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March 9, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D. C. 20554

Re: ET Docket No. 95-183
DCT Transmission, L.L.C.
Petition for Reconsideration

Dear Ms. Salas:

Transmitted herewith are an original and eleven copies of DCT Transmission, L.L.C.'s Petition for Reconsideration in the above-referenced proceeding.

Please "date-stamp" the enclosed stamp-and-return version of this pleading and return it to the courier delivering this package.

Sincerely,

Russ Taylor

Russ Taylor

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
	)	
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

Directed To: The Commission

PETITION FOR RECONSIDERATION OF REPORT AND ORDER

DCT TRANSMISSION, L.L.C.

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March 9, 1998

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SUMMARY

DCT Transmission, L.L.C. ("DCT") petitions the FCC to reconsider portions of its Report and Order which discriminate against pending applications in manners that are either unlawful or not in the public interest.

DCT demonstrates that the agency's decision to dismiss pending mutually exclusive applications is unfair in light of its related actions preventing these applicants from settling their mutually exclusive applications through engineering amendments.

DCT points out that Congress was specifically concerned that the agency might overlook its obligation to avoid mutually exclusive applications. In the Balanced Budget Act Congress directed the FCC to search out means by which to avoid or eliminate mutual exclusivity short of an auction. Rebutting the agency's reasons for not permitting amendments to pending applications, DCT demonstrates that the FCC is violating Section 309(j)(6)(E) of the Communications Act.

In other rule making actions involving transition to auction allocation, the FCC has dismissed pending applications only where its actions have fundamentally changed the nature of the radio service involved. DCT proves that, much like the case with MDS, the FCC's rule making actions have not significantly changed the nature of the 39 GHz radio service. Thus, like MDS, there is no rationale for dismissing pending applications.

Finally, for the same reasons why the FCC's action dismissing pending mutually exclusive applications is flawed, DCT urges the Commission to reconsider its action dismissing "unripe" applications (whether MX'd or not). DCT urges that, pursuant to FCC rule and case law, these applications are ripe for processing and should be considered without further competition.

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Directed To: The Commission

PETITION FOR RECONSIDERATION OF REPORT AND ORDER

DCT Transmission, L.L.C. ("DCT"), pursuant to Rule 1.429, and by its counsel, hereby petitions the Commission to reconsider its Report and Order, FCC 97-391, (the "Order") in the above-captioned docket. DCT urges the Commission to reconsider its actions, to process pending 39 GHz radio service applications without further delay, to accept post-December 15, 1995 application amendments that terminate application conflicts and to allow applicants a reasonable period of time to engage in settlement negotiations designed to eliminate application conflicts. The Order, released on November 3, 1997, was not summarized in the Federal Register until February 6, 1998. 63 Fed. Reg. 6079 (Feb. 6, 1998). Thus, this Petition is timely filed.

I. Standing

DCT has numerous applications for new 39 GHz authorizations pending. Some of those applications are cut-off from additional competing applications, but remain mutually-exclusive ("MX'd") with other applications filed during the cut-off window. Some of those applications had not appeared on public notice for 60 days prior to the implementation of the freeze on the filing of new 39 GHz applications. Because the Order states that those applications will be dismissed by the Commission, and does not permit a period of time in which MX'd applicants are further permitted to resolve their conflicts, DCT is injured by that decision and has standing to contest the Order.

II. The FCC's Action Dismissing Pending Applications is Unlawful

A. The Order Unfairly Treats Pending Applicants

The Order treats pending 39 GHz applicants such as DCT in a harsh manner. In the Order, the Commission, citing the need for "fair and efficient licensing practices," decides to dismiss all pending mutually exclusive 39 GHz applications. Order at ¶ 90. The dismissal is absolute -- it does not distinguish among applicants, nor does it consider any particular applicant's proposal to serve the public. Further, it is important to note that the only defect these applications possess is the fact that they are mutually exclusive. As a further rationale for the wholesale dismissal, the Order states that competitive bidding is a superior allocation method that permits those who value spectrum most highly to acquire it. Thus, according to the Commission's logic, the benefits of competitive bidding "will be lost" if pending mutually exclusive

applications are processed under the old processing system, which according to the Commission is unduly labor-intensive. Id.

If the Commission were concerned with its staff's ability to resolve MX'd applications under the old rules, one would logically conclude that the agency would seek to promote the time-honored means by which most applicants eliminate MX'ing without Commission staff intervention -- the submission of engineering amendments. In this proceeding, however, the Commission went to unprecedented lengths to prohibit MX'd applicants from amending their applications. The Commission, without warning, "froze" the acceptance of these types of amendments for a period of over two years,[1] thus ensuring the very result it would later decry in the Order as burdensome to the agency's staff. The agency's circuitous logic can be simplified in the following statement: the agency prevented the un-MX'ing of applications, then used the fact that applications were MX'd to justify their dismissal. Never has an entire class of applicants been so unfairly treated by an administrative agency. The FCC's actions in this proceeding are unprecedented, defy logic, and lead to only one conclusion -- the agency wants as few encumbrances on this spectrum as possible so that it may enhance the revenue obtained at the auction. On this basis alone the Order must be reconsidered.

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[1] In particular, the FCC did not accept amendments that were filed on or after December 15, 1995. DCT and others, contending that the freeze was unlawful, submitted amendments after that time. Those amendments, and any amendments permitted as a result of this petition should be honored by the Commission. The Commission has not articulated a rational distinction between pre-December 15, 1995 amendments and those amendments filed thereafter.

B. The Order Ignores Congressional Intent & Direction

Congress was aware that the political lure of auction revenue might eclipse an agency's public interest obligations. For that reason, Section 3002 of the Balanced Budget Act of 1997 amended Section 309 of the Communications Act of 1934 to strengthen the provision which requires the FCC to avoid mutual exclusivity where possible. See Pub. L. No. 105-33, 111 Stat. 251 (1997). The Conference Report accompanying the legislation stated in this regard:

> First, the conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded auction authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.

H.R. Rep. No. 109, 105th Cong., 1st Sess., at 6173 (1997).

The amended provisions of Section 309 of the Communications Act became effective in the summer of 1997, after the comment cycle in this proceeding had passed. Nevertheless, the Commission was obligated to heed this Congressional directive when it adopted the Order.[2] The Order cites three reasons why the FCC believes that it has fulfilled its obligations under Section 309(j)(6)(E) of the Communications Act to avoid mutual exclusivity. Each rationale is addressed and rebutted below:

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[2] DCT notes that the Commission was aware of some directives contained in the Budget Act when it adopted the Order. For example, the Commission's decision to permit flexible use of 39 GHz radio spectrum was specifically tied to the Budget Act's direction. Order at ¶ 26.

Reason #1 -- MX'd applicants had "ample opportunity" to file amendments before the rule making proceeding was commenced. As an initial matter, the Commission cannot seriously claim that it has given applicants ample opportunities to resolve MX'd applications when it has frozen the acceptance of these types of curative amendments for over two years. If the Commission truly desired to afford 39 GHz applicants an ample opportunity to file amendments, it had the opportunity to do so when it released the Order. DCT believes that the Commission's actions -- not its unsupported platitudes -- speak volumes. The agency's actions freezing the acceptance of amendments for two years indicates that the FCC never intended to provide applicants with a meaningful opportunity to resolve MX'd situations. And it had that effect, as the volume of settlements based upon amendments slowed to a trickle.[3] This result violates Section 309(j)(6)(E) and must be reconsidered.

The Order's first rationale is also factually incorrect. Many of DCT's applications, for example, were filed in the summer of 1995. These applications often took some time to appear on Public Notice as accepted for filing. An applicant such as DCT would not even know until sometime after the 60-day cut-off filing window had passed if its application was potentially MX'd with another applicant. The FCC's Public Notices for this radio service also do not contain enough application data to permit a determination of mutual exclusivity. For example, the Public Notices do not

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[3] It makes little sense to spend the time, the effort and the money to settle application conflicts by amendment to applications in the face of the Commission's pronouncement that it would not give effect to amendments, but would hold them in abeyance. While DCT and others nevertheless made those efforts during the abeyance period, many others would undoubtedly submit amendments if the agency permitted a settlement period.

provide complete geographic coordinates of an applicant's proposed rectangular service area (only the minimum coordinates are provided). Additionally, unlike other radio services, such as ITFS, the Commission has required 39 GHz applicants to self-coordinate. The Commission does not release Public Notices announcing which applications are mutually exclusive.

Under these conditions and procedures, an applicant submitting an application in the summer of 1995 would barely be able to obtain the information necessary to be fully aware of the extent of MX'ing with other applicant(s) until approximately 90-120 days after the submission of an application. This timetable would have afforded applicants such as DCT only a brief 30-60 day window in which to negotiate engineering solutions and file amendments eliminating MX'd situations before the surprise freeze -- hardly the "ample opportunity" touted by the Commission.

The credibility of the Commission's claim that applicants had ample opportunity to submit un-MXing amendments is further diminished when one considers that **applicants did not know that an application and amendment "freeze" was about to be handed down by the agency**. Under the rules in effect at that time, amendments were filed as a "matter of right," and could generally be filed up until the time the application was processed. 47 C.F.R. § 21.23(a) (1995). Amendments eliminating application conflicts were strongly encouraged.[4] Thus,

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[4] In adopting the point-to-point microwave rules, the Commission specifically encouraged applicants to file amendments to eliminate frequency conflicts. In the Matter of Common Carriers -- Competition for Specialized Services, 22 R.R.2d 1501, para. 135 (1971) (First Report and Order in Docket No. 18920).

parties properly expected the rules to be followed at that time. A simple thought experiment dramatically proves this point: If a person relied upon an airplane departure schedule and planned to take a later flight, the airline could not change the schedule, cancel the later flight, and then logically claim that the passenger had ample opportunity to take an earlier flight. Applicants' reasonable expectations that the FCC's rules would be honored must be considered.

Reason #2 -- MX'd applicants can accomplish results similar to un-MXing a market by participating in an auction and making joint venture or partitioning arrangements. This rationale, on its face, violates the plain language and intent of Section 309 the Communications Act, which states that a mandatory prerequisite for auction authority is the existence of mutual exclusivity. The Act plainly requires the agency to avoid MX'ing <u>before</u> an auction, not after.

Reason #3 -- Permitting applicants to resolve their MX'd applications would be unfair to other potential participants who would be foreclosed from the 39 GHz radio service. The Commission does not state why it is so keen to protect the interests of a presently unknown group of potential, future auction applicants for the 39 GHz radio service. DCT is aware of no rule or policy that permits the agency to take cognizance of the expectancies of those parties who did not file competing applications within the time period permitted by law. In fact, the FCC's policies have traditionally cut the other way. The Commission's cut-off rules have for years foreclosed late-

comers from participating in licensing proceedings.[5] In fact, in analogous cases, the Commission is expressly forbidden by statute from considering the interests of applicants other than the applicant of record. 47 U.S.C. § 310(d) (1997). DCT believes that the only difference between those late-filers the Commission has rejected over the years and the late-filers identified in the Order is auction money.

The Commission's third rationale is not only contrary to its long-established processing policies, it is also irrelevant. Both MX'd and non-MX'd applications that are processed potentially foreclose opportunities for future auction applicants -- yet the agency decided to process the latter. The Act plainly requires the agency to use means to avoid mutual exclusivity between applicants. In this case, the FCC used every means at its disposal to prevent the un-MX'ing. The agency's assertion of the interests of third parties is a straw man and does not address the statutory duty that it has toward existing applicants.

Finally, to state that those who pay for a license value it more than those who obtain a license outside of auction is unfounded and irrational. It may be true in some cases and it may be false in other cases. And even if the one who buys a particular license values it at a higher dollar amount than another entity does not translate to the concept that the former would advance public interest goals with the license more than the latter. Indeed, the Federal Government's small business programs are founded on

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[5] DCT does not herein recite the Commission's long history of enforcement of its cut-off and window filing rules. Suffice it to say that the agency can take official notice that its staff has dismissed late-filers as a regular administrative practice for years.

the concept that much of the innovation and technological development in the United States emanates from those who lack financial resources.

C. The Order Departs From Precedent And Wrongly States That The 39 GHz Radio Service Has Significantly Changed

The FCC has, over the past four years, revised service and technical rules to permit licensing by auction in a variety of radio services. In some cases, the Commission has dismissed pending applications, and, in other cases, the Commission has processed pending applications based on the rules in effect at the time they were filed. DCT notes that the Commission has determined not to dismiss pending applications when the service and technical rules brought about in the rule making proceedings did not change the nature or the scope of the service. That precedent is sound policy[6] and should have been followed here.

For example, the Commission refrained from dismissing pending MDS applications when it determined that its rule making actions did "not fundamentally change the nature of the service." Report and Order, MM Docket 94-131, 10 FCC Rcd 9589, ¶ 92 (1995). Similarly, in deciding to dismiss 33 pending applications for nationwide authority in the 220 MHz SMR service, the Commission relied heavily on the fact that it had significantly changed its rules to permit commercial operations on those frequency assignments for the first time. Third Report and Order, PR Docket No. 89-552, FCC 97-57, ¶¶ 197-209, released March 12, 1997. In this case, nothing

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[6] If there is no drastic change in the service, the only difference between an auction applicant and existing applicants is money. Thus, it is sound public policy for the agency to ignore this difference and focus instead on the qualifications of the existing applicant as required by statute.

adopted in the Order fundamentally changes the nature of the 39 GHz radio service. As the following table illustrates, the Order, while deciding to employ auctions to process MX'd applications, makes no fundamental change in the 39 GHz service rules:

Table. 39 GHz Radio Service -- Changes Made in Docket 95-183.

	Before	After	Difference?
Service Area	Self-Defined Rectangular, Wide-Area	BTA, Wide-Area	Not Much -- Partitioning / Disaggregation Permits Licensees to Self-Define Area Under New System As Well
Type of Service	Commercial Microwave	Commercial Microwave	Not Much -- New Decision Also Permits Mobile and Point-to-Multipoint Use, But Does Not Change Commercial, Terrestrial Nature of Service
Channelization	14 50-MHz Channel Pairs	14 50-MHz Channel Pairs	None
License Term (For post 8/1/96 grants)	10 years	10 years	None
Performance Requirements	18-Month Construction Deadline	"Substantial Service" Requirement	Unknown -- The FCC Has Yet To Decide In A Particular Case. Plus, Sub. Service Standard Applies to Both Incumbents & Auction Winners
Aggregation Limit	None	None	None
LEC Restrictions	None	None	None

Thus, the agency's statement that it adopted "significantly different rules" for the 39 GHz band is not correct. Order at ¶ 93. If those rule changes were so fundamental, there would be a clash between the use of 39 GHz spectrum by incumbent licenses and the use of that spectrum by those licensed by auction. But, the two groups will employ the spectrum under the same service rules and will co-exist. Similar to the MDS situation (and unlike the 220 MHz SMR situation) there is no fundamental change and, thus, no agency rationale for dismissing the pending applications.

Accordingly, the agency's decision to dismiss pending applications is a drastic, unexplained departure from precedent and must be reconsidered.[7]

D. The FCC's Treatment of "Unripe" Applications Is Similarly Flawed

As DCT and others have stated on several occasions throughout this proceeding, the Commission should not dismiss "unripe" applications[8] based on its adoption of new service rules. The agency's decision not to further process these applications is based solely on the FCC's claim that it has made significant changes to the 39 GHz radio service. Order at ¶ 93. As noted above, that claim is simply untrue. Accordingly, similar to its treatment of MX'd applications, the agency's treatment of "unripe" applications is flawed and should be reconsidered. Because the agency's "freeze" was the only reason these applications were not further subjected to competing applications, the fact that other parties may be foreclosed is the FCC's fault, not the applicant's.

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[7] In the case cited by the Commission, Maxcell Telecom Plus, Inc., the D.C. Circuit noted that the applicant was not harmed because it was aware that the licensing procedures might change at the time the application was filed. 815 F.2d 1551, 1555 (D.C. Cir. 1987). That is not the case here. That was also not the case in the MDS proceeding where the Commission decided not to dismiss the pending applications. See also Chadmoore Communications, Inc. v. FCC, No. 96-1061 (D.C. Cir. 1997) (noting that applicant was "placed on specific notice" that licensing procedures would likely change). Because DCT and others were not aware that the FCC might change its licensing procedures, the decision to dismiss the applications is arbitrary and capricious and must overturned.

[8] DCT believes that it is important to point out that the concept of an "unripe" application has no basis in law. All of DCT's pending applications have passed the 30-day public notice period required by Section 309 of the Communications Act -- they are "ripe." As DCT previously stated in this proceeding, simply because the Commission routinely considered later-filing applicants rather than enforce rule section 101.103(e) does not mean that the first-in-time filer's application is not processable. Thus, a determination that an application is "unripe" has nothing to do with the rules, it is only an *ad hoc* agency determination that the application will be affected by the Commission's newly-created auction scheme.

DCT notes that there is nothing that prevents the FCC from declaring these "unripe" applications cut-off as of the date of the application filing freeze. No recognized rights would be impaired. Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). Indeed such a declaration would serve the paramount statutory goal of using service rules and other means to avoid application mutual exclusivity. 47 U.S.C. § 309(j)(6)(E) (1997). The corollary of this observation is that not processing these applications will have the tendency to open the requested facilities to mutually exclusive applications in violation of that statutory requirement. The Commission should process these applications without further competition and issue licenses.

III. Conclusion

WHEREFORE, the foregoing premises considered, DCT Transmission, L.L.C. respectfully requests the Commission to reconsider its decision to dismiss pending 39 GHz applications and to allow a reasonable settlement period during which application amendments and dismissals that cure application conflicts will be accepted.

Respectfully submitted,

DCT TRANSMISSION, L.L.C.

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