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

JAN - 5 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
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
RM-8117, RM-8030,
RM-8029

and

Implementation of Section 309(j) of the)
Communications Act —)
Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

To: The Commission

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COMMENTS

APPLIED TECHNOLOGY GROUP, INC.

Dennis C. Brown
Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: January 5, 1995

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Exhibit I

Summary Of The Filing

Applied Technology Group, Inc. (Applied) is a small operator of SMR systems in the Central Valley of northern California. Applied desires the opportunity to continue to grow and develop its traditional SMR service to the public of its area.

This proceeding is premature. There is, in essence, one existing prototype of a wide area system, namely, that of Nextel Communications, Inc. Nextel has not succeeded in making its technical system operate satisfactorily and the financial market has shown no confidence in the likelihood of Nextel's success as a wide area operator of Cellular-like systems. Under the terms of the waiver granted it by the Commission, Nextel has until 1996 to succeed or fail. Until the future is clearer, the Commission should not leap into adoption of its proposed rule amendments.

There are serious doubts about the validity of the assumption which underlies the instant proceeding, namely, that wide area SMR service can and should compete directly with Cellular and Personal Communications Service. The limited experience which the Commission has to date does not support the assumption.

The proposal to assign wide area licenses on the basis of Major Trading Areas is fraught with practical difficulties and is likely to create so much work for the Commission that it would be a net loss for the public. Among the likely results of adoption of the

proposal are disappointing returns at lottery, an upsurge of litigation activity, and the warehousing of vast quantities of spectrum.

Mandatory exchanges of frequencies between wide area and site-specific licensees would be manifestly unfair because, under the Commission's proposal, there would be no frequencies comparable to the upper 200 SMR channels. Only if the Commission is prepared to conduct hundreds of evidentiary hearings on the reasonableness of the terms of mandatory frequency exchange proposals should it undertake such a regulatory scheme.

With no evidence in its Notice of Proposed Rule Making that any change was needed to the current intercategory sharing of channels by SMR systems, there was no justification for the proposal to terminate intercategory sharing and the licensing of new SMRs on the General Category channels. If the Commission is truly concerned about maximizing competition, it will take care to provide continued expansion opportunities for traditional SMR operators by means of intercategory sharing.

To further promote competition if it adopts a plan of Commission-defined wide service areas, the Commission should allow incumbent licensees the freedom to improve their facilities prior to the time that a wide-area system on the same channels places a conflicting facility in operation. The Commission should maximize the benefits available to the public by allowing incumbent licensees to increase, relocate and supplement their

facilities freely, so long as they would not cause harmful interference to any actually operating wide area facility.

To date, the Commission's efforts to provide new opportunities to Designated Entities have been of only limited success. To improve that situation, the Commission should designate the entire block of 280 SMR channels as an Entrepreneurs Block, with only the Designated Entities eligible to apply for those channels.

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800 MHz SMR)

To: The Commission

COMMENTS

Applied Technology Group, Inc. hereby respectfully files its Comments in the above captioned matter. In support of its position, Applied Technology shows the following.

Applied Technology is a very small operator of Specialized Mobile Radio Systems in the San Joaquin Valley of California. It has been successfully engaged in the provision of local SMR service to eligible end users since the earliest days of SMR operation. Applied Technology desires and intends to continue to serve its loyal customers and to expand its service to others indefinitely. However, some of the proposals offered by the Commission in its Further Notice of Proposed Rule Making (FNPRM) would impose severe and unnecessary limitations on Applied Technology and other small SMR operators, with no demonstrated certainty of any compensating benefit to the public interest, all in the name of economic discrimination in favor of artists of the blue sky.

The Proceeding Is Premature

The instant proceeding was commenced prematurely. While the Commission has granted a small number of authorizations for wide-area SMR systems — most notably, to Fleet Call, Inc. ("Nextel") — there is no evidence of record that any of the systems has been successfully constructed and operated as promised by the wide area licensees. In 1991, the Commission received an application from Nextel in which Nextel proposed "to build an ambitious private land mobile radio system that promises improved spectrum efficiency without requiring additional spectrum," Fleet Call, Inc., _____ FCC Rcd. _____ (1991) at para. 36. In Fleet Call, Inc., the Commission granted Nextel a waiver of Rule Section 90.631, "provid[ing] Fleet Call with five years to construct any stations that would be part of its digital networks," *id.* at para. 21. Nextel has not yet demonstrated that it can build and operate its ambitious private land mobile radio system that promised improved spectrum efficiency without requiring additional spectrum. Under the terms of the waiver granted in Fleet Call, Inc., Nextel has until some time in 1996 to succeed or fail in carrying out its promise.

To date, there are no facts before the Commission which demonstrate that Nextel, or any other wide-area licensee, can actually succeed in constructing and operating the system for which it was licensed, under the terms of its promise to the Commission. There is no evidence that any wide-area system will even be technically feasible. The evidence which exists raises substantial doubt that Nextel can fulfill its promise to improve spectrum efficiency without

requiring additional spectrum.¹ There is no evidence that if the operation of a wide-area system were to become technically feasible that it would have any chance of success in the marketplace. Therefore, the Commission's proposal to terminate the future of an SMR industry which has been, by any measure, highly successful and reallocate spectrum to an unproven form of the art is premature. At the least, the Commission should defer any action in this matter until the time in 1996 at which it must be determined whether Nextel has kept its promise, and then act in the light of that experience.

The Shoe Should Fit The Actual Foot

Not reached by the FNPRM is an underlying question which must be clearly addressed, namely, is there any merit to the concept that a wide-area SMR system either can or must compete with Cellular and PCS systems? At paragraph 21, the Commission appears to base its entire proposal on an unexamined assumption that a wide-area SMR system can and should compete with Cellular and PCS systems. However, close scrutiny of the questions raises serious doubts about the validity of the assumption. As the Commission recognized at paragraph 21 of

¹ The stock market, which is generally believed to be a reliable evaluator of the likelihood of success of an enterprise, has shown little confidence in Nextel's ability. During the past year, Nextel's shares on the NASDAQ exchange have fallen from 46-3/4 to 12-3/4. As shown by an article from the Wall Street Journal published on January 3, 1995, attached as Exhibit I hereto, analysts are now recommending that persons who hold Nextel shares sell them. The article indicates that Nextel is now denying that it had ever claimed to be the next cellular giant and is now redirecting itself toward the dispatch market. While Nextel may continue to express confidence, the market clearly does not share it. In view of the collective evaluation of Nextel's potential, the Commission should have serious doubts about limiting the growth of a well working radio communications service to leap into a speculative future or to rescue a venture which many knowledgeable persons evaluate as having already failed.

its NPRM, even were a wide-area licensee to accumulate 10 MHz of spectrum, it would not have the resources to compete head-to-head with a 25 MHz wide Cellular system or a 30 MHz wide PCS system. Since a wide-area SMR inherently cannot do the same job as a Cellular or a PCS system, then perhaps the greater wisdom is to be found in recognizing that even the largest conceivable wide-area SMR system is fundamentally not the same thing as a Cellular or a PCS system.²

One-way paging provides a service which meets the needs of some persons as well as would Cellular service, at substantially lower cost. However, the fact that one-way paging is capable of meeting some user needs has not led the Commission to tear up its rules which have provided for a well-working paging service in a vain effort to pretend that paging might someday compete directly with the services provided and to be provided by Cellular and PCS. Similarly, the Commission should not cannibalize an SMR service which consists of thousands of successful systems serving the real needs of business and industry with the objective of forcing the development of something different.

There is a homely expression which appears to be applicable to the instant situation, which is, "You shouldn't try to teach a pig to sing; you'll only frustrate yourself and annoy the pig." The Commission would do well to recognize the technical limitations which must forever

² This is not to quarrel with the Commission's broader conclusion that everyone in telecommunications competes in some way or other with everyone else. It is only to question the factually unsupported assumption that there is any potential for fungibility between the wide-area SMR service and the Cellular and PCS services.

divide the SMR service from the more capable Cellular and PCS and direct its efforts toward making the most that can be made of the SMR animal, on the animal's own terms.

In its provision of spectrum for PCS, the Commission has taken a significant step to provide real, effective competition to the Cellular service. The great gulf of available bandwidth which divides SMR from Cellular and PCS would, at best, prevent a contest between wide-area SMR and Cellular or PCS from ever being more than a non-league game. Rather than indulging in an unjustified assumption that a junior welterweight fighter would provide an entertaining match for the heavyweight champion, the Commission should recognize the fundamental difference between SMR and Cellular or PCS and should structure any changes that it imposes on the industry on the basis of the necessity that the SMR service can be successfully regulated only on its own terms. If the Commission takes the SMR service on its own terms — on the basis of the services which the SMR service is capable of providing — the Commission's best choice would be to allow wide-area systems to be developed by those who choose to take the risk of buying the necessary assets in the private sector and allow the invisible hand of competition to determine whether they are successful against other SMR systems.

The MTA Proposal Is Likely A Net Loser

The Commission would do well to abandon its entire proposal to grant MTA licenses for the old SMR channels. In contrast to its experience in the Personal Communications Services and in the Interactive Video Data Service, the Commission does not write on a clean slate with

respect to the old SMR spectrum.³ The old SMR channels are already heavily licensed for land mobile operation. As the Commission is well aware, only in the most remote parts of the nation is any of the old SMR spectrum not assigned or currently applied-for. Were the Commission to grant MTA licenses, it would place itself in the position of a used-car dealer, offering every rusty, greasy, moth-eaten vehicle on an as-is basis, with no ability even to assure the buyer of clear title to any particular part of the car. Were the Commission to enter into the shady used-frequency business, it would find itself confronted with an almost unimaginable collection of litigation problems. Now coming to light are numerous situations in which the Commission has made erroneous, conflicting grants on the old channels, including conflicting exclusive grants to traditional SMR operators and wide-area waiver licensees, *see, e.g., LMR International, Inc. v. Dispatch Communications of Mid-Atlantic, Inc.* The service and interference areas of many incumbent systems are open to almost interminable debate over the extent of their coverage. The extent of rights to be enjoyed by wide-area licensees now developing their systems under rule waiver are not well defined by the proposal. Were the Commission to undertake licensing on an MTA basis, it would have to be in a position to litigate a host of controversies between incumbents and MTA licensees, and between MTA licensees.

³ To the extent that some of the PCS spectrum was already under license, it was under license for microwave systems operating between fixed-points. Systems which operate along narrow beams between fixed points are far easier for a new licensee to accommodate than land mobile systems which are intended to provide reliable service over a wide, generally circular area.

In view of the extent of incumbent licensing, the proposed MTA licenses cannot be expected to raise a great deal of money at auction. The Commission is well aware of the limited resources of its already overdriven Licensing Division. The Commission might not engage in elaborate cost accounting for each of its activities as would a private factory, but there surely is a cost to the treasury to the Commission's handling each problem which is presented to it. Applied Technology respectfully suggests that, in view of the number and extent of litigation problems which grant of MTA licenses would generate, it is not reasonable to conclude that grant of MTA licenses would result in anything other than a net loss to the treasury and a detriment to the public interest in wise use of the Commission's scarce regulatory resources.

Since 1974, the hallmark of SMR licensing has been simplicity, strictness, and sureness. Since the earliest of its decisions, *e.g.*, Texas Two-Way, Inc., _____ FCC 2d _____ (1983), the Commission has administered the SMR field with a high degree of regulatory efficiency by making simple, swift decisions; employing strict enforcement of its rules; and providing sureness to its regulatees as to the Commission's policies and the results of their application to specific situations. In contrast to a less bright record in the fields of telephone, broadcast, and common carrier regulation, in which fields the Commission has often labored for many years to make a final decision in a contested case,⁴ the Commission's history of regulation of the SMR field has

⁴ The Commission's reports are littered with an unfortunate record of litigation difficulty in broadcast, telephone, and common carrier regulation, in which it has not been uncommon to find cases taking six, eight, or ten years before the Commission, or even its all-time record of 38 years to reach a final, unchangeable decision. In contrast, hardly any SMR cases have required as much as two years to resolve.

stood as a well-polished star on the Commission's escutcheon. The MTA plan proposed by the Commission would throw out a fine record of regulatory success in the name of replacing a simple, well-functioning plan with one of enormous complexity, disorder, uncertainty, and cost to the public.⁵

The persons interested in wide-area licensing have not proven that they need the Commission's assistance to accomplish development of their wide area systems. If they need additional channels to relieve problems with their initial system designs, they have only to offer incumbent licensees sufficient incentives to acquire their channels under the Commission's existing regulations. There is no demonstrated need for the Commission to become involved in creating an overly-complex mechanism for licensing when interested persons have the power in their own hands to carry out their desires under the existing, relatively simple rules. After full consideration of the complexity and long-term costs of its proposed MTA licensing scheme, the Commission should terminate this proceeding without action, and allow the licensing of SMRs to proceed as it has, as generally one of the most successful programs of commercial licensing ever undertaken by the Commission.

⁵ Litigation cost must be carefully considered by the Commission, particularly in the SMR field. Over a 20 year period, only a handful of Commission adjudicatory decisions in the SMR field have been taken to the Court of Appeals. In part, that is because the quality of Commission decision-making has generally been high, and, in part, it is because the cost of a court appeal has rarely been justified in SMR cases. However, if an MTA licensee pays millions of dollars for a license, he is going to expect millions of dollars worth of services from the government, and the MTA licensee's investment would be sufficiently large to justify carrying cases forward on appeal which would probably not be continued were there less money at stake. Before the Commission leaps to raise the stakes in the SMR field, it should look to see if the Commission, itself, is likely to impale itself on any of those upturned stakes.

The public interest would suffer a net loss by allowing MTA licensees to warehouse large quantities of spectrum. In contrast to 20 years of regulation in which the Commission has applied objective standards to the number of channels for which a licensee is qualified, the Commission would now allow an MTA licensee to hoard 50 or more channels. Indeed, the Commission's plan would allow an MTA licensee to waste nearly all of its assigned channels, provided only that it develop some indefinite grade, quantity, or quality of coverage to two-thirds of its MTA within five years. Nothing in the Commission's proposed plan would appear to prevent an MTA licensee from building only the minimum number of single-channel stations sufficient to meet the coverage requirement, without ever making any substantial use of 49 or more of the channels assigned to it. If the Commission is to carry out its mandate to spread communications far and wide, 47 U.S.C. §151, it can do so much more effectively by changing none of its SMR rules than by making any of the changes proposed by the FNPRM.

No Forced Frequency Swaps

Obviously, the most hotly contested issue which the must resolve in this matter is whether to allow a wide-area licensee to force an incumbent licensee to change channels. There is no need for the Commission to impose such a burden on the thousands of incumbent licensees on the "old SMR" channels. Neither is there any need for the Commission to provide an MTA licensee with any express "right to negotiate to acquire incumbent systems within the MTA block," FNPRM at para. 12. If the Commission adopts its proposed MTA licensing plan, the MTA licensee will have the inherent right of all persons engaged in business to negotiate with the holder of a right for acquisition of that right. If the MTA licensee is willing to pay an

incumbent's price, the Commission should not stand in the way of an otherwise lawful transaction, but the Commission should not adopt a misleading or ambiguous rule or policy concerning acquisition of incumbent systems.

The Commission's suggestion that perhaps it might require an incumbent licensee to accept mandatory frequency relocation fails because it cannot be harmonized with the overall proposal. The Commission proposes to reallocate the old SMR channels to MTA applications and to retain the new SMR channels only for local licensing. Since the Commission does not propose to authorize MTA-wide operation on any but the old SMR channels, there would be no "fully comparable alternative frequencies", FNPRM at para. 36, to which an MTA licensee could bump an incumbent old channel licensee.

Making any provision for mandatory frequency relocation of incumbent old SMR channel licensees could involve the Commission in hundreds of evidentiary hearings at which it would have to determine whether the proffered frequencies were "fully comparable alternatives", and whether the proffered payments were reasonable. Then might follow additional litigation protesting an alleged lack of comparability of the offered replacement facilities with the incumbent's existing facilities. Since it is clear that the Commission does not have the resources necessary to conduct the reasonably predictable number of hearings in mandatory frequency relocation cases, the Commission would be well advised not even to start down such a path.

Intercategory Sharing Should Continue

The Commission did not express any obvious reason for its proposal to terminate the intercategory sharing of channels by SMR licensees. Intercategory sharing has provided countless opportunities for SMR operators to put otherwise fallow spectrum to productive use. The FNPRM presented no factual justification, whatsoever, for closing off the opportunity for willing entrepreneurs to make good use of allocations which proved to be unnecessarily generous in their communities. Intercategory sharing has, and should continue to, provide a maximum of competition to the user of radio communications. In view of the wide-area operators' projections that their systems can accommodate from six to 15 times the traffic of existing systems, there is no reason for the Commission to fear that any Business or Industrial/Land Transportation eligible cannot obtain radio communications service at a competitive price. Therefore, the Commission should continue to permit intercategory sharing of channels in the 800 MHz band.

The Commission Should Avoid Unsupported Presumptions

Proposed Rule Section 90.667 would put in place an apparently irrebuttable presumption that acquisition of an incumbent license by an MTA licensee would be in the public interest. However, proposed Rule 90.667 does not appear to be lawful in light of Section 314 of the Communications Act of 1934, as amended. Section 314 provides, in relevant part, that no person in the business of transmitting and/or receiving for hire messages by any telephone line shall acquire any radio system if the purpose "or effect thereof may be to substantially lessen competition," 47 U.S.C. §314. In view of the necessity of the Commission's making a case-by-

case determination as to the competitive effect of any acquisition of any certain radio system, it does not appear that proposed Rule Section 90.667 can be harmonized with Section 314. Accordingly, the Commission should decline to adopt the proposed rule.

The Commission has recognized that two Cellular systems are insufficient to provide enough competitors to the public. Based on its experience that two per market is not enough, the Commission should recognize that at least three wide-area SMRs will be necessary in each market if the public is to have an opportunity to enjoy competition in the wide-area SMR field.⁶ To assure that at least three competitive wide-area systems are licensed for each market, the Commission should initially limit any wide-area licensee in a market to holding authorization at any location within the MTA for no more than 66 of the 200 channels proposed to be reallocated to MTA licensing.⁷ To assure that enough wide-area SMR competitors are initially licensed, the Commission should limit each bidder in a market to bidding for one 50-channel block.⁸

⁶ While Applied Technology recognizes that the Commission hopes that wide-area SMR systems might be able to compete with Cellular and PCS systems, there is, as yet, no evidence that such will occur. Accordingly, the Commission would need to take the steps necessary to assure the public of an adequate level of competition within the wide-area SMR market, itself. In that way, if the wide-area systems are not, in fact, successful in competing with Cellular and PCS, then their customers can still enjoy the benefits of having a choice among competing wide-area systems.

⁷ To assure that there are sufficient competitors from the outset of wide-area MTA licensing, the Commission should bar from applying for an MTA authorization any person holding authorizations at any location within the MTA for more than 66 channels, and any person who is currently developing a system under a waiver authorizing wide-area operation over substantially all of the MTA.

⁸ After initial licenses are issued, the Commission might, on a case-by-case basis, grant authority for two or more licensees to merge. However, at the outset, the Commission should

More Competition Is Better

If the Commission truly believes in maximizing competition, it should not prohibit incumbent licensees from increasing their service areas after grant of an MTA license. The Commission should provide the public with the benefits to flow from permitting incumbent licensees to continue to develop their systems on the same terms as the MTA licensees would be permitted to develop, namely, on the basis of not intruding an incumbent station's interference contour over the service area contour of an actually existing MTA station. Allowing incumbent licensees to expand their service areas to the extent that they do not cause interference to actually existing MTA stations would provide the public with the maximum possible amount of service at the earliest possible time, and substantially reduce the public's risk that MTA systems will ultimately prove to be impracticable or that an MTA licensee might allow channels to lie fallow.

The Commission's disposition toward more competition can best be carried forward by recognizing that if someone builds a station, users may come, but first there must be a station built. If the public is to enjoy the maximum benefits of competition, the maximum possible number of station builders should be permitted to build the maximum coverage at the earliest possible time. If the Commission adopts an MTA licensing plan, it should provide for direct competition between the new MTA licensee and continued coverage development by existing

provide the public with the protection of having more than two competitors in the wide-area SMR field.

providers. Accordingly, the Commission should take no action that would limit the expansion potential of incumbent licensees in competition with MTA licensees.

As an alternative to allowing the public to receive the competitive benefits to flow from allowing incumbent SMR operators to expand at their convenience, the Commission might adopt a plan similar to the plan under which it provided a single, time-bound opportunity for the filing of an incontestible major modification application by an existing Cellular licensee prior to the filing of an application for service authority to unserved areas. Were it to adopt a plan parallel to its plan for the Cellular Service, the Commission would afford a limited period of time, during which any incumbent licensee could file one incontestible application for major modification of its facilities, prior to the time that it accepted MTA applications. Such a method would protect the interest of incumbent licensees and their subscribers by allowing them to maximize their service to the public before MTA applicants came forward.

Incumbent SMR operators have led the way toward a thriving competition in the provision of two-way services. The Commission would show small gratitude on behalf of the public were it to terminate the service area expansion opportunities of existing operators in favor of up to five years of slow expansion by a new licensee. If existing licensees are not to be unfairly deprived of the fruits of their labors, the Commission should provide the an equal opportunity with MTA licensees to expand early service to more of the public.

Incumbent Licensees Should Not Be Unfairly Shackled

Some incumbent SMR operators have already suffered from the freeze on the filing of modification applications in a way probably not anticipated by the Commission. To prevent any such further harm, the Commission should provide a greater range of flexibility for an incumbent operator to modify its facilities. Under the current freeze, many antenna site landlords have recognized that their SMR operator tenants are trapped, unable to file applications to relocate their stations, and, accordingly, have dramatically increased their site rents. While there is no reliable record which would prove the extent to which SMR operators rely on using sites which they do not own in fee simple, Applied Technology is reliably informed that a large number of SMR operators rely on antenna site leases with either private parties or governmental entities, including the United States Forest Service and the Bureau of Land Management. To avoid subjecting SMR operators to the oppressive rents which can be extracted from captive tenants, the Commission needs to provide sufficient flexibility for relocation of incumbent stations.

The Commission's proposal that an incumbent station be permitted to relocate, provided that its new contours not exceed its old is unnecessarily confining and would lead to the unnecessary death of many an incumbent station, whether by slow strangulation by its landlord, or by a leap from its existing site into oblivion. Particularly in the case of the mountaintop sites which serve a high percentage of the nation's population, it may not be possible to relocate an SMR station to any other practicable site while keeping the service area from the old site confined to the "footprint" of the old site.

Applied Technology suggests that the Commission permit a traditional SMR to be relocated freely to any site, provided only that other incumbent stations are provided with protection in the ratio of 40/22 dB μ , and that the relocated station's service contour will not include any greater area than the service contour from the existing site. So long as a relocated station will not conflict with an actually existing MTA station, the MTA operator should be adversely affected if an existing station's footprint is merely relocated from one part of the MTA to another.

Although the Commission did not propose specific language for a codified rule, Applied Technology supports the Commission's proposal at paragraph 40 of the FNPRM to establish a 30 kilometer fixed-radius protected service area, within which an existing licensee could place fill-in stations. The Commission has had a long-standing policy allowing for the licensing and use of secondary fill-in stations. To allow existing licensees an additional measure of flexibility, at no risk to any other interested person, the Commission should permit an incumbent licensee to install and operate, without requiring further licensing, any number of fill-in transmitters within a 30 kilometer radius of the authorized base station location, provided that the signal strength of any such fill-in transmitter would not extend the 40 dB μ signal strength contour of the existing station.

To provide certainty for incumbent licensees and would-be MTA applicants, the Commission needs to clarify the meaning of any waiver which it has granted authorizing wide-area operation to provide an unambiguous date for the termination of the waiver. For example,

in the case of Nextel, the Commission should clarify that the five year period provided for Nextel to complete construction of its wide-area system under waiver of Rule Section 90.631 will terminate on March 14, 1996, and that the rights of Nextel, incumbent operators, and MTA operators will be determined by the extent of Nextel's completion of construction and placing in operation of actual facilities on that date. Where Nextel has constructed facilities and placed them in operation at the five-year point, its coverage contours should be protected as against traditional SMR operators and against the MTA operator. To the extent that Nextel might have been granted authority to construct a wide-area station, but did not do so by March 14, 1996, the authority for that station should automatically cancel as of that date.

The Commission Must Respect The Rights Of Waiting List Applicants

The Commission's proposal to provide the MTA licensee with "the right to use any spectrum within the MTA block that is recovered by the Commission from an incumbent SMR licensee in the event of termination of the incumbent's license," FNPRM at para. 12, would place the Commission of selling something to which it no longer has clear title. The assumption that "the MTA licensee has obtained the contingent rights" to spectrum recovered from incumbent licensees who either fail to construct or discontinue operation would unlawfully divest those persons who are on the waiting list of the procedural rights which the Commission has long afforded them.

It is crucial to remember that the Commission included the sanctity of a position on the waiting list as one of the rights which its policy of first-in-time-is-first-in-right provided in

exchange for the right of applicants to comparative hearings under the rule of Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945). The Commission cannot lawfully, at this late date, after some applicants have been waiting patiently on the waiting list for more than ten years for grant of recovered channels, divest them of their rights without completely undoing nearly 20 years of licensing and giving the waiting list applicants comparative hearings against incumbent licensees, just as if the incumbents' applications had never been granted. The waiting list applicants exchanged their right to a comparative hearing among applications filed within a wide time window for a place on the waiting list. The Commission could not now deprive them of those vested rights without providing some form of just and adequate compensation. Based on the market value of a channel, just and adequate compensation could amount to as much as two million dollars per application.

Small Business Should Be Provided A Fair Opportunity

As the Commission has implicitly recognized in its Fifth Memorandum Opinion and Order in PP Docket No. 93-253, _____ FCC Rcd. _____ (FCC 94-285 Released November 23, 1994), it has not, thus far, been terribly successful in ensuring "that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services," 47 U.S.C. §309. The SMR field provides the Commission with a unique opportunity to balance some of its early difficulties in exercising the mandate of Section 309.

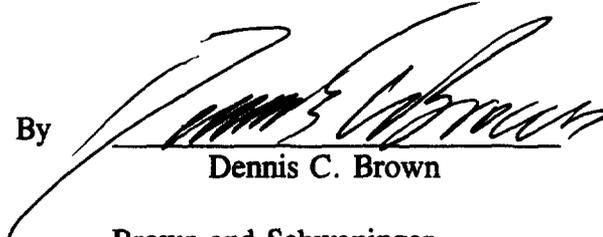
From the beginning, the Commission has always conceived of the SMR field as the place for an entrepreneur to exercise the spirit of risk and willingness to work which has made America prosper. To continue this tradition, which has met with great success over the past 20 years, the Commission should take a firm and positive step by reserving eligibility for licensing for SMR systems, whether local or MTA, to Designated Entities. In short, the 280 SMR Category channels should be an Entrepreneurs Block. By reserving eligibility for the entire SMR band to Designated Entities, the Commission can demonstrate a record of success in ensuring an opportunity for Designated Entities to participate in the provision of spectrum based services and can continue to provide an opportunity for the energetic entrepreneur to contribute to the American economy.

Conclusion

For all the foregoing reasons, the Commission should provide the maximum possible amount of competition in the provision of SMR services and should provide that competition through the efforts of the Designated Entities.

Respectfully submitted,
APPLIED TECHNOLOGY GROUP, INC.

By

A handwritten signature in black ink, appearing to read "Dennis C. Brown", is written over a horizontal line. The signature is stylized and cursive.

Dennis C. Brown

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: January 5, 1995