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

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		
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket No. 93-253

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To: The Commission

OPPOSITION AND MOTION TO DISMISS UNAUTHORIZED PLEADINGS

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SUMMARY

The Omnibus Budget Reconciliation Act of 1993 required the Federal Communications Commission (the "Commission") to establish a common regulatory framework for all commercial mobile radio services ("CMRS") to promote enhanced competition and increased consumer choices. The Commission is presently considering in PR Docket No. 93-144 the Wireless Telecommunications Bureau's (the "Bureau") recommendation that it adopt revised Specialized Mobile Radio ("SMR") licensing rules and policies comparable to those it has adopted for competing CMRS services, such as cellular and Personal Communications Services.

The Bureau's recommendations result from rule makings that have been ongoing for more than two years. Over 350 comments have been filed in the various phases of these proceedings. On September 18, 1995, the Bureau took the unprecedented step of announcing to the industry its proposed recommendations and inviting additional oral and written responses. The industry, including smaller SMR operators, took full advantage of this extraordinary opportunity to influence the Commission's decision.

Notwithstanding the above, on November 13 and December 4, 1995, several SMR operators (the "Movants") filed motions asking the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC") and the United States Congress to derail the wide-area SMR licensing rule making. The Movants admit that they have had multiple opportunities to articulate their positions, yet persist

in filing unauthorized, unsubstantiated and unsupported allegations essentially seeking before-the-fact reconsideration of a prospective Commission decision, while misleading DOJ, FTC and Congress as to the facts of the Bureau's pending recommendation.

Through their Motions, the Movants attempt to usurp congressional prerogative by announcing Senate hearings on SMR licensing. They attempt to usurp the Commission's lawful rule making authority by soliciting DOJ and FTC intervention on the basis that the Commission "is not an agency with expertise in antitrust laws." This not only insults the Commission, which has comprehensively evaluated and analyzed the competitive status and market structure of the CMRS in a number of fora, but would deny the Commission its lawful opportunity to determine whether competitive bidding for 800 MHz wide-area SMR licensing is within the authority conferred by its organic statute. The Movants also abuse DOJ and FTC processes since these agencies have no "appellate" jurisdiction over the Commission.

In addition, the Movants unabashedly mislead DOJ, FTC and Congress asserting that they would suffer "irreparable harm," while not disclosing that the Bureau's recommendations would require that incumbent licensees that do not win the 800 MHz wide-area SMR license auctions must be made whole. The Bureau would permit incumbents to be retuned to comparable 800 MHz channels <u>only</u> if they receive the same service area and number of frequencies, with all "retuning" costs paid by the auction winner. Movants do not explain how they are irreparably harmed when they would receive

substitute channels, free of charge, that assure comparable service over their existing service areas.

By their Motions, Movants seek government intervention in the marketplace to protect them from the enhanced competition that will result from achieving regulatory parity among CMRS providers. The Movants want to continue feeding at the federal "spectrum welfare trough," even though Congress has eliminated it by mandating competitive bidding to license spectrum for commercial wireless services. In reality, what Movants advocate is a continuing waste of taxpayer dollars on inefficient, archaic site-by-site SMR licensing solely to protect their ability to block licensees who are investing hundreds of millions of dollars to introduce more efficient, competitive technologies and services for the American public.

In short, the subject Motions are unauthorized pleadings uniquely lacking in legal or factual substantiation of their breezy hyperbole. They demand summary dismissal.

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To: The Commission

OPPOSITION AND MOTION TO DISMISS UNAUTHORIZED PLEADINGS

I. INTRODUCTION

On November 13, 1995 and December 4, 1995, respectively, several Specialized Mobile Radio ("SMR") operators (collectively referred to as "Movants") filed motions in the above-captioned dockets,1/ asking the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and the United States Congress to derail

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1/ *See* Motion, filed November 13, 1995, in PR Docket No. 93-144, which was actually directed to DOJ and the FTC (hereinafter "Motion To DOJ"). *See also* Motion to Defer Action, filed December 4, 1995, in PR Docket No. 93-144 (hereinafter "Motion To Defer").

The Motion To DOJ violates *ex parte* rules since it is a "presentation" that it is "directed to the merits or outcome of [the] proceeding" (47 C.F.R. Section 1.1202(a)), and it was "made *to* decision-making personnel" when it was served on each of the Commissioners. 47 C.F.R. Section 1.1202(b). By not filing the Motion as an *ex parte* pleading -- or serving any of the parties to the proceeding -- other interested parties were unaware of the filing, thereby defeating the purpose of the *ex parte* rules, *i.e.*, "to ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process. . . " 47 C.F.R. Section 1.1200(a).

a rule making that has been ongoing for two years and that, by law, should have been completed by the Federal Communications Commission ("Commission") 16 months ago.2/

Movants offer no justification for filing either of the unauthorized pleadings, both of which are replete with unsubstantiated legal and factual misrepresentations. Therefore, Nextel Communications, Inc. ("Nextel") hereby files this Opposition and Motion To Dismiss.

The Commission should summarily dismiss the pleadings for the following reasons, each of which is discussed further herein:

- Movants, by their own admission have had multiple opportunities to articulate their position, yet they continue to abuse Commission processes by filing unauthorized pleadings.
- Movants claim they will suffer "irreparable harm" despite the fact that the current proposal would, at most, mean that they may be retuned at no cost to them, to comparable channels in the 800 MHz SMR band with comparable coverage, and with the guarantee that they will be made whole or not subjected to retuning.
- Movants' pleadings contain unsubstantiated, unsupported claims that speculate on a prospective decision while misrepresenting current Commission proposals.

2/ The subject proceedings propose a new licensing process that would authorize wide-area SMRs on a geographic basis and assign the licenses through competitive bidding. The Commission is proposing the new licensing process to fulfill its Congressional mandate in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which required that SMRs be provided regulatory parity with other Commercial Mobile Radio Service ("CMRS") providers, such as cellular and Personal Communications Services ("PCS"), by August 10, 1994. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI Section 6002(d)(3); *see also* H.R. Rep. No. 111, 103d Cong., 1st Sess., at p. 262.

- Movants make insupportable factual claims, including their statement that they represent a "substantial portion of the SMR marketplace" when, in reality, they represent less than four percent of all 800 MHz SMR licensees in the U.S.3/

- Both Motions ignore Commission processes as set forth in the Communications Act of 1934,4/ the Commission's Rules, and the Administrative Procedure Act5/ by filing a "Before-the-Fact Petition For Reconsideration."

- Both Motions improperly collaterally attack a yet-to-be-concluded Commission rule making before governmental bodies with no appellate authority over the Commission.6/

Movants have insulted the Commission's integrity by seeking review of its prospective decision at agencies which have no appellate or decisional authority over this matter. They have abused the processes of DOJ and the FTC by filing unsupported, unsubstantiated and misleading allegations about a yet-to-be decided Commission rule making. Their Motion to Defer has insulted

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3/ *See* Motion to Defer at p. 6. The American Mobile Telecommunications Association ("AMTA"), the trade association representing SMR companies, has stated that there are approximately 3,300 800 MHz SMR licensees.

4/ 47 U.S.C. Section 151 *et seq.*

5/ 5 U.S.C. Section 552 *et seq.*

6/ Movants are prematurely and improperly attempting to challenge the yet-to-be-decided rule before the U.S. Congress in order to avoid a losing court challenge. Motion To Defer at p. 9. This position ignores the procedures employed in administrative proceedings to ensure that all parties are provided due process. *See* Administrative Procedure Act, *supra*. The court system, Congress' co-equal branch of government, was constitutionally created for just what Movants argue should be avoided -- the review of a government agency's action. This argument is nonsensical and should be given no credence.

the United States Congress by second-guessing its articulation of the Commission's auction authority,7/ and by announcing, on behalf of the United States Senate, congressional hearings. For all of these reasons, the Commission should summarily dismiss the Motions and expeditiously complete this rule making.

II. BACKGROUND

Nextel is the largest provider of SMR services in the United States, investing hundreds of millions of dollars over the last three years to construct digital wide-area SMR systems throughout the U.S. that will provide its 800,000 customers more competitive and more efficient SMR services. Given Nextel's commitment to competing in the wireless telecommunications marketplace, it has a keen interest in the above-referenced proceeding and has been an active participant in it and related proceedings since they were first initiated by the Commission in May of 1994.8/ Thus,

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7/ Motion to Defer at p. 9. Movants argue that the Commission cannot move forward with its Congressional mandate without "a clearer articulation of the Commission's auction authority by the U.S. Congress." This argument ignores the fact that the Commission has successfully conducted auctions for both narrowband and broadband PCS, interactive video dialtone services ("IVDS"), and is currently conducting auctions for multipoint distribution services and 900 MHz SMR licenses. The adoption of competitive bidding for 800 MHz wide-area SMR licensing is properly within the realm of the Commission's authority to interpret its organic statute.

8/ The proposal to license SMRs in a manner similar to other CMRS providers, *i.e.*, on a geographic-area basis, was first noticed by the Commission in the May 20, 1994 Notice Of Proposed Rule Making in GN Docket No. 93-252. Notice of Proposed Rule Making, 9 FCC Rcd 2863 at para. 29 (1994)("We first seek comment on whether our channel assignment rules for 800 and 900 MHz SMR should be revised to facilitate licensing on a wide-area, multi-channel basis comparable to our licensing of cellular and broadband PCS."). In

(continued...)

Movants' unauthorized pleadings address issues first raised more than a year ago and upon which they have had multiple opportunities to comment.9/

After providing interested parties two opportunities to comment on its FNPRM herein,10/ the Wireless Telecommunications Bureau ("Bureau") held an unprecedented industry-wide public meeting on September 18, 1995, at which it described its proposed recommendations on the FNPRM to the Commission. The Bureau expressly invited written comments on its recommendations by September 29, 1995, and it encouraged follow-up meetings with Staff. Thus, all parties -- including Movants -- have had not only the standard comment periods for a Commission rule making, but they also have had the unprecedented opportunity to comment -- both in meetings and written form -- on the Bureau's normally confidential recommendations to the Commission. In fact, over 350 written

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8/(...continued)
the Third Report and Order, which resulted from the May 20 NPRM, the Commission concluded that it should use its auction authority to license wide-area SMRs on a geographic basis, but it left the details of the proposal to a further proceeding. Third Report and Order, 9 FCC Rcd 7988 at paras. 103-104 (1994).

9/ Pursuant to its conclusion in the Third Report and Order, the Commission issued a Further Notice of Proposed Rule Making ("FNPRM") in the instant proceeding on November 4, 1994. 9 FCC Rcd 1647 (1994). In the FNPRM, the Commission specifically proposed to auction wide-area SMR licenses on a geographic basis in multi-channel contiguous blocks.

10/ The FNPRM established a comment and a reply comment period, thus providing interested parties the generally-accepted two opportunities to comment. *See* Rule 1.415 of the Commission's Rules. 47 C.F.R. Section 1.415.

submissions have been filed with the Commission throughout these related proceedings.

The crux of Movants' opposition to the rule making is the Commission's proposal to use auctions. In the Motions, Movants assert that the Commission has no authority to auction wide-area 800 MHz SMR licenses.11/ However, the initial position of some of the Movants completely contradicts the position they now take. Some of those same parties, using the same counsel, initially argued that a wide-area 800 MHz SMR licensing scheme would require the use of auctions.12/

By filing unauthorized pleadings at this stage in the proceeding, Movants are seeking government intervention in the marketplace to protect them from the enhanced competition that will result from achieving regulatory parity among CMRS providers. The Movants want to continue feeding at the federal "spectrum welfare trough," even though Congress has eliminated it by mandating competitive bidding to license spectrum for commercial wireless services. In reality, what Movants advocate is a continuing waste of taxpayer dollars on inefficient, archaic site-by-site SMR licensing solely to protect their ability to block licensees who are investing hundreds of millions of dollars to introduce more

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11/ *See, e.g.*, Motion To DOJ at p. 14; Motion To Defer at pp. 8-9; *see also* Supplemental Comments of several SMR companies (essentially "Movants"), filed September 18, 1994, in PR Docket No. 93-144, at pp. 11-13 and the Attachment thereto.

12/ *See* Reply Comments of Fresno Mobile Radio, Inc., GN Docket No. 93-252, filed July 11, 1994, at p. 5, fn. 1.

efficient, competitive technologies and services for the American public.

III. DISCUSSION

A. Movants Expressly Misstate The Communications Act By Arguing That The Commission Has No Expertise Or Experience In Resolving Competitiveness Issues

Movants claim to DOJ and the FTC -- without any supporting citations -- that the Commission is "not an agency with expertise in antitrust laws, litigation, and legislation."13/ "Indeed," Movants continue, "nothing contained in the Communications Act requires that the FCC demonstrate such expertise and nothing within the Act suggests that the FCC possesses jurisdiction over such issues."14/

Contrary to the Movants' bald statements, the Communications Act explicitly places "competitive" issues within the realm of Commission jurisdiction and expertise. Section 314 of the Communications Act is entitled "Preservation of Competition in Commerce," and it expressly deals with actions that "substantially lessen competition or [] restrain commerce. . ."15/ Section 332, which specifically addresses competition in the SMR services, among others, states that the Commission "shall consider,

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13/ Motion To DOJ at p. 15.

14/ *Id.*

15/ 47 U.S.C. Section 314.

consistent with Section 1 of this Act, whether [its] actions will . . . encourage competition . . ."16/

Thus, the Communications Act gives the Commission authority and jurisdiction over the competitiveness of the communications marketplace. Indeed, the Commission just employed that expertise in analyzing the competitiveness of the CMRS marketplace in the Third Report and Order.17/ There the Commission analyzed and evaluated the competitiveness of different types of mobile services and concluded that all CMRS services are competitive or potentially competitive.18/

The Commission also has recently defined the relevant product market for SMRs, concluding that they are not a self-contained market.19/ Rather, the Commission has concluded that SMRs compete with all other CMRS providers.20/

16/ 47 U.S.C. Section 332(a)(3). Moreover, Congress ordered the Commission to conduct a review of competitive market conditions within the commercial mobile services marketplace, and follow up with an annual report on the state of competition therein. 47 U.S.C. Section 332(c)(1)(C). The Commission released its initial review on August 18, 1995. *See* First Report, FCC 95-317, released August 18, 1995.

17/ Third Report and Order, *supra*. at fn. 8, at paras. 37 *et seq*.

18/ *Id*. at para. 43.

19/ Order Approving The Transfer Of Control of Dial Page, Inc. to Nextel, DA 95-2379, released November 22, 1995, at para. 25.

20/ *Id*. *See also* Order Approving OneComm Transfer of Control, DA 95-263, released February 17, 1995, at para. 27; Order Approving Motorola Assignment of 800 MHz SMR licenses to Nextel, DA 95-890, released April 27, 1995, at para. 18.

B. Movants Misrepresent The Potential For "Irreparable Harm"

Movants argue that the Commission's prospective decision will cause them "irreparable harm" and should therefore be stopped before it is made.21/ They claim that "[t]he injury and irreparable harm to Movants has been well articulated in this proceeding" and is "well established."22/ This argument, like many of Movants' others, fails to tell the whole story. First, Movants cannot know whether the Commission's action will cause them irreparable harm since the Commission has not released its decision.23/ Second, given the state of the record as they describe it,24/ Movants' position has been repeatedly articulated and therefore will be fully considered by the Commission. Third, under the most recent Bureau proposal, all incumbents, including Movants, will not experience "irreparable harm."

Under what is publicly known of the Bureau's most recent proposal (a summary of which is attached hereto at Exhibit A), incumbent licensees that do not win the 800 MHz SMR auctions must be made whole by the auction winner or they will not be retuned out

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21/ Motion to Defer at p. 11.

22/ *Id.*

23/ Movants' pleadings, in essence, seek a stay of a Commission rule which has not been adopted. Again, the request is premature, illegal and nonsensical.

24/ Motion to Defer at pp. 6, 7-8, and 11 ("Movants' [position] is well established within this docket . . . ").

of the auction winner's block.25/ This means that the auction winner will bear all of the expense of retuning the incumbent, and the auction winner must provide the incumbent with "comparable" channels and facilities, *i.e.*, at a minimum, the incumbent will be entitled to the same number of channels and the same service area.26/ Interestingly, both Motions fail to address this part of the retuning proposal -- making the pleading particularly misleading before Congress and at DOJ and the FTC, given their lack of participation in the Commission proceeding.27/ Movants have not explained how they will be caused "irreparable harm" when they would be provided with facilities and channels, free of charge, that ensure comparable service over the same service area. Further, if Movants truly believe their own verbiage, they can exercise their statutorily protected appeal rights provided under Section 402 of the Communications Act.28/

25/ The Bureau did not release any written documentation of its September 18 proposal. Attached hereto as Exhibit A is a summary of the meeting that was distributed by AMTA, the trade association of SMR companies. *See* Exhibit A at p. 3 ("No relocation would occur if comparable spectrum were not available.").

26/ *Id.*

27/ *See* Motion To DOJ at pp. 7-8 wherein Movants claim that retuning will "result in total destruction of many small businesses" while nowhere bothering to explain to the FTC or DOJ that the Bureau's proposal would require the auction winner to pay the entire cost of retuning and ensure that the incumbent is made whole on spectrum where SMRs currently operate.

28/ 47 U.S.C. Section 402.

C. Movants Ignore Commission Rules, Abuse Commission Processes, And Fail To Support Any Of Their Claims

Not only are the motions unauthorized and untimely, they also are filled with unsubstantiated, speculative, and repetitive claims. Both Motions are utterly and suspiciously lacking in legal or factual citations.29/ A few examples include:

(1) Movants claim that "The plain language of the Communications Act" provides boundaries within which the Commission must operate in "this proceeding."30/ Yet, Movants have provided no citation for any particular section of the Communications Act to which they attribute such limitations.

(2) On one of the occasions where Movants do cite a document to support their assertion, they cite a letter that is not a public document, not attached to the pleading, and not readily available for interested parties to evaluate.31/

(3) Movants claim that the "Commission will move forward with capriciousness" if it makes a decision now.32/ However, the Movants fail to explain that the Commission's auction authority has been thoroughly addressed in the record of this proceeding,33/ and that the

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29/ *See, e.g.*, Motion To DOJ at p. 15, where Movants state that there is "a plethora of case law" demonstrating that the Commission has no antitrust expertise, yet there is not even a singular citation to support this all-encompassing conclusion.

30/ Motion to Defer at p. 8.

31/ *Id.* at p. 7.

32/ *Id.* at p. 8.

33/ *See* Comments of SMR WON, PR Docket No. 93-144, filed January 5, 1995, at pp. 3--32; Reply Comments of SMR WON, PR Docket No. 93-144, filed March 1, 1995, at Exhibit 3, p. 1; Petition For Reconsideration of SMR WON, GN Docket No. 93-252, filed December 21, 1994, at pp. 4-8; Reply To Opposition To Petition For Reconsideration of SMR WON, GN Docket No. 93-252, filed January 30,

(continued...)

Commission has had more than two years to research and interpret its statutory authority.34/ Most absurdly, Movants accuse the Commission of capricious action when (a) the Commission has yet to take any final action and (b) they claim to have clearly delineated their position in this proceeding.35/

(4) Movants claim that the FNPRM and the Bureau recommendation make no guarantee that incumbents will be moved within the 800 MHz band, implying that they could be moved to other less desirable non-800 MHz channels.36/ This is false. The Bureau, at the September 18 industry-wide meeting, clearly recommended that incumbents be moved only onto channels currently used by SMR operators within the 800 MHz band.37/

33/(...continued)
1995, at pp. 2-9; Supplemental Comments of Movants, PR Docket No. 93-144, filed September 29, 1995, at pp. 11-13; Reply Comments of the Joint Commenters, PR Docket No. 93-144, filed March 1, 1995, at p. 15; Reply Comments of the Personal Communications Industry Association ("PCIA"), PR Docket No. 93-144, filed March 1, 1995, at p. 3; and Opposition to Petition for Reconsideration of Nextel, GN Docket No. 93-252, filed January 20, 1995, at pp. 12-17.

34/ *See* Exhibit B, which is a chronology of the CMRS rule making proceedings since the enactment of the Budget Act.

35/ Motion to Defer at pp. 6, 7-8, and 11.

36/ Motion to DOJ at p. 7.

37/ *See* Exhibit A at p. 2. In its summary of the Bureau's proposal, AMTA reports that the Bureau proposed that incumbents be retuned only to channels within the top 200 SMR channels, the lower 80 SMR channels, or the 150 General Category channels.

Moreover, because the FTC and DOJ have not been parties to this proceeding, they would have no knowledge that not one commenter has advocated the use of other than comparable 800 MHz channels for retuning of incumbents. On the contrary, AMTA, the trade association representing SMR operators, has commented that only 800 MHz channels will suffice. *See* Comments of AMTA, filed January 5, 1995, in PR Docket No. 93-144, at p. 22.

By offering virtually no legal or factual support for their assertions, Movants are misleading the DOJ, the FTC, and the U.S. Congress in a desperate attempt to convince them to delay a lawful Commission proceeding which is intended to bring heightened competition to their marketplace. Every day a decision in this proceeding is delayed, SMRs are placed at a greater competitive disadvantage vis-a-vis their CMRS competitors. Movants claim that "no harm" will result from a delay, but according to the Cellular Telecommunications Industry Association ("CTIA"), some 28,000 new customers sign up for cellular service every day.38/ Thus, every day that SMRs, with their application process frozen,39/ await the licensing, operational and spectrum parity mandated by the Budget Act, other CMRS providers are adding hundreds of thousands of customers, expanding their services, and enhancing their competitive advantage.

Movants' unsupported misrepresentations are particularly egregious when made to other governmental bodies (including, indirectly, the United States Congress) that have no on-hand expertise or resources regarding the proceeding to test the Movants' veracity and accuracy. This is an abuse of the Commission's, DOJ's and the FTC's processes, engaged in for no other purpose than to avoid a competitive telecommunications marketplace, and it should not be tolerated.

38/ *See* Exhibit C attached hereto.

39/ Third Report and Order, *supra*. at fn. 8, at para. 108.

D. The Commission Should Summarily Dismiss These Unauthorized Pleadings

Whether styled a "Motion" or a "Before-the-Fact Petition for Reconsideration," there is simply no authority to support Movants' pleadings. Nowhere do the Commission's rules provide for additional pleadings in a rule making proceeding, and the Movants have cited no legal authority for either of their motions. Rule 1.45(c) of the Commission's Rules, states that "[a]dditional pleadings may be filed only if specifically requested or authorized by the Commission."40/ The same is true in Rule 1.413(d), which specifically governs rule making proceedings. It states that "[n]o additional comments may be filed unless specifically requested or authorized by the Commission."41/

As explained above, the Bureau invoked both of these rules in asking for Supplemental Comments on its recommendation to the Commission. Since that time, neither the Bureau nor the Commission has indicated that it seeks further pleadings or comments. Moreover, Movants have not even asked for -- much less made a showing justifying -- the Commission's permission to file these pleadings pursuant to Rules 1.45 and 1.413.

Movants, moreover, attempt to file this unauthorized pleading despite the fact that the Commission has provided multiple opportunities for them to comment, of which they have fully taken

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40/ 47 C.F.R. Section 1.45 (c) (emphasis added).

41/ 47 C.F.R. Section 1.413 (d).

advantage.42/ Not only have most of the Movants used each of these opportunities, many of them -- and parties with similar interests -- have filed pleadings addressing the same issues on numerous other occasions.43/ Given the number of occasions that Movants have had their position stated for the record, there is no justification for delaying this proceeding any further by admitting these unauthorized comments.

IV. CONCLUSION

Movants, like every other industry participant, have had multiple opportunities to participate in this rule making proceeding. The current Motions are simply further attempts to delay this proceeding. Given not only the unauthorized nature of

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42/ Motion to Defer at pp. 6, 7, and 11. *See also* Exhibit B attached hereto. The Commission has provided Movants at least five formal opportunities to comment on the wide-area licensing of SMR systems: (1) June 20, 1994 - Comments in GN Docket No. 93-252 (the rule making that concluded wide-area SMRs should be licensed on a geographic-area basis, thus spawning the current proceeding); (2) July 11, 1994 - Reply Comments in GN Docket No. 93-252; (3) January 5, 1995 - Comments in PR Docket No. 93-144; (4) March 1, 1995 - Reply Comments on PR Docket No. 93-144; and (5) September 29, 1995 - Supplemental Comments in PR Docket No. 93-144.

43/ *See, e.g.*, Comments of Brown and Schwaninger, filed June 20, 1994, in GN Docket No. 93-252; Reply Comments of August Bert Carver, filed July 11, 1994, in GN Docket No. 93-252; Reply Comments of Applied Technology Group, Inc., filed July 11, 1994, in GN Docket No. 93-252; Reply Comments of Southeastern SMR Association, *et al.*, filed July 11, 1994, in GN Docket No. 93-252; Preliminary Comments of Clarks on the Proposed Antitrust Final Judgment, filed November 30, 1994, in DA 94-1087; Comments of Clarks on Proposed Antitrust Final Judgment, filed December 14, 1994, in DA 94-1087; Petition for Reconsideration of SMR WON, filed December 21, 1994, in GN Docket No. 93-252 (also attaching a copy of the December 14 filing in the OneComm proceeding, DA 94-1087); Comments of SMR WON, filed January 5, 1995, in PR Docket No. 93-144 (also attaching a copy of the December 21 filing in GN Docket No. 93-252); and Reply Comments of SMR WON, filed March 1, 1994, in PR Docket No. 93-144.

the pleadings, but also their flagrant disregard for Commission processes, they should be summarily dismissed.

Respectfully submitted,

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Date: December 7, 1995

EXHIBIT A

AMTA

American Mobile Telecommunications Association

Regulatory Report -- # 95-23

To: AMTA Members
From: Jill M. Lyon, Dir. Regulatory Relations
Date: September 19, 1995
Re: FCC 800 MHz Wide-Area Proposal (PR Docket No. 93-144)

This report is designed to provide you with a summary of the Wireless Telecommunications Bureau's proposal in the above-referenced proceeding, and to highlight differences between this proposal and AMTA's official position in this matter. The Bureau's recommended licensing framework was presented in an industry meeting held Monday, September 18. **Since the Bureau intends to place this item on the Commission's November meeting agenda, it requests that written *ex parte* responses be filed, or meetings with Commission staff be scheduled, by Friday, September 29.**

The Bureau has made the following recommendation to the Commission:

I. Channel Assignment and Service Areas

- The upper 200 channels of the current 800 MHz SMR band would be re-allocated for wide-area operations, to be licensed on a BEA basis;

- In each BEA, a 120-channel, 60-channel and 20-channel license would be awarded [slightly different from AMTA's proposal of 120-channel and 80-channel blocks];

- There would be no limit on aggregation of licenses by a single licensee within a geographic area.

II. Rights, Obligations of Wide-Area Licensees

- Rights – Wide-area licensees would have the right to construct as needed within the BEA, would be entitled to all recovered spectrum within the channel block (meaning the likely elimination of the finder's preference program, as at

900 MHz), and would have a presumption in favor of FCC approval of negotiated transfers of spectrum from incumbent licensees. [AMTA has requested clarification that there would be no presumption against approval of transfers to third parties.]

- Requirements -- Wide-area licensees would be required to meet construction and coverage requirements of one-third within three years and two-thirds within five years after license grant. The Bureau's proposal was unclear whether this referred to population or geography, and did not specify how many channels the licensee would be required to construct to meet the requirement. [AMTA has requested that construction requirements include both population and geography, and some minimum number of channels.]

  If the licensee failed to meet the coverage requirement, it would forfeit the wide-area license; however, a licensee with incumbent systems in the BEA would not lose previously-licensed spectrum.

- Partitioning -- All licensees (not just designated entities) would be allowed to partition the BEA to aid in meeting construction requirements. [AMTA advocated partitioning either of geography or channel block.]

III. Treatment of Incumbent Systems

- The Bureau proposes a one-year period in which incumbent licensees could voluntarily relocate to other channels, either within the 200 wide-area channels, in the remaining 80 SMR Category channels, or to channels in the General Category. There would then be a two-year period of mandatory relocation to comparable spectrum. [AMTA's compromise position advocated required notification of incumbents, then "progressive reconfiguration" allowing mandatory relocation of remaining incumbents only with a showing that the wide-area licensee had reached voluntary agreements with a large percentage of incumbents. The percentage would decrease over time, with a maximum of 4 years before mandatory relocation of remaining "holdouts".]

  To aid licensees in relocating systems, new licensing on these channels would be delayed, and the freeze on SMR Category licensing lifted to allow additional incumbent licensing only. No incumbent relocating its system would be subject to any second round of relocation. The plan is similar to the relocation model adopted for relocation of microwave incumbents from PCS spectrum.

- The Bureau does request comment on the definition of "comparable spectrum" during the mandatory relocation period. The minimum expectation would be the same number of channels and the same service area. No relocation would occur if comparable spectrum were not available. [AMTA proposed an Incumbents' Bill of Rights, in which relocated incumbents would also be entitled to 70-mile co-channel protection wherever available, no further short-spacing of their service areas, protection from "cherry-picking" of channels to be relocated, and alternative dispute resolution procedures.]

- Incumbent licensees would be allowed to expand their systems with the consent of the wide-area licensee. Otherwise, systems would be protected within their existing 40 dBu contours.

- Licensees with existing extended implementation grants would be required to rejustify their grants by filing a compliance report after the effective date of new rules. If justified, the Bureau would grant a minimum of 2 years to complete construction, should less than 2 years be remaining in the grant. No further extended implementation grants will be made to incumbent licensees.

IV. Licensing Other Channels

- Lower 80 -- The Bureau proposes to allow limited site-by-site licensing of the remaining 80 SMR Category channels to facilitate relocation of incumbents. This spectrum would then be converted to geographic area licensing. The freeze on new licensing will continue. The Bureau plans a future Notice of Proposed Rulemaking (NPR) to determine licensing issues.

- General Category -- Future eligibility for these channels would be limited to SMR applicants. This spectrum would be frozen to new licensing during the relocation period, with a future NPR proposed to determine licensing and auctions issues and the treatment of grandfathered private systems.

  [Both of these proposal are in line with AMTA's position, although we advocated BEA licensing without auctions on the lower bands.]

V. Competitive Bidding

- The Bureau proposes simultaneous, multiple-round bidding in the upper-band auction. Rules for other SMR channels would be determined in a future NPR.