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

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

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1999
Released: July 29, 1999

By the Commission:

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On January 17, 1997, the Commission released a *Memorandum Opinion and Order*[1] that modified the interim rules for the filing and processing of applications and amendments for fixed point-to-point microwave services in the 38.6-40.0 GHz (39 GHz) band. Two petitions for reconsideration of this action were filed.[2] On November 3, 1997, the Commission released a *Report and Order and Second Notice of Proposed Rule Making* which amended Parts 1, 2, and 101 of our rules by revising the licensing and technical rules for the fixed point-to-point microwave service in the 39 GHz band, and dismissed certain 39 GHz applications and amendments thereto that had been held in abeyance pending the outcome of this rulemaking proceeding.[3] We have received twelve petitions for reconsideration of the *Report and Order and Second NPRM* concerning the channelization plan, performance requirements, and licensing

[1] 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, *Memorandum Opinion and Order*, 12 FCC Rcd 2910 (1997) (*Jan. 17 MO&O*).

[2] ELAR Cellular Petition for Partial Reconsideration (filed Feb. 18, 1997) (ELAR MO&O Petition); BizTel, Inc., Petition for Reconsideration (filed Apr. 1, 1997) (BizTel MO&O Petition).

[3] 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, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600 (1997) (*Report and Order and Second NPRM).*

rules, along with the disposition of pending 39 GHz applications.[4] The instant *Memorandum Opinion and Order* addresses the pleadings filed concerning these two Commission items. Generally, we revisit the 39 GHz band service areas, channelization plan, performance requirements, licensing rules and disposition of pending applications, and affirm application of the standard method for calculating unjust enrichment payments on a *pro rata* basis. We also dismiss as moot an Emergency Request for Stay filed in connection with one of the petitions for reconsideration.[5]

2. The significant decisions in the instant *Memorandum Opinion and Order* are as follows:

- We affirm our decision to dismiss, without prejudice, all pending mutually exclusive 39 GHz applications where mutual exclusivity was not resolved by December 15, 1995, and all major modification applications and amendments thereto filed on or after November 13, 1995, and all amendments to resolve mutual exclusivity filed on or after December 15, 1995.

- We will process all 39 GHz applications that were not mutually exclusive with previously filed applications as of December 15, 1995, that conform in all aspects to our rules and all associated amendments of right filed before December 15, 1995, where such applications have satisfied the 30-day public notice requirement, even if they have not been subject to the full 60-day window during which competing mutually exclusive applications may be filed.

- We affirm our decision to dismiss, without prejudice, all 39 GHz applications that did not meet the 30-day public notice requirement as of November 13, 1995.

- On our own motion, we reconsider the service area definitions for the 39 GHz band and decide to license all channel blocks in the 39 GHz band using Economic Areas (EAs).

- We retain the channelization plan set forth in the *Report and Order and Second NPRM*.

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[4] AA&T Wireless Services, Cambridge Partners, Inc., Linda Chester, HiCap Networks, Inc., Paul R. Likins, PIW Development Corporation, SMC Associates, Southfield Communications LLC, Wireless Telco (filed Mar. 9, 1998) (AA&T *et al*., Joint Petition); Advanced Radio Telecom Corporation Petition for Reconsideration (filed Mar. 9, 1998) (ART Petition); Bachow and Associates, Inc. and Bachow Communications Inc. Petition for Reconsideration (filed Mar. 9, 1998) (Bachow Petition); Biztel, Inc. Petition for Reconsideration and Clarification (filed Feb. 20, 1998) (Biztel Petition); Petition for Reconsideration of Columbia Millimeter Communications, L.P. (filed Mar. 9, 1998) (CMC Petition); Commco L.L.C., PLAINCOM, INC., Sintra Capital Corp. and Eric Sterman Petition for Reconsideration and Clarification (filed Mar. 9, 1998) (Commco *et al.*, Joint Petition); Comsearch Petition for Reconsideration (filed Mar. 6, 1998) (Comsearch Petition); DCT Transmission, L.L.C. Petition for Reconsideration of Report and Order (filed Mar. 9, 1998) (DCT Petition); No Wire LLC Petition for Reconsideration (filed Dec. 4, 1997) (No Wire Petition); James W. O'Keefe Petition for Reconsideration (filed Mar. 9, 1998) (O'Keefe Petition); Petition for Reconsideration of TRW Inc. (filed Feb. 20, 1998) (TRW Petition); Petition for Clarification/Reconsideration of WinStar Communications, Inc. (filed Mar. 9, 1998) (WinStar Petition).

[5] DCT Emergency Request for Stay (filed April 8, 1998).

- Consistent with the new Part 1 rules governing applications for license renewal provided in 47 C.F.R. § 1.949, 39 GHz licensees seeking renewal of station authorizations must file applications no later than the expiration date of the authorization for which renewal is sought, and no sooner than 90 days prior to the date of license expiration.

- Consistent with the Part 1 competitive bidding provision contained in 47 C.F.R. § 1.2111(e), unjust enrichment payments for 39 GHz licensees that obtain a bidding credit at auction, and subsequently partition or disaggregate to an entity that would not have qualified for such a credit, will be calculated on a *pro rata* basis, using population to determine the relative value of the partitioned area, the amount of spectrum disaggregated to determine the relative value of the disaggregated spectrum, and some combination thereof for combined partitioning and disaggregation.

II. BACKGROUND

3. On September 9, 1994, the Telecommunications Industry Association (TIA) filed a Petition for Rulemaking proposing a modification of the rules governing the 39 GHz band in order to increase the variety of possible uses on the band.[6] On November 13, 1995, the Wireless Telecommunications Bureau (Bureau) issued a *Freeze Order*, which froze acceptance of new 39 GHz applications.[7] On December 15, 1995, the Commission issued a *Notice of Proposed Rule Making and Order*, whereby it proposed to amend the rules for fixed, point-to-point microwave service in the 39 GHz band, and to adopt a conforming set of new rules for the virtually unused 37 GHz band in order to allow for the expansion of 39 GHz-type service.[8] The *NPRM and Order* expanded upon the *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.[9] It also stated that amendments to pending 39 GHz applications, and certain modification applications and modification amendments, filed on or after November 13, 1995, would be held in abeyance during the pendency of the instant proceeding.[10]

4. On January 17, 1997, the Commission released a *Memorandum Opinion and Order* which lifted the processing freeze on amendments of right filed on or after November 13, 1995, but before December 15, 1995.[11] This action authorized the processing of applications for licensing new 39 GHz frequency assignments that had completed the 60-day public notice period before November 13, 1995, and had been amended to resolve mutual exclusivity on or after that date, but before December 15, 1995.[12] The *Jan. 17 MO&O* also clarified that

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[6] TIA Petition for Rule Making, RM-8553 (filed Sept. 9, 1994); TIA Amendment to Petition for Rulemaking, RM 8553 (filed May 4, 1995).

[7] Petition for Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands, RM-8553, *Order*, 11 FCC Rcd 1156 (Acting Chief, Wireless Telecommunications Bureau, Nov. 13, 1995) (*Freeze Order*).

[8] 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, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930 (1995) (*NPRM and Order*).

[9] *Id.* at 4988-89.

[10] *Id.*

[11] *See* note 1, *supra*.

[12] *Jan. 17 MO&O*, 12 FCC Rcd at 2918; *see* 47 C.F.R. § 101.29.

applications to modify existing 39 GHz licenses and amendments thereto would be processed regardless of when filed, provided they neither enlarge the service area nor change the assigned frequency blocks, except to delete them.[13] The rest of the freeze was left in place.[14]

5. On November 3, 1997, the Commission released the *Report and Order and Second NPRM*, which amended Parts 1, 2 and 101 of our rules to facilitate more effective use of the 39 GHz band, by implementing a number of improvements, such as licensing by Basic Trading Areas (BTAs) and employing competitive bidding procedures as a means for choosing among mutually exclusive license applications.[15] We concluded that our regulatory framework should be expanded to include service rules for mobile operations in the 39 GHz band,[16] and addressed the status of those 39 GHz applications held in abeyance pursuant to the processing freeze imposed in the *NPRM and Order*, as modified in the *Jan. 17 MO&O*.[17] In the *Second NPRM*, we sought comment on: (a) the types of unjust enrichment requirements that should be placed on 39 GHz licensees receiving bidding credits as a condition for approval of partitioning and disaggregation arrangements; and (b) the method of calculating unjust enrichment payments for 39 GHz licensees that are awarded bidding credits and subsequently partition or disaggregate to a larger business or a business not entitled to the same level of bidding credits.[18]

6. On April 8, 1998, DCT filed an Emergency Request for Stay of our decision to dismiss and return all 39 GHz applications that remained mutually exclusive as of December 15, 1995, and those applications that had not passed the 60-day cut-off period as of November 13, 1995, pending final determination of all challenges to the subject applications.

III. DISCUSSION

A. RESOLUTION OF THE OUTSTANDING 39 GHZ APPLICATION MATTERS

1. Reconsideration of the Commission's January 17, 1997 Memorandum Opinion and Order

7. Two parties, ELAR and BizTel, seek reconsideration of the interim filing and processing freeze,[19] which was modified pursuant to the *Jan. 17 MO&O*.[20] This is the second time that reconsideration of

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[13] *Id*. at 2924.

[14] *Id*. at 2911.

[15] *Report and Order and Second NPRM*, 12 FCC Rcd at 18603-06.

[16] *Id.* at 18613-15.

[17] *Id.* at 18637-45.

[18] *Id.* at 18669-70.

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

[20] *Jan. 17 MO&O*, 12 FCC Rcd at 2918.

the interim filing and processing freeze has been requested.[21] Section 1.429(i) of the Commission's Rules states:

> Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious.[22]

Thus, we will reconsider the *Jan. 17 MO&O* only to the extent that it modifies the *NPRM and Order*.[23]

8. *ELAR MO&O Petition*. ELAR asks us to lift the processing freeze on applications that were amended on or after December 15, 1995, based on four arguments: (1) because amendments of right are effective upon filing, the *NPRM and Order* and *MO&O* cannot prevent amendments submitted on or after December 15, 1995, from taking effect;[24] (2) the *NPRM and Order* was a retroactive rulemaking;[25] (3) the *MO&O*'s distinction between applications amended of right before December 15, 1995, and those sought to be amended on or after that date was arbitrary and capricious;[26] and (4) the *NPRM and Order* was not effective until notice of it was published in the Federal Register, or the Commission's Daily Digest, or at least until it was available to the public, and any amendment of right submitted before such notice must be accepted for filing and processed.[27]

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[21] See *Jan. 17 MO&O*, 12 FCC Rcd at 2910. On January 16, 1996, Commco, L.L.C., PLAINCOM, INC., and Sintra Capital Corporation filed a joint petition for reconsideration, and DCT Communications, Inc., filed a partial petition for reconsideration, seeking reconsideration of that portion of the *NPRM and Order* that imposed an interim freeze on 39 GHz applications and amendments.

[22] 47 C.F.R. § 1.429(i) (emphasis added).

[23] *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *see also* Waivers of Section 90.621(b) of the Commission's Rules for Applicants in the Specialized Mobile Radio Service, PR Docket No. 90-34, *Order*, 8 FCC Rcd 7619, 7619 (1993).

[24] ELAR MO&O at 5.

[25] *Id*. at 6.

[26] *Id*. at 7.

[27] *Id.* at 8.

9. As noted above, the *NPRM and Order* itself is no longer subject to reconsideration,[28] so arguments that the freeze as a whole is invalid,[29] and arguments going to aspects of the freeze that the *Jan. 17 MO&O* left unchanged,[30] may no longer be raised, regardless of whether they were raised earlier.[31] We find that the argument that the *NPRM and Order* was a retroactive rulemaking addresses the *NPRM and Order* rather than the *Jan. 17 MO&O*, and therefore is repetitious and untimely. The rule against repetitive reconsideration petitions "bring[s] finality to our decision making process and eliminate[s] uncertainty,"[32] and may be waived only when "the arguments that petitioners proffer in support of their requests [are] so compelling that they warrant departure from this policy."[33] The argument that the *NPRM and Order* was a retroactive rulemaking is not sufficiently compelling, and in fact was considered and rejected in the *Jan. 17 MO&O*.[34]

10. Our review of ELAR's petition is limited, therefore, to arguments challenging the modifications to the freeze adopted in the *Jan. 17 MO&O*, or questioning the scope of these modifications, *i.e.*, issues pertaining to which amendments of right and which modifications should be accepted for filing and/or processed. Three of ELAR's arguments are reviewable under that standard. None of these, however, provides a basis for altering the policies adopted in the *Jan. 17 MO&O*. First, the argument that the modifications to the freeze adopted in the *NPRM and Order* and the *Jan. 17 MO&O* cannot prevent amendments of right submitted on or after December 15, 1995, from taking effect overlooks the difference between filed amendments and amendments tendered but not filed due to the freeze.[35] As the Commission has previously stated, the fact that amendments of right are

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[28] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, *Order on Further Reconsideration*, 6 FCC Rcd 76 (CCB 1991).

[29] *See*Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, GEN Docket No. 91-2, *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787, 2788 & n.23 (1993); Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, MM Docket No. 87-121, *Order*, 7 FCC Rcd 2954, 2954 (MMB 1992).

[30] *See* Exchange Carrier Ass'n, CC Docket No. 78-72, *Memorandum Opinion and Order*, 3 FCC Rcd 1717, 1720 (1987); MTS and WATS Market Structure, *Memorandum Opinion and Order*, 99 FCC 2d 708, 712 (1984) (MTS/WATS II); MTS and WATS Market Structure, CC Docket No. 78-72, *Memorandum Opinion and Order*, 97 FCC 2d 834, 879 (1984) (MTS/WATS I).

[31] *See, e.g.*, Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Settlements for Open Network Architecture, CC Docket No. 89-79, *Memorandum Opinion and Order on Third Further Reconsideration*, 10 FCC Rcd 1570, 1572 (1994) (dismissed as repetitious Pet. for Recon. that raised issues that had previously been considered and rejected).

[32] MTS/WATS II, 99 FCC 2d at 711; *accord* MTS/WATS I, 97 FCC 2d at 879.

[33] MTS/WATS I, 97 F.C.C.2d at 879; *accord* MTS/WATS II, 99 FCC 2d at 712; *see also* MTS and WATS Market Structure: Average Schedule Companies, CC Docket No. 78-72, *Memorandum Opinion and Order*, 2 FCC Rcd 6642, 6642 (1987) (requiring "special circumstances that would warrant consideration of repetitive petitions").

[34] *See Jan. 17 MO&O*, 12 FCC Rcd at 2915. Specifically, the Commission reasoned that the freeze clearly did not have the effect of a retroactive rulemaking because it did not alter the past legal consequences of pending 39 GHz applications, and the Commission had not yet rendered a final disposition of the applications and amendments.

[35] *NPRM and Order*, 11 FCC Rcd at 4990; *see* Kessler v. FCC, 326 F.2d 673, 684 (D.C. Cir. 1963) (holding that Section 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), (e), which provides for a hearing on certain applications "filed with" the Commission, does not apply to applications submitted but not accepted for

effective upon filing does not mean that all proffered amendments of right must be accepted for filing, or that amendments not accepted for filing are effective upon submittal.[36]

11. Second, ELAR's argument that processing amendments of right filed before the expanded *Freeze Order* portion of the *NPRM and Order* took effect, while refusing to accept such amendments submitted thereafter, is arbitrary and capricious similarly misreads the *Jan. 17 MO&O*. The *Jan. 17 MO&O* concluded that amendments of right resolving mutual exclusivity that were filed after the initial *Freeze Order* was released and before the modifications to the freeze adopted in the *NPRM and Order* was released should be processed, rather than held in abeyance as provided in the *NPRM and Order*.[37] The Commission reasoned in the *Jan. 17 MO&O* that, because those amendments took effect upon filing (*i.e.*, were not subject to the freeze), the amended applications were not "materially different" from pending applications that were not mutually exclusive as of November 13, 1995, which the Commission continued to process.[38] ELAR contends that if there is no material difference between an application that was not mutually exclusive as of November 13 and one that was amended between November 13 and December 15 to resolve mutual exclusivity, then there is no material difference between an application that was amended between November 13 and December 15 to resolve mutual exclusivity and an application sought to be so amended on or after December 15. We disagree. The material difference between these two situations, however, is that the latter amendment would have been unacceptable for filing because of the freeze as modified by the *NPRM and Order*.[39] Thus, this argument fails because it disregards the difference between an amendment that is filed and one that is submitted but not accepted for filing. Moreover, in reaching its decision regarding the ability of parties to amend their pending applications after December 15, 1995, the Commission noted that the applicants had ample opportunity to file amendments prior to the commencement of this rule making and that applicants would have a reasonable avenue of relief under the rules and procedures adopted in the *Report and Order*.[40]

12. Third, ELAR argues that any "amendment of right" submitted before the *NPRM and Order* became effective must be processed. As previously noted, the *Jan. 17 MO&O* agreed with this argument, and those applications filed between Nov. 13 and Dec. 15 and determined to be "ripe" were to be processed.[41] ELAR further argues that the *NPRM and Order* was not effective until notice of it was published in the Federal Register or the Commission's Daily Digest, or at least until it was available to the public.[42] The *NPRM and Order* provided that amendments to pending 39 GHz applications filed on or after December 15, 1995, would "not be accepted for filing."[43] It is well settled that an application freeze is the type of procedural action that may be

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filing because of a freeze) (*Kessler*).

[36] *See Jan. 17 MO&O*, 12 FCC Rcd at 2918 (citing *Dial-A-Page, Inc.*, 75 FCC 2d 432, 437 (1980)).

[37] *Id.*

[38] *Id.*

[39] *NPRM and Order*, 11 FCC Rcd at 4990.

[40] *Report and Order and Second NPRM*, 12 FCC Rcd at 18642.

[41] *Id.*

[42] ELAR MO&O Petition at 8.

[43] *NPRM and Order*, 11 FCC Rcd at 4990.

adopted without notice and comment under the Administrative Procedure Act.[44] We conclude, therefore, that the *Freeze Order* portion of the *NPRM and Order* was effective on December 15, 1995, when it was released. While ELAR contends that the *NPRM and Order* was not in fact available to the press and public on December 15, 1995,[45] our rules make no provision for deeming a date other than the one "on the face of the document" to be its release date.[46] Even if the presumption that the document correctly reflects the release date is rebuttable, ELAR's unsubstantiated allegation that the document was not available until the following day does not suffice.[47]

13. ELAR also contends that it was exempted from the *NPRM and Order*'s freeze on filing amendments until ELAR, itself, had actual notice thereof,[48] because Section 0.445(e) of our Rules states, "No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or a document stating it has been published."[49] The *NPRM and Order* did not require ELAR and the other parties with pending applications to "comply" with anything, for it required no action on their part.[50] Thus, we find that Section 0.445(e) offers ELAR no basis for relief. We therefore deny ELAR's petition.

14. *BizTel MO&O Petition*.[51] BizTel filed a Petition for Reconsideration asking us to process all pending applications that are not mutually exclusive and to allow the filing of amendments of right at least until this rulemaking proceeding is terminated.[52] BizTel's first two arguments, that the freeze violates portions of

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[44] 47 C.F.R. § 1.102(b). *See Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986) (upholding Section 1.102(b)); *see also Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637-38 (D.C. Cir. 1984) (holding Commission's filing freeze is a procedural rule not subject to the notice and comment requirements of the Administrative Procedures Act); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 952-53 (6th Cir. 1971) (same); *Kessler v. FCC*, 326 F.2d 673, 680-82 (D.C. Cir. 1963) (same).

[45] ELAR MO&O Petition at 8.

[46] *See*Addition of New Section 1.103 to the Commission's Rules of Practice and Procedures; Amendments to Section 1.4(b) of Those Rules, GEN Docket No. 80-488, *Memorandum Opinion and Order*, 85 FCC 2d 618, 619 (1981) (noting contention that documents are not always available on their stated release date, but not adopting a mechanism for establishing an alternate effective date). *But see* John S. Landes, *Memorandum Opinion and Order*, 86 FCC 2d 121, 123 n.6 (1981) (calculating deadline for reconsideration petition from date order was "publicly released," which differed from date on face of document).

[47] *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (Courts presume that public officials properly discharge their official duties).

[48] ELAR MO&O Petition at 7-8.

[49] 47 C.F.R. § 0.445(e).

[50] *See Kessler*, 326 F.2d at 690 (filing freeze did not violate Section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002(a), which states, "No person shall in any manner be required to resort to organization or procedure not [properly] published": "[T]he freeze order here did not require any procedural action on appellants' part. It was simply an announcement of a freeze on the further filing of applications pending completion of rulemaking proceedings.").

[51] DCT Communications, Inc., filed comments in support of the BizTel Petition, but did not make any additional arguments. *See* Comments of DCT Communications, Inc. in Support of Petition for Reconsideration of BizTel, Inc. (filed May 27, 1997).

[52] BizTel MO&O Petition at 7-8.

Section 309(j)[53] of the Communications Act of 1934, as amended (the "Act"),[54] and that pending applications that were not mutually exclusive as of November 13, 1995, should be processed because they cannot become mutually exclusive,[55] address the *NPRM and Order* rather than the *Jan. 17 MO&O*. For the reasons outlined above with respect to ELAR's MO&O Petition, we dismiss these arguments as repetitious and untimely.

15. BizTel next argues that we must continue to accept amendments of right for three reasons. First, BizTel argues that Section 309(j)(6)(E) of the Communications Act requires us to resolve mutual exclusivity among pending applications.[56] This argument, however, was previously held to be premature in the *Jan. 17 MO&O*.[57] That decision was correct and there are no grounds to reverse it here. We do note, however, the issue was addressed in the *Report and Order and Second NPRM*, and was raised in petitions seeking reconsideration, which are discussed below.[58] Second, BizTel argues that the right to amend cannot be revoked without notice and comment.[59] This argument fails as well, because, as noted previously, a freeze is a procedural matter and thus may be initiated without prior notice and comment.[60] Third, BizTel argues that the freeze on filing amendments of right is arbitrary and capricious because it serves no purpose.[61] This argument ignores the justifications for the freeze discussed in the *NPRM and Order* and *Jan. 17 MO&O*. As we have previously stated, accepting and processing such amendments would burden Commission resources and could lead to results inconsistent with our intent in this proceeding to update the regulatory structure of the 39 GHz band in light of contemporary market conditions.[62] BizTel's view of the best way to proceed understandably is influenced by its desire to obtain the licenses for which it has applied. We must, however, consider the interests not only of pending applicants, but also of future applicants, consumers, and others.[63] We thus adhere to the balance struck in the *Jan. 17 MO&O*.

16. Finally, BizTel asserts that the *Jan. 17 MO&O* "mischaracterizes and fails to adequately

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[53] 47 U.S.C. § 309(j).

[54] BizTel MO&O Petition at 7-8.

[55] *Id*. at 9-17.

[56] *Id.* at 17-19.

[57] *Jan. 17 MO&O*, 12 FCC Rcd at 2918. "BizTel's argument that we are violating Section 309(j)(6)(E). . . is premature. There is as yet no final decision implementing service rules that would potentially result in mutually exclusive situations." *Id.* A final decision concerning this issue is discussed in paras. 35-38 below.

[58] *See infra* ¶ 22.

[59] *Id*. at 18.

[60] *Jan. 17 MO&O*, 12 FCC Rcd at 1922-23; *NPRM and Order*, 11 FCC Rcd at 4988-89.

[61] *Id*. at 19-20.

[62] *Jan. 17 MO&O*, 12 FCC Rcd at 2917; *NPRM and Order*, 11 FCC Rcd at 4988-89.

[63] *See, e.g.*, 800 Data Base Access Tariffs and the 800 Service Management System Tariff, CC Docket No. 93-129, *Order on Reconsideration*, 12 FCC Rcd 5188, 5193 (1997); Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8883 (1996).

consider BizTel's legal challenge to the unlawful policies adopted in the [*NPRM and Order*]."[64] It specifies two arguments that it claims were raised earlier but not addressed. One is that the freeze violates Section 309(j)(7)[65] of the Act, which prohibits the basing of a finding of the public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding.[66] Our review of the record reveals nothing on this topic in BizTel's comments[67] that we did not address in the *Jan. 17 MO&O*, and therefore we dismiss this argument as untimely.[68]

17. The other argument that BizTel says was raised but not addressed in the *Jan. 17 MO&O* is that *McElroy Electronics Corp. v. FCC*[69] compels the processing of all pending, non-mutually exclusive applications, whenever they were filed.[70] At issue in *McElroy* was whether the public notice announcing the appellant's application commenced a cut-off period for mutually exclusive applications pursuant to Section 22.131(b) of our rules.[71] The Commission concluded that it had not (because the notice did not state that the application had been "accepted for filing," and the Commission had not specifically established a filing window), so the Commission established a one-day filing window for that market.[72] On appeal, the D.C. Circuit held that the notice did commence the cut-off period, and ordered the applications received during the one-day filing window dismissed.[73] BizTel cites *McElroy* for the proposition that a filing cut-off can be established even if we do not explicitly set out the cut-off date.[74] According to Biztel, under *Kessler*, a freeze order forever forecloses the subsequent filing of applications that are mutually exclusive to pending applications. Therefore, BizTel asserts that the Commission, in the *Freeze Order* portion of the *NPRM and Order* should have treated applications pending as of November 13, 1995, that were not mutually exclusive, yet had not completed the public notice period, the same as pending applications that had completed the notice period, and should have ruled that these applications should

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64 BizTel MO&O Petition at 2 n.3.

65 47 U.S.C. § 309(j)(7).

66 BizTel Petition at 7.

67 *See* Supplemental Comments of BizTel, Inc. at 13, 17 (filed Oct. 17, 1996) (BizTel Supplemental Comments); Reply Comments of BizTel, Inc. at 14-15 (filed Apr. 1, 1996); Comments of BizTel, Inc. at 24 (filed Mar. 4, 1996).

68 *Jan. 17 MO&O*, 12 FCC Rcd at 2917-18. "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 competitive bidding system for assigning 39 GHz licenses." *Id.* The final disposition of this issue is discussed in para. 21 below.

69 86 F.3d 248 (D.C. Cir. 1996).

70 BizTel MO&O Petition at 12-13.

71 47 C.F.R. § 22.131(b).

72 *McElroy Elec. Corp.*, 86 F.3d at 251-52.

73 *Id.* at 255-58.

74 BizTel MO&O Petition at 12-13; BizTel Supplemental Comments at 12.

be processed rather than held in abeyance.[75]

18. We believe that we sufficiently considered and rejected this argument, in the *Jan. 17 MO&O*, explaining that applications that were held in abeyance by the initial *Freeze Order* and the *NPRM and Order's* modification of the initial *Freeze Order* were not *permanently* cut off from the filing of competing applications:

> [W]e 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.[76]

We therefore reject Biztel's argument that *McElroy* compels processing of these applications, and deny Biztel's petition.

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[75] BizTel MO&O Petition at 12-13.

[76] *Jan. 17 MO&O*, 12 FCC Rcd at 2920. The final disposition of this issue is discussed in paras. 41-44, *infra*.

2. November 3, 1997 Report and Order Treatment of Pending 39 GHz Applications

a. Legality of License Processing Rules

19. Some parties claim that the new license processing policy adopted in the *Report and Order and Second NPRM* violates certain sections of the Act.[77] On the contrary, as discussed below, we believe that the new processing policy comports with the Act and controlling case law.

20. A few petitioners argue that the "sole operative purpose" of the our new processing rules is to preserve spectrum in the "expectation of increased Federal Revenues"[78] in violation of Section 309(j)(7)(A) of the Act.[79] As stated above, the Commission has previously set forth clear public policy reasons for implementing this licensing scheme,[80] and has thus rejected petitions for reconsideration concerning this issue.[81] Accordingly, these petitioners' arguments are rejected.

21. Some parties also claim that the new licensing regime prevents the grant of licenses to applicants who contribute to the development of new telecommunications services and technology, in violation of Section 309(j)(6)(G) of the Act.[82] To the contrary, under our rules, eligibility to participate in the competitive bidding process for 39 GHz licenses is not restricted. In fact, the Commission has structured the auction to encourage and promote participation by many different entities.[83] Additionally, we have found, after reviewing the record in this proceeding, that implementing the new licensing regime will expand the pool of potential 39 GHz applicants, which, in turn, will provide opportunities for new entities to develop new and innovative services in this spectrum.[84]

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[77] *See, e.g.,* AA&T *et al.,* Joint Petition at 11-12; Commco *et al.,* Joint Petition at 8-10; No Wire Petition at 1-4; DCT Petition at 4-8.

[78] *See, e.g.,* AA&T *et al.*, Joint Petition at 11; Commco *et al.*, Joint Petition at 12.

[79] 47 U.S.C. § 309(j)(7)(A).

[80] The reasons for implementing this proceeding are: (a) to better accommodate 39 GHz services which support existing and emerging technologies; and (b) to provide for competitive bidding which will (i) allow the spectrum to be acquired by those who value it most highly, and (ii) increase the likelihood that innovative, competitive services will be offered to consumers. *See Jan. 17 MO&O*, 12 FCC Rcd at 2917; *Report and Order and Second NPRM*, 12 FCC Rcd at 18642.

[81] *Jan. 17 MO&O*, 12 FCC Rcd at 2917-18.

[82] 47 U.S.C. § 309(j)(6)(G); *see, e.g.,* AA&T *et al.*, Joint Petition at 12.

[83] *Report and Order and Second NPRM*, 12 FCC Rcd at 18617-20.

[84] *See Id.* at 18642-43.

b. Disposition of Pending Mutually Exclusive 39 GHz Applications

22. Some parties assert that the new licensing regime violates applicant "processing rights."[85] They assert that a window of time should be provided to resolve pending mutually exclusive 39 GHz applications, and that those applications should be processed under the old rules.[86] One party also requested clarification of our processing policy concerning pending "partially mutually exclusive" 39 GHz applications.[87] We disagree that the new licensing policy violates processing rights. The Balanced Budget Act of 1997 requires us, with limited exceptions, to use competitive bidding to resolve mutually exclusive applications.[88] Our new processing policy is pursuant to and consistent with that legislative mandate.[89]

23. Section 309(j)(1) of the Communications Act requires the Commission, subject to certain exceptions not pertinent to this proceeding, to use competitive bidding to resolve mutually exclusive applications for all categories of spectrum licenses.[90] Additionally, Section 309(j)(6)(E) of the Communications Act states that, in determining the auctionability of applications, the Commission has the "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings."[91]

24. As we stated in our recent decision resolving petitions for reconsideration of our adoption of a geographic area licensing approach for paging services, the Commission has previously construed Section 309(j)(6)(E) to mean that it has an obligation to attempt to avoid mutual exclusivity by the

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[85] *See, e.g.,* AA&T *et al.*, Joint Petition at 12; Commco *et al.* Joint Petition at 12 (citing *Ashbacker v. FCC*, 326 U.S. 327, 333 (1945)); No Wire Petition at 4-8.

[86] *See* AA&T *et al.*, Joint Petition at 7-11; Commco *et al.*, Joint Petition at 15-16; No Wire Petition at 4-8.

[87] CMC Petition at 11-12.

[88] P.L. 105-33, Sec. 3002; codified at 47 U.S.C. § 309(j)(1) (Balanced Budget Act of 1997).

[89] In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making*, WT Docket No. 97-81 (1999).

[90] 47 U.S.C. § 390(j)(1). The three exceptions to the Commission's auction authority are public safety radio services, digital television service to be provided by existing terrestrial broadcast licensees as replacement for their analog television licenses, and noncommercial educational or public broadcast stations. 47 U.S.C. § 309(j)(2).

[91] 47 U.S.C. § 309(j)(6)(E).

methods prescribed therein only when it would further the public interest goals of Section 309(j)(3).[92] In the *Paging MO&O*, we determined that the public interest would be better served by licensing all remaining paging spectrum through a geographic licensing scheme rather than processing additional site-specific licenses.[93] We reasoned that geographic area licensing "provides flexibility for licensees and ease of administration for the Commission, facilitates build-out of wide-area systems, and enables paging operators to act quickly to meet the needs of their customers.[94] We also determined that it would "not be in the public interest to implement other licensing schemes or other processes that avoid mutual exclusivity, thus fulfilling the Commission's obligation under Section 309(j)(6)(E)."[95] Moreover, we explained that "we have concluded in other proceedings that the Balanced Budget Act's revision of our auction authority does not require us to re-examine determinations regarding the use of geographic licensing and competitive bidding that were made under the auction authority provided by the 1993 Budget Act."[96] Thus, in the *Paging MO&O* we affirmed our previous decision to dismiss all pending applications.[97]

25. We believe that the same type of analysis supports the Commission's decisions in this proceeding to adopt a geographic licensing approach and dismiss pending mutually exclusive 39 GHz applications. In the *Report and Order and Second NPRM*, the Commission addressed Section 309(j)(3) public interest goals *vis a vis* the Section 309(j)(6)(E) obligations and determined that the proposed change in the 39 GHz licensing scheme comports with those objectives and obligations.[98] At that time, the Commission considered comments from those who contended that because the then-current point-to-point rules were structured to avoid mutual exclusivity through frequency coordination, changing the rules to license by larger service areas would encourage mutual exclusivity.[99] In rejecting that argument, the Commission stated that, due to the significantly increased requests for large service areas and multiple channels in the 39 GHz band, frequency

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[92] *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, FCC 99-98 (1999) (*Paging MO&O*). *See also DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997) ("Nothing in § 309(j)(6)(E) requires the FCC to adhere to a policy that it deems outmoded `to avoid mutual exclusivity in ... licensing proceedings'"); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd 19079, 19104, 19154 ¶¶ 62, 230 (1997); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10009-10 ¶ 115 (1997) (Section 309(j)(6)(E) does not prohibit the Commission from conducting an auction without first attempting alternative licensing mechanisms to avoid mutual exclusivity).

[93] *Paging MO&O* at ¶ 11, *citing* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997) (*Second Report and Order and Further Notice*).

[94] *Id., citing* p. 2744.

[95] *Paging MO&O* at ¶ 11.

[96] *Id.*

[97] *Id.*

[98] *Report and Order and Second NPRM*, 12 FCC Rcd at 18647.

[99] *Id.* (citations omitted).

coordination techniques that were suitable for a lower level of 39 GHz spectrum demand were no longer adequate.[100] The Commission asserted that auctioning licenses for pre-defined, larger service areas would serve the public interest by providing for a more orderly structure for the licensing process; and, by placing 39 GHz licenses in the hands of those who value them the most, encourage the creation and deployment of new services, which would foster efficient and expeditious use of the 39 GHz spectrum.[101] It further stated that continued use of applicant-defined service areas would actually slow service to the public because the processing of each application requires extensive analysis and review by Commission staff.[102] The Commission also noted that, because we had previously sought comments concerning the auctionability of the 39 GHz band in the *NPRM and Order*,[103] and because the Bureau regularly releases public notices announcing time frames for upcoming auctions, we satisfied the requirements that notice and comment be permitted prior to issuing bidding rules, and that interested parties have time to develop business plans, assess market conditions, and determine the availability of suitable equipment, after the issuance of bidding rules.[104] As a result, consistent with our decision in the *Paging MO&O*, we conclude that the Commission effectively determined that it would not be in the public interest to implement other licensing schemes or other processes that avoid mutual exclusivity, and thereby fulfilled the Commission's obligation under Section 309(j)(6)(E).[105]

26. Additionally, we decline to resolve pending mutually exclusive 39 GHz applications under the prior rules. Because the Balanced Budget Act of 1997 terminated the Commission's authority to use random selection for the issuance of licenses for most communications services,[106] the only method for resolving mutually

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[100] *Id.*

[101] *Id.* The Commission also addressed the requirements of Section 309(j)(3)(C) by promulgating the payment and unjust enrichment rules for the 39 GHz auction. *Report and Order and Second NPRM* at 18655-18658, 18666-67.

[102] *Id.* at 18647. The Commission also considered and rejected various proposals for alternative licensing schemes. *Id.* at 18647-48.

[103] *NPRM and Order*, 11 FCC Rcd at 4945, 4978. Because the *NPRM and Order* was released prior to the Balanced Budget Act of 1997, some of the criteria used by the Commission in that item to determine the auctionability of the 39 GHz band have been superseded by the Balanced Budget Act of 1997. For example, the Commission stated that point-to-point microwave channels in the 39 GHz band used as part of subscriber-based service offerings met the "principal use" requirement of the Communications Act. *Id.* at 4945, *citing* 47 U.S.C. § 309(j)(2)(A) (1995). Under former Section 309(j)(2)(A), the Commission was required to determine, when considering the auctionability of a given band of spectrum, that the "principal use" of such spectrum was reasonably likely to involve the licensee receiving compensation from subscribers. 47 U.S.C. § 309(j)(2)(A) (1995). As stated in ¶ 97 *supra*, the Balanced Budget Act expanded the Commission's auction authority by amending Section 309(j)(1) to require the Commission, subject to limited exceptions, to award all mutually exclusive applications for initial licenses or permits by competitive bidding. Consequently, the "principal use" requirement is no longer applicable. The Commission subsequently determined that the amendments to Section 309(j), promulgated by the Balanced Budget Act of 1997, requires it to auction the 39 GHz band. *Report and Order and Second NPRM*, 12 FCC Rcd at 18645-48.

[104] *Id.* at 18648.

[105] *Paging MO&O* at ¶ 11.

[106] *See* 47 U.S.C. § 309(i)(5). *See also Report and Order and Second NPRM*, 12 FCC Rcd at 18645-46 (Commission concluded that auctioning the 39 GHz band comports with the Balanced Budget Act of 1997).

exclusive applications in the 39 GHz band under the old rules would be through comparative hearings.[107] The comparative hearing process involves a trial-type proceeding before an Administrative Law Judge, which can prove burdensome to the parties and a strain our limited resources.[108] In the past, those burdens have proven manageable in processing applications for single point-to-point links. Such applications were very easy to coordinate and have resulted in few, if any, instances of mutual exclusivity. The rare case that could not be coordinated to avoid interference would be appropriate for comparative hearing. Now, however, applicants seek to serve geographic areas rather than single point-to-point links. This results in significant conflicts among entities seeking to acquire spectrum.

27. Accordingly, we uphold our finding that comparative hearings would be slower and more costly, both to the government and applicants, than competitive bidding, and that comparative hearings are not in the public interest where, as here, large numbers of applications and large protected service areas are involved.[109] Thus, for pending mutually exclusive applications in the 39 GHz band, we conclude that competitive bidding serves the public interest and is the best method for choosing among mutually exclusive applicants. We also uphold our finding that those who believe that they should be afforded the opportunity to amend their applications to avoid mutual exclusivity had ample opportunity to file such amendments prior to the commencement of this rulemaking, and further delay would not be in the public interest.[110] Accordingly, we will not grant a window of time for pending 39 GHz applicants to resolve mutually exclusive applications.

28. We also affirm our decision regarding the partially mutually exclusive applications, *i.e.*, to process the non-mutually exclusive portion of them, while dismissing the remainder of those applications that cannot be granted due to mutual exclusivity.[111] CMC argues that, by taking that action, the Commission changed the course of the instant proceeding. CMC further argues that we should provide a reason for distinguishing partially mutually exclusive applications from other mutually exclusive applications.[112] The *Report and Order and Second NPRM* previously explained that the frequency pairs in those applications were categorized as either mutually exclusive or non-mutually exclusive, pursuant to our findings in the instant rulemaking.[113] Based on the record, the Commission reasonably determined that the best course of action was to grant the uncontested frequency pairs requested in the partially mutually exclusive applications, while dismissing the applications with respect to contested frequency pairs.[114] This decision parallels the Commission's approach regarding non-mutually exclusive applications, which were processed, and mutually exclusive applications, which were dismissed. Consequently, our decision concerning the partially mutually exclusive applications did not "change the course" of the instant rulemaking, and we reject CMC's argument to the contrary.

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107 *See* 47 C.F.R. § 101.45(d).

108 *See Report and Order and Second NPRM*, 12 FCC Rcd at 18642 n.178.

109 *Id.*

110 *See Id.* at 18642.

111 *Report and Order and Second NPRM*, 12 FCC Rcd at 18645.

112 CMC Petition at 11-12.

113 *Report and Order and Second NPRM*, 12 FCC Rcd at 18645.

114 *Id.*

c. Disposition of Amendments to Pending 39 GHz Applications

29. In the *Report and Order and Second NPRM*, we stated that, in order to further the goals of the instant rulemaking -- *e.g.*, updating the regulatory structure for the 39 GHz band -- amendments to pending 39 GHz applications intended to avoid mutual exclusivity, filed on or after December 15, 1995, would be dismissed.[115] A few parties[116] argue that by dismissing those amendments, we revoked their "substantive" right to amend, and that all such amendments to 39 GHz applications filed on or after December 15, 1995 should be processed.[117] Some parties also argue that our decision to dismiss those amendments violates Section 309(j)(6)(E) of the Act.[118]

30. It is well established that when an entity has notice that we might change our rules and/or procedures, the implementation of a new rule or procedure does not impair any substantive right upon which that entity is entitled to rely.[119] After being put on notice of our proposed rule and policy changes by the *NPRM and Order*, the parties, as of that date, had no "substantive" right to amend their applications. The parties thus filed such amendments at their own risk.

31. In the *Jan. 17 MO&O*, the Commission announced that we would process amendments to pending 39 GHz applications, filed between the dates of the initial *Freeze Order* and the modification to the freeze adopted in the *NPRM and Order*, that resolved mutual exclusivity and were otherwise in compliance with our rules.[120] It stated that such amendments were "as of right and were effective when filed" because the initial *Freeze Order* did not specify that those amendments were frozen.[121] It specifically interpreted the subsequent modification of the freeze adopted *NPRM and Order* as a freezing of amendments and subsequently dismissed all those amendments filed on or after December 15, 1995.[122] It also reasoned that permitting existing 39 GHz applicants to amend their pending applications on or after December 15, 1995, would run contrary to the goals of the instant rulemaking proceeding.[123] The Commission found, for example, that if existing applicants were allowed to resolve conflicts outside of the competitive bidding process, other entities would be prevented from applying for 39 GHz spectrum under the new rules.[124] It also found that the resulting limited pool of applicants

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[115] *Id.* at 18641-44.

[116] *See, e.g.*, Commco *et al.*, Joint Petition at 8-10; AA&T *et al.*, Joint Petition at 8-9.

[117] At first blush, it would appear that the discussion of pending applications in this section duplicates the discussion of pending applications contained in the discussion of the Commission's *Jan. MO&O*, *supra* at paras. 7- 17. Although we reach the same result, the analysis differs because of the procedural timing of the arguments.

[118] *See, e.g.*, Commco *et al.*, Joint Petition at 10; AA&T *et al.*, Joint Petition at 12; CMC Petition at 16-17; DCT Petition at 4-9; No Wire Petition at 1-4.

[119] *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 241-42 (D.C. Cir. 1997) (*Chadmoore*).

[120] *Jan. 17 MO&O*, 12 FCC Rcd at 2918.

[121] *Id.*

[122] *Id. See also Report and Order and Second NPRM*, 12 FCC Rcd at 18642-44.

[123] See *Jan. 17 MO&O*, 12 FCC Rcd at 2917; *Report and Order and Second NPRM* at 18642.

[124] *Report and Order and Second NPRM*, 12 FCC Rcd at 18642.

could "inhibit the development of new and innovative services in this spectrum."[125] Accordingly, the Commission determined that dismissal of the pending amendments would serve the public interest.[126]

32. Commco argues that by dismissing amendments to pending 39 GHz applications filed on or after December 15, 1995, the Commission "improperly amended" its finding in the *NPRM and Order* that such amendments are "of right."[127] However, Commco's argument ignores the fact that the freeze portion of the *NPRM and Order* provided notice that such amendments would no longer be accepted for processing. Consequently, although we found that amendments filed prior to the *NPRM and Order* should be processed "of right," any former right to amend a pending 39 GHz application ended with the release of the *NPRM and Order*.[128]

33. Commco further argues that Sections 101.29(a)[129] and 101.45(f)(2)[130] of the Commission's Rules provide that an applicant may amend an application "as of right," and that the Commission violated those rules when we dismissed amendments to 39 GHz applications filed on or after December 15, 1995.[131] For the reasons set forth below, we disagree.

34. Section 101.29(a) generally states that pending applications that are not designated for the random selection process may be amended "as a matter of right."[132] It is well established that the mere filing of an FCC application vests no rights in an applicant.[133] Moreover, as stated above, any right to amend a pending 39 GHz application ended with the release of the *NPRM and Order*.[134] We stated in the *NPRM and Order* that amendments to pending applications would not be accepted for filing on or after December 15, 1995.[135] In addition, Section 101.45(f)(2) does not provide an applicant with a vested right to amend its application. Rather, it provides an exception to the general rule that pending applications amended by major amendments are considered "newly-filed" and lose their place in the processing line.[136]

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125 *Id.* at 18642-3.

126 *Id.*

127 Commco *et al.*, Joint Petition at 8-10.

128 *See Chadmoore*, 113 F.3d at 241-42.

129 47 C.F.R. § 101.29(a).

130 47 C.F.R. § 101.45(f)(2).

131 Commco *et al.*, Joint Petition at 8-10.

132 47 C.F.R. § 101.29(a).

133 *Chadmoore*, 113 F.3d at 240-41 (citations omitted).

134 *See Chadmoore*, 113 F.3d at 241-42.

135 *NPRM & Order*, 11 FCC Rcd at 4990.

136 47 C.F.R. § 101.45(f)(2). "For the purposes of this section, any application . . . will be considered to be a newly filed application if it is amended by a major amendment . . . except . . . . [when] [t]he amendment resolves frequency conflicts . . . . which would otherwise require resolution by hearing, by comparative evaluation . . . or by random selection . . . provided that the amendment does not create new or additional frequency conflicts. *Id.*

35. Some parties argue that by dismissing amendments to pending 39 GHz applications intended to resolve mutual exclusivity filed on or after December 15, 1995, the Commission violated Section 309(j)(6)(E) of the Communications Act.[137] Contrary to those assertions, by dismissing the subject amendments and unripe applications, we did not violate our statutory mandate to "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[138] The Commission conducted the instant proceeding in response to a petition for rulemaking where it considered implementing new technical standards for the 39 GHz band, which would require new licensing procedures.[139] It froze new applications for 39 GHz licenses because of its concern that applications filed under the former rules may not conform to the technical and service requirements being considered.[140] For the same reason, it froze certain amendments to pending 39 GHz applications, including those at issue.[141] After a notice and comment period, as required by the APA,[142] the Commission determined that continuing to license the 39 GHz band under the former rules would run contrary to its proposed regulatory overhaul and decided to implement competitive bidding for all future 39 GHz licensees.[143] Accordingly, it dismissed "unripe" pending mutually exclusive 39 GHz applications and certain amendments thereto, including amendments which were filed on and after December 15, 1995, to avoid mutual exclusivity with other pending applications.[144]

36. As noted in the preceding paragraphs, we have carefully considered our obligations under Section 309(j)(6)(E) in making our decision to uphold the dismissal of "unripe" pending mutually exclusive 39 GHz applications and amendments. We have also determined, after considering our Section 309(j)(6)(E) obligations, to process those 39 GHz applications that passed the 30-day public notice period as of the release date of the *Freeze Order*, November 13, 1995, and all associated amendments of right filed before the release date of the *Notice of Proposed Rule Making and Order*, December 15, 1995.[145] Further, we will grant those pending applications that are not mutually exclusive with previously-filed applications.[146]

37. It has been established by case law that Section 309(j)(6)(E) does not require us to adhere to an

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137 *See, e.g.,* AA&T *et al.,* Joint Petition at 11-12; CMC Petition at 16-17; Commco *et al.*, Joint Petition at 10; DCT Petition at 4-9; No Wire Petition at 2-4.

138 47 U.S.C. § 309(j)(6)(E).

139 *Freeze Order*, 11 FCC Rcd at 1156.

140 *Id.*

141 *NPRM and Order*, 11 FCC Rcd at 4988-89.

142 5 U.S.C. § 553(c).

143 *Report and Order and Second NPRM*, 12 FCC Rcd at 18603-04.

144 *Id.* at 18642-44.

145 *See* para. 40, *infra*. The Commission had previously determined that pending 39 GHz applications would be processed only if the 60-day period for filing mutually exclusive applications expired before November 13, 1995. *NPRM and Order*, 11 FCC Rcd at 4988.

146 *See* para. 40 *infra*.

outmoded licensing policy in order to avoid mutual exclusivity.[147] Section 309(j)(6)(E) merely requires that we take certain measures to avoid mutual exclusivity "*within the framework of existing policies*."[148] The Commission's decision to adopt competitive bidding procedures for assignment of 39 GHz licenses arose from the changes it made to the service and licensing rules for the 39 GHz band, which were found, pursuant to notice and comment, to serve the public interest. Thus, we conclude that Section 309(j)(6)(E) does not require us to process the petitioners' amendments, because they were submitted under a regulatory regime that is no longer in effect. Accordingly, we affirm our decision to dismiss all amendments, filed on or after December 15, 1995, including those intended to resolve mutual exclusivity among pending 39 GHz applications.

38. Similarly, we do not believe that Section 309(j)(6)(E) requires us to process unripe pending mutually exclusive applications, nor are we required to foster settlement agreements among applicants who submitted applications under the former processing rules and policies. Bachow claims that it reduced its channel requests in compliance with the Commission's September 16, 1994, *Public Notice*,[149] which contained a policy statement that, *inter alia*, imposed a spectrum cap on applicants for certain 39 GHz services.[150] Bachow states that it was unable to reach agreements to resolve mutually exclusive situations with non-complying applicants before the unripe pending applications were dismissed.[151] Bachow argues that the Commission should insist that all pending applications conform to the *Public Notice* before dismissing unripe pending application.[152] We disagree. The *Public Notice* was issued pursuant to the former regulatory regime, and the fact that some pending applications may have been subject to dismissal due to nonconformance with the *Public Notice* is inapposite.

147 *DIRECTV*, 110 F.3d at 828.

148 *Id.* (emphasis added).

149 *Public Notice*, Mimeo No. 44787 (rel. Sept. 16, 1994) (*Public Notice*).

150 Bachow Petition at 8.

151 *Id.* at 8-10.

152 *Id.*

d. Disposition of 39 GHz Applications Meeting the Public Notice Requirement as of November 13, 1995

39. In the *NPRM and Order*, the Commission expanded upon the *Freeze Order* by stating that 39 GHz applications would be processed if they were not mutually exclusive with other 39 GHz applications at the time of the *Freeze Order*, and if the 60-day period for filing mutually exclusive applications expired prior to November 13, 1995.[153] Some parties argue that a 30-day cut-off period -- not a 60-day cut-off period -- is the correct requirement for processing eligibility.[154] Section 309(b) of the Communications Act[155] and Section 101.37(c) of the Commission's Rules (former Section 21.27(c))[156] state that we may process an application no earlier than 30 days after it has been placed on public notice. Section 101.45(b)(2) (former Section 21.31(b)) allows competing applications to be filed up to 60 days after the date of the public notice listing the first of the conflicting applications as accepted for filing.[157] Subparts (i) and (ii) explain that the cut-off date is the earlier of two dates:

> (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing; or (ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice).[158]

40. We have determined, after further consideration, that those 39 GHz applications that met the 30-day public notice requirement, but not the 60-day period for which mutually exclusive applications may be filed, are not materially different than those applications for which the 60-day period for filing mutually exclusive applications has passed. Specifically, we find that those 39 GHz applications that meet the 30-day public notice requirement are ripe for processing, in accordance with our rules. It is our practice to process applications as soon after the close of the 30-day public notice period as possible. Even though the mounting number of 39 GHz applications created complexities that generally forestalled our processing of those applications until after the 60-day period for filing mutually exclusive applications had passed, we find that those applications became ripe for processing on day 31. Therefore, we will process those 39 GHz applications that passed the 30-day public notice period as of November 13, 1995 and all associated amendments of right filed before December 15, 1995, and grant those applications that are not mutually exclusive with previously-filed applications. We find this action to be in the public interest because it best comports with the plain reading of our rules, and promotes regulatory certainty and consistency.

e. Disposition of 39 GHz Applications not Meeting the Public Notice Requirement

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153 *NPRM and Order*, 11 FCC Rcd at 4988.

154 *See, e.g.*, AA&T *et al.*, Joint Petition at 13-15; Biztel Petition at 3-5; Commco *et al.*, Joint Petition at 14.

155 47 U.S.C. § 309(b).

156 47 C.F.R. § 101.45(b)(2).

157 47 C.F.R. § 101.45(b)(2)(i); *see* 47 U.S.C. § 309(j); *McElroy* at 255 (1996): "The thirty-day period in [Section] 309(b) . . . simply requires the Commission to wait thirty days before granting . . . applications."

158 47 C.F.R. § 101.45(b)(2)(i),(ii).

as of November 13, 1995

41. Some petitioners also argue, based on *McElroy* and *Kessler*, that the *Freeze Order* announcing that the Commission would no longer accept for filing any applications for new 39 GHz licenses filed on or after November 13, 1995,[159] constitutes an "accelerated cut-off" period requiring us to process all 39 GHz applications on file as of that date.[160] As an initial matter, we note that the Commission did not cut-off the processing of eligible, ripe applications, rather it froze application processing in preparation for a rulemaking proceeding, and later dismissed applications not comporting with our Rules as unacceptable for filing. Further, petitioners misconstrue *McElroy* and *Kessler*. At issue in *McElroy*, was whether certain public notices prevented the 60-day cut-off period for filing of competing applications from commencing because they failed to adequately notify competing applicants by including the phrase "accepted for filing."[161] The Court found that the public notices gave adequate notice and did not prevent the 60-day cut-off period from commencing.[162]

42. Petitioners also cite *Kessler* as a basis for their claim that the *Freeze Order* imposes an accelerated cut-off date.[163] However, in *Kessler*, the pertinent issue was whether it was arbitrary and capricious for the Commission to fail to give advance notice of a freeze, and the Court held that it was not.[164] Moreover, the application freeze imposed in *Kessler* is distinguishable from the 39 GHz application freeze. In the underlying proceeding in *Kessler*, the Commission decided that it was in the public interest to process pending applications for the following reason:

> [T]he total number of potential grants that could result from proposals on file . . . was not sufficiently great to frustrate the ends we sought to accomplish through our rulemaking. We decided, therefore, that we could continue to process those cases, without substantial sacrifice of our basic objectives.[165]

The Commission then amended its procedural rules "to establish, in effect, a new 'cut-off' date for most pending applications, this new date acting to supersede all previous cut-off lists."[166] This "exceptional treatment" was proposed in an effort "to speed up the disposition of applications where a contest had ceased to exist."[167] In the 39 GHz proceeding -- unlike the underlying proceeding in *Kessler* -- the Commission found the large volume of

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159 *Freeze Order*, 11 FCC Rcd at 1156.

160 *See, e.g.,* AA&T *et al.*, Joint Petition at 13-18; Bachow Petition at 2-7; Biztel Petition at 3-7.

161 *McElroy*, 86 F.3d at 255.

162 *Id.*

163 *See, e.g.,* AA&T *et al.*, Joint Petition at 13-18; Bachow Petition at 2-7; Biztel Petition at 3-7.

164 *Kessler*, 326 F.2d at 686.

165 *Id.* at 685.

166 *Id.*

167 *Id.*

potential grants of licenses sufficiently great to frustrate the goals of the 39 GHz rulemaking.[168]

43. It is well settled that the Commission "is not bound to adhere to a procedure just because it was once adopted."[169] If we find that it is in the public interest to hold in abeyance the acceptance of applications, we may craft a freeze to fit the circumstances. For example, in one proceeding, the Commission suspended acceptance of all new paging applications in conjunction with a proposal to convert from site-by-site licensing of paging channels to licensing on a geographic area basis,[170] and subsequently modified the freeze to give incumbent licensees with operating paging systems the opportunity to file primary site applications for sites that incrementally expand their services areas.[171] Further, in the 220-222 MHz band proceeding, the Commission imposed a freeze on the filing of initial and modification applications due to the volume of applications, and later lifted the filing window for non-nationwide 220 MHz licensees who sought to obtain modification of their authorizations to relocate base stations.[172] These are but two examples of how the Commission has crafted procedural rules to fit the circumstances.

44. Moreover, applications that do not comport with the 30-day public notice requirement as of the November 13, 1995 *Freeze Order* are, under our rules, unripe for processing. As discussed above, Section 101.37(c) (former Section 21.27(c)) of the Commission's rules states that we may process an application *no earlier* than 30 days after it has been placed on public notice.[173] Thus, those applications for which the 30-day public notice period was not completed by the November 13, 1995 *Freeze Order* are permanently foreclosed from becoming ripe for processing. To find otherwise would defeat the purpose of the processing freeze. In the *Report and Order and Second NPRM*, the Commission found that because the 39 GHz band is subject to significantly different rules than the ones used previously, the most fair and reasonable approach concerning pending unripe 39 GHz applications was to dismiss them, without prejudice, and allow those applicants to reapply under the new rules. We continue to believe that this approach adequately balances the expectations of applicants with the need for a more efficient and effective system for licensing use of the 39 GHz band.

f. Emergency Request for Stay

45. DCT filed an Emergency Request for Stay on April 8, 1998, requesting that we stay the decision to dismiss those 39 GHz applications that were not resolved of their mutual exclusivity as of December 15, 1995, and those 39 GHz applications that had not passed the 60-day cut-off period as of November 13, 1995, pending final resolution of all challenges to the Commission's 39 GHz application dismissal policy. Inasmuch as we have

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168 *See, e.g., NPRM and Order*, 11 FCC Rcd at 4988.

169 *Kessler*, 326 F.2d at 685.

170 Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rule Making*, 11 FCC Rcd 3158 (1996).

171 Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket 96-18, *First Report and Order*, 11 FCC Rcd 16570 (1996).

172 Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, GN Docket No. 93-252, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, n.10 (1997).

173 47 C.F.R. § 101.37(c).

carefully reviewed the substance of DCT's request, and in light of today's decision and the absence of prior dismissal of the pending 39 GHz applications subject to this proceeding, we conclude DCT has in fact received the relief it requested. Moreover, there will be no further delay in implementing the dismissal or further processing of the above-referenced applications because this Memorandum Opinion and Order resolves the issues addressed in the petitions for reconsideration. We therefore dismiss DCT's request for stay as moot.

B. SERVICE AREAS

46. In the *NPRM and Order*, we proposed to license all channel blocks in the 39 GHz band using BTAs, and we solicited comments on that proposal.[174] Based on the record as it existed at the time of the release of the *Report and Order and Second NPRM*, we determined that BTAs were the most appropriate geographic areas for the types of services envisioned for the 39 GHz band.[175] Explicit in this determination was the Commission's expectation that 39 GHz licensees and Rand McNally would execute licensing agreements similar to those in other services.[176] Subsequent to the release of the *Report and Order and Second NPRM*, new developments concerning Rand McNally's copyright interest in BTAs lead us to conclude that using BTAs as service areas for 39 GHz authorizations could result in extended delays in the 39 GHz licensing process.[177] Thus, on our own motion, after reviewing the current record, we reconsider the service area definitions for the 39 GHz band and will license all channel blocks in the 39 GHz band using Economic Areas (EAs).[178] We believe that licensing the 39 GHz band by EAs will provide ample population coverage and allow licensees the flexibility to provide many different types of services, which will promote an equitable distribution of licenses and services among geographic areas, encourage economic opportunities among a wide variety of applicants, and foster investment in and rapid deployment of new technologies and services.[179] In addition, by using EAs we will better serve the public by avoiding the potential delays in the continued licensing of the 39 GHz band under the new licensing approach established in this proceeding. Accordingly, a total of 175 authorizations (172 EAs, and three EA-like areas, covering Guam and Northern Mariana Islands; Puerto Rico and the U.S. Virgin Islands; and American Samoa) will be issued for each 39 GHz channel block.[180]

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[174] *NPRM and Order*, 11 FCC Rcd at 4941-43.

[175] *Report and Order and Second NPRM*, 12 FCC Rcd at 18610-12. In reaching the conclusion that BTAs would be the most appropriate service areas for anticipated 39 GHz services, we stated that the record did not indicate that the majority of 39 GHz licensees would seek to provide services over vast geographic areas. Hence, we noted that large service areas such as MTAs would be inappropriate for the 39 GHz band. *See Id.* at 18611.

[176] *Report and Order and Second NPRM*, 12 FCC Rcd at 18611-12.

[177] Rand McNally is the copyright owner of the *Basic Trading Area and Major Trading Area Listing*, which lists the counties contained in each BTA. *Report and Order and Second NPRM*, 12 FCC Rcd at 18610, n.32 (citation omitted).

[178] EAs are delineated by the Regional Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce. *See* 47 C.F.R. § 90.7. EAs are larger than BTAs and smaller than MTAs.

[179] *See* 47 U.S.C. § 309(j)(4)(C). For entities desiring service areas smaller than EAs, we note that we are permitting partitioning and disaggregation in the 39 GHz band. *See* paras. 57-62, *infra*. The availability of these options will enhance 39 GHz licensees' flexibility regarding system design and service offerings, which will promote the efficient and diverse use of the 39 GHz band.

[180] *See* 47 C.F.R. § 90.7.

C. CHANNELIZATION PLAN

47. In the *Report and Order and Second NPRM*, we determined that the 39 GHz spectrum could be used to offer a variety of terrestrial services.[181] TRW, Inc. (TRW) asks that we ensure that some of the global spectrum allocation for fixed satellite services (FSS) on the 39 GHz band remain available for next-generation satellite networks. Specifically, TRW entreats us to limit our 39 GHz spectrum channelization plan for terrestrial wireless services to those frequencies below 39.5 GHz in order to provide a segment of the spectrum above 39.5 GHz for FSS.[182] TRW requests that, at a minimum, we clarify that fixed and mobile service authorizations in the 39 GHz band "will not confer exclusive spectrum rights, and that fixed and mobile licensees should be required to coordinate with satellite operators to facilitate spectrum sharing to the extent feasible."[183] TRW also suggests that a limitation on elevation angles of terrestrial transmitting equipment would "assist spectrum sharing in the 39 GHz band."[184]

48. Several parties oppose the TRW Petition, and request that we affirm the current channelization plan and decline to reserve the 39.5-40.0 GHz band for satellite operators.[185] Both ART and WinStar correctly assert that we have already addressed the issue of reserving the 39.5-40.0 GHz band for satellite operators.[186] In addition, several parties maintain that sharing between terrestrial and satellite services in this segment of the 39 GHz band is not feasible.[187] WinStar, for example, argues that interference concerns would freeze fixed terrestrial services out of significant areas surrounding proposed satellite earth stations and that terrestrial services would find it impossible to operate under the severe power density and automatic transmission power control sought by satellite operators if TRW's proposal is adopted.[188] These parties, therefore, request that we not revisit our earlier decision to maintain terrestrial primacy in the 39.5-40.0 GHz band.

49. We find that TRW has not provided a convincing basis for altering our rules for this band. Further, we affirm the conclusion that altering the service designation in the 39.5-40.0 GHz segment of the band is not in the public interest. As we stated in reaching our initial decision rejecting TRW's request, we believe that it would be too burdensome to "repack" terrestrial users in a portion of the band below 39.5 GHz, because, among

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[181] *Report and Order and Second NPRM*, 12 FCC Rcd at 18607.

[182] TRW Petition at 5-8. The 39.5-40.0 GHz band is currently allocated for fixed and satellite services. *Report and Order and Second NPRM*, 12 FCC Rcd at 18608.

[183] TRW Petition at 2, 8.

[184] *Id.* at 10.

[185] Alcatel *et al.* Joint Opposition at 1-3; ART Opposition at 2-4; Biztel Opposition at 1-3; CMC Reply at 4; WinStar Opposition at 1-3.

[186] ART Opposition at 2-3; WinStar Opposition at 1-3; *Report and Order and Second NPRM*, 12 FCC Rcd at 18609.

[187] *See* Alcatel *et al.* Joint Opposition at 1-3; ART Opposition at 2-4; Biztel Opposition at 1-3; CMC Reply at 4; WinStar Opposition at 1-3.

[188] WinStar Opposition at 2.

other things, existing licensees could be required to purchase new equipment or change frequencies.[189] In addition, we explained that a new terrestrial frequency plan would be required, based on a different transmit/receiving separation, which would be costly to equipment manufacturers and licensees.[190] Furthermore, due to the potential for interference between contemplated ubiquitous satellite and the in-place high density operating terrestrial systems, altering the current allocation of the 39 GHz band, at the present time, would not serve the public interest and would be inconsistent with the outstanding proposals in the March 24, 1997, *Notice of Proposed Rulemaking* in IB Docket No. 97-95.[191] Thus, we conclude that it would not be practical to implement TRW's request, and it is therefore denied. However, we reiterate that our current allocation for the 39 GHz segment of the band contains both fixed and satellite services and, as noted in the R*eport and Order and Second NPRM,* our action here does not constrain our ability to make modifications to the Table of Allocations at a later

[189] *Report and Order and Second NPRM*, 12 FCC Rcd at 18609.

[190] *Id.*

[191] Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz , 40.5-41.5 GHz, and the 48.2-50.2 GHz Frequency Bands, IB Docket No. 97-95, *Notice of Proposed Rulemaking*, 12 FCC Rcd 10130 (1997). On December 23, 1998, the International Bureau subsequently released the following item: Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations, *Report and Order*, IB Docket No. 97-95, 13 FCC Rcd 24649 (1998).

time.[192] Nor is our action here in any way intended to constrain wireless licensees' ability to deploy satellite earth stations in the 39.5-40.0 GHz band.[193]

D. PERFORMANCE REQUIREMENTS: RENEWAL AND BUILD-OUT

50. Prior to the *Report and Order and Second NPRM*, 39 GHz licensees were subject to the Part 101 build-out rules, which required station construction within 18 months of the date of license grant.[194] Licensees authorized before August 1, 1996, received a five-year, fixed license term[195] and licensees authorized after August 1, 1996, received a ten-year, fixed license term.[196] Moreover, at that time, neither the Part 21 rules nor the Part 101 rules directly provided for a renewal expectancy at the time of license expiration. However, in the *Report and Order and Second NPRM*, the Commission determined that, in order to promote flexibility in system design and market development, it would combine the performance standards required at build-out with the requirements for a renewal expectancy into one showing of substantial service at the time of license renewal, in accordance with Section 101.17(a).[197] It further determined, at that time, that the substantial service showing be made 18 months prior to the license expiration date in accordance with Section 101.15(c).[198]

51. In pleadings responsive to the *Report and Order and Second NPRM*, many petitioners ask us to reconsider our decision concerning the incumbent renewal deadline, arguing that the new renewal requirement will promote inequity between the incumbents and new licensees.[199] These parties assert that incumbent 39 GHz licensees will be placed at a disadvantage due to a shorter period of time in which to

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[192] *See Report and Order and Second NPRM*, 12 FCC Rcd at 18608-09.

[193] It may be possible and desirable for a licensee to deploy both terrestrial and satellite facilities. For example, terrestrial facilities may be deployed in more densely populated urban areas, while satellite facilities, particularly "gateway" type facilities, may be deployed in sparsely populated rural areas.

[194] 47 C.F.R. § 101.63.

[195] Former Rule 47 C.F.R. § 21.45.

[196] 47 C.F.R. § 101.67.

[197] 47 C.F.R. § 101.17(a), as amended, requires 39 GHz licensees to demonstrate substantial service at the time of license renewal.

[198] Former Rule 47 C.F.R. § 101.15(c), as amended, required a 39 GHz licensee to file a renewal form 18 months prior to the expiration date of the license sought to be renewed.

[199] ART Petition at 4-7; Biztel Petition at 10-11; CMC Petition at 3-6; AA&T *et al.*, Joint Petition 21-22; *see, supra* para. 24 for a discussion of license terms.

meet the performance requirements.[200] ART, for example, contends that the renewal deadline is "antithetical" to our policy of ensuring that licensees have flexibility and time to acquire necessary capital and to build-out their systems.[201]

52. We disagree that the renewal requirements adopted in the *Report and Order and Second NPRM* cause inequity among licensees or are inconsistent with the Commission's stated goals in this proceeding. Due to recent developments, however, we are reconsidering our decision regarding renewal requirements on different grounds. Subsequent to the adoption of the *Second Report and Order and NPRM*, the Commission streamlined its wireless license application process by implementing an automated licensing system and integrated database for the wireless services.[202] The result of this effort was the Universal Licensing System (ULS). With the deployment of ULS, the Commission intends to "improve the consistency of the Commission's rules across wireless services and provide a single point of reference for applicants" by consolidating the procedural rules governing the filing and processing of wireless applications, including the procedures for license renewal, into Part 1 of the Commission's Rules.[203] In this connection, Section 101.15, which required 39 GHz licensees to file for renewal 18 months prior to the licenses expiration date, was removed and replaced by Section 1.949 of the Commission's Rules.[204] Section 1.949 requires all applications for renewal of station authorization to be filed no later than the license expiration date and no earlier than 90 days prior to the expiration date.[205] A showing of substantial service must also be made at that time that an application for renewal of station authorization is filed. We believe that this approach better comports with our goal in this proceeding of promoting flexibility in system design and market development. Further, this approach conforms to the Commission's intention to promote consistency across the wireless services. Thus, under the new ULS guidelines 39 GHz licensees are not required to comply with the 18 month filing requirement in former Section 101.15, but rather should refer to Section 1.949 for license renewal requirements.[206] We clarify, however, that the substantial service performance requirement under Section 101.17(a) remains the performance standard for the 39 GHz band and must be demonstrated upon

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[200] *See, e.g.,* AA&T *et al.*, Joint Petition at 21-22; ART Petition at 4-7.

[201] ART Opposition at 5. ART also contends that the renewal deadline would be disadvantageous to those licensees who intend to utilize point-to-multipoint technology. It contends that the necessary equipment is still in the beta testing stage and won't be commercially viable until very close to the first substantial showing deadline. *Id.* at 6.

[202] In the Matter of the Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Report and Order*, FCC 98-23 (adopted September 17, 1998, released, October 21, 1998) (*ULS Report and Order*).

[203] *Id* at para. 56.

[204] Former Rule 47 C.F.R. § 101.15; 47 C.F.R. § 1.949 [added].

[205] 47 C.F.R. § 1.949; Licensees should also be aware that 47 C.F.R. § 101.65(b) was revised in order to discontinue the reinstatement procedures for expired licenses. License authorizations will automatically terminate on the specified expiration date, unless a timely application for renewal is filed. 47 C.F.R. § 1.955; *see also ULS Report and Order*, FCC 98-234 at para. 95-101.

[206] In the Matter of the Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Memorandum Opinion and Order*, FCC 99-139 (rel. June 28, 1999).

license renewal.[207]

53. Biztel asks that we amend Section 101.63(a) to reflect that 39 GHz licensees are exempted from compliance with Section 101.63(a)'s build-out requirement of mandatory operation within 18 months from the initial date of license grant, in light of the new performance standard under Section 101.17(a).[208] We find that this clarification comports with our determination in the *Report and Order and Second NPRM*,[209] and, thus, we amend Section 101.63(a) to read as follows:

> Each Station, except in Local Multipoint Distribution Services and the 38.6-40.0 GHz band, authorized under this part must be in operation within 18 months from the initial date of grant.[210]

54. Finally, AA&T *et al.*, Joint Petitioners, seek clarification that incumbent service areas, and not just individual links, will be protected from the operations of those who obtain their licenses by competitive bidding.[211] Accordingly, we clarify that Section 101.147(u)(2) -- which compels applicants to be aware of any grandfathered links within their EA -- protects all incumbent service areas from the operations of licensees who receive their licenses by competitive bidding.[212] Thus, Section 101.147(u)(2) will be modified to read:

> Applications filed pursuant to Section 101.1206 shall identify any pre-existing rectangular service area authorizations that are located within, or are overlapping with, the EA for which the license is sought, and the provisions of Section 101.103 shall apply for purposes of frequency coordination between any authorized rectangular service area(s) and EA service area(s) that are geographically adjoining and overlapping.[213]

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207 *See* 47 C.F.R. § 101.17(a).

208 BizTel Petition at 10-11.

209 *Report and Order and Second NPRM*, 12 FCC Rcd at 18622-18626.

210 47 C.F.R. § 101.63(a).

211 AA&T *et. al.* Joint Petition at 21-23; *see also* Winstar Opposition at 6-7 in support of AA&T *et. al.*

212 47 C.F.R. § 101.147(u)(2).

213 *Id.*

E. LICENSING RULES

1. Antenna Requirements

55. The Commission requires fixed stations operating at 932.5 MHz or higher to utilize transmitting and receiving antennas meeting or exceeding the appropriate performance standards in order to avoid frequency interference.[214] Thus, it generally requires the use of either Category A antennas, or, in areas not subject to frequency congestion, Category B antennas.[215] However, in the *Report and Order and Second NPRM*, the Commission did not require utilization of Category A antennas and, in fact, advocated the use of a variety of antennas, including omni-directional and sectored antennas, in order to promote the entry of point-to-multipoint users in the 39 GHz band and to allow those users more flexibility in meeting service demands.[216] It stated, however, that if a licensee utilizing an antenna other than a Category A antenna causes interference which cannot be resolved among the licensees involved that licensee must resolve the interference by replacing its antenna with a Category A antenna, or one with better performance.[217] One petitioner asks that we exclude omni-directional or sectored antennas from directional Category A or B radiation pattern requirements, reasoning that the interference replacement requirement confers secondary status upon point-to-multipoint users employing those types of antennas.[218]

56. As discussed in the *Report and Order and Second NPRM*, we permit various types of antennas for use in the 39 GHz band because Category A directional antenna may be too restrictive to fulfill the requirements of diverse system configurations in the 39 GHz band.[219] We clarify, however, that Category A and B radiation pattern requirements do not apply to wide-beam antennas, such as omni-directional and sectored antennas. Point-to-multipoint licensees should benefit from this rule modification because the omni-directional and sectored antennas "represent a more cost-effective and technically suitable alternative to traditional narrowbeam Category A antennas when deployed in a point-to-multipoint configuration."[220] However, in the event that interference difficulties arise as a result of the use of wide-beam antennas and are not resolved by the licensees, we reserve the right to employ any reasonable method necessary to resolve the interference, including requiring the use of better performing antennas.

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214 47 C.F.R. § 101.115(c).

215 47 C.F.R. § 101.115(c) defines the performance standards required for Category A and B antennas. Category A antennas have a higher performance standard, for example they radiate less energy in the side lobes, thereby lessening the chance for interference.

216 *Report and Order and Second NPRM*, 12 FCC Rcd at 18632.

217 *Id.*

218 Comsearch Petition at 5.

219 *Report and Order and Second NPRM*, 12 FCC Rcd at 18631.

220 *Id.* at 18632.

2. Frequency Coordination and Power Flux Density Limit

57. In the *Report and Order and Second NPRM*, in order to facilitate coordination between 39 GHz licensees licensed in adjoining areas, the Commission adopted interim frequency coordination procedures, but declined to establish final rules concerning maximum field strength or power flux density (PFD) limits pending the results of the National Spectrum Management Association (NSMA) interference study.[221] We decided, in the interim, that it was in the public interest to continue to use the frequency coordination procedures in Section 101.103(d) of our rules, as amended, with the following modifications: (1) neighboring co-channel and adjacent channel licensees must coordinate within 16 kilometers of an adjacent service area boundary, and (2) licensees that receive coordination notifications must respond within 10 days, as opposed to the 30 days afforded under the former rules.[222]

58. Several petitioners express concern regarding the interim coordination boundaries and notification response time.[223] First, regarding coordination boundaries, one party contends that a coordination distance of 16 km for 39 GHz services is not enough to preclude the possibility of harmful interference, and suggests that a distance of 50 km be used.[224] WinStar disagrees, maintaining that the frequency coordination measures are interim in nature and that "it would be counterproductive to adopt [permanent] interference measures" prior to analyzing the results of the NSMA study.[225] We concur with WinStar as we have received no notice of difficulties to date with the interim rule, nor to our knowledge, have incumbent licensees experienced complications. Therefore, we find that it is in the public interest to retain the interim rule requiring licensees to coordinate frequency interference within 16 kilometers of an adjacent service area boundary, pending the conclusion and analysis of the NSMA study.[226]

59. Second, ART and WinStar request a reduction in notification response time, with ART requesting a decrease from 10 to 5 business days.[227] ART argues that 5 business days would better facilitate the

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[221] *Id.* at 18632-33.

[222] *Id.* at 18633-34; *see also UlS Report and Order*, FCC 98-234 at para. 84-88. 47 C.F.R. Section 101.103(d) was revised pursuant to the *ULS Report and Order* to require frequency coordination to be completed prior to filing an application for regular authorization, or a major amendment to a pending application, or any major modification to a license. *Id.* Applicants and licensees should refer to 47 C.F.R. § 1.929 of the Commission's Rules for a classification of major and minor filings.

[223] *See, e.g.,* ART Petition at 4-5; Comsearch Petition at 2-5; WinStar Petition at 7-8; *see also* ART Opposition at 7; Fixed Section Opposition at 2-3.

[224] Comsearch Petition at 2-4.

[225] WinStar Opposition at 5-7.

[226] We have previously found that the propagation characteristics of the 39 GHz spectrum requires a 16 Km coordination distance between neighboring systems. *Report and Order and Second NPRM,* 12 FCC Rcd at 18634.

[227] ART Petition at 4-5; *see also* WinStar Opposition at 6, maintaining that "a shorter response time is necessary to facilitate rapid service installation schedules."

ability of a licensee to determine the impact of an interference problem and to rapidly meet customer needs.[228] We are not persuaded that a shorter response time will necessarily decrease burdens on licensees and Commission staff. We also are concerned that a five-day response time could unduly burden coordination notice recipients by forcing them to rush a response without having sufficient time to fully consider the relevant technical data of the proposed operation. Thus, we conclude that a reduction in the notification response is not warranted at this time.

3. Partitioning and Disaggregation

60. In the *Report and Order and Second NPRM*, the Commission stated that all entities eligible to hold 39 GHz licenses should be permitted to partition and disaggregate spectrum within the 39 GHz band.[229] It stated that these options would enhance 39 GHz licensee flexibility with respect to system design and service offerings.[230] Some petitioners incorrectly read these rules to mean that these options are not available to incumbent licensees.[231] We, therefore, clarify that all 39 GHz licensees, including incumbents and those who obtain their 39 GHz license by competitive bidding, may partition and disaggregate.

61. Although the *Report and Order and Second NPRM* did not address the issue of combined partitioning and disaggregation agreements, WinStar requests that we permit this type of arrangement.[232] The Commission has previously allowed such combinations in other services and has found that providing licensees such flexibility promotes "competitive service offerings, encourages new market entrants, and ensures quality service to the public."[233] Therefore, in keeping with the underlying purpose of this proceeding, *i.e.*, to promote flexibility both in system design and service, and to encourage new entrants into the market, we permit all 39 GHz licensees to enter into combined partitioning and disaggregation agreements.

62. In addition, in the *Report and Order and Second NPRM*, the Commission decided to allow partitioning according to county boundaries or geo-political subdivisions.[234] WinStar requests that licensees be allowed to partition along any licensee defined service area arguing that requiring partitioning along geo-political subdivision boundaries is "unduly restrictive and will diminish the utility of licensees' partitioning abilities."[235]

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228 ART Petition at 4-5.

229 *Report and Order and Second NPRM*, 12 FCC Rcd at 18634-18636.

230 *Id.*

231 *See, e.g.*, Winstar Petition at 1-3.

232 WinStar Petition at 4-5.

233 *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, GN Docket No. 93-252, *Second Report and Order*, 12 FCC Rcd 19079, 19150 (1997) (*SMR Order*); In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831, 21866 (1997) (*PCS Order*).

234 *Report and Order and Second NPRM*, 12 FCC Rcd at 18635; *see* 47 C.F.R. § 101.56(a)(1).

235 WinStar Petition at 6.

We agree with WinStar's concern and will observe the policy -- as established in the *PCS Order* -- of allowing licensees to determine the area to be partitioned.[236] Therefore, Section 101.56(a)(1)[237] is amended as follows:

> The holder of a EA authorization to provide service pursuant to the competitive bidding process and any incumbent licensee of rectangular service areas in the 38.6-40.0 GHz band may enter into agreements with eligible parties to partition any portion of its service area as defined by the partitioner and partitionee. Alternatively, licensees may enter into agreements or contracts to disaggregate any portion of spectrum, provided acquired spectrum is disaggregated according to frequency pairs.

63. WinStar also raised the issue of whether licensees utilizing bidding credits should be permitted to partition and disaggregate their spectrum in the same manner as licensees not eligible for such provisions, and favored permitting partitioning and disaggregation by such licensees, subject to our unjust enrichment rules.[238] We concur. We have permitted licensees utilizing bidding credits to partition and disaggregate their spectrum in other services, and we find no reason not to allow 39 GHz licensees to have the same opportunity.[239] By this action, we encourage the participation of those who desire individual links, smaller service areas, or smaller spectrum blocks in the provision of 39 GHz service. Thus, we will amend Section 101.56(i) accordingly.

F. SECOND NOTICE OF PROPOSED RULE MAKING

64. In the *Second NPRM*, the Commission sought comment on the appropriate provisions to prevent unjust enrichment and ensure effective implementation of partitioning and disaggregation in the 39 GHz service.[240] It also sought comment on how to calculate the unjust enrichment payments for 39 GHz licensees that are awarded bidding credits and subsequently partition or disaggregate to a business not qualifying for bidding credits or not qualifying for the same level of bidding credits, and asked commenters to address whether the unjust enrichment payments should be calculated on a proportional basis.[241]

65. Subsequent to our issuance of the *Second NPRM*, we adopted a provision in Part 1 of the Commission's Rules for all auctionable services that provides a uniform approach for calculating unjust

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[236] *PCS Order*, 11 FCC Rcd at 21847. In the *PCS Order*, the Commission determined that requiring geographic partitioning by county lines may not necessarily be "reflective of market realities and may otherwise inhibit partitioning." *Id.*

[237] 47 C.F.R. § 101.56(a)(1).

[238] WinStar Petition at 5-6.

[239] *See, e.g., SMR Order*, 12 FCC Rcd 19079, 19148 (1997).

[240] *Report and Order and Second NPRM*, 12 FCC Rcd at 18668-69.

[241] *Id.*

enrichment payments in the context of partitioning and disaggregation.[242] Since we received no comments addressing the issue of calculating unjust enrichment payments, we will adopt the uniform procedures set forth in Sections 1.2111(d)[243] and 1.2111(e)[244] of our rules for the 39 GHz service and amend Section 101.56(i) accordingly. As a result, we will calculate unjust enrichment payments using population to determine the relative value of the partitioned area and the amount of spectrum disaggregated to determine the relative value of the disaggregated spectrum.[245] Population will be calculated based upon the latest available census data. The Commission has consistently adopted this approach for other wireless services, including most recently LMDS.[246] For purposes of applying our unjust enrichment payments when a combined partitioning and disaggregation is proposed, we will use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these *pro rata* calculations.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

66. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, is contained in Appendix B.

B. Ordering Clauses

67. This action is taken pursuant to authority found in Sections 4 (i), 257, 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i), 257, 303(r), and 309(j) and Sections 0.131 and 1.429 of the Commission's Rules, 47 C.F.R. §§ 0.131 & 1.429. For the reasons set forth above, we take the following actions.

68. IT IS ORDERED that, the Petitions for Reconsideration filed by ELAR Cellular and BizTel, Inc., ARE DISMISSED IN PART and DENIED IN PART.

69. IT IS FURTHER ORDERED that, the Petitions for Reconsideration submitted by AA&T *et al.*,

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[242] *See* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 434 (1997) (adopting 47 C.F.R. § 1.2111(e)).

[243] 47 C.F.R. § 1.2111(d).

[244] 47 C.F.R. § 1.2111(e).

[245] As provided in our rules, the unjust enrichment payment will be reduced over time. *See* 47 C.F.R. § 1.2111(d)(2).

[246] Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service, FCC 98-77, CC Docket No. 92-297, ¶ 25, *Fourth Report and Order*, (released May 6, 1998); *see also* In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, Broadband PCS Report and Order, FCC 96-474, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd at 21881-2 (1996).

(filed Mar. 9, 1998), Advanced Radio Telecom (filed Mar. 9, 1998), Bachow, *et al.* (filed Mar. 9, 1998), Biztel, Inc, (filed Feb. 20, 1998), Columbia Millimeter Communications, L.P. (filed Mar. 9, 1998), Commco L.L.C., *et al.* (filed Mar. 9, 1998), Comsearch (filed Mar 6, 1998), DCT Transmission, L.L.C. (filed Mar. 9, 1998), No Wire LLC (filed Dec. 4, 1997), James W. O'Keefe (filed Mar 9, 1998), TRW Inc. (filed Feb. 20, 1998), and WinStar (filed Mar. 9, 1998) ARE HEREBY GRANTED IN PART AND DENIED IN PART.

70. IT IS FURTHER ORDERED that the Emergency Petition for Stay filed by DCT Transmission, L.L.C. IS HEREBY DISMISSED as moot.

71. IT IS FURTHER ORDERED that Part 101 of the Commission's Rules IS AMENDED as specified in Appendix C, effective 60 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r) and 309(j).

72. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

PARTIES FILING PETITIONS FOR RECONSIDERATION OF THE COMMISSION'S JANUARY 17, 1997 *MEMORANDUM OPINION AND ORDER*

ELAR Cellular (ELAR)
BizTel, Inc. (BizTel)

PARTIES FILING PETITIONS FOR RECONSIDERATION OF THE COMMISSION'S *REPORT AND ORDER AND SECOND NPRM*

AA&T Wireless Services, Cambridge Partners, Inc. , Linda Chester, HICAP Networks, Inc., Paul R. Likins, PIW Development Corporation, SMC Associates, Southfield Communications LLC, Wireless Telco (AA&T *et al.*)
Advanced Radio Telecom Corporation (ART)
Bachow and Associates, Inc., and Bachow Communications, Inc. (Bachow)
Biztel, Inc., (Biztel)
Columbia Millimeter Communications, L.P. (CMC)
Commco, L.L.C., Plaincom, Inc., Sintra Capital Corporation, Eric Sterman (Commco *et al.*)
Comsearch
DCT Transmission, L.L.C., (DCT)
No Wire L.L.C., (No Wire)
James W. O'Keefe (O'Keefe)
TRW, Inc. (TRW)
WinStar Communications, Inc. (WinStar)

PARTIES FILING OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Advanced Radio Telecom Corp. (ART)
Alcatel Network System, Inc., Digital Microwave Corporation, Harris Corporation-Farinon Division (Alcatel *et. al*.)
Biztel, Inc. (Biztel)
Fixed Point-to-Point Communications Section, Wireless Communications Division, of the Telecommunications Industry Association (Fixed Section)
WinStar Communications, Inc. (WinStar)

PARTIES FILING REPLIES TO THE OPPOSITIONS

Columbia Millimeter Communications, L.P. (CMC)
TRW, Inc., Lockheed Martin Corporation (TRW)
James O'Keefe (O'Keefe Reply)

LATE FILED COMMENTS

Alcatel Network System, Inc., Digital Microwave Corporation, Harris Corporation-Farinon Division (Alcatel *et. al.*)

APPENDIX B

REGULATORY FLEXIBILITY ACT

Supplemental Final Regulatory Flexibility Analysis

Memorandum Opinion and Order

As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603 (RFA), an Initial Regulatory Analysis (IRFA) was incorporated into the *Notice of Proposed Rulemaking and Order* (*NPRM and Order*) in this proceeding.[247] The Commission sought written public comment on the proposals in the *NPRM and Order*, including comment on the IRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the *Report and Order and Second Notice of Proposed Rule Making* in this proceeding in ET Docket No. 95-183.[248] This present Supplemental FRFA, associated with the present *Memorandum Opinion and Order* (*MO&O*), reflects revised or additional information to that contained in the FRFA.[249] This supplemental FRFA conforms to the RFA.[250]

A. Need for, and Objectives of, the Memorandum Opinion and Order

This *MO&O* addresses petitions for reconsideration and clarification received in response to the *Report and Order* and further simplifies and corrects the rules implemented in the *Report and Order*. This *MO&O* reconsiders the service area definitions established in the *Report and Order* and determines to license all channel blocks in the 39 GHz band using Economic Areas (EAs). In the *Report and Order*, the Commission determined to license all channel blocks in the 39 GHz band using Basic Trading Areas (BTAs). However, due to recent developments concerning Rand McNally's copyright interests in BTAs, the Commission has determined that the public interest would be better served by licensing all 39 GHz channel blocks using Economic Areas (EAs) as the authorized service areas.[251]

The *MO&O* further modifies the Commission's geographic partitioning provisions and permits the use of partitioning and disaggregation by parties taking advantage of bidding credits under our competitive bidding licensing rules. In the *NPRM*, we proposed a partitioning scheme with respect to rural telephone companies.

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[247] 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, *Notice of Proposed RuleMaking and Order*, 11 FCC Rcd 4930 (1995) (*NPRM and Order*).

[248] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket 95-183, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600 (1997) (*Report and Order and Second NPRM).*

[249] The instant *MO&O* also addresses petitions for reconsideration of a prior *Memorandum Opinion and Order* released on January 17, 1997 (*Jan. 17 MO&O*). The prior *Jan. 17 MO&O* modified the interim filing and processing rules for the 39 GHz band. However, in the instant *MO&O*, the Commission promulgates no additional rules, and our action does not affect the previous analysis.

[250] *See* 5 U.S.C. § 604.

[251] EAs are delineated by the Regional Analysis Division of Economic Analysis, U.S. Department of Commerce. *See* 47 C.F.R. § 90.7.

Then, in the *Report and Order*, the Commission determined that the option of partitioning should be made available to all entities eligible to be licensees in the 39 GHz band. The Commission also concluded that all 39 GHz licensees should be permitted to disaggregate their spectrum blocks. In the *MO&O*, we have clarified that incumbent licensees may partition and disaggregate their non-EA licenses. We have allowed all 39 GHz licensees to enter into and/or combine existing partitioning and disaggregation agreements and we have permitted licensees to define their own partitioning boundaries along licensee service areas in order to encourage new entrants, including small businesses, into the market. We will enable licensees utilizing bidding credits to partition and disaggregate, subject to unjust enrichment provisions.

In the *MO&O*, the Commission reconsiders its decision regarding license renewal. In the *Report and Order*, the Commission required a showing of substantial service 18 months prior to the license expiration date. The *MO&O*, however, directs 39 GHz licensees to comport with the recently implemented Part 1 rules governing license renewal provided in Section 1.949 of the Commission's Rules.[252] Section 1.949 requires all applications for renewal of station authorization to be filed no later than the license expiration date and no sooner than 90 days prior to the expiration date.[253] Finally, the Commission considered various petitions for reconsideration relating to the dismissal of pending 39 GHz applications and coordination requirements. The rule changes made herein are generally minor in nature and are focused on eliminating confusion and promoting the public interest.

B. Summary of Significant Issues Raised by Public Comments in Response to the Final Regulatory Flexibility Analysis

No petitions were filed in direct response to the FRFA. In general, the 12 petitions for reconsideration of the *Report and Order*, five opposition to petitions and two replies were not directly related to small entities. However, one petition raised several issues that might affect small entities concerning partitioning and disaggregation. In particular, this party requested that the Commission allow the combination of partitioning and disaggregation agreements and permit 39 GHz licensees to define their own boundaries for partitioning, as opposed to partitioning according to county lines or geo-political subdivisions.[254] Further, Winstar requested that licensees utilizing bidding credits be permitted to partition and disaggregate their spectrum, subject to the unjust enrichment provisions of the Commission.[255]

C. Description and Estimate of the Small Entities to Which Rules Will Apply

In the previous FRFA in this proceeding, we determined in detail the description and estimate of the following small entities subject to these rules from the FRFA: cellular licensees, Broadband PCS licensees, and

[252] 47 C.F.R. § 1.949; *see also* In the Matter of Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Report and Order*, FCC 98-23 (adopted September 17, 1998, released, October 21, 1998) (*ULS Report and Order*).

[253] 47 C.F.R. § 1.949.

[254] Winstar Petition at 4-7.

[255] Winstar Petition at 5-6.

Point-to-Point or Point-to-Multipoint licensees.[256] We include the following revision of the estimate for broadband PCS Licensees: The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[257] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[258] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[259] No small businesses within the SBA approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F.[260] Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules**.**

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

There are no general reporting or recordkeeping requirements proposed or adopted in this *MO&O.*

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The use of EAs as authorized service areas will better serve the public interest. Specifically, EAs will provide ample population coverage and allow small businesses the flexibility to provide a variety of services. Further, the use of EAs will promote an equitable distribution of licenses among various geographic areas and promote economic opportunity among a wide variety of applicants. Finally, those licensees seeking service areas smaller than EAs may partition or disaggregate.

The minor partitioning and disaggregation rule changes implemented herein will further facilitate market entry by small entities who may lack the financial resources for participation in the auctions, including small businesses. By permitting flexible partitioning and disaggregation, small businesses will be able to obtain licenses for smaller service areas and smaller amounts of spectrum tailored to meet the needs of their proposed service. Finally, allowing geographic partitioning of 39 GHz licenses defined by the parties along licensed service

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256 *Report and Order and Second NPRM*, 12 FCC Rcd at 18677-18679.

257 *See* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278, WT Docket No. 96-59, paras. 57-60. (released June 24, 1996), 61 FR 33859 (July 1, 1996), *see also* 47 C.F.R. § 24.720(b).

258 *See* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, FCC 96-278, WT Docket No. 96-59, para. 60. (released June 24, 1996), 61 FR 33859 (July 1, 1996).

259 *See, e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-5584 (1994).

260 FCC News, Broadband PCS, D, E, and F Block Auction Closes, No. 71744 (rel. Jan. 14, 1997).

areas, rather than only by county lines or geo-political subdivisions, will permit small businesses to enter the marketplace.

The license renewal procedures governed by Section 1.949 of the Commission's Rules better comport with the Commission's goal of promoting flexibility in system design and market development Further, this approach fosters uniformity across the wireless services.

The Commission will send a copy of the *MO&O*, including this SFRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[261] In addition, the Commission will send copy of the *MO&O*, including the SFRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *MO&O* and SFRFA (or summaries thereof) will be published in the Federal Register.[262]

Report to Congress: The Commission will send a copy of the *Memorandum Opinion and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Memorandum Opinion and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Memorandum Opinion and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

[261] *See* 5 U.S.C. § 801(a)(1)(A).

[262] *See* 5 U.S.C. § 604(b).

APPENDIX C

A. Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended: 47 U.S.C. Sections 154, 303: Implement, 5 U.S.C. Sections 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Revise paragraph (a)(9) to Section 1.2102 to read as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) * * *

(9) Economic Area licenses in the 38.6-40.0 GHz band.

* * * *

B. Part 101 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 101 FIXED MICROWAVE SERVICES

1. The authority citation for Part 101 continues to read as follows:

Authority: Sec. 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303, unless otherwise noted.

* * * *

2. Amend § 101.17 to revise paragraph (a) as follows:

§101.17 Performance Requirements for the 38.6-40.0 GHz frequency band.

(a) All 38.6-40.0 GHz band licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each EA or portion of an EA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

* * * *

3. Amend § 101.56 to revise paragraphs (a)(1), (b), (d)(1), (d)(2), (f), (g), (h), and (i) to read as follows:

§ 101.56 Partitioned Services Areas (PSAs) and Disaggregated Spectrum

(a)(1) The holder of an EA authorization to provide service pursuant to the competitive bidding process and any incumbent licensee of rectangular service areas in the 38.6-40.0 GHz band may enter into agreements with eligible parties to partition any portion of its service area as defined by the partitioner and partitionee. Alternatively, licensees may enter into agreements or contracts to disaggregate any portion of spectrum, provided acquired spectrum is disaggregated according to frequency pairs.

* * *

(b) The eligibility requirements applicable to EA authorization holders also apply to those individuals and entities seeking partitioned or disaggregated spectrum authorizations.

* * *

(d)(1) When any area within an EA becomes a partitioned service area, the remaining counties and geopolitical subdivision within that EA will be subsequently treated and classified as a partitioned service area.

(d)(2) At the time an EA is partitioned, the Commission shall cancel the EA authorization initially issued and issue a partitioned service area authorization to the former EA authorization holder.

* * *

(f) The duties and responsibilities imposed upon EA authorization holders in this part, apply to those licensees obtaining authorizations by partitioning or spectrum disaggregation.

(g) The build-out requirements for the partitioned service area or disaggregated spectrum shall be the same as applied to the EA authorization holder.

(h) The license term for the partitioned service area or disaggregated spectrum shall be the remainder of the period that would apply to the EA authorization holder.

(i) Licensees, except those using bidding credits in a competitive bidding procedure, shall have the authority to partition service areas or disaggregate spectrum.

* * * * *

[Amend § 101.63 to revise paragraph (a) to read as follows:

§ 101.63 Period of Construction; Certification of Completion of Construction

> Each Station, except in Local Multipoint Distribution Services and the 38.6-40.0 GHz band, authorized under this part must be in operation within 18 months from the initial date of grant.

* * *

4. Add new section § 101. 64 to read as follows:

§ 101.64 Service areas.

Service areas for 38.6-40.0 GHz service are Economic Areas (EAs) as defined below. EAs are delineated by the Regional Economic Analysis Division, Bureau of Economic Analysis, U.S. Department of Commerce. The Commerce Department organizes the 50 States and the District of Columbia into 172 EAs. Additionally, there are four EA-like areas: Guam and Northern Mariana Islands; Puerto Rico and the U.S. Virgin Islands; American Samoa. and the Gulf of Mexico. A total of 175 authorizations (excluding the Gulf of Mexico EA-like area) will be issued for each channel block in the 39 GHz band.
* * * *

5. Amend § 101.103 to revise paragraph(i)(i) to read as follows:

§ 101.103 Frequency coordination procedures.

* * * *

(i)(i) When the licensed facilities are to be operated in the band 38,600 MHz to 40,000 MHz and the facilities are located within 16 kilometers of the boundaries of an Economic Area, each licensee must complete the frequency coordination process of subsection 101.103(d) with respect to neighboring EA licensees and existing licensees within its EA service area that may be affected by its operation prior to initiating service. In addition to the technical parameters listed in subsection 101.103(d), the coordinating licensee must also provide potentially affected parties technical information related to its subchannelization plan and system geometry.

* * * *

6. Amend § 101.147 to revise paragraph (u)(2) to read as follows:

§ 101.147 Frequency assignments

* * *

(u)(2) Applications filed pursuant to Section 101.1206 shall identify any pre-existing rectangular service area authorizations that are located within, or are overlapping with, the EA for which the license is sought, and the provisions of Section 101.103 shall apply for purposes of frequency coordination between any authorized rectangular service area(s) and EA service area(s) that are geographically adjoining and overlapping.

* * * * *