Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Massachusetts-Connecticut Mobile Telephone Company, Mobile Radio Communications, Inc. and Radiofone, Inc. (hereinafter "the Part 22 Licensees"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petition the Commission for reconsideration of various aspects of its Third Report and Order (hereinafter "Third R&O") in the above-captioned proceeding. As explained below, certain rule changes will create unnecessary burdens for Part 22 and Part 90 licensees, which will hinder their ability to provide service to the public.

All of the petitioners are currently licensees under both Part 22 and Part 90 of the Commission's rules whose interests would be adversely affected unless reconsideration is granted. The Part 22 Licensees have filed a December 19, 1994 Petition for Partial Reconsideration of the Commission's Report and Order in CC Docket No. 92-115, urging the

Commission to reconsider the very rules adopted for 931 MHz paging which the Third R&O would now apply to all or most Part 22 and Part 90 operations. The arguments therein apply with equal force to the broader application of the rules adopted in the Third R&O.

I. The Definition of "Modification Application" Should Use a 50% Overlap Test.

The Commission has adopted an unduly restrictive definition of the term "modification application." In particular, paragraph 356 of the Third R&O classifies a proposal to implement a Part 22 or Part 90 CMRS facility as an application for an "initial" license, if the new location is more than two kilometers (1.2 miles) from the applicant's existing station. This definition was adopted over the strong opposition of the industry, in both the captioned proceeding and CC Docket No. 92-115.[1] The 1.2-mile standard unnecessarily restricts modifications to existing systems, especially relocations of existing (or previously authorized) facilities. Grantees often find that by the time its application has been granted, the authorized antenna site is no longer available. Even after a facility is constructed, the site may be lost through no fault of the licensee. Under these circumstances, the licensee must find a new site; and it is not always possible to find a suitable antenna structure as close as 1.2 miles away. Zoning restrictions, federal and state regulations, or the remoteness of the area may prevent the licensee from securing alternative tower space nearby. Moreover, the relocation may be necessitated by propagation considerations, in which case a site less than 1.2 miles from the original site may not cure the problem.

Under the Commission's proposed rule, an existing licensee who is forced to abandon a site may find that it is dragged into an auction for a new site more than two kilometers away. If this auction is lost, the licensee may have to curtail service to existing customers, which is clearly adverse to the public interest. Competitors may even improperly file mutually exclusive applications which are designed solely to force an auction.

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[1] See Third R&O at para. 351; Report and Order, CC Dkt. No. 92-115; at p. 46 n. 177.

Several commentors in CC Docket No. 92-115 urged the Commission to revise its proposed rule, to classify a "modification" application as one which overlaps the authorized reliable service area contour by at least 50%. See Comments of CompComm at p. 6 (26 km/16.2 mile standard); Ameritech Mobile Services, Inc. (26 km/16 mile standard); Source One Wireless, Inc. at pp. 2-3 (20 miles); Paging Partners at pp. 5-6 (20 miles); Priority Communications, Inc. at p. 4 (40 miles); Skytel at pp. 12-15 (40 miles); McCaw Cellular Communications, Inc. Reply Comments at p. 10 (40 miles); SMR Systems, Inc. at p. 5 (40 miles); Metrocall, Inc. at p. 8 (non-overlapping service areas). Likewise, commentors in the captioned proceeding urged a less restrictive standard. Third R&O at para. 351.

A 50% overlap requirement (or any of the other suggested alternatives) would better reflect the realities of site availability. The Commission has already used the 50% overlap rule as a measure of whether an applicant proposes a new service area, rather than an additional channel for an already existing service area. See 47 C.F.R. § 22.16(b)(2) ("Applications are considered to be requesting initial channels if less than 50% of the proposed reliable service area contour overlaps an existing contour"); see also 47 C.F.R. § 22.16(e) (50% "fill-in" rule).

The Commission itself has stated that the only modification applications subject to auctions should be those "so different in kind or so large in scope and scale" that they constitute applications for new services. Second Report and Order, Gen. Dkt. No. 93-252, 9 FCC Rcd 2348, 2355 (1994); see Report and Order, supra, at para. 103. A 1.2 mile change clearly falls short of this mark. The proposed 50% standard would clearly be more appropriate.

An agency must provide a reasoned explanation for an adopted rule. Western Coal Traffic League v. United States, 677 F.2d 915, 927 (D.C. Cir. 1982). The Third R&O relies on the Part 22 Rewrite for its justification, wherein the Commission's only reason for its action is its claim that "we believe that the two kilometer distance should allow a licensee who loses its transmitter site to find another one nearby." Report and Order, supra, at para. 105. An

agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate rebuttal. Western Coal, supra, 677 F.2d at 927.

The Report and Order's above quoted statement does not constitute a reasoned explanation for adopting the 1.2-mile/2-kilometer standard. Nor does the Third R&O's statement that the Commission considers system expansion beyond two kilometers to be "new ventures." Id. at para. 356. These statements ignore "vital comments regarding relevant factors," including the possible unavailability of alternative sites within two kilometers; zoning restrictions; federal protections and use restrictions; and the fact that an antenna located within two kilometers of the original site may not cure propagation problems. The Commission's logic also ignores the public interest in facilitating the expansion and/or improvement of service to existing public subscribers, which should be given weight over facilitating an auction which may merely give a competitor a chance to block system expansion. The statement accompanying the promulgation of a rule must show that it is rational, by demonstrating that a reasonable person upon consideration of all the points urged, pro and con, would conclude that it was a reasonable response to the problem faced by the agency. See Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992). The 1.2-mile/2-kilometer rule is not a reasonable response, in light of the record before the Commission.

The new rule also violates "ascertainable legislative intent" of the auction legislation. See Western Coal, supra, 677 F.2d at 927. The auction provision of the Omnibus Budget Reconciliation Act of 1993 exempted renewal and modification applications from auctions. This action was clearly intended to prevent disruption of existing services. However, under the new rule, an existing licensee may have to discontinue service because it loses an auction for a relocation or fill-in application. The Commission failed to address these major issues raised on the record, and failed to explain why the Commission responded to these issues as it did. Because the new rule contravenes the statutory objectives to be served, it is void. See Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir. 1987).

If the Commission is concerned that a 50% overlap standard would allow piecemeal system growth (i.e., where a licensee extends coverage into new areas by applying over time for a series of transmitters spaced 16 miles apart from each other), it can provide that expansion applications must be within, e.g., 16 or 20 miles of a co-channel facility authorized to the applicant prior to January 1, 1995, in order to be considered a "modification application." This would constitute a less drastic alternative which the Commission should consider.

II. The 60-Day Cutoff Period Should be Retained.

The petitioners herein seek reconsideration of the Commission's decision to apply a 30 day "cutoff" period for the filing of mutually exclusive applications against all Commercial Mobile Radio Service (CMRS) filings. Third R&O at para. 332. The Third R&O recognizes that for many applicants, this rule change reduces the relevant cut off period from 60 to 30 days, but indicated that a 30-day cutoff period is sufficient to allow all qualified applicants to file. Id. However, 30 days is not enough time to receive the Public Notices; review the notice for applications which may affect your operations; find antenna sites and obtain reasonable assurance of site availability for a competing application; prepare the application(s); microfiche the application(s); and file the application(s) at the Commission's lockbox bank in Pittsburgh. Receiving the public notices by mail can take several days. Thus, even if a licensee is prompt in reviewing the notices, it may not be able to respond in time. This shortened cut-off window is another burden for small businesses, which have already been saddled with the costs of filing fees, microfiche, user fees, and courier costs for the Pittsburgh filings. This additional burden contravenes the policy underlying the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), which states at § 2(a)(5) that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." The Commission fails to address this additional burden adequately in a regulatory flexibility analysis in the Third R&O.

CONCLUSION

In light of the foregoing, the Commission should revise its CMRS rules as suggested above, or should take further public comment on the issues raised herein.

Respectfully submitted,

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Filed: December 21, 1994