

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 Facilitate Future Development of)
SMR Systems in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

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Implementation of Section 309(j) of the)
Communications Act-Competitive Bidding)
800 MHz SMR)

PP Docket No. 93-253

To: The Commission

FURTHER COMMENTS

The Commenting Parties are as follows:

California

Fresno Mobile Radio, Inc. of Fresno, California
Madera Radio Dispatch, Inc. of Madera, California
Applied Technology Group, Inc. of Bakersfield, California
G & K Rentals of Bakersfield, California
Alpha Radio Service of Bakersfield, California
Cumulous Communications Corporation of Fresno, California
McGee Communications Electronics, Inc. of Stockton, California
Ray's Radio, Inc. of Modesto, California
Eden Communications, Inc. of Salinas, California
X.W. Corporation d/b/a John Mitchell Company of Fullerton, California
Mobile U.H.F., Inc. of Garden Grove, California
A-1-A Security & Communications of Westminster, California
Anderson Communications Corporation of Palm Desert, California
Wise Electronics, Inc. of Brawley, California
Communications Licensing Consultant of San Diego, California

Washington State

Radio Link Company of Seattle, Washington

Oregon

Silke Communications, Inc. of Eugene, Oregon

Arizona

Pro Tec Mobile Communications, Inc. of Casa Grande, Arizona

Gila Electronics of Yuma, Arizona

Durham Communications, Inc. of Mesa, Arizona

Utah

GSC Electric & Communications of Kearns, Utah

New Mexico

Specialty Communications of Albuquerque, New Mexico

Colorado

Omni Range Communications of Aurora, Colorado

Bran-Dex Wireline Services, Inc. of Sterling, Colorado

South Dakota

Communications Center, Inc. of Pierre, South Dakota

Dakota Electronics of Aberdeen, South Dakota

Oklahoma

Dave Fant Company d/b/a Oklahoma Radio Systems of Oklahoma City, Oklahoma

Leon's Radio, Inc. of Oklahoma City, Oklahoma

Texas

CommNet Communications Network, Inc. of Dallas, Texas

Louisiana

Communications Center, Inc. of Covington, Louisiana

Wisconsin

Viking Communications, Inc. of Milwaukee, Wisconsin
Communications Electronics of Fond du Lac, Wisconsin
Air Communications of Central Wisconsin, Inc. of Wisconsin Rapids, Wisconsin
JSM Systems, Inc. of Sheboygan Falls, Wisconsin
4X Corporation of Appleton, Wisconsin

Illinois

Supreme Radio Communications, Inc. of Peoria Heights, Illinois
Craig Antenna Service of Pana, Illinois

Michigan

DeltaCom, Inc. of Detroit, Michigan
Electronic Communications Company of Detroit, Michigan
Midcom Service of Muskegon, Michigan
General Communications Company of Grand Rapids, Michigan
Johnson Repeater Company of Gaylord, Michigan
Kay Communication of Saginaw, Michigan
State Systems Radio, Inc. of Kalamazoo, Michigan

Indiana

Mobile Communications Corporation of South Bend, Indiana

Ohio

Domer Communication, Inc. of North Canton, Ohio
E.A. Henson of North Canton, Ohio
Donald R. Nelsch d/b/a Donnel Communications of North Canton, Ohio

Tennessee

Memphis 3rd Mobile Associates of Memphis, Tennessee

Pennsylvania

Robert J. Fetterman d/b/a R.F. communications of Catawissa, Pennsylvania

Delaware

LMR International, Inc. of McLean, Virginia

Virginia

Mid Atlantic Communications, Inc. of Fredricksburg, Virginia
LandAir Communications & Electronics, Inc. of Virginia Beach, Virginia
Business Autophones, Inc. of Roanoke, Virginia
Valley Communications of Union Hall, Virginia
Specialty Electronics Systems Company, Inc. of Lynchburg, Virginia
Piedmont Electronics Company of Charlottesville, Virginia
VA-KY Communications of Wise, Virginia

South Carolina

CoastCom, Inc. of Garden City, South Carolina

Florida

Communications Service Center of Bradenton, Florida

New York

T & K Communications, Inc. of Owego, New York
Genesee Business Radio Systems, Inc. of Rochester, New York
Allstate Mobile Communications Corporation of Rochester, New York
JPJ Electronic Communications, Inc. of Yorkville, New York
Furman Communications, Inc. of Savannah, New York

Connecticut

Utility Communications, Inc. of Hamden, Connecticut

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September 29, 1995

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THE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION
IN ACCORD WITH 47 U.S.C. §309(j)(3)

SUMMARY

The commenting Parties hereby respectfully state that the announced plan suggested by the Wireless Telecommunications Bureau for employing competitive bidding methods, forced frequency migration, and limitations on operational flexibility for non-wide area SMR operations would result in anticompetitive consequences which are apparent and should be recognized by the full Commission as a clear basis for rejection of the Bureau's recommendations.

Additionally, the Bureau's Plan does not demonstrate reasoned decision making and, if adopted, would be contrary to the clear language of the Communications Act of 1934 (as amended) which grants to the Commission the authority to employ competitive bidding only when the statutory requirements contained therein are fully satisfied. Such satisfaction is not remotely possible by the Bureau's Plan.

The commenting Parties respectfully request that the Commission recognize that the Bureau's Plan will not result in an auction of spectrum, as suggested, but an auction of property rights, collected and bundled for the sole purpose of providing, via auction, an opportunity for one competing class of operators to gain an unfair advantage over another class of operators.

The commenting Parties, therefore, request that the Commission reject the Bureau's Plan and release the SMR industry from the uncertainty visited upon it by the regulatory wrangling for unfair advantage by a small, discreet, well-funded group of operators, returning this healthy industry to the legal *status quo ante*, which existed prior to the commencement of this protracted proceeding.

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To: The Commission

FURTHER COMMENTS

On September 18, 1995, the Commission held a public meeting at which the Wireless Telecommunications Bureau staff disclosed and invited the filing of additional written comments on the Bureau's recommendations to the Commission in the above captioned proceeding ("the Bureau's Plan"). These comments are in response to that public invitation for additional written comments.¹

The parties represented by these comments ("the Parties") are as follows:

¹ The Bureau's request was for *ex parte* comments, however, since the matters discussed herein are of paramount importance to many members of the industry, the commenting parties has taken the liberty of serving its comments on all parties which have commented in this proceeding. In any event, the Commission's staff's request for clarification of issues would render these comments exempted *ex parte* comments in accord with 47 C.F.R. §1.1204(b)(7).

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Furman Communications, Inc. of Savannah, New York

Connecticut

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As the Commission may easily determine by the foregoing list of commenting parties, the Bureau's specious declaration made at its meeting regarding a presumed approval by a majority of commenters of the Bureau's Plan is in serious doubt and is likely wholly inaccurate.

The Bureau's Orally Announced Plan

Would Create An Improper Competitive Aberration

The Parties have carefully reviewed the natural effect of the Bureau's Plan on the industry to determine the validity of the proposals contained therein.² It is the Parties' conclusion that the Plan results in anticompetitive consequences which are unknown in U.S. economic history.

By execution of the Bureau's Plan one class of competitor would receive a distinct advantage over another, gained solely by the advantaged competitor's ability to pay a sum at federal auction, which would be held in the main to sell assets of the disadvantaged competitor. The advantages to be purchased at auction are not only the ability to market

² As discussed within the Attachment hereto and fully incorporated herein, THE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION IN ACCORD WITH 47 U.S.C. §309(j)(3), it is clear that the Commission lacks the authority to employ competitive bidding in the manner suggested by the Bureau.

services over a larger, overlapping area, but include the ability to force an asset swap with the disadvantaged operator to gain an additional competitive advantage for the winning bidder. Then, as two final elements provided to the advantaged competitor via auction, the winning bidder would receive a longer construction deadline and the ability to preclude any efforts by its competitors to expand or alter their existing services.

The Parties cannot, despite considerable effort, point to an example in the economic history of the United States where a person has been able to purchase competitive advantages from a governmental entity, which were formerly the property of another entity, absent a dissolution of a entity or that entity's violation of law or a condemnation proceeding.³ The Parties suggest that, perhaps, the reason no examples exist is that the entire concept is contrary to the promotion of competition and free trade.⁴ Instead, the concept is so biased

³ If viewed as a condemnation proceeding, the Plan also fails. Such proceedings are intended to make public formerly private property for the purpose of delivering necessary services to the public. There is no such legally defensible condemnation proceeding whereby the affected property owner is not fully compensated by the fair market value of its seized property and where the ultimate, stated objective is to resell the property for a private company's use.

⁴ It may be noted that such effect would be contrary to the published statements of Chairman Reed E. Hundt, who has claimed publicly, speaking about himself, "I don't think there was ever a chairman of the FCC who was more committed to vigorous competition in communications markets than I am," *Radio Mergermania And The Price of Overconcentration*, NAB Radio Show, New Orleans, Louisiana, September 8, 1995. Upon that same occasion, Chairman Hundt warned against overconcentration of the radio industry and the need to assure that the public continues to be provided with the benefits of vigorous competition from numerous providers. Chairman Hundt's vision of the role of government in the promotion of competition and the benefits to the market flowing therefrom, parallel others' comments.

Competition tends toward desired social goals besides better market

toward one class of competitor as against another class of competitor as to call into serious question its legality.

Within this docket, some commenting parties have attempted to compare the roster of proposals lofted within this proceeding with previous Commission actions regarding the Personal Communications Service (PCS). Such comparisons are seriously flawed. Nowhere within the Commission's consideration of the PCS frequency migration issue was there a question of creating competitive advantages for one class of operator over another, competing class. Nowhere was there the issue of extinguishing traditional licensee rights. And nowhere was there a proposal to create devastating operational limitations and, thus, a diminution of future business opportunities for one class of competitors versus another. These elements are unique to this docket.

To further illustrate the difference between the PCS frequency migration and the instant proceeding, one need only consider the following: Subsequent to a PCS migration,

performance. Thus competition tends to disperse private power; this is a value in itself in a liberal society, reducing the need for large governmental power to regulate private power. Relatedly, competition substitutes the impersonal forces of the market for individual or bureaucratic decision-making about resource allocation and related economic matters. Finally, competitive markets, by facilitating entry at the smallest efficient scale and facilitating exit by an entrepreneur who wishes to withdraw, help to maintain the widest possible degree of economic opportunity. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, at 29 (1977)

the migrating licensee lost no ability to continue to compete in the marketplace, including the ability to expand previously offered services, following migration. The suggestions made by the Commission in the instant proceeding would have the unique and inappropriate effect of terminating the ability of one class of CMRS operators to continue to compete with other classes of CMRS operators.⁵

The effect of adoption of the Bureau's Plan would be tantamount to the provision of support to an army which intended to lay siege. In exchange for tribute to the sovereign, the army laying siege receives necessary assurances of victory, including the continued promise that the competing army will remain within the confines of its existing moat. Added to that is the exchange of food stuffs to support the army laying siege wherein the sovereign rules that confined troops must exchange their grain for hay. Although the exchange appears

⁵ Taken in the context of a private arena, the combined effort and effect of the Bureau's proposed actions and the reaction of winning bidders would appear to be violative of the Sherman Act. Therein, a person would be deemed to have violated Section 2 of the Sherman Act if it has deliberately followed a course of market conduct through which it has obtained or maintained power to exclude competition in some part of the trade or commerce covered by the Act. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 31 S.Ct. 502 (1911); United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632 (1911); United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp 295 (D. Mass. 1953), aff'd per curiam 347 U.S. 521, 74 S. Ct. 699 (1954), Telex Corp v. IBM Corp, 510 F.2d 894 (10th Cir. 1975); Twin City Sport-service, Inc., 512 F.2d 1264 (9th Cir. 1975). Clearly, interstate telecommunications would be covered by the Act, thereby begging the question, if the intended consequences of the Bureau's Plan would result in *prima facie* anticompetitive activities, can the Commission support such a Plan and remain faithful to its obligations under Section 309 of the Communications Act of 1934 (as amended)? Likely not.

"comparable" to a botanist noting that both are parts of grassy plants, the reality is quite different come suppertime.

The Bureau has implied that its proposals to the Commission are neutral in their application, suggesting that the advantages will be bestowed upon ANY auction winner. Yet, such feigned attempts at neutrality are belied by the other criterion which underlies the Plan - that the wide area licensee will possess the necessary inventory of comparable spectrum to participate in forced frequency migration. A review of the FCC's license/application data base will quickly demonstrate that the actual number of eligible participants in the proposed auction who are concurrently able to provide the necessary inventory of comparable spectrum, is extremely limited and in most markets, reduces the number of eligible participants to one.⁶

Again, attempting to feign neutrality, the Commission has implied that no frequency migration might be forced where this, as yet undefined, comparable spectrum is unavailable. If, in fact, such migration is not possible to achieve the Commission's purported licensing goals, what purpose is served by the auction and subsequent licenses? One of the primary motivations expressed by the Commission in entertaining this matter has been the bringing forth of a new service, dependent on blocks of contiguous spectrum. However, if such

⁶ In fact, no spectrum is comparable to the SMR Category channels number 400-600. The proposed rule amendments would prohibit the operation of a new wide area SMR system on lower channels, and would not extend the same flexibility of operation to operators authorized to use lower channels. Since there is no truly comparable spectrum, the Bureau's Plan to force frequency migration based on this criterion is unreasonable on its face.

blocks cannot be reasonably expected to be created due to insufficient inventory to facilitate frequency migration, one must reasonably question the prudence of any auction in the first instance.

Accordingly, in the final analysis, all must admit that the Bureau's Plan will create one of two possible and equally improper results. Either the Plan must be viewed as

(1) Designed to favor one class of competitors over another, based on a party's willingness to pay at auction -- and that auction will be held primarily for the purpose of selling one class of competitor's property rights to another competitor. The Parties strongly state that a sale of persons' property rights without a finding of wrongdoing or insolvency is wholly improper.

Or,

(2) The Plan is an unnecessary burden since the ultimate goal, wide area operation on contiguous spectrum, is a practical impossibility in many areas due to the unavailability of comparable spectrum for the purpose of facilitating frequency migration.

The Parties opine that the above analysis is wholly accurate and urge the Commission to avoid employing its auction authority, which will result in irreparable harm to persons whose only "crime" is that they do not possess either the will or the resources to construct a wide area system.

Use of Auctions To Raise Public Funds

Before the Commission exists a conundrum of competing interests, which the Commission has thus far determined it will resolve by auction. The alchemy of radio opportunities stirred and poured over the landscape of SMR operations is, indeed, intended for a single purpose -- to turn lead into gold. Left untouched by the Commission's regulatory scheme, the 800 MHz spectrum will return only nominal, visual returns to the United States Treasury in licensing fees and user fees. If the Bureau's Plan is adopted, the same spectrum may reap large rewards for the United States Treasury, but only in the short term.^{7 8} In providing auction authority to the Commission, Congress expressly stated that the Commission should not employ auction authority in a manner which was in the main directed

⁷ Given the absence of legitimate, interested, qualified bidders, there continues to exist extreme doubt as to whether the proposed auctions will net much in revenue for the United States Treasury. An auction attended by a single bidder is no auction at all. In fact, a rational comparison of the value of receiving, for example, one dollar at auction from an entity which is unlikely to show a profit; to the detriment of numerous, smaller profit making entities which, but for the destruction of their businesses, would have paid much more in income tax; appears to be, at best, penny wise and pound foolish.

⁸ There also exists the potential that operators adversely affected by the legislation will be positioned to claim a catastrophic loss or involuntary conversion via the reduction in the value of their assets and business, thereby resulting in income tax deductions which might easily offset any benefit to the United States Treasury via auction proceeds. Tens of thousands of adversely affected end users, whose existing mobile equipment cannot be retuned to accommodate new channels forced upon their home systems, will doubtlessly experience a catastrophic loss or involuntary conversion and will be eligible to claim a deduction on their income tax statements. Actions by a hostile agency, Charles J. Fay v. Helvering, 120 F. 2d 253; or the unusual effect of a known cause, Chicago, St. Louis & New Orleans Railroad Co. v. Pullman Southern Car Co., 139 U.S. 79; or other destruction of property and/or the value thereof by casualty or involuntary conversion, Clarence A. Peterson et ux v. Commissioner, 30 T.C. 660 (1958), *see, also* United States v. White Dental Manufacturing Co., 274 U.S. 398 (1927) and associated revenue rulings under Sections 165 & 1033 of the Internal Revenue Code; would be applicable to the total loss of adversely affected property.

at raising federal revenues. Although the Commission has certainly not expressed its motives in this manner, one must question whether there can exist any other possible explanation.

The overwhelming effort which will be required, both administratively by the agency and practically by the industry, demands a clear articulation of the reasons for such upheaval. As stated *supra*, licensees' existing rights will be placed on the block for bulk sale to those same licensees' competitors. This bizarre proposal is so incredible and so devastating as to require a copious amount of explanation from the agency lofting this plan. Yet, the Commission's past explanations have been wholly insufficient.

The Commission has suggested that wide area licensing is necessary to enhance competition among classes of wireless carriers, i.e. ESMR and cellular and PCS. However, this analysis is wholly flawed since traditional SMR operators, whose competitive opportunities are to be severely reduced, compete against ESMR and cellular operators now, and will doubtlessly compete against PCS operations when such is constructed. Not only have traditional SMR operators competed, they have done so quite successfully and the Commission has admitted those successes -- which have come without auction for contiguous blocks of spectrum. Accordingly, the Bureau's Plan suggests that ESMR operations will fare better against cellular and PCS operations. This underlying assumption is unfounded. An examination of the financial records of ESMR operators will quickly demonstrate that none of these operators has made a profit from sales of ESMR service. The only financial successes experienced by ESMR operators is from their ability to sell stock, merge and be

acquired, and even this type of success has seriously waned over the past year. Although laudable on Wall Street, such financial acumen should count for little on M Street.

The Parties must assume that the financial success of ESMR operators, gained solely through sales of stock, has not gone unnoticed by the Commission. These pools of cash reserves, which have not yet been drained by the necessity of having to construct and operate radio systems which do not turn a profit, must serve as a great temptation to those members of the agency who are committed to employing auction authority at each opportunity. The Parties hereby urge the Commission to avoid the obvious temptation to "get a piece of the action" by auctioning licensee rights and opportunities. As the previous comments have amply demonstrated, the return to the Commission would be small, brief and will not result in the bringing of a more competitive service to the public for which demand exists. Instead, the result will be an eschewing of the Commission's duty to maintain the provision of services to the public for which continuous, increasing demand has been amply recorded; it will be the loss of employment for persons whose livelihood depends on employment by traditional SMR operators; it will be the breaking of faith with operators who reasonably relied on the continuation of their business opportunities, without fear that such opportunities would be sold to their competitors at federal auction; it will be the destruction of the natural evolution of opportunities for entrepreneurs, demanding that their resources be directed at auction payment rather than to finance the expansion of their business by continued investment; and it will be proof that the agency has abandoned the needs, rights, and hopes of independent operators in favor of the federal coffers. Such results must be avoided, even

if by its avoidance the Commission rejects adding a few more dollars to the United States Treasury.

Lost Business Opportunities

The Commission's analysis of its Plan should include the obvious effect of its action. Existing licensees with deeply committed business investments, who are providing valuable services to the public in accord with their authorizations, will lose future business opportunities and will be forever precluded from developing further their businesses to take advantage of additional, expanded business opportunities.⁹ No such opportunities would exist or, under the Bureau's Plan, be allowed.

The Bureau's Plan effectively allows the auction winner to create a wall around existing licensees' service areas, simply by virtue of the grant of a wide area license.¹⁰ This

⁹ As the Commission is aware, business opportunities are deemed a property right, protectable by law and subject to remedies when removed or thwarted improperly. In another context, such rights are referred to as "good will" or reasonable expectation of profits, either of which has been recognized as a property right. It is apparent that the thing of greatest value to be auctioned is the reasonable expectancies of adversely affected operators, whose businesses would suffer undue interference by the Commission and the winning bidders. It has been said that "in a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it," and that since a large part of what is most valuable in modern life depends upon "probable expectancies," as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue interference. Brennan v. United Hatters of North America, 73 N.J.L. 729, 65 A. 165 (1906) and Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 53 A. 230 (1902).

¹⁰ This "wall" is in addition to the chilling effect of the Commission's acceptance of thousands of wide area applications which have been unsupported by engineering or frequency coordination. Had the Commission required that all such applications be supported by the necessary engineering and frequency coordination, existing operators would

ability to forestall a competitor's expansion or modification in a service area is granted without regard to whether the wide area licensee has a facility which might receive harmful interference from the existing licensee's change in service area and without regard as to whether the wide area licensee ever intends to provide service in the area which, but for the prohibition, the existing entrepreneurial licensee might have served.

The members of the public which reside in the affected area would, therefore, not receive services until and unless the wide area licensee deemed it expedient to provide those services. The Commission is able to review the experience in the provision of cellular radio to see that, although smaller operators are willing to provide service in a geographic area of limited demand by constructing smaller, less costly systems, larger operators always invest first and foremost in areas of greatest demand and population, leaving lesser populated areas unserved for years.

Notwithstanding the improper public policy exposed by this Plan which is clearly anticompetitive, the other mischief to be visited upon existing licensees is apparent. For example, the Bureau's Plan would discourage an existing licensee from relocating its system, without likely foregoing some amount of its service area. The Commission implies that this outcome is necessary to preserve the value of the auction winner's contribution to the United States Treasury. Unfortunately, the Commission has not considered the effect this Plan will

not have already been penned in by the existence of these bogus applications on the Commission's data base. The Commission's newest regulatory wall is an exacerbation of a problem which has been present, without proper relief, for over a year.

have on the existing licensees who, by virtue of their inability to participate successfully in the Commission's auction, the Commission would deemed have abandoned their right to engage in business in a normal manner.

One obvious effect of the Plan will be the site rents to be paid by existing licensees to tower owners and operators. Existing licensees' inability to negotiate fairly the cost of such rents is a natural byproduct when those licensees are stuck on the sites. It takes little imagination to see that the tower owner can, in effect, state to the existing licensee, "pay the higher rent or forego service area or get out of the business." Nothing within the Bureau's Plan justifies, much less considers, this obvious outcome. Nor should the Commission ignore the fact that while existing licensees are made to suffer this disadvantage, the competing wide-area licensee is not so shackled to a site.

The foregoing illustration is unfortunately only one adverse effect to be visited upon existing licensees. They will be precluded from "following the market". As the Commission is well aware, radio operators expand and construct facilities based on increased market opportunities which arise. A new industrial area is created and hence demand for service in that area. However, if that area is built outside the magic circle of an existing operator's service area, those customers cannot be served by the existing operator and that same

operator cannot apply to provide that service through modification/expansion of its service area.¹¹

This regulatory tethering of existing licensees must be accompanied by an overwhelming public interest consideration to be justifiable, employing any litmus test of reasoned decision making. The Commission's removal of the reasonable expectations of existing licensees must be harmonized with the Commission's mandate to promote the provision of competitive services to the marketplace. This legal basis simply does not exist. Accordingly, the Commission must reject the Bureau's Plan.

Comparable Spectrum Considerations

The Parties consider the Bureau's inability to identify and define the suggested "comparable spectrum" referred to in its Plan as a darkly ominous sign. Is the Bureau suggesting that something other than 800 MHz SMR Category channels might be given in

¹¹ For the most part the "expectancies" thus protected have been those of future contractual relations, such as the opportunity of obtaining customers. In such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered. Huskie v. Griffin, 75 N.H. 345, 74 A. 595 (1909); Bacon v. St. Paul Union Stockyards Co., 161 Minn. 522, 201 N.W. 326, (1925); Wilner v. Silverman, 109 Md. 341 71 A 962 (1909); see Hundley v. Louisville & Nashville Railroad Co., 105 Ky 162, 48 S.W. 429 (1903); see also Longo v. Reilly, 35 N.J. Super. 405, 114 A.2d 302, fraudulent conduct resulted in plaintiff's defeat in election to an office. This was treated as wrongful interference with a business property or right; Jersey City Printing Co. v. Cassidy, 63 N.J.Eq. 759, 53 A. 230 (1910); Vegeahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896); Erdman v. Mitchell, 207 Pa 79, 56 A 327 (1903); Tuttle v. Buck, 107 Minn 145, 119 N.W. 946 (1909); Graham v. St. Charles Street Railroad Co., 47 La. Ann. 214, 16 So. 806 (1895); Boggs V. Duncan-Schell Frurniture Co., 163 Iowa 106, 143 N.W. 482 (1913).

exchange by the wide area licensee as token compensation in a frequency exchange? If the Bureau's hesitation implies this possibility, then the Commission's path is even more biased than originally considered possible.

What other logical spectrum might be possible? To be deemed comparable, the spectrum would need to perform in accord with existing system design. Unless the Commission contemplates a total change-out of equipment, the channels would have to exhibit compatibility with existing equipment, both transmitting equipment and end user equipment. The spectrum must be regulated in a manner which provides exclusivity to the operators, trunking capacity, comparable propagation characteristics, and cost of maintenance or replacement. Accordingly, if not 800 MHz SMR Category frequencies, then what?

That this question has not been answered by the Commission at this late date is glaring evidence of the capricious nature of the Commission's handling of this proceeding. It is obvious that whatever preparation and consideration the Commission has performed has not resulted in clear objectives and answers which are required to determine the ultimate effect of its decisions. When the Commission cannot even identify the source of the comparable spectrum, it is time to question the entire method whereby the issues have been considered. Existing licensees deserve much more than a vague response which amounts to little more than, "Don't worry. We'll cross that bridge later." If the Commission is to demand that existing licensees jump off this regulatory precipice, those licensees are entitled to know where they are going to land.

The Parties hereby submit that the Commission's request for additional comment on this essential question is ample evidence that it has not proceeded in a manner which can be found to be reasoned decisionmaking. Instead, the Commission is attempting to make interim rules without clear objectives and without consideration of outcome. It is improper to ask commenters to respond to the Commission's informal, verbal statements when a core issue remains in flux and doubt. If the Commission desires such comment, it should abide by the terms of the Administrative Procedures Act and produce a further notice of proposed rule making which asks the question in a legal, formal environment; accept those comments willingly and properly; and forego any action on all related matters until such time as this essential issue is decided with finality.¹² To do otherwise undermines the entire rule making and calls into serious doubt the Commission's authority to act in the first instance.

The Commission's Frustration

The Parties hereby accept the existence of the Commission's frustration in dealing with the explosion of interest in the 800 MHz band. The agency's inability to deal effectively with application mills created heaps of applications for processing, resulting in grants of licenses for facilities which would never be constructed by the get-rich-quick

¹² The Parties respectfully submit that if the Commission's Plan includes an unrevealed intent to dismiss the pending 800 MHz applications which have languished before the agency, frozen in regulatory limbo; or if the agency intends to employ that spectrum which has been held in queue by those applications by virtue of the Commission's data base rules, to supply auction winners the necessary inventory for frequency migration; or if the Commission has failed to articulate purposefully or negligently its intended strategy to deny access to the aforementioned spectrum to adversely effected existing licensees; the Commission's unwillingness to expose the whole of its proposed Plan is similarly contrary to the intent of the notice and comment requirements of the Administrative Procedures Act.