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SUMMARY OF THE FILING

Brown and Schwaninger offer their comments to the Commission's Further Notice of Proposed Rule Making in GN Docket No. 93-252.

The Commission needs to take into account immediately three aspects of channelization and existing technical rules as they apply to the new Commercial Mobile Radio System operators. If the Commission is to find that wide area SMRs provide services which are substantially similar to Cellular systems, then it needs to provide wide area SMRs with substantially similar channel bandwidths. The Commission needs to provide immediate emission flexibility and exclusivity of channel use for all CMRS operators.

The Commission should harmonize recent contradicting statements and its codified rules to explain that any Business Radio Service system may provide CMRS operation.

The Commission should adopt its proposal to allow Private Carrier Paging system operators to use a greater antenna height and effective radiated power than is currently permitted by the Commission's Rules.

The Commission should require wide area SMRs not only to be interoperable with one another, but to be interoperable with the Cellular systems to which the Commission proposes to find them substantially similar.

There is one thing to be said concerning loading standards above 800 MHz: It is time for them to go.

The Commission should impose a low enough limit on spectrum aggregation by a wide area SMR system that at least three such systems can be authorized in each market and so that existing, traditional SMRs can continue to grow.

Congress has not given the Commission authority to revise application filing fees on any basis other than a change in the Consumer Price Index since 1991. Therefore, the Commission's proposed changes in application filing fees would not be lawful.

Congress enacted a schedule of regulatory fees at the same time that it required the conversion of interconnected for-profit systems to CMRS regulation. Therefore, there is nothing to suggest that the Commission has any authority to revise the schedule of regulatory fees at this time.

The proposed Form 600 suffers from a collection of problems, both big and small. The biggest problem is that it is the product of an attempt to merge two conflicting administrative philosophies. It is a valiant attempt, but the Commission would spend its efforts better by improving the operation of separate Private Radio Bureau and Common Carrier Bureau application methodologies. If the Commission decides to adopt a form as complex as the proposed Form 600, it should enforce its existing rules which require applicants either to appear on their own behalf or to be represented by an attorney at law.

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

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In the Matter of)
) GN Docket No. 93-252
Implementation of Sections 3(n) and 332 of)
the Communications Act)
)
Regulatory Treatment of Mobile Services)
)
To: The Commission

COMMENTS

Dennis C. Brown and Robert H. Schwaninger, Jr. d/b/a Brown and Schwaninger ("Brown and Schwaninger" or "we"), on behalf of various clients who are licensees in the common carrier radio services and in the private radio services, respectfully submit our Comments in the above captioned matter. These comments are in response to the Further Notice of Proposed Rule Making (FNPRM) which the Commission released on May 20, 1994. In support of our position, we show the following.

Common Carriage Below 512 MHz

At footnote 14 of its FNPRM, the Commission stated that it did "not regard the enactment of Section 332 as having a significant bearing on [its] proposals in the *Refarming Notice* relating to rechannelization and other technical changes in private land mobile bands below 512 MHz. However, it would appear that the Commission needs to take into account three aspects of channelization and technical rules as they apply to licensees which are to become Commercial Mobile Radio Service (CMRS) operators. The first change which the Commission needs to take into account at this time is a determination that it will maintain comparability

between CMRS licensees administered by the Private Radio Bureau and by the Common Carrier Bureau with respect to the bandwidth which is assigned to competitors in the same frequency bands. In PR Docket No. 92-235, the Commission has proposed to reduce the authorized bandwidth for Private Radio Services licensees to as little as 6.25 kHz. However, the Commission has not proposed a similar reduction of the bandwidth authorized to mobile system licensees in the Common Carrier Services. To assure that comparability is maintained among all CMRS licensees, the Commission needs immediately to withdraw its proposals to reduce the bandwidth to be assigned to CMRS operators which are regulated by the Private Radio Bureau.

The Commission reaches the tentative conclusion that wide-area Specialized Mobile Radio Systems ("ESMRs") should be deemed to be competitors with Domestic Public Cellular Radio Telecommunications Systems, and that, therefore, regulatory parity must be achieved between them.¹ We respectfully submit that such a determination would also compel a technical determination that the channel bandwidth authorized to any ESMR must be comparable to the bandwidth assigned to competing Cellular operator. We suggest that to achieve the technical parity which would justify regulatory parity, the Commission should, on August 10, 1996,

¹ If the Commission determines that ESMR systems are to compete with Cellular systems, then the Commission also needs to provide technical parity between such competitors to avoid having the public be misled. If the Commission is to determine that the public is to rely on a legal finding that ESMR and Cellular operators are comparable, then it needs to make directly comparable technical authorizations available to both. Unless the Commission provides the same channel bandwidth to both, ESMR operators cannot reasonably be expected to provide competitive carrier-to-noise ratios, competitive throughput capacities, or, ultimately, competitive grades of service, as compared to Cellular systems. Unless it provides for technical comparability between ESMR and Cellular systems, the Commission should not allow the public to be misled into believing that the two types of systems are comparable.

modify the licenses of all ESMR systems to authorize them to use bandwidths of 30 kHz, rather than the current 20 kHz. To avoid unduly impairing the interests of adjacent channel licensees, the Commission should require each ESMR operator to obtain the consent of each adjacent channel licensee on mutually agreeable terms, prior to continuing operation beyond August 10, 1996.

In requiring ESMR operators to compensate existing licensees for intruding upon their channels, the Commission should not allow an adjacent channel licensee unreasonably to hamstring an ESMR operator. Therefore, the Commission should determine that a refusal by the adjacent channel licensee to accept in consideration of a grant of consent compensation from the ESMR licensee in the amount of one-fifth² of the current market value of a 25 kHz wide SMR channel in the relevant market would be unreasonable.

The Commission's Rules and licensing procedures permit a CMRS operator which is regulated by the Common Carrier Bureau automatically to obtain authorization for use of all standard modes of emission on any frequency. Further, the Commission's Rules governing facilities regulated by the Common Carrier Bureau permit the licensee complete flexibility to

² Channels in the 800 MHz band are allocated at intervals of 25 khz. An ESMR system expanding from an occupied bandwidth of 20 khz to a bandwidth of 30 khz would expand by 10 khz, with 5 khz on each side of its channel, thereby moving into one-fifth of the 25 kHz currently authorized for each adjacent channel licensee. Therefore, in keeping with the precedent set by the Commission for allowing licensees in other Radio Services to impose themselves upon existing licensees, the Commission should require an ESMR system to compensate adjacent channel licensees for at least one-fifth of the market value of a channel.

operate in a trunked or a conventional mode. To provide comparability of regulation, the Commission needs to revise its technical rules and licensing procedures to provide the same technical and, therefore, competitive flexibility for all CMRS licensees, otherwise one group of operators would have an unjustifiable competitive advantage over another group, simply as the result of an accident of regulatory history.

The *Refarming Notice* proposed to provide for the availability of exclusive authorizations for CMRS licensees below 470 MHz. The enactment of Section 332 requires the Commission to accelerate its provision of the availability of exclusive use authorizations for all CMRS licensees, without regard to whether they are regulated by the Private Radio Bureau or the Common Carrier Bureau. With only two exceptions, mobile services provided by facilities regulated by the Common Carrier Bureau are afforded exclusive use the channels on which they operate. Those exceptions are the 150 MHz band "Guardband" paging channels, and the moribund systems in the 470-512 MHz band.

The Commission allocated a limited number of common carrier one-way paging frequencies in spectrum which had been used as guardbands between channels, but, in contrast to precedent, did not provide for exclusive authorization to one carrier in an area. The Commission did not extend the experimental Guardband licensing mode in the common carrier services.

In the 470-512 MHz band, the Commission allocated from 12 to 24 frequencies for use by shared, trunked use by common carriers. In some of the 13 markets in which the channels were allocated, the carriers formed consortia to operate the systems. In all markets, the Commission required the carriers to reach agreement on a common mode of operation to prevent interference. Those systems generally failed in the marketplace shortly after Cellular service was introduced, and the Commission has recovered for control station use most of the frequencies which were initially allocated to the shared use.

With the exception of the Guardband paging systems and the small number of channels still allocated to common carrier mobile use in the 470-512 MHz band in a small number of markets, all traditional common carriers enjoy exclusive use of their channels, without regard to frequency band. To provide for regulatory parity, the Commission needs to take immediate steps to provide for exclusive use of channels in all bands by all CMRS operators.

The *Refarming Notice* proposed to provide for "exclusive use overlay" licensing in the bands below 470 MHz by permitting licensees to purchase one another's radio system interests. We respectfully suggest that the Commission can more economically and expeditiously provide for exclusive use authorizations for CMRS operators by adopting an exclusive authorization mechanism much like the mechanism which it adopted for the 929 MHz band Private Carrier Paging systems. To provide regulatory comparability for all CMRS operators in all bands, the Commission should adopt rules which provide for exclusive use of any channel by a CMRS

licensee, without regard to whether the facility is regulated by the Private Radio Bureau or by the Common Carrier Bureau.

When we suggest that the Commission use the method which it applied to the 929 MHz band, we mean that the Commission should grant an exclusive license to any licensee operating a CMRS system on any frequency as of August 10, 1996. Other licensees sharing a channel with a CMRS operator would be "grandfathered" indefinitely, but would not be permitted to add to or modify their facilities, nor would they be permitted to assign their licenses to anyone other than the CMRS licensee(s)³ having exclusive use of the channel or to a person who acquired the entire business interest⁴ of the non-exclusive licensee. We suggest that the only comparable basis for determining the area of co-channel protection which any CMRS operator would enjoy would be the area determined by the method employed by the Common Carrier Bureau as of August 10, 1996.

We suggest that, among the elements which the Commission is required to assess in determining whether services are substantially similar, is whether they both enjoy exclusive use

³ As in the 929 MHz band, there might be more than one CMRS operator on a given frequency in a given area on August 10, 1996.

⁴ By "entire business interest", we mean that business activity which actually uses the radio system. A holding company which was engaged in, for example, the business of guns and the business of butter, could sell its butter business and could assign the associated radio system licenses to the butter business buyer, while retaining its gun business interests which did not use the radio system to be assigned. To prevent the interminable churning of licenses among non-CMRS operators, however, the holding company could not keep both businesses and assign its radio system licenses to anyone other than the exclusive use CMRS licensee(s).

of a channel. Historically, the Commission allocated frequencies on an exclusive basis for common carrier use and only on a shared basis for private⁵ use. In addition to the two regulatory experiments discussed above, in 1976, the Commission attempted a halfway house experiment, allocating frequencies for exclusive use by either commercial or non-commercial users, with a lower level of scrutiny imposed than the Commission continued to impose on common carriers. As the common carrier regulatory experiment was overtaken by events, the private carrier halfway house is largely being shuttered by congressional action. Congress, in its wisdom, has declared that persons providing substantially similar services shall be subjected to comparable regulation. If the Commission determines that for-profit, interconnected operation by a formerly private licensee is to be regulated in a manner comparable to a public service licensee, then it is incumbent upon the Commission to provide technical comparability between the two with respect to exclusive use of channels, flexibility of emissions, and assigned bandwidth.

A Distracting Error

We respectfully suggest that the Commission erred at footnote 19 of its FNPRM in stating that "conventional SMR systems operate on one to four channels with no trunking allowed." Although the Commission does specifically authorize the operation of SMR-Trunked systems, nothing in the Commission's Rules prohibits the licensee of an SMR-Conventional station from operating in a trunked mode. Footnote 19 is further in error in stating that "trunked

⁵ Or, looking even further back into the history of the terminology, frequencies were allocated for use by public systems and by "safety and special", that is, non-public, systems.

SMR systems use blocks of five or more channels, with users automatically routed to an available channel."⁶ Review of the Commission's records will demonstrate that, apparently primarily as the result of channel take-backs, the Commission has authorized a number of SMR-Trunked systems having fewer than five channels, including some which are authorized for operation on only a single channel. In the single channel case, no automatic routing takes place. While not particularly relevant to issues of regulatory comparability, we call attention to the mis-statements in the hope that the Commission will expressly correct them, rather than inadvertently changing long-standing rules and policies by footnote.

For-Profit Common Carrier Operation In The Business Radio Service

Footnote 20 of the FNPRM contains a substantial and significant mis-statement of law which should be corrected. Footnote 20 states that "Business systems in [the 800 and 900 MHz] bands are prohibited from selling service to customers for profit."⁷ That is not what 47 C.F.R. §90.179 — cited by the Commission as authority for the statement — says, and that is not what the Commission stated in its Second Report and Order (SR&O) in the above-captioned proceeding. Rule Section 90.179(f)⁸ provides that "above 800 MHz, shared use on a for-profit private carrier basis is permitted only by SMR and Private Carrier Paging licensees." (emphasis

⁶ The mis-statement is repeated at paragraph 27 of the FNPRM.

⁷ The mis-statement is repeated at footnote 31 of the FNPRM.

⁸ Footnote 20 mis-states the citation as "47 C.F.R. §90.179(g)." There is, however, no such subsection "g". Rather, the rule which the Commission obviously intended to cite was Rule Section 90.179(f).

added) The Rule does not prohibit for-profit common carrier operation by a Business licensee above 800 MHz.

At paragraph 87 of its SR&O, the Commission stated that

in the case of the Business Radio Service (BRS), we have determined that our eligibility rules are sufficiently broad to render this service effectively available to a substantial portion of the public. Therefore, classification of BRS licensees will depend on whether they meet other elements of the CMRS definition discussed in this Order. BRS licensees who offer for-profit interconnected service, as we have defined these terms, will be classified as CMRS providers. On the other hand, BRS licensees who operate internal use systems or do not offer interconnected service to system users will be classified as PMRS unless it is demonstrated that they are providing service that is functionally equivalent to CMRS.

Accordingly, we believe that the correct interpretation of Rule Section 90.179(f), when read in light of the Commission's most recent pronouncement on the subject, namely, its SR&O, is that the Commission expects that a Business Radio Service licensee may, indeed, lawfully render CMRS, that is, for-profit, interconnected mobile radio communications service to the public. However, above 800 MHz, a Business licensee is not permitted to provide for-profit service which is not interconnected with the public switched telephone network, or which is not made available to a substantial segment of the public.

Height-Power Rules

We support, without reservation, the Commission's authorizing non-nationwide licensees in the 929-930 MHz band using transmitter powers of up to 3500 watts within their existing service areas. If the Commission is to impose comparable regulation on operators of common carrier and formerly-Private Carrier Paging systems, it would appear to be required to provide

them with similar opportunities for economical operation. Apart from the issue of what the Commission is required to do, however, is the question of elemental fairness. If the Commission is to be fair to all persons whom it deems to be competitors, because it finds that they provide substantially similar services, then the Commission should adopt technical rules that facilitate the most economical possible operation for both, thereby resulting in the most competitive charges and terms being made available to the public.

Interoperability

The Commission has charted an uncertain course with respect to interoperability of radio systems. From the early days of maritime safety radio, for which Congress required that public coast stations interoperate with any vessel, to Congress's recent requirement that the Commission abandon the unsuccessful experiment in which it had hoped that marketplace forces would lead to a voluntary standardization of AM Broadcast stereo transmission, it has clearly been Congress's expectation that the Commission would impose interoperability requirements on competing radio systems.

Apart from the AM Stereo debacle briefly referred to above, three historical cases will illustrate the desirability of the Commission's clearly requiring interoperability of public radio systems. One case to be considered involves 800 MHz band trunked systems, another involves Automated Maritime Telecommunications System (AMTS) facilities, and the third involves the Cellular service.

When the Commission first allocated frequencies for 800 MHz band trunked systems, it expressed the "expectation" that manufacturers would develop interoperable systems. However, having failed to mandate interoperability, the Commission was met with competing manufacturers who not only designed incompatible trunking systems, but aggressively protected their proprietary interests in their unique trunking methods. Consequently, eligible users have never enjoyed the benefits of full competition among all SMR operators.

When the Commission allocated frequencies for AMTS use along the Mississippi River System, at the height of its deregulatory disposition, it declined to require AMTS systems to be interoperable with one another. For reasons best left to the Commission to explore, if it so desires, there has never been more than one AMTS operator on the River. The role that has been played by the apparent inability of any competitor to obtain equipment which is compatible with the equipment used by the existing, sole operator is one that the Commission should take into account in the instant matter.

From the beginning, the Commission required every Cellular system to comply with the Electronic Industries Association standard for analog Cellular system operation, which extensively, clearly, and fully described the tasks to be performed by each component of the system to assure full interoperability among all mobile units and all base stations. The development of the Cellular service business, fully interoperable so that a subscriber can rely on moving with ease from system to system and town to town, has been one of the Commission's major regulatory success stories.

The Commission raised the issue of whether, if it determines that ESMRs are substantially similar to Cellular systems, it should require interoperability among ESMRs. However, it neglected the more obvious question of whether it should require interoperability of ESMRs with Cellular systems. If the Commission determines that ESMRs will provide the third (or fourth, or fifth) competitor to established Cellular systems, and if it is to avoid the same type of unfair imposition by ESMR operators on unsophisticated users as resulted in the SMR field, the Commission should immediately require that, by August 10, 1996, all ESMR equipment be fully interoperable with all Cellular systems.

What is reportedly taking place currently in the marketplace establishes the need for the Commission to require that ESMR equipment be technically compatible not only with other ESMR systems, but also with Cellular systems. We are informed that, at present, some ESMR personnel are distributing mobile equipment to end users, including current dispatch service customers, at very low prices. The equipment is not, however, compatible with more than one actually operating system. There appear to be two expectations to this strategy. The first is that it will preclude current dispatch customers from moving to competing analog SMR systems during transition to digital operation. The second expectation is that the Commission will prohibit ESMRs from continued dispatch operation in 1996, thereby precluding ESMR customers who have purchased incompatible equipment from having any choice but to migrate to the ESMR's interconnected service at a much higher monthly cost.

If it is to prevent the harm to the public interest which has always resulted, since the earliest days of maritime safety radio, from the Commission's failing to require interoperability, the Commission should require ESMRs to be compatible with one another. It should also require, effective August 10, 1996, any ESMR equipment to be compatible with analog Cellular equipment.

Loading Standards

The time has clearly come to terminate the Commission's use of loading standards for purposes of renewing authorizations. Use of the 800 MHz band has been an unqualified success and the loading requirements are no longer needed to prevent the warehousing of channels. To the extent that SMR systems can be successful, they have been and they are.⁹ In the major urban areas, 900 MHz band systems have been successful. However, to prevent warehousing and anti-competitive efforts to preclude a competitor's expansion by acquiring unused channels, some test of actual usage remains necessary to make a licensee eligible to obtain additional channels.

If the Commission is to apply regulatory parity to substantially similar systems, and if one leg of the test of CMRS status is interconnected operation, the Commission should apply the same channel occupancy standards to 800 and 900 MHz band systems regulated under Part

⁹ SMRs in the 800 MHz band in the Top 50 markets have been uniformly successful and few, if any, channels remain unassigned. In the less urbanized areas, SMRs have developed less rapidly, but we have never heard of one which failed to make money, even though loading may have fallen short of expectations.

90 as it applies to systems regulated under Part 22 of its Rules.¹⁰ To allow an SMR CMRS operator to meet the public's need for interconnected service, the Commission should discontinue its current practice of requiring that an interconnected system be loaded with an impossibly large number of mobile units. Instead, to be eligible to obtain additional channels, an SMR operator should be required to demonstrate that it meets the objective need standards which are currently in effect for Part 22 systems.

Repeater Talk Around

At paragraph 76 of its FNPRM, the Commission alluded to an important difference between regulation of two-way systems under Parts 90 and 22 of its Rules. However, the Commission failed even to propose a resolution of the difference.

Part 90 permits a commercial operator to be licensed for use of both frequencies of a two-way channel by mobile units and to permit mobile units to communicate directly with one another without their communications' passing through the base or mobile relay station. This mode of operation is customarily referred to as "repeater talk-around" operation, because the mobile units talk to one another by going around, rather than through, the base or mobile relay station. However, Part 22 prohibits common carrier mobile units from communicating directly with one another. If the Commission is to provide regulatory comparability among CMRS

¹⁰ We would not suggest that the Commission's earlier determination to terminate the use of loading standards in 1998 was in error at the time that it was made. However, that decision was overtaken by the events of August 10, 1993, and should be reconsidered in the light of the establishment by Congress of the CMRS.

systems, it should withdraw its restriction on mobile units of systems regulated by Part 22's communicating with directly with one another.¹¹

Station Identification

The Commission appears to be headed in a correct direction in considering how it might revise its station identification requirements. We suggest, generally, that where transmission of a call sign is not required for the Commission to identify a monitored station, the transmission of station ID is unnecessary and should not be required. Even with respect to SMRs, referred to at paragraph 81 of the FNPRM, the Commission's Field Operations Bureau personnel have little or no difficulty ascertaining the identity of a station in an exclusive use environment without receiving a transmitted call sign.^{12, 13}

¹¹ Clearly, some Part 22 systems, for example, Cellular systems, would not work satisfactorily if repeater talk around communications were commenced. Accordingly, we do not suggest that the Commission should require the provision of such service. Rather, we suggest only that the concept of regulatory parity implies that common carrier regulatees should be permitted to provide the service if they choose to do so.

¹² In an exclusive use environment, it does not take long, either by radio direction finding or by reference solely to the Commission's data base to determine what authorized base station in any given area is transmitting.

¹³ The number of notices of apparent liability which the Commission issues each year for failure to transmit a call sign, compared to the number which it issues for any other violation, suggests that the Commission has little difficulty identifying a station without regard to whether its call sign is transmitted.

The requirement for transmission of station identification serves as an impediment to improved services to the public. Reliable data communications relies on uninterrupted use of a channel. When station identification is transmitted automatically, by Morse Code, on a timed basis, it unnecessarily obstructs use of the channel for more useful correspondence. Accordingly, the Commission should determine the extent to which it can, in its sixtieth year, relax the antiquated requirement.

Common carrier mobile licensees currently enjoy a regulatory benefit which is not available to Part 90 licensees, which is that they are permitted to operate dozens of base stations under one call sign. To achieve regulatory comparability, the Commission should permit all CMRS operators either not to transmit station identification, or to transmit station identification of any and all commonly owned facilities under a specially selected identifier other than each station's call sign.¹⁴

Spectrum Aggregation Limit

The Commission proposed to adopt a cap on the amount of spectrum which can be held by any CMRS operator. While we generally endorse the cap, we suggest that caps should be set at different levels, depending on the nature of the service provided by the licensee.

¹⁴ The Part 80 Rules permit a Public Coast station to be identified by something other than its call sign, provided that the form of identification is listed with the Commission. The Commission has proposed to permit Amateur Radio Service operators to have a choice of call sign. If the Commission is going to permit amateur users of the spectrum to choose their own form of identification, it should also allow professional users to select their own method for station ID.

With respect to ESMRs, the Commission's records raise a question as to whether some some ESMR licensees have abused the waiver authority which they were given for aggregate loading determinations and for construction period extensions. The Commission's records show numerous instances in which an ESMR has obtained an authorization for all channels which were not already assigned to existing analog stations, without regard to the reasonableness of need for that much spectrum when compared to the population of the service area.¹⁵ As recently as the current day, the Commission's historical records show that warehousing of spectrum can constitute a major technique of anti-competitive activity. Not only to prevent the waste of spectrum which might otherwise be used by the public, but to prevent anti-competitive abuses in the development of ESMR systems, the Commission should impose a cap on the number of channels which can be held by any ESMR licensee.

The Commission appears to be questioning, elsewhere, whether two Cellular operators in a market are sufficient to prevent oligopolistic strategies, even if unspoken between the licensees. There is evidence to suggest that two competitors in a market is too few in advanced public mobile radio communications if the public is to be provided service at just and reasonable rates. To avoid allowing a similar situation to develop with respect to ESMRs, the Commission should limit the number of channels which any ESMR may hold to the number of channels which will permit the simultaneous operation of three ESMR systems in the market, together

¹⁵ The Commission's records could well lead one to the conclusion that the number of channels requested in rural areas by some ESMR operators could be justified only if they found some means of extracting payments for service from moose, elk, and mountain lion, which probably outnumber the humans in those areas.

with all currently authorized traditional SMR-Trunked systems, increased by 20 percent. When we say "increased by 20 percent", we mean that enough SMR Category channels should be left by three ESMRs to allow each currently authorized analog SMR-Trunked systems to grow by 20 per cent.

To apply the suggested ESMR spectrum cap, consider the following: It appears that an ESMR requires at least 42 channels for efficient and effective operation.¹⁶ Three ESMRs, then, would require a minimum of 126 channels out of the 280 allocated 800 MHz band SMR Category channels. In a market having no existing SMR-Trunked system service, three ESMRs could comfortably operate because there would be more than enough channels available to meet their needs. In any market, there could be up to 25 five channel SMR-Trunked systems before any ESMR would have to buy someone out to aggregate 42 channels.¹⁷ In a market in which all channels were currently assigned and no channels were available for expansion by existing traditional SMR operators, an ESMR operator could be permitted to obtain the consent of all existing licensees to forego their expansion opportunities.¹⁸ The ESMR cap which we suggest

¹⁶ Six-channel base stations on a seven-cell grid.

¹⁷ Twenty-five five channel systems would require 125 channels. If each added one channel (for a total of 25 channels), then a 20 percent expansion of existing systems would require a total of 150 channels, leaving available the 126 channels needed to operate three ESMR systems. Another four channels would remain for assignment either to a new system or to expand one or more of the traditional or ESMR systems.

¹⁸ The Commission could review the reasonableness of any refusal by an existing licensee to deal in good faith with a proposed ESMR operator.

would provide for healthy competition for both ESMRs and continued growth by existing systems in every market.¹⁹

Application Fees

At paragraph 115 of the FNPRM, the Commission solicited comment with respect to a proposal that the Commission revise the schedule of application filing fees. It is difficult to offer comment on that proposal which does not resemble the cheer sometimes heard from the borough of the Bronx. However, doing our best, we note that the Commission expressly observed that Congress did not revise Section 8 of the Communications Act with respect to private and common carrier license application fees. Nevertheless, the Commission proposes to subject CMRS systems licensed under Part 90 of the Commission's Rules to the \$230 application fee which is charged for applications for licenses granted under Part 22 of the FCC Rules. We respectfully suggest that had Congress intended for the Commission to change the application fees in any way, it would have done so, or would have expressly granted the Commission authority to make changes. However, Congress left Section 8 unmolested, leading to the conclusion that the Commission's authority to revise the schedule is still limited to making a biennial adjustment in accord with the Consumer Price Index (CPI). To the extent that we can divine any intent of Congress to revise the schedule of application fees, we would have to

¹⁹ We suggest that any ESMR which was authorized for an excessive number of channels in any market upon the effective date of the Commission's proposed rules should have 30 days to specify the channels which it requests that the Commission strike from its over-authorized licenses.

conclude that Congress intended for the Commission to reduce the Part 22 fee to correspond to the Part 90 fee of \$35, as adjusted for changes in CPI.

Regulatory Fees

At paragraph 116 of the FNPRM, the Commission solicited comment with respect to a proposal that it disregard the fact that Congress newly adopted Section 9 of the Communications Act at the same time as it required regulatory parity for CMRS operators. Suppressing the urge to express the views of the folks on Flatbush Avenue, we respectfully submit that the Budget Act can be read only as one piece, and that Congress must be taken as having understood what it was doing when it set out one method for assessing regulatory fees for SMRs and a different method for assessing fees for other categories of stations or other Radio Services. Since the Commission has not proposed to change or abolish any of the Radio Services set forth at Section 9 of the Act, it does not appear that the Commission has the authority of Congress to revise the schedule of regulatory fees with respect to the various, enumerated Radio Services. Until such time as it abolishes SMRs or Congress revises Section 9, it would appear that the Commission is bound to charge them the enacted regulatory fee of \$16 per year; no more and no different.

Application Forms And Licensing Procedures

The proposed FCC Form 600 demonstrates and suffers from a difference of philosophy between the Common Carrier Bureau and the Private Radio Bureau which should be resolved before the Commission proceeds further with construction of forms and modification of computer programs. The basic difference appears to be that the Private Radio Bureau is

accustomed to working with an application which sets forth the entirety of a proposed radio system, while the Common Carrier Bureau is accustomed to working with an application which includes only the differences between an existing situation and proposed radio system. The apparent reason for the difference is that, although the Private Radio Bureau approach facilitates the expeditious processing of an application to grant, the Common Carrier Bureau approach facilitates the production of a public notice concerning each application and an incremental approach to licensing.

We have done something that the Commission has not done. The Commission has processed millions of applications. We have prepared thousands of them. Our long experience in preparing thousands, indeed, tens of thousands, of applications for both types of radio systems and prosecuting them before both bureaus leads us to suggest that the replacement for Forms 401 and 574, if any, should follow the Private Radio Bureau model, with the Commission's computer programs being revised to facilitate automated production of a public notice of common carrier application receipts.

We question the wisdom of the "Swiss Army Knife" approach to the construction of the land mobile (and the air mobile cavalry) application form. There is a basic principle of engineering that a tool which is dedicated to one function is more likely to perform that function well than a tool which is intended to serve multiple purposes. We respectfully suggest that the current effort to combine a wide variety of disparate Radio Services and to merge two different processing philosophies into one form is less likely to lead to satisfactory results than to continue