FCC MAIL SECTION
DOCKET FILE COPY ORIGINAL
JAN 23 9 32 AM



**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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

# MEMORANDUM OPINION AND ORDER

**Adopted: December 20, 1996** **Released: January 17, 1996**

By the Commission:

## I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address the petition for reconsideration filed by Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation ("Commco"), and a partial petition for reconsideration filed by DCT Communications, Inc. ("DCT").[1] These petitioners seek reconsideration of that portion of the Commission's December 15, 1995 *Notice of Proposed Rule Making and Order* in ET Docket No. 95-183 which imposed an interim processing freeze on certain 38.6-40.0 GHz ("39 GHz") band license applications and amendments.[2] For the reasons that follow, we grant these petitions in part and deny them in part. In addition, we dismiss as moot the Emergency Request for Stay filed by Commco in connection with its petition for reconsideration.[3] We will address all other issues raised by the *NPRM and Order* in a subsequent document.

---

[1] Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation Petition for Reconsideration (filed Jan. 16, 1996) ("Commco Petition"); DCT Communications, Inc., Petition for Partial Reconsideration of Freeze Order (filed Jan. 16, 1996) ("DCT Petition").

[2] *NPRM and Order*, 11 FCC Rcd 4930, 4988-89 (1995) (*"NPRM and Order"*).

[3] Commco Emergency Request for Stay (filed Jan. 16, 1996) ("Stay Request").

## II. EXECUTIVE SUMMARY

2. Upon reconsideration, we have decided to lift the processing freeze on amendments of right filed before December 15, 1995.[4] By this action, all applications that were amended to resolve mutual exclusivity before this date will be processed, provided they had completed their 60-day public notice period as of November 13, 1996. In addition, we are clarifying that applications to modify existing 39 GHz licenses and amendments thereto will be processed regardless of when filed, provided they neither enlarge the service area nor change the assigned frequency blocks (except to delete them). In all other respects, our decisions regarding the filing and processing of 39 GHz applications and amendments are unaffected by this decision. A summary of the main points of our decision follows.

- We will process those amendments of right filed on or after November 13, 1995, but before December 15, 1995.
- We will continue to hold in abeyance all other amendments filed on or after November 13, 1995.[5]
- We will process all non-mutually exclusive applications, provided they were "ripe" as of November 13, 1995 -- *i.e.*, they had been placed on public notice and completed the 60-day cut-off period for filing of competing applications as of November 13, 1995.[6]
- We will continue to hold in abeyance all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995.
- We will continue to hold in abeyance all applications that had not been placed on public notice or completed the 60-day cut-off period as of November 13, 1995.
- We will process all modification applications and amendments to modification applications, regardless of when filed, provided they neither enlarge the service area nor change frequency blocks (except to delete them).

---

[4] *See* 47 C.F.R. § 101.29 (addressing amendments of right); *supra* para. 19 (discussing treatment accorded said amendments).

[5] See 47 C.F.R. § 101.29 (c)(1)-(c)(5) for discussion of major amendments.

[6] By using the terms "ripe" and "unripe" to identify applications' status with respect to completion of the public notice period, we do so only for drafting clarity; the terms are not meant to prejudge the acceptability of any of these applications.

## III. BACKGROUND

3. Currently, the 39 GHz band is used to support fixed point-to-point microwave communications. Service rules and a channeling plan for the 39 GHz band are set forth in our Rules.[7] On September 9, 1994, the Point-to-Point Microwave Section of the Telecommunications Industry Association ("TIA") filed a Petition for Rule Making concerning use of the 39 GHz band and the 37.0-38.6 GHz ("37 GHz") band, for which there are currently no licensing or service rules.[8] TIA's petition recommended licensing rules which would better meet the needs of emerging technologies. In particular, TIA proposed a channeling plan and technical rules that would open up the 37 GHz band to terrestrial service and maintain consistency between the 37 and 39 GHz bands so that these two contiguous portions of spectrum would be available for broadband personal communications services ("broadband PCS") operators, cellular operators, other common carriers, and private operators in order to satisfy point-to-point communications needs.[9]

4. On November 13, 1995, the Wireless Telecommunications Bureau ("Bureau") issued an *Order* (*"Freeze Order"*) announcing that the Commission would no longer accept for filing any applications for new 39 GHz licenses in the Common Carrier or Operational Fixed Point-to-Point Microwave Radio Services, pending Commission action on TIA's Petition.[10] The *Freeze Order* was made effective upon its release date of November 13, 1995. The Bureau asserted that the increasing number of applications (over 2,100 filed from January to November of 1995) constituted a burden on Commission resources and processing them could limit the impact of new technical, operational, and licensing requirements the Commission might ultimately adopt in response to TIA's Petition.[11]

5. On December 15, 1995, we issued the *NPRM and Order* that initiated this docketed rulemaking proceeding, seeking comment on TIA's proposals for the 37 GHz and 39 GHz bands. With respect to the 39 GHz band, we proposed amending the existing licensing and technical rules to make them consistent with those we were proposing for the 37 GHz band. For example, we proposed that unlicensed areas be licensed using BTA service areas, and that auctions be used to choose among applicants filing mutually exclusive applications for the 39 GHz band.

---

[7] *See* 47 C.F.R. § 101.147(u).

[8] TIA Petition for Rule Making, RM-8553 (filed Sept. 9, 1994) ("TIA Petition"); *see also* TIA Amendment to Petition for Rule Making, RM-8553 (filed May 4, 1995) ("TIA Amendment").

[9] TIA Petition at 6; TIA Amendment at 3-4.

[10] *Freeze Order*, 11 FCC Rcd 1156 (Chief, Wireless Telecom. Bureau, 1995).

[11] *Id.*

6. The *Order* portion of the *NPRM and Order* expanded upon the November 13, 1995, *Freeze Order*, primarily by distinguishing between those pending 39 GHz applications that would be processed and those that would be held in abeyance pending the outcome of the rulemaking proceeding.[12] Specifically, the *NPRM and Order* provided that pending applications would be processed if (1) they were not mutually exclusive with other applications at the time of the Bureau's November 13, 1995 *Freeze Order*, and (2) the 60-day period for filing mutually exclusive applications had expired prior to November 13, 1995.[13] The *NPRM and Order* further provided that those applications that were mutually exclusive with others as of November 13, 1995, or within the 60-day period for filing competing applications on or after November 13, 1995, would be held in abeyance for processing and disposition. Amendments to these frozen applications received on or after November 13, 1995, would also be held in abeyance.[14] Moreover, applications for modification of existing 39 GHz licenses filed on or after November 13, 1995, would be held in abeyance, as well as amendments to these modification applications filed on or after November 13, 1995.[15] Finally, no new applications to modify existing licenses, or amendments to pending modification applications, would be accepted for filing on or after December 15, 1995.[16] The foregoing restrictions on modification applications and amendments thereto were not intended to apply if the requested action would neither enlarge the service area nor change frequency blocks (except to delete them).[17]

## IV. CONTENTION OF THE PARTIES

7. On January 16, 1996, Commco filed its Petition for Reconsideration requesting the Commission to vacate that portion of the *NPRM and Order* imposing an interim freeze on the processing of mutually exclusive applications to establish new facilities in the 39 GHz band, including amendments thereto, pending as of November 13, 1995.[18] At a minimum, Commco requests that the Commission issue a new public notice clarifying that its freeze on the acceptance and processing of amendments that eliminate mutual exclusivity is prospective only, running from the date that such a clarifying public notice is issued.[19] Also on January 16, 1996, Commco filed

---

[12] *NPRM and Order*, 11 FCC Rcd at 4988-89.

its Stay Request, seeking to dissolve the freeze until the Commission acts on its Petition. BizTel, Inc., ("BizTel"), GHz Equipment Company, Inc. ("GEC"), and TIA filed comments in support of the Stay Request.

8. Additionally, on January 16, 1996, DCT Communications, Inc., filed a Petition for Partial Reconsideration, requesting that the Commission process (a) minor amendments, at least those that eliminate mutual exclusivity, and (b) as-yet uncontested applications for which the 60-day period for filing mutually exclusive applications had not expired prior to the November 13, 1995, *Freeze Order*.[20]

9. A number of commenters to the *NPRM and Order* ask the Commission to modify its interim licensing policy.[21] Some commenters contend that the Commission's interim processing freeze violates the Administrative Procedure Act[22] because it (a) rescinds the guarantee inherent in Rule 21.23(a)(1) that an amendment of right is effective upon filing,[23] and (b) lacks a rational basis.[24] Commenters also assert that the interim processing freeze violates the Communications Act's "Use of Competitive Bidding" provisions, which (a) continue to require the Commission to employ certain measures in resolving mutually exclusive applications,[25] and (b) prohibit the Commission from adopting competitive bidding systems if such action is based solely or predominantly on the expectation of raising Federal revenues from these systems.[26] Commenters further contend that notice of the interim freeze was ineffective under Commission rules and

---

[20] DCT Petition at 6.

[21] *See, e.g.*, Comments of Altron Communications, L.C. (filed March 4, 1996) at 2; Comments of Ameritech (filed March 4, 1996) at 3-5; Comments of Bachow and Associates (filed March 4, 1996) at 5-6; Comments of Columbia Millimeter Communications, L.P. (filed March 4, 1996) at 5-12; Comments of Commco, L.L.C. (filed March 4, 1996) at 3; Comments of Gigahertz Equipment Company, Inc. (filed March 4, 1996) at 5; Comments by Microwave Partners d/b/a Astrolink Communications (filed March 4, 1996) at 5; Reply Comments of Pinnacle Seven Communications, Inc. (filed April 1, 1996) at 2; Comments by the Fixed Point-to-Point Communications Section, Network Equipment Division of the Telecommunications Industry Association (filed March 4, 1996) at 10-15.

[22] 5 U.S.C. § 552 *et seq.* ("APA").

[23] *See, e.g.*, Bachow Comments at 6; Columbia Comments at 8-10; Commco Comments at 3; DCT Comments at 30; Pinnacle Seven Reply at 3; TIA Comments at 11.

[24] *See, e.g.*, BizTel Comments at 37; Columbia Comments at 6-19; DCT Comments at 29.

[25] *See, e.g.*, DCT Comments at 33; Reply Comments of Cambridge Partners (filed April 1, 1996) at 5-6; Columbia Comments at 7.

[26] *See, e.g.*, Commco Comments at 3.

precedent, and therefore the Commission must process the applications and amendments that have been held in abeyance.[27]

## IV. DECISION

10. With respect to the broad APA challenge to our decision to suspend processing of certain 39 GHz applications, it is well established that the Commission may initiate a freeze without prior notice and hearing when the purpose is, as here, "the creation of conditions under which formal rulemaking proceedings can be held in an effective, efficient, and meaningful manner."[28] Thus, the Commission may take temporary measures to hold applications in abeyance pending its decision on the substantive matters upon which public comment is sought. Once the Commission provides such an opportunity for comment, it may, if the record warrants, change its rules in a manner that affects the disposition of pending applications. Neither the November 13, 1995 freeze, nor the December 15, 1995 freeze, however, has decided the final outcome of any of the applications subject to the freeze. Accordingly, the Commission did not alter its rules without notice and opportunity for comment at the time of either freeze, as petitioners and commenters allege. In fact, the Commission asked for comment on the very question of how to treat the subject applications.[29]

11. Petitioners also aver that the Commission's December 15, 1995, *NPRM and Order* was a retroactive rule making because it altered the "past legal consequences of past actions."[30] As explained herein, however, petitioners misconstrued the effect of the Commission's processing freeze. The freeze did not alter the past legal consequences of petitioners' instant applications and amendments, because the Commission has not yet rendered a final disposition of these applications and amendments. Moreover, petitioners and commenters similarly mistake the effect of our actions in asserting that we have retroactively altered the rule deeming such amendments effective upon filing by suspending processing of amendments of right filed between the November 13 and December 15 freeze decisions. As explained below, we recognize that such amendments were in fact effective upon filing. The following discussion also addresses the continued need for the processing freeze with respect to the broad categories of affected

---

[27] *See, e.g.*, Columbia Comments at 5-12; DCT Comments at 33 (citing In the Matter of Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, Docket No. 18920, *First Report and Order*, 29 FCC 2d 870, 931 (1971)).

[28] *Kessler v. FCC*, 326 F.2d 673, 679-81 (D.C. Cir. 1963) (holding that a temporary suspension of filing procedures, until unsatisfactory old rules could be reexamined in a proceeding which would conform with the requirements of public notice and hearing, was not subject to the APA's rules regarding formal rulemaking procedures).

[29] *NPRM and Order*, 11 FCC Rcd at 4989.

[30] Commco Petition at 18 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).

applications -- applications that are mutually exclusive with others, "unripe" applications, and applications to modify existing licenses.

### A. Pending Mutually Exclusive 39 GHz Applications

12. PCS and other CMRS licensees, equipment manufacturers, and TIA ask that the Commission process 39 GHz applications that are pending and mutually exclusive.[31] GTE, however, urges the Commission either to (1) dismiss the pending 39 GHz applications that it is holding in abeyance and open a new application filing window for such frequencies and licensing areas under the new rules that the Commission adopts in this proceeding; or (2) retain those applications on file and permit other interested parties to file competing applications that will be processed pursuant to an adopted competitive bidding policy and corresponding rules for 39 GHz authorizations.[32] Some commenters recommend a specific time frame for allowing 39 GHz license applicants to resolve mutual exclusivity, *i.e.*, between 60 days and six months after a *Report and Order* is issued in this proceeding. Bachow asks that the Commission dismiss, without prejudice, any mutually exclusive applications that remain after the time for resolving mutual exclusivity passes.[33]

13. Some commenters further ask that the Commission dismiss as defective any applications which did not limit themselves to only one specified 39 GHz channel as of November 13, 1995, or which otherwise failed to satisfy a 1994 FCC policy statement that articulated the regulations applicable to the 39 GHz band.[34] Under this approach, any remaining applicants that are still subject to mutual exclusivity would be allowed to file amendments to reduce their proposed service area contours or otherwise enter into settlement agreements to resolve their conflicts.

---

[31] *See, e.g.*, Comments of Alcatel Network Systems, Inc. (filed March 4, 1996) at 2 ("ANS Comments"); Altron Comments at 2; Ameritech Comments at 4-6; Comments of AT&T Wireless Services, Inc. (filed March 4, 1996) at 12-13; BizTel Comments at 36-39; Columbia Comments at 5-12; Commco Comments at 3-4; DCT Comments at 29-34; DMC Comments at 2; GEC Comments at 5; Comments of Harris Corporation - Farinon Division (filed March 4, 1996) at 2; Microwave Partners Comments at 7-9; Spectrum Comments at 2-3; TIA Comments at 10-12; Pinnacle Reply Comments at 2.

[32] GTE Comments at 6-7.

[33] Bachow Comments at 6, 16.

[34] *Public Notice*, Mimeo No. 44787 (released Sept. 16, 1994). *See also* Ameritech Comments at 3-4; AT&T Comments at 12-13; Bachow Comments at 5-6. Since we have decided, for the reasons set forth below, to continue to hold pending, mutually exclusive applications in abeyance until we issue a Report and Order resolving the substantive issues of this proceeding, we need not resolve here whether some of these applications should be dismissed for noncompliance with our rules or policies. We note, however, that prior to the effective date of our substantive decision in this proceeding, the FCC staff will have evaluated all pending applications to ensure that they are properly classified as mutually exclusive; all applications that are dismissible because of noncompliance with our rules or policies will be dismissed regardless of how we ultimately decide to treat frozen applications.

14. BizTel argues that the Commission is violating Section 309(j)(7)(a) of the Communications Act by not processing all applications received prior to the *Freeze Order* because, BizTel alleges, the Commission is trying to "maximize the availability of spectrum to increase proceeds of a planned auction."[35] This is so, BizTel argues, because the Commission is not obeying its statutory duty to resolve all mutually exclusive conflicts prior to instituting a system of competitive bidding.

15. We remain concerned that the award of licenses in mutually exclusive situations under our current rules could lead to results that were inconsistent with the objectives of the rulemaking proceeding. For the reasons discussed in the *Freeze Order* and the *NPRM and Order*, we continue to believe that the best approach for handling the pending mutually exclusive applications is to hold them in abeyance pending substantive action in this rulemaking proceeding.[36] Unless we take this approach, we run the risk of undermining our efforts to optimize the public interest in establishing fair and efficient licensing practices. Moreover, if we were to proceed with processing mutually exclusive applications, those mutually exclusive applications that could not be accommodated by the availability of alternative frequencies would be subject to comparative hearing (either formal or informal). While these rules may be useful in other bands to address the rare situation in which two point-to-point links cannot be coordinated to avoid interference, in the 39 GHz band, applicants seek to serve geographic areas rather than to provide service on a single point-to-point link basis. This, coupled with the exponential growth in demand for 39 GHz spectrum, results in a significant number of mutually exclusive applications, including "daisy-chain" situations, among entities seeking to acquire spectrum. Resolving these mutually exclusive applications through comparative hearings would be slow and possibly very costly, both to the government and applicants. Our processing freeze prevents this situation from developing, thus permitting us to weigh the costs and benefits of the existing regulatory framework against those of our proposals. Thus, we preserve the opportunity to make meaningful regulatory changes.

16. We reject BizTel's arguments that this rulemaking proceeding violates Section 309(j)(7)(B) of the Communications Act, which prohibits us from basing a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding.[37] The public interest reasons for undertaking this rulemaking proceeding were delineated in the *NPRM and Order* -- *e.g.*, to better accommodate point-to-point services which support existing and emerging technologies, and to consider the benefits to the public, as specified in Section 309(j)(3)(B) of the Communications Act, of employing a

---

[35] Supplemental Comments of BizTel, Inc., at 16-19 (filed Oct. 17, 1996).

[36] *NPRM and Order* at 4989; *Freeze Order* at 1156.

[37] 47 U.S.C. § 309(j)(7)(A).

competitive bidding system for assigning 39 GHz licenses.[38] Moreover, BizTel's argument that we are violating Section 309(j)(6)(E) of the Communications Act, which prohibits us from deliberately preserving mutually exclusive situations in order to invoke our competitive bidding authority, is premature.[39] There is as yet no final decision implementing service rules that would potentially result in mutually exclusive situations.

17. As a final matter regarding this issue, we address the principal concern raised by those who challenged the legality of the November and December freeze orders -- that is, whether applications that were amended to resolve mutually exclusive situations before the December freeze should be treated as mutually exclusive applications and held in abeyance, or as non-mutually exclusive and processed. Pursuant to Sections 101.29 and 101.45 Commission's Rules, 47 C.F.R. §§ 101.29 and 101.45, an 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.[40] Accordingly, amendments filed between November 13 and December 15, 1995, which resolve mutually exclusive situations among pending applications and which otherwise meet the Commission standards for being acceptable for filing as of right, were effective when filed.[41] While the December 15 freeze suspended any further action on these amendments, this freeze -- which occurred after the subject amendments were filed and became effective -- did not negate the effectiveness of these amendments. Thus, the applications that were amended to resolve mutual exclusivity during the November 13 - December 15 period are properly classified as non-mutually exclusive, despite their having been held in abeyance. Assuming these applications were "ripe" -- *i.e.*, the period for filing additional mutually exclusive applications had expired as of November 13 -- we have determined, after further consideration, that they are not materially different than the other non-mutually exclusive applications that we have decided to process.[42] Accordingly, we will resume processing the former class of non-mutually exclusive, ripe applications.[43]

---

[38] 47 U.S.C. § 309(j)(3)(B). These benefits include the development and rapid deployment of new technologies, products and services, promoting economic opportunity and competition, and ensuring that new and innovative technologies are readily accessible to the American people. *Id.*

[39] 47 U.S.C. § 309(j)(6)(E).

[40] *See Dial-A-Page, Inc.*, 75 FCC 2d 432, 437 (1980).

[41] Ripe applications that were amended before the November 13 *Freeze Order* so as to resolve mutual exclusivity are not at issue, insofar as they were not subject to any freeze.

[42] *NPRM and Order,* 11 FCC Rcd at 4989.

[43] Minor amendments, *i.e.*, those which are not major amendments as defined at 47 C.F.R. § 101.29, are also classified as amendments of right that are effective upon filing. For the reasons set forth above, we will process any ripe, non-mutually exclusive application that has been held in abeyance because of the filing of any amendment of right during the November 13, 1995 to December 15, 1995 time period.

### B. Applications Within the 60-day Public Notice Period on November 13, 1995

18. Some petitioners and commenters argue that the Commission should process the "unripe" applications -- those that had not passed the 60-day public notice period as of the date of the November 13, 1995 *Freeze Order*.[44] According to DCT, for example, all applications that have been or should have been placed on public notice announcing their susceptibility to petitions to deny, as required by Section 309 of the Communications Act, meet the processing requirements of the Communications Act.[45] DCT contends that the disparate treatment of these applications and those we have decided to process would only make sense if there were no vacant channel pair available for a second applicant in the same service area.[46] DCT and WinStar argue that under the rules, if there were a vacant channel pair, a second applicant would have to yield ultimately to the first-in-time applicant with respect to the frequencies specified by the first-in-time applicant.[47]

19. These arguments, however, ignore the fact that under our current rules the period for filing mutually exclusive applications must run before we can determine whether vacant channel pairs are available for all applicants. In other words, while an applicant within the 60-day window for filing mutually exclusive licenses may have an uncontested application pending for a service area that also contains a vacant channel pair, if we allow the full 60-day period to run, we cannot predict whether other applicants will file competing applications, creating mutual exclusivity. Thus, applications that had not completed the 60-day public notice period do not appear sufficiently distinguishable from the frozen mutually exclusive applications to justify different treatment. Moreover, by suspending action on the applications that have not completed the 60-day public notice period, we retain the greatest flexibility in our decision-making process.

20. In Supplemental Comments, BizTel argues that the *Freeze Order* constitutes a change in procedural rules that effectively created a new cut-off deadline of November 13, 1995, for applications that had not achieved cut-off status under the original rules.[48] Accordingly, it argues, all applications can be processed because they are ripe for consideration. BizTel's argument in

---

[44] *See, e.g.,* DCT Comments at 34-36.

[45] *Id.*

[46] DCT Comments at 34-36.

[47] DCT Comments at 34-36; WinStar Comments at 5. These commenters cite Section 101.103(e) of our Rules, which states that "[w]here frequency conflicts arise between co-pending applications in the Point-to-Point Microwave Radio and Local Television Transmission Services, it is the obligation of the later filing applicant to amend his application to remove the conflict, unless it can make a showing that the conflict cannot be reasonably eliminated. Where a frequency conflict is not resolved and no showing is submitted as to why the conflict cannot be resolved, the Commission may grant the first filed application and dismiss the later filed application(s) after giving the later filing applicant(s) 30 days to respond to the proposed action." 47 C.F.R. § 101.103(e).

[48] BizTel Supplemental Comments at 10-14.

support of this position is that the Commission characterized a similar freeze it had imposed in the *Kessler* proceeding as having created a new cut-off date. BizTel argues, therefore, that "the Court-affirmed Commission interpretation of the cut-off acceleration effect of the freeze order in *Kessler* ***must apply with equal force to the Application Freeze Order***."[49] Thus, according to BizTel,

> [T]he arbitrary determinations as to cut-off status and processing eligibility . . . must be redrawn . . . to specify that *all 39 GHz applications pending as of the date of the Application Filing Freeze was adopted are cut-off from the further filing of competing mutually exclusive applications.*[50]

21. BizTel mistakenly interprets *Kessler*'s use of the word "cut-off" as a term of art referring to a permanent ending of the time in which competing applications may be filed against pending ones. The court in *Kessler*, however, did not address the ultimate procedural status of the applications that were subject to that case's freeze. Rather, the court correctly characterized the Commission's suspension of action on those applications as a "temporary halt on the filing of new applications pending the consideration, and possible promulgation, of new rules following notice and a public hearing."[51] The "unripe" applications at issue before us now are similarly situated; we have not yet completed the rulemaking process that is necessary to determine the very question of what final action will be taken with regard to the 39 GHz applications held in abeyance. Until we complete our consideration of the record, we will not be in a position to state whether further applications may be filed, or how the applications presently held in abeyance will be treated. In contrast, the procedural status of the "ripe" applications has already been determined -- under our current rules, competing applications may no longer be filed. Thus, we have two distinct categories of "cut-off" applications: those that have been temporarily cut-off from competition, subject to the results of our notice-and-comment rulemaking proceeding here, and those that were permanently "cut-off" from competition by operation of our rules. Our decision to process the latter type of applications -- *i.e.*, "ripe" applications that are not subject to competing applications -- is a reasoned choice, given the comparatively small effect that such processing will have on the new regulatory approach we may adopt in this proceeding. Processing the former type of applications -- those that are "unripe" -- may or may not undermine the ultimate regulatory approach we take. That will depend on what form this approach takes. By holding these applications in abeyance, we preserve our options and ability to fashion the approach that best serves the public interest.[52]

---

[49] *Id.* at 12 (emphasis and boldface in original).

[50] BizTel Supplemental Comments at 13 (emphasis in original).

[51] *Kessler*, 326 F.2d at 681.

[52] Depending on the ultimate regulatory approach taken, there are a range of treatments for these frozen applications (*e.g.*, treating the pending "unripe" applications as cut-off from competition by mutually exclusive applications, permitting the 60-day "clock" for filing such applications to resume running, adopting an entirely new

22. BizTel further argues that the Commission is unjustified in freezing applications to avoid unfairness to future applicants in the 39 GHz band. In support of this argument, it cites *Reuters Ltd. v. FCC*[53] for the proposition that substantive rights settle only upon the acceptance for filing of an application, and argues that applicants who have not yet filed have no expectation of a right to file mutually exclusive applications. BizTel misunderstands the purpose of our concern for future applicants. Our intention in freezing the processing of mutually exclusive and unripe applications is to preserve the *status quo* in order that we may have the maximum flexibility in the instant rulemaking proceeding. In the event that we decide to maintain our current rules for the 39 GHz band, the licensing process would continue as before. On the other hand, should we decide to change the rules for 39 GHz licensing, we would not have undermined the new regulatory framework.

23. As a final matter regarding this issue, there has been some dispute over the relevant dates of the 60-day public notice period. In the *NPRM and Order*, we determined that applications that were still within the 60-day public notice period as of November 13, 1995 -- the effective date of the Bureau's *Freeze Order* -- would be held in abeyance:

> With 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.[54]

We further noted:

> Whenever the 60-day "cut-off" date for an application occurs on or after the processing "freeze" date of November 13, 1995, we will hold the application in abeyance. This will assure fairness to potential applicants who were precluded by the freeze from filing competing applications in time to be entitled to comparative consideration.[55]

In this footnote, however, we inadvertently miscalculated the last day an application could have been placed on public notice, stating that under the 60-day time frame established in the *Freeze Order*, only 39 GHz applications placed on public notice on or after September 14, 1995, would be held in abeyance.[56] Under our rules for calculating compliance with deadlines, however, an

---

regulatory approach for these applications). As indicated above, the final order in this proceeding will determine the appropriate treatment for these applications.

[53] 781 F.2d 946 (D.C. Cir. 1986).

[54] *NPRM and Order*, 11 FCC Rcd at 4989.

[55] *Id.* at n.197.

[56] *Id.*

application that was placed on public notice on September 13, 1995, would not have completed the 60-day period as of November 13, 1995, the effective date of the *Freeze Order*.[57] Accordingly, the suspension of processing under the *NPRM and Order* properly applies to applications placed on public notice on September 13, 1995, and such applications have, in fact been held in abeyance.

24. Winstar had 17 applications placed on public notice on September 13. It argues that these applications should be held to have completed their 60-day public notice period. In support of its argument, Winstar first states that the Commission indicated a date certain for the last day which an application could have been placed on public notice, that this choice was clear, and that no erratum was issued to change the date. Second, Winstar argues that the Commission staff misinterpreted the *NPRM and Order* by deciding that applications placed on public notice in the September 13 publication had not completed the 60-day public notice period by November 13. Winstar argues this position is incorrect because the *Freeze Order* assertedly was not effective on November 13, and therefore the public notice window should have been considered open through the end of that day, thus concluding the 60-day period in connection with those applications placed on notice on September 13. WinStar and other parties argue that the *Freeze Order* was not validly released on November 13, 1995, because it was not placed in the Federal Register on that date, and that it appears that the decision may not have in fact been available to anyone on that date.[58] In this regard, these commenters observe that the *Freeze Order* did not appear in the Daily Digest until two business days after the stated release date, and that the trade press did not mention the freeze until November 27, 1995.

25. We deny Winstar's request. Section 1.4(b)(2) of our Rules provides that a non-rulemaking document (here, the *Freeze Order*) is effective upon the day of release.[59] Winstar's efforts to acquire rulemaking status for the *Freeze Order* are misdirected; freeze orders are routinely effective on the day of release or even the day of adoption, notwithstanding their

---

[57] This is so because 47 C.F.R. § 1.4(b) provides that the day for beginning the count of a 60-day public notice period is the day after the day the public notice was released. It also provides that if the final day of the 60-day period falls on a holiday (defined as, *inter alia*, Saturday or Sunday) then the next regular business day is the due date. Thus, assuming the effective date of the *Freeze Order* was its release date, Monday, November 13, 1995, then the last day upon which a 60-day public notice period could be completed prior to the effective date of the freeze was the previous Friday, November 10. In order to be completed by November 10, a public notice period would have to have started running on September 12. The release date of the last public notice containing applications which could complete the 60-day filing window prior to the freeze, therefore, would have to have been on or before September 11, 1995. Since the Bureau issues public notices with applications accepted for filing on Wednesdays of each week, applications listed on the September 6, 1995 public notice were the last ones which could be considered ripe before the November 13, 1995 freeze date.

[58] *See, e.g.*, Commco Petition at 8.

[59] 47 C.F.R. § 1.4(b)(2).

connection to a rulemaking proceeding.[60] It is well established that imposition of a freeze is a procedural action, not subject to notice-and-comment rulemaking.[61] Thus, Winstar's argument that the *Freeze Order* was not "released" until publication in the Federal Register is inapposite because of the action's procedural nature. Section 1.4(b)(2) further provides that a non-rulemaking document is "released" by making the full text available to the press and public in the Commission's Office of Public Affairs, and that the release date is on the face of the document.[62] The *Freeze Order* was made available to the public on November 13, 1995, in the Office of Public Affairs: copies were placed on the counter in the usual manner for access by the public. Accordingly, the effective date of the freeze is the November 13, 1995 release date of the *Freeze Order.*

26. The inadvertent miscalculation of the specific public notice date in the *NPRM and Order* does not alter the fact that the closing date of the filing window for applications placed on public notice on September 13, 1995, was in fact November 13, the release date of the *Freeze Order*. The effectiveness of the *Freeze Order* is not affected by this inadvertent error, on when publication is made in the Daily Digest, nor on the decision of the trade press to report the action.[63] The Commission rightfully suspended the filing window prior to the end of the public notice period for applications publicly noticed in the September 13, 1995 publication; accordingly, all 39 GHz applications placed on public notice on or after September 13, 1995, are clearly in the category of unripe applications and will be held in abeyance for the same reasons as discussed above.

### C. Modification Applications

27. In the *NPRM and Order*, we stated that we would hold in abeyance modification applications, and any amendments thereto, that were filed on or after November 13, 1995, the date of the *Freeze Order*.[64] We stated that no new applications to modify existing licenses would be accepted after December 15, 1995, unless they did not involve any enlargement in any portion

---

[60] *Cf. District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("'The form of the proceeding is not significant. It is the nature and effect which is controlling.'" (quoting *In re Summers*, 325 U.S. 561, 567 (1945))).

[61] *Kessler v. FCC*, 326 F.2d at 682.

[62] 47 C.F.R. §1.4(b)(2).

[63] *See, e.g.*, In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, *Order*, Mimeo No. 4074 (adopted July 16, 1987; released July 17, 1987) (ordering that freeze would be effective as of close of Commission business on day of adoption of the *Order*).

[64] A modification application and any amendment thereto, is filed pursuant to an existing license. There is no amendment of right for an existing license. An amendment of right is filed pursuant to a license application.

of the service area and did not change frequency blocks (unless to delete one).[65] Modification applications filed prior to November 13, 1995 were not affected by this action and have been processed.

28. We clarify that the *NPRM and Order* was not intended to hold in abeyance modification applications and amendments thereto which do not involve any enlargement in any portion of the service area or which do not change frequency blocks (unless to delete one). Granting applications that meet these criteria will not undermine the goals of any of the proposals we are considering in this proceeding. Moreover, by holding these applications in abeyance, we would preclude existing licensees from upgrading equipment or making minor adjustments to their system in order to better serve the public.[66] Accordingly, we will continue to process these applications.

29. BizTel argues that we should allow all modifications of existing authorizations that reasonably relate to the licensees' ability to provide service to its customers within a 100 x 100 square mile service area, so long as any proposed modification does not result in mutual exclusivity with another licensee or timely filed applicant.[67] We disagree with this suggestion. Granting modification applications filed after November 13, 1995 to serve new areas, even areas adjacent to their existing service areas, would be analogous to granting new applications, a practice that is inconsistent with the *Freeze Order*.

### D. Emergency Request for Stay

30. Commco filed an Emergency Request for Stay requesting that the Commission immediately stay its December 15, 1995, interim freeze on the processing of mutually exclusive applications, including amendments thereto, to establish new facilities in the 39 GHz frequency band, pending Commission action on its Petition for Reconsideration. In light of today's decision, the Emergency Request for Stay is hereby moot.

## V. ORDERING CLAUSES

31. This action is taken pursuant to authority found in Sections 4 (i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 303, and Section 0.131 of the Commissions Rules, 47 C.F.R. §§ 0.131.

---

[65] *NPRM and Order*, 11 FCC Rcd at 4989.

[66] Sections 101.59 and 101.61 of our Rules permit these types of minor modifications. To the extent that the above-mentioned criteria are satisfied, we see no reason to prevent licensee from seeking and obtaining authorization to make these changes in their operations.

[67] BizTel Comments at 38.

32. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration submitted by Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation (filed Jan.16, 1996), and the Petition for Partial Reconsideration filed by DCT Communications, Inc., (filed Jan. 16, 1996), ARE HEREBY GRANTED IN PART AND DENIED IN PART.

33. IT IS FURTHER ORDERED that the Emergency Petition for Stay filed by Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation IS HEREBY DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary