

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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In the Matter of)	
)	
Amendment of Parts 2 and 90 of the)	PR Docket No. 89-553
Commission's Rules to Provide for the)	
Use of 200 Channels Outside the)	
Designated Filing Area in the)	
896-901 MHz and the 935-940 MHz Bands)	
Allotted to the Specialized Mobile Radio Pool)	
)	
Implementation of Section 309(j))	
of the Communications Act —)	PP Docket No. 93-253
Competitive Bidding)	
)	
Implementation of Sections 3(n) and 332)	
of the Communications Act)	GN Docket No. 93-252

**EMERGENCY PETITION FOR RECONSIDERATION
AND/OR WAIVER OF ACTIVITY RULES**

RAM Mobile Data USA Limited Partnership ("RMD"), by its attorneys, hereby urgently requests the Commission to reconsider and/or grant a general waiver of the activity rules that were announced in the above-referenced proceeding¹ so as to prevent their denying existing licensees the flexibility to bid on less heavily encumbered or unencumbered blocks within an MTA should more encumbered blocks in the same MTA be subject to delayed and higher bidding.²

¹ Second Order on Reconsideration and Seventh Report and Order, FCC 95-395 released September 14, 1995 (the "Second Order").

² Although a less critical issue, RMD also asks the Commission to correct and clarify certain parts of Attachment A to the Public Notice that announced the auction of 900 MHz SMR licensees. In this Attachment, it is erroneously stated that there are no existing licensees in Milwaukee. In addition, the Louisville DFA, in which RMD also is licensed for Block F, is not included at all in Attachment A. As reflected in Attachment C, certain blocks are licensed, including Block F to RMD. Also, because Attachment A refers only to DFAs, instead of the MTAs, it does not advise bidders of RMD's existing licensee presence in the El Paso, Tulsa, Spokane, Wichita, Des Moines, Little Rock, Knoxville and Omaha MTAs, all of which is reflected in Attachment C. A lesser problem is that because the DFAs and MTAs do not evenly line up, Attachment A also does not always identify all of the incumbent licensees who are present in an MTA. Finally, if the Attachments are being edited, RMD requests that a contact (footnote cont'd on next page)

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In the absence of reconsideration or waiver, the activity rules will put existing licensees who are seeking expansion frequencies in an impossible position: They either must bid for far more ten-channel blocks than they actually desire or bid only on those they want, but irrevocably foreclose their ability to bid on potential substitutes should the bidding on more heavily encumbered blocks within the MTA later exceed the bids for less encumbered or unencumbered frequencies in the same MTA.³

A. THE GROSS DISPARITIES IN ASSIGNED ACTIVITY UNIT VALUES OF DIFFERENT FREQUENCY BLOCKS WITHIN MTAS WILL HAVE AN IMMEDIATE AND DEVASTATING IMPACT ON THE AUCTIONS.

To understand fully that this problem will skew the auction from the very first round of bidding, it is important to look at the tremendous disparity in activity units that have been assigned to different ten-channel blocks within the same MTAs. For example, in Los Angeles, the two most encumbered blocks have activity units averaging a little over 220,000 units, but the median block has activity units of over 2,300,000; and the highest unit block has over 3,600,000 units; in New York, the lowest activity unit block is assigned less than 450,000 activity units, while the median block has over 2,800,000 units; in Philadelphia, the two lowest unit blocks have less than 130,000 units, while the median is over one million and the highest are over 2 million.

person, Steven T. Apicella, its Vice President for Regulatory Affairs, be identified in Attachment B.

³ This issue was not raised in the comments, because the Commission's Second Further Notice of Proposed Rulemaking gave no indication that the activity rules would assign different activity unit values to different ten-channel blocks within the same MTA, as opposed to basing such values on the MHz/pop for the entire MTA, which would mean that for activity rule purposes, each ten-channel block within the same MTA would be valued the same. See Second Report and Order and Second Further Notice of Proposed Rule Making, 10 FCC Rcd. 6884, 6916-19 and 6923-24 (1995) (the "Further Notice"). RMD only became aware that this approach might be under consideration when the Commission released its Public Notice regarding MDS license auctioning, two days before the sunshine period commenced in this docket. Public Notice, Report No. AUC-95-06 (September 5, 1995) (the "MDS Notice").

RMD does not know of any interested party who would oppose the relief requested. Copies of this Emergency Petition are being hand served, faxed and, in one case where we only have a California address, sent by Federal Express, to all parties who filed petitions for reconsideration and/or comments on the Further Notice.

While the disparities vary by market, the effect is that those bidding on the most encumbered blocks, even if they make higher up front payments, will immediately fall below the activity rules. Even assuming that automatic waivers could be used in the first five rounds, by round six, the flexibility to change blocks would be dramatically reduced or gone.

This is not a case in which it might be said that, even if the rules are not perfect, they impact all potential bidders equally, because they do not. As a practical matter, those bidding in the early rounds on encumbered blocks are likely to be the existing licensees of frequencies in those blocks, who best can use the frequencies in the remaining interstitial areas in MTAs in which they have already built.⁴ Further, those most in need of the remaining interstitial areas of the MTA blocks are those licensees with wide area systems who will require future expansion and the ability to fill in gaps in their coverage, which the present rules do not permit.⁵

B. THE PROPOSED ACTIVITY RULES THWART THE PURPOSE OF THE SIMULTANEOUS AUCTIONS WHICH IS TO ALLOW BIDDERS REASONABLE FLEXIBILITY TO CHANGE THEIR BIDS TO EFFECTIVE SUBSTITUTES.

The overriding objective of the simultaneous auction is to give prospective bidders reasonable flexibility to change their bidding strategy during the auction to

⁴ The Commission has recognized "the likelihood that incumbent licensees will bid on the MTAs that surround their systems." Second Order, FCC 95-395, at ¶ 37. It is fair to ask whether anyone other than the incumbent would bid on heavily encumbered MTAs and, if one can assume good faith and that only those desiring to construct a system will bid as opposed to holding up the existing licenses, the answer may be "no." Indeed, in RMD's judgment, anyone other than the incumbent licensee who is willing to bid more for a more encumbered block than a less encumbered block in the same MTA will be, almost by definition, doing so for ulterior motives. But if this occurs, and if the Commission will not prevent it, the existing licensee should at least have the ability to defend itself, if necessary by moving to other blocks in the MTA.

⁵ The effect of the rules is not ameliorated for those such as RMD who may wish to acquire licenses in more than one MTA. The problem, instead, is cumulative. In RMD's case, the activity units associated with all of its existing blocks equal slightly less than 24 million units, but the activity units necessary to have the flexibility bid on alternative blocks (the same number in the same MTAs), is over 88.5 million units. Even at the 50% level, if RMD started the bidding in its own occupied blocks, RMD would not maintain its right to bid on many substitutes, and at 75% or 95%, it would have almost no room at all.

move their bids among license properties that could be effective substitutes for each other while moving the auction along at a reasonable pace.⁶ That objective is not served here, among other reasons, because of the failure to recognize that in a situation in which multiple licenses covering the same MTA are available⁷ and where many, and quite likely the majority, of interested bidders already have existing systems which they desire to expand, the most likely “substitutes” will be found among properties within each MTA and not between MTAs. Thus, for an existing licensee in one MTA wishing to expand, frequencies in another MTA are irrelevant: *i.e.*, three St. Louis blocks are not substitutes for one New York block.

On the other hand, while an existing licensee reasonably would prefer to stay on its same block of frequencies within the MTA, other frequencies in the MTA, particularly those that are less encumbered, could be employed, albeit not as easily, for expansion purpose.⁸ For that reason, while incumbent licensees’ initial bidding is likely to focus on the blocks they already occupy, if for some reason these blocks are bid up at a late stage in the auction, the flexibility is needed to go to other blocks in the same MTA. This flexibility will be foreclosed by the existing activity rules.

Furthermore, the requirements of existing licensees to complete their networks also undermine the Commission’s assumption about the comparative values of blocks, which underlies the activity rules. Thus, to an existing licensee, a more encumbered block on its own frequencies is likely to be more, or at least no less, valuable than a less encumbered block in the same MTA, which the licensee does not already occupy. Further, while all recognize that there is great uncertainty about how much the frequency blocks will be valued at auction, the Commission’s auction experience to date demonstrates that more urban area blocks, and even less populated areas that connect them, are likely to be more valuable than rural areas to a degree that is not simply a function of MHz/pops.

⁶ See Further Notice, *supra*, 10 FCC Rcd. at 6917.

⁷ Because there is only one license per geographic area, the MDS auction, where the Commission recently stated that it will value licenses for activity rule purposes based on the degree of encumbrance, does not suffer the same problems. See Note 3, *supra*.

⁸ Thus, RMD operates a nationwide mobile data service. While RMD has made every effort to acquire common frequencies blocks for the network, this has not always been possible. As a result, while some blocks are much more heavily employed by RMD, nationwide, it employs 16 of the 20 ten-channel blocks that are licensed in at least one MTA.

Accordingly, trying to equate the value of partial MTA areas in New York or Los Angeles with full MTAs that cover Montana is not likely to yield an accurate or even an approximate result. Moreover, given the degree to which the frequencies being auctioned are already occupied with licensees who will be providing the same or similar radio services as other bidders, unlike the case with PCS where incumbents will ultimately be relocated, any theoretical value associated with trying to fine-tune the activity rules to allow movement from one MTA to another has little or no practical value. This is true because it is highly unlikely that many (or any) likely bidders would enter the auction with strategies that have them undetermined as to whether they wish to operate a system in a sliver of the New York MTA or all of St. Louis.

Indeed, to the extent that licenses in different MTAs may be related for some bidders, it would be because of an effort to secure common frequencies in adjacent markets and not with a view of different markets as substitute. But, here too, the activity rules operate at cross-purposes with the bidding flexibility that could otherwise be present in a simultaneous auction. Thus, a bidder with a substantial presence in a market like Phoenix might seek common frequency blocks in adjacent markets, such as Albuquerque, with the aggregate price of the markets being the relevant number for its bidding purposes. If the common frequency blocks being bid goes higher, it might easily shift to other common frequency blocks as an effective substitute. But, the activity rules, particularly at the later stages, would make such a strategy impossible to implement without, what should be an unnecessary and is an economically inefficient strategy, of preserving activity credits by bidding on licenses that are not truly sought.

C. THE PROPOSED ACTIVITY RULES MAY ALSO LEAD TO UNENCUMBERED OR LESS ENCUMBERED BLOCKS BEING UNDERVALUED.

From a strict revenue perspective, it should also be understood that the activity rules may lead to unencumbered or less encumbered blocks being sold at less than full value. Thus, to the extent that existing licensees practically will be precluded from following backup strategies to bid on less encumbered blocks, those who do bid on such blocks may be able to lock them up at a reduced rate and let the activity rules preclude those bidding on encumbered blocks from changing their blocks within the MTA, before turning their attention to the encumbered blocks. The present activity rules, in fact, invite such a strategy.

**D. FLEXIBILITY TO BID AMONG BLOCKS WITHIN INDIVIDUAL MTAS
NEEDS TO BE RESTORED.**

For the auctions to work fairly and for the goals of the simultaneous auction design to be achieved, a change in the auction rules or their application is necessary so as to allow practical flexibility to bidders to change their bidding throughout the auction from more to less heavily encumbered blocks within individual MTAs. RMD believes that the simplest way to achieve this goal is to assign each ten-channel block within any given MTA the same number of activity units. To take into account that some MTAs -- generally the top ten markets -- are far more encumbered than others, the assigned activity unit value for each MTA could be based upon the average amount that each block is encumbered.⁹

If the Commission rejects this solution, an alternative solution, which RMD believes should also be practical to implement with only very modest software changes, would be to establish a supplemental rule as follows. "If, at any time during stage 2 or 3 of the auction, the price of a license with fewer activity units exceeds the price of a license in the same MTA with more activity units, then the activity units for the former license will be increased to the level for the latter license." This change would have no effect at all on the conduct of the auction if RMD's concerns are misplaced. If, however, RMD's concerns are important as it believes they are, then this change would restore the ability of those who may initially bid primarily on encumbered blocks to pursue meaningful back-up strategies.

Finally, even if the Commission is unwilling to adopt either of the solutions suggested above, RMD urges that, at very least, the Commission issue a clear statement that expressly authorizes the Wireless Telecommunications Bureau to grant eligibility rule waivers (in addition to the automatic waivers of the activity rules that are generally available), if necessary, to allow bidders to change the frequency blocks on which they are bidding within an MTA to what the bidding has made a less expensive (even if less encumbered license) within the MTA, as long as immediately prior to this time the bidder had been the high bidder (but is now outbid) or made a qualifying bid on a different block (or an equal number of blocks) within the MTA. As

⁹ Upfront payments could be tied to the average value or, if it is felt that this might create too great a hardship on some potential new entrants, on the lowest value for any ten-channel block reflected before averaging.

with the alternative stated in the preceding paragraph, if in fact the bidding works as the Commission anticipates, and more encumbered blocks within an MTA are not subject to higher bids than less or unencumbered blocks in the same MTA, the waivers would never have to be granted; but if the Commission's underlying assumption proves wrong, a policy would be in place to fix it.

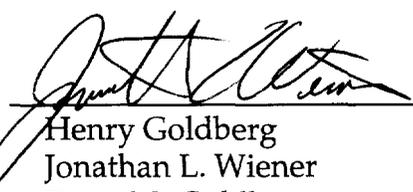
E. CONCLUSION: RMD UNDERSTANDS THAT TIME IS OF THE ESSENCE, BUT URGES THAT SOME REDRESS IS NEEDED.

RMD understands and supports the Commission's efforts finally to go forward with 900 MHz SMR licensing. Indeed, while there are many aspects of the Commission's Second Order that RMD has long opposed,¹⁰ RMD does not lightly take this step of asking the Commission to modify its auction procedures so close to the time that the auctions are scheduled to commence. At the same time, RMD believes that the activity rules that have been announced dramatically would skew the auction against incumbent bidders' flexibility in individual MTAs in a way that is fundamentally unfair and at odds with the Commission's stated concerns and goals regarding preserving the ability of existing licensees to expand their systems through auctions.

Respectfully submitted,

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September 21, 1995

¹⁰ RMD may seek further reconsideration or appeal of other issues, in the ordinary course.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Emergency Petition for Reconsideration and/or Waiver of Activity Rules of RAM Mobile Data USA Limited Partnership was hand delivered, this 21th day of September, 1995, to each of the following:

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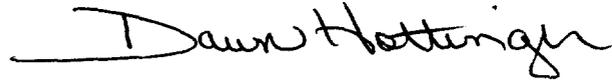
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