

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

In the Matter of Applications of	)	
	)	
DCT Transmission, L.L.C.	)	File Nos. 9505285, 9505295, 9505297,
	)	9505298, 9505299, 9505304, 9506000,
To Provide 39 GHz point-to-Point Service in the	)	9506008, 9509656, 9509658, 9510294,
Areas of Florida; Des Moines, Iowa; San Juan,	)	9600055, 9600056, 9600066, 9600067,
Puerto Rico; Detroit, Michigan; Honolulu, Hawaii;	)	9600070, 9600073, and 9600076
West Palm Beach, Florida; York, Pennsylvania; St.	)	
Louis, Missouri; Jacksonville, Florida; Orlando,	)	
Florida; Indianapolis, Indiana; Spokane,	)	
Washington; Lakeland, Florida; Columbia, South	)	
Carolina; Melbourne, Florida; Modesto,	)	
California; Monterey, California; Kalmazoo,	)	
Michigan and Syracuse, New York	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** August 24, 2000

**Released:** September 8, 2000

By the Commission:

1. The Commission has before it an Application for Review filed by DCT Transmission, Inc. (DCT) on May 10, 2000. DCT requests reconsideration of several orders<sup>1</sup> by the Wireless Telecommunications Bureau (Bureau) Public Safety and Private Wireless Division (Division) dismissing the above-captioned applications for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.

2. We have analyzed the Application for Review and find that the Commission staff properly decided the matters raised. The Commission has established and affirmed a processing policy concerning 39 GHz channels that includes the dismissal of (a) applications that failed to meet the thirty-day public notice requirement as of November 13, 1995; (b) all new applications, major modification applications and amendments filed on or after November 13, 1995; and (c) applications whose mutual exclusivity was not resolved by December 15, 1995 and amendments resolving mutual exclusivity that were filed on or after

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<sup>1</sup> DCT Transmission, L.L.C., *Order on Reconsideration*, 15 FCC Rcd 10196 (WTB PSPWD 2000); DCT Transmission, L.L.C., *Order on Reconsideration*, 15 FCC Rcd 10227 (WTB PSPWD 2000); DCT Transmission, L.L.C., *Order on Reconsideration*, 15 FCC Rcd 10233 (WTB PSPWD 2000); DCT Transmission, L.L.C., *Order on Reconsideration*, 15 FCC Rcd 10235 (WTB PSPWD 2000); DCT Transmission, L.L.C., *Order on Reconsideration*, 15 FCC Rcd 10243 (WTB PSPWD 2000); and DCT Transmission, L.L.C., *Order on Reconsideration*, DA 00-825, (WTB PSPWD 2000).

December 15, 1995.<sup>2</sup> In addition, the Commission's Rules provide for the dismissal of mutually exclusive applications and late-filed competing applications.<sup>3</sup>

3. The above-referenced applications were dismissed because they violated our 39 GHz processing policy. Specifically, seventeen of the subject applications were filed more than sixty-days beyond the public notice date of another application for which there was a geographic overlap.<sup>4</sup> The remaining application was mutually exclusive with another application and the mutual exclusivity was not resolved by December 15, 1995.

4. DCT argues that the Division improperly relied on *William G. Bowles, Jr. d/b/a Mid Missouri Mobilefone (Bowles)*<sup>5</sup> in determining that its applications were untimely filed. DCT further argues that the Division's decisions are inconsistent with *Answer Fort Smith (Answer)*,<sup>6</sup> which allowed an applicant to amend its application after the sixty-day cutoff period.

5. We have repeatedly stated that *Bowles* clearly illustrates that a mutually exclusive application that is filed after the cut-off date established by the first-filed application is untimely and will not be accepted for filing.<sup>7</sup> Moreover, DCT's reliance on *Answer* is misplaced. In that case, Answer filed an application and mistakenly believed its application was mutually exclusive with an application that had been filed ten months earlier by Snider Communications Corporation (Snider).<sup>8</sup> Snider argued that the application should be dismissed as untimely.<sup>9</sup> However, when Snider's application was granted, Answer realized that its application did not geographically overlap Snider's application and Answer was allowed to amend its application to clarify that the proposed station would not cause harmful interference.<sup>10</sup> Because there was no mutual exclusivity, there was no applicable cut-off date. Therefore, the amendment filed by Answer did not resolve the untimeliness of the application because Answer's application was not actually untimely. Here, DCT does not dispute that its applications that were dismissed as untimely were mutually

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<sup>2</sup> See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18639-45 ¶¶ 83-97 (1997); *aff'd* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12440-51 ¶¶ 19-44 (1999) (*July 29 MO&O*).

<sup>3</sup> See 47 C.F.R. § 21.31 (b)(2)(i) (1995); 47 C.F.R. § 101.45(b)(2)(i) (disposition of mutually exclusive applications). See also 47 C.F.R. § 1.934 (dismissal of defective applications).

<sup>4</sup> FCC File Nos. 9505285, 9505295, 9505297, 9505298, 9505299, 9505304, 9506000, 9506008, 9509656, 9510294, 9600055, 9600056, 9600066, 9600067, 9600070, 9600073, and 9600076.

<sup>5</sup> William G. Bowles, Jr. d/b/a Mid Missouri Mobilefone, *Memorandum Opinion and Order*, 61 Rad. Reg. (P&F) 2d 20 (CCB 1986) (*Bowles*).

<sup>6</sup> Answer Fort Smith, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 2249 (MSD 1992) (*Answer*).

<sup>7</sup> See, e.g., DCT Transmission, L.L.C., *Memorandum Opinion and Order*, FCC 00-52 (rel. Feb. 22, 2000); Plaincom, Inc., *Memorandum Opinion and Order*, FCC 00-225 (rel. Jun. 28, 2000).

<sup>8</sup> *Answer*, 7 FCC Rcd at 2249 ¶ 2.

<sup>9</sup> *Id.* ¶ 1.

<sup>10</sup> *Id.* ¶ 2.

exclusive as originally filed.

6. DCT also argues that the Division's decision is unlawful because the Division's decisions reached in the 39 GHz rulemaking proceeding are currently under review in *Bachow Comm. et. al v. FCC*, No. 99-1345 (D.C. Cir. 1999). DCT believes that the rulemaking actions which serve as the basis for the Division's decision will be overturned by the U.S. Court of Appeals for the D.C. Circuit. The possibility, however, of reversal on appeal is not a basis for reversing the Division's decision.

7. In addition, DCT contends that our decision to dismiss mutually exclusive 39 GHz applications is arbitrary and capricious. DCT also contends that our decision not to accept engineering amendments during the last four years is an arbitrary and capricious violation of Section 309(j)(6)(E) of the Communications Act of 1934, as amended. Both of these arguments, however, were addressed and resolved in the *July 29 MO&O*.<sup>11</sup> Because we continue to support the rationale in the *July 29 MO&O*, we need not address them again.

8. Finally, DCT argues that the Division's dismissal of DCT's petition requesting reconsideration of our February 22, 2000 *Memorandum Opinion and Order (MO&O)*<sup>12</sup> as repetitious pursuant to Section 1.106(b)(3) of our Rules was unlawful because the Division is without delegated authority to act on a petition for reconsideration of a Commission-level decision.<sup>13</sup> However, Section 1.106(b)(3) of our Rules states that a "petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious."<sup>14</sup> DCT's petition for reconsideration did not rely on new facts or changed circumstances. Therefore, the Division was within the scope of its delegated authority to dismiss DCT's petition as repetitious.

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by DCT Transmission, L.L.C. on May 10, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>11</sup> *July 29 MO&O*, 14 FCC Rcd at 12441-45 ¶¶ 22-28.

<sup>12</sup> DCT Transmission, L.L.C., *Memorandum Opinion and Order*, FCC 00-52 (rel. Feb. 22, 2000).

<sup>13</sup> See DCT Transmission, L.L.C., *Order on Reconsideration*, 15 FCC Rcd 10233 (WTB PSPWD 2000).

<sup>14</sup> 47 C.F.R. § 1.106(b)(3). See *Global Cellular Communications, Inc., Order*, 13 FCC Rcd 2708 (1998).