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

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

COMMENTS OF MCCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"),[1] by its attorneys, hereby files these comments in response to the Further Notice of Proposed Rulemaking ("Further Notice")[2] in the above-captioned proceedings.

In establishing a framework for licensing specialized mobile radio services ("SMRS") -- particularly wide-area SMRS -- the Commission must not lose sight of the statutory mandate to eliminate regulatory disparities among providers of commercial mobile radio services ("CMRS") and to prevent the creation of new disparities. McCaw agrees that the technical and operational rules for SMRS should be comparable to the requirements

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[1] On September 19, 1994, McCaw became a wholly-owned subsidiary of AT&T Corp.

[2] 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, FCC 94-271 (released November 4, 1994).

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applicable to other providers of CMRS. The proposals in the Further Notice generally meet this goal.

By the same token, SMRS licensees desiring the operational flexibility of cellular and other CMRS services should be expected to bear the same regulatory burdens as the providers of those services. While SMRS licensees were given a three-year period to make the transition from private carriers to common carriers, they are not entitled to the artificial marketplace advantage that would result from according them operational flexibility without also imposing the common carrier obligations to which cellular and PCS are subject. The transitional period was established to minimize regulatory burdens on formerly private carriers, not as an interim in which to establish new differences between the treatment of private and common carriage. To avoid the creation of such disparities, the licensing rules proposed in the Further Notice should not take effect until the expiration of the transition period or until an SMRS licensee voluntarily agrees to be treated as a CMRS provider, whichever is earlier.

I. Wide-Area SMRS Licensees that Enjoy the Operational Flexibility of Other CMRS Providers Should be Subject to the Same Common Carrier Obligations as Those Providers

McCaw supports the effort to establish rules for SMRS that are comparable to the rules governing competing commercial mobile radio service providers.[3/] While the establishment of uniform

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[3/] See Further Notice at ¶ 9.

technical, operational and licensing rules will help further goals of regulatory parity among mobile services, however, parity will be undermined if SMRS licensees, particularly licensees offering wide-area service, can avail themselves of the more flexible operational and technical rules characteristic of CMRS without also assuming the regulatory responsibilities of CMRS providers.

When it enacted Sections 3(n) and 332 of the Communications Act ("Act") in 1993,[4] Congress sought to establish a comprehensive Federal scheme to govern the offering of mobile radio services[5] under which like services are subject to consistent regulatory treatment.[6] In the CMRS Second Report and Order,[7] the Commission substantially accomplished these goals, creating a sound regulatory foundation for the continued growth and development of CMRS. Since SMRS licensees compete with existing and potential wide-area CMRS providers,[8] they are

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[4] 47 U.S.C. §§ 3(n), 332, as amended by Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 107 Stat. 312, 392 (1993).

[5] See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993); H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

[6] See, e.g., House Report at 259-60.

[7] Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411 (1994).

[8] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, FCC 94-212 (rel. Sept. 23, 1994), at ¶ 94 ("CMRS Third Report and Order").

properly subject to the same regulatory framework as other providers of CMRS.

This means that providers of SMRS, like cellular and PCS licensees, are common carriers[9] that must offer their services at just and reasonable rates, without any unjust or unreasonable discrimination among subscribers. It also means that other requirements made applicable to CMRS providers, including equal access and any interconnection obligations,[10] should be consistently applied to SMRS. Such a result is consistent with the Commission's stated goal of "achiev[ing] regulations that maximize competition among CMRS providers and eliminat[ing] regulatory distortions in the mobile services market."[11] It was, after all, the unjustified regulatory disparities between the private and common carrier mobile radio services that motivated Congress to revise Section 332(c).[12]

The pending proposal to establish a flexible licensing and regulatory scheme for SMRS should not be the occasion to recreate regulatory disparities between SMRS and other CMRS providers. The Commission errs in suggesting that the three-year transition

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[9] See CMRS Third Report and Order at ¶ 20.

[10] See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry, FCC 94-145, (rel. July 1, 1994). Cf. id. at ¶ 127 (acknowledging that different interconnection obligations for different CMRS providers would, "by definition, result in a lack of symmetry").

[11] Further Notice at ¶ 2.

[12] See House Report at 259-60.

period established by Congress for reclassified private radio licensees[13] dictates an interval during which SMRS licensees can enjoy the operational flexibility conferred upon CMRS providers without also bearing the common carrier responsibilities imposed on those providers.[14] Creating this new and significant disparity, which could persist for 18 months, would unjustifiably confer an artificial marketplace advantage on SMRS licensees that Congress did not desire or intend.

The three-year transition period was designed to "ensure an orderly transition for all reclassified private services" that would become common carriers under the definitional framework of Section 332(d).[15] Private mobile licensees facing reclassification were given two years to bring their services into compliance with the Commission's CMRS rules. "Attempting to make reclassification effective before this process is complete would cause significant disruption and confusion in the ongoing licensing and regulation of affected private mobile services," the Commission observed.[16]

The three-year transition period was not intended to exacerbate the disparities between private and common carrier

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[13] Omnibus Budget Reconciliation Act of 1993, § 6002(c)(2)(B).

[14] See Further Notice at ¶ 70.

[15] CMRS Second Report and Order, 9 FCC Rcd at 1513.

[16] Id. at 1514; see also House Report at 262 ("nothing in the Commission's rules could have the effect of accelerating the three year period for compliance").

licensees that the legislation was enacted to correct.[17] During the transition, SMRS licensees remain regulated as private carriers[18] in order to avoid the kind of "disruption" or "confusion" that a sudden reclassification might have produced. Having delayed the "burdens" of becoming CMRS providers, however, SMRS licensees should not be permitted to enjoy the benefits of that status. Nothing in law or public policy justifies the creation of a private carrier/common carrier hybrid. To the contrary, the establishment of such a classification is contrary to the entire thrust of Section 332. To avoid this result, the grant of operational flexibility to wide-area SMRS licensees[19] should not take effect until earlier of August 10, 1996, the end of the three-year transition period,[20] or until a SMRS licensee voluntarily agrees to be treated as a CMRS provider for all purposes.[21]

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[17] See, e.g., House Report at 260.

[18] This rule applies even to providers of wide-area SMR service. CMRS Second Report and Order, 9 FCC Rcd at 1513-14.

[19] See, e.g., Further Notice at ¶¶ 30-31.

[20] Cf. CMRS Third Report and Order at ¶ 9 (holding that reclassified entities would not be subject to CMRS technical, operational, or licensing rules until the end of the transition period).

[21] This proviso would apply to any MTA licensee with respect to its licensed spectrum as well as to the spectrum of any incumbent that "reverts" to an MTA licensee. See Further Notice at ¶ 31.

II. SMRS Providers Should be Required to Meet the Notice and Technical Record-Keeping Requirements Applicable to Cellular Carriers

The Commission's proposal to afford SMRS providers the same operational flexibility as cellular carriers to construct and modify facilities within their service areas should also encompass the notice and record-keeping requirements that apply to cellular carriers.[22] Imposition of these additional requirements would be consistent with the Commission's goal of putting SMRS licensees and other CMRS providers on an equal footing "to the fullest extent possible."[23]

A cellular carrier may locate, design, construct and modify facilities within its service areas without prior Commission approval, but only so long as it causes no interference to other licensees.[24] To prevent interference, cellular carriers must notify the Commission of the addition or modification of cell sites that affect its service area boundary. This notification requirement enables licensees of adjacent cellular systems to assess the potential for interference when modifying or designing their systems.[25] Given that the Commission proposes to allow

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[22] See 47 C.F.R. § 22.163.

[23] Further Notice at ¶ 2.

[24] CMRS Third Report and Order at ¶ 95.

[25] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the

(continued...)

SMRS licensees to "self-coordinate" system modifications within their service areas without prior Commission approval, including the addition or modification of base station facilities,[26] a similar requirement should be incorporated into the Commission's rules for SMRS systems to prevent the construction of facilities that could cause interference at their service area boundaries.[27]

SMRS licensees should also be required to maintain relevant technical and administrative information concerning modified facilities and supply such information upon request by the Commission. Such a requirement would be analogous to the Commission's requirement that cellular carriers provide similar information concerning modified facilities that do not affect the service area boundaries.[28] While SMRS licensees will be able to make minor modifications to their facilities without prior approval or notification, the technical and administrative information underlying those changes should be readily available to the Commission if needed. Applying this requirement uniformly

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[25] (...continued)
931 MHz Band in the Public Land Mobile Service, 9 FCC Rcd 6513, 6519 (1994); see also 47 C.F.R. § 22.163(e).

[26] Further Notice at ¶ 30.

[27] The potential for boundary area interference among SMRS licensees may be significant since the Commission proposes to allow them to make major modifications to their facilities without prior approval. See Further Notice at ¶ 60.

[28] 47 C.F.R. § 22.163(d).

to SMRS and cellular licensees is also consistent with the general statutory goal of regulatory parity.

Conclusion

To prevent the creation of new disparities between comparable mobile services, the Commission should modify its proposed rules as set forth above.

Respectfully submitted,

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