

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
In the Matter of Amendment of the 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
	)	
	)	

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

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Dated: February 20, 1998

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## SUMMARY

The Commission should reconsider its decision to dismiss without prejudice the pending applications that had not completed the 60-day cut-off period, mutually exclusive applications, and modification applications. The Commission's action lacks legal support and denies applicants the reasonable expectation that their applications would be processed pursuant to the rules under which the applications were filed. The Commission did not have a reasonable basis for retroactively applying its new rules in dismissing the pending applications. Since the Commission contemplates that incumbent and new licensees will operate concurrently, it should have recognized the legitimate expectations of pending applicants in receiving rectangular service area licenses as provided by the current rules and in operating concurrently with new licensees operating in BTA service areas by continuing to process the pending applications. Contrary to the Commission's conclusion, this approach, rather than the dismissal of the pending applications, adequately balances the expectation interests of pending applicants with the goals of the new licensing scheme.

The Commission should also clarify its 39 GHz Order by amending Section 101.63(a) of its Rules to reflect the new build-out policy applicable to incumbent and new licensees and which the Commission incorporated in Section 101.15(c) and 101.17 of its Rules. The new policy requires incumbent licensees to make a "substantial service" showing at renewal time and replaces the build-out requirement in Section 101.63(a) of the Rules. In adopting this new policy,

however, the Commission did not amend Section 101.63(a) of its Rules to reflect that intent. Accordingly, in the interest of avoiding any confusion, the Commission should amend Section 101.63(a) by excluding 39 GHz licensees from the scope of that rule.

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and 38.6-40.0 GHz	)	

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

BizTel, Inc. ("BizTel"), pursuant to Section 1.429 of the Commission's Rules, hereby requests that the Commission reconsider its decision in its recent 39 GHz Order in the above-captioned proceeding<sup>1</sup> to dismiss the pending 39 GHz applications of BizTel and other parties that had not completed the 60-day "cut-off" period as of November 13, 1995, and to dismiss pending mutually exclusive applications. This decision lacks legal support, should be rescinded, and the Commission should resume the normal processing of those applications. The Commission should also clarify its 39 GHz Order by amending Section 101.63 of its Rules to confirm that incumbent 39 GHz licensees are subject to the new

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1. Report and Order and Second Notice of Proposed Rulemaking, FCC 97-391 (rel. Nov. 3, 1997), 63 Fed. Reg. 3075 (Jan. 21, 1998) ("39 GHz Order").

"substantial service" renewal standard established in Sections 101.15 and 101.17 of the Rules as provided in its Order.

**I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO DISMISS PENDING APPLICATIONS**

The processing of pending 39 GHz applications that had not completed the 60-day cut-off period, mutually exclusive applications, and modification applications has been frozen since the Wireless Telecommunications Bureau issued an Order on November 13, 1995 announcing that the Commission would no longer accept such applications.<sup>2</sup> In its NPRM and Order<sup>3</sup> the Commission extended and clarified the effect of the freeze, and on January 17, 1996, it essentially affirmed the freeze, with certain modifications.<sup>4</sup> In its 39 GHz Order, the Commission decided to dismiss those pending applications without prejudice, "in view of the goals of this proceeding, e.g., to foster competition among different service providers, to promote maximum efficient use of the spectrum, and to provide efficient service to customers by improving the licensing procedure."<sup>5</sup> The Commission concluded that the "best approach" is "to allow these applicants to submit new applications under the competitive bidding rules established in this

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2. Freeze Order, 11 FCC Rcd 1156 (Wireless Telecom. Bur. 1995).

3. Notice of Proposed Rulemaking and Order, 11 FCC Rcd 4930 (1995) ("NPRM and Order").

4. Memorandum Opinion and Order, 12 FCC Rcd 2910 (1996).

5. See 39 GHz Order at ¶ 87.

proceeding. We take this action because we find that it will optimize the public interest by promoting fair and efficient licensing practices."<sup>6</sup> As explained below, the Commission erred in dismissing these applications.

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

The Commission sought to justify its decision to dismiss the frozen applications that had not completed the 60-day public notice "cut-off" period by reasoning as follows:

Having concluded here that the 39 GHz band should be subject to significantly different rules than the ones used previously, we believe that the most fair and reasonable approach with regard to pending unripe applications is to dismiss them and allow these applicants to reapply under the rules set forth in this proceeding. Taking into account our conclusion that these new rules further the public interest, we believe that applying the new 39 GHz rules to those applications that were still subject to the possibility of competing applications under the former rules adequately balances the expectations of applicants with the public need for a better system for licensing use of the 39 GHz band. We further believe that we have crafted a fair approach because such applicants will be permitted to apply for spectrum under the new rules.<sup>7</sup>

The Commission's rationale does not support its conclusion and its conclusion lacks adequate legal support.

Reconsideration of the Commission's 39 GHz Order is required by outstanding case law which recognizes the legitimate expectations of pending applicants. For instance, in McElroy Electronics Corp. v. F.C.C., 990 F.2d 1351

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6. Id. at ¶ 90.

7. Id. at ¶ 93.

(D.C. Cir. 1993), the petitioner filed cellular applications for unserved areas when it reasonably understood the Commission was entertaining such applications. Subsequently, however, the Commission changed its processing rules and dismissed the pending applications. The D.C. Circuit held that the Commission should not have dismissed the timely filed applications, in view of the Commission's failure to give adequate notice of its decision to change its rules governing the filing of applications. In the instant proceeding, the 39 GHz applications of BizTel and other applicants were similarly timely filed and the Commission failed to give notice that it intended to freeze the processing of those applications.

In Reuters Ltd. v. F.C.C., 781 F.2d 946 (D.C. Cir. 1986), the Court reversed a Commission decision rescinding licenses issued to one applicant and granting them to another applicant on the ground that the Commission had failed to follow its own cut-off rules. In the instant case, the Commission also failed to follow the processing rules applicable when the pending applications were filed in deciding to dismiss those applications rather than allowing the 60-day cut-off period to be completed. Nor is the Commission's action supported by the decision in Kessler v. F.C.C., 326 F.2d 673 (D.C. Cir. 1963). In that case, the Court, in reviewing a freeze on the acceptance of new radio broadcast station applications pending the adoption of new processing rules, suggested that the Commission could postpone a hearing on existing applications pending the conclusion of its rulemaking proceeding. However, Kessler did not address the eventual standing of

applications that had been subject to a processing freeze, and indeed the Court suggested that the Commission could not deprive applicants of their processing rights.<sup>8</sup>

Parties like BizTel that filed timely applications "have a legitimate expectation that the cut-off rules [under which they filed] will be enforced." Florida Institute of Technology v. F.C.C., 952 F.2d 549, 554 (D.C. Cir. 1992) (citing City of Angels Broadcasting, Inc. v. F.C.C., 745 F.2d 656, 663 n.7 (D.C. Cir. 1984)). In the instant case, the cut-off rules provided for a 60-day window for the filing of competing applications, and the Commission is obligated to enforce those rules, unless it provides clear notice of its intention to change those rules, which it did not issue in this case. Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985). See also Satellite Broadcasting Co., Inc. v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987).

Courts are also solicitous of the rights of competing applicants in a clear delineation of the applicable requirements and deadlines. For instance, in Oregon v. F.C.C., 102 F.3d 583, 586 (D.C. Cir. 1996), the Court held that "absent clear notice" of the application cut-off, it is arbitrary and capricious to reject a competing application after the cut-off. And in Kessler, 326 F.2d 673, 688, the Court held that "the public interest would demand" that competing applications timely filed be considered in a comparative hearing regardless of a "freeze." Here the Commission did not give any notice of its intention to eliminate the cut-off

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8. 326 F.2d at 687-88.

rules under which the pending applications had been filed, thereby precluding the filing of competing applications.

Under appropriate circumstances, the Commission can adopt new rules and apply those rules retroactively to pending applications. Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1554-56 (D.C. Cir. 1987). Whether such retroactive application is correct in a given case depends upon a balancing of various considerations, including the reliance interest of existing applicants and the public policy advantages of the new rule the Commission seeks to apply. The propriety of retroactively applying new procedures and rules is a ". . . question of law resolvable by reviewing courts with no overriding obligation to the agenc[y's] decision.'" Id. at 1554 (citing Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)). The Commission should therefore reconsider its decision and resume the processing of those applications under its current rectangular service area rules, thereby afford those applicants the option of dismissing their applications or applying for channels under the new rules.

In the instant case, the Commission did not have a reasonable basis for retroactively applying its new rules in dismissing the pending applications and requiring those applicants to apply for spectrum under the new rules. Since the Commission contemplates that incumbent and new licensees will operate concurrently, it should have recognized the legitimate expectations of pending applicants in receiving rectangular service area licenses as provided by the current rules and in operating concurrently with new licensees operating in BTA service

areas. The Commission could have achieved this result by continuing to process the pending applications. This approach would no more undermine the goals of the new licensing rules than the Commission's decision to allow incumbent and new licensees to operate concurrently, and would recognize the legitimate expectations of pending applicants. Contrary to the Commission's conclusion, this approach, rather than the dismissal of the pending applications, "adequately balances the expectations of [pending] applicants with the public need for a better system for licensing use of the 39 GHz band."<sup>9</sup>

B. Pending Mutually Exclusive Applications and Modification Applications

The Commission dismissed without prejudice pending mutually exclusive applications because it believed that holding comparative hearings would be slower and more costly than allowing the applicants to reapply and participate in competitive bidding for channels.<sup>10</sup> It rejected claims that parties should be permitted to resolve mutually exclusive situations by filing appropriate amendments, concluding that parties had adequate time to file such amendments and can still participate in 39 GHz services by joining BTA ventures.<sup>11</sup> The Commission's reasoning is flawed. For the reasons discussed above, the Commission should have recognized the legitimate interest and expectation of applicants in receiving rectangular service area licenses.

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9. See 39 GHz Order at ¶ 93.

10. Id. at ¶ 90.

11. Id. at ¶ 91.

Contrary to the Commission's assumption, comparative hearings are not necessarily slower than the process of entertaining new applications and holding auctions. Such hearings could be streamlined and undoubtedly would be less costly for applicants than the competitive bidding process. Similarly mistaken is the Commission's assumption that parties would be unable to resolve mutually exclusive situations if they have not done so to date. Given the opportunity to receive licenses promptly, and facing the prospect of competition from new licensees, parties certainly would be motivated to resolve mutually exclusive situations.<sup>12</sup> In addition, again contrary to the Commission's assumption, there is no assurance that pending mutually exclusive applicants would be able to participate in BTA licenses given the uncertainties of the competitive bidding process.

Finally, the Commission is simply wrong in finding that the public interest would be disserved by the resolution of mutually exclusive situations because that result would limit the number of potential applicants to the pending group who have already filed, "and may inhibit the development of new and innovative

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12. The Commission agreed to process only those amendments resolving mutually exclusive situations filed between November 13 and December 15, 1995, provided the period for filing mutually exclusive applications had expired by November 13. See Memorandum Opinion and Order, 12 FCC Rcd 2910, 2917-18. Thus, any such amendments filed outside that window have not been processed and it would have been futile for parties to have filed any new amendments. Consequently, it was the Commission's own policy that has resulted in the failure of parties in many cases to resolve mutually exclusive situations rather than their inability to resolve those matters. If the Commission agreed to now allow parties to amend their applications, it can be confident that many mutually exclusive situations would be resolved.

services in this spectrum."<sup>13</sup> The Commission's one and only statutory obligation is to issue 39 GHz licenses to qualified applicants, and it should be completely indifferent whether the licensee is a pending mutually exclusive applicant or a new applicant. Moreover, pending applicants are just as capable of providing "new and innovative services" as new applicants. As with its dismissal of pending applications that had not completed the 60-day processing window, the Commission's dismissal of pending mutually exclusive applications unreasonably denies parties the reasonable expectation that, under the Commission's Rules, their applications would be processed.

The Commission similarly erred in dismissing without prejudice any modification application held in abeyance under the freeze, on the same grounds that it dismissed the other categories of pending applications discussed above.<sup>14</sup> This result is not fair to pending applicants who had no expectation of being forced to participate in a competitive bidding process in order to obtain a license. Moreover, the Commission's claim that potential new entrants would be disadvantaged if parties were allowed to amend their applications assumes that, from a statutory standpoint, the interests of new entrants should be given greater weight than the interests of pending applicants in being allowed to modify their

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13. Id. at ¶ 91.

14. Id. at ¶ 96.

applications and to have those applications processed.<sup>15</sup> The Commission offers no statutory basis for its assertion, and indeed none exists.

**II. THE COMMISSION SHOULD AMEND SECTION 101.63(a) OF ITS RULES TO CONFIRM THAT INCUMBENT 39 GHz LICENSEES ARE SUBJECT TO THE NEW BUILD-OUT REQUIREMENTS OF SECTIONS 101.15(c) AND 101.17**

In the interest of eliminating any possible confusion concerning the build-out and renewal rules that will apply to incumbent licensees, the Commission should amend Section 101.63(a) of its Rules<sup>16</sup> to reflect the intent of its 39 GHz Order. In its Order, the Commission amended Section 101.15(c) and added a new Section 101.17 of its Rules to provide that all 39 GHz licensees, including both incumbent and new licensees, will be required to make a "substantial service" showing when filing their renewal applications 18 months before the expiration of their licenses.<sup>17</sup> The Commission "combine[d] the showing traditionally required for build-out and the showing required to acquire a renewal expectancy into one showing at the time of renewal."<sup>18</sup> Although the Commission clearly intended that its new policy will replace the 18 month build-out policy of Section 101.63(a)

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15. See id.

16. Section 101.63(a) provides that "[e]ach station, except in the Local Multipoint Distribution Services, authorized under this part must be in operation within 18 months from the initial date of grant."

17. Id. at ¶¶ 38-50. See id. at ¶ 46 ("a showing of substantial service, the approach we proposed for new 39 GHz licensees, should be applied to both incumbent and new licensees in the band").

18. Id. at ¶ 47.

that has applied to incumbent 39 GHz licensees, it did not amend Section 101.63(a) to reflect that intent. This omission is clearly an oversight, and should be rectified. Accordingly, the Commission should confirm that incumbent licensees are subject to the build-out and renewal requirements of Sections 101.15(c) and 101.17 of its Rules by amending Section 101.63(a) of its Rules to provide an exception to the 18 month build-out rule for authorizations in the 38.6-40.0 GHz band.

**III. CONCLUSION**

For the reasons stated above, the Commission should reconsider and clarify its 39 GHz Order.

Respectfully submitted,

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Dated: February 20, 1998

CERTIFICATE OF SERVICE

I, Charlene A. Reed, do hereby certify that on this 20th day of February, 1998, I have caused a copy of the foregoing PETITION FOR RECONSIDERATION to be served via hand delivery, upon the persons listed below:

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