

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Eligibility for the Specialized)
Mobile Radio Services and Radio)
Services in the 220-222 MHz Land)
Mobile Band and Use of Radio)
Dispatch Communications)

GN Docket 94-90

DOCKET FILE COPY ORIGINAL

OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
TO THE PETITION FOR RECONSIDERATION

CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION

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May 24, 1995

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SUMMARY

The Commission, on reconsideration, should deny AMTA's petition to reinstate the common carrier dispatch prohibition, including its proposal to recover, reallocate and reassign "unused" Part 22 spectrum and subject it to auction ("refarming" proposal), for the following reasons:

- AMTA's petition fails to provide a sufficient basis to secure reconsideration; moreover, the "refarming" proposal is clearly beyond the scope of the present proceeding;
- AMTA's petition contravenes Section 332 mandates to foster competition, efficiency, regulatory parity and technological innovation within the mobile services;
- AMTA's "refarming" proposal is inconsistent with Title III licensing requirements;
- AMTA's "refarming" proposal is infeasible in that it misperceives basic cellular technology design; and
- AMTA's "refarming" proposal raises special concerns in rural areas where scope economies may require integrated service offerings and where RSA cellular operators are still in the process of building out their systems.

AMTA's petition extends far beyond a mere proposal to reinstate the common carrier dispatch prohibition. Rather, it represents a back-door attempt to fundamentally shift Commission treatment of commercial mobile radio service ("CMRS") providers. As such, it should be denied.

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**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
TO THE PETITION FOR RECONSIDERATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ respectfully submits its Opposition in the above-captioned proceeding.²

I. INTRODUCTION

The Commission's decision to remove the common carrier dispatch prohibition reflects its ongoing efforts to foster the development of a competitive, efficient, technologically-innovative mobile services industry. By permitting all CMRS providers the freedom to use their licensed spectrum to provide a

¹ CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, PCS providers, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry.

² Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, Report and Order in GN Docket 94-90, FCC 95-98 (rel. March 7, 1995) ("Report and Order").

variety of mobile services, including dispatch, the Commission also furthers the principle of regulatory parity.³

The American Mobile Telecommunications Association ("AMTA"), proposes on reconsideration to revive the common carrier dispatch prohibition.⁴ Specifically, AMTA claims that:

the fundamental issue in this proceeding is not whether underutilized or unutilized Part 22 spectrum should be employed to inject additional competition into the already highly competitive dispatch marketplace. The issue is whether spectrum which has been determined to be superfluous for the provision of cellular service should be retained automatically by the cellular operator to be used for alternative purposes.⁵

Thus, AMTA proposes that "spectrum which is not needed to provide a cellular service should be recovered by the Commission and reassigned to whatever party values it most highly as determined by competitive bidding."⁶

CTIA submits that AMTA's petition is flawed as a matter of law and policy. Specifically, the Commission should reject AMTA's petition to reimpose the dispatch prohibition, including its proposal to reallocate unused Part 22 spectrum and subject it to auction, for the following reasons:

- AMTA's petition fails to provide a sufficient basis to secure reconsideration; moreover, the

³ See Report and Order at ¶¶ 29-36.

⁴ Request for Partial Reconsideration and for Clarification of the American Mobile Telecommunications Association, Inc. in GN Docket 94-90, filed April 24, 1995 ("AMTA petition").

⁵ AMTA petition at 6.

⁶ Id.

"refarming" proposal is clearly beyond the scope of the present proceeding;

- AMTA's petition contravenes Section 332 mandates to foster competition, efficiency, regulatory parity and technological innovation within the mobile services;
- AMTA's "refarming" proposal is inconsistent with Title III licensing requirements;
- AMTA's "refarming" proposal is infeasible in that it misperceives basic cellular technology design; and
- AMTA's "refarming" proposal raises special concerns in rural areas where scope economies may require integrated service offerings and where RSA cellular operators are still in the process of building out their systems.

The AMTA petition seeks to fundamentally shift the law and policy governing the regulation of CMRS providers. As such, it should be denied.

II. THE COMMISSION SHOULD REJECT AMTA'S PETITION AS CONTRARY TO BOTH LAW AND POLICY

- A. AMTA's petition provides insufficient grounds for reconsideration; moreover, its "refarming" proposal is clearly beyond the scope of the instant proceeding.**

AMTA's petition to reimpose the common carrier dispatch prohibition, which includes its proposal to reassign "unused" Part 22 spectrum by competitive bidding, suffers from several fatal flaws, any one of which dictates the denial of its request. The most glaring (and serious) defect is procedural -- the petition simply provides insufficient grounds for granting reconsideration. Moreover, the primary relief requested, i.e., the "refarming" proposal, is clearly beyond the scope of this proceeding.

First, it is standard Commission policy that "bare disagreement [with the Commission], absent new facts and arguments properly submitted, is insufficient grounds for granting reconsideration."⁷ The Commission in its Report and Order already has addressed, and rejected, the concerns prompting AMTA's petition to reinstate the dispatch prohibition.⁸

Specifically, the Commission found that:

[it does] not believe that limiting dispatch services to SMR frequencies would be an efficient use of spectrum. To the extent that any CMRS providers have excess spectrum, we want to encourage them to develop innovative uses for it that are responsive to consumer demand, including dispatch service.⁹

Essentially, AMTA quibbles with the Commission's failure to agree that a dispatch restriction is still warranted.¹⁰ AMTA's concerns have already been addressed and answered -- in the

⁷ Creation of an Additional Private Radio Service, Memorandum Opinion and Order in Gen Docket 83-26, 1 FCC Rcd. 5, 6 (1986) (citing WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); Florida Gulfcoast Broadcasters, Inc., 37 FCC 833 (1964)).

⁸ AMTA, by its petition, claims that regulatory parity concerns do not dictate removal of the restriction as Part 22 providers can receive Part 90 licenses to provide dispatch. AMTA petition at 3-4.

⁹ Report and Order at ¶ 33.

¹⁰ AMTA claims that it "is not persuaded that the record in this proceeding, or the analysis in the [Report and Order], support the abandonment of the preclusion against the provision of dispatch service on common carrier spectrum." AMTA petition at 1. See also id. at 3 ("The record in this proceeding does not support the rationales proffered by the agency in support of its action.") Specifically, it questions the Commission's findings that demand for private land mobile spectrum capacity will be alleviated and that rural areas will benefit from the removal of the restriction, in addition to its regulatory parity concerns. Id. 3-5.

negative.¹¹ Without more, the Commission is justified in rejecting AMTA's petition in whole.

Second, AMTA's petition extends far beyond a mere request to reinstate on reconsideration the common carrier dispatch prohibition. As such, it should be rejected as beyond the scope of this proceeding.¹² AMTA is essentially petitioning the Commission to reverse course -- to fundamentally shift its entire perspective with respect to CMRS -- to reconsider all facets of its regulatory treatment of CMRS. Specifically, to give full credence to AMTA's proposal, the Commission would have to rethink and revise, among other things, its decision to permit flexible use of mobile services spectrum¹³ and its decision -- pursuant to

¹¹ See Creation of an Additional Private Radio Service, 1 FCC Rcd. at 6 ("[w]e agree with those commenters who stated that the petitioners have not presented any information which the Commission did not consider in its original decision. Also, the petitioners have failed to demonstrate that our original decision was based on flawed reasoning, or an incomplete review of the record.")

¹² See Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 783 (D.C. Cir. 1990) ("If the petitioners want the Commission to reconsider the rationale underlying its use of the prime rate for the AFUDC generally, then they must petition the agency to initiate a rulemaking in the usual manner. The petitioners cannot require the Commission to expand the scope of its proceeding through a petition for reconsideration.")

¹³ See, e.g., Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in Domestic Public Cellular Radio Telecommunications Services, Report and Order in GEN Docket 87-390, 3 FCC Rcd. 7033 (1988); Memorandum Opinion and Order, 5 FCC Rcd. 1138 (1990) (flexible cellular orders); Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order in GEN Docket 90-314, 8 FCC Rcd. 7700 (1993) (defining PCS services broadly to include all mobile and ancillary fixed applications).

Congressional direction -- to subject like mobile services to similar regulatory treatment.¹⁴ Such a proposal extracts numerous costs with no concomitant benefit, and essentially flies in the face of Commission efforts and Congressional mandate to foster the efficient, competitive provision of CMRS.

B. The Commission should deny AMTA's petition as contrary to Section 332 mandates.

Perhaps the most fundamental substantive reason for denying AMTA's petition arises from statutory mandate. Section 332 of the Communications Act, 47 U.S.C. § 332, as revised by Congress in 1993, provides the Commission with the regulatory blueprint governing mobile services founded upon principles of competition, efficiency, regulatory parity and technological innovation.

Specifically, Section 332(a) requires the Commission, in managing mobile services, to consider consistent with Section 1 of the Act, a number of policy objectives, including (1) whether its actions will "improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;" and (2) whether it will "encourage competition and provide services to the largest feasible number of users."¹⁵ Section 332 also permits the Commission discretion

¹⁴ See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket 93-252, 9 FCC Rcd 1411 (1994).

¹⁵ 47 U.S.C. § 332(a) (emphasis added). Section 1 of the Act, 47 U.S.C. § 151, in turn, admonishes the Commission "to make
(continued...)

to forbear from burdensome Title II obligations in an effort to give freer play to competitive forces.¹⁶ Congress also revised Section 332 in an effort to establish regulatory parity among similar mobile services.¹⁷ It specifically adopted such a regulatory scheme to protect against disparities created under former Section 332 which likely impeded "the continued growth and development of commercial mobile services."¹⁸ AMTA's petition, because it contravenes the very essence of Section 332, should be denied.

AMTA's proposal, if adopted on reconsideration, would hamper competition by artificially limiting similarly-situated service providers from competing in the provision of mobile services, including dispatch. Because CMRS providers would be hampered in their ability to offer a full panoply of services without an additional license, overall social costs would increase, as would

¹⁵ (...continued)
available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (emphasis added).

¹⁶ 47 U.S.C. § 332(c)(1)(A).

¹⁷ See 47 U.S.C. § 332(d)(1). See also H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) ("House Report") (in revising Section 332 Congress sought to ensure regulatory parity among CMRS providers because "the disparities in the current regulatory scheme [e.g., private mobile carriers are exempted from state and federal regulation of rates and entry while common carriers are not] could impede the continued growth and development of commercial mobile services"); id. at 259 (Commission directed to "review its rules and regulations to achieve regulatory parity among services that are substantially similar").

¹⁸ House Report at 260.

the prices paid by the consumer. Considering the competitive nature of the mobile services market, consumer demand, and not regulatory fiat, should determine the types of services offered by CMRS providers.

AMTA's proposal completely ignores these efficiency concerns. It ignores the scope economies afforded by the integrated provision of dispatch and cellular services, a factor especially important in rural areas, as discussed below. Dual provision of dispatch and other mobile services under one license is simply more cost-effective in terms of equipment (no need for dual-band phones) and network coordination costs. Simply put, there are inevitable costs associated with requiring a mobile services provider to offer services under two different licenses, the least of which is the time and expense involved to procure the second license, and the added administrative burdens upon the Commission. Without any corresponding benefit, such costs should be avoided.

Moreover, AMTA incorrectly assumes that the identity of the provider is an important factor in determining how the "excess" spectrum will be used. It is fundamental that as long as the rights and obligations of a given provider are carefully and well-defined, and there are no undue restrictions on transferability, efficient outcomes will result regardless of who actually holds the licenses at the outset.¹⁹ AMTA's proposal to

¹⁹ R. H. Coase, The Federal Communications Commission, 2 J.L. & Econ. 1-40 (Oct. 1959); R. H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1-44 (Oct. 1960).

create new regulatory mechanisms to award spectrum to the "party who values it most highly" is unnecessary. The person who values it most highly, (who will therefore put it to the most efficient use) either already holds the license or can make an offer to acquire it from the licensee.

Contrary to AMTA's assertions,²⁰ regulatory parity concerns also support the Commission's decision to remove the dispatch prohibition. As the Commission itself recognizes, in light of developments within the marketplace, all CMRS providers should be permitted to offer dispatch services, i.e., the factors which arguably once justified such a prohibition no longer remain.²¹ By arbitrarily imposing use restrictions, the Commission would merely reintroduce the very disparities which provided the impetus for Congress' revision of Section 332.²²

Further, AMTA's proposal amounts to the notion that a mobile services provider subjects itself to partial license revocation whenever it decides to offer new (and more spectrum efficient) services under its current license. This seriously undermines Congressional and Commission efforts to foster technological

²⁰ See AMTA petition at 3-4.

²¹ See Report and Order at ¶ 35 ("we note that recent technological developments undermine the original justification for the dispatch prohibition").

²² The same regulatory parity concerns also control with respect to the effective date of the rule eliminating the dispatch prohibition. Contrary to AMTA's petition (at 6-7), the Commission is justified in eliminating the dispatch ban effective 30 days after publication in the Federal Register, instead of August 10, 1996, which represents the end of the statutory transition period for reclassified private carriers.

innovation. In the least, AMTA's proposal chills efforts to innovate with regard to technologies and service offerings in response to consumer demand.

It is also important to note that AMTA's petition is sufficiently pervasive to color the provision of all mobile services, not just cellular. The stated justification underlying AMTA's "refarming" proposal applies equally as well to all CMRS, including PCS.²³ Viewed in this light, it is doubtful, at best, that the winning bidders of the A and B block PCS licenses, in retrospect, would value their licenses as highly if the Commission were to subject such spectrum to "refarming."²⁴

C. The Commission should deny AMTA's proposal as contrary to Title III licensing requirements.

AMTA, by its proposal for the Commission to recover unused cellular spectrum and to auction it for "more productive uses, including dispatch,"²⁵ essentially requests the Commission to partially revoke cellular licenses and to reallocate such spectrum by auction. Aside from the questions surrounding the Commission's ability to auction such recovered spectrum,²⁶ or the

²³ Moreover, notions of regulatory parity would also dictate similar regulatory treatment for PCS.

²⁴ See Congressional Budget Office, Auctioning Radio Spectrum Licenses: A CBO Study, at xiii (March, 1992) ("imposing [use and other] restrictions on a licensee will decrease revenue because winning bidders will be more limited in the strategies they can apply to achieve profitability").

²⁵ AMTA petition at 6.

²⁶ See 47 U.S.C. § 309(j)(1) (Commission's auction authority extends to initial licensing, not renewals); see also (continued...)

complicated rule making procedures implicated by AMTA's request to reallocate Part 22 spectrum,²⁷ the Commission is also hampered from providing the requested relief by Title III requirements governing radio license revocations. As such, the Commission should reject AMTA's proposal given its questionable legal nature and the significant administrative and other costs associated with it.

AMTA, by its petition, essentially requests the Commission to revoke all cellular licenses in part. Such a proposal for partial license revocation appears contrary to the procedures governing license revocations under Section 312 of the Communications Act, 47 U.S.C. § 312. As license revocation represents the ultimate sanction for non-compliance with statutory mandate and Commission regulation, it requires, as a

²⁶ (...continued)

H.R. Rep. No. 111, 103rd Cong, 1st Sess. 253 (1993) (competitive bidding not permitted "in the case of [] a renewal or modification of the license"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order in PP Docket 93-253, 9 FCC Rcd. 2348, 2350 (1994).

²⁷ See National Telecommunications and Information Administration, U.S. Department of Commerce, U.S. Spectrum Management Policy: Agenda for the Future, 36 (Feb. 1991) ("The FCC makes allocation decisions for non-federal spectrum use through public rulemakings that seek to determine the public interest. Implementing domestic changes to the non-federal portion of the allocation table through this process can be time-consuming and contentious, often lasting several years.") (emphasis added), see also, id. at 59 ("in order to encourage more efficient use, it may make sense to define blocks [of spectrum] broadly, thus allowing users a range of spectrum options, without the delays associated with reallocation proceedings . . . [s]pectrum managers should seek to eliminate artificial service boundaries that prevent the realization of . . . efficiencies"); id. at 84 ("greater user flexibility would permit more private ordering of desirable spectrum uses").

precondition to license forfeiture, that the Commission carry the burden of proving significant misconduct on the part of the licensee.²⁸ Importantly, none of these statutory prerequisites includes the type of showing relevant in this case, *i.e.*, that a licensee wishes to employ excess spectrum in new uses. To the contrary, the Commission's rules have long encouraged the flexible use of mobile services spectrum, even before the congressional mandate to rely upon competitive forces within the mobile services marketplace.²⁹ AMTA's proposal, if granted, would violate both the substance and procedures governing Section 312.

D. AMTA's proposal to reallocate "unused" Part 22 spectrum is infeasible because it misperceives basic cellular technology design.

In addition to the legal and policy defects described above, AMTA's proposal fails in practice as well. Put simply, the AMTA proposal fundamentally ignores the reality of basic cellular technology design.

In all cellular networks, cell size and spectrum usage will vary within the given geographic area of license. In densely-populated areas with high volumes of traffic (for example, a bridge or tunnel approach) very small cells (measured in terms of yards) may be used to carry mobile services traffic; while in a sparsely-populated area, the cell could be several miles in

²⁸ See 47 U.S.C. § 312(a)(1)-(7) (sanctioning, for example, willful and repeated failures to observe Congressional mandate and/or Commission regulation).

²⁹ See *supra* note 13 and accompanying text.

width.³⁰ Moreover, cell size and spectrum usage will vary in the normal course of development of landscapes and populations.³¹ In high-density traffic areas, all frequencies are used and cells are further split in an effort to accommodate users.³² Cellular system engineering requires careful frequency coordination as well as the balancing of antenna height and power levels to avoid interference with adjacent cells. Such a design requires a carrier to take into account the entire geographic area. Dispatch networks, which are configured to serve an entire service area from a single tower, would be required to operate on an extremely low power to avoid interference with adjacent cellular system cells, thus negating the essence of "dispatch" service by confining the dispatch service area to one cell, without the benefit of frequency reuse that is the essence of cellular architecture.

³⁰ R.C.V. Macario, Cellular Radio: Principles and Design, 73 (1993).

³¹ The Commission recently recognized that such a design configuration is economically justified. See Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, Report and Order in PR Docket 94-105, FCC 95-195, ¶ 130 (rel. May 19, 1995) ("The CPUC's argument that market conditions are unreasonable places great weight on capacity utilization data. . . . We conclude that the CPUC's reliance on such data is misguided. As several carriers point out, no reasonable carrier would engineer its network to operate all or even most of [its] cells at peak load capacity. Investment in cell sites tends to be 'lumpy.'")

³² Thus, if there is a shortage of SMR spectrum in urban areas as AMTA contends, cellular spectrum would not provide the necessary relief.

Given these complications, AMTA's proposal to auction "excess" spectrum in cellular carriers' CGSAs is inconsistent with normal cellular growth patterns and, absent extraordinary increases in adjacent system coordination efforts, with basic cellular system architecture. Thus, AMTA's proposal to identify for reallocation and reassignment unused spectrum within a given area fails technically as well.

E. AMTA's petition does not adequately account for rural concerns.

Although AMTA questions whether rural areas will benefit from the removal of the dispatch prohibition,³³ there are in fact tangible benefits arising from integrated dispatch and cellular services offerings. AMTA fails to account for scope economies present in the joint provision of dispatch and other mobile services (including cellular) under a Part 22 license. In sparsely populated areas, such economies ultimately may determine whether or not dispatch is widely available in a cost-effective manner.

Moreover, as a matter of equity, the Commission should refrain from imposing the "refarming" proposal upon RSA cellular operators. Compared to MSA systems, RSA providers have only recently been awarded licenses and are still in the process of building out their systems. Furthermore, approximately 20 RSAs have yet to be licensed. For these reasons, a reallocation proposal would be especially onerous as such operators would be

³³ AMTA petition at 5-6.

significantly limited by the amount of remaining spectrum available to expand their services in the normal course.

III. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission on reconsideration deny AMTA's petition to reinstate the common carrier dispatch ban and to reallocate unused Part 22 spectrum.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
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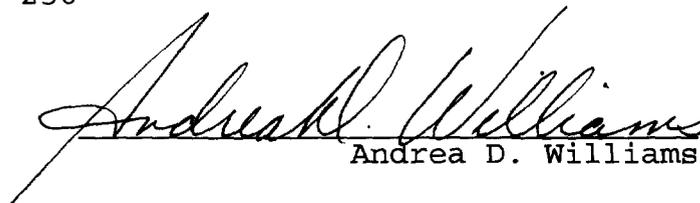
CERTIFICATE OF SERVICE

I, Andrea D. Williams, certify that I served a copy of this "Opposition of the Cellular Telecommunications Industry Association to the Petition for Reconsideration" today by hand delivery to the parties listed below:

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