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November 13, 1995

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Office of Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Docket 93-144

Dear Sir or Madam:

On behalf of the persons and entities identified herein as Movants, we hereby file the instant Motion to the United States Federal Trade Commission, to be included as a portion of Rule Making Docket 93-144, pending before the Commission.

The original Motion has been filed with the FTC and this copy is intended to inform the Commission of the contents contained therein and to notify the Commission that such action has been taken by Movants, requesting that the FTC review the proposals within the captioned rule making to determine the anticompetitive results of adoption of the proposals.

If there are any questions regarding the following, please contact our offices.

Very truly yours,

Robert H. Schwaninger, Jr.

RHS:rn

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Before the
FEDERAL TRADE COMMISSION
Bureau of Competition
Washington, D.C.

RECEIVED
NOV 13 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)
	)
Notice of Proposed Rule Making Pending Before the Federal Communications Commission	)
	)
Docket 93-144	)
	)
To Determine the Anticompetitive Results of Adoption Of the Proposed Rules	)

DOCKET FILE COPY ORIGINAL

To: William J. Baer, Director

MOTION

The following persons and entities hereby move the Commission to examine the proposed regulations which, in accord with informal announcements, are intended to be adopted by the Federal Communications Commission, and to determine whether such regulations, if adopted, would result in actions which are in conflict with the antitrust laws of the United States. Additionally, Movants respectfully request that the Commission, applying its expertise and jurisdiction in the area of antitrust, determine whether the proposed adoption of the subject regulations would result in a violation of the plain language of Communications Act of 1934 (as amended).[1] So request the following:

California

Fresno Mobile Radio, Inc. of Fresno, California
Madera Radio Dispatch, Inc. of Madera, California
Applied Technology Group, Inc. of Bakersfield, California
Eden Communications, Inc. of Salinas, California

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[1] To avoid any difficulty arising out of jurisdictional questions, an essentially duplicative Motion has been filed before the United States Department of Justice for its consideration.

Mobile U.H.F., Inc. of Garden Grove, California
Wise Electronics, Inc. of Brawley, California
Communications Licensing Consultant of San Diego, California
Hi-Desert Communications of Hesperia, California

Washington State

Americell Communications of Wilbur, Washington
Columbia Communications, Inc. of Kennewick, Washington
Spectrum Communications, Inc. of Moses Lake, Washington

Oregon

Silke Communications, Inc. of Eugene, Oregon

Arizona

Pro Tec Mobile Communications, Inc. of Casa Grande, Arizona
Gila Electronics of Yuma, Arizona

Utah

GSC Electric & Communications of Kearns, Utah

New Mexico

Specialty Communications of Albuquerque, New Mexico

South Dakota

Communications Center, Inc. of Pierre, South Dakota
Vantek Communications of Sioux Falls, South Dakota

Oklahoma

Leon's Radio, Inc. of Oklahoma City, Oklahoma
Total Com, Inc. of Enid, Oklahoma

Texas

CommNet Communications Network, Inc. of Dallas, Texas
Mobile Relays, Inc. of McAllen, 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
4X Corporation of Appleton, Wisconsin
Nielson Communications, Inc. of Green Bay, Wisconsin
Camel Communcations, Inc. of Cedarburg, Wisconsin
Milwaukee Repeater Service, Inc. of West Allis, Wisconsin
Concept—20 Communications, Inc. of Salem, Wisconsin
Bandt Communications, Inc. of Janesville, Wisconsin

Illinois

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

Michigan

Midcom Service of Muskegon, Michigan
General Communications Company of Grand Rapids, 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

Pennsylvania

Robert J. Fetterman d/b/a R.F. Communications of Catawissa, Pennsylvania
Centre Communications of Bellefonte, Pennsylvania

Delaware

American Industrial and Marine Electronics of Dover, Delaware
Baycomm, Inc. of Bear, Delaware

Maryland

LP Communications of Lutherville, Maryland
Two-Way Radio Service, Inc. T/A TWR Communications of Cumberland, Maryland
Charles C. Stull of Frederick, Maryland
Action Radio of Wheaton, Matyland
Commercial Electronics Services, Inc. of Waldorf, Maryland

Virginia

LandAir Communications & Electronics, Inc. of Virginia Beach, Virginia
Business Autophones, Inc. of Roanoke, Virginia
Linden SMR Associates of Front Royal, Virginia
Piedmont Electronics Company of Charlottesville, Virginia
Professional Communications of Blacksburg, Virginia

North Carolina

Professional Communications, Inc. of Fayetteville, North Carolina

South Carolina

Riley's Communications, Inc. of Newberry, South Carolina

Georgia

Donald Arsenault of Gainsville, Georgia

Florida

Lynn D. Clark of Venice, Florida

New York

T & K Communications, Inc. of Owego, New York
Gennesee 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
Metro Electronics Service of Western New York, Inc. Cheektowaga, New York

New Jersey

Waxman Communications Corp. of Lindenwood, New Jersey

Background

Movants own and operate Specialized Mobile Radio Service (SMR) facilities throughout the United States. SMR radio systems are employed to provide two-way radio service to customers, which are typically local governments, public safety entities, taxicabs, trucking companies, and other consumers of analog two-way land mobile radio services. SMR systems employ frequencies in the 800 MHz radio band and are located in both rural and urban areas. Most, if not all, of the Movants would be considered small businesses by the prevailing standards applied in the telecommunications industry.

Movants have operated their SMR systems in accord with the FCC Rules for varying time periods, typically between one and fifteen years. To be able to sustain their authority to operate their radio facilities, Movants have had to demonstrate to the FCC that they have constructed each channel assigned to their stations and have provided service which fully utilizes the capacity of each channel authorized. In other words, the FCC Rules have required that each Movant properly build its system and be fully successful in meeting system loading criteria, or be subject to a "take back" of channels for failure to construct or failure to meet mandated service levels. Movants, therefore, have faithfully met these high standards and represent successful SMR systems which have and are meeting the demand of the public for receipt of valuable services.

To meet the aforementioned standards, each Movant has had to make large investments in the creation of SMR service from their facilities. A brief and incomplete list of those investments is: (i) the purchase of transmission equipment, (ii) the construction of station facilities, (iii) the lease of space on towers or buildings to mount antenna hardware, (iv) the purchase of inventory for sales to customers, (v) the creation of mobile unit installation facilities, (vi) the cost of payroll for sales, repair, maintenance, and installation personnel, and (vi) legal fees in the making of applications and similar documents to assure compliance with the FCC Rules. Accordingly, each of the Movants has invested (at the extreme least) fifty thousand dollars in the creation of a competitive, compliant SMR service, and many of the Movants have invested in excess of a million dollars. Since the proposed actions of the FCC would diminish or extinguish the invested and earned value of the Movants' radio systems and associated businesses, the matter at bar is of extreme importance to Movants, as their livelihood is being placed in extreme jeopardy by the proposals of the FCC.

Also placed in jeopardy are the investments in SMR equipment made by the hundreds of thousands of customers for SMR service. The combined customer base of the Movants is estimated to be in excess of fifty thousand. Over ninety percent of those customers own their own mobile equipment, which equipment may be rendered obsolete by the FCC's proposed actions. And even if not rendered obsolete, most of the customers will note a serious degradation in the quality of service and/or interruptions in their service. Movants' customers' investment in mobile equipment is approximately $100 million, and represents only a portion

of the total investment in SMR mobile radio equipment which has been spent by the American public and which is jeopardized by the FCC's proposed adoption of its amendments.

Despite the obvious harm which would result from adoption of the FCC's proposals, on September 18, 1995, the FCC staff informally announced the agency's intention to adopt its proposals.

The Proposals

The subject rule making includes proposals which would amend the FCC Rules to create the following regulatory/industrial policy for operation of SMR systems:

(1) The agency proposes to auction the right to operate on contiguous blocks of occupied spectrum, whereby winners at auction would receive exclusive use of 800 MHz spectrum blocks throughout market areas, most likely Metropolitan Trading Areas or Basic Economic Areas. Since the spectrum is occupied by existing SMR operators, including Movants, the contiguous blocks would be created by providing to auction winners the authority to force frequency migration.

(2) Forced frequency migration would be accomplished by "frequency swapping" between auction winners and existing operators. Although one might presume that, as a public policy matter, the migration would require that auction winners relocate existing operators' systems to other spectrum within the 800 MHz band, to enable existing operators to continue some degree of use of existing equipment, the FCC proposals contain no such guarantee. To

date, the proposals merely refer to "comparable spectrum" which, as of its announcement of September 18, 1995, the FCC admits it has not defined.

(3) Following auction, existing operators which did not participate or were unsuccessful must then forego the ability to apply for or receive future channels for the purpose of continued growth; must not relocate the transmission site of their systems, unless they are willing to reduce their operating/service areas; may not apply to increase their service areas to serve new demand; and must, despite these competitive hardships, compete directly with auction winners for consumer dollars.[2]

Given the extremely detrimental effects that adoption of the FCC proposals will have on their ability to continue to compete, Movants have commented in the subject rule making, requesting that the FCC not adopt its rules as contrary to the plain language of the Communications Act, violative of the FCC's obligation to assure that its decisions do not have blatantly anticompetitive effects, Section 309 of the Communications Act, 47 U.S.C. §309, violative of the FCC's mandate to protect small businesses contained within the legislation limiting the agency's auction authority, and detrimental to the interests of a large segment of the

[2] The Department should also note that adversely affected operators' businesses will suffer enormous upheaval due to forced frequency migration. The cost and time involved would chill those operators' ability to compete effectively in the marketplace for over a year, during any transition period, including the inability to sell additional customer equipment which might have to be recalled to retune each such mobile unit. The naturally attendant lack of consumer confidence in these systems would be devastating and would likely result in the total destruction of many small businesses, including many of the Movants.

American public that relies daily on traditional SMR service from potentially adversely affected operators and systems.

That serious economic and competitive hardships would be visited on Movants, the SMR industry, and customers of these services has been made a matter of record in this rule making. An economic study submitted by the association SMR WON has clearly shown what injury will be visited on the industry.[3] The individual comments of dozens of SMR operators, including many of the Movants, has pointed out with great clarity the injury which would be a direct result of the FCC's adoption of its proposals. These same comments have shown that the public interest would not be served and that there exists an extreme likelihood that monopolies of SMR service would be created in most markets.

Movants believe that it is important to recognize that Movants do not seek protection from a free market environment. Movants have competed well in the current free market environment and have successfully challenged other providers of two-way radio service to garner a share of the market. Movants' challenge is to the FCC proposals which would replace a free market system with one that rewards large, publicly traded corporations to the detriment of smaller entities; and which would ignore the years of investment and commitment demonstrated

[3] Also contained in the record before the FCC are comments pointing out that small businesses often finance the construction and operation of SMR systems with personal guarantees and home mortgages. The devastation of these businesses will have the horrendous result of causing families to seek bankruptcy protection as they are no longer able to meet their debt requirements.

by hundreds of small businesses in reliance on the FCC's existing rules; choosing, instead, auction revenue.

This Commission can easily discern the threat of overconcentration and monopoly of the SMR industry by simply considering the following:

> First, despite the relative successes of the Movants, most simply do not possess the financial resources to allow them to compete in auctions with large publicly traded corporations, particularly in view of the fact that their participation, even if successful, would net them little more than what they presently possess under the existing FCC rules.
>
> Second, the FCC's stated intention in its proposals is the making available of contiguous blocks of spectrum via forced frequency migration between Movants and auction winning entities which possess the authorization for alternative channels. The FCC's proposals ignore the clear fact that only one entity, Nextel Communications, Inc., possesses such an inventory. Accordingly, the unstated, natural result of adoption of the FCC's proposals is a singular boon to a single company.
>
> Third, even if an alternative entity wished to gain the necessary inventory of alternative frequencies to engage in frequency swapping following a successful auction, that entity would be thwarted by the FCC freeze on applications for additional 800 MHz channels which has been in place for more than a year. And even if the freeze were suddenly lifted, a review of the FCC's licensing records would quickly show that there are insufficiently available 800 MHz channels for which one could apply to obtain

the necessary inventory.[4] Ergo, only Nextel Communications, Inc. is positioned to take full advantage of the FCC's proposals.

The foregoing is *prima facie* evidence that adoption of the FCC proposals in Docket 93-144 is anticompetitive and, therefore, a violation of the FCC's Congressional mandate. The FCC is not positioned to blithely act as though its proposals are entirely neutral when, in fact, its actions will result in a benefit, in large measure, for only one entity at the expense of many others, and when the benefitted entity possesses the market power and economic resources to gain monopoly power in over one hundred markets throughout the United States.[5]

If allowed to proceed, the FCC would act in a manner which is either directly repugnant to the doctrines which are the foundation of the all antitrust legislation and statutes, or which

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[4] One of the primary reasons for the lack of available spectrum has been the application activity of Nextel Communications, Inc. which has filed with impunity for thousands of channels throughout the United States, effectively chilling the ability of others to obtain additional 800 MHz spectrum. Often Nextel's efforts have been in violation of the FCC Rules which require that applicants protect the operations of existing licensees. Yet, the FCC has often improperly accepted such applications and even granted some of Nextel's improperly prepared applications despite Nextel's failure to meet basic criteria which the FCC has applied to other, smaller operators.

[5] This Division may easily recognize the name Nextel Communications, Inc. from its earlier examination of the effect of the merger of certain assets between Nextel and Motorola, Inc. following a complaint filed by Geotek, Inc. To avoid an unhealthy concentration of market power, this Division assisted in creation of a consent agreement among the parties which required the Nextel/Motorola group to give up blocks of 900 MHz channels in exchange for the ability to concentrate on spectrum in the 800 MHz frequency band. Movants do not seek any disturbance of that earlier action, nor question the quality of those actions. Rather, Movants seek similar assistance from the Division to assure that the further concentration of ownership by Nextel Communications, Inc. of 800 MHz band SMR authorizations, assisted by the adoption of the FCC's proposals, does not result in undesirable loss of competition, significant diminution in the number of small businesses, and injury to the consuming public.

would create an environment which would result in antitrust violations by persons acting under its proposed rules. For illumination, the Commission may note that if the FCC Rules do not compel monopolizing entities to force operators to make frequency exchanges, yet simply provide the capacity for such forcing, the monopolizing entity moves at its risk and peril, without any legal immunity for the injurious results of such action. In effect, the Sherman Act would apply since the decision to force migration would be left to the moving party and the result of any antitrust injury arising out of such actions would reside with the compelling/monopolizing party. The courts have long held that mere receipt of authority from the FCC does not create an immunity to the antitrust laws. See, McKeon Construction v. McClatchy Newspapers, 19 RR 2d 2029 (ND Ca 1969). Any entity wilfully acquiring and maintaining monopoly power which results in injury to competing entities within a relevant market (which would established by the FCC's proposed legislative action) would be liable under the existing antitrust laws, even if the capacity for creating such injury arose out of the FCC's licensing authority, See, Phonetele v. American Telephone & Telegraph Co., 664 F.2d 716, 737 fn. 56 (9th Cir. 1981). Accordingly, the FCC's adoption of its proposed rules will likely create peril for both small business and for entities bent on monopolizing the SMR market.

The Agency's Justification

Through its public pronouncements and discussions with Movants, the FCC appears to believe that it is somehow compelled by Congress to move in its announced direction.[6]

[6] This perception is belied by the numerous communications from members of Congress, questioning the propriety of the FCC's proposals, including one statement signed by ten members of Congress who therein declared opposition to the FCC's proposals.

Although it is wholly unclear where the basis for the FCC's perception resides, the agency has justified its intended actions on theories related to regulatory parity, auction authority, and the emergence of new technology. Yet, none of these alleged motivations can serve as a credible basis for its intended actions and, even taken together, they fall far short of a reasoned analysis of the interests involved. To the contrary, the FCC's proposals, if adopted, would limit the ability of the public to enjoy the benefits intended by Congress in its creation of the FCC's auction authority.

Regulatory parity, as a justification, would only apply if all members of a class of radio operators were, for reasons unrelated to the services provided, held to differing regulatory standards. However, the Movants' systems have little in common with cellular radio systems, the group with which, by its proposals, the FCC has attempted to equate Movants' systems. Even the FCC has stated in other recent decisions that many existing SMR operators are not equivalent to the operation of integrated, cellular systems which are interconnected with the telephone network. The proposals are an attempt by the FCC to "bootstrap" the regulatory parity argument onto the regulatory landscape, by first attempting to coerce the industry into the creation of systems which exhibit greater equivalence with cellular radio systems. The FCC's justification is, therefore, flawed as it seeks to excuse the fact that today, such equivalence only exists as an objective contained within the FCC's proposals and does not exist in the marketplace. In fact, if the proposals are adopted, the Movants will never reach any resemblance in operation with cellular radio systems, because the adoption of the proposals will foreclose that potential.

The FCC's newly obtained auction authority is no justification. The language contained within the Communications Act specifically demands that the FCC explore alternative methods to avoid the creation of mutually exclusive applications, which is the initial threshold for use of auction authority. Yet, contrary to the specific mandates of Congress, the FCC proposals are specifically designed to create mutually exclusive applications in violation of the plain language of the Act. Accordingly, the FCC's excuse arising out of its expanded authority falls woefully short of a reasoned justification for its proposals.

Finally, the FCC has stated that its actions are designed to assist in the development of new technology, to provide additional services to the American public. Yet, the FCC's proposals would not foster new technology. The technology employed in the bringing of market based, two-way radio systems using digital transmissions is not new. It has existed in many forms for years and is being employed in the operation of Personal Communications Systems (PCS). Nor has the FCC explained why the opportunity to introduce any such new technology must be reserved solely for auction winners. Movants are both capable and willing to employ new technology. That adoption of the proposals would prevent Movants from enjoying the benefits of offering the alleged new technology is but another anticompetitive element of the FCC's proposals.

Movants recognize that the FCC possesses some degree of discretion in its promulgation of rules which might be contrary to the tenets of the antitrust laws of the United States. The public interest might compel some regulations which, but for the agency's mandate to serve an

overwhelming public interest, would be rejected as wholly repugnant to the greater need to serve the laudable ends of the free market system. In the instant matter, the FCC has not articulated how any objective related to serving the public interest might be met by adoption of its proposals. In fact, it is quite apparent that the FCC's proposals arise out of its personal agenda of administrative efficiency combined with the political efficiency which it believes will be served by holding another auction. The public interest, as is reflected in the interests of hundreds of thousands of potentially adversely affected customers of SMR service, is certainly not to be served. Accordingly, one is left only with the attendant harm to competition which would be a certain byproduct of adoption.

Jurisdiction and Expertise

Despite Movants' many pleas to the FCC to eschew its proposals and Movants' constant barrage of objections in reliance on the FCC's mandate to act in a manner which promotes, rather than diminishes, competition in the provision of telecommunications services, it is understandable that the FCC does not fully appreciate the ramifications of adoption of the proposals. The FCC is not an agency with expertise in antitrust laws, litigation and legislation. Indeed, nothing contained with the Communications Act requires that the FCC demonstrate such expertise and nothing within the Act suggests that the FCC possesses jurisdiction over such issues.

There exists a plethora of case law which amply demonstrates that the FCC lacks expertise and jurisdiction in the area of antitrust. However, were that ponderous line of cases

insufficient to make the point, the FCC, itself, has admitted on numerous occasions that it simply is not qualified to judge the merits of an antitrust complaint. For example,

> The Commission concludes that resolution of the many antitrust questions raised in your complaint is an action more appropriately taken by the courts or by the Federal Trade Commission. As we have previously made clear in another context, in view of the many problems confronting this agency, with its limited staff resource, in its own areas of exclusive jurisdiction (e.g. licensing, renewal, transfers, fairness, equal time, etc.), it would make no sense for us to duplicate the function of the courts or other agencies having antitrust jurisdiction and expertise by ourselves investigating and adjudicating every alleged violation. See Consumers Association of the District of Columbia, 32 FCC 2d 400 [23 RR 2d 187] (1971). As demonstrated by this complaint, alleged Sherman Act violations require the precise application of subtle principles in a complex and evolving area of the law.

In the Matter of Cahill and Kaswell, 37 RR 2d 197, 200 (1976). This Commission may then easily conclude that the FCC simply lacks the resources and expertise to judge the consequences of its actions and that it is, therefore, incumbent upon this Commission to protect the rights of the American public, Movants, and the SMR industry to prevent the irreparable harm which would be a natural consequence of the FCC's adoption of its proposals.

This Commission, by preventing the injury or threat of injury to Movants, might be able to prevent the flood of litigation which would be a likely result of the adoption of the FCC proposals. If the FCC proceeds to adoption, thereby resulting in the ability for monopolizing entities to force frequency migration and diminish the growth of adversely affected businesses, those injured businesses will seek remedies before the courts in accord with existing antitrust statutes and case law, directing their efforts against auction winners which move to gain or maintain monopoly power within the relevant markets. Accordingly, this matter is better

disposed of at a time prior to the creation of an unhealthy competitive environment which will spawn litigation between private parties, and should be addressed now in the public arena in a manner which will avoid the economic waste which such litigation will create.

Conclusion

For the reasons stated herein, Movants respectfully request that this Commission and Bureau, exercise its expertise and jurisdiction to prevent an agency of the federal government from acting to create legislation that is patently anticompetitive and which will result in the filing of numerous antitrust lawsuits in the future. Movants further offer any and all assistance required by the Commission to assess the level of probable injury to Movants and similarly situated parties, and undersigned counsel will make himself available for any discussion which the Commission deems appropriate.

Very truly yours,

Robert H. Schwaninger, Jr.

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: November 13, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this thirteenth day of November, 1995, I served a copy of the foregoing Motion on the follwoing by placing a copy in the United States Mail, first class postage prepaid:

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Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Commissioner James H. Quello
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Washington, D.C. 20515

The Honorable Bobby L. Rush
United States House of Representatives
131 Cannon House Office Building
Washington, D.C. 20515

The Honorable Anna G. Eshoo
United States House of Representatives
308 Cannon House Office Building
Washington, D.C. 20515

The Honorable Ron Klink
United States House of Representatives
125 Cannon House Office Building
Washington, D.C. 20515

The Honorable John R. Kasich
United States House of Representatives
1131 Longworth House Office Building
Washington, D.C. 20515

Kisha R. Jackson