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

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MAR 1 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF 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

REPLY COMMENTS

Cumulous Communications Corp. ("Cumulous"), by its attorneys, hereby respectfully submits its Reply Comments regarding the above-captioned matter. In support of its position, Cumulous shows the following:

The Demise of the SMR Industry

Cumulous strongly opposes the proposals contained within the Commission's *Further Notice of Proposed Rule Making*, and views their implementation as the first step toward the demise of the SMR industry. The SMR industry has suffered much of late. Spectrum shortages, speculation, and the overheating rhetoric and promises of entities which occupy the boiler room and the boardroom have all sapped the strength of this robust portion of the telecommunications industry. Yet, independent analog operators, such as Cumulous, have

persevered despite the obstacles in their paths. However, in opposing the proposed changes to the current SMR regulatory scheme, these operators face their greatest challenge of all—potential extinction.

Regulatory Parity

Like the famed Four Horsemen, this apocalypse has now been visited upon small and local analog SMR operators who have long provided the life's blood of the industry. The first horseman calls itself regulatory parity. After a substantial amount of cajoling by Nextel, the Commission, by this rule making, seeks to create regulatory parity between the providers of similar services. Specifically, the Commission wishes to enable the SMR industry to better compete with cellular and personal communications services ("PCS") markets via wide-area ESMR systems.

The Commission, however, appears to base its proposition solely on the unexamined notion that a wide-area ESMR system has the capability to compete with cellular and PCS.¹ While the Commission has recognized that a wide-area ESMR licensee would need at least 10 MHz of spectrum in order to even hope to compete with cellular and PCS, the Commission has admitted that even with 10 MHz of spectrum, it is doubtful that a wide-area ESMR system

¹ *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 (released November 4, 1994) at paragraph 21.

would be able to provide all of the services offered by cellular or PCS systems.² Since a wide-area ESMR system is inherently unable to provide the same services afforded by cellular and PCS, it appears that wide-area ESMR systems fundamentally differ from cellular or PCS systems. The Commission's vision of regulatory parity among wide-area ESMR systems and cellular and PCS is, at this point, merely a chimera. Therefore, until such time as the Commission can demonstrate conclusively that wide-area ESMR systems can and must compete with cellular and PCS systems, it should refrain from creating a regulatory scheme directed exclusively toward that end.

Forced Frequency Swaps

The second horseman is forced frequency swaps. In 1991, Nextel approached the Commission and requested permission to construct a wide-area ESMR system. The Commission granted this request, based largely on Nextel's explicit assurances that it would not require additional spectrum.³ Now, however, thinking itself short of spectrum, Nextel has persuaded the Commission to consider this ludicrous idea in an attempt to bail itself out of the mess it has created.

As an incumbent licensee on a substantial number of SMR systems in the Fresno, California, area with plans to expand its systems in the near future, Cumulous wholeheartedly

² Id. at paragraph 20.

³ Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd. 1533 (1991), *recon. dismissed*, 6 FCC Rcd. 6989 (1991).

rejects this proposal. Cumulous, in creating its current SMR network, took great pains to fashion it in such a manner that expansion would be feasible and convenient under the Commission's current regulatory scheme. Under the proposed scheme, however, Cumulous will be halted from achieving its goals of expansion and growth. Cumulous will be required to surrender its "old SMR" frequencies to wide-area ESMR operators and will be compensated by substitute frequencies that the Commission has deemed to be sufficient swaps, with absolutely no say in the matter.⁴ If the Commission elects to implement a system of forced frequency swapping as proposed in the Commission's Notice, all of Cumulous' previous efforts regarding the development of its system will have been for naught. Cumulous and other small and local operators, by faithfully abiding by the Commission's current regulatory scheme, will actually become a bigger victim than others who had not dared to take the Commission at its word.

Market-Based Licensing

The third horseman is market-based licensing. The SMR industry is asked to forget its own history. It is asked to forget the encouragements of the past, to seek out the market and the demand for service and to construct systems to serve that demand. Now, the proposals offered suggest that all such activity was incorrect or in vain. Instead, operators should have been constructing their systems to stop at the county line or the BTA line or the MTA line or the MSA or RSA or whatever arbitrary system fits the needs of the largest operators. If adopted,

⁴ Cumulous notes that is highly doubtful that fully comparable alternate frequencies exist, and respectfully requests that the Commission produce clear and convincing proof that the necessary spectrum is in fact available before the Commission considers implementing any type of forced frequency exchange.

the industry will lose its vital, organic growth that follows population centers and manufacturing centers and lines of growth. Instead, service will be confined to a box, with only *de minimis* intrusions beyond arbitrary parameters. And the public will mark their approval of the new system, each time they pay another new roamer charge.

Auctions

The last Horseman is auction. This one, like the first, starts with a false premise and rides forth. The premise is that there is anything of value for the federal government to gain through auctions of 800 MHz spectrum. The Commission has pending before it over 40,000 applications for 800 MHz spectrum. It has already licensed systems which provide service to millions of end users. An objective and realistic look clearly illustrates that there is virtually nothing at all left to auction, unless the Commission intends to auction the future of legitimate, analog, local operators.

On reply, Cumulous merely asks that the Commission see these proposals for what they are. The death of the small entrepreneur who has turned sweat into revenue, vitality into service, and hard work into a vital industry. Fundamental fairness and the long term health of the SMR industry requires that the Commission reject Nextel and its compatriots' comments. Cumulous urges that the Commission, in making its final determination in this matter, act in favor of the smaller operators who comprise the majority of the SMR industry, and not be swayed by the larger operators who are looking out only for themselves. Equity demands rejection. Fairness demands rejection. And the mandate of the Federal Communications

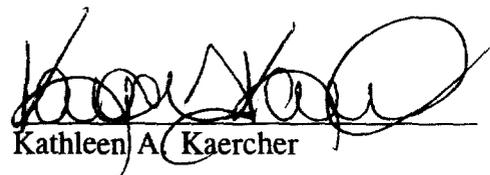
Commission, to provide telecommunications service to the public at an affordable cost, in a competitive environment, without regard to the size of the financial structure of the competitors, demands that the Commission reject these proposals. Anything less will loose the Four Horseman upon the SMR industry, the certain demise of which will be felt throughout the entire telecommunications industry as a betrayal of the small two-way entrepreneur.

Conclusion

For all the foregoing reasons, Cumulous respectfully requests that the Commission reject the proposals contained in its *Further Notice of Proposed Rule Making* and continue with its current SMR regulatory scheme.

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By


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Dated: March 1, 1995

Certificate of Service

I hereby certify that on this first day of March, 1995, I served a copy of the foregoing Reply Comments on the following by placing a copy in the United States Mail, first class postage prepaid:

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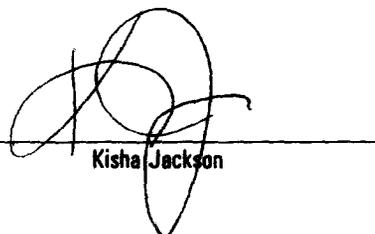
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