

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

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JUN -5 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendments of Parts 2 and 90 of the)
Commission's Rules to Provide for the)
Use of 200 Channels Outside the Designated)
Filing Areas in the 896-901/935-940 MHz)
Bands Allotted to the Specialized Mobile)
Radio Pool)
)
Implementation of Section 309(j) of the)
Communications Act - Competitive Bidding)
)
Implementation of Sections 3(n) and 322)
of the Communications Act)

PR Docket No. 89-553

PP Docket No. 93-253

GN Docket No. 93-252

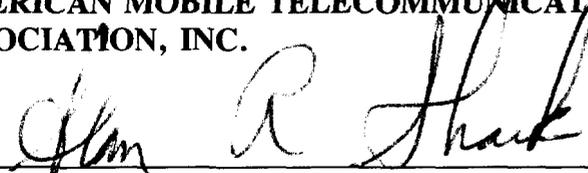
To: **The Commission**

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PETITION FOR PARTIAL RECONSIDERATION
AND CLARIFICATION

Respectfully submitted,

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No. of Copies rec'd 049
List A B C D E

June 5, 1995

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SUMMARY

AMTA is pleased that the Commission has adopted a 900 MHz SMR regulatory framework which will permit the national deployment of this service. The Association generally supports the rule structure to be implemented, but believes that reconsideration of the following aspects of the FCC's decision will better serve the public interest.

First, AMTA urges the FCC to eliminate entirely the 900 MHz SMR loading requirement. The Commission itself has determined that retaining a loading requirement for some, but not all, competitors in the wireless marketplace will constitute the inequitable regulation of services which the FCC has deemed to be substantially similar. This result is inconsistent with the Congressional directive regarding implementation of comparable regulatory schemes for such services, and with the FCC's express desire to establish a level playing field for competitive offerings.

In addition, the Association recommends that the Commission grant primary status to 900 MHz SMR stations when applications are filed in response to the award of a dispositive Finders Preference, a relatively rare situation which apparently was not considered in the context of this proceeding. AMTA also requests that the Commission reconsider its determination regarding the flexibility to be granted incumbents under the revised regulatory structure. Existing licensees should be permitted to redeploy frequencies when doing so does not expand the existing 22 dB μ interference contour, but without interference protection from the subsequently-granted MTA licensee. They also should be permitted to continue to license secondary sites strictly on a secondary, non-interference basis.

Finally, AMTA asks that the Commission confirm that the new discontinuance of operation rule is applicable only to stations temporarily removed from service after the effective date of that rule.

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To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION
AND CLARIFICATION**

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Petition for Partial Reconsideration and Clarification in the instant proceeding.^{1/} Although the Association is pleased that the Commission has at last adopted rules which will permit the further deployment of 900 MHz SMR systems, and generally supports the licensing structure defined for this service, it believes that modification of certain aspects of the rules adopted will better serve the interests of the public and the 900 MHz SMR industry.

^{1/} Second Report and Order and Second Further Notice of Proposed Rule Making (FCC 95-159), 60 FR 22023 (May 4, 1995)("900 MHz Second R&O").

I. INTRODUCTION

AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.^{2/} The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") Service operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country.

The Association's members include the vast majority of existing 900 MHz SMR licensees, including both Geotek Communications, Inc. ("Geotek") and RAM Mobile Data USA Limited Partnership ("RMD"), by far the two largest operators of 900 MHz systems in the nation. Additionally, a significant number of AMTA members are likely to pursue the acquisition of 900 MHz authorizations when the rules permit them to do so. Thus, the Association has a profound interest in the outcome of this proceeding.

II. BACKGROUND

This proceeding has had a lengthy, complex history. It was initiated by the FCC in 1989 when the agency adopted a Notice of Proposed Rule Making proposing to begin what then was called "Phase II" of the 900 MHz SMR licensing process, wherein the Commission would authorize such systems on a nationwide basis.^{3/} Licensing of new

^{2/} These entities had been classified as private carriers prior to the 1993 amendments to the Communications Act of 1934. See Omnibus Budget Reconciliation Act of 1993, Publ. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 ("Budget Act").

^{3/} Notice of Proposed Rulemaking, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989) ("900 MHz NPR").

SMR facilities in this band had been "frozen" since the acceptance of initial applications in 1986.^{4/} In 1993, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking which would have modified the original Phase II licensing proposal in fundamental respects by authorizing systems on nationwide, regional and local bases.^{5/} Shortly thereafter, the Communications Act was amended, among other things, to reclassify all mobile services as either Commercial Mobile Radio Service ("CMRS") or Private Mobile Radio Service ("PMRS"), and to authorize the FCC's use of competitive bidding -- auctions -- procedures to award licenses under certain conditions.^{6/}

In response to these legislative changes, the Commission deferred further consideration of its second Phase II proposal and, instead, incorporated consideration of the appropriate 900 MHz regulatory structure in its broader proceeding regarding

^{4/} Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986).

^{5/} First Report and Order and Further Notice of Proposed Rulemaking, PR Docket 89-553, 8 FCC Rcd 1469 (1993)("Phase II First R&O and FNPR"). The FCC included in the Phase II First R&O a general Subpart S provision regarding discontinuance of service for both 800 MHz and 900 MHz systems. AMTA petitioned for reconsideration on this aspect of the FCC's Order. The Association also requested and was granted a stay of the effectiveness of that new rule pending disposition of its reconsideration petition. AMTA Request for Stay, filed April 2, 1993. That rule has been modified in the instant 900 MHz Second R&O, thereby rendering AMTA's earlier-filed petition for reconsideration moot. However, as detailed infra, the Association requests clarification of the applicability of the revised rule regarding discontinuance of service.

^{6/} Budget Act, supra.

appropriate regulation of mobile services generally.^{7/} The Commission described its framework for the revised 900 MHz regulatory structure in the CMRS Third R&O as including the following key elements:

- (1) 900 MHz SMR spectrum would be licensed in 20 ten-channel blocks with MTA service areas;
- (2) auctions would be used to select among mutually exclusive applications;
- (3) incumbent licensees would retain their operating authorizations and the right to continue covering their existing service areas. 900 MHz Second R&O at ¶ 27.

The CMRS Third R&O also indicated that the Commission intended to retain loading requirements for 900 MHz SMR licensees which did not acquire the MTA license for their frequencies. CMRS Third R&O at ¶ 194. Further, it proposed to permit licensees of secondary sites authorized prior to August 10, 1994 to acquire primary status for those facilities upon timely construction. CMRS Third R&O at ¶ 119. Consideration of the appropriate competitive bidding procedures to be utilized was deferred until the instant proceeding, and is being resolved in the associated Second Further Notice of Proposed Rule Making, a proceeding in which AMTA has participated actively.^{8/}

^{7/} See Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994) ("CMRS Second R&O"); CMRS Third Report and Order, 9 FCC Rcd 7988 (1994) ("CMRS Third R&O").

^{8/} See May 24, 1995 AMTA Comments and May 25, 1995 AMTA Motion for Extension of Reply Comment Date.

Because the Commission defined its modified 900 MHz approach in a Report and Order, interested parties, including AMTA, were required to detail their responses in the context of Petitions for Reconsideration. For the most part, they endorsed the key elements of the proposal as set out above.^{9/} However, certain aspects of the structure were challenged by the Association and other interested parties. Some commenters disagreed with the agency's retention of 900 MHz loading requirements for non-MTA licensees in light of the Commission's own compelling analysis of their inapplicability in a competitive environment such as that existing in the CMRS marketplace.^{10/} Several parties urged the Commission to extend primary status to applications submitted prior to August 10, 1994, even if the applications were not granted until after that date.^{11/} Although the CMRS Third R&O did not attempt to define the service area in which an incumbent would be entitled to protection, a number of commenters suggested that a system's existing 22 dB μ contour should define the area within which the licensee could modify its facility(s) without approval from the MTA licensee.^{12/} Moreover, because of the relatively skeletal description of the FCC's proposed licensing scheme in the omnibus CMRS Third R&O proceeding which encompassed all mobile services, not

^{9/} See, e.g. Petitions for Reconsideration of Geotek, RMD and Personal Communications Industry Association, Inc. ("PCIA"), filed Dec. 21, 1994.

^{10/} See, e.g., Petitions for Reconsideration of AMTA and PCIA.

^{11/} See, e.g., Petitions for Reconsideration of AMTA, Geotek, RMD and PCIA.

^{12/} See, e.g., Petition for Reconsideration of AMTA; Motorola Comments, filed Jan. 20, 1995. Geotek and RMD further suggested that the operating area be determined by the mileage equivalent of the station's 22 dB μ contour. RMD/Geotek Joint Ex Parte Presentation, filed Feb. 6, 1995.

all details of the 900 MHz SMR proposal were able to be considered adequately. Thus, certain of the provisions for which AMTA seeks reconsideration were not specified by the Commission in any of the multiple phases of this proceeding prior to its decision in the instant 900 MHz Second R&O.

III. REQUESTS FOR RECONSIDERATION

A. Loading Requirements Should Be Eliminated For All 900 MHz SMR Systems

The Commission has already considered and reached a legally and economically compelling determination regarding the retention of loading requirements.

Based on our view of existing and potential competition in the CMRS marketplace, we believe that continuing to impose mobile loading requirements on some CMRS providers but not others contravenes the Congressional goal of regulatory symmetry and could unfairly impair the ability of certain licensees to compete. CMRS Third R&O at ¶ 190.

AMTA agrees fully with that assessment, and urges the Commission to reconsider its rejection of its own reasoning in regard to 900 MHz SMR licensees.

In the 900 MHz Second R&O, the Commission indicated that it had considered, but did not agree with, the arguments of those who opposed retention of 900 MHz SMR loading requirements. *Id.* at ¶ 57. The FCC noted that licensees in this service already had been granted a two-year loading extension, and that retention of spectrum by those who had failed to load during that seven-year period would constitute "warehousing of spectrum". By contrast, the FCC determined that MTA licensees, including incumbents, should not be subject to loading standards, presumably on the theory that spectrum which is bought from the government at auction cannot be classified as "warehoused,"

irrespective of the level of subscriber utilization on it.^{13/}

The Commission's reasoning regarding this aspect of its decision is flawed. First, as noted supra, the agency already has articulated eloquently the legal inequity of subjecting some CMRS systems to arbitrarily-defined loading standards from which competitive CMRS providers are exempt. The FCC has been directed by Congress to dismantle, not perpetuate, such regulatory discrepancies which distort the economic efficiencies of a competitive marketplace. Implementation of the FCC's decision would leave 900 MHz SMRs as the only segment of the CMRS industry subject to loading requirements -- an outcome which will pre-ordain their inability to compete on an equal basis in the wireless marketplace.^{14/}

The agency's decision to retain loading also relies on its conclusion that the 900 MHz service is not a "mature" service. AMTA fails to understand how that

^{13/} The Commission also granted RMD a waiver of the application of the loading rules to its system until thirty days after completion of the auctions in response to RMD's assertions that it intended to participate actively in those auctions and that the nature of its operation made loading assessments difficult. 900 MHz Second R&O at ¶¶ 58-9. AMTA does not request reconsideration of the FCC's decision on RMD's request.

^{14/} AMTA previously has urged the Commission to narrow the scope of its CMRS definition to exclude all non-wide-area SMR operators. See, e.g., Comments of AMTA in response to Notice of Proposed Rule Making, GN Docket No. 93-252, 8 FCC Rcd 7988 (1993). The Commission repeatedly has declined to do so. Thus, at least those 900 MHz SMR operators whose systems are interconnected with the public switched telephone network are classified by the FCC as CMRS, albeit with grandfathered status. See, CMRS Second R&O at ¶¶ 88-93. However, the FCC recently has determined that all SMR systems, whether CMRS or PMRS, are presumptively competitive for purposes of calculating the CMRS spectrum aggregation cap. See, Third Further Notice of Proposed Rule Making, GN Docket No. 93-252 (released May 5, 1995). Consistent with that conclusion, the FCC must consider even non-interconnected 900 MHz SMRs as participating in the broader CMRS marketplace in which the agency is statutorily charged to eliminate regulatory inequities.

determination, even if accurate, supports the FCC's decision. For example, there is no rational basis on which the FCC could conclude that the 900 MHz SMR service, which has been in existence and serving subscribers for almost a decade, is "less mature" than PCS for which the first authorizations have just been issued. Nonetheless, the Commission has not imposed a loading requirement on PCS licensees. Further, it is not obvious why the FCC would place a more substantial burden on a less mature service since doing so seemingly would impede its fullest development. In this respect, the Commission appears to be treating loading as effectively a reverse handicap -- one intended not to equalize the race among competitors but to disadvantage further those whom the FCC already has determined are lagging behind. This approach is fundamentally inconsistent with the FCC's obligation to "level the playing field" for competitive systems.

AMTA is reluctant to conclude that the FCC's retention of 900 MHz SMR loading requirements is simply a means to recover already constructed channels and thereby enhance the auction value of this spectrum, but it can identify no other rational explanation for the FCC's decision. If this is the basis for the agency's determination, it is prohibited by the clear Congressional directive regarding the appropriate use of auctions.^{15/} AMTA urges the Commission to reconsider this aspect of the Order.

Alternatively, if the Commission will not eliminate 900 MHz SMR loading entirely, then the Association requests that it afford all licensees the same relief granted to RMD, and defer any channel recovery action until after the auctions have been

^{15/} H.R. Rep. No. 103-111, 103d Cong., 1st Sess. (1993).

concluded. Some of the parties from whom channels otherwise will be recovered may well be the successful winner of the MTA auction. However, the current rules will permit the FCC to recover any less than fully loaded frequencies even though it may not reassign that spectrum to another operator until the MTA licenses are awarded. If that winner is the licensee from whom the frequencies had been recovered, the FCC simply will have denied the customers of that operator the use of the spectrum in the interim.

While AMTA hopes that these auctions will be scheduled and completed promptly, there is no certainty regarding when this process will be finalized. A number of issues have been raised recently regarding aspects of the FCC's auction authority which may delay the process for an extended period of time. In the interim, the FCC will have taken spectrum that currently is constructed and serving the public out of operation. The Commission itself will be warehousing spectrum. There is no public interest served by this result.

B. Applications From Parties Awarded Finders' Preferences Should Be Granted Primary Status

The Commission has responded to earlier-filed requests from AMTA and other parties to grant primary status to applications for secondary sites submitted, even if not granted, on or before August 9, 1994 and subsequently constructed on a timely basis. 900 MHz Second R&O at ¶ 53. AMTA requests that the FCC reconsider that aspect of its decision in one additional respect.

The Commission's Finders' Preference rules permit the targeting of 900 MHz

SMR systems.^{16/} To the extent the FCC retains that program, it will continue to award preferences to those who identify unused spectrum, and accept their applications for those same frequencies. 900 MHz SMR licenses granted as a result of those preferences should be entitled to the same co-channel protection afforded all incumbents whenever their applications are received. The Association requests that the FCC modify its rules to reflect this change.

C. Incumbents Should Be Permitted to Modify Facilities Within Existing 22 dB μ Contours

The Commission previously concluded that 900 MHz SMR incumbents would be entitled to co-channel protection from MTA licensees.^{17/} The instant Order states further that incumbents will be afforded interference protection in accordance with FCC Rule Section 90.621(b).^{18/} However, the agency declined to adopt the industry recommendation that an incumbent retain authority to redeploy frequencies freely as long as doing so does not expand their 22 dB μ interference contours. Instead, the FCC concluded that existing licensees should be permitted to modify their facilities only if there is no expansion of the existing 40 dB μ service contour. 900 MHz Second R&O at ¶¶ 46-7.

^{16/} See, 47 C.F.R. § 90.173(k).

^{17/} See, CMRS Third R&O at ¶ 145.

^{18/} AMTA suggests that the Commission not permit the so-called "short-spacing" of incumbent 900 MHz systems, and instead provide for co-channel operation only in accordance with the mileage and geographic-specific separations set out in Section 90.621(b)(1), (2), and (3). Unlike the heavily licensed 800 MHz SMR service in which short-spacing already is extensive, there currently is no short-spacing of 900 MHz facilities. Retention of a less congested spectral environment will provide the public with an optimal quality of service, and enhance the value of the spectrum at issue.

AMTA requests that the FCC modify this decision in the following respect. The Association asks that the FCC permit incumbents to implement additional or modified primary status facilities at any site which does not expand the 22 dB μ contour of an existing site, with the proviso that such a site would not be entitled to protection from the operation of the subsequently-granted MTA licensee. This provision will enable multi-site operators, such as Geotek and RMD, to establish very low-power stations outside the current service areas of their already operational facilities, but entirely within the existing, overlapping 22 dB μ interference contours of authorized stations. This will permit incumbents to cover what otherwise would be "dead spots" without in any way diminishing the geographic area in which the MTA licensee would be permitted to operate. The incumbent would be required to accept interference from the MTA licensee if it developed, but would be permitted to provide coverage in an area which otherwise might not be served at all.

In a related matter, AMTA recommends that the Commission reconsider its previous determination and continue to accept incumbent applications for secondary sites. It may be an extended period of time before MTA licenses even are issued, and will be longer still before these geographically-expansive systems will be fully implemented.^{19/}

^{19/} AMTA also has certain reservations about the reasonableness of the 900 MHz MTA licensee coverage requirements, defined for the first time in the instant Order. As the Commission is aware, 900 MHz SMR is essentially a business-oriented service. Unlike cellular, PCS and even ESMR, these systems typically are designed to accommodate the wireless requirements of business customers rather than consumers. Coverage requirements comparable to those adopted for PCS which ultimately may provide essentially ubiquitous service, perhaps even replacing the local loop, may prove unattainable. However, AMTA is not requesting reconsideration of this aspect of the Commission's decision at this time in light of the alternative, "substantial service"

The public interest will be served if existing licensees, willing to expand their coverage on purely a secondary, non-interference basis, are permitted to do so.

IV. REQUEST FOR CLARIFICATION

As noted supra, the Commission has included in this Order a new rule regarding the discontinuance of service for all 800 MHz and 900 MHz SMR systems. Previously, facilities licensed under Part 90 of the FCC's Rules, including SMR systems, were permitted to be taken out of operation for up to twelve months. See, 47 C.F.R. § 90.157(c). Newly adopted Rule Section 90.631(f) would reconcile SMR service discontinuation rules with those applicable to other CMRS offerings such as cellular and PCS by providing that a station may be taken out of operation for up to ninety (90) consecutive days. 900 MHz Second R&O at ¶ 65.

AMTA recognizes the Commission's efforts to ensure that substantially similar services are subject to comparable regulatory treatment and does not oppose this new obligation.^{20/} The Association does request confirmation of its understanding of the prospective nature of the rule. AMTA assumes that a station taken out of operation prior to the effective date of the new regulation would be governed by the twelve-month service discontinuation provision applicable at the time the station was temporarily removed from service. Similarly, only stations taken out of operation after that date

showing permitted. 900 MHz Second R&O at ¶ 41.

^{20/} Again, however, AMTA questions why the FCC is unwilling to adopt a similar approach with loading requirements given its conclusion that "the 800 and 900 MHz SMR services compete, or have the potential to compete with existing wide-area CMRS service providers." CMRS Third R&O at ¶ 94.

would be subject to the new ninety-day requirement. To interpret the applicability of this provision otherwise would be to apply it retroactively in contravention of normal Commission practices.

V. CONCLUSION

The 900 MHz SMR industry has waited almost a decade for the Commission to adopt rules enabling this service to move beyond the confines of the originally-adopted Designated Filing Areas. The public will be well served by the regulatory structure adopted in the instant proceeding, as modified as proposed herein.

For the reasons described above, AMTA urges the Commission to proceed promptly to reconsider those aspects of the 900 MHz Second Report and Order detailed in the instant Petition, and to initiate the further licensing of 900 MHz SMR systems expeditiously.

CERTIFICATE OF SERVICE

I, Cheri Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 5th day of June, 1995, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing Petition for Partial Reconsideration and Clarification, to the following:

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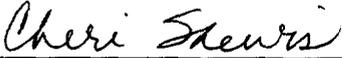
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