive Bidding Order subverts the rule to create the fiction of mutual exclusivity where none exists. In its invention of a "ripeness" concept, the Commission directly contravenes Section 309(j)(6)(E) of the Communications Act, which obligates the Commission to use various means, including it rules, to eliminate mutual exclusivity. Congress was clear that the Commission may not base a finding that an auction is in the public interest predominantly on the expectation that federal revenues will be generated.[36] In fact, the House Budget Committee, in approving a similar provision, stated, "The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so."[37] By establishing a rule that literally creates the fiction of mutual exclusivity, the Commission has made its revenue raising goal transparent.

33/ (...continued)

> the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice.

47 C.F.R. §101.45(b). See Reuters v. FCC , 781 F.2d 946 (D.C. Cir. 1986).

34/ Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker").

35/ Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1561 (D.C. Cir. 1987)(holding that Ashbacker rights are not implicated by a cut-off rule which is a regulation "that for orderly administration, requires an application . . . to be filed within a certain date.")

36/ Communications Act, 47 U.S.C. §309(j)(7)(B).

37/ House Report No. 111, 103 Cong., 1st Sess. May 23, 1993 at pp. 258-259.

2. By Operation of Law, the Competitive Bidding Order Has Established That The Terminal Date For Any Uncompleted Cut-off Period Was November 13, 1995

By announcing that it would not accept any new applications in conflict with applications that had not completed a 60-day public notice period prior to November 13, 1995, the Commission effectively established November 13, 1995 as the terminal date applicable to any unfinished cut-off period. The Commission can no longer indulge in the pretense that its freeze is only an interlocutory pause. Now that the frozen cut-off periods have been terminated, the Commission must process all pending, non-mutually exclusive applications accepted for filing prior to November 13, 1995. In the Reconsideration Order, the Commission dismissed a similar argument submitted by BizTel Inc. by holding that at the time of the Reconsideration Order, final disposition of the "unripe" applications had not yet been decided.[38] That final disposition (i.e., the decision not to accept new applications and to dismiss those pending) has now been rendered. Yet, the Commission continues to justify application of the 60-day cut-off window by claiming, "[W]e believe that applying the new 39 GHz rules to those applications that were still subject to the possibility of competing applications under the former rules adequately balances the expectations of applicants with the public need for a better system for licensing use of the 39 GHz band." Such an irrational argument ignores an applicant's right to rely on the Commission to follow its own cut-off rules and the Communications Act. The cut-off rule does not bestow rights on anyone to file mutually exclusive applications after the 30-day public notice period had expired. In addition, the dismissal of now "ripe" applications will, in fact, delay licensing, to the detriment of the public and competition in the industry.

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[38] Reconsideration Order, 12 FCC Rcd at 2920.

3. Applicants Who Timely File under the Cut-off Rule Have Legitimate and Protectable Reliance Interests

Applicants have a legitimate expectation that the cut-off rules will be enforced.[39] In the instant proceeding, Petitioner's have an enforceable expectation that their non-mutually exclusive applications which completed the statutorily prescribed 30-day public notice period by November 13, 1995 are "ripe" for processing. The opportunity to file a mutually exclusive application within 60 days after the first application appears on public notice as accepted for filing is not unqualified. Section 101.45(b) extends no right to anyone to file competing applications after the first accepted application is granted, and certainly not after the agency has declared that an interim freeze has become permanent.[40] In fact, "[A]s against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the cut-off rules."[41] Therefore, the Commission must process applications which have completed the cut-off period by November 13, 1995, as foreshortened by the Commission. This is particularly true for those applications that have actually gone through the 30-day public notice period by that date, because those applications are ripe for grant. To dismiss a timely filed uncontested application for the purpose of accepting new applications for auction after the original cut-of stands notions of fairness and due process on their head, all flies in the face of well settled precedent.

39/ McElroy Electronics Corp. v. FCC, 86 F.3d 248, 253 (D.C. Cir. 1996) ("McElroy II") (citing Florida Institute of Technology v. FCC, 952 F.2d 549, 554 (D.C. Cir. 1992) and City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 663 and n. 7 (D.C. Cir. 1984)).

40/ In Reuters, the court held that Reuters Limited had a right to rely on the Commission's cut-off rules and the grant of its applications 41 days after their acceptance, despite the fact that a competitor filed mutually exclusive applications on day 46. 781 F.2d 946.

41/ McElroy II, 86 F.3d at 253.

III. THE COMMISSION MUST FORESTALL ANY AUCTION UNTIL FUNDAMENTAL PROCESSING ISSUES HAVE BEEN RESOLVED AND APPLICANTS HAVE BEEN AFFORDED A FINAL OPPORTUNITY TO RESOLVE FREQUENCY CONFLICTS

A. To Ensure Equity and to Preserve Integrity of the Auction, Commission Should Allow a Reasonable Time for Applicants to Resolve Mutually Exclusive Applications

Petitioners request that the Commission establish a 90-day period in which pending applicants can employ settlement procedures such as voluntary dismissals and amendments of right in order to eliminate mutual exclusivity. Ninety days would allow sufficient time for Petitioners and other applicants to determine what mutual exclusive situations exist and to negotiate a resolution of the situations. Such a resolution period, which would result in grants of licenses much faster than an auction, would promote the Commission's goals to foster competition, promote efficient use of the spectrum, provide efficient service to the public and to promote fair and efficient licensing.[42] Otherwise, dismissed applicants will likely file requests to stay the auction as well as a vast array of petitions to deny and appeals against auction winners. Such lawsuits will encumber the auction process and delay the advent of competitive service to the public.

In addition, the creation of a resolution period will serve to promote fair and efficient licensing by affording an opportunity to cure the Commission's erratic and arbitrary processing of pending applications to date. For example, although the Commission placed a moratorium on the processing of amendments, the Commission itself amended certain applicants' multichannel applications on an involuntary basis.[43] Moreover, Commission files demonstrate that other

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[42] Communications Act, 47 U.S.C. §309(j)(3)(A)-(D) and Competitive Bidding Order at ¶87.

[43] See Letters from Michael B. Hayden to Jerome Blask dated November 22, 1995 (Attached hereto as Attachment C).

applicants have been permitted after the freeze to engage in reciprocal withdrawal of applications to resolve mutual exclusivity, and have received grants. Other applicants received multichannel grants with no explanation as to the preferential treatment accorded.[44] The Commission has also decided to process certain "partially mutually exclusive" applications by granting the non-mutually exclusive frequencies and dismissing the remaining frequency requests.[45] This announcement by the Commission clearly demonstrates its ability to amend applications to resolve mutual exclusivity even at this date. The applicants should be permitted to do the same. A basic principle of administrative law is that agencies must articulate the basis on which their decisions are premised. Under Melody Music, the court held that the Commission must explain its reasons for differentiating treatment between similarly situated applicants and it must explain the relevance of those differences to the purposes of the Communications Act.[46] The Commission has made no effort to offer a basis for its differential treatment of applications.

B. The Commission Should Resolve All Pending Petitions for Reconsideration Prior to Auction

To further minimize litigation against the Commission and auction winners, the Commission should resolve all pending petitions for reconsideration, whether such petitions relate to the rulemaking or to individual applications, prior to the commencement of an auction. Otherwise, winning bidders of contested markets will be unsure of the finality of their winning bids and may be expected to reduce their bids accordingly.

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[44] See "Wireless Telecommunications Bureau Weekly Receipts and Disposals," Public Notice, Report No. 1975 (rel. Feb. 10, 1998) (relevant pages attached hereto as Attachment D).

[45] Competitive Bidding Order at ¶97.

[46] Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

IV. CONCLUSION

As demonstrated above, in the Competitive Bidding Order, the Commission violates the Communications Act and its own rules by not processing amendments of right. The Commission did not amend its amendment rules and therefore, amendments of right must still be effective upon filing. The processing of such amendments would reduce instances of mutual exclusivity as mandated by the Communications Act. Furthermore, by operation of law, the Competitive Bidding Order created a new cut-off date of November 13, 1995 for the filing of mutually exclusive applications. Thus, the Commission must process all non-mutually exclusive applications which were placed on pubic notice as accepted for filing, particularly those accepted 30 days prior to November 13, 1995. To instill regulatory certainty in the awarding of 39 GHz licenses via competitive bidding, the Commission must also delay the commencement of an auction until the Commission has afforded applicants a reasonable period to file amendments of right and voluntary dismissals to resolve mutually exclusive situations and until the Commission has resolved all

pending petitions for reconsideration. For the above reasons, grant of the instant petition is in the public interest.

Respectfully submitted,

COMMCO, L.L.C.
PLAINCOM, INC.
SINTRA CAPITAL CORPORATION
ERIC STERMAN

By: _____
Louis Gurman
Kimberly D. Wheeler

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Dated: March 9, 1998

Their Attorneys

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
1270 FAIRFIELD ROAD
GETTYSBURG, PA 17325-7245

NOV 22 1995

IN REPLY REFER TO:
7140-12
1700B

Commco L.L.C.
P.O. Box 85208
Sioux Falls, SD 57118

Attn: Rosemarie Reardon

Re:	FCC file number	Remaining Frequency Pair
	9409540	4A/4B
	9409541	6A/6B
	9409543	3A/3B
	9409544	4A/4B
	9409547	6A/6B
	9409549	4A/4B
	9409554	4A/4B
	9409557	6A/6B

(continued)

Dear Ms. Reardon:

In accordance with Rule 21.20 the Wireless Telecommunications Bureau is dismissing a portion of the above referenced applications for 38 GHz authorizations in the Point-to-Point Microwave Radio Service. The first 38 GHz frequency pair listed on your applications as listed above will remain pending and under review by the Commission. The remainder of the frequencies requested in your applications are dismissed.

Rule 21.701(j) states that 38 GHz frequencies will be assigned only where it is shown that the applicant will have a reasonable projected requirement for a multiplicity of service points or transmission paths within an area. A careful review of your applications and your communications requirements fails to demonstrate a compelling need or sufficient justification for more than a single frequency pair. You may direct any questions or response you may have to Mary Shultz, who is familiar with this matter, at 717-337-1421 x 193 between 8:30 AM and 4:30 PM EDT, or by email on the Internet at mshultz@fcc.gov, or myself at mhayden@fcc.gov.

Sincerely,

Michael B. Hayden
Chief, Microwave Branch

cc: Gurman, Blask & Freedman
1400 Sixteenth St., NW, Ste. 500
Wasington, DC 20036
Attn: Andrea Miano

TOTAL P.02