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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of)
)
Amendment of Part 90 of the)
Commission's Rules to Provide)
for the Use of the 220-222 MHz Band)
by the Private Land Mobile)
Radio Service)
)
Implementation of Sections 3(n) and 332)
of the Communications Act)
)
Regulatory Treatment of Mobile Services)

PR Docket No. 89-552

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GN Docket No. 93-252

COMMENTS OF
SMR ADVISORY GROUP, L.C.

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September 13, 1995

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To: The Commission

COMMENTS OF SMR ADVISORY GROUP, L.C.

SMR Advisory Group, L.C. ("SMR Advisory"), by its counsel and pursuant to Section 1.415 of the Commission's Rules, hereby submits its comments on the Fourth Notice of Proposed Rulemaking, FCC 95-381, released on August 29, 1995, in the above-captioned proceeding.¹ In the Fourth Notice, the Federal Communications Commission ("FCC" or "Commission") proposes rules to govern the filing and processing of modifications to the authorizations of existing 220 MHz licensees ("Phase I Licensees").

¹ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, GN No. 93-252, released August 29, 1995 ("Fourth Notice").

Specifically, the FCC proposes to allow Phase I Licensees to modify their original authorizations only if such modifications will not increase their originally licensed 38 dBu contours in any way. Although SMR Advisory acknowledges the FCC's efforts to address this issue, it is forced to oppose the FCC's proposal on the grounds that it does not adequately serve the needs of the 220-222 MHz industry.²

As an alternative to the Commission's proposal, SMR Advisory supports a rule which will permit Phase I Licensees to relocate to any site that --

- is no more than 35 kilometers from the original site; and
- is no more than ½ the distance in excess of 120 kilometers from any co-channel 220-222 Mhz licensee, unless the relocating licensee obtains the concurrence of the co-channel licensee and files such concurrence with its modification.

For the reasons below, SMR Advisory believes that this alternative addresses the FCC's expressed concerns in this rulemaking, while better serving the public interest generally as well as the interests of the 220-222 MHz industry.

² On August 28, 1995, the Commission also released its Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, FCC 95-312 ("Third Notice"), proposing rules to govern the 220 MHz service prospectively, including 220-222 MHz as yet unlicensed (the licensees for which are hereinafter referred to as "Phase II Licensees"). The Third Notice, among other things, proposes an auction procedure to select from among mutually exclusive applicants for 220-222 MHz spectrum. Because the channels included in the to-be-auctioned channel groups include the channels already licensed to Phase I Licensees, the modification procedure ultimately adopted by the FCC will necessarily affect the Phase II Licensees. To effectively preclude Phase I Licensees from implementing any meaningful modifications to their licenses, however, elevates the interests of future licensees over existing licensees to an unreasonable degree.

I.

INTRODUCTION

SMR Advisory manages some eight-five (85) 220-222 MHz licensed systems, of which approximately sixty (60) have been constructed. These constructed systems constitute approximately thirteen percent (13%) of the total 220 MHz systems constructed to date.³ About one half of the total systems managed by SMR Advisory require authority to relocate the facilities to an alternative site. In many cases, relocation is necessary because the original site has become unavailable since the date the original application was filed in 1991.⁴ In other instances, alternative sites are preferable for routine business reasons. And still other sites are simply unsuitable for the proposed service due to technical or engineering reasons.⁵ In any case, the need and desire to relocate an originally specified site are both reasonable and predictable given the history of the 220 MHz service in particular, and the normal course of system licensing in any service.

³ To date, the Commission has issued nearly 3,800 authorizations for non-nationwide 220-222 MHz stations. The vast majority of these stations remains unconstructed, however, due at least in part to the uncertainty as to whether and to what extent modifications will be permitted.

⁴ Such sites, for example, may simply have been leased out at full capacity to licensees in other services during the intervening four years. Other sites have suffered some damage (such as fire, rust or condemnation) such that they are no longer viable locations for system construction.

⁵ For example, some tower locations have intermodulation problems caused by an excessive number of frequencies at the same coordinates. In other cases, the topography around the sites hinders the provision of quality service.

In 1991, the FCC imposed a freeze on the filing of 220 MHz applications, which continues to this day.⁶ In addition to precluding the filing of initial applications, however, the Commission's directive also encompassed any and all modifications of 220 MHz licenses. Although the FCC has granted Special Temporary Authority ("STA") to Phase I Licensees requesting relocations, there has been no assurance that permanent authority will be granted at the modified site. And while many Phase I Licensees have proceeded to construct at a modified site pursuant to STA, these licensees have been forced to assume the risk that permanent authority will not be forthcoming.⁷

At the time initial applications for 220-222 MHz authorizations were filed, neither the FCC's rules nor the pertinent application form (i.e., FCC Form 574) required 220 MHz applicants to demonstrate site availability. During the four year period since 220 MHz applications were first filed, new sites have become necessary for a variety of reasons which historically have been perfectly acceptable to the Commission. The retroactive imposition of a rule which restricts the licensee's ability to relocate to a degree never before contemplated raises serious notice issues and violates fundamental notions of fairness.

⁶ This freeze was imposed by the FCC shortly after receiving nearly 60,000 applications for 220 MHz service assignments in 1991. See Acceptance of 220-22 MHz Private Land Mobile Applications, 6 FCC Rcd 333 (1991).

⁷ Many Phase I Licensees requiring relocation have been unwilling to risk constructing at an STA location without some indication from the FCC as to how permanent modification applications would be handled. With the advent of the December 31, 1995 construction deadline, however, the position of these licensees as well has become increasingly untenable.

SMR Advisory agrees with the Commission that any 220 MHz license modifications should be swift, certain and efficient so as not to interfere unduly with the Phase II Licensing process. SMR Advisory submits, however, that the Commission's proposal, as articulated in the Fourth Notice, unfairly penalizes Phase I Licensees and hinders the expeditious development of 220 MHz service.⁸ The industry alternative set out below, on the other hand, addresses the stated concerns of the FCC, meets the needs of the 220 MHz industry, and best assures the timely provision of service to the public.

II.

DISCUSSION

A. The Commission's Proposal Does Not Serve the Needs of the 220-222 MHz Industry.

The Commission has proposed to allow 220 MHz licensees to modify their authorizations to locate their base stations anywhere within their existing service area contour so long as the transmissions at their new station locations do not exceed a predicted field strength of 38 dBuV/m anywhere within this contour. Fourth Notice, at ¶7. Although this proposal will ensure that no mutually exclusive applications result from a modification filing window, it also effectively prevents those Phase I Licensees who need to relocate from developing their authorizations in any meaningful way.

⁸ Although it has been suggested that the auctions for the Phase II licenses will take place by November of 1996, there is no assurance that this will occur given that comments on these rules have yet to be filed and final rules have yet to be adopted.

A Phase I Licensee proposing to move to a site located any appreciable distance from its original site will be forced to reduce its effective radiated power or its antenna height to a substantial degree. The resulting actual service area, while still contained within the original 38 dBu contour, will in fact be dramatically smaller.⁹ As a practical matter, therefore, the FCC has effectively restricted any movement from the original site to fairly nominal distances. Such a restriction ignores the realities facing the 220 MHz industry.

Among the forty-plus licenses managed by SMR Advisory requiring relocation, a substantial number must be moved to a site more than 10 miles away from the original site.¹⁰ In some cases, there are simply no closer locations available; in other instances, engineering concerns dictate the relocation distance. In each case, however, the reduction in power necessary to ensure that transmissions from the new station location will not exceed the originally authorized 38 dBu contour will surely diminish the overall service area to an unacceptable degree.¹¹

⁹ It should be noted that the quality of service within the defined service area also would likely suffer. The reduction in power -- in addition to decreasing the overall breadth of the area covered -- also creates "holes" within the area to be covered.

¹⁰ This is particularly true when the license is located in a rural area. SMR Advisory manages a number of licenses, for example, where a vigorous search for alternative sites revealed no viable locations within 10 miles of the original site. In such cases, the licensee will be forced either to give up significant service area through no fault of its own, or invest in the construction of an entire tower (as opposed to leasing space on an existing tower) at a prohibitive cost.

¹¹ The FCC also has proposed to require licensees to cover at least fifty percent (50%) of its original service area from the new location. Fourth Notice, at ¶ 19. While SMR Advisory understands the FCC's concern that licensees not select site locations with the intent of serving entirely new service areas, the requirement that licensees reduce their power and/or antenna heights so as to remain entirely within the original 38 dBu contour may prevent a licensee from meeting this 50% requirement, when it otherwise could easily

Nor is this concern alleviated by the FCC's proposal to permit Phase I Licensees to install "fill-in" stations to cover original area not served by the modified site. First, the costs associated with securing a "fill-in" station are considerable. The licensee must pay the site leasing fees for the second site, purchase the equipment for the fill-in station, install the equipment, and incur the operating costs for a second station. Given the economics of a 220-222 MHz system, these costs are likely to be prohibitive. Second, the FCC assumes that a site is available for the fill-in station -- an assumption which, as discussed above, simply is not true in many instances. To the extent that a closer site were available, the Phase I Licensee would in all likelihood have selected the closer location for its modification in the first place.

In short, while the proposed relief for the Phase I Licensees ensures that no mutual exclusive applications will be filed within the modification window, the FCC has unnecessarily penalized the Phase I Licensees by drastically reducing their service area. As will be shown below, the same goals (of maintaining mutual exclusivity) can be maintained under the 220 MHz industry's alternative proposal, with none of the negative repercussions associated with the FCC's proposal.

**II. Modifications Based on Distance Separation Criteria
Will Better Serve all of the Interests at Issue.**

The Commission's proposal to allow only those modifications which do not increase the licensee's original 38 dBu contour is based on its determination to "avoid

have done so. The resulting "Catch-22" serves neither the public nor the 220 MHz industry.

mutually exclusive situations with new applicants and other licensees seeking modifications." Fourth Notice, at ¶ 14. In requesting comments on this and alternative proposals, the Commission noted that "any alternative which would permit Phase I licensees to file license modifications establishing significantly different geographic service areas would be problematic and would delay service to the public if mutually exclusive applications result." Fourth Report, at ¶ 14 (Emphasis added). SMR Advisory believes that the alternative here proposed meets the Commission's criteria in that it will not result in mutually exclusive applications. Moreover, this alternative will better serve the needs of the industry by permitting Phase I Licensees to provide quality service to the public.

Rather than focus on the original 38 dBu contour as the determinative factor in considering modifications, SMR Advisory proposes that the Commission focus instead on the distance separating the Phase I Licensee desiring to relocate from the closest co-channel 220 MHz licensee. Specifically, SMR Advisory proposes that Phase I Licensees be permitted to relocate their facilities a maximum of $\frac{1}{2}$ the distance over 120 kilometers toward any co-channel licensee to a maximum of 35 kilometers. Any modifications resulting in less than a 120 kilometer separation must include the written consent of the co-channel licensee(s) with its modification application.¹² Any modifications not meeting these standards would be deemed deficient and dismissed outright.¹³

¹² SMR Advisory agrees with the FCC that all modifications should be filed within a filing window announced soon after adoption of a Report and Order in this proceeding. Fourth Notice, at ¶ 5.

¹³ SMR Advisory also agrees with the FCC that all Phase I Licensees whose modifications are granted should receive an additional four months from the modification

This alternative proposal meets the FCC's expressed concerns, while better serving the needs of the 220 MHz industry. Specifically, this proposal ensures that, by the Commission's own definition of mutual exclusivity¹⁴, there will be no mutual exclusive applications resulting from the modifications. Thus, for example, if co-channel licensees are located 160 kilometers apart, each licensee would be entitled to move no more than 20 kilometers closer to each other and still maintain the 120 kilometer separation. To the extent that one licensee moves and the other does not, the distance separating the licensees still would exceed 120 kilometers.¹⁵ In addition, Phase I Licensees will be precluded from moving closer to more densely populated urban areas, since doing so would surely violate the 120 kilometer separation criteria. Finally, the 35 kilometer maximum distance will ensure that Phase I Licensees continue to serve the general areas originally proposed, and do not attempt to serve entirely new service areas.

While meeting the FCC's concerns, this alternative proposal also will enable Phase I Licensees to select the best available sites without compromising the service to the public. The increased flexibility of the industry proposal allows licensees to better tailor their

grant date to construct their modified facilities. Phase I Licensees who either do not file modifications or whose modifications are dismissed as deficient will be required to construct their facilities by the current December 31, 1995 construction deadline.

¹⁴ In its 220 MHz Report and Order, the FCC provided 120 kilometer co-channel protection for 220 MHz stations. Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Radio Services, 6 FCC Rcd 2356 (1991).

¹⁵ Of course, the move could be greater if these co-channel licensees cooperate with each other and concur (in writing) to a move which will maintain a less than 120 kilometer separation.

service areas to ensure the highest quality service. Licensees are not penalized for the routine loss of sites, particularly when such loss was -- in many cases -- completely beyond the control of the licensees.

III.

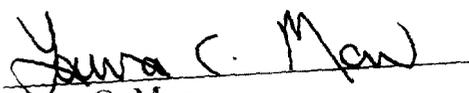
CONCLUSION

For the reasons above, SMR Advisory urges the Commission to adopt the alternative industry proposal set out in these comments for the filing and processing of modifications to existing 220-222 MHz licenses.

Respectfully submitted,

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