EX PARTE OR LATE FILED

REED SMITH SHAW & MCCLAY

1200 18TH STREET, N.W.
WASHINGTON, D.C. 20036
202-457-6100

PITTSBURGH, PA
PHILADELPHIA, PA
HARRISBURG, PA
McLEAN, VA
PRINCETON, NJ

FAX 202-457-6113
WRITER'S DIRECT DIAL NUMBER
(202) 457-8646

DOCKET FILE COPY ORIGINAL

December 14, 1994

RECEIVED
DEC 14 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Submission
PR Docket No. 93-61

Dear Mr. Caton:

On behalf of MobileVision, L.P. ("MobileVision"), I am filing the original and one copy of this written ex parte communication pursuant to Section 1.1206(a)(1) of the Commission's Rules.

A majority of the wideband LMS participating in this proceeding yesterday filed an ex parte consensus position with respect to two important issues, interconnected services and transition rules for currently licensed system providers. The comments presented here are in support of that consensus position. (A copy of the consensus position is attached.)

Until recently, little focus and commentary has been spent in this proceeding on whether ancillary voice and data services for LMS should be interconnected services. The debates that have raged back and forth on issues related to band spectrum, sharing or non-sharing, interrelation with Part 15 service, and auctioning have dealt with services only as they pertain to the other specific issues under discussion. As a result, a number of misconceptions regarding the requirement for, practical limitations on, and effect of interconnected services have been created. Similarly, since transition rules became critically important in this proceeding only after the likelihood of auctions had been introduced several months ago, the record has been unclear regarding the transition rules being considered by the Commission. These brief comments are intended to bring the interconnected service issues into proper focus and to address several factors necessary for equitable transition rules.

Existing Regulatory Framework

As essential background to the issues in this proceeding, a brief outline of the purpose and scope of the existing rules is in order:

- The purpose of the Interim Rules was to permit development of services, including voice and data,[1] that the public (market) defined as desirable.[2]

- The licenses under Interim Rules were not "interim," nor was it the intent of the Commission, as Southwestern Bell has recently suggested, that the concept of licensing AVM services was "interim." Rather, the Commission made it clear that after technology development and market demands were more fully known, permanent rules would be adopted to reflect developments and public interest.[3]

- Voice and data services were specifically permitted under Interim Rules. While the Interim Rules provided as part of the definition of Automatic Vehicle Monitoring (AVM) that AVM systems "may also transmit status and instructional messages related to the vehicles involved" (§ 90.7), that permissive language is descriptive only. The authority granted operations of an AVM system is found in § 90.239(a) and provides clearly that "the authority is also

---

1 The Commission's Order adopted July 31, 1974, by which the Interim Rules were promulgated, (hereinafter "Order") stated "A fifth function common to most systems is the capability of providing instructions through supplementary voice or data messages." Order, ¶ 6.

2 See Order, ¶ 15. The NPRM specifically recognized that need for service development: "The interim rules were adopted at a time when very little information was available on AVM systems, including the demand for such services, or on the eventual technology that would be used to provide these services. The interim rules were, therefore, intended to promote the technological and marketplace development of AVM systems in general and to provide an environment of experimentation." NPRM, fn. 29.

3 Id.

provided for the transmission of voice and/or nonvoice messages relating to vehicles being located." The authority is not limited, as has often been misstated, to status and instructional messages. The definition uses those terms illustratively; the later section is empowering and governs the operation of systems.

- Interconnect for voice and data was not precluded under the Interim Rules. Specifically, the exclusion of interconnection under the Commission's Rules § 90.477(c) to other radiolocation services did not apply to the AVM services under Subpart J, further illustrating that it was not the intention of the Commission to restrict AVM services from interconnection.

- The Commission in establishing its spectrum plan in 1974 also made it clear that only two multilateration wideband AVM systems were to be licensed in each market: "[U]nder this approach, two separate wideband AVM systems may be accommodated in each market." (Order, ¶ 10). If the Commission intended sharing in these bands, it would have stated that the Interim Rules would permit "many" or "multiple" or "several" systems.

MobileVision's Licenses

When METS first applied for AVM licenses, the Private Radio Bureau gave it guidance that included recommendations on emission designators to permit the broadest services. Thereafter, METS applied for and received licenses with emission designators pursuant to §§ 90.239(b) and (e)(2)(iii) authorizing voice and data.[4] During (and after) this time period, METS performed extensive market research and made numerous contacts with

---

[4] Section 90.239(b) states: "The use of F1D, F2D, F3E, G1D, G2D, G3E, or P0N emissions is authorized for operation of transmitters in AVM systems subject to paragraph (e)(2)(iii) of this section."

Section 90.239(e)(2)(iii), applicable to AVM systems in the 900 MH_Z bands, states: "Emissions will be authorized on a case-by-case basis dependent on the requirement of the specific technique utilized."

potential fleet customers that indicated voice and data were required as ancillary to location services if there was to be sufficient market demand to make such systems economically viable.

Based on PRB's guidance and the Interim Rules, METS developed a system in which voice and data services were an integral part and that, pursuant to the Interim Rules, would be interconnected services. Subsequently, PRB also gave guidance that it was the long standing Commission policy that first built systems would be protected against interference from a subsequently built system and that services offered to the public would not be taken away by another system's interference. Interference, of course, would have to be demonstrated. (The record is clear in this proceeding that wideband LMS systems would interfere.) Within that framework, METS and a partner created MobileVision and an additional $30 million was committed to the final system development, hardware production and other pre-deployment capital expenditures (bringing the total investment to $60 million).

The uncertainty engendered by new issues raised during the rulemaking, particularly arguments regarding "sharing" and Part 15 "rights" and the extended time of this proceeding, has frozen further investment and thus precluded deployment of the developed METS/MobileVision LMS system.[5] Contrary to the assertions made by some, from the date of its first license, METS/MobileVision has completed its technological development and market plans, and sought investment for deployment with the clearest intention that all licenses would be built out to create a national LMS system. The licenses acquired by METS/MobileVision were available to all potential participants (and, in fact, four other parties have licences in the same band as METS/MobileVision). These licenses were not "warehoused" by even the broadest definition of that term. Rather, they have not been built out (other than as initial systems in three markets) as a result of the delay and confusions surrounding this rulemaking.

<u>The Rulemaking: Services</u>

The NPRM recognized that voice and data services were part of LMS services. NPRM ¶ 9. The NPRM also recognized that

---

5 Indeed, in great part, the uncertainty of the proceeding led to the withdrawal of METS' partner and has made it impossible to proceed with other investors while the proceeding continues.

the services offered by LMS systems should be broad enough to meet IVHS needs. NPRM ¶¶ 1,5. In this connection, the NPRM proposed that there be no emission designators. NPRM ¶ 30.

Without discussion and analysis, however, a subtle change contained in Appendix C to the NPRM setting forth the proposed rule changes -- specifically, a change of the applicable Subpart containing the permanent rules to Subpart F -- would, perhaps inadvertently, preclude interconnect. While there has been some limited comments on whether the LMS services should be interconnected, there has been no focus in this rulemaking on the technical change in Subpart designation that may bar such interconnection.

MobileVision has previously addressed the need for adequate voice and data services and the market demand for them, as well as the need for systems to provide such communications if LMS systems are to be economically viable. As early as its ex parte submission on October 20, 1993, MobileVision described market studies that clearly indicated minimal market penetration without ancillary voice and data capability. Prospective national accounts customers (automobile manufacturers and national automobile clubs, for example) have been clear and unanimous in setting a requirement for associated voice and data functions. Market studies for commercial services show unacceptable market penetration where voice and data messaging capability is absent. They show penetration growing by five times over location-service-only when associated voice capability is among the optional service offerings.[6] The same market studies and potential user contacts also show clearly that such services if they are to be desirable to end users must provide for interconnected services.

It is important to emphasize that LMS systems, even when interconnected, are not designed and will not compete with cellular systems or other technologies, such as Personal Communications Services ("PCS"), where voice, not location, is the primary service. Even if voice and data services are provided on an unrestricted basis to support IVHS goals and LMS market needs, LMS systems do not have the capacity to compete with cellular systems and such services will remain ancillary to the primary

---

6 Automobile manufacturers' plans include providing location service units as standard equipment in millions of cars annually. Similarly, MobileVision's accounts in Chicago include a major national automobile club that requires ancillary voice and data.

service of location.[7] However, when the primary requirement of a licensed service is location IVHS related providers of that service should not be placed at a competitive disadvantage to other providers, such as cellular and PCS, whose services, linked with global positioning satellites ("GPS") or with other location systems, possess or will possess those needing voice and data capabilities. For example, automobile manufacturers have already advised that in the absence of such ancillary services, a GPS system coupled with cellular service is the only method to meet their needs. Since many consumers will not subscribe to the higher cost cellular systems, a large segment of the public would thus be deprived of valuable, innovative, even life-preserving services for lack of a competitive lower cost alternative.

A change in the Interim Rules should only be based on the needs of the marketplace and technological developments. The needs of the marketplace and the technology developments that those Interim Rules intended to spawn do not suggest that the interconnected services permitted by the Interim Rules should now be eliminated from LMS services. Rather, those market needs and technological developments demand that interconnected services be provided.

Transition Rules

Since the concept of auctioning was introduced this past summer, MobileVision and most other wideband LMS providers have urged the need for fair and equitable transition rules. The attached consensus paper sets forth the requirements for such rules. MobileVision would like to restate certain of its comments in an earlier ex parte filing that refute various misconceptions that have been expressed in this proceeding regarding transition rules:

- Transition rules will not grant rights to current licensees. Rather, they already have license rights as well as time remaining to build out under their currently held licenses. Transition rules will provide for mechanisms through recognized first to build criteria to determine which licensees will

---

7 MobileVision has stated in its ex parte discussions with the Commission staff that the final rules can provide for restrictions requiring that would prevent any abuse by licensees of claiming a priority of location services while primarily offering voice and data services.

continue to hold rights in bandwidth now to be recognized formally as exclusive. Transition rules can also provide for later auctioning in a defined way by substituting a single build out deadline for the many individual license deadlines that now exist.

- The current licensees have not "warehoused" spectrum. That concept relates to the accumulation of licenses without a current intent to use, while depriving competitors of their availability. There has been no deprivation of use since any party in this proceeding could have obtained licenses identical to those held by the current licensees since the Commission issued them on a nonexclusive basis under the Interim Rules. As to the current intent to use, but for the initiation of this rulemaking and its extended nature, MobileVision, at least, would have received the necessary capital infusion and already been deployed in the major markets for which it holds licenses.

- The current licensees will not be inappropriately favored by the creation of grandfathering provisions but, rather, such provisions would simply recognize the equities in permitting a sufficient time for entrepreneurial companies who have expended years of labor and investment in the technology development to be permitted the fruits of that effort. To do otherwise is contrary to the public policy of providing such rewards and, in this industry, will permit success to only those who idly sit by with the larger purse awaiting the opportunity to bury private innovators in a an avalanche of auction dollars. Any balance of interest that does not recognize these equitable considerations will be shortsighted and without vision of true public interest.

MobileVision has already addressed transition rules in detail in its August 12 ex parte submission and believes the comments therein constitute an appropriate framework on which to proceed. For the reasons set forth in that submission, MobileVision submitted that a three year period for build out for grandfathering purposes would be appropriate. While it still believes that is the case, if the Commission adopts the standards of Section 90.155(c) as the build out criteria, MobileVision could support a lesser transition period of eighteen months beginning from the effectivity of the final rules.

That eighteen month period is necessary to permit for reengineering to meet the requirements of the final rules (including changes to bandwidth allocation), allow for arrangements for capital infusion, and, only after those events are concluded, the likely build out of a limited number (perhaps 15% to 20%) of MobileVision's current licenses. In that regard, after the issuance of the final rules, MobileVision is prepared to identify licenses it will surrender as impracticable to build out in the transition period. Those licenses to be surrendered will constitute at least eighty per cent (80%) of its currently held licenses.

For that build out under transition rules to be meaningful, licenses to be kept and built out must be subject to prior Commission practice regarding modification and addition of sites. A majority of the LMS wideband system participants have specifically addressed those needs. (See consensus paper, ¶ 1).

* * * * *

A brief mention of exclusivity is appropriate. The record is absolutely clear by now that wideband LMS systems must operate in bandwidth not occupied by a second wideband LMS system. This result is not driven by market or economic concerns. Although capacity is a contributing factor to that need, that need is the consequence of the laws of physics that were extensively commented on in the early filings in this proceeding. It is appropriate to note that the immutability of those laws was recognized in 1974 when the original Order stated clearly "under this approach [establishing two 8MHz bands], two separate wideband AVM systems may be accommodated in each market." (Order, ¶ 10).

For the reasons stated above, MobileVision requests that the Commission adopt rules consistent with the consensus paper submitted.

Respectfully submitted,

John J. McDonnell

JJM/agw
Enclosure

REED SMITH SHAW & MCCLAY

1200 18TH STREET, N.W.
WASHINGTON, D.C. 20036
202-457-6100

PITTSBURGH, PA
PHILADELPHIA, PA
HARRISBURG, PA
McLEAN, VA
PRINCETON, NJ

FAX 202-457-6113
WRITER'S DIRECT DIAL NUMBER
(202) 457-8646

December 12, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Submission
PR Docket No. 93-61

Dear Mr. Caton:

The undersigned are representatives of the majority of wideband LMS participants in the LMS rulemaking proceeding and are filing the original and one copy of this written ex parte communication pursuant to Section 1.1206(a)(1) of the Commission's Rules.

In connection with the issues regarding transition period and offered LMS services, the undersigned participants in the proceeding urge the Commission to adopt its final rules incorporating provisions consistent with the following:

Transition Period:

1. Current licensees should be permitted during a period of eighteen (18) months following the effective date of the rule to construct systems for existing licenses consistent with prior Commission practice. Prior Commission practice was to permit construction not only at the designated locations of the initial license but to issue modifications of such licenses for change of tower location and additional tower locations within the radius of operation as defined in the license.

2. When a system is built out during that period pursuant to Section 90.155, the licensee shall be grandfathered subject to the new rule, including those provisions governing band allocation, licensed service area, services and exclusivity of

licensed operations for that area. Auctions would not be held for grandfathered areas.

Services:

Services permitted under the new rules can be interconnected.

Various of the undersigned have previously provided formal and informal comments in connection with these positions and will supplement the record as necessary in support thereof.

Respectfully submitted,

for Mobilevision, L.P.

for Airtouch Telatrac

for Uniplex Corporation

JJM/agw
cc: Chairman Reed E. Hundt
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Commissioner James H. Quello
Attached Service List