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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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August 18, 1994

Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844, Stop Code 0103
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation - GN Docket 93-252

Dear Commissioner Chong:

This law firm represents several clients who, in good faith reliance on the Commission's long-standing rules, filed applications for 800 MHz Specialized Mobile Radio ("SMR") licenses. Some of these applications were filed as long ago as in the fall of 1993. The majority of the applicants are female-owned and controlled. Generally, the applicants are small enterprises attracted to the expanding opportunities in wireless communications.

Last week the Commission announced its intention to issue a Further Notice of Proposed Rulemaking in Docket PR 93-144 to further assess a framework for licensing 800 MHz SMR systems on a "wide-area" basis. Pending the completion of that Rulemaking the Commission announced the suspension of "acceptance of new 800 MHz SMR applications...."

The Commission's News Release did not address the matter of already pending 800 MHz SMR applications. However, our clients have been led to believe that the Commission is considering permanently suspending the processing of these applications (or even returning them) to switch in midstream to competitive bidding procedures for selecting among mutually exclusive initial applications in the 800 MHz band. These SMR applicants filed on the basis of rules providing for licensing on a first-come, first-served basis. These pending applications generally are not mutually exclusive.

Our clients strongly oppose any decision to suspend processing or return these applications, or to subject them to selection by auction among mutually exclusive applicants as grossly unfair and legally untenable for the following reasons:

13. Such A Decision Would Fly In The Face Of Two Key Provisions Of The Omnibus Budget And Reconciliation Act of 1993 ("Budget Act")

The Budget Act proscribes the Commission from deciding to employ auctions "solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding...." 47 U.S.C. § 309(j)(7)B). The House Budget Committee, in approving a similar provision, stated:

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> "The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so. The ongoing MSS (or "Big LEO") proceeding is a case in point. The FCC has and currently uses certain tools to avoid mutually exclusive licensing situations, such as spectrum sharing arrangements and the creation of specific threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate."

House Rep No. 111, 103 Cong., 1st Sess., May 23, 1993, at pp. 258-259 (emphasis supplied). It would appear that the Commission here is considering exactly the opposite of what the Congress encouraged because the pending SMR applications are generally not mutually exclusive. In the immediate instance, under the existing licensing rules for 800 MHz SMR, licenses are granted to applications on a first-come first-served basis.

A second Budget Act provision relates to one of the specific statutory requirements for implementation of competitive bidding. In designing systems of competitive bidding the Congress required the FCC to further the following objective (among others):

> "[P]romoting economic opportunity and competition and ensuring the new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women."

47 U.S.C. 309(j)(3)(B); see, House Report No. 111, 103rd Cong., 1st Sess., May 25, 1993, at p. 254 ("[U]nless the Commission is sensitive to the need to maintain opportunities for small businesses competitive bidding could result in a significant increase in concentration in the telecommunications industries.") Yet by suspending the processing of (or returning) these applications, the Commission is merely giving large, deep-pocketed companies the opportunity to buy frequencies that many of these "little guy/gal" applicants identified and filed for on a first-come, first-served basis months ago.

2. The Harm Derived From Retroactive Application Of The Commission's Licensing Rules Would Far Outweigh Any Perceived Public Benefit

Retroactive application of agency regulations is disfavored where it would have the impact projected here.

> "Retroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application...or when the hardship on affected parties will outweigh the public ends to be accomplished."

Iowa Power and Light Company v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981), cert. den., 455 U.S. 907.

The United States Court of Appeals for the District of Columbia Circuit has stated that the relevant factors in determining whether regulatory retroactivity is permitted include "the degree of retroactivity, the need for administrative flexibility and the hardship on the affected parties." Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116, n. 77 (1979), cert. den., 445 U.S. 920; see, Summit Nursing Home, Inc. v. U.S., 572 F.2d 737, 743 (Ct. Cl. 1978). (Court must compare the public interest in the retroactive rule with the private interests that are overturned by it).

Here the applicants have spent very significant sums of money on engineering, frequency coordination and application fees, not to mention their own uncompensated time and energy. Many of these applications are in smaller markets or more rural areas of the country. The major market frequencies are already controlled by the larger SMR providers.

The decision in Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1251 (D.C. Cir. 1987) does not support a Commission decision to suspend processing or return these applications. In Maxcell, the Court was faced with a challenge to the FCC's decision to apply lottery procedures to cellular applications originally filed under comparative licensing rules. The Court assessed whether the "ill effect of the retroactive application of the rule outweighed the mischief of frustrating the interests the rule promotes." The Court supported the Commission's overriding concern with the efficient processing of hundreds of mutually exclusive applications for cellular licenses. Moreover, the Maxcell court noted that the applicants had been aware at the time it filed its application that a lottery scheme might be used to select among competing applicants. In summary, because the applicants had "suffered neither the deprivation of a right nor the imposition of new and expected liabilities or obligations, [they had] not suffered any significant injury from the retroactive effect of the lottery procedure."

The Maxcell situation is clearly distinguishable from the case at hand. In Maxcell the Commission did not return the applications or allow additional applications to be filed. Unlike Maxcell, these SMR applicants had no notice or expectation that applications not mutually exclusive and, therefore, not subject to the competitive bidding statute would be suspended or returned for the express purpose of allowing competitive bidding. Further, the SMR applicants would be subject to new and unexpected liabilities in the form of auction payments. Retroactive application of whatever wide-area SMR licensing rules might be adopted cannot be legally sustained under this standard.

Furthermore, retroactive changes in the SMR licensing rules, which would effectively wipe out investments made in reliance upon cut-off protection afforded by the Commission's policy of first-come, first-served processing, are prohibited by general principles of administrative law.

The U.S. Supreme Court has held that retroactivity in formal rulemaking proceedings is inherently suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). *See also*, Health Insurance Association of America, Inc. v. Donna E. Shalala, No. 92-5196 (May 13, 1994). Retroactive application of a rule requires specific statutory authority for such retroactivity. Bowen, *supra*, at 213. Nothing in either the Communications Act or the Administrative Procedure Act would support a retroactive change in the rules governing the process and licensing of the SMR applications.[1/] As the Supreme Court noted in Bowen:

[1/] In Maxcell, *supra*, which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to

> It is axiomatic than an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id., at 208. There is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the radio licensing provisions applicable to SMR licenses, Sections 307 to 309 and Section 332, 47 U.S.C. §§ 307-309, 332, to justify the retroactive imposition of new burdens on applicants that have filed their applications based upon an expectation of cut-off protection from mutually exclusive applicants because they were filed on a first-come, first-served basis.[2/]

In addition, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act. The APA specifically defines a "rule" as an agency statement "of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis supplied). *See also* Bowen, supra, 488 U.S. at 218 (J. Scalia Concurring). GN Docket 93-252 is by definition a notice and comment rulemaking proceeding. Thus, retroactive changes in the rules eliminating the cut-off protections of the pending SMR applications would amount to what Justice Scalia characterized as "secondary retroactivity", *i.e.*, "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." Id., 488 U.S. at 220 (J. Scalia Concurring). Retroactive changes in the rules to allow for mutually exclusive applications would impose retroactively a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon rules and policies then in effect. Such retroactivity is prohibited by the APA.

3. Return For Retroactive Application Must Also Fail For Lack Of Notice

There is a clear line of court authority that before an FCC application is subject to the "grave sanction of dismissal" traditional concepts of administrative law require that the applicant be required to receive adequate notice of the substance of the rule which led to the dismissal. This doctrine has generally been applied where an application was dismissed by the FCC for not complying with a newly-announced standard when the "announcement" was not sufficient. See, Satellite Broadcasting Company v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987); Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985). In these cases the D.C. Circuit reversed FCC rejection of an application where the agency's rules were unclear. *See also*, McElroy Electronics v. F.C.C.,

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eliminate application backlogs, *inter alia*. Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. By contrast, the SMR applicants have incurred substantial costs in preparation of applications that could be granted on a first-come, first-served basis. There was no expectation of being subjected to competitive bidding procedures because Congress specifically intended that its auction legislation only apply to mutually exclusive application situations.

[2/] The D.C. Circuit has previously reversed the dismissal of applications for unserved cellular service areas that had been filed in reliance upon cut-off protection afforded by the rules in effect when the applications were filed. McElroy Electronics Corporation v. F.C.C., 990 F.2d 1351 (D.C. Cir. 1993). Otherwise qualified applicants in the private radio services that were properly cut-off are entitled to grant when there were no timely filed mutually exclusive applications. Reuters, Ltd. v. F.C.C., 781 F.2d 946 (D.C. Cir. 1986). The SMR applicants, provided that they are basically qualified, are now eligible for grant for the frequencies and locations for which they filed on a first-come, first-served basis. The Commission has explicitly recognized that a qualified application filed on the basis of first-come, first-served procedures is entitled to grant and protected from later-filed applications for the same frequency. Roger Wahl, 8 FCC Rcd 980 (1993) (FM application filed under first-come, first served provisions of 47 C.F.R. § 73.3573(g)).

supra. That argument may be applied by analogy here. There was never any notice that the Commission would decide to adopt a wholly-different licensing scheme and apply it retroactively to pending applications. The failure to provide such notice bars retroactive application of the licensing scheme.

* * *

A Commission decision, either directly or indirectly, to make these applicants start from scratch cannot be squared with these explicit legal principles. Therefore, whatever path the Commission may decide to take for future 800 MHz SMR applications, it should not force these applicants ex post facto down that same road.

Sincerely yours,

BESOZZI, GAVIN & CRAVEN

By _____
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