

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections 3(n)) GN Docket No. 93-252
and 332 of the Communications Act)
)
Regulatory Treatment of)
Mobile Services)

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS ON THE THIRD FURTHER NOTICE
OF PROPOSED RULEMAKING

Respectfully submitted,

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ASSOCIATION, INC.

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The American Mobile Telecommunications Association, Inc. (“AMTA” or the “Association”), in accordance with Section 1.415 of the Federal Communications Commission (“FCC or the “Commission”) Rules and Regulations, 47 C.F.R. § 1.415, respectfully submits its Comments in the above-entitled proceeding.¹ The instant Notice follows the Commission’s earlier decision in this same proceeding, in which the FCC established a cap of 45 MHz of radio spectrum that could be aggregated by any one entity and its affiliates to be used to provide “broadband” commercial mobile radio service (“CMRS”).² Broadband CMRS has been defined to include broadband personal communications services (“PCS”), cellular and Specialized Mobile Radio (“SMR”) services.³

The Commission now proposes to extend the spectrum cap to include spectrum used to provide private mobile radio service (“PMRS”) toward any entity’s total aggregation in a given geographic area. The FCC also proposes to eliminate any delay in applying the spectrum cap to “grandfathered” SMR licensees, which will not be reclassified as CMRS until August 10, 1996.

AMTA notes that any additional SMR spectrum included in the spectrum cap would be subject to the 10 MHz maximum on attributable SMR spectrum. However,

¹ *Third further Notice of Proposed Rulemaking*, GN Docket No. 93-252 (adopted April 10, 1995 and released May 5, 1995) (“FNPR” or “Notice”).

² *See Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (“3rd R&O”), at ¶ 258.

³ *Id.* at ¶ 263.

AMTA must generally oppose the Commission's proposal to expand the cap to include spectrum used for services which are not competitive with CMRS offerings.

I. INTRODUCTION

AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.⁴ The Association's members include trunked and conventional 800 and 900 MHz SMR operators, licensees of wide-area SMR systems and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country, and present the substantial majority of those private carriers whose systems will be reclassified as CMRS. As a representative of many licensees to be impacted by the spectrum cap, either as CMRS or PMRS service providers, AMTA is deeply interested in the outcome of this proceeding.

II. BACKGROUND

Since participating actively in the legislative debate that led to the Budget Act, AMTA has long been supportive of the Commission's efforts to achieve its Congressional mandate of regulatory symmetry. The Association is confident that

⁴ 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, Pub. L. No. 103-66, Title VI § 6002(b), 107. Stat. 312, 392 (the "Budget Act").

the public will benefit from enhanced competition if similar services are provided to the public on a level regulatory playing field.

To implement the CMRS-related amendments of the Communications Act, the Commission in the 3rd R&O modified its rules governing the Private Radio Services to ensure that private land mobile licensees reclassified as CMRS would be subject to technical requirements comparable to those governing providers of “substantially similar” common carrier services. Specifically, the FCC determined that, all CMRS services were substantially similar, since they were actually or potentially competitive with one another. It also began to craft consistent rules for licensing CMRS services, including reclassified services consistent with the statutory requirements for Title III common carrier licensing. Further, it capped at 45 MHz the total amount of combined broadband PCS, cellular and SMR spectrum in which an entity may have an attributable interest in any geographic area.

At first glance, the instant Notice appears to focus on the Commission’s laudatory goal of protecting competition among wireless services. The FCC’s proposed amendment of the spectrum cap would, in fact, have only a minimal effect upon most of the Association’s members. However, AMTA is concerned that the reasoning underlying the FCC’s proposals stakes out new and unsupported regulatory ground. The Association respectfully submits that the Commission’s hypothesis concerning the competitive status of CMRS and PMRS is erroneous, since the Notice

seeks to protect competition among services that are not competitive. Therefore, AMTA opposes the Commission's proposal to extend the cap to PMRS spectrum and to eliminate the remaining transition period for grandfathered SMR licensees by imposing the cap at this time.

III. LIMITS ON SMR SPECTRUM ATTRIBUTION MINIMIZE THE IMPACT OF AN EXPANDED CAP.

In the 3rd R&O, the Commission recognized that SMR spectrum is not functionally equivalent to other CMRS services under the current regulatory structure.⁵ SMR systems are licensed on a channel-by-channel, site-specific basis. Licensees have only a limited ability to reconfigure their systems. In recognition of these limitations, the 3rd R&O incorporated a 10 MHz maximum on 800 MHz and 900 MHz SMR spectrum attributable toward the 45 MHz spectrum cap, irrespective of an entity's actual SMR holdings.⁶

Many SMR operators offer interconnected commercial service, and therefore, are or will be CMRS providers. However, many provide only two-way dispatch services, and do not offer interconnection with the public switched telephone network ("PSTN"). This is especially true of smaller operators. Under Congress's statutory definition, these licensees are PMRS providers and are exempt from the full range of

⁵ 3rd R&O at ¶ 275.

⁶ *Id.*

CMRS regulation. Thus, many SMR operators not heretofore subject to the spectrum cap would become so under the Commission's proposal.

It is unlikely that most smaller SMR operators provide PMRS service on enough channels in any geographic area to exceed the 10 MHz maximum. Moreover, these operators are not likely prospects to acquire broadband PCS or other licenses to the extent that they would approach the 45 MHz cap. Therefore, the expansion of the spectrum cap would not adversely affect most SMR operators. However, AMTA is concerned that the 10 MHz maximum for SMR attribution is not mentioned in the Notice. The Association wishes to clarify that either CMRS or PMRS SMR spectrum would be included in the 10 MHz maximum to be attributed toward the cap.

IV. PMRS SERVICES ARE NOT COMPETITIVE WITH CMRS.

Congressional intent in establishing CMRS/PMRS designations for wireless services was clear: to provide for comparable regulation of like services. Throughout the history of its CMRS docket, the Commission has sought to create a level regulatory playing field for "substantially similar" services. To that end, it engaged in a lengthy analysis of competitive factors in the 3rd R&O, finally fashioning a broad definition of such services based on its determination that all CMRS services are to

some extent actually or potentially competitive.⁷

Heretofore, the Commission's competitive analysis has not defined any PMRS as "substantially similar" to, or inherently competitive with, CMRS. However, this is the basis of its argument in favor of expanding the spectrum cap:

We note that this potential for a licensee to reduce the number of competitors by aggregating spectrum exists regardless of whether the licensee is providing CMRS or PMRS. Moreover, the services provided by PMRS providers may well be viewed as competitive alternatives to CMRS by customers; thus, excluding them from the cap could provide PMRS providers with an unfair competitive advantage over CMRS providers.

Notice at ¶ 3.

AMTA submits that the Commission's argument in this matter is fundamentally flawed: PMRS services are not fully competitive with CMRS offerings under the FCC's own regulatory framework.

By definition, PMRS offerings either cannot be offered to the public or a substantial portion of the public, or cannot include interconnection with the PSTN. Therefore, they are limited to private, non-commercial radio systems constructed for the purpose of internal business communications, or to service offerings by commercial operators that do not allow communication with anyone not operating on the same system. They do not compete with the sort of ubiquitous, packaged

⁷ 3rd R&O at ¶ 27. AMTA has consistently held that the definition is over-inclusive, and has requested that the Commission reconsider its decision, to exempt non-wide-area SMR and 220 MHz operators from among those services subject to comparable regulation. *See* AMTA Petition for Reconsideration and Request for Clarification, filed December 21, 1994.

communications offerings designed for a public “on the move” that the FCC has envisioned in its previous decisions in this docket.⁸

There is no articulated basis for the FCC’s suggestion that an operator may choose a non-competitive service simply to avoid compliance with the spectrum cap. Concerns about overpriced PMRS services by an operator do not apply to a CMRS marketplace offering a variety of feature-rich, widespread communications services. With several interconnected SMR operators, cellular providers and PCS licensees in each geographic area, an operator offering high-priced PMRS services would not remain in business very long.

Equally importantly, expansion of a measure designed to foster CMRS competition to non-CMRS spectrum would be contrary to Congressional intent. Congress specifically exempted PMRS services from its decision to regulate certain wireless services as common carriers. The Commission, in implementing Congressional directive, has naturally maintained the statutory differentiation between CMRS and PMRS services in crafting the necessary regulatory framework.

The spectrum cap was imposed by the Commission specifically to avoid excessive aggregation of CMRS spectrum by large operators, which might then exert undue market power or inhibit market entry by other service providers.⁹ The

⁸ See 3rd R&O at ¶ 58.

⁹ *Id.* at ¶ 248.

Commission's determination concerning those services to be regulated as substantially similar followed a lengthy analysis of antitrust factors.¹⁰ Its decision to impose the cap on CMRS spectrum came only after a thorough examination of present and likely future competitive factors affecting the CMRS marketplace.

No such analysis has been made with regard to PMRS spectrum, yet the Commission, in one paragraph of a four-page Notice, relied on that assumption to support its proposal that PMRS, as well as CMRS, should be included in the spectrum cap. AMTA submits that no foundation whatsoever has been laid for this conclusion. PMRS spectrum has never been a part of the Commission's market analysis, and should not now suddenly be incorporated into the CMRS regulatory framework.

AMTA recognizes that there may be Commission concerns over the use of the large amounts of PCS spectrum that the FCC is now in the process of licensing. The exact nature of PCS services is still unknown, since no system is close to operational status, and there are few restrictions on permissible uses of each license. However, it has become clear that large amounts of broadband PCS spectrum will be held by major communications entities, both wireless and wireline. To the extent that the instant Notice attempts to prevent large corporations from circumventing restrictions on their aggregation of spectrum, AMTA suggests the problem be approached

¹⁰ See 3rd R&O at ¶¶ 22-79.

directly. A better resolution to this problem would be amendment of the PCS rules, rather than an over-inclusive expansion of the CMRS spectrum cap.

AMTA urges the Commission to retain the spectrum cap within its CMRS regulatory scheme to the extent it is needed for the “substantially similar” services envisioned in the Budget Act. Further, since grandfathered SMR operators are currently regulated as PMRS providers, the remaining transition period to August 10, 1996 should be retained before the spectrum cap is imposed on these operators as part of CMRS regulation.

V. CONCLUSION

For the reasons stated herein, AMTA opposes the proposed expansion of the CMRS spectrum to include spectrum used to provide PMRS services, and urges the Commission to expeditiously complete this proceeding consistent with the recommendations detailed herein.

CERTIFICATE OF SERVICE

I, Allison J. Dalseg, in the office of the American Mobile Telecommunications Association, Inc., hereby certify that I have on this 5th day of June, 1995, caused to have hand-delivered a copy of the foregoing Comments to the following:

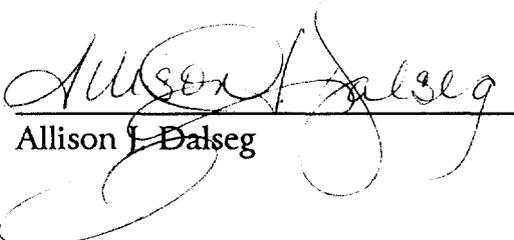
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