Increased regionalization accompanied this expansion. Several companies, notably Fleet Call, began experimenting with digital systems to increase user capacity. To facilitate the construction of such Enhanced Specialized Mobile Systems ("ESMRs"), Fleet Call applied in 1990[51] and received a limited waiver of the FCC construction regulations in 1991.[52]

This waiver was significant in that the Commission granted it to encourage efficiency and quality in the SMR industry. The Commission, discussing comments concerned with the nature of the service Fleet Call was proposing to create, specifically noted the "Fleet Call [did] not propose to abandon dispatch service" and that Fleet call planned "on using new digital technologies specifically designed *for dispatch-oriented* SMR systems" (emphasis in original).[53] Although the Commission noted Fleet Call's intent to aggregate its channels in each market,[54] Fleet Call did not claim the company would need large, contiguous blocks of spectrum to provide the new service.

This step was followed shortly thereafter with a shift in Fleet Call's business focus away from traditional SMR service and toward the cellular market. In an attempt to compete directly

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[51] Fleet Call's submitted its request on April 5, 1990, and modified that request on June 7, 1990. See Fleet Call, 6 FCC Rcd. at nn. 1 & 2 (giving request and comment filing history).

[52] See In re Request of Fleet Call, Inc. for Waiver and Other Relief To permit Creation of Enhanced Specialized Mobile Radio System in Six Markets, 6 FCC Rcd. 1533 (1991)

[53] Fleet Call, 6 FCC Rcd. at 1537.

[54] Fleet Call, 6 FCC Rcd. at 1533-34.

with cellular carriers through its ESMR service, Fleet Call in April, 1992 requested that the Commission adopt rules which would permit the company to acquire large blocks of spectrum and implement ESMR systems over extended time frames.[55]

Fleet Call's proposal broke from its previous requests in that the company effectively called for the complete overhaul of SMR bandwidth utilization. Fleet Call requested that large blocks of spectrum ("innovator blocks") be set aside specifically for ESMR services, excluding traditional SMR operators in the process. Fleet Call stated that "an optimum innovator block would have 105 analog channels"[56], although a block of "at least 42 channels would permit a minimal level of frequency reuse thereby assuring sufficient capacity for subscriber growth and roaming traffic."[57] As most cellular systems utilized up to 45 channels in their cell sites, Fleet Call's lower range more closely approximated the reality of cellular systems.[58] Fleet Call claimed in its petition that 105 channel blocks would provide the "necessary system capacity and permit[] sufficient frequency reuse to make constructing advanced digital SMR systems

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[55] See Petition for Rulemaking, RM 7985 at pp. 7-9 (filed April 22, 1992).

[56] Petition for Rulemaking at pp. 7. See id. pp. 17-20 (further discussing claims of optimum and minimum spectrum blocks).

[57] Id. at 7.

[58] See Declaration of William A. Holesworth of October, 1994 at pp.3-4 (discussing size requirements of cellular systems).

economic."[59] The minimum 42 channels apparently were necessary to assure "sufficient capacity for subscriber growth and roaming traffic."[60]

Even in 1992 the difficulty of creating such large blocks was obvious. With large waiting lists for most areas of the country,[61] many markets had fewer than 42 un-allocated channels, let alone the "optimum" 105 channels Fleet Call desired. To protect the innovator blocks, Fleet Call suggested a temporary moratorium on the licensing of spectrum in those blocks and assigning new applicants to 900 MHz trunked frequencies.[62]

Fleet Call, however, did not suggest any channels already licensed should be retrieved and the licensees reallocated. In fact, Fleet Call emphatically declared that its proposal offered a "method for maximizing existing locations without the need for additional spectrum or spectrum reallocation to implement technological advances" (emphasis in original).[63]

The Commission chose not to act on Fleet Call's petition directly. Instead, in 1992 the Commission proposed[64] and in

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[59] Petition for Rulemaking, RM 3584 at p.7.

[60] Id.

[61] See Specialized Mobile Radio at 21 (providing table of applications on waiting lists for 35 regions of the country, based on Public Notice of July 2, 1990).

[62] Id. at 20-21.

[63] Id. at 16.

[64] In the Matter of Amendment of Part 90 of the Commission's Rules Governing Extending Implementation Periods, 7 FCC Rcd. 6587 (1992).

1993 adopted rule changes governing extended implementation schedules.[65] These rule changes addressed increased requests for implementation waiver requests by lengthening the time periods for construction, eliminating fleet and reporting requirements and applying extended construction rules to SMR applicants.[66]

At the same time the Commission proposed rules permitting widespread channel aggregation.[67] The proposed rules would permit the aggregation of up to 42 channels for wide-area systems and adjusting the first-come, first-serve basis for allocating channels to permit negotiation or competitive bidding.[68] Although the Commission eventually did not adopt any of its proposed rules, through a letter clarification at the end of 1993, the Commission supported the warehousing of spectrum prior to the establishment of wide-area systems.[69]

As a result, Fleet Call and other urban-based operators with sufficient "aggregate loading" to meet the Weisman letter "criteria" "began warehousing" large numbers of channels across

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[65] In the Matter of Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, 8 FCC Rcd. 3975 (1993) (adopting rule changes).

[66] Id. at 6587-88.

[67] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, 8 FCC Rcd. 3950 (1993).

[68] Id. at 3951-52.

[69] Letter to David E. Weisman, 8 FCC Rcd. 143, 144-45 (1993) (permitting aggregate loading to allow applicants for extended construction waivers to satisfy the "40-mile rule").

the country. Fleet Call set up a subsidiary, Smart SMR, in 1993 which began and continues through the present to submit wide area filings for large blocks of spectrum. The consequence of such massive filings have become clear; by early 1994 the waiting list for spectrum in all regions of the United States had climbed to over 40,000 applications.[70]

Fleet Call (now "Nextel") again raised the issue of spectrum blocks following the Commission's proposed rulemaking to implement Congressional amendments to sections 3(n) and (j) and 332 of the Communications Act in the Omnibus Budget Reconciliation Act of 1993.[71] Although nothing in the amended statutes or legislative history suggested Congress intended to restructure the SMR industry in its entirety, Nextel proposed in its comments to restructure the 800 MHz bandwidth and relocate present licensees wherever insufficient spectrum existed to meet industry (i.e., Nextel) needs.

In sum, Nextel suggested that 200 of the 280 800 MHz SMR channels be allocated exclusively for ESMR systems such as those Nextel operates, with no limitation on the amount of spectrum that any given entity may acquire in the remaining 400 unallocated channels.[72] Nextel has proposed that it also retain

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[70] See Public Notice, "Private Radio; 800 MHz Radio Systems: Application Waiting List (May 27, 1994).

[71] Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993) ("Budget Act").

[72] See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Comments of Nextel [Nextel Comments] at pp. ii, 11-19.

any other frequencies outside this 200-channel block which it currently or in the future may hold.[73] Although Nextel controls over 70% of the available SMR spectrum in many markets,[74] it opposed the establishment of 40 MHz block caps on the grounds that there was no "empirically-demonstrable economic or antitrust basis" between CMRS and ESMR systems to support such a cap.[75] Nextel did not comment on the effect of such a cap on the company's control of various SMR markets.

Nextel did not merely expand its 1992 rulemaking request for widespread spectrum aggregation. Instead, Nextel suggested that all licensees presently located in the proposed 200 channel band now should be relocated and obligated to retune their frequencies.[76] Nextel proposed this relocation to other "available" spectrum despite the fact that virtually all 800 MHz and most 900 MHz spectrum had been allocated or applied at the time the company filed its comments.

IV. FREQUENCY WAREHOUSING

The single most dramatic development in the past year in the SMR industry has been the warehousing of massive amounts of frequencies in licenses subject to five-year extended

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[73] This includes the "lower 80" channels, which the Commission has proposed as the "Local SMR" channels; and any SMR licenses in the 50 intercategory pool or 150 General Category channel blocks.

[74] See attached declaration of William Holesworth (Exhibit K).

[75] Id. at 27.

[76] Id. at ii, 16-20.

construction schedules. The other most dramatic occurrence has been the proposed merger of the largest regional holders of warehoused frequencies in the hands of one operator, Nextel. Nextel, the largest SMR operator nationwide, has proposed to merge with Motorola, the second largest operator nationwide.[77] Nextel also has proposed to merge with OneComm, the largest holder of unconstructed SMR channels in sixteen Western states,[78] and Dial Page, the largest holder of unconstructed SMR channels in twelve Southeastern states.[79] These events, standing alone and in combination, have had dramatic and unanticipated immediate effects on the SMR markets. These developments also affect substantially the Commission's auction proposals. Among the effects are the following:

Inability to Grow. Independent small business SMR operators, both within and without wait list areas, have been unable to expand their product[80] or geographic[81] markets i.e., to grow.

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[77] See FCC's request for comment on assignment of licenses, 13 FCC Daily Digest 241 (December 22, 1994); Nextel 10K SEC filing of June 9, 1994; DOJ Complaint (Exhibit F).

[78] In re Applications of Nextel Communications, Inc. for transfer of Control of OneComm Corporation, N.A. and C-Call Corp., DA 94-1087, File Nos. 903335 and 903334; See also DOJ CIS at 8-9 (Exhibit F.)

[79] CIS at 8-9.

[80] The product market is defined as the amount of communications time available on the system for sale to subscribers. See DOJ Complaint, ¶18.

[81] The geographic market is defined as the area of present service. See DOJ Complaint, ¶18.

Use of Urban Area "Aggregate Loading". The frequencies which in 1993 were otherwise available for system expansion have been warehoused in unconstructed licenses using "aggregate loading" figures from high-density urban markets - a prerequisite for such licensing unavailable to the small business operator in smaller metropolitan and rural markets.

Short Spacing. The "warehousing" licensees have designed their unconstructed facilities to short space existing licensees, effectively reducing their competitors' geographic operating area.[82]

Increasing Blocked Call Rates. The effect of warehousing has been dramatic. Unable to meet growing demand for service as the economy improves, independent SMR operators have seen their blocked call rates skyrocket to as much as 9%, because they have been unable to add new frequencies.[83] The cellular industry blocked call average is 4%; 4% is the rate mobile customers generally will tolerate; much above that, customers will begin looking elsewhere for service.[84] Nine percent (9%) means approximately one of every ten calls is blocked, an unacceptable rate to customers.

The effect of such a high blocking rate is enormous, and especially affects an SMR system's largest customers. Not only

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[82] See Declaration of Gene Stoker (Exhibit C).

[83] See attached Declaration of Richard Hafla, (Exhibit H).

[84] Bell Atlantic currently is advertising a blocked call rate of less than 1%.

will the larger customers encounter blocking more often, given their fleet size, but an SMR operator will have a more difficult time providing service to many new vehicles as his largest customers grow. These are not future problems; they are problems facing hundreds of independent operators in 1994, 1995, and 1996. Relief has to be forthcoming immediately in 1995.

Market Concentration. SMR WON does not believe the Commission anticipated or foresaw that the abuse of its extended construction policy would threaten the survival of the low-cost mobile radio alternative to cellular telephone. The Commission did not foresee that the major beneficiaries of extended implementation would:

1. License more channels per site than could reasonably be constructed;[85]

2. Be merged into one entity, thereby concentrating economic power over the industry.

As a result of this unanticipated market concentration through acquisitions in 1994 and 1995, the Department of Justice concluded that undue concentration of the SMR market would result in the largest 15 urban markets through the merger of Motorola and Nextel. DOJ based its conclusions on an analysis of licensed channel concentration, generally finding that concentrations in

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[85] In scores of repeated instances, licensees have licensed up to 150-200 frequencies per site, many of these short-spaced to existing operations.

excess of 60% following the merger would result in anticompetitive effects.[86]

In addition it has been demonstrated that similarly high concentrations would result in areas outside the top 15 urban markets. Following the proposed mergers, Nextel would control 96% of all licensed 800 MHz SMR frequencies in Washington State, 87% in Oregon, and 73% in Idaho, many of them short-spaced to existing licensees.[87]

SMR WON has undertaken further studies of other markets, using 70 mile radius searches of the FCC database as it appeared on December 14, 1995, using the ISI database.[88] That search demonstrated that, following the proposed mergers of OneComm and Dial Page/Dial Call and Motorola with Nextel, Nextel would control over 60% of the licensed and pending 800 MHz channels designated for SMR use in the General Category, Mid-Channel

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[86] The chart attached hereto as Exhibit I summarizes the channel concentration figures contained in the DOJ Complaint, ¶¶ 26-40. See also DOJ Complaint, Exhibit F hereto.

[87] Channel control is an accurate and accepted method of predicting concentration of control of the mobile radio industry. The DOJ relied upon channel usage figures to reach its conclusions that concentration of SMR frequencies in Nextel's hands would result in anti-competitive effects in the 15 largest urban markets. See DOJ Complaint, ¶¶ 25-40.

[88] The radius was taken from the tower site coordinates of an SMR WON member's owned or managed license. See Exhibit J.

Intercategory Pool, or the Exclusive SMR Channels, i.e., all SMR ("YX") use within channels 1-600.[89]:

NEXTEL CHANNEL CONCENTRATION

Market	Total SMR	Nextel affiliated	% Nextel
Columbia, SC	1733	1375	79%
Sunnyside, WA	3136	2897	92%
Covington, LA	2126	1626	76%
Washington, IL	1495	1038	69%
Kosciusko, MS	1003	588	59%
Idaho Falls, ID	1376	882	64%
Enid, OK	3109	2904	93%

** Nextel affiliated means Nextel owned, operated, managed, or under contract for sale to Nextel.

V. THE COMMISSION LACKS AUTHORITY TO REAUCTION EXISTING LICENSED SERVICES TO COMPETITORS

The Commission proposes to auction that which it already has licensed.

Congress did not give, nor intend to give, the Commission authority to take spectrum from existing licensees and auction it to competitors in the same service.

It is simply unfair and inequitable for the FCC to strip from one set of SMR licensees and sell to new licensees in the same service, without compensation to the existing licensees,[90]

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[89] See 47 C.F.R. §§ 90.613, 615 and 617.

[90] The Commission proposes only to compensate existing licensees for the cost of "relocation", a value significantly less than the fair market value of the license rights being transferred with the frequencies to the new licensee.

the good will inherent in the development of a business using electromagnetic spectrum, both present and potential. And why is the Commission doing this? Because, buried in permitted ex parte contacts, but nowhere discussed as part of the record herein, or in the companion GN Docket 93-252, is the patent fact that the Motorola/Nextel's technology will not work unless Nextel has a clear band. Nextel wants the rest of the existing licensee's band which it has not already acquired,[91] and the Commission is acquiescing in the private desires of a single licensee, without critical analysis of the technology issues or consequences.

The disruption to existing licensed services, the disruption to profitable small businesses providing low-cost mobile communications service to a wide segment of the public, would be catastrophic.[92] This was why a new SMR small business association formed so quickly in the past few months.

Congress did not give the Commission auction authority to conduct spectrum re-licensing of existing services for the primary benefit of big business licensees.[93] This submission is

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[91] For those who doubt this assertion, see Nextel's most recent comments in GN Docket 93-252, filed June 20, 1993.

[92] Disruption to existing services and the public, the lack of available relocation spectrum set aside by the Commission, make this plan a disaster for existing small business licensees. These problems will be explored more fully below.

[93] No amount of discussion of "designated entity" incentives, for example, will obscure the fact that, under the relocation scheme proposed, only one entity, Nextel, will be able successfully to bid at auctions, because only Nextel following its mergers with Motorola, Dial Page and OneComm, would have sufficient spectrum to relocate existing licensees. However, as (continued...)

supported in detail in SMR WON's "Petition for Partial Reconsideration" of the companion Third Report and Order in GN Docket 93-252. Those arguments are attached hereto as Exhibit B, and are incorporated herein by reference.

Stripped of all the justifications, the Commission herein is attempting to create an additional cellular-like service to replace existing low-cost SMR licensees in the 200-channel 861-866 band. The idea is wrong for a number of reasons.

Nextel Is Not Proposing A Cellular Service; The New MIRS Technology Doesn't Yet Work. Recent public statements by Motorola within the last months, quoted in Exhibit B hereto, dramatically change the Commission's assumptions that it is creating a new cellular service:

> ... Motorola, Inc.'s officials last week stressed the need to adjust their marketing strategy for ESMR technology. The greatest marketing change would attempt to alter the perception that ESMRs would soon be a third cellular competitor, focusing instead on the integrated wireless services for dispatch, said Lise Farmer, spokeswoman for the Motorola division supplying...MIRS technology to Nextel...and its potential partners, OneComm Corp. and DialPage, Inc.
>
> Robert Pass: "They just started talking about being a third cellular carrier...but they didn't have technology that was superior to cellular" [Without superior technology] and it they can't price it well below

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[93] (...continued)
developed below, even Nextel admits it does not have sufficient spectrum to relocate existing licensees.

> cellular, then how are they going to [compete with cellular].[94]

Nextel is having serious difficulties with the new technology, both in Los Angeles and San Francisco, where it is being rolled out, and not just on frequency interference issues. Competing equipment manufacturers who are in contact with Nextel customers report that customers are demanding, and Nextel is providing, refunds on equipment and service, because of customer dissatisfaction with the technology.

Price Competition Will Be Reduced. Attached hereto as Exhibit E is the declaration of Fred Goodwin. This declaration establishes that Nextel's business plan in San Francisco has been to displace existing customers using analogue equipment from the 800 MHz band, especially dispatch customers, and to raise prices. The effect of the Commission's proposed restructuring can only be to raise prices to the consumer, because the Commission is by regulation, forcing a more costly, capital intensive replacement technology on the band!

A. The Disruption of Existing Service Is Not in the Public Interest.

SMR WON's arguments in support of avoiding disruption in an existing licensed service in high demand by the public[95], have been described as "turning back the clock" on SMR regulation. To

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[94] Land Mobile Radio News, Vol. 48, No. 47, p.1 (December 2, 1994) (Emphasis and brackets in original).

[95] Rates of growth among small business licensees are 10%-25% per year in the 1990s, and averaged 15% last year.

the contrary, the concerns are consistent with Congressional intent to avoid disruptive spectrum fights and auctions of already licensed bands[96]. SMR WON's concerns also are consistent with this Commission's own commitment to price competition. SMR WON is attempting to preserve existing price competition; implementation of additional cellular-like SMR technology is driving up the cost of both dispatch and interconnect SMR service in the marketplace, and displacing customers from a desirable band, forcing on them services they have neither sought nor need, at prices they do not wish to pay.[97]

The clock may need some fixing to restore existing small business licensees' ability to compete and grow in their markets, but it does not need to be rolled back. It is the abuse of the warehousing and short spacing rules for anticompetitive purposes, and the anticompetitive impact of the pending corporate mergers which must be rolled back.

Existing small business SMR operators "played by the rules" applicable to their systems and markets. They constructed their systems within a year; they loaded them as required by the Commission's rules; where they could not load them, they lost

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[96] See H. Rep. No. 103-111, P.L. 103-66, reprinted at 103rd Cong. 1st Sess., U.S.C.C.A.N. at 250, 253 (1993) (hereinafter "House Report). See generally SMR WON's Petition for Reconsideration.

[97] This sentence also was written before the Wall Street Journal independent reporting confirmed this assertion on January 3, 1995, (See Exhibit L).

the frequencies. They had existing, year-by-year business plans to add frequencies as their business grew, in efficient quantities and without over-building or hoarding frequencies[98].

"Aggregate loading," first permitted only in 1993, disrupted the small business operator's business plans. Urban operator's "aggregate loading" from other markets were used to justify licensing of massive amounts of frequencies outside their present markets. The "aggregate loading" figures were not available to operators in smaller metropolitan and rural markets, and, as a result, they were frozen out of this geographic expansion program. Licensees taking advantage of this program were not limited by the Commission to the minimum 42 channels needed to engage in frequency reuse[99], but instead licensed as many channels as they could at a given site, up to 150 and over 200 channels in some instances.

The Clayton Act and other antitrust laws were passed both to prevent and correct abuses of the marketplace. Now, any monopolist seeking to avoid divestiture would argue that a proposal to correct past abuses would be "turning back the clock" on actions already taken. The government generally, and the FCC specifically, have the power and authority under Clayton to correct past abuses and prevent future anticompetitive behavior. That is what small businesses are seeking in this proceeding.

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[98] See Declaration of Richard Hafla, attached hereto as Exhibit H.

[99] See Petition for Rulemaking, RM 7985 at 7, 20 (filed April 22, 1992.)

The abuses for the most part are fresh and not yet final or implemented; in most instances the licenses proposed for transfer or merger are not yet built, which is itself a violation of Section 90.609(b) of the rules.

SMR WON is not out to prevent competition or destroy competitors. SMR WON's members have been competing successfully in the marketplace for many years with cellular providers, and SMR small business providers are no strangers to competing with large, cellular-based entities. However, the current regulatory schemes, both those in place and those proposed, prevented in 1994 small businesses from expanding and growing both their product and geographic markets, a circumstance which, if permitted to continue, will weaken and potentially eliminate SMR competitors. When Nextel or other cellular-like SMR providers enter the market 2-5 years from now, displace existing customers and raise prices, there will be no strong competitor with sufficient low-cost SMR capacity to compete for those customers, as already happened in San Francisco![100]

B. There is No Spectrum Available to Auction.

This proposition does not require substantial time to establish, because the Commission itself recognizes it. Every study which SMR WON or its members, Nextel, or the Commission have done indicates that in every significant market, except perhaps North and South Dakota, and Montana, there is no

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[100] See the attached Statement of Fred Goodwin.

substantial spectrum in 861-866 MHz unlicensed and available for auction. Indeed, most spectrum, except for a few channels, is licensed in all the three categories between 851-866 MHz (General Category, Intercategory Pool, and SMR). The studies include the following:

1. A study by SMR WON of seven markets, including both rural and urban markets in Illinois, Mississippi, South Carolina, Louisiana, Idaho, Oklahoma, and Washington State.[101]

2. State-wide studies of the states of Washington, Idaho, Oregon, Colorado, Utah, Oklahoma, Louisiana, South Carolina, and Georgia.[102]

3. Nextel's own studies of selected frequency use in the US.[103]

4. The Commission listed most of the country on its SMR wait-lists in May, 1994, as a result of the massive frequency warehousing applications filed in 1993.[104]

This accumulated evidence led the Commission to admit that it was not conducting a spectrum auction, but an auction of geographic territory - an auction of geographic overlay licenses:

> We recognize that the large number of systems already authorized or operating in the band places <u>significant</u> limitations on our ability to provide MTA licensees with clear spectrum

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[101] The results of that study are attached hereto as Exhibit K.

[102] See Exhibit K hereto.

[103] See Exhibit B, Attachment B.

[104] <u>See</u> FCC Public Notice, "Private Radio 800 MHz Radio Systems; Application Wait List," May 27, 1994, Mimeo No. 43004.

> comparable to our allocations for cellular or PCS.[105]

Accordingly, the Commission opted for a "voluntary relocation plan."

C. There is Insufficient Spectrum Available for Relocation.

The Commission has called for a voluntary plan of relocation through "frequency swaps, mergers, purchases, or other arrangements on a voluntary basis."[106] However, the Commission also has re-opened the question whether mandatory relocation of some type should be permitted, and requested comment on:

> "the specific form of intervention, if any, that should be taken by the Commission in those instances when the incumbent has refused such [voluntary] inducements [for sale].[107]

Relocation is a trap for the unwary licensee. Permitting an auction winner to force the relocation of existing licensees for the "cost of retuning" undervalues the bundle of separate property rights which a licensee holds in connection with the license, i.e., business good will, which includes the value of uninterrupted, undisrupted service to customers. Relocation costs also do not take into account the prospective value of the

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[105] Third Report and Order, supra, at p. 60, ¶ 106. Thus, the Commission admits that this proposed auction is not like the PCS auctions, where significant vacant, unlicensed bandwidth was made available to licensees.

[106] FNPRM at 22, ¶ 35.

[107] Id.

license to the new geographic licensee - i.e., the value of the spectrum, when and if aggregated into larger geographic markets under an exclusive licensing plan, is greater than its value in the hands of many within the same market.

The proceeds from the sale of a communications license are among the bundle of private property rights separate from the license which the licensee owns and which can be sold, optioned, or encumbered for security purposes. In re Ridgley Communications, Inc., 139 B.R. 374 (Bankr. D. Md. 1992).[108] Therefore, the value of the license to another foreseeable licensee aggregating frequency for a larger geographic market, is among the sale values in which the licensee has a protected property right.[109] It is this "increased value" property right which the Commission proposes to deny the incumbent licensee under the "relocation cost" concept. Common practice in evaluating the communications businesses takes "future" or "prospective value" to the buyer into account when determining the fair market value of communications properties. By forcing the incumbent licensee to accept the "costs of relocation" as full compensation for transferring his license to an

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[108] Accord, In re PBR Communications Systems, Inc., 75 Rad. Reg. 2d 1336 (Pike & Fischer)(S.D. Fla. 1994); In re Thomas Communications, 75 Rad Reg. 2d 599 (Pike & Fischer), 16 B.R. (846 (S.D., W. Va., 1994). This "separate property right" proposition was approved by the Commission's Common Carrier Bureau In re Walter O. Cheskey, 9 F.C.C. Rcd. 986 (C.B., 1994).

[109] This is akin to the increased property value a residential property may command when aggregated into a commercial property development.

"aggregating" licensee, the Commission is attempting to take for the Federal government through auction the licensee's property right to the full value of the proceeds from the sale of the license. Here, the Commission wants to conduct the sale and reap the proceeds, and deny it to the licensee.

Since no spectrum for relocation has been identified, SMR WON discusses the issue of relocation only with extreme caution. SMR WON has no idea what it is being asked to comment on. There is no sufficient proposal put forward which would identify how, in practice, a relocation plan would work. Based on the substantial difference between the costs of relocation and the fair market value of the property rights SMR WON's members are being asked to transfer to a new competing licensee, it is patently unfair to the existing licensee to debate the problem as a "relocation" issue. The Commission has no proposal for relocation, no defined Relocation Block, and no other details. It has simply said "Let the market do it. We'll hold the 'no-spectrum geographic area auction,' and walk away."

Under the circumstances, SMR WON feels it may be debating against itself even to address so amorphous a relocation plan. SMR WON discusses relocation herein only for the purpose of illuminating the variety of issues neither considered, proposed, nor discussed by the Commission in putting this item out for public comment. Specifics are needed before SMR WON, or any commenter, could have adequate notice of what it is being asked to comment on.

The only basis for evaluating any proposal put forward by a commenter or the Commission[110] is whether the current licensee receives fair market value for the license rights it is transferring. This immediately eliminates any discussion of mandatory relocation, since a mandatory exit period whether two or five years hence, reduces the license fair market value, i.e., the value of proceeds from sale of the license, and unlawfully transfers that value, to the Federal Government in the auction. The auction value would then be the value of this mandatory period. Only truly voluntary "frequency swaps, mergers, purchases, or other arrangements on a voluntary basis"[111] would bring to the licensee that which all other Commission licensees have been permitted to obtain since the 1934 Communications Act established this unique "privatized" system for the delivery of public radio communications services the full value of the sale of the license.

If the Commission's intent on auctioning the licensed SMR band, let it also propose to restructure the geographic markets, and re-auction cellular licenses in the upper 800 MHz band, and see how much support that proposal garners.

The foregoing paragraphs, however, do not put SMR WON on record as favoring voluntary relocation. Simply put, there is not enough identified frequency available to "relocate" incumbent

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[110] SMR WON submits that any specific proposal may have to be the subject of a further rule making, since this FNPRM gives no notice of the Commission's proposed "relocation" plan.

[111] See FNPRM, ¶35.

licensees - SMR WON knows of no plan, either by the Commission, trade associations, or others, which identifies sufficient frequencies for relocation of all incumbents. To the unwary, support of "voluntary relocation" as presently proposed (if it can even be considered a detailed proposal) would result in many licensees, and particularly the largest small businesses,[112] being unable to be relocated, and thus left to die on the vine for lack of available spectrum for growth. This would force the sale of many small business licensees, particularly the largest ones, at substantially below fair market value.

This is the practical effect of the Commission's present "voluntary relocation" proposal. It is patently anti-competitive, takes existing communication business' fair market value for the Government auction, and disserves the interests of small business licensees. Small businesses will also be prevented from participating in the proposed auctions, precisely because of the poorly delineated relocation proposal.

D. There is Insufficient Spectrum for Either Voluntary or Mandatory Relocation.

There is insufficient spectrum to implement either "voluntary" or "mandatory" relocation. While the Commission has hinted that either the "lower" 80 channel band, and/or the

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[112] SMR WON throughout uses a definition of small business as a business which produces, with affiliates, $15 million or less per year in gross revenues.

General Category band would be used for relocation, both bands are licensed throughout the country.

Attached hereto as Exhibit J, Table 1 is a chart showing the unlicensed frequencies in selected markets SMR WON studied. SMR WON looked at channel use within a 70-mile radius of the licenses of eight SMR WON members. This study was done to demonstrate and support the claims by SMR WON members about frequency use in their markets. This chart shows that there are insufficient vacant channels available in 851-866 MHz, either in the General Category or Intercategory Pool, or the "lower 80" SMR channels.[113/]

So, where is the Relocation Spectrum block to come from? The Commission FNPRM is remarkably silent on this critical question. It could come from one of three sources:

1. Licensed but unconstructed facilities;
2. Existing licensees who would win geographic auctions.
3. New relocation spectrum designated by the Commission.

The frequencies could come from other, unidentified vacant spectrum, from existing licensees in the General Category or Intercategory Pool (or SMR licensees) who would be displaced in favor of relocating SMR licensees out of the 861-866 band, or

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[113/] The only market studied in which there might be sufficient channels was Idaho Falls, Idaho. However, with a 40,000 application backlog, the December 14 ISI database had not yet entered all pending applications. Therefore, it is likely that fewer channels will be available in each market if all General Category applications are processed.

from an existing licensee who happens to hold enough spectrum to relocate existing users.

The Commission's proposed relocation plan does not work without available spectrum for relocation, unless it is also the Commission's intent to force existing SMR operators to sell out at low prices to the winners of geographic auctions by not specifying any available relocation spectrum.

SMR WON's survey of frequency use by its members suggests that a Relocation Block of approximately 200 channels would have to be available in most markets to accommodate relocation of existing licensees off the 200 channel block between 861-866 MHz. Relocating existing licensees to the 80-channel "lower block" would not provide sufficient spectrum in most markets, especially where larger systems serve mid-sized metropolitan areas; a number of SMR WON's members operate systems in excess of 100 channels in a given market.

Therefore, it appears that 800 MHz spectrum, if it were to be designated for a Relocation Block, would have to come from the General Category and Intercategory Pool.[114] This would create a relocation "domino effect", whereby at least two existing licensees and two frequencies would have to be relocated and vacated to create an auctionable "spectrum block" in 861-866 MHz.

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[114] SMR WON's comments should not be construed as advocating the relocation of currently operating licensees in the General Category or Intercategory Pool in favor of relocating SMR licensees from Channels 401-600.