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June 9, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222 - Mail Stop 1170
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Communication
PR Docket No. 93-144

Dear Mr. Caton:

On behalf of the Personal Communications Industry Association ("PCIA") and pursuant to Section 1.1206(a)(2) of the Commission's Rules, 47 C.F.R. §1.1206(a)(2), this is to notify you of a written ex parte communication on June 6, 1995 concerning the above-referenced proceeding.

The contact consists of the attached letter and legal analysis and was provided to Regina Keeney, Rosalind Allen, David Furth, Sally Novak and D'Wana Speight of the Wireless Telecommunications Bureau.

Please contact the below-signed should you have any questions in this matter.

Sincerely,


Alan S. Tilles

cc: Rosalind K. Allen, Esquire

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June 9, 1995

VIA HAND DELIVERY

Regina Keeney, Chief
Wireless Telecommunications Bureau
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Re: PR Docket No. 93-144

Dear Ms. Keeney:

In discussions concerning PR Docket No. 93-144, your staff has indicated its belief that an auction of 800 MHz spectrum as proposed in the Commission's Notice of Proposed Rule Making is consistent with the Omnibus Budget Reconciliation Act of 1993.

PCIA's counsel has researched the Act and has reached the conclusion that an auction, unless limited exclusively to unassigned frequencies and without diminishing the rights of incumbent spectrum licensees, is precluded by the Act. PCIA's membership has recently had numerous contacts with their Congressional representatives to discuss the findings. Prior to your receiving any questions on the matter from the Hill, PCIA thought that it would be appropriate for you and your staff to have a copy of the analysis for review and consideration.

We would appreciate the opportunity to discuss this issue with you and your staff sometime in the near future. Should you have any questions, please do not hesitate to call.

Sincerely,

Mark J. Golden
Vice President, Industry Affairs

cc: Rosalind K. Allen, Esquire
David Furth, Esquire
Sally Novak, Esquire
D'Wana Speight, Esquire

BUDGET ACT ANALYSIS OF 800 MHZ SMR SPECTRUM AUCTIONS

Meyer, Faller, Weisman
& Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20554

Date: May 8, 1995

Through the Budget Act of 1993, Congress intended auctions to be used on a limited basis, and not replace first-come, first-serve filing procedures

Applications in the 800 MHz SMR band, prior to the Commission's recently imposed freeze, were processed under a "first-come, first-serve" licensing process.¹ The entire Budget Reconciliation Act, Legislative History, and House Conference Report fails to mention first-come, first-serve procedures at all.² Rather, Chapter 1 under Purpose and Summary of the Legislative History of the Budget Reconciliation Act, titled "Current Licensing Procedures", discusses the failures of lotteries and comparative hearings. This section, which cites the problems of licensing via lottery and comparative hearings and why this portion of the process must be fixed, fails to mention first-come, first-serve licensing procedures or any problems associated with this licensing format.

Section 5203 of Chapter 1 under Competitive Bidding Authority of the Legislative History of the Budget Reconciliation Act states that "[t]his authority [to use auctions] is in addition to the FCC's existing authority to use comparative hearings and lotteries..."³ Further, the same section states that "[t]he enactment of section 309(j) should not affect the manner in which the Commission issues licenses for virtually all private services...."⁴ While many SMR applications are classified as CMRS, the committee here refers to the private "**services**". Part 90 is still titled "Private Land Mobile Radio Services".

Congress fully intended the use of auctions to be limited. The Legislative History states that "... there are limited cases in which competitive bidding would be appropriate and in the public interest. The limited grant of authority contained in this section is designed so that only those classes of licenses would be issued utilizing a system of competitive bidding."

Congress intended that the Commission continue to have the authority to accept first-come, first-serve applications. The Senate amendment specifically exempted from auctions "... non-mutually applications (such as specialized mobile radio, maritime and aeronautical end-users licenses)..."⁵ This was later modified in the Conference Agreement to provide that auctions "... will only be used when the Commission accepts for filing mutually exclusive

¹See, 47 C.F.R. §90.611(b).

²H.R. Rep. No. 103-111, 103d Cong. 1st Sess. (1993).

³Id. at p. 580.

⁴Id.

⁵Id. at p. 1170.

applications for a license."⁶ The Commission has repeatedly held that it has the discretion to decide what constitutes mutually exclusive applications, and the Commission has found that the existing rules in the 800 MHz band which provide for first-come, first-serve processing does not constitute mutual exclusivity.⁷

Congress intended auctions to be used for new "services", not new "licenses" in a currently allocated service

The Legislative History states that it would be disruptive to interrupt the "on-going filing, processing and approval of applications for licenses for existing services...", but suggests that auctions may be appropriate for "... several new services - such as interactive video, the proposed new services in the 220-222 MHz band, and (perhaps) the narrowband paging services proposed in the 900 MHz band..."⁸ Congress' failure to mention the 800 MHz service as a possible candidate for auctions is important, and indicates that Congress did not consider an existing service to be conducive to auction authority.

The Commission's proposal to license a geographic "overlay" license in the SMR Pool can be analogized to the cellular service. If a cellular company, holding one of the two licenses in each market, would state to the Commission that it would like to have the Commission issue a single license for **both** cellular applications because it would like to implement new technology to provide the same services currently offered by cellular. It is not hard to imagine the outcry from cellular operators if the Commission proposed an "overlay" license over existing cellular spectrum. Instead, the Commission identified "white space" that existing cellular operators were not serving, and accepted applications for such areas.

The Commission must first investigate alternative methods to avoid mutually exclusive applications

Prior to the Commission's recent "freeze", the Commission accepted 800 MHz applications on a first-come, first-serve basis. As discussed above, Congress clearly intended that the Commission could continue accepting applications in this manner. However, the Commission has failed to consider continuing to accept applications

⁶Id.

⁷See, for example, Notice of Proposed Rule Making, PR Docket No. 90-481, 55 FR 46834 (November 11, 1990).

⁸House Report No. 103-111, supra at p. 590.

⁹Memorandum Opinion and Order, CC Docket No. 90-6, FCC 93-99, released Feb. 19, 1993.

in the band on a first-come, first-serve basis, and has failed to consider alternative licensing mechanisms which avoid mutually exclusive applications.

The Conference Agreement stated a **requirement** that the Commission "... continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing procedures."¹⁰ The Legislative History also recites this requirement.¹¹ This Congressional mandate is reflected in Section 309(j)(6)(E) of the Act. Section 309(j)(3) **requires** the Commission to test alternative methodologies to avoid mutually exclusive applications and thereby avoid auctions. However, the Commission has not proposed, considered or tested any alternative methodologies since the passage of the Budget Act, such as the proposal suggested by PCIA. Indeed throughout this proceeding, the Commission's proposal, which has only considered auctions, has received little support other than the support of the proposal's primary beneficiary, Nextel.

PCIA's proposed plan would limit eligibility to existing licensees on the channels requested, thereby limiting mutually exclusive applications. In PCIA's discussions with the Bureau staff, staff members rejected this part of PCIA's proposal, stating that they believed that they did not have the authority to limit eligibility in this manner. Yet, such a threshold eligibility test to avoid mutually exclusive applications is specifically contemplated in the Legislative History, and the Commission has previously held that under the standard established in the Ashbacher case, it has the authority to create threshold eligibility tests to the point that the class of eligibles may consist of a single entity.¹²

Existing 800 MHz licenses must not be rendered "Second Class" licenses

The Senate and House Amendments in the Legislative History precludes the Commission from granting "... any right to a licensee different from the rights awarded to licensees [within the same service] who obtained their license through assignment methods other than competitive bidding. "

¹⁰House Conf. Rep. No. 103-213, supra at p. 1174.

¹¹Id. at p. 585.

¹²See, for example, Notice of Proposed Rule Making, PR Docket No. 90-481, 55 FR 46834 (November 11, 1990).

¹³House Conf. Rep., supra at p. 1174.

Under the Commission's proposal, the geographic licensee will obtain many more rights than incumbent licensees. For example, under the Commission's proposal, geographic licensees will obtain the rights to the spectrum held by an incumbent should the incumbent not be able to renew its authorization.¹⁴ Yet the incumbent does not obtain the rights to the geographic license if that licensee fails. Similarly, the transfer of an incumbent system to the geographic licensee will be presumed to be in the public interest,¹⁵ while a transfer to a non-MTA licensee is not proposed to be accorded the same benefit. Geographic licensees are proposed to enjoy more flexible emission mask requirements,¹⁶ will have extended periods to construct their systems,¹⁷ and will have more flexibility in the location of transmitter sites.¹⁸ Therefore, the incumbent's license is rendered a second class status, contrary to the expressed will of Congress.

The Commission must not unfairly modify existing 800 MHz licenses

The statute and Legislative History prohibit the use of auctions for modifications of a license.¹⁹ The "mandatory retuning" proposal submitted by several parties, regardless if the retuning takes place over one year or several years, is clearly a modification of license.

The Commission's proposal would modify the licenses of all existing operators. Specifically, the Commission's proposal can be summarized as a proposal to issue geographic licenses on top of existing licenses, since the geographic licensee would be licensed for the entire geographic area which encompasses the incumbent's license.²⁰ As a result, existing systems have an extremely limited ability to move or modify their systems. Although it can be argued that the short-spacing of systems currently prevents operators from

¹⁴Further Notice of Proposed Rule Making, PR Docket No. 93-144, 59 FR 60111 at para. 31.

¹⁵Id.

¹⁶Id. at para. 43.

¹⁷Id. at para. 46.

¹⁸Compare, Further Notice of Proposed Rule Making, supra at par. 30 versus par. par. 40.

¹⁹Id. at p. 580.

²⁰Further, as discussed above, if the incumbent licensee's authorization is cancelled, the geographic licensee would be entitled to operate in the vacated area.

moving their systems to a significant degree, the fact is that in the existing licensing environment virtually every system **could** be moved more than their existing interference contour in one or more directions. The Commission's proposal to prevent moves beyond the current interference contour eliminates such flexibility.

Further, existing licensees would, as a result, have virtually no realistic ability to transfer or assign their licenses to a buyer other than the geographic licensee. As a result, the licensee's authorization is modified by limiting its transferability.

The concept of "regulatory parity" neither requires the assignment of channels in contiguous block nor mandatory retuning

Nextel states its position in an ex parte presentation to the Commission that there is a "... necessity of a new licensing scheme for Specialized Mobile radio that would provide the regulatory parity mandated by the Budget Act, i.e., the need for contiguous blocks of spectrum, a 200-channel (10 MHz) block, and mandatory retuning of incumbents."

The Budget Act does **not** mandate contiguous spectrum or mandatory retuning. With regard to parity, the Act specifies that similar services should be regulated in a similar manner,²¹ however, the Legislative History discusses parity with regard to common carrier-type issues, i.e. interconnection issues, state preemption issues, entry issues, etc.²² "Licensing" parity is not mandated. Further, absolute parity is not required. In fact, the Conference Report specifically contemplates that "... market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services."²³

A single licensee must not be permitted to dominate a single service and will effectively exclude small businesses from the agency's licensing procedures

The Legislative History requires the Commission, in deciding whether to auction spectrum, to take into account whether "... a single licensee dominates any particular service, or it dominates a significant group of services."²⁴ The Legislative History mandates that the Commission's rules promote economic opportunity and competition, and "... ensure that the adoption of the

²¹Id. at p. 576.

²²See, generally, House Report No. 103-111 at p. 586-588.

²³Id. at p. 1180.

²⁴Id. at p. 581.

competitive bidding provisions of this section will not have the effect of excluding small businesses from the Commission's licensing procedures".²⁵ Further, the Legislative History states that for the Commission to realize these goals the Commission must disseminate licenses among a wide variety of applicants.²⁶

The Commission's proposal has the impact of limiting participants in an auction to Nextel and its affiliates. The proposed channel block size (50 contiguous channels), geographic market size (Major Trading Areas) and build-out coverage requirements mean that only Nextel and its affiliates could participate in the auction. Only Nextel currently has spectrum over a large, MTA geographic area that would permit relocation of incumbent licensees, which would be necessary because of coverage requirements for the license. Only Nextel has spectrum across the entire channel block, and only Nextel has the financial resources to bid. Therefore, the adoption of the Commission's proposal would create a private auction and, contrary to the expressed intention of Congress, ensures that small businesses are not excluded from the Commission's licensing procedures as small operators: (1) will not have the financial resources to bid at auction; (2) cannot build-out such large geographic areas; and (3) do not have available spectrum to relocate Nextel.

²⁵Id.

²⁶Id.