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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

PETITION FOR RECONSIDERATION OF BIZTEL, INC.

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SUMMARY

By this Petition for Reconsideration, BizTel, Inc. seeks modification of processing policies adopted in this rulemaking proceeding relating to pending 38.6 - 40.0 GHz Point-to-Point Microwave Radio Service ("39 GHz") applications. As a result of these policies, more than sixty pending BizTel applications, as well as a large number of pending applications filed by others, have been withheld from processing and grant. This petition is ripe for reconsideration at this time because, in critical substantive respects, the Commission's processing policies have the effect of a Final Order.

As fully demonstrated in this petition, the Commission must find on reconsideration that: (1) all pending 39 GHz applications are cut-off from the further filing of competing applications and are ripe for processing; (2) all amendments of right filed within a thirty (30) day period following release of a Final Order in the Rulemaking must be processed; at a minimum, all amendments of right filed before the release of a Final Order must be processed; and (3) licenses must be issued to all non-mutually exclusive applicants that otherwise meet the threshold licensing qualifications established under the pre-existing rule structure. Grant of the instant petition and the resulting modification of the Commission's 39 GHz processing policies in the manner set forth above will serve the public interest, convenience, and necessity.

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To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, BizTel, Inc. ("BizTel"), through its undersigned counsel, submits the following Petition for Reconsideration in the above-captioned rulemaking (the "Rulemaking"). The instant petition seeks reconsideration of the January 17, 1997 Memorandum Opinion and Order in the Rulemaking.[1/] The Reconsideration Order failed to cure defects in the processing policies relating to pending 38.6 - 40.0 GHz Point-to-Point Microwave Radio Service ("39 GHz") applications adopted in the Notice of Proposed Rulemaking and Order in the above-captioned proceeding.[2/]

[1/] See Memorandum Opinion and Order, ET Docket No. 95-183 & RM 8553, PP Docket No. 93-253, FCC 96-486, (released January 17, 1997), 62 Fed Reg 14015 (March 25, 1997) (the "Reconsideration Order"). See 47 C.F.R. § 1.429(d); see, also, 47 C.F.R. § 1.4(b)(1).

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

I. INTRODUCTION

BizTel is a pioneer and industry leader in the development and deployment of innovative 39 GHz fixed wireless broadband systems and services. In accordance with its long-standing business plan, BizTel has commenced operations in 156 authorized service areas. These systems provide viable *facilities-based* competition to entrenched local wireline telephone companies in accordance with FCC and Congressional public policy objectives.

Paradoxically, however, as a result of the policies adopted in the Processing Order and perpetuated by the Reconsideration Order, more than sixty pending BizTel applications, as well as a large number of pending applications filed by other pioneering companies, have been withheld from processing and grant. Consequently, visionary business plans of BizTel and others have been impeded, and efforts to introduce innovative competitive services to the public have been frustrated. These policies cannot be reconciled with the Communications Act of 1934, as amended (the "Communications Act"), regulations adopted pursuant thereto, previous action in the Rulemaking, controlling case law, or the Commission's professed objectives in the Rulemaking, all of which clearly establish that:[3/]

[3/] BizTel has addressed 39 GHz application processing issues in detail several times in its submissions to the record of the Rulemaking. See, e.g., Supplemental Comments of BizTel, Inc., ET Docket No. 95-183 (filed October 17, 1996) (the "October 17 Supplement"); Reply Comments of BizTel, Inc., ET Docket No. 95-183 (filed April 1, 1996) (the "BizTel Reply Comments"), at 13-16; Comments of BizTel, Inc., ET Docket No. 95-183 (filed March 4, 1996) (the "BizTel Comments"), at 36-40. The Reconsideration Order mischaracterizes and fails to adequately consider BizTel's legal challenge to the unlawful policies adopted in the Processing Order.

(1) The processing policies adopted thus far in the Rulemaking are ripe for reconsideration at this time;

(2) The processing policies adopted thus far in the Rulemaking contravene the Communications Act;

(3) All 39 GHz applications pending as of November 13, 1995 have achieved cut-off status and may not be subjected to the filing of further competing applications;

(4) A reasonable time period following the release of a Final Order in the Rulemaking must be allowed for the filing of amendments to remove mutual exclusivity; at a minimum, all amendments of right filed before the release of a Final Order must be processed; and

(5) Licenses must be issued to all non-mutually exclusive pending applicants possessing the necessary threshold qualifications under the pre-existing rule structure.

II. BACKGROUND

Four years ago, the 39 GHz band was considered to have minimal commercial value. However, a rapidly expanding marketplace demand for viable competitive local broadband service alternatives transformed high-cost military technologies into cost-efficient commercial millimeter wave transmission systems, with performance and reliability comparable to that provided by fiber optics. These ground-breaking developments, in combination with strong encouragement from Commission staff, persuaded BizTel and other pioneers to risk scarce seed capital in the development of the 39 GHz industry.

BizTel filed its first 39 GHz applications in early March of 1994. These applications, part of a plan to develop a nationwide wireless broadband footprint, were not accepted for

filing until three months later (June 29, 1994).[4] Even though these applications fully conformed to the service rules in force at that time, the Commission did not process them or, for that matter, others filed in the same timeframe.

On September 16, 1994, the Common Carrier Bureau issued a policy statement containing new 39 GHz filing and processing guidelines.[5] The new guidelines were made immediately applicable to all pending and future applications, and were ostensibly intended to quash rumored "speculation" and to preserve 39 GHz spectrum for "legitimate" uses. Although these new policies constituted, in all relevant legal respects, new rules adopted in the absence of the notice and comment procedures required by the Commission's Rules and the Administrative Procedure Act,[6] BizTel and other 39 GHz applicants did not challenge them but, rather, expended substantial resources to bring their applications into compliance with the new "rules" in an effort to avoid further costly delays. Notwithstanding this effort, another five months elapsed before the first few BizTel licenses were finally issued by the Commission -- almost a year from the date of BizTel's original filings.[7]

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[4] See FCC Public Notice, Report No. 1089 (released June 29, 1994).

[5] See Public Notice re: Policy Governing the Assignment of Frequencies In The 38 GHz And Other Bands To Be Used In Conjunction With PCS Support Communications, FCC Public Notice No. 44787 (released September 16, 1994).

[6] See 5 U.S.C. § 553; see, also, United States Telephone Association v. FCC, 28 F.3d 1232, 1236 (D.C. Cir. 1994).

[7] See FCC Public Notice, Report No. 1125 (released March 8, 1995).

Processing continued from that time, albeit at a *very* slow pace, through the early fall of 1995. On November 13, 1995, the Wireless Telecommunications Bureau adopted a freeze on the filing of new 39 GHz applications.[8/]

Then, on December 15, 1995, the Commission adopted the NPRM and the Processing Order. Among other things, the Processing Order: (1) removed, retroactively, substantive amendment rights; (2) imposed an arbitrary and capricious cut-off requirement; and (3) blocked the processing of 39 GHz applications, amendments of right thereto, and the issuance of licenses to properly qualified applicants.[9/] This action was justified by nothing more than reference to the objectives of the proceeding.[10/]

On January 16, 1996, two petitions for reconsideration were filed.[11/] BizTel supported these petitions in timely submissions to the Commission.[12/] On October 17, 1996, at the request of Commission staff, BizTel filed the October 17 Supplement, which elaborated on previous BizTel filings in the Rulemaking relating to the issues raised by the Processing

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[8/] See Order, 11 FCC Rcd 1156 (1996)(the "Freeze Order").

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

[10/] See, e.g., Processing Order, at ¶ 123.

[11/] See Petition For Reconsideration of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation (the "Commco Petition"); Petition For Partial Reconsideration of DCT Communications, Inc. (the "DCT Petition"), ET Docket No. 95-183 (filed January 16, 1996), Public Notice Report No. 2120 (released February 9, 1996), 61 Fed Reg 5773 (February 14, 1996). See, also, Emergency Request For Stay of Commco, L.L.C., Plaincom, Inc., and Sintra Capital Corporation, ET Docket No. 95-183 (filed January 16, 1996).

[12/] See, e.g., BizTel Comments, at 36-40 & FN 2; BizTel Reply Comments, at 13-16; see, also, Comments of BizTel, Inc. In Support Of Emergency Request For Stay, ET Docket No. 95-183 (filed February 1, 1996).

Order.[13] On January 17, 1997, the Commission released the Reconsideration Order which granted the Commco Petition and the DCT Petition in part by declaring that amendments of right filed prior to December 15, 1995 would be processed.

III. THE PROCESSING POLICIES ADOPTED THUS FAR IN THE RULEMAKING ARE RIPE FOR RECONSIDERATION AT THIS TIME

The Reconsideration Order states that several of BizTel's key arguments relating to the need to modify the Commission's 39 GHz processing policy are premature because no final decision has been made by the Commission that would potentially result in mutual exclusivity.[14] However, the Reconsideration Order authorized the processing of one class of applications (i.e., those that were 60 days past public notice as of November 13, 1995 and free of mutual exclusivity conflicts as of December 15, 1995), while it affirmed the Commission's previous denial of the processing rights of many other pending applicants. This action constitutes an arbitrary and capricious limitation on processing eligibility that, in all relevant legal respects, determines mutual exclusivity status for immediate processing purposes and, thus, has the effect of a Final Order.

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[13] In a motion filed concurrently with the October 17 Supplement, BizTel demonstrated good cause for the Commission's formal acceptance of the October 17 Supplement in the record of the Rulemaking. Because the October 17 Supplement was referenced in the Reconsideration Order, BizTel assumes that the October 17 Supplement was accepted as a formal supplement to the Commco Petition and the DCT Petition. See 47 C.F.R. § 1.429(d).

[14] Reconsideration Order, at ¶16.

IV. THE PROCESSING POLICIES ADOPTED THUS FAR IN THE RULEMAKING CONTRAVENE THE COMMUNICATIONS ACT

The Reconsideration Order is but the latest link in a long chain of impediments imposed on 39 GHz applicants that have blocked the grant of licenses to qualified applicants under the pre-existing rule structure. BizTel has previously explained that the 39 GHz processing regime violates Section 309(j)(7)(A) of the Communications Act because its operative result is to preserve spectrum for auction in the expectation of increased Federal revenues.[15] The central operative objective of the Rulemaking is the intent to modify the applicable licensing and technical rules to facilitate the future issuance of licenses by competitive bidding.[16] The Reconsideration Order fails to directly address BizTel's arguments relating to Section 309(j)(7)(A) of the Communications Act, and instead embarks on a discussion that overstates the complexity and impact of addressing mutual exclusivity conflicts among pending applicants.[17] As set forth in Section VIII infra, it is the Commission's decision not to process amendments of right that has precluded the resolution of many of the mutual exclusivity conflicts that exist today.

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[15] See October 17 Supplement, at 13 & 17; BizTel Reply Comments, at 14-15; BizTel Comments, at 24. See, also, Reconsideration Order, at ¶ 15.

[16] See, e.g., NPRM, at ¶¶ 2 & 104.

[17] See October 17 Supplement, at 13; see, also, Reconsideration Order, at ¶ 15.

Additionally, as BizTel has also previously explained,[18] the Processing Order and Reconsideration Order contravene Section 309(j)(6)(E) of the Communications Act[19] by: (1) misinterpreting the legal significance of cut-off rules;[20] (2) blocking the processing of applications for which already filed amendments of right have solved mutual exclusivity conflicts;[21] (3) blocking the processing of any further amendments that may be filed which resolve mutual exclusivity;[22] and (4) assuming mutual exclusivity where none actually exists to block the processing of non-mutually exclusive applications.[23]

Finally, because the processing regime in the Rulemaking prevents the grant of licenses to applicants who make significant contributions to the development of a new telecommunications service or technology, it violates Section 309(j)(6)(G) of the Communications Act. BizTel and others that invested scarce seed capital and diligently filed applications to launch an important new service in bands that had previously been of little use are entitled to fair and legitimate processing under Ashbacker Radio Corp. v. FCC.[24]

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[18] See October 17 Supplement, at 17; BizTel Comments, at 24; BizTel Reply Comments at, 14.

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

[20] See Processing Order, at ¶¶ 122-123; Reconsideration Order, at ¶¶ 20-22.

[21] See Processing Order, at ¶ 123; Reconsideration Order, at ¶¶ 15 & 17.

[22] Id.

[23] See Processing Order, at FN 197; see, also, Reconsideration Order, at ¶ 21.

[24] See Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945). To paraphrase the words

(continued...)

V. THE RECONSIDERATION ORDER SHOULD HAVE FOUND THAT ALL PENDING 39 GHz APPLICATIONS WERE CUT-OFF FROM THE FILING OF FURTHER COMPETING APPLICATIONS AS OF NOVEMBER 13, 1995 BY VIRTUE OF THE FREEZE ORDER

The Reconsideration Order should have found that the Freeze Order established November 13, 1995 as the operative cut-off date for all pending 39 GHz applications and, consequently, that no further competing applications may be filed after that date. Instead, the Commission continues to rely on a theory of processing unripeness that preserves mutually exclusivity, leaves open the possibility that further competing applications may be accepted for filing at some future time and,[25] thus, arbitrarily and capriciously forecloses processing.

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

Under Section 309(b) of the Communications Act and Section 101.37(c) of the Commission's Rules, a 39 GHz application may be granted at *any time* after the passage of thirty days from its appearance on public notice, so long as no petition to deny is pending.[26] Section 309(b) is the only statutory threshold required to be met for an application to be

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[24](...continued)
of former Commissioner Barrett's statement at the December 15, 1995 Commission meeting commenting on the adoption of the Processing Order, " 'Entrepreneur' is not a dirty word!" (emphasis added).

[25] See Processing Order, at FN 197; Reconsideration Order, at FN 52. See, also, October 17 Supplement, at 14-16. In fact, no party to the Rulemaking has claimed that its right to file a competing application has been trampled by the Commission's failure to accept applications tendered for filing after the effective date of the Freeze Order. See Kessler v. FCC, 326 F.2d 673, 686 (D.C. Cir. 1963); Reuters Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986).

[26] 47 U.S.C. § 309(b); see, also, 47 C.F.R. § 101.37(c).

eligible for processing and grant. Furthermore, Section 309(b) is solely intended to allow for the filing of petitions to deny by interested parties, and does not bestow upon would-be applicants any legal or equitable right to file competing applications. Given that neither the Freeze Order or the Processing Order precluded the filing of petitions to deny with respect to any pending application, the thirty-day statutory protest period clearly has run for all pending 39 GHz applications and, thus, the only statutory pre-requisite for processing has been satisfied.[27]

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

The sole purpose of cut-off rules, as narrowly construed by repeated review of the Courts, is to provide administrative convenience in establishing finality in determining which applications make up a processing group.[28] It is well-settled that cut-off provisions, in and of themselves, neither vest nor divest any absolute legal right on the part of a putative applicant to file a competing application.[29] Furthermore, cut-off rules are procedural and,

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

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

[29] See Reuters Ltd. v. FCC, at 951; Committee for Effective Cellular Rules v. FCC, at 1320.

thus, may be established or modified by the Commission without resort to formal rulemaking under the Administrative Procedure Act.[30]

By definitively foreclosing the filing of additional 39 GHz applications, the Freeze Order defined the universe of pending applications and, thus, modified the relevant cut-off rules that were in force prior to that time. In doing so, the Commission unambiguously created the administrative finality for processing purposes that is the exclusive legal relevance of cut-off rules. Yet, in order for pending applications to be considered "ripe" for processing, the Commission is *still* requiring completion of a 60-day cut-off period prior to the effective date of the Freeze Order.[31] By refusing to process 39 GHz applications that were not 60 days past public notice prior to the effective date of the Freeze Order, and instead by treating them as if they are subject to mutual exclusivity regardless of their actual status,[32] the Commission has distorted the applicability of its cut-off rules.

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

The Rulemaking seeks to implement a system of competitive bidding to replace the pre-existing licensing approach By treating all pending applications that do not meet its arbitrary processing criteria "as if" they are mutually exclusive, and refusing to process applications, the Commission has created mutual exclusivity where none existed before, or

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

[31] See Processing Order, at ¶ 122; see, also, Reconsideration Order, at ¶ 17.

[32] See Processing Order, at FN 197.

perpetuated mutual exclusivity conflicts that could have otherwise been easily resolved through the processing of applications and amendments of right thereto that are, instead, frozen and capriciously blocked from processing.[33] This constitutes a clear violation of Section 309 of the Communications Act.[34] Failure by the Commission to recognize the cut-off acceleration effect of the Freeze Order and the resulting cessation of processing of the affected applications has precluded the issuance of licenses to duly qualified applicants, such as BizTel, who make significant contributions to the development of new telecommunications service or technology. These actions are also a clear violation of Section 309(j)(6)(G) of the Communications Act.

D. The Controlling Case Law Affirms The Existence Of An Accelerated Cut-Off And Bars The Reopening of Filing Windows

1. The Freeze Order Must Be Construed As An Accelerated Cut-Off

The fact that the Freeze Order did not explicitly impose an accelerated cut-off does not preclude such a result.[35] In McElroy, the cut-off date for applications for cellular telephone licenses was established by operation of law, notwithstanding that the relevant Commission release did not contain language indicating that an accelerated cut-off date had been

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[33] Id.

[34] Reconsideration Order, at ¶ 16.

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

established.[36] Although the same circumstances apply in the instant case, the Reconsideration Order ignores the implications of McElroy properly raised by BizTel.[37]

Likewise, the Reconsideration Order improperly disregards Kessler v. FCC as a basis for a cut-off acceleration in the instant case.[38] The Freeze Order relied exclusively on Kessler as the controlling precedent for implementation of the freeze in the instant case.[39] In Kessler, the Commission found that its adoption of a freeze on the acceptance of new AM Broadcast applications pending possible revision of the applicable licensing rules served to establish a cut-off date for all pending applications on the date the freeze became effective. As the Commission itself explained:

> ... ***we amended our procedural rules to establish, in effect, a new 'cut-off date' for most pending [AM broadcast] applications [except those not subject to the freeze], this new date acting to supersede all previous cut-off lists.***(emphasis added).[40]

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[36] Id.

[37] See October 17 Supplement, at 12.

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

[39] See Freeze Order, at 1156. The *only* difference between the facts in Kessler and the instant case is that the new rules here involve the implementation of a system of competitive bidding. The Court of Appeals noted in Kessler that it had previously found that the Commission's acceleration of the closing of an application processing group to be well within requisite procedural constraints. See Kessler v. FCC, at 685 (citing Federal Broadcasting System v. FCC, 225 F.2d 560, 565-567 (D.C. Cir. 1955), cert. denied, sub nom. WHEC, Inc. v. Federal Broadcasting System, 350 U.S. 923 (1955)).

[40] See Kessler v. FCC, at 685 (citing the Commission's own Memorandum Opinion & Order in the case). Without any foundation, the Reconsideration Order states that BizTel mistakenly interpreted Kessler's use of the word "cut-off" as a term of art. Reconsideration Order, at ¶ 21. In fact, nothing in the Kessler opinion indicates that the Commission, in explaining the effect of the application freeze in that case, chose to use the word "cut-off" as

(continued...)

The Freeze Order is indistinguishable in operation from the freeze imposed in Kessler, yet the Commission has not offered any legitimate justification for deviating from the cut-off acceleration result that arose from implementing the freeze in that case.[41] Therefore, the precedent for establishing an accelerated cut-off through the adoption of an application filing freeze created by the Commission in Kessler should control in the instant case.

Even assuming, *arguendo,* that Kessler does not compel a finding that an application freeze establishes an accelerated cut-off in *all* cases, the Commission must be able to show a legitimate legal or public policy basis for disregarding the precedent established by its own actions in Kessler.[42] The Commission, however, fails in its Reconsideration Order to even acknowledge the controlling precedential effect of Kessler, much less offer a basis for a different policy.

2. The Commission Is Barred From Reopening 39 GHz Filing Windows

Because the Freeze Order imposes an accelerated cut-off for all pending 39 GHz applications, and because potential applicants do not have a right as a matter of law to file mutually exclusive applications, the Commission should not reopen 39 GHz filing

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[40](...continued)
anything *other* than a term of art which unambiguously refers to the closing of an application processing group.

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

[42] Id.

windows.[43] The Reconsideration Order, however, fails to dispose of this issue in a final manner.[44]

The Commission's indecision in this regard may be related to its actions in WT Docket No. 96-18 (the "Paging Rulemaking"). Even though filing windows *were* reopened in the Paging Rulemaking, this result in the Paging Rulemaking is inapposite here.[45] The Commission's sole justification for reopening filing windows in the Paging Rulemaking was an "equity interest" in the consistent treatment of applications pending prior to the freeze and *new* applications filed as a result of lifting the freeze.[46]

In contrast, as the Commission explicitly recognized in the Paging Reconsideration Order, the "equity" rationale relied upon by the Commission to support the reopening of filing windows in the Paging Rulemaking *does not exist* in the instant Rulemaking.[47] The Commission has made it quite clear that it has no intention of lifting the prohibition on the

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[43] See Reuters Ltd. v. FCC, at 951; Committee for Effective Cellular Rules v. FCC, at 1320; see, also, October 17 Supplement, at 14 - 16.

[44] See Reconsideration Order, at FN 52.

[45] See Notice of Proposed Rulemaking, WT Docket No. 96-18, 11 FCC Rcd 3108 (1996), at ¶¶ 139 - 148.

[46] See First Report and Order, WT Docket No. 96-18, 11 FCC Rcd 16570 (1996) (the "Paging Reconsideration Order"), at ¶26 and ¶41. This rationale ignores the Commission's obligation to refrain from reopening filing windows once an application processing group has been legitimately closed. The Paging Reconsideration Order failed to articulate any argument whatsoever to establish otherwise. See Reuters Ltd. v. FCC, at 951; Committee for Effective Cellular Rules v. FCC, at 1320.

[47] See Paging Reconsideration Order, at ¶ 24.

filing of new applications imposed by the Freeze Order.[48] As is clearly illustrated by the Commission's recent experience in the Paging Rulemaking, the reopening of 39 GHz filing windows closed by the Freeze Order would generate mutual exclusivity conflicts, thus obstructing the issuance of licenses to qualified applicants, and needlessly blocking the provision of service to the public by companies making significant contributions to the development of important new services.[49] Such action is barred in the instant case, because it would negate the cut-off acceleration effect of the Freeze Order, and would contravene Sections 309(j)(6)(E) and 309(j)(6)(G) of the Communications Act.

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

As set forth above, the legal rationale in the instant case for a finding that the Freeze Order imposed an accelerated cut-off and definitively foreclosed the further filing of competing applications is clearly compelled by the Communications Act and the controlling case law. BizTel and other bona fide applicants who filed their applications under the pre-existing rule structure have a legitimate expectation that their processing rights will not be subrogated due to misinterpretation of the cut-off rules.[50] Accordingly, the determinations as to cut-off status and processing eligibility made thus far in the Rulemaking must be modified to acknowledge that all 39 GHz applications pending as of the effective date the

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[48] Id. See, also, Reconsideration Order, at ¶ 29.

[49] See Second Paging Order, at ¶ 6. The Commission failed to articulate any justification in the Paging Rulemaking for inviting competing filings and then dismissing resulting mutually exclusive applications.

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

Freeze Order are cut-off from the further filing of competing mutually exclusive applications and, thus, are ripe for processing.

VI. THE COMMISSION MUST ALLOW A REASONABLE PERIOD AFTER THE RELEASE OF A FINAL ORDER FOR THE FILING OF ADDITIONAL AMENDMENTS TO REMOVE MUTUAL EXCLUSIVITY; AT A MINIMUM, ALL AMENDMENTS OF RIGHT FILED BEFORE THE RELEASE OF A FINAL ORDER MUST BE PROCESSED

Consistent with its obligation under Section 309(j)(6)(E) of the Communications Act to continue to use, among other things, engineering solutions and service regulations to avoid mutual exclusivity when attempting to implement a new system of competitive bidding, the Commission must permit a reasonable time period (e.g., thirty (30) days) following release of a Final Order in the Rulemaking for the filing of amendments to resolve the few remaining mutual exclusivity conflicts among pending 39 GHz applicants. Given the ambiguity and uncertainty created thus far in the Rulemaking with respect to the ability of applicants to resolve mutual exclusivity conflicts, additional time for the filing of responsive amendments of right is merited to ensure adherence to Congress' intent in implementing the Commission's competitive bidding authority. A thirty-day period after the release of a Final Order in the Rulemaking for the filing of further amendments of right is consistent with the timeframes the Commission has elsewhere specified as the period for parties to assess the impact of pending applications, and should allow sufficient time for affected applicants to engineer solutions to

many, if not all, of the remaining mutual exclusivity conflicts.[51] At a minimum, the Commission must issue a finding that all amendments of right filed before the release of a Final Order in the Rulemaking will be processed.

The Reconsideration Order properly affirmed that applicants are entitled by Sections 101.29 and 101.45 of the Commission's Rules to file amendments of right, and that these submissions must be accepted for filing without any further action by the Commission.[52] However, the Reconsideration Order erred by only ordering the processing of amendments of right filed prior to December 15, 1995.[53] The right to amend is a substantive right which the Commission may not revoke without the completion of notice and comment procedures in the context of a rulemaking.[54] There is simply no rational distinction that can be made between amendments of right filed on or before December 14, 1995, and those filed thereafter. 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.

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[51] See, e.g., 47 C.F.R. 101.43(a).

[52] See Reconsideration Order, at ¶¶ 11 & 17. See, also, Dial-A-Page, Inc., 75 FCC 2d 432, 437 (1980).

[53] Reconsideration Order, at ¶17.

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

Even assuming, *arguendo,* that the suspension of processing of amendments of right filed after December 14, 1995 can somehow be reconciled with the notice and comment provisions of the Administrative Procedure Act and the Commission's Rules relating to the immediate effectiveness of amendments of right, the Commission has articulated no legitimate connection between the suspension of processing of amendments of right and the stated goals of the Rulemaking. The Reconsideration Order speculates that the incidence of mutual exclusivity among pending applicants would result in the need for comparative hearings, thereby causing undue expense and delay to the government and applicants.[55] According to the Reconsideration Order, the Processing Order forestalls this possible situation and maximizes the Commission's "flexibility".[56]

However, the suspension of processing of amendments of right filed after December 14, 1995 has had just the opposite effect, because it has eliminated the *only* legitimate means that applicants have at their disposal to resolve mutual exclusivity during the application process, in contravention of Section 309(j)(6)(E) of the Communications Act.[57]

BizTel's analysis indicates that a substantial percentage of pending 39 GHz applications are, in fact, free of mutual exclusivity conflicts.[58] In addition, the vast majority

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[55] Reconsideration Order, at ¶15.

[56] Id.

[57] By suspending the processing of all amendments of right filed after December 14, 1995, the Commission has not only precluded 39 GHz applicants' ability to resolve mutual exclusivity, but has eliminated the processing of an entire broader class of amendments of right provided for by the Commission's Rules. See 47 C.F.R. 101.29.

[58] See, e.g., Applications of BizTel, Inc., File Nos. 9510336 - 9510342; 9510344 - 9510370, FCC Public Notice Report No. 1156 (released October 11, 1995).

of existing mutual exclusivity conflicts involve only two or three parties. In many cases, adjacent service areas have only very minor overlaps. These conflicts are readily amenable to engineering solutions, as demonstrated by the fact that several hundred similar conflicts have already been resolved in a like fashion without *any* expenditure of Commission resources. Moreover, absolutely no evidence has been presented by the Commission or any other party to support the Commission's speculative allegation that continued processing of all 39 GHz applications and pending amendments thereto would require any substantially greater effort than the processing of only non-mutually exclusive applications -- *in either case*, an identical effort to determine the mutual exclusive status of an application must be made. Accordingly, the lack of any justification for the suspension of processing of amendments of right filed after December 14, 1995 violates Sections 309(j)(6)(E), 309(j)(6)(G), and 309(j)(7)(A) of the Communications Act.

VII. LICENSES MUST BE ISSUED TO ALL NON-MUTUALLY EXCLUSIVE APPLICANTS THAT ARE OTHERWISE QUALIFIED

There is no legitimate legal or public policy basis to support the processing obstructions adopted thus far in the Rulemaking. Therefore, the Commission must specifically instruct the Wireless Telecommunications Bureau to complete processing of *all* pending 39 GHz applications and to issue licenses to all non-mutually exclusive applicants that are otherwise qualified under the pre-existing licensing rule structure. Any other treatment of non-mutually exclusive applications would contravene the Commission's competitive bidding

authority, and would be inconsistent with recent Commission decisions in other rulemaking proceedings involving a shift from a pre-existing licensing rule structure to a system of competitive bidding.[59]

VIII. THE POLICY MODIFICATIONS SOUGHT HEREIN ARE CONSISTENT WITH THE COMMISSION'S COMPETITIVE BIDDING AUTHORITY, AND WILL SERVE THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

The Reconsideration Order asserts that the motivations for the Commission's actions in the instant case 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."[60] However, there is absolutely no evidence presented in the record of the Rulemaking by the Commission or any other party demonstrating that these goals were not being met by the pre-existing licensing rule structure. In truth, the pre-existing rule structure was more than adequately meeting these goals. Of course, this does not mean that the Commission may not transition to a system of competitive bidding in the instant case; *only that it must not prejudice the rights of pending applicants in doing so.*

Modification of the Processing Order and the Reconsideration Order in the manner set forth in the instant petition is fully consistent with the intent of Congress in establishing the

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[59] See, e.g., Second Paging Order, at ¶ 6.

[60] Reconsideration Order, at FN 38.