ORIGINAL

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

RECEIVED
MAY 19 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside of the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR RECONSIDERATION

DW Communications, Inc. (DW), by its attorneys, respectfully requests reconsideration of the Commission's Second Report and Order and Second Further Notice of Proposed Rule Making (SR&O) in the above-captioned matter (FCC 95-159 Released April 17, 1995). In support of its position, DW shows the following.

DW had no cause to have participated at any earlier stage of the instant proceeding. Not until April 17, 1995, concurrent with the release of the SR&O, did the Commission grant DW an SMR-Trunked system license in the 900 MHz band, raising issues which the Commission appears not to have considered in the proceeding. Accordingly, DW is constrained to filing the instant petition.

No. of Copies rec'd 0+4
List A B C D E

The SR&O Overlooked Finder's Preference Grants

DW obtained the license for SMR-Trunked system WPGZ968 on April 17, 1995, via a Finder's Preference grant. Since the filing window has been closed to all other types of applications for new SMR stations in the 900 MHz band for some years, the Finder's Preference procedure is the only means by which a person can file an application for a new, primary SMR system in the 900 MHz band. Since nearly all licenses for SMR stations in the band were granted in 1987, it is entirely understandable that the Commission may have overlooked the situation of the few licensees who received initial authorizations by means of a grant of a Finder's Preference. That the Commission simply overlooked the matter is demonstrated by the total absence of any reference in the SR&O to persons who received grants by Finder's Preference.

Two problems result from the Commission's not having taken into account the situation of persons who obtained new 900 MHz band SMR licenses during the pendency of the instant proceeding. The first problem is that such licensees would be denied incumbent status unfairly. The second problem is that licensees receiving new grants at this late date should not be subjected to loading requirements.

Incumbent Status Should Be Provided

New Rule Section 90.667, entitled "grandfathering provisions for incumbent licensees", would apply only to "900 MHz SMR licensees who obtained licenses or filed applications on or

before August 9, 1994," 47 C.F.R. §90.667(a). Only such licensees are defined as "incumbents". Only incumbents are entitled to interference protection against persons who later receive licenses to serve a wide area. As a non-incumbent, DW would receive no protection against interference from other stations.

It would appear from a review of the full text of new Rule Section 90.667 that the purpose of the rule was not to exclude as incumbents persons such as DW, whose Finder's Preference application had requested a primary station, but rather, to exclude the possibility of the Commission's affording primary status to a secondary station, if the application for that secondary station were not filed on or before August 9, 1994. Rule Section 90.667(b) provides that "applications in the 900 MHz SMR service for secondary sites filed after August 9, 1994, shall be authorized on a secondary, non-interference basis to MTA licensee operations," 47 C.F.R. §90.667(b), thereby demonstrating that the Commission's intent was to preclude assignment of licenses for new secondary stations after a certain date. It is by no means evident, however, that the Commission intended, in essence, to undercut the position of persons who have recently received licenses by means of Finder's Preference.

The Finder's Preference program was intended to reward persons who are able to demonstrate certain rule violations by existing licensees by taking channels from the delinquent existing licensees and giving them over to the finders, for the purpose of allowing the finders to provide the service which the original licensee should have been providing. The Commission should assure that a finder succeeds to all of the rights which the former licensee on the channels

had, else it cannot expect that persons will be motivated to file Finder's Preference requests in the future. DW respectfully submits that it would be fundamentally unfair to both the finder and the public interest for the Commission to invite a finder to gather and present the evidence necessary to win a Finder's Preference, only to reward the finder with an SMR license which is only secondary in status and subject to destruction at the whim of a future licensee.

The absence of a provision in Rule Section 90.667(a) taking into account the situation of a person who recently received a license by means of Finder's Preference would undercut the Finder's Preference program. Rather obviously, the Commission cannot expect the recipient of a Finder's Preference grant for a new station to construct the station and provide new, competitive service to the public if it is to grant a finder only a secondary authorization to replace the primary authorization against which the preference was awarded. Therefore, to encourage persons to continue to file Finder's Preference requests and bring unlawful situations to the Commission's attention, the Commission should revise Rule Section 90.667(i).

To allow the finder to make its new service available to the public to replace the service which the old licensee failed to provide, the Commission should amend Rule Section 90.667(a) to read, as follows:

> These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications on or before August 9, 1994, <u>and to all 900 MHz SMR licensees who obtained licenses for new stations by the grant of a finder's preference</u> ("incumbent licensees").

DW does not believe that the Commission intended to prevent the recipient of a Finder's Preference from obtaining a license for a new primary station. However, if the Commission did intend to impose a cut-off on eligibility for a new, primary station license by a finder, the Commission should afford parity between the filing of Finder's Preference request and the filing of an application for a license. To provide such parity, the Commission could adopt the following amendment to Rule Section 90.667(a):

> These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications or finder's preference requests on or before August 9, 1994 ("incumbent licensees").

With either of the minor amendments suggested above, the Commission can accommodate those few situations in which it has awarded a Finder's Preference and allow new, competitive service to be provided to the public with assurance that the new service will be protected from interference.

Loading Requirements Should Not Be Applied To Finder's Preference Grants

Amended Rule Section 90.631(i) makes no sense in the context of a new 900 MHz band station, granted by means of Finder's Preference in 1995. Therefore, it should not be applied to persons obtaining initial licenses by means of Finder's Preference.

Rule Section 90.631(i) requires 900 MHz band SMR licensees to meet loading requirements and provides a period of five years, plus two extended years, within which to meet

full loading. In its historical context, the rule is reasonable, if one assumes that the licenses for all affected stations were granted in 1987. As the Commission's records reflect, 900 MHz band SMR service did not develop a customer base as quickly as had been expected, primarily as a result of poor general economic conditions. Accordingly, the Commission afforded 900 MHz band SMR licensees an extended period of two more years within which to meet loading requirements. However, effective with licenses granted on and after June 1, 1993, licensees of new stations in the 800 MHz band did not have to meet loading requirements, 47 C.F.R. §90.631(b). DW believes that review of the Commissions' records will show that, other than the small number of licenses granted by means of Finder's Preference, no new 900 MHz band SMR licenses have been granted for primary stations since June 1, 1993.

If there is no good cause to impose loading requirements on 800 MHz band trunked system licenses granted since 1993, then there is no good cause to impose such requirements on new 900 MHz band licenses granted during the same time frame. There was every good reason for the Commission to have imposed loading requirements on the initial group of licensees whose licenses were granted in 1987, and good reason to extend their period to meet loading requirements. However, there is, today, no good reason to require the licensee of a new 900 MHz band station, granted by means of Finder's Preference, to meet any loading requirement. If the Commission is to maintain regulatory parity between 800 MHz and 900 MHz band licensees whose licenses were granted during the same period of time, it should not impose loading requirements on licensees of new 900 MHz band stations whose initial licenses were granted since June 1, 1993.

The Commission can easily amend Rule Section 90.631(i) to provide regulatory parity between 800 MHz and 900 MHz SMR stations authorized during the same period of time. To do so, the Commission need only append to Rule Section 90.631(i) a sentence stating that "As a further exception to this requirement, these loading requirements are not applicable to any 900 MHz band SMR license granted on or after June 1, 1993, as the result of a Finder's Preference."

Conclusion

For all the foregoing reasons, DW respectfully requests that the Commission reconsider its SR&O and grant the relief requested herein.[1]

Respectfully submitted,
DW COMMUNICATIONS, INC.

By
Dennis C. Brown

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

Dated: May 19, 1995

[1] Because the Commission Secretary's data base has no record of any filings in PR Docket No. 89-553, DW is not in a position to serve copies of its Petition on any other person.