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

In the Matter of	)	
	)	
DCT GREATER PHILADELPHIA, LLC	)	File Nos. 9505456, 9505449, 9505462
DCT TRANSMISSION, LLC	)	
	)	
Applications for 39 GHz Point-to-Point	)	
Microwave Radio Station Authorizations	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2001 **Released: March 5, 2001**

By the Commission:

I. INTRODUCTION

1. On August 11, 2000, DCT Greater Philadelphia, LLC, and DCT Transmission, LLC (DCT),[1] filed an application for review of a July 12, 2000, Wireless Telecommunications Bureau (Bureau) *Order on Reconsideration*,[2] which denied a petition requesting reconsideration of a December 8, 1999, Public Safety and Private Wireless Division (Division) *Order* dismissing the above-captioned applications for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.[3] For the reasons set forth below, we deny the application for review and affirm the Bureau's decision.

II. BACKGROUND

2. Prior to June 1994, DCT, along with Advanced Radio Technologies Corporation, American Cellular Network Corporation, American Personal Communications, Avant-Garde Telecommunications, Inc. (now WinStar Wireless Fiber Corp. (WinStar)), and Biztel, Inc., submitted mutually exclusive applications for new microwave facilities in the 39 GHz band. On June 3, 1994, these applicants entered into a Settlement Agreement intending to resolve the mutual exclusivity among their applications.[4]

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[1] On November 14, 1997, DCT amended its New York application to specify a new entity as the applicant, DCT Transmission, LLC. DCT amended its Philadelphia and Trenton applications on December 9, 1997, to specify a new entity as the applicant, DCT Greater Philadelphia, LLC. Hereinafter, we will refer to both entities as DCT.

[2] DCT Greater Philadelphia, LLC; DCT Transmission, LLC, *Order on Reconsideration*, 15 FCC Rcd 12626 (WTB 2000) (*Order on Reconsideration*).

[3] Advanced Radio Technologies, *et al., Order*, 14 FCC Rcd 20744 (WTB PSPWD 1999) (*Order*).

[4] Settlement Agreement Among 38.6-40.0 GHz Applicants (filed Jun. 3, 1994).

3. On November 13, 1995, the Wireless Telecommunications Bureau (Bureau) issued an *Order* which froze acceptance of new 39 GHz applications.[5] On December 15, 1995, the Commission expanded upon the Bureau *Order* 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 rule making proceeding.[6] On January 17, 1997, the Commission stated that the non-mutually exclusive portion of certain pending applications requesting multiple channels would be processed.[7] On November 3, 1997, the Commission, *inter alia*, dismissed without prejudice all pending 39 GHz applications that were: (a) mutually exclusive; and (b) applications that were not yet on public notice, or for which the 60-day cut-off period for filing competing applications had not been completed prior to November 13, 1995.[8] Subsequently, on July 29, 1999, the Commission affirmed its licensing approach, and amended its processing policy by deciding to process all 39 GHz applications that were placed on public notice at least thirty days prior to November 13, 1995.[9]

4. In the *Order*, the Division dismissed the Settlement Agreement because it determined that the mutual exclusivity among the applications that are the subject of the Settlement Agreement was not entirely resolved.[10] The Division also determined that certain of the subject applications were mutually exclusive with applications filed by entities who were not parties to the Settlement Agreement.[11] Accordingly, because the Settlement Agreement did not resolve mutual exclusivity among competing applications, the Division determined that approval of the Settlement Agreement would not further the public interest.[12]

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[5] Petition for Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, RM-8553, *Order*, 11 FCC Rcd 1156 (WTB 1995). The *Order* was issued in response to a petition for rule making, filed by the Telecommunications Industry Association (TIA) on September 9, 1994, which proposed a modification of the rules governing the 39 GHz band in order to increase the variety of possible uses on the band. TIA Petition for Rule Making, RM-8553 (filed Sep. 9, 1994); TIA Amendment to Petition for Rule Making, RM-8553 (filed May 4, 1995).

[6] 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, 4988-89 ¶ 122 (1995).

[7] 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).

[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, RM-8553; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PP Docket No. 93-253, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600, 18641-45 ¶¶ 88-97 (1997) (*Report and Order and Second NPRM*).

[9] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, RM-8553; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PP Docket No. 93-253, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12449 ¶¶ 35-36 (1999).

[10] *Order*, 14 FCC Rcd at 20746 ¶ 3.

[11] *Id.*

[12] *Id.*

5. The dismissal of the Settlement Agreement directly affected DCT's applications for authorization in the areas of Philadelphia, Pennsylvania[13] and Trenton, New Jersey.[14] On March 4, 1994, WinStar filed an application for 39 GHz authorization on Channels 2A/B, 3A/B, and 12A/B in Philadelphia, Pennsylvania[15] which was placed on public notice on July 6, 1994.[16] On April 12, 1994, DCT submitted applications for authorization in the area of Philadelphia, Pennsylvania, on Channels 2A/B, 3A/B, 4A/B, and 13A/B,[17] and in the area of Trenton, New Jersey, on Channels 2A/B, 3A/B, 4A/B, and 6A/B.[18] As noted, on June 3, 1994, the Settlement Agreement was signed. On June 22, 1994, Winstar submitted a minor amendment requesting withdrawal of its Philadelphia application as to Channels 2A/B, 3A/B and 12A/B, in connection with the Settlement Agreement. Although Winstar's Philadelphia application was dismissed on May 15, 1995, it was subsequently reinstated *nunc pro tunc* because Winstar demonstrated that the withdrawal was contingent upon Commision approval of the Settlement Agreement.[19] Similarly, on June 22, 1994, DCT filed an amendment, which was conditioned on Commission acceptance of the Settlement Agreement, to remove Channels 4A/B and 6A/B from its application in the Trenton market. This amendment was not accepted as a result of the dismissal of the Settlement Agreement. On October 21, 1994, DCT amended its Trenton and Philadelphia applications to request only Channel 2A/B in each market.[20] The service areas proposed in Winstar's Philadelphia application geographically overlapped the services areas proposed in DCT's Philadelphia and Trenton applications. Therefore, the Division dismissed DCT's Philadelphia and Trenton applications and WinStar's Philadelphia application as to Channel 2A/B because they were mutually exclusive.[21]

6. On March 4, 1994, WinStar filed an application for authorization for Channels 2A/B, 5A/B, and 12A/B in New York, New York.[22] On April 12, 1994, DCT submitted an application for authorization on Channels 4A/B and 13A/B in New York, New York.[23] On October 21, 1994, DCT filed

[13] FCC File No. 9405449.

[14] FCC File No. 9405462.

[15] FCC File No. 9404184.

[16] *Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1090 (rel. Jul. 6, 1994).

[17] *See* FCC File No. 9405449.

[18] *See* FCC File No. 9405462; *see Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1089 (rel. Jun. 29, 1994).

[19] *See Order*, 14 FCC Rcd at 20747 ¶ 5.

[20] *Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1117 (rel. Jan. 11, 1995).

[21] *Order*, 14 FCC Rcd at 20751-52 ¶ 9.

[22] FCC File No. 9404182; *see Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1090 (rel. Jul. 6, 1994).

[23] FCC File No. 9405456.

an amendment to its New York application to request only Channel 2A/B.[24] Because DCT's original application did not contain a request for Channel 2A/B, it was deemed that DCT's October 21, 1994, amendment requesting Channel 2A/B was a major amendment pursuant to Sections 101.29(c)(1)(i) and 101.45(c) of the Commission's Rules.[25] Thus, DCT's application received a new filing date of October 21, 1994,[26] which was more than sixty days after the July 6, 1994, public notice announcing the acceptance of WinStar's application for filing. Accordingly, in the *Order*, the Division dismissed DCT's late-filed competing New York application pursuant to Section 101.45(e) of the Commission's Rules.[27]

7. On January 7, 2000, DCT filed a petition requesting reconsideration of the Division's decision to reject the Settlement Agreement and concurrently dismiss the subject applications.[28] On July 12, 2000, the Bureau denied DCT's petition for reconsideration.[29] On August 11, 2000, DCT filed the subject application for review.[30]

III. DISCUSSION

8. *Philadelphia and Trenton Applications.* DCT argues that Bureau ignored Commission precedent by rejecting the Settlement Agreement.[31] In the *Order on Reconsideration*, the Bureau stated that joint agreements are evaluated on a case-by-case basis.[32] DCT admits "the Bureau should engage in case-by-case analysis in certain adjudicative proceedings."[33] DCT argues, however, that even when the Bureau evaluates agreements on a case-by-case basis, it has an obligation to (1) act rationally and (2) treat similar applicants in a similar manner.[34] DCT states that the failure to adhere to earlier precedent by rejecting the Settlement Agreement indicates that there was no rational basis for the dismissal.[35]

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[24] *Public Notice,* Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1117 (rel. Jan. 11, 1995).

[25] 47 C.F.R. §§ 101.29(c)(1)(i), 101.45(c) (formerly 47 C.F.R. §§ 22.131 and 22.122, respectively).

[26] 47 C.F.R. §§ 101.37(1) (formerly 47 C.F.R. §§ 22.127).

[27] *Order*, 14 FCC Rcd at 20750 ¶ 8.

[28] *See* DCT Petition for Reconsideration (filed Jan. 7, 2000).

[29] *See Order on Reconsideration*, 15 FCC Rcd 12626 (WTB rel. Jul. 12, 2000)

[30] *See* DCT Application for Review (filed Aug. 11, 2000).

[31] DCT Application for Review at 5.

[32] *See Order on Reconsideration*, 15 FCC Rcd at 12630 ¶ 9 (citing Formulation of policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, *Memorandum Opinion and Order*, 5 FCC Rcd 3902, 3904 ¶ 14 (1990) (citing Western Connecticut Broadcasting Co., *Memorandum Opinion and Order*, 88 FCC 2d 1492 (1982) (settlements in comparative renewal proceedings would be considered on a case-by-case basis))).

[33] DCT Application for Review at 5.

[34] *Id.*

[35] *Id.*

9. We agree that the Bureau has a duty to act rationally and treat similar applicants in a similar manner. We believe the Bureau met that duty in this case. DCT does not cite any case where a Settlement Agreement was approved that failed to resolve mutual exclusivity between the parties. The cases DCT cited in its petition for reconsideration,[36] *LA Star Cellular Telephone Company (LA Star)*[37] and *Aurio A. Matos* (*Matos*),[38] do not involve the settlement agreements of applicants for service in the 39 GHz band. Moreover, while the settlement agreements in *La Star* and *Matos* offered clear public interest benefits, the Settlement Agreement, as submitted to us, would not have any public interest benefits because it would not resolve the mutual exclusivity between the parties. In *LA Star*, the Commission approved a settlement agreement to resolve a cellular licensing dispute conditioned on the deletion of an unlawful consent decree.[39] The settlement agreement had the public interest benefit of ending protracted litigation.[40] In *Matos*, the Review Board approved a settlement agreement it had previously rejected after the parties deleted certain provisions that were inconsistent with the Commission's Rules.[41] That settlement agreement ended a hearing proceeding and allowed the initiation of new broadcast service.[42]

10. Here, the Division dismissed the Settlement Agreement because it determined that the public interest would not be served given the Settlement Agreement's failure to eliminate the mutual exclusivity that existed among pending applications. The Settlement Agreement represented a series of complex and intertwined compromises made by six different parties and we believe that, unlike the agreements in *LA Star* and *Matos*, the problems with the Settlement Agreement could not be resolved by simply deleting a certain provision. Moreover, the parties knew, or should have known, that the Settlement Agreement did not entirely resolve the mutual exclusivity that existed among pending applications.[43] As such, the parties had approximately eighteen months prior to December 15, 1995 (when the Commission suspended the filing of amendments to 39 GHz applications[44]) to resolve the mutual exclusivity by revising the Settlement Agreement. Had DCT and the other parties revised the Settlement Agreement and resolved the mutual exclusivity, we would have accepted such a revised agreement, consistent with the rationale in *LA Star* and *Matos*.[45] They did not, however, take advantage of that opportunity. Accordingly, we conclude that the staff's dismissal of the Settlement Agreement was proper and consistent with precedent.

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[36] *See* DCT Petition for Reconsideration at 7.

[37] *See* LA Star Cellular Telephone Company, *Memorandum Opinion and Order*, 11 FCC Rcd 1059 (1996) (*LA Star*).

[38] Aurio A. Matos, *Memorandum Opinion and Order*, 10 FCC Rcd 4329 (Rev. Bd. 1995).

[39] *See LA Star*, 10 FCC Rcd at 1061 ¶ 16.

[40] *See La Star*, 10 FCC Rcd at 1060 ¶ 13.

[41] *See Matos*, 10 FCC Rcd at 4330 ¶ 9.

[42] *See Matos*, 10 FCC Rcd at 4331 ¶ 14.

[43] See *Order*, 14 FCC Rcd at 20746 ¶ 3.

[44] 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, 4989 ¶ 124 (1995).

[45] DCT also suggests that it was unfair that the Division did not reject the Settlement Agreement prior to December 15, 1995, thus providing the parties with notice that the agreement needed to be revised. DCT Application for (continued….)

11. DCT also argues that the Division's dismissal of the Settlement Agreement violates Section 309(j)(6)(E) of the Communications Act of 1934, as amended (Communications Act),[46] which states that nothing in Section 309(j) of the Act shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings."[47] Section 309(j)(6)(E), as previously interpreted, requires an attempt to avoid mutual exclusivity by the methods prescribed therein only when it would further the public interest goals of Section 309(j)(3) of the Communications Act.[48] DCT argues that the Bureau never explained why it was in the public interest to deny the Settlement Agreement.[49] It also contends that the Bureau ignored Congress' concern that the Commission may minimize its obligation to seek engineering solutions, negotiations, or other tools to avoid mutual exclusivity.[50]

12. We disagree. First, both the Bureau and the Division stated that the Settlement Agreement was dismissed because the public interest would not be served given the Settlement Agreement's failure to eliminate the mutual exclusivity that existed among pending applications.[51] The Division and Bureau also provided that the Settlement Agreement would not serve the public interest because mutual exclusivity existed between the subject applications and applications filed by entities who were not parties to the Settlement Agreement.[52] Second, we believe that DCT and the applicants were provided ample opportunity

(Continued from previous page)

Review at 6 n. 8. We disagree. It is the parties' responsibility to negotiate and to proffer an acceptable settlement agreement.

[46] DCT Application for Review at 5-6.

[47] 47 U.S.C. § 309(j)(6)(E).

[48] *See* Implementation of Section 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, __ FCC Rcd __, FCC 00-403 ¶ 21 (rel. Nov. 20, 2000); *see also* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PR Docket 93-253, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12441-12445 ¶¶ 22-28 (1999); 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 Benkelman Telephone Co., et al v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) (*citing DIRECTV 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).

[49] DCT Application for Review at 6.

[50] *Id.*

[51] *See Order on Reconsideration*, 15 FCC Rcd at 12627 ¶ 4 (citing *Order*, 14 FCC Rcd at 20746 ¶ 3).

[52] *Id.*

to resolve the mutual exclusivity through negotiations, in accordance with Congress' intentions, as evidenced by the proposed Settlement Agreement. However, as previously stated, the Settlement Agreement presented to the Commission failed to resolve the mutual exclusivity and was properly dismissed. Thus, we believe that this action and our 39 GHz licensing policy are consistent with Section 309(j)(6)(E) of the Communications Act.[53]

13. *New York Application.* As indicated earlier, on October 21, 1994, DCT filed an amendment to its New York application in order to request only Channel 2A/B.[54] Because DCT's original application did not contain a request for Channel 2A/B, it was deemed that its October 21, 1994, amendment requesting Channel 2A/B was a major amendment pursuant to Sections 101.29(c)(1)(i) and 101.45(c) of the Commission's Rules.[55] Thus, DCT's application received a new filing date and was dismissed as a late-filed competing application pursuant to Section 101.45(e) of the Commission's Rules.[56] DCT states that this application should not have been dismissed because the October 21, 1994, amendment requesting a previously unproposed channel pair was a typographical error.[57] Pursuant to the Commission's Rules, amendments merely correcting typographical, transcription, or similar clerical errors, which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create any new frequency conflicts, are not to be considered newly filed applications.[58]

14. The Bureau concluded that there was no unmistakable evidence within the four-corners of the application, which would have caused the Division to conclude that the request for a new channel pair in the amendment of October 21, 1994, was a typographical error.[59] DCT argues that the following phrase: "from among the channels sought by DCT's original application," which was found on the cover letter attached to the application, is unmistakable evidence that the request for Channel 2A/B in the amendment application was a typographical error.[60] We disagree. Even if we consider the cover letter part of the application, the language cited by DCT in the cover letter is ambiguous and does not clarify which channel DCT sought. Even now, in its application for review, DCT has not specified which channel it intended to apply for in the amendment.[61] We believe the brief phrase from the cover letter is inconclusive evidence that the reference to Channel 2A/B in the amendment was a typographical error. Furthermore, DCT has not provided any additional evidence to support its allegations. Therefore, we find that there was no unmistakable evidence within the four-corners of the application which would have caused the Division to

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[53] *See Bachow Communications, Inc., et al. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

[54] *Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1117 (rel. Jan. 11, 1995).

[55] 47 C.F.R. §§ 101.29(c)(1)(i), 101.45(c) (formerly 47 C.F.R. §§ 22.131 and 22.122, respectively).

[56] *Order*, 14 FCC Rcd at 20750 ¶ 8, 47 C.F.R. § 101.45(e).

[57] *See* DCT Application for Review at 7-8.

[58] 47 C.F.R. §§ 101.45(f); 101.45(f)(5).

[59] *See* Order on Reconsideration, 15 FCC Rcd at 12632 ¶ 13 (citing Application of Plaincom, Inc., *Order on Reconsideration*, 14 FCC Rcd 17628, 17630 ¶ 5 (1999)).

[60] See Application for Review at 7.

[61] See Application for Review.

conclude that the request for a new channel pair in the amendment of October 21, 1994, was a typographical error.

15. Finally DCT, argues that if we consider the amendment to be major, the Commission should permit it to withdraw the amendment to cure the mistake.[62] Citing Golden Shores Broadcasting, Inc. (*Golden Shores*),[63] DCT contends that the Commission should permit DCT to withdraw its unintentional major amendment.[64] DCT's reliance on *Golden Shores* is misplaced. In *Golden Shores*, the Commission stated that an applicant is entitled to remove its amendment "at the processing stage."[65] DCT waited until after the application was dismissed before it requested that the amendment be returned. Once an application is dismissed, it is past "the processing stage." Therefore, DCT missed its opportunity to withdraw the amendment. In addition, DCT had more than a year to withdraw the amendment, correct the error, and resubmit the amendment before the Commission suspended the acceptance of amendments on December 15, 1995, but failed to do so. Accordingly, we affirm the Division's decision to dismiss DCT's New York application.

IV. ORDERING CLAUSE

16. 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 of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by DCT Greater Philadelphia, LLC and DCT Transmission, LLC on August 11, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[62] *Id.* at 8.

[63] Golden Shores Broadcasting, Inc., *Memorandum Opinion and Order*, 2 FCC Rcd 4743 (1987).

[64] *Id.*

[65] *Id.* at 4746 ¶ 8.