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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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	)	
	)	
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

PETITION FOR RECONSIDERATION

RAM MOBILE DATA USA LIMITED PARTNERSHIP

Henry Goldberg
Jonathan L. Wiener
Daniel S. Goldberg

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 429-4900

Its Attorneys

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SUMMARY

RMD asks the Commission to reconsider its decision to auction interstitial areas of MTAs in which 900 MHz SMR systems have previously been constructed. RMD urges that the Commission's decision to proceed with auctions is contrary: (1) to statute; (2) to the Commission's practice with respect to other radio services that have been licensed both before and after the passage of the Budget Act; and (3) to the public interest in viable nationwide and regional mobile data system operators competing with entrenched cellular, 800 MHz SMRs and other providers who have far greater spectrum resources that have never been subject to auctions.

If the Commission determines to proceed with auctions, RMD urges that, at least, the Commission's rules be clarified to allow for effective wide area operation within the overall coverage area of facilities that have been previously licensed or for which applications were pending at the time the Commission's auction decision was announced.

Finally, RMD asks the Commission to reconsider its decision to continue to apply loading requirements to 900 MHz SMR incumbents, while eliminating such requirements for all of their competitors. RMD urges that the application of loading rules to 900 MHz systems is both unnecessary and places such systems at a distinct competitive disadvantage to all other CMRS providers.

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PETITION FOR RECONSIDERATION

RAM Mobile Data USA Limited Partnership ("RMD"), by its attorneys, hereby seeks reconsideration of the Commission's decision in the above-captioned proceeding, in which the Commission proposes to auction intersticial areas of MTAs in which 900 MHz SMR systems have been constructed.[1] Absent reconsideration, the public interest in fostering innovative wide-area 900 MHz SMR networks to compete with entrenched cellular, 800 MHz SMR, and paging operations will not be served.

At the very least, ten-channel blocks in MTAs where substantial wide-area construction already has taken place should not be subject to auction. The nature of the interstitial areas that are left makes them of little value to any new entrant truly wishing to operate its own system, but would be of great interest to a competitor seeking to block a wide-area system from developing or to others who might seek "greenmail" from an existing system operator.

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[1] Third Report and Order, GN Docket No. 93-252 et al, 76 R.R.2d 326 (1994) (the "Third Report and Order").

Nonetheless, if the Commission proceeds with auctions, RMD urges that the Commission's rules be clarified to allow for effective wide-area operation within the overall coverage area of facilities that have been previously licensed or for which applications are pending. Although this matter may be addressed when the Commission issues new technical operating rules for 900 MHz systems,[2] in one proceeding or the other, it is crucial to the ongoing viability of existing wide-area systems that they be given the same operational flexibility within their existing coverage and interference protection areas to add, move, and modify base station sites and channels, as will be available to other wide-area SMR MTA,[3] cellular and other CMRS licensees.

RMD also asks the Commission to reconsider its decision to maintain loading requirements for 900 MHz SMR incumbents, while eliminating such requirements for all of their competitors — a decision that seems to penalize 900 MHz SMR incumbents for the Commission's refusal to allow them to expand their networks. There is no rationale for continuing the loading rule for 900 MHz SMR incumbents, when it no longer applies to systems that compete with 900 MHz SMRs.

I. TEN CHANNEL BLOCKS ON WHICH EXISTING SYSTEMS ARE ALREADY OPERATING IN THE MTA SHOULD NOT BE SUBJECT TO AUCTION.

The Commission's decision to ignore the system expansion needs of 900 MHz SMR licensees without being subject to competitive bidding is contrary: (1) to statute; (2) to the Commission's practice with respect to other radio services; and (3) to the public interest in viable nationwide and regional mobile data systems that can compete with entrenched cellular, 800 MHz SMR and other providers who have far greater spectrum resources that have never been subject to auctions. These issues

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2 See First Report and Order and Further Notice of Proposed Rulemaking, PR Docket 89-553, 8 FCC Rcd. 1469, 1471 (1993) ("900 MHz Phase II Further Notice"), Third Report and Order at 359-360.

3 RMD's proposal, cited by the Commission, Third Report and Order at ¶ 359, and supported by other commenting parties was to employ "modified MTAs." See RMD's Comments at 2-4 and Attachment 2 (April 23, 1993) filed in response to the 900 MHz Phase II Further Notice. These are areas that are generally consistent with Rand-McNally MTA boundaries, but which were modified in some cases to better conform with the Commission's initial DFA licensing scheme. Among other things, this approach, which RMD still believes to be preferable, would make it easier for incumbent systems wishing to expand to do so without creating a situation of mutual exclusivity among themselves. Whichever scheme is adopted (and without commenting on the substance of the copyright claim), RMD is working with Rand-McNally and other industry representatives in an effort to resolve the copyright licensing dispute noticed in footnote 218 of the Third Report and Order. RMD is hopeful that the matter can be satisfactorily resolved in the near future.

have been addressed in numerous pleadings already contained in the record of this proceeding and need not be restated extensively here. Still, a summary of certain basic points that the Commission does not appear to have considered or addressed in the Third Report and Order are set forth below.

A. Contrary To Statute.

The Budget Act[4] requires the Commission to seek "to avoid mutual exclusivity" by the application of "engineering solutions, negotiations, threshold qualifications, service regulations, and other means." 47 U.S.C. § 309(j)(6)(E). It further requires the Commission to follow licensing procedures that promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." 47 U.S.C. § 309(j)(e)(A). Rather than supersede the Commission's policies to establish threshold license qualifications and service criteria to avoid mutual exclusivity, the legislative history of the Budget Act (as well as the words of the statute) states that such criteria "should continue to be used when feasible and appropriate."[5]

Despite this legislative mandate, the Commission's decision treats auctions not as a means to resolve situations of mutual exclusivity, but as an end in itself. The Commission has not adequately considered ways in which situations of mutual exclusivity involving existing systems might be avoided. There seems to be little appreciation of the fact that those who have made the investment in the 900 MHz services are in the best position to expand service to unserved areas. Similarly, the Commission has not fully weighed the impact on investment, both by 900 MHz system licenses and their customers, of a decision that would undercut the ability of existing systems to complete their networks. There is little consideration of the fact that auctioning interstitial frequencies will delay licensing and further balkanize the 900 MHz band so that no viable competitive service ever will develop.

Indeed, the Third Report and Order makes clear that, but for the auction legislation, the Commission would have limited initial eligibility (and thereby avoided mutual exclusivity), at least for certain channels, to "incumbent DFA licensees with a substantial presence in the relevant service area."[6] But now,

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4 Omnibus Budget and Reconciliation Act of 1993 (the "Budget Act").
5 H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 258-59 (1993).
6 Third Report and Order at ¶ 360.

contrary to the clear legislative mandate, the Commission has reversed gears to create a licensing system in which mutual exclusivity is invited.

B. Contrary To Treatment Of Incumbents In Other Services.

The Commission has long recognized, and, since the passage of the Budget Act has continued to recognize, the public interest in allowing those who have made the investment in existing licensed services a first opportunity to expand these systems, when new licensing rules make the possibility of expanded service available. For example, after the Budget Act was passed, the Commission determined to allow existing private carrier paging services, previously operating on shared channels without any right to exclusivity to obtain nationwide exclusivity based on their construction of existing non-exclusive sites to fill out their systems.[7]

The Commission's decision regarding private carrier paging was based on the recognition that, as in other services,[8] establishing eligibility criteria based on existing construction does not give an unfair preference, "but simply reflects the investment that these licensees have already made at 900 MHz when other potential applicants chose not to."[9] The exact same rationale and standard for construction could have been applied to 900 MHz SMR systems. It was not and such disparity in treatment of similarly situated services and licensees cannot be justified.

Similarly, the Commission's decision with respect to unserved cellular areas[10] is not consistent with the Third Report and Order's treatment of 900 MHz SMRs. There the Commission elected to proceed with lotteries, rather than auctions, recognizing that auctioning interstitial areas would delay service to the public and would not "expedite the deployment of service to the public," which the Commission recognized as "a principal objective of the auction law."[11] The Commission recognized, moreover, that auctions in such circumstances, would disrupt business plans, without any clear sense of the value of interstitial areas if

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[7] Report and Order, Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz. 8 FCC Rcd. 8318 (1993).

[8] See Second Report and Order and Further Notice of Proposed Rulemaking, Advanced Television Systems, 7 FCC Rcd. 3340, 3342 (1992).

[9] Notice of Proposed Rulemaking, to Provide Channel Exclusivity to Qualified Private Paging Systems, 8 FCC Rcd. 2227, 2232 (1993).

[10] Memorandum Opinion and Order, Implementation of Section 309(j) of the Communications Act — Competitive Bidding, FCC No. 94-123 (July 14, 1994) (the "Cellular Lottery Decision").

[11] Id. at ¶ 16.

auctioned separately from adjacent markets. All of these considerations apply with equal force to 900 MHz SMRs.

Indeed, even after the issuance of the Third Report and Order, the Commission has proposed a first window filing for MDS licenses be limited to existing system operators as a way to "encourage enhancement of wireless cable operations, and thus accelerate opportunities for competition with wired cable systems in various locations."[12] The Commission could have chosen a similar approach for 900 MHz SMR wide-area systems. Consistent with the MDS decision, 900 MHz SMRs with a minimum number of sites could have been allowed a first window for expansion to facilitate their becoming effective competitors to cellular, 800 MHz SMR, and paging companies.

C. Contrary To The Public Interest.

The Third Report and Order not only will inflict business hardships on 900 MHz SMR licensees, it will prevent those licensees from completing their networks. Moreover, the continuing delays in "Phase II" SMR licensing until auctions are held at some indefinite date in the future will prevent 900 MHz SMR licensees from becoming viable competitors to entrenched cellular, 800 MHz SMR, paging and other networks that have not suffered from such constraints.[13]

In such circumstances, putting the remaining interstitial areas of the MTA up for auction undermines the public interest in the development of efficient wide-area service.[14] Keeping existing systems locked in their current boundaries does not serve this goal. Nor will the public interest be served by forcing such systems to try to outbid others for interstitial areas, particularly when such less populated areas are unlikely to be able to support a stand alone system — as witnessed by the lack of 900 MHz SMR construction even in major urban areas outside the top 10 markets.

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[12] Notice of Proposed Rulemaking, MM Docket No. 94-131, et al., FCC 94-293 (released December 1, 1994), at 9.

[13] The Commission also should consider that those speaking loudest for the need to protect "new entrants" are the very companies who have already been granted other mobile services licenses by the Commission, without auction, and who stand to benefit the most by delaying effective competition from 900 MHz SMR.

[14] Although RMD does not believe it would go far enough, at very least, the Commission should give incumbent licensees an opportunity to expand their systems (without mutual exclusivity or auctions) in MTAs in which the wide-area coverage requirements (to be established by the Commission) already have been met, on a particular ten-channel block, by them or where the area left to be built, *i.e.*, what remains outside of the incumbent(s)' 22 dBu contours in the particular channel block in an MTA is less than the area required to establish a wide-area system.

While it is theoretically possible for incumbents to acquire licenses for the interstitial areas at auction, the rules will not prevent bad faith participation in the auctions by those whose interests would be served by preventing, delaying, or running up the costs of the completion of potential wide-area service competitors. It also is not clear that the rules will prevent those with access to bidding credits from using such credits to outbid an incumbent, and then extract the difference from the incumbent through "management" agreements and the like.

Furthermore, given the current schedule, it seems very unlikely that MTA auctions will take place before the Summer of 1995 or later — leaving existing 900 MHz systems in limbo, while cellular, 800 MHz SMR, and paging systems continue to expand their customer base. The result will be that 900 MHz SMR licensees will be forced to spend another year "on hold," with every post-August 9, 1994, secondary site that they build outside of previously constructed areas at risk.

II. RULES GOVERNING THE PROTECTION OF INCUMBENT SYSTEMS SHOULD BE CLARIFIED TO FACILITATE WIDE-AREA OPERATION BY EXISTING SYSTEMS OVER AREAS LICENSED OR SUBJECT TO LICENSE APPLICATION AS OF AUGUST 9.

Even if the Commission chooses to leave the auction requirement in place, it should clarify the rules to facilitate wide-area operation by existing licensees. As the Commission recognized in the Third Report and Order, a more flexible licensing scheme is necessary to allow wide-area SMR systems effectively to compete with cellular, PCS, and other wide-area-licensed services.[15] At the same time, the Commission left the details of SMR wide-area licensing to be addressed in other technical rulemaking proceedings specifically involving 800 MHz and 900 MHz SMRs. RMD fully supports the Commission's decision to move toward wide-area licensing of 900 MHz SMR systems and is actively participating in the relevant technical rulemaking proceeding involving 900 MHz SMRs.

While most issues regarding wide-area SMR licensing can be addressed in the specific technical rulemaking dockets, there are certain points of clarification that may be necessary to address in the instant proceeding. Of particular importance to the overall scheme of 900 MHz SMR licensing is that existing wide-area systems, even if they are not permitted to expand to MTA boundaries, must be given the flexibility to enjoy the benefits of wide-area licensing within their existing coverage areas.

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[15] Third Report and Order at 346.

This means, among other things, that such systems should no longer be required to license individual base stations, but, instead as long as they do not extend their interference contours, should be given the freedom to add, modify, and move base station sites and channels within the contiguous service areas of existing licensed facilities, as other wide-area systems are permitted to do. Incumbent systems should be protected by other licensees on a similar basis of area contours instead of individual stations. While the details of such a licensing scheme may be better left to the 900 MHz SMR technical docket, if necessary, it should be clarified that the Third Report and Order was not intended to limit the benefits of 900 MHz SMR wide-area licensing to MTA licensees.[16]

The other issues that relate to the operation of incumbent systems involve the cut off date for secondary sites granted protection and the continuing ability of incumbent systems to license secondary sites, as secondary. With respect to the August 9, 1994, cut off date for protection, RMD urges that facilities subject to pending application as of that date also should be granted protection. Such a decision would be consistent with the Commission's decision to continue to process 800 MHz SMR applications that were on file prior to August 10, 1994,[17] and with the Commission's earlier decision to proceed with lotteries for pending cellular applications, rather than return such applications and license by auction.[18] At the very least, the Commission should clarify that licenses granted to systems after August 9, 1994, which permit modifications either in base stations or channel locations or that permit the exchange of frequency blocks, will be granted protected status, as long as there is no increase in the protected area.

In addition, consistent with the Commission's current practice, it should continue to accept and process 900 MHz SMR applications filed after August 9, 1994, as secondary.[19] While such sites would not be granted protected status, the ability to continue to construct and operate these sites is essential to ensure that incumbent

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16 Of the actual rules promulgated by the Commission in the Third Report and Order, and not left for a later technical rulemaking decision, the only one that appears to require change in this regard is Section 90.425(e). More particularly, the station identification exemption should be extended to include 900 MHz SMR licensees who are authorized to operate on a single block of channels over a wide area, whether that area is defined by MTA borders or by the contours of stations licensed (and applied for) prior to the Commission's auction decision.

17 See FCC News Release, "FCC and Industry to Speed Processing of 800 MHz Licenses" (Nov. 29, 1994).

18 See Cellular Lottery Decision, supra.

19 RMD believes that the statement in the Third Report and Order that the Commission "will not allow additional secondary sites in the band" may have been intended only to state a cut off for protected status. Third Report and Order at 360.

systems can meet their customers' needs while MTA licensing and construction of MTA-based systems remains in the distance.

III. LOADING REQUIREMENTS SHOULD BE ELIMINATED.

The Commission proposed, and commenting parties supported, the elimination of loading requirements for all SMR systems as an unnecessary regulatory intrusion into the operation of constructed and licensed systems and as inconsistent with the goal of parity among CMRS systems. The rulemaking record further establishes that loading rules, which were developed to apply for single site traditional dispatch SMR systems, are practically impossible to apply to wide-area networks. Loading rules are even more difficult to apply when wide-area systems offer capacity for non-voice applications[20] and to value-added suppliers, who are not the system's ultimate end users.[21]

The point is that, when companies expend millions of dollars for construction, there is no need for a regulatory requirement that they seek customers. If, however, a customer base is slow to develop, such licensees should not be penalized, particularly when a major contributing factor, as recognized by the Commission, has been its failure to establish rules for licensing adjacent areas where wide-area customers demand service. The Commission seemed to concur in that the Commission stated that loading requirements:

> "contravene[] the Congressional goal of regulatory symmetry and could unfairly impair the ability of certain licensees to compete;"
>
> "are not a reliable indicator of efficient channel usage,"
>
> "are unnecessary when construction requirements are enforced;" and
>
> "ha[ve] outlived [their] regulatory purpose", etc.

Third Report and Order at 373-74.

Inexplicably, however, the Commission went on to state that loading requirements will continue to apply to 900 MHz SMR licensee incumbents unless

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[20] See Report and Order, PR Docket No. 89-552, 6 FCC Rcd. 2356, 2367 (1991) (loading not applied at 220-222 MHz as unnecessary given capital investment required to construct and particularly difficult to apply to data systems).

[21] See, e.g., RMD's Comments (April 23, 1993) at 9-10 filed in response to the 900 MHz Phase II Further Notice.

they acquire MTA licenses. As its rationale for this turnabout, the Commission stated that 900 MHz SMR rules did not require licensees to achieve significant coverage requirements. The same rationale, however, could be applied to 800 MHz SMRs, including single site and conventional spectrally inefficient untrunked systems, all of which, including new station-by-station licensees, will not be subject to loading requirements.

Furthermore, while not "required" to build wide-area systems — indeed, operating under rules that have and continue to make wide-area expansion exceedingly risky because of the uncertain fate of Phase II — some systems, such as RMD's, have been built on a wide-area basis and employ digital technology that is far more efficient even than typical trunked systems, much less conventional non-trunked operations, as to which, at 800 MHz, the loading rules will no longer apply. The fact is, moreover, that unlike cellular, PCS and newly proposed MTA based SMR systems, incumbent 900 MHz SMR systems will be given protection rights only over areas in which they have been required to build systems — the concept of a coverage requirement is irrelevant to them because they get no license protection for areas that are not covered by a constructed system.

The Commission stated that its decision to continue to impose loading requirements on 900 MHz licensees was mitigated by a previous extension of the time for loading granted to such systems in 1992.[22] The Commission's reason for that extension, however, was that the delay in proceeding with Phase II SMR licensing "limited 900 MHz systems to artificially defined markets," and hindered licensees from developing "the kind of wide-area services expected by today's private radio customers."[23] Because of this delay, and based upon what was then a reasonable assumption that the Commission would quickly proceed with Phase II licensing, a loading extension was granted. Now, in what amounts to a triple blow to 900 MHz license incumbents, the Commission has decided: (i) not to let them expand; (ii) to impose loading requirements on them because they were not "required" to expand; and (iii) to do so in a timeframe that, even if licensees wanted to expand to MTAs (and, thereby, as proposed, be relieved of loading requirements), many of their initial licenses will expire before such MTAs are available for license!

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[22] Report and Order, Amendment of Section 90.631 of the Commission's Rules Concerning Loading Requirements for 900 MHz Trunked SMR Stations, 7 FCC Rcd 4914 (1992).
[23] Id. at 4914-15. Emphasis added.

RMD respectfully submits that imposing loading requirements upon 900 MHz licensees will hinder their ability to compete with other CMRS licensees and unfairly penalizes incumbents because of the Commission's unwillingness to give them the same ability to expand that has for years been given to other systems. At the very least, such a requirement should not be imposed on systems, such as RMD's, that, despite the limitations of the rules, have constructed wide-area systems at their own risk. Moreover, no 900 MHz SMR license should be lost for lack of system loading until licensees have been given a chance to acquire the applicable MTA license and, if not, a further period to develop their systems, as they are able, under a new licensing regime.

IV. CONCLUSION

There is more to the public interest than auctions. That was true before the passage of the Budget Act and it is true subsequent to passage. For the reasons stated and previously presented, RMD again urges the Commission not to auction frequencies in areas in which substantial construction and related investment in 900 MHz SMR systems already has occurred under a different licensing regime.

If the Commission concludes otherwise, RMD urges the Commission, at least, to adopt rules that allow existing wide-area systems effectively to operate within the borders of their licensed and previously applied for facilities and without the burden of antiquated loading requirements that have been lifted from all competitive systems.

Respectfully submitted,

RAM MOBILE DATA USA LIMITED PARTNERSHIP

By: _____

Henry Goldberg
Jonathan L. Wiener
Daniel S. Goldberg

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 429-4900

Its Attorneys

December 21, 1994

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Reconsideration was sent by first-class mail, postage prepaid, this 21st day of December, 1994, to each of the following:

Kenneth G. Starling
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for Airtouch Communications

Carl W. Northrop
Bryan Cave
70013th Street, N.W., Suite 700
Washington, DC 20005
Counsel to Arch Communications Group, Inc., AirTouch Paging and CellCall

Bruce D. Jacobs
Glenn S. Richards
Fisher Wayland Cooper Leader & Zargoza LLP.
2001 Pennsylvania Avenue, N.W., Suite 400
Washington, DC 20006
Counsel to American Mobile Satellite Corporation

Lon C. Levin
Vice Pesident and Regulatory Counsel
American Mobile Satellite Corporation
10802 Parkridge Boulevard
Reston, VA 22091

J. Barclay Jones
Vice President for Engineering
American Personal Communications
1025 Connecticut Avenue, N.W.
Washington, DC 20036

John T. Scott, III
Charon J. Harris
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for The Bell Atlantic Companies

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
Counsel for BellSouth

Charles P. Featherstun
David G. Richards
1133 21st Street, N.W.
Washington, DC 20036
Counsel for BellSouth

Alan R. Shark, President
American Mobile Telecommunications
Association, Inc.
1150 18th Street, N.W., Suite 250
Washington, DC 20036

Thomas Gutierrez
Elizabeth R. Sachs
Gerald S. McGowan
George L Lyon, Jr.
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Suite 700
Washington, DC 20006
Counsel for American Mobile Telccommunications Association, Inc., Suncom Mobile and Data, Inc., Pittencrieff Communications, Inc., and Dial Page, Inc.

Dennis C. Brown
Robert H. Schwaninger, Jr.
Brown and Schwaninger
1835 K Street, N.W., Suite 650
Washington, DC 20006
Counsel for Don Cook, et. al.

Michael F. Altschul
Vice President, General Counsel
Randall S. Coleman
Vice President for Regulatory Policy and Law
Cellular Telecommunications Industry Association
1250 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036

Frederick M. Joyce
Christine McLaughlin
Joyce & Jacobs
2300 M Street, N.W. Suite 130
Washington, DC 20037
Counsel for Celpage, Inc., Metrocall, Inc., Ram Technologies, and Network USA

Robyn G. Nietert
Scott C. Cinnamon
Brown Nietert & Kaufman, Chartered
1920 N Street, N.W., Suite 660
Washington, DC 20036
Counsel for Global Cellular Communications, Inc. and Jean M. Warren

Frederick J. Day
1110 N. Glebe Road, Suite 500
Arlington, VA 22201-5720
Counsel for Industrial Telecommunications Association, Inc., Council of Independent Communications Suppliers, Industrial Telecommunications Association and Alliance of Private 800/900 MHz Licensees

Gail L Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
Counsel for GTE

William J. Franklin
William J. Franklin, Chartered
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC 20006
Counsel for LegalCom Services, Inc., Air Spectrum III, Committee for Effective Cellular Rules, Simrom, Inc., SMR Systems, Inc., and PCC Management Corp.

William D. Wallace
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel for Loral/Qualcom Partnership, LP.
Leslie A. Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 208174302
Counsel for Loral/Qualcom Partnership, LP.

W. Bruce Hanks, President
Century Cellunet, Inc.
100 Century Park Avenue
Monroe, LA 71203

Robert A. Mazer
Nixon, Hargrave, Devans & Doyle
One Thomas Circle, N.W., Suite 800
Washington, DC 20005
Counsel for Constellation Communications, Inc.

Rayrnond G. Bender, Jr.
J. G. Harrington
Leonard J. Kennedy
Laura H. Phillips
Richard S. Denning
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, DC 20037
Counsel for Comcas Corp. and Vanguard Cellular

David C. Jatlow
Young & Jatlow
2300 N Street, N.W., Suite 600
Washington, DC 20037
Counsel for The Ericsson Corporation

Michael Hirsch, Vice President
External Affairs
Geotek Communications, Inc.
1200 19th Street, N.W., Suite 607
Washington, DC 20036

Robert Fay, Pres.
The RF Technologies Group
Police Emergency Radio Services, Inc.
82 Herbert Street
Framingham, MA 07101

Paul J. Feldman
George Petrutsas
Fletcher, Heald & Hildreth
11th Floor, 1300 North 17th Street
Rosslyn, VA 22209
Counsel for Roseville Telephone Co. and Banks Tower Communications

Harold C. Davis
Executive Vice President, Business Development
Smartlink Development LP.
1269 South Broad Street
Wallingford, CT 06492

Stephen G. Kraskin
Caressa D. Bennet
Kraskin & Associates
2120 L Street, N.W., Suite 810
Washington, DC 20037
Counsel for The Rural Cellular Association

William R Miller
dba/Russ Miller Rental
3620 Byers Avenue
Fort Worth, TX 76107

Wayne V. Black
Dorotly E. Cukier
Carole C. Harris
Christine M. Gill
Marc Berejka
Barry J. Ohlson
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
Counsel for The Southern Company, United States Sugar Corporation, American Petroleum Institute and SIRSA

Robert M. Lynch
Paula J. Fulks
175 E. Houston, Rm. 1218
San Antonio, TX 78205
Counsel for Southwestern Bell

Donald M. Mukai
Jeffrey S. Bork
1020 19th Street, N.W.
Suite 700
Washington, DC 20036
Counsel for U S West, Inc.

Jeffrey L. Sheldon
Sean A. Stokes
Utilities Telecomrnunications Council
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, DC 20036

Norman P. Leventhal
Raul R. Rodriguez
Leventhal Senter & Lerrnan
2000 K Street, N.W.
Suite 600
Washington, DC 20006
Counsel to TRW

David E. Weisman
Alan S. Tilels
Meyer, Faller, Weissman and Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
Counsel for National Association of Business and Educational Radio, Inc. and Speed-Net

Thomas J. Casey
Jay L Birnbaum
Timothy R. Robinson
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Avenue, N.W.
Washington, DC 20006
Counsel for New Par

Robert S. Foosaner
Lawrence R. Krevor
Laura L Holloway
Nextel Communications, Inc.
800 Connecticut Avenue, NW
Suite 1001
Washington, DC 20006

Mark J. Tauber
Mark J. O'Connor
Piper & Marbury
1200 19th Street, NW
Seventh Floor
Washington, DC 20036
Counsel for Omnipoint Communications, Inc.

Michael R. Carper
Vice President & General Counsel
OneComm Corporation
4643 Ulster Street, Suite 500
Denver, CO 80237

William J. Balcerski
Edward R Wholl
120 Bloomingdale Road
White Plains, NY 10605
Counsel for NYNEX Corporation

Phillip L Spector
Susan E. Ryan
Paul Weiss, Rifkind, Wharton & Garrison
1615 L Street, N.W.
Washington, DC 20036
Counsel for Pagemart, Inc. and Seiko Telecommunication Systems

Judith St. Ledger-Roty
James J. Freeman
Marnie K Sarver
John W. Hunter
Andrea S. Miano
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
Counsel for Paging Network, Inc.

Mark J. Golden
Personal Communications Industry
Association
1019 19th Street, N.W.
Washington, DC 20554

Eliot J. Greenwald
Howard C. Griboff
Fisher, Wayland, Cooper, Leader & Zaragoza LLP.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20006
Counsel for US Mobilcomm, Inc.

Richard Rubin
Fleischman and Walsh
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
Counsel for US Mobilcomm, Inc.

Jay C. Keithley
Leon Kestenbaum
1850 M Street, N.W.
Suite 1100
Washington, DC 20036
Counsel for Sprint Corporation

Russell H. Fox
A.B. Cruz III
Susan H.R. Jones
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 East Tower
Washington, DC 20005
Counsel for The E.F. Johnson Company and WJG Maritel Corporation

Cathleen A. Massey
Regulatory Counsel
McCaw Cellular Communications, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, DC 20036

Mary Brooner
Manager, Wireless Regulatory Policies
Motorola, Inc.
1350 I Street, N.W.
Washington, DC 20005

Thomas J. Keller
Verner, Liipfert, Bernhard McPherson and Hand, Chartered
901 Fifteenth Street, N.W.
Suite 700
Washington, D.C. 20005-2327
Counsel for SEA, Inc.

Richard S. Becker
Becker & Madison, Chartered
1915 I Street, N.W.
Eight Floor
Washington, D.C. 20006
Counsel for Range Corporation and Northwest Wireless

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037

David L. Hill
Audrey P. Rasmussen
O'Connor & Hannan
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006-3483
Counsel for Qualicom Systems, Inc.

Mary McDermott
Linda Kent
United States Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

Joe D. Edge
Richard J. Arsenault
Drinker Biddle & Reath
901 15th Street, N.W.
Suite 900
Washington, D.C. 20006
Counsel for Puerto Rico Telephone Company

Alan F. Ciamporcero
Pacific Telesis
1275 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20004

Raymond J. Kimball
Kathryn A. Hutton
Ross & Hardies
888 16th Street, N.W.
Suite 300
Washington, D.C. 20006
Counsel for Southeastern SMR Association

Paul C. Besozzi
Besozzi, Gavin & Craven
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036
Counsel for USITV, Inc.

George Y. Wheeler
Koteen & Naftalin
Suite 1000
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
Counsel for American Paging, Inc. and Telephone and Data Systems, Inc.

Neal T. Kilminster
Nacy J. Thompson
COMSAT Mobile Communications
22300 Comsat Drive
Clarksburg, MD 20871

Charles Townsend
Atlantic Cellular Company, L.P.
15 Westminster Street, Suite 830
Providence, RI 02903

Lewis J. Paper
David B. Jeppsen
Kech, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
Counsel for Cellular Service, Inc. and ComTech, Inc.

John A. Prendergast
Blooston, Mordkofsky, Jackson& Dickens
Suite 300
2120 L Street, N.W.
Washington, D.C. 20554
Attorney for Radiofone, Inc. and Central Station Alarm Assoc.

Lori Purkerson, President
Accent Radio Service, Inc.
1317 Simnpson Way, Suite H
Escondido, CA 92025

Fred F. Fielding
Philip V. Permut
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for United Parcel Service

/s/ Laurie A. Gray
Laurie A. Gray