7. In § 94.75, the frequency band 38,600 to 40,000 MHz is revised to read as follows:

§ 94.75 Antenna limitations.

* * * * *

(b) * * *

ANTENNA STANDARDS

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
*	*	*	*	*	*	*	*	*	*	*
38,600 to 40,000[13]	A	N/A	38	25	29	33	36	42	55	55

* * *

[13] This antenna standard applies only to licensees of grandfathered links. Antennas installed prior to January 1, 1998, may be of Category B. However, antennas installed on or after that date shall be of Category A.

* * * * *

8. § 94.94 is amended by adding a sentence to the end of the section to read as follows:

§ 94.94 Microwave digital modulation.

* * * Facilities in the band 38,600-40,000 MHz that are licensed to licensees of grandfathered links and that are constructed on or after January 1, 1998 shall transmit at minimum equivalent digital efficiency of 1 bps/Hz and equipment installed on or after that date shall also have the capability to support the transmission of 1 bps/Hz.

Appendix B: Initial Regulatory Flexibility Analysis

Pursuant to Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason For Action: We find that there is a need for additional point-to-point microwave channels, which could be used by broadband PCS and cellular licensees for backhaul and backbone links. This rule making proceeding is initiated to obtain comment regarding proposals to make the 37 GHz band available for point-to-point communications and to amend the rules for the 39 GHz band.

B. Objective: The objectives of this proposal are to provide adequate point-to-point microwave spectrum, including channels for the support of broadband PCS and other services, and to provide for technical commonality across the bands.

C. Legal Basis: The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303 (f), 303(g), 303(r) and 309(j). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio as is in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected: Bidding credits, installment payments, and reduced upfront payments are proposed for small businesses. In addition, this proposal may provide new opportunities for radio manufacturers and suppliers of radio equipment, some of which may be small businesses, to develop and sell new equipment. We invite specific comments on these points by interested parties.

E. Reporting, Record Keeping, and Other Compliance Requirements: Applicants must apply in order to be eligible for the auction. High-bidders at the auction must apply for their respective licenses. Rectangular service area licensees must either certify that they meet the construction threshold or file a list of operating links that they wish to have grandfathered. Licensees in the 37 GHz band would be required to maintain a computer-readable database with the coordinates of their sites, frequencies (occupied bandwidth) assigned to their sites, EIRP, and other information for all of their links in order to facilitate the addition of new Government links.

F. Federal Rules That Overlap, Duplicate, or Conflict With This Rule: None.

G. Significant Alternatives: If promulgated, this proposal will provide additional point-to-point spectrum, which can be used for the support of broadband PCS and other services. We are unaware of other alternatives which could provide sufficient spectrum in the immediate future. We solicit comment on this point.

Partial Dissenting Statement of Chairman Reed E. Hundt

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

This Notice of Proposed Rulemaking proposes to: (1) establish technical and service rules for the 37 GHz band; (2) alter significantly the rules for the 39 GHz band; and (3) license the spectrum in these bands by means of competitive bidding. I wholeheartedly support almost all aspects of this decision, which makes significant strides toward increasing the value of the spectrum to the public, by placing licenses in the hands of those who value the spectrum most highly. Regrettably, the Notice of Proposed Rulemaking includes a statement of intent with respect to processing that seriously undermines this otherwise commendable effort.

I therefore must dissent from the portion of the decision that announces an intention to continue processing those pending applications that are not mutually exclusive. Instead, the Commission should defer processing all applications during the pendency of the rulemaking. Assuming the Commission ultimately decides to auction this spectrum, the pending applications should be dismissed. Applicants would have an opportunity to refile, and participate in an auction.

There is no longer any serious dispute that sound public policy requires assigning spectrum licenses by competitive bidding except where there are clear and compelling public

interest reasons to the contrary. No compelling reasons have been given here. Auctions put licenses into the hands of those who value them most highly, and who are therefore most likely to provide service the public desires and to do so quickly and efficiently. Auctions also permit the U.S. Treasury to recover for the public a portion of the value of the public's spectrum.

By a unanimous vote, the Commission has expressed an intent to move to auctions for this spectrum. The Commission proposes to change the rules for the spectrum in this band, in large part because existing rules provide little or no incentive for licensees to build out systems and offer service. In fact, our current rules allow applicants to define the size of their service areas without any real showing of need. The only requirement is that the service area be drawn as a rectangle. The current rules actually create incentives for applicants to request large amounts of spectrum in large, self-defined, geographic areas, regardless of whether they are using the spectrum efficiently.

Under existing rules, applicants have paid only a $180 application fee, which would be returned if the applications were dismissed. Often, when the Commission gives away licenses, the applicants sell the licenses shortly thereafter, and this spectrum is no exception. For example, one company that obtained 30 licenses in September 1993 soon sold them for $12.5 million -- 2,300 times the amount the original licensee paid in application fees. We should not be surprised by these sales. They are the logical consequence of rules that assign spectrum by date stamp.

There is ample Commission precedent and clear legal authority for dismissing pending applications that are inconsistent with new Commission rules. See, e.g., Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,578 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985). The Commission gave away billions of dollars worth of spectrum before it obtained auction authority, but there is no reason to continue this practice. While any single decision to process pending applications (whether by lottery, or otherwise) may seem in isolation not to be terribly costly, those decisions in the aggregate inflict serious harm on the public interest.

Under current rules, once an applicant files, and the Wireless Telecommunications Bureau places the application on public notice, other interested applicants have a limited opportunity to file competing applications. Contrast this approach with the approach under auctions, in which the Commission publicly announces its intent to open up spectrum, holds public seminars, provides extensive information in bidding packages, and generally does everything it can to ensure that the universe of interested businesses have a full and fair opportunity to obtain licenses. Under the current rules, people interested in filing competing applications must obtain the services of Washington insiders -- lawyers and lobbyists -- who monitor the weekly public notices listing all applications.

This problem is especially acute in the case of the spectrum at 39 GHz, for which there was a land rush in July 1995, because it is spectrum that the Commission identified as useful for backhaul links required by Personal Communications Services (PCS) licensees.

Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, GEN Docket No. 90-314, RM 7140, RM 7175, RM 7618, 8 FCC Rcd 7700, 7741. Most potential PCS licensees do not yet know where and whether they will obtain licenses (the C, D, E, and F block licenses). The winners in the A and B blocks, who received their licenses in June 1995, would have been required to act almost instantaneously to have a shot at the 39 GHz spectrum before the land rush.

The Commission itself has identified PCS winners as potential licensees for the 39 GHz spectrum. It makes sense to license this spectrum in such a way that PCS licensees have a real opportunity to participate. It makes no sense to process applications under rules that provide PCS licensees little or no meaningful opportunity to express their interest in this spectrum to the Commission. And yet, that is exactly what the Commission, by processing pending applications, would be doing.

If all pending applications were granted, there would be no channels left in most major markets, and few channels available in other markets. The majority (in which I join with respect to this point) would defer processing of mutually exclusive applications, and thus leave open the possibility that these channels might be available to future applicants, assuming that pending applications are dismissed, and the Commission proceeds to auction. Some may argue that half a loaf is better than none. I say simply that a whole loaf is better than half a loaf, and the Commission should not process any pending applications at all.

Issuing licenses by processing pending applications, rather than by auction, is a giveaway. In the absence of an auction, we do not know exactly what this spectrum is worth. However, extrapolating from publicly available values, the entire 39 GHz band could be worth $950 million. Even if the pending non-mutually exclusive applications are worth a fraction of this amount, it is money that belongs to the American public. I see no reason to deprive the U.S. Treasury of meaningful revenues, particularly if we simply propose to give these spectrum licenses away to applicants that are likely to resell them privately for significant amounts. Although this is the season of giving, this is not supposed to be the Federal Chanukah/Christmas Present Commission, particularly as Congress and the Administration struggle to find ways to meet the country's pressing need for a balanced budget.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz [Notice of Proposed Rulemaking and Order]

Today, the Commission issues a *Notice of Proposed Rulemaking* proposing to amend Parts 1, 2, 21 and 94 of our rules to provide channeling plan and licensing and technical rules for fixed point-to-point microwave operations in the 37.0-38.6 GHz band. We also propose to amend the licensing and technical rules for 38.6-40.0 GHz band. The Commission has decided to process pending applications that are non-mutually exclusive and which were put on public notice sixty (60) days before the date of the recently imposed application freeze. Pending mutually exclusive applications and those non-mutually exclusive applications put on public notice less than sixty (60) days before the freeze will be held in abeyance pending the completion of the rulemaking in this proceeding.

I support the decision to process the non-mutually exclusive applications for two (2) primary reasons. First, the Commission does not have auction authority for applications that are not mutually exclusive.[1] Therefore, I see no justification for refusing to process these applications in order to provide some certainty for those applicants. Second, while some would have us believe that a great deal of these applications may be from speculators, I continue in my belief that the government should not prejudge any applicant's intention with respect to the provision of service. Again, I emphasize that not every applicant that does not acquire a license through the competitive bidding process should be deemed suspect. To that end, I believe that the Commission has determined to take the appropriate course of action with regard to the pending non-mutually exclusive applications.

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[1] See 47 C.F.R. § 21.31(b).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

DISSENTING IN PART

Re: *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*

Today, we propose new service and licensing rules for the 37 and 39 GHz bands which advance our goal of efficient use of the spectrum and further our Congressional mandate to place licenses in the hands of those that most value them. I strongly support that decision. However, I must dissent from that portion of today's decision which frustrates those goals by permitting the processing and licensing of pending applications.

I do not favor auctions at all costs and in every instance. But absent a showing of unique and compelling circumstances -- a showing which is not made here -- pending applications should be dismissed if and when we decide to change our licensing rules, and processing should cease in the interim. It is fundamental to me that applicants seeking to use the radio spectrum not be accorded rights or expectancies that outweigh the Commission's responsibilities to serve as a responsible steward of the spectrum and to effectuate Congressional mandates.

The Commission plays a critical role in spectrum management. The public benefits of new technologies and innovative services can be realized only if the Commission can identify appropriate spectrum and modify its rules to facilitate development of those new services. Congress expands the Commission's authority to award spectrum licenses to include competitive bidding; again, we change our rules to implement Congress' mandate. Failure by the Commission to modify our rules to respond to these and other changes as they arise would clearly be irresponsible.

The Notice of Proposed Rulemaking we adopt today is an example of the Commission's exercise of these responsibilities. We seek to ensure that a portion of the spectrum -- specifically the 37 GHz and 39 GHz bands -- will be made available for use in a manner that best serves the advancement of new wireless services and to devise appropriate rules for channeling plans, service areas and licensing methods that carry out that purpose. These actions are fundamental to carrying out our spectrum management responsibilities.

The majority decision to process several hundred pending applications for channels in the 39

GHz band, however, frustrates the future direction our Notice proposes for that band. Both the service areas and the licensing methods we use today for the 39 GHz band are inconsistent with the changes we propose, changes that we believe will be critical to the development of services using these frequencies. By awarding these hundreds of licenses, we will be carving out that many more "holes" in the service areas we ultimately license, obviously impairing the value of the licenses at auction. We will also be rewarding entities that filed large numbers of preemptive applications, anticipating our transition to competitive bidding, in order to obtain as many channels as possible before the Commission auctions the "leftovers".

Our legal authority to dismiss the pending applications is not in doubt. It is well established that the Commission may apply new rules to pending applications.[1] The Commission has previously done so[2] and has dismissed pending applications, without prejudice to the applicants' right to re-file, as a result of rule changes.[3]

Further, our Congressional mandate to employ competitive bidding clearly requires us to adopt new licensing rules for auctionable services. We have tentatively concluded in the Notice we unanimously adopt today that auctioning the remaining channels in the 39 GHz band as well as the 37 GHz band will best accomplish Congress' objectives. Our licensing rules must promote "the development and rapid deployment of new technologies, products and services", ensure "efficient and intensive use of the electromagnetic spectrum", and assure "recovery for the public of a portion of the value of the public spectrum resource..." Section 309(j)(3). Licensing the pending 39 GHz applications does not meet these goals. The entities who have filed the pending applications should instead have the opportunity to participate -- along with everyone else -- in the auction of licenses for these frequencies.

Of course, it would be preferable if we could change our rules only at times when no

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[1] See e.g., Storer Broadcasting v. United States, 351 U.S. 192 (1956); Hispanic Information and Telecommunications Network v. FCC, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989).

[2] See, e.g., Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 F.C.C. 2d 175 (1984), recon., 101 F.C.C.2d 577 (1985); Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, 7 FCC Rcd. 1625, 1628 n. 22 (1992); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 7 FCC Rcd. 4484, 4489 n. 66 (1992).

[3] See Private Operational-Fixed Microwave Service, 48 Fed. Reg. 32,587 (1983), aff'd, Affiliated Communications Corp. v. FCC, No. 83-1686, unpublished judgment (D.C. Cir. May 8, 1985).

applicant would be affected. But in this time of transition, as we move from lotteries and comparative hearings to auctions, from small site-specific service areas to wide area licensing, our ultimate policy goals outweigh the impact on pending applicants.

The frequencies at 39 GHz, once hardly noticed, have now become highly desirable, largely due to the development of innovative technologies and services. It is precisely circumstances such as these that make it essential that the Commission have the flexibility to change its rules to encourage the most efficient use of spectrum. The service rules put in place in the past do not properly reflect the uses envisioned for this spectrum today. Our old licensing methods were adopted over twenty years ago -- long before our Congressional mandate to auction and prior to development of innovative new uses for this spectrum.

The old rules neither encourage efficient spectrum use nor recover for the public the value of this spectrum. That is why I strongly agree with the proposal to change the rules but I must disagree with the majority's decision to issue new licenses in the 39 GHz band before our new rules are in place.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: Amendment of the Commission's Rules Regarding the 37.0 - 38.6 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) -- Notice of Proposed Rule Making

I fully support the proposals set forth in today's *Notice of Proposed Rule Making* for revising our rules for licensing of spectrum in the 37-39 GHz band. I write separately to explain my views on our decision to process pending non-mutually exclusive applications -- and on why I respectfully disagree with the arguments raised by my dissenting colleagues.

The issue is whether we should process pending 39 GHz applications that are uncontested, or whether we should, as the dissenters suggest, postpone any action on these applications until the conclusion of this rulemaking, and possibly dismiss them at that point. This is an issue that reoccurs whenever we propose to revise our licensing rules in an existing service, and it is particularly acute where, as here, we are proposing to adopt competitive bidding as the new method of selecting licensees. Having carefully considered the facts and circumstances pertaining to the pending applications in this service, I believe that both legal and policy considerations weigh in favor of processing these applications.

First, these are *non-mutually exclusive* applications that are immediately grantable under our rules. These applications have been placed on public notice (including dissemination on the Internet), giving others the opportunity to file competing applications, and the original applications remain uncontested. Thus, we are not dealing here with resolving *mutually exclusive* applications that could be subject to auction if we were to adopt our proposed competitive bidding rules. Indeed, even if we had auction rules in place today, these applications would *not* be subject to auction. Under Section 309(j)(1) of the Communications Act, the Commission has authority to use competitive bidding *only* where mutually exclusive applications are filed.

Second, I believe that not processing uncontested applications would be inconsistent with Section 309(j)(6)(E) of the Act, which states that competitive bidding authority does not relieve the Commission of the obligation to take steps to avoid mutual exclusivity in the application and licensing process. If we were to dismiss these applications and require the applicants to refile under auction rules, we would in effect be subjecting them to double jeopardy by allowing a second opportunity for mutually exclusive applications to be filed. This appears to me to be *seeking* opportunities for mutual exclusivity rather than avoiding them where possible as the plain language of the statute requires.

Third, the fact that these applications are not mutually exclusive strongly suggests that the spectrum covered by these applications is neither in significant demand nor of high value. Generally, it is the highest-value markets that are most likely to be subject to competing applications. Thus, I do not believe granting non-mutually exclusive applications constitutes any kind of "giveaway" of potentially high-value spectrum prior to auction.

Fourth, I am not persuaded that granting these applications would create incentives for speculation. Although a large number of 39 GHz applications have been filed within the last six months or so, many applications (if not most) come from entities with significant resources and communications experience. There is no indication of speculative activity by application mills of the type we have seen in some other services. Moreover, to encourage only serious applicants, we propose in this *Notice* to impose stepped-up construction requirements on 39 GHz incumbents and to license new channels in the 37 GHz band. Both of these steps are likely to limit opportunities for any existing 39 GHz licensee that seeks to profit from the transfer of its license.

Finally, granting these applications will help competition to develop while this rulemaking is pending. Our early licensing of 39 GHz has substantially benefitted one licensee in particular, because it was the first to aggressively pursue development of this spectrum. A number of other applicants are now poised to compete with this company. If we delay processing of uncontested applications for the six to twelve months that this rulemaking could take, we risk impeding competition in the near term and inadvertently conferring an advantage on one licensee. Given all of the above, I would prefer to take swift action to get more competition in place in the near term and grant these non-mutually exclusive applications.