

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Amendment of Part 90 of the  
Commission's Rules to Provide for Use  
of the 220-22 MHz Band by the Private  
Land Mobile Radio Service

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)  
) PR Docket No. 89-552  
)  
)

Implementation of Sections 3(n) and 332  
of the Communications Act

)  
) GN Docket No. 93-252  
)  
)

Regulatory Treatment of Mobile  
Services

Implementation of Section 309(j) of the  
Communications Act -- Competitive  
Bidding, 220-222 MHz

)  
) PP Docket No. 93-253  
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TO: The Commission

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COMMENTS OF UTC

Pursuant to Section 1.415 of the Commission's Rules, UTC hereby submits its comments on the *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, FCC 95-312, released August 28, 1995, in the above-captioned matter.

UTC's comments are limited to the future licensing and use of the nationwide non-commercial channels in the 220 MHz band.

UTC is the national representative on communications matters for the nation's electric, gas and water utilities and natural gas pipelines. Approximately 2,000 such companies are members of UTC, ranging in size from large combination electric-gas-water utilities serving millions of customers, to small rural electric cooperatives and

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water districts serving only a few thousand customers each. UTC has been an active participant in Docket No. 89-552 on the development of rules for the licensing and use of the 220-222 MHz band, as well as the Commission's proceedings on regulatory treatment of commercial mobile services and the use of competitive bidding. Furthermore, UTC has an interest in this proceeding as a member of the Utility Cooperative Communications Service (UCCS), which is an applicant for a nationwide non-commercial 220 MHz license.

**Pending Applications for the Non-Commercial Nationwide Channels Should Be Processed and Granted According to the Current Rules**

The Commission has requested comment on how to resolve the pending, mutually-exclusive applications for the non-commercial nationwide channels. It offers three possible alternatives: (1) grant the applications through random selection; (2) grant the applications through comparative hearings; or (3) return the pending applications and use competitive bidding. As discussed below, UTC urges the Commission to follow-through with its earlier commitments that it would select from among the pending applications using random selection.

In response to the FCC's Rules for the licensing of non-commercial, nationwide radio systems in the 220 MHz band, UTC organized a not-for-profit cooperative association known as the Utility Cooperative Communications Service (UCCS) to apply for and hold nationwide 220 MHz authorizations. The philosophy behind UCCS was a simple one: to the extent the FCC was broadly allocating mobile radio spectrum on a nationwide basis, the members/owners of UCCS would be able to operate radio systems

to meet their internal communications requirements. Nearly 30 electric and gas utilities from throughout the country are members of UCCS and have agreed to contribute to the construction and operation of the UCCS land mobile radio system. Operating under strict guidelines established by UCCS, each member utility will be able to use the 220 MHz facilities within its service territory to meet internal communications requirements for reliable and secure dispatch and ancillary telemetry services. In addition, use of a common block of frequencies will allow the members of UCCS to establish a mutual aid network under which crews from a "host" utility will be able to readily communicate with the crews of other utilities who may be called upon to provide assistance with restoration of utility service following storms, earthquakes or other disasters.

UCCS filed its applications for nationwide licenses on May 1, 1991 -- over four years ago. Although there have been several post-licensing pleading cycles challenging various aspects of the 220 MHz service rules, the most recent pleading cycle ended in September 1993, in connection with three Petitions for Reconsideration of a June 21, 1993, *Order*, FCC 93-297, in PR Docket No. 89-552. Furthermore, the Commission recently resolved all outstanding issues as to the regulatory status of the non-commercial, nationwide 220 MHz service, and affirmed the use of random selection for these applications. See *Second Report and Order* in GN Docket No. 93-252, 9 FCC Rcd 1411 (1994), at para. 95; and *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994), paras 26 and 29. Therefore, aside from the disposition of the Petitions for Reconsideration which have been pending since August 1993, there are no regulatory

impediments to the prompt initiation of procedures to assign these licenses through random selection.

As the operators of large, sophisticated private communications systems, utilities must carefully plan system expansions. The delays of this proceeding -- created through no fault or dereliction on the part of the applicants -- have made it impossible for the members of UCCS to make definite plans for system budgeting, construction and implementation. Licensing delays are troublesome for commercial carriers, but licensing delays are problematic for companies such as utilities and pipelines that must use licensed private radio systems to meet their public safety/public service obligations.

Having delayed taking final action regarding the mere handful of nationwide, non-commercial applications now pending at the agency, the Commission now seeks to establish a rulemaking record that will support its conclusion that competitive bidding will expedite the initiation of service on these channels. At least with respect to the non-commercial, nationwide channels, all of the issues raised in the present proceeding were raised before and have been resolved:

- In June 1992, the FCC affirmed the use of random selection, as opposed to comparative hearings, for selection from among mutually-exclusive applications, including nationwide applications, in the 220 MHz service.<sup>1</sup>

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<sup>1</sup> *Memorandum Opinion and Order* in PR Docket No. 89-552, 7 FCC Rcd 4484 (1992).

- In February 1994, the FCC confirmed that non-commercial, nationwide licenses would be preemptively “Private Mobile Radio Services” (PMRS) because these channels “are assigned for internal use of the licensee, which we have determined is not a for-profit use.”<sup>2</sup>
- In March 1994, the FCC confirmed that random selection would be used to select from among mutually-exclusive applications for non-commercial, nationwide 220 MHz licenses, because “as licenses limited to the provision of private service, they are outside the ambit of Section 309(j).”<sup>3</sup>

Thus, there is simply no reason to review these issues.

The Commission attempts to bootstrap a reason for reviewing these channels based on its own delays in requesting updated financial information and conducting the random selection procedures:

We have not yet solicited the amending information necessary to process the 33 pending Phase I applications for the nationwide, non-commercial channels and therefore we are unable to take any action with respect to these applications at this time. We seek comment on three possible ways in which to address these applications. . . .<sup>4</sup>

Therefore, because the *Commission* has not requested the information necessary to process these applications, the *applicants* must face continuing uncertainty as to whether,

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<sup>2</sup> *Second Report and Order* in GN Docket No. 93-252, 9 FCC Rcd 1411, 1452 (1994).

<sup>3</sup> *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348, 2353 (1994).

<sup>4</sup> *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking* in PR Docket No. 89-552, *et al.*, FCC 95-312, at para. 30.

when and under what conditions the Commission will grant authorizations for these channels.

The Commission must proceed cautiously when changing current policy, particularly when it has only recently announced or affirmed its existing policy. *California v. FCC*, 905 F.2d 1217 (1990), *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). In the present proceeding, the Commission has presented no new facts or changed circumstances that would justify such a radical change in licensing procedures for these channels.

Even if the Commission now decides that the public interest would be served by relaxing or removing the restrictions on using the non-commercial nationwide channels for subscriber-based services, the Commission is not compelled to subject these channels to competitive bidding. First, if the Commission were to revise or even eliminate the current restrictions on use of the non-commercial channels to render a for-profit communications service, there is no evidence to indicate that the current applicants for these channels would, in fact, offer commercial communications service. Indeed, because of the previous restrictions on the use of these channels and the showings required of the current applicants for these channels, it is safe to say that these channels will probably be used for private, or non-subscriber based communications services even if the restrictions on resale of capacity are revised or eliminated. Significantly, the Commission did not re-open the filing window for the nationwide channels when other changes were made in the restrictions on these channels, and it would be inequitable for it to re-open the filing

window for these channels at this late date merely because it wants to give licensees additional “flexibility” in the use of the channels.

Second, even if the Commission somehow concludes that the current applicants would be likely to offer subscriber-based radio service if restrictions on resale are lifted, the auction statute does not compel the Commission to use competitive bidding. Section 6002(e) of the Omnibus Budget Reconciliation Act of 1993 prohibits the use of lotteries unless (1) the FCC determines that it is not required to use competitive bidding for the particular radio service, or (2) “one or more applications for such license were accepted for filing by the Commission before July 26, 1993.” In applying the discretion to lottery applications filed before July 26, 1993, the Commission’s rationale for proceeding with lotteries for long-pending multichannel multipoint distribution service (MMDS) applications is particularly instructive here. In its *Report and Order* in MM Docket No. 94-131, FCC 95-230, released June 30, 1995, the Commission noted that it should adopt a “straightforward approach that is easy to apply, fair to the applicants, and serves the public interest.” The Commission noted that relatively few applications were involved; the applications had been pending a significant period of time (four years) through no fault of the applicants; proceeding with lotteries would expedite granting of the applications and initiation of service because of the administrative delays that would be caused by announcing and conducting auctions; proceeding with lotteries as originally planned would minimize the risk of further delays caused by reconsideration requests or court appeals filed by the dismissed applicants; and there was no evidence that the pending applicants were not committed to building and operating radio systems as

proposed in their applications. UTC submits that each and every one of these factors deemed relevant to the Commission's decision is present in the case of the pending non-commercial nationwide applications. UTC therefore urges the Commission to proceed with lotteries to resolve the few remaining applications for these nationwide channels.<sup>5</sup>

### **Conclusion**

UTC urges the Commission to proceed with lotteries to resolve the long-pending applications for nationwide, non-commercial 220 MHz service. These applications have been allowed to remain pending at the Commission for over four years through no fault of the applicants. Further, to the extent the Commission wants to give greater "flexibility" to nationwide licensees to offer commercial or non-commercial radio service, this factor should not be used to prejudice the rights of these pending applicants. The applications that are now pending for these channels were premised on the applicants' desire -- and commitment to the Commission -- to provide non-commercial radio service. It is disingenuous for the Commission to now attribute commercial motives to these applicants, and thereby make these channels subject to auctions, merely by offering to remove the current restrictions on commercial use of these channels.

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<sup>5</sup> Although UTC strongly believes that the Commission should proceed with lotteries to select from among the pending non-commercial nationwide applications, it agrees with the Commission that all filing fees, including any interest thereon as permitted by law, should be refunded if the applications are dismissed.

**WHEREFORE, THE PREMISES CONSIDERED**, UTC respectfully urges the Commission to take action in this docket consistent with the views expressed herein.

UTC, The Telecommunications  
Association

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