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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Policies and Rules for Licensing
Follow 800 MHz Specialized Mobile Radio
Spectrum Through A Competitive Bidding
Process

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RM-7985

ORIGINAL
FILE

COMMENTS

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July 17, 1992

No. of Copies rec'd 049
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EXECUTIVE SUMMARY

While Express is not prepared at this juncture to fully endorse Fleet Call's proposal to permit the licensing of up to 105 channels per market in "innovator blocks", Express certainly agrees with Fleet Call that there is a need to foster the more productive use of the 800 MHz SMR channels by permitting prospective system operators ready access to more than just five channels. Thus, although Express believes that the public might be better served by awarding multiple blocks of channels in each market rather than just a single block as Fleet Call proposes, Express certainly agrees that the five-channel assignment limitation of Section 90.621 is not serving the public well and should be revised to permit the licensing of more substantial blocks of spectrum.

Where Express parts company with Fleet Call, however, is with respect to the rules and policies that should govern the licensing of these larger spectrum allocations. Express opposes Fleet Call's proposal that the Commission request authority from Congress to award 800 MHz channels through auctions. Admittedly, Express agrees with Fleet Call that the Commission's present lottery system is an inefficient mechanism for awarding licenses. However, unlike Fleet Call, Express believes that it is possible for the Commission to implement lottery rules that will preclude speculation, while preserving opportunities for smaller entrepreneurs and minorities who deserve an opportunity to participate on an equal basis in the allocation of radio spectrum.

Therefore, Express proposes that future licenses for multiple channel blocks at 800 MHz be awarded based on a reformed lottery system. Under Express' proposal, the

Commission would utilize higher filing fees, heightened entry criteria (including firm financial requirements), tough construction schedules, and restrictions on trafficking (including transfer fees paid to the government) to deter speculative applications.

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COMMENTS

Express Communications, Inc. ("Express"),¹ by its attorneys, hereby submits its initial comments in response to the April 22, 1992 Petition for Rulemaking of Fleet Call, Inc. ("Fleet Call").

I. INTRODUCTION

With its Petition, Fleet Call makes a persuasive argument that the Commission should address the substantial number of 800 MHz trunked Specialized Mobile Radio ("SMR") channels that have laid fallow for more than ten years. In an era marked by an increasing demand for mobile communications services and precious little spectrum to accommodate that demand, the Commission cannot abide fallow spectrum that could be put to productive use. While Express is not prepared at this juncture to fully endorse Fleet Call's proposal to permit the licensing of up to 105 channels per market in "innovator blocks", Express certainly agrees with Fleet Call that there is a need to foster the more productive use of the 800 MHz SMR channels by permitting

¹Express provides a variety of consulting and management services to entrepreneurial investors in the communications industry. As such, Express and its clients have a vital interest in the subject matter of Fleet Call's Petition for Rulemaking -- the manner in which the Commission allocates spectrum for communications services.

prospective system operators ready access to more than just five channels. Thus, although Express believes that the public might be better served by awarding multiple blocks of channels in each market rather than just a single block as Fleet Call proposes,² Express certainly agrees that the five-channel assignment limitation of Section 90.621 is not serving the public well and should be revised to permit the licensing of more substantial blocks of spectrum.

Where Express parts company with Fleet Call, however, is with respect to the rules and policies that should govern the licensing of these larger spectrum allocations. Simply stated, Express opposes Fleet Call's proposal that the Commission request authority from Congress to award 800 MHz channels through auctions. Make no mistake, Express agrees with Fleet Call that the Commission's present lottery system is an inefficient mechanism for awarding licenses. Too often, the regulatory environment associated with lottery services has led to rampant speculation in applications.³ However, unlike Fleet Call, Express believes that it is possible for the Commission to

²Fleet Call claims that awarding a single "innovator block" would not insulate the recipient from competition because additional channels would remain available for licensing to others. See Fleet Call Petition, at 20 n. 36. However, those channels would continue to be licensed in five-channel blocks -- blocks which Fleet Call has demonstrated to be too small to be of utility. Thus, it would appear that true competition can best be assured by awarding fallow spectrum in at least two blocks of more than five channels each.

³See, e.g. *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 Services*, 7 FCC Rcd 898 (1992); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992).

implement lottery rules that will preclude speculation, while preserving opportunities for smaller entrepreneurs and minorities who deserve an opportunity to participate on an equal basis in the allocation of radio spectrum.

II. DISCUSSION

In Express' view, it is not lotteries *per se* that promote the filing of speculative applications. Rather, history has shown that it is the totality of the regulatory environment surrounding a service that dictates whether speculative applications will be filed. Where entry requirements have been high and the prospects for a quick profit low, speculative applications have not been a major problem. Indeed, the *Memorandum Opinion and Order* released by the Commission just yesterday in PR Docket No. 89-552 regarding the licensing of nationwide 220-222 MHz systems is proof positive that the Commission can combine high filing fees, strict entry criteria, financial requirements, construction deadlines and restrictions on license assignments to minimize speculative applications and assure the licensing of qualified entities.⁴ By crafting a regulatory framework for the licensing of multiple blocks of channels in 800 MHz band that is uncondusive to speculative applications, the Commission can retain all of the benefits of a lottery system, without either the administrative burdens associated with speculative applications or the problems identified with auctions.

⁴*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 Services*, FCC 92-261, PR Docket No. 89-552, at 5-9 (rel. July 16, 1992)[hereinafter cited as "220-222 MHz MO&O"].

A. Auctions Are Not A Tonic For The Lottery System's Ills.

Will auctions prove to be the panacea for the licensing delays brought on by speculative applications? Express doubts it. Express believes that the only type of auction which might conceivably lead to the more rapid introduction of service is the New Zealand model; an "all cash up front" bidding system. However, even most auction proponents recognize that this approach is unpalatable politically in America since medium-sized firms, rural and local communications companies, small entrepreneurs and minorities effectively would be precluded from applying for licenses. As Commission Duggan recently put it:

[u]nder any new system, we need to give new entrants and smaller players a fair and full chance to compete. I can appreciate how difficult it will be to craft devices to accomplish this goal, but that should not prevent us from trying. Allowing installment payments in some form, perhaps . . . might encourage greater participation from a wide range of applicants.⁵

However, allowing deferred financing bids to be considered as suggested by Commission Duggan would exacerbate rather than resolve the problems of undue delay, litigation and speculation that have led to the current frustration with random selection as a vehicle for choosing licensees. The acceptance of deferred financing bids would necessarily result in a new comparative hearing process for the Commission to

⁵"Spectrum Licensing In The '90s: Can We Find A Way?", Remarks of Ervin S. Duggan before the American Mobile Telecommunications Association SMR Leadership Conference, at 7-8 (June 24, 1992)[hereinafter cited as "Spectrum Licensing In The '90s"].

determine which applicant's bid is "best". It is a virtual certainty that bids will differ in the timing and method of payment. A well-financed Bell Operating Company or other established communications company (such as Fleet Call) may offer to pay a specified amount immediately to acquire the licenses whereas other sincere yet less well-financed applicants may have no choice but to fund their bids out of operating revenues over a number of years. The combinations imaginable for the funding of bids are endless. It is inevitable that the Commission will face a difficult, time-consuming task in determining which is the "best" offer and in evaluating the present and future monetary values of those bids.

Additionally, due to the subjective decisions the Commission will be forced to make in awarding licenses, this process will invite petitions to deny from disgruntled "lower" bidders and endless litigation among applicants, many of whom almost by definition would be well-financed and determined to obtain a particular license. The primary purpose of auctioning spectrum -- expediting service to the public -- will be undercut if post-auction adversarial proceedings cause delays in making spectrum available to applicants who can begin rapid deployment of service.

B. A Reformed Lottery System Can Deter Speculative Applications And Raise Funds, Without The Problems Associated With Auctions.

Express has previously submitted written testimony to the Senate Subcommittee on Communications for inclusion in the record of a hearing on the use of auctions to award communications authorizations, in which Express sets forth the public

interest benefits of an alternative -- a reformed random selection process that employs higher filing fees, additional entry criteria, minimum holding periods and transfer fees to deter speculation while raising revenues.⁶ Attached as Exhibit A is a copy of that testimony. In recent weeks, Commissioners Quello and Duggan have each publicly called for the Commission to consider alternatives to auctions to deter the filing of speculative applications.⁷ In this regard, Express encourages the Commission to consider applying Express' proposed reforms to the random selection system in awarding multiple channel blocks in the 800 MHz band.

Express believes that adoption of its proposals would deter, if not eliminate, speculative applications and thus reduce the cost of spectrum assignment both in terms of the time necessary to allocate licenses and the amount of money the Commission must spend on administering the application process. By implementing stricter standards, most of the problems associated with the lotteries previously conducted by the Commission to allocate communications licenses would be resolved. Taking these actions also could

⁶Recently, in response to the invitation of the staffs of Senators Inouye and Stevens, Express provided its views on the "Spectrum Competitive Bidding Amendment" to S. 218, the Emerging Telecommunications Technologies Act of 1991 and proposed an alternative under which the FCC would employ this reformed random selection system to address the problems driving the push towards auctions. See "Company Offers Unique Alternative To Auctioning Drafts Floated In Senate, *Washington Telecom Week*, at 3-4 (July 3, 1992); "Express Communications Has Proposed Alternative", *Communications Daily*, at 5 (June 16, 1992).

⁷Spectrum Licensing In The '90s, *supra* note 5; 220-222 MHz MO&O, *supra* note 4, at 14 (Separate Statement of Comm. Quello).

raise significantly more funds than would auctions. Additionally, the government would participate financially in every sales transaction, not just the initial allocation.

Express believes that there are four key elements that could be adopted by the Commission in order to deter speculative 800 MHz SMR applications under a lottery system. First, the filing fee for multiple channel block 800 MHz SMR applications should be set at a sufficiently high level as to deter speculative filings.⁸ The Commission's recent experience in the 220-222 MHz band is illustrative of how effective filing fees can be in deterring speculative filings. While approximately 57,000 applications were filed for the local 220-222 MHz authorizations which required only a \$35.00 filing fee, just 174 applications were submitted for the nationwide authorizations which required filing fees of \$12,250.00. Set the filing fees for 800 MHz SMR authorizations high enough, Express submits, and speculation will be deterred.

Second, the Commission should implement stricter entry requirements than are presently applied under Part 90 to 800 MHz SMR applications to deter speculative applications. Requiring the submission of detailed engineering information regarding the design and construction of the proposed system will undoubtedly deter speculative applications. Express believes each applicant for a 800 MHz SMR authorization should

⁸Express recognizes that under Section 8 of the Communications Act of 1934, as amended, (the "Communications Act") the Commission is constrained in its ability to set filing fees above certain Congressionally established levels. 47 U.S.C. § 158. Express urges the Commission, if necessary, to request that Congress amend the Communications Act to afford it greater flexibility to establish filing fees designed to deter speculative applications.

be required to include detailed system engineering in its applications and not be permitted to deviate substantially from its proposal except to demonstrably improve service to the public.

In Express' view, the imposition of strict financial entry requirements will be the key to deterring speculative multiple channel block 800 MHz SMR applications. The Commission should require every applicant for a multiple channel block 800 MHz SMR authorization to include with its application a business plan setting forth the applicant's plans for construction, management and operation of the proposed system, including plans for marketing, a construction timetable and *pro forma* financial projections. Each application should also be accompanied by a firm financial commitment consistent with the applicant's *pro forma* financial projections and satisfying requirements similar to those set forth in Section 22.917(f) of the Commission's Rules - - requirements adopted to encourage only *bona fide* applicants to file applications.⁹

Third, the Commission should do as it has in other services of late and impose strict construction timetables on licensees in order to assure diligent efforts to introduce service to the public and deter warehousing by speculators. The timetable should require that each licensee execute a non-cancelable equipment purchase order within 90 days of the authorization grant date and have its facilities constructed in eight

⁹*See Amendment of Part 22 of the Commission's Rules to provide for the filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules*, 6 FCC Rcd 6185, 6211-12 (1991)[hereinafter cited as "*Cellular Unserved Order*"].

months, or forfeit its license. Extensions of time should only be grant if the licensee shows that the failure to complete construction is due to causes beyond its control.¹⁰

Finally, but perhaps most importantly, the Commission should impose significant limitations on the assignment of license and the transfer of interests in licensees. Express proposes that a licensee of a multiple channel block 800 SMR facility be required: (i) to construct and operate the system for a minimum of one year before any sale, transfer or other disposition of greater than a 25% interest can occur; and (ii) to construct and operate the system for a minimum of five years before a sale, transfer or disposition of 50.01% or more can occur. Express proposes that these restrictions apply not only to actual transactions, but also exclude the execution of an agreement (such as an option) prior to the expiration of the minimum operating period to effect such sale or transfer even if the closing of the sale or transfer would not occur until following the minimum operating period.¹¹

As part of its proposal to reform the lottery process, Express believes that the Commission should request from Congress authority to impose a transfer fee, calculated as a percentage of the gross sales price, upon each assignment of a license or transfer of control of a licensee.¹² This percentage would be greater in the earlier years

¹⁰*See, e.g. id.*, at 6224.

¹¹*See id.* at 6223.

¹²Express believes these fees should be paid to a newly-created communications research and development agency. Such an approach will not only improve the state-of-
(continued...)

to deter speculative applications and purchases of licenses. Upon each resale of a license, the "clock" would begin again with regard to the applicable fees. If the Commission adopts the minimum operating requirements Express proposes in the preceding paragraph, Express believes the transfer fees should be calculated as follows:

Year Following Expiration of Minimum Operating Requirement	% of Gross Sales Price Paid to Govt.
1	10%
2	9%
3	8%
4	7%
5	6%
6	5%
7	4%
8	3%
9	2%
10	1%

¹²(...continued)

the-art in communications, but assist United States telecommunications companies compete more effectively in the global marketplace.

If, however, the Commission rejects the proposed restrictions on trafficking, Express suggests that the transfer fees be calculated as follows:

Year Following Construction	% of Gross Sales Price Paid to Govt.
1	25%
2	21%
3	18%
4	15%
5	12%
6	10%
7	7%
8	5%
9	2%
10	0%

Since, as the Commission is aware, the bulk of those filing speculative applications are attempting to derive a profit through quick resale rather than through operation, imposition of a sliding scale of transfer fees along the lines proposed by Express should substantially reduce the incidence of speculation.

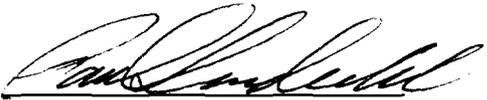
III. CONCLUSION

In short, although Fleet Call should be applauded for its efforts to bring about productive use of fallow 800 MHz SMR spectrum, Fleet Call's proposal to employ auctions is flawed. Before the Commission considers seeking authority from Congress to utilize auctions -- a selection vehicle that is rife with potential problems -- the

Commission should seriously consider and seek public comment upon Express' plan for reforming the lottery system to deter speculation.

Respectfully submitted,

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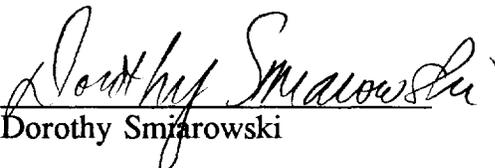
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July 17, 1992

CERTIFICATE OF SERVICE

I, Dorothy Smiarowski, hereby certify that the foregoing Comments were served this 17th day of July, 1992 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

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**July 1992 Comments of
Express Communications, Inc.**

Before the Senate Subcommittee on Communications

**Regarding the Adoption of a
Dual Track Test Providing for the
Allocation of Radio Spectrum by Trial Auctions
as Compared to the Adoption
of a Reformed Random Selection Allocation Process**

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JULY 1992 COMMENTS
OF

EXPRESS COMMUNICATIONS, INC.

BEFORE THE SENATE SUBCOMMITTEE ON COMMUNICATIONS

REGARDING THE ADOPTION OF A DUAL TRACK TEST
PROVIDING FOR THE ALLOCATION OF RADIO SPECTRUM BY
TRIAL AUCTIONS AS COMPARED TO
THE ADOPTION OF A REFORMED
RANDOM SELECTION ALLOCATION PROCESS

Preface. We appreciate the opportunity to present additional written testimony to the Senate Committee on Commerce, Science and Transportation through its Subcommittee on Communications (the "Committee"). Express Communications, Inc. ("Express") enthusiastically supports Senator Inouye's bill, S. 218, which provides for the reallocation to public use of at least 200 MHz of government-controlled spectrum. We feel that the Committee is well aware of the positive benefits accruing to the public and the nation by virtue of this proposed "privatization" of spectrum.

Our testimony, therefore, will concentrate on addressing the issues regarding the amendment of the Communications Act of 1934 to allow for competitive bidding as proposed in Senator Stevens' and Senator Inouye's amendment of S. 218. Express proposes a unique dual track test comparing the results of the allocation of radio spectrum to the results obtained from implementing a significantly reformed random selection allocation process as proposed by Express in October 1991 and as set forth below.

INTRODUCTION

Express' Participation. Since last fall, Express Communications, Inc. has played an active role in providing the Senate Communications Subcommittee with comments on its various versions of S. 218 regarding the reassignment of 200 MHz of government spectrum and how this spectrum should be reallocated, whether by auction as in the most recently proposed amendment of Senators' Stevens and Inouye, by the FCC's current lottery process or by some other method.

Express does not advocate continuation of the random selection allocation process as it is currently conducted by the FCC. In our testimony, we are proposing significant and needed changes to this process. Instead of the provision for auctions of spectrum set forth in the amendment to S. 218, Express favors the adoption of a rational random selection allocation process limited to applicants with both the demonstrated capability and intent to operate any awarded spectrum to realize its fullest and best use. Although we believe our proposal is the superior approach, we encourage the Senate to further amend its trial auction provisions to S. 218 to call for a comparison test of auctions and a reformed random selection allocation process incorporating our proposals.

Express clients are serious, yet usually small entities, local or regional communications concerns, and entrepreneurs who wish to continue to be afforded the opportunity to participate on an equal basis in the allocation of radio spectrum. We believe that it is important for the Committee to remember that communications companies such as MCI, McCaw Cellular, Cellular Communications, Inc., Vanguard Cellular, Cellular, Inc., and Metro Mobile Communications, among others, would have been excluded from the communications industry if the competitive bidding process proposed by Senator Stevens' amendment to S. 218 had been in effect since 1983, instead of the random selection allocation process.

Express' Concerns. Express and its clients are concerned about the increasing numbers of speculative applications filed with the FCC for several reasons. First, such applications unduly burden the FCC's limited resources and greatly slow the process of spectrum allocation and commercial development of new communications technologies. Second, many licenses are awarded to applicants who lack the financial and technical resources and the desire to develop the spectrum. These licenses either have been resold to companies or individuals, in some cases for considerable profit or, in the absence of buyers, warehoused or forfeited and returned to the FCC for reallocation. In the case of certain frequency allocations, we are aware of numerous licenses that have been warehoused for several years until a buyer comes forward. Finally, due to the atmosphere created by the FCC's present rules, the random selection process for certain communications services not only dilutes the chances of capable sincere entrepreneurs and small companies of being awarded a license but also, in many cases, raises the purchase price of licenses in the secondary marketplace to a level which can be afforded only by the largest and most well-financed communications firms.

Express agrees with Senator Stevens and others that "private auctions" already occur. Where we disagree with Senator Stevens and the proponents of spectrum auctions is how best to address

the problems with the present spectrum licensing process and to achieve what we believe are shared policy goals. We strongly oppose the institution of auctions as a means to remedy the current abuses of the lottery process and as a means to provide additional revenues to the Treasury. Instead, we offer other alternatives that would address these concerns in a much more equitable fashion than the competitive bidding proposal.

COMMON GOALS

Express sets forth below what we perceive to be the common goals and interests of all parties in this process. Indeed, Express believes these are worthy and attainable goals and we appreciate the opportunity to address each area and to propose viable solutions to the Committee. Express intends to set forth our common goals and then outline its alternative proposals to auctions. We will then proceed with analyses of how each goal can be better met through our proposed alternative procedures than through the implementation of a competitive bidding system.

It would appear that both auction proponents and opponents have the following goals in mind for the allocation of spectrum:

- I) To reduce the cost of spectrum assignment, in terms of time and money, by discouraging speculative applications;
- II) To increase the efficiency and effectiveness of the assignment process by awarding licenses to those with the greatest desire and ability to provide the service;
- III) To encourage the efficient use of spectrum by licensees through (a) the delivery of improved services to the public; (b) the introduction of new services; and (c) the development of new communications technologies;
- IV) To compensate the government and the taxpayers for the use of a scarce public resource; and
- V) To compete effectively in the global telecommunications arena.

PROPOSAL TO REFORM RANDOM THE SELECTION ALLOCATION PROCESS

- A. **Increase filing fees** for license applications significantly. Some specific recommendations include:
- (1) Increase the Cellular Unserved Area application filing fee from \$235 per market to \$1,000 per market.
 - (2) Increase the 900 MHz SMR Nationwide application filing fee from \$3,000 per application to \$10,000 per application.
 - (3) Increase the filing fee for SMR local systems from \$30-\$35 per market to \$200 per market.
 - (4) Institute a filing fee for PCS of \$25,000 per application.
- B. **Implement stricter entry requirements** for accepting license applications. In addition to the increased filing fee, Congress and the FCC should require that the following items be included as exhibits to an application in order for it to be considered qualified:
- (1) **Actual engineering** that would be used in the design and construction of the proposed system. An applicant would not be allowed to significantly modify its engineering after being awarded a license except to expand its coverage area as prescribed by the FCC.
 - (2) A **business plan** which would set out the applicant's plans for construction, management and operation of the proposed system including its plans for marketing, its construction timetable and pro forma financial projections.
 - (3) A **firm financial commitment letter** that must be drawn upon immediately should the applicant be awarded a license. We would propose that Congress and the FCC adopt generally the requirement set forth in the Cellular Unserved Area application rules that a licensee must execute a non-cancelable equipment purchase order within 90 days of the authorization grant date or automatically forfeit the license. Such a purchase order typically requires a considerable cash down payment. This requirement forces an applicant to obtain a funding commitment from a recognized financial institution, either already participating in providing financing to the communications industry or genuinely interested in funding established or new communications firms engaged in developing commercially improved technologies.

C. Implement construction and operation requirements for those awarded licenses.

- (1) Congress and the FCC should implement strict minimum timetables for systems to be constructed by a licensee to avoid forfeiture of the license. Such timetables were adopted by the FCC in the 220-222 MHz Nationwide SMR and Cellular Unserved Area application rules and we would propose the FCC use such standards as a model for all future license application rulemaking.
- (2) The applicant should be required to construct and operate the system it is awarded for a minimum of one year before the sale, transfer or other disposition of greater than a 25% interest is allowed. Such limitation also should include the prohibition found in the Cellular Unserved Area application rules against execution of an agreement prior to the expiration of the minimum operating period to effect such a sale or transfer even if the sale or transfer would not occur until following such minimum operating period. Such limitation therefore would preclude the grant of purchase options.

We would encourage that Congress and the FCC define the word "interest" to encompass any or all present, or future or contingent ownership or financial interests, and to include specifically options and rights of first refusal.
- (3) The applicant should be precluded from the sale, transfer or disposition of control of 50.01% of the license until it has constructed and operated the system for a minimum of five years.