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

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rule to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

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To: The Commission

REPLY OF RAM MOBILE DATA USA LIMITED PARTNERSHIP

RAM Mobile Data USA Limited Partnership ("RMD"), hereby submits this Reply to the Opposition of Pittencrieff Communications, Inc. ("PCI"), to the Application for Review filed by RMD, in which RMD sought Commission review of the "Second Erratum," issued on November 8, 1995, by the Wireless Telecommunications Bureau (the "Bureau"), in the above-referenced matters.

In the "Second Erratum," DA 95-2327, the Bureau purported to "clarify" the coverage requirements for MTA licensees in the 900 MHz Specialized Mobile Radio ("SMR") Service. As demonstrated in RMD's Application for Review, the "Second Erratum" in fact effected a substantial change in the Commission's rules and policies regarding the 900 MHz SMR service. Thus, at the very least, the changes made in the "Second Erratum" should have been subject to notice and comment rulemaking procedures. Moreover, the Bureau's failure to articulate a reasoned basis for its change in policy rendered the new rule arbitrary and capricious. For these and other reasons detailed in RMD's Application for Review, the new coverage rule contained in the "Second Erratum" should immediately be rescinded.

I. Overview.

PCI opposes RMD's Application for Review. In its opposition, PCI attempts to defend the coverage rule announced in the "Second Erratum" as consistent with previous Commission decisions regarding the coverage requirements for 900 MHz SMR licensees. As demonstrated below, PCI's opposition fails on a number of grounds.

First, PCI is able to point to no support in the record for the proposition that the alternative coverage requirement contained in the "Second Erratum" had ever before been encompassed within the Commission's 900 MHz SMR rules. PCI, moreover, does not respond to the issue presented by RMD as to whether the Commission may make such a substantive change without public notice and participation.

Second, PCI's *post hoc* rationalization for the new rule not only is unconvincing, it essentially repeats arguments made to the Commission by PCI's predecessor in interest in this proceeding, when it sought to have the rules reconsidered. Having had such request for reconsideration expressly denied by the Commission, it borders on the disingenuous for PCI now to say that the Commission's "Erratum" only clarifies what the rule was intended to say all along.

Finally, since the filing of RMD's initial Application for Review, it has learned of an *ex parte* filing, and associated threat to seek a stay of the auctions, to which the Second Erratum clearly was directed.[1] The existence of this pleading, unreported until well after the Second Erratum was announced, should dispel any notion that what was involved here was merely an administrative crossing of "t"s and dotting of "i"s. Rather the "Second Erratum" represents a substantial change in the rules, made at a critical time — just before the commencement of

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[1] Letter to Rosalind K. Allen, Esq., Chief Commercial Division, Wireless Telecommunications Bureau, "Request for Clarification of the Applicability of Substantial Service Showing Alternative for 900 MHz SMR MTA Licensees or, in the Alternative, Request for Reconsideration ("Request"), submitted on behalf of Airwave West, Inc., and "other parties" (November 3, 1995). On November 28, 1995, after RMD's counsel learned of the submission and questioned the failure to file it as an ex parte presentation -- twenty days after the Second Erratum was released -- the letter was submitted "out of an abundance of caution" as an ex parte presentation.

the 900 MHz auction — at the behest of one named and other "unnamed parties," without opportunity for public comment. Accordingly, the Second Erratum should be rescinded immediately.

II. Prior To Issuance Of The "Second Erratum," The Commission's Rules Required All MTA Licensees To Provide Service To One-Third Of The MTA's Population Within Three Years Of License Grant.

On November 8, 1995, the Bureau issued the "Second Erratum," without notice or public comment, purportedly to "clarify" the 900 MHz SMR coverage requirements.[2] In the "Second Erratum," the Bureau determined that MTA licensees would be permitted to satisfy the Commission's coverage requirements either by providing service to one-third of the MTA's population within three years of license grant and to two-thirds within five years; or by providing "substantial service" to the MTA after five years and by notifying the Commission after three years of the licensee's intent to do so.

PCI concedes that the rule "as originally adopted, stated that 900 MHz SMR MTA licensees must construct and place into operation a sufficient number of base stations to provide coverage to one third of the population of the MTA by the end of three years from the initiation of the license term."[3] PCI asserts that the rule is ambiguous, because it is "silent as to the ability of the licensee to submit [a substantial service] showing at the end of three years."[4] But to attempt to infer intent from silence is simply to play with words; the rule was silent as to the application of a "substantial service" test at three years because it quite clearly did not provide for it — nothing more.

Equally unavailing is PCI's claim that the administrative record shows that, despite the plain language of the rule, the Commission intended the "substantial service" list to apply at the three-year benchmark. As pointed out by RMD in the Application for Review, but ignored by PCI, the Commission, on several occasions confirmed the natural reading of the rule. Thus, in rejecting

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[2] Second Erratum, PR Docket 89-553, *et al.* (rel Nov. 8, 1995).
[3] PCI Opposition at 3
[4] Id. at 4-5.

challenges that the coverage rule was too harsh, the Commission pointed to the "substantial service" test as "designed for specialized users who may not be able to meet the two-thirds due to individualized circumstances."[5]

Again, in the Third Order on Reconsideration, the Commission noted that the "substantial service" showing was intended to be a "mechanism designed for specialized users who may not be able to meet the two-thirds coverage requirement."[6] It did not in any way suggest that the "substantial service" showing was intended to release licensees from the obligation to provide service to at least one-third of the MTA's population three years after license grant.

Apparently, like Humpty-Dumpty, PCI believes that it can make words mean what it wants them to mean merely by force of will.[7] In support of its proposition that the "Second Erratum" reflected a consistent interpretation of the Commission's rules, PCI quotes a single snippet of text in which the Commission omits any reference to the three-year coverage benchmark in its explanation of the alternative "substantial service" showing mechanism.[8] PCI, however, selectively ignores several passages in which the Commission made clear that the "substantial service" alternative would be available only as relief at the five-year mark (see above). PCI also fails to explain the Commission's statement one paragraph below its quotation that the Commission thought it necessary to apply a more rigorous coverage standard than proposed by RMD and others — one-quarter population coverage in three years, one-third in five.[9] Had the Commission intended to allow licensees to avoid a one-third (or really any) coverage requirement at three years, this statement would make no sense.

Despite PCI's assertions, it is clear that, prior to the "Second Erratum," the Commission's rules provided that the "substantial service" alternative applied only at the five-year mark. The Commission was not silent on this issue. PCI's inference, therefore (even putting aside the logical difficulty of basing any

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[5] Second Order on Reconsideration and Seventh Report and Order, PR Docket No. 89-553, *et al.*, 78 R. R. 2d 1641, 1652 (Sept. 14, 1995) (the "Second Order on Reconsideration").
[6] Third Order on Reconsideration, PR Docket No. 89-553, *et al*, 78 R. R. 2d 1727, 1730 (Oct. 20, 1995).
[7] See Lewis Carroll, Alice in Wonderland and Through the Looking Glass, 197-98 (Simon & Schuster 1982) ("When I use a word," Humpty-Dumpty said in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less.").
[8] PCI Opposition at 5 (quoting Second Report and Order, 10 FCC Rcd 6884 , 6898 (1995)).
[9] Second Report and Order, supra, 10 FCC Rcd at 6898.

affirmative rule on the silence of the agency), that the "substantial service" alternative was all along intended to apply in lieu of both coverage benchmarks is unwarranted.

III. PCI's Arguments Regarding The Merits Of The Rule Were Made To, And Rejected By, The Commission On Earlier Reconsideration Of The Rule.

PCI's belated complaint that the coverage requirements are too strict, because of the presence of existing systems in certain MTA blocks, challenges a basic premise of the rule that was adopted, to wit:

> regardless of the extent of the presence of incumbents within its MTA block ... [w]e believe that this will also serve to discourage applicants who have a limited ability to provide coverage within an MTA from seeking MTA licenses for anticompetitive reasons.[10]

PCI did not even seek reconsideration of this rule, when promulgated. It should be noted, however, that the same issue of the alleged difficulties of meeting the coverage requirements in San Diego, which now is raised by PCI,[11] was raised on reconsideration by Advanced Mobilecomm Inc. ("AMI"), the entity from whom PCI intends to acquire a San Diego 900 MHz system, which, according to PCI, is the basis for its concern here.[12]

The Commission expressly denied AMI's request for reconsideration in the Second Order of Reconsideration,[13] as to which neither AMI nor PCI timely sought further reconsideration or review thereof. Now PCI (claiming to stand in AMI's shoes as the "putative holder" of the San Diego 900 MHz license) supports the Commission's interpretation of what PCI says was always clearly "the Commission's intent," while failing to mention that AMI's own petition for reconsideration of the same issue was denied by the Commission. At the very least, this reflects PCI's fairly creative view of the administrative record.

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[10] Id. at ¶ 42.
[11] PCI Opposition at 1.
[12] Id. at 2-3. See Petition for Partial Reconsideration of the Advanced Mobilecomm, PR Docket No. 89-553. (June 5, 1995)
[13] Second Order on Reconsideration, supra, 78 R. R. 2d at 1651-1652.

IV. THE PROCEDURAL INFIRMITIES OF THE "SECOND ERRATUM" ARE COMPOUNDED BY AN UNREPORTED EX PARTE PLEADING AND THREAT TO SEEK A STAY OF THE AUCTIONS.

Unbeknownst to RMD (or to the rest of the public) at the time that RMD filed its Application for Review, just five days before the Second Erratum, Airwave West Inc., and "other parties," not identified in the letter, submitted a letter to the Chief of the Wireless Bureau requesting the very relief that was granted in the Second Erratum.[14] The Request threatened that a stay of the auctions would be sought if the requested relief was not granted. Specifically, in the Request, Airwave asked that the 900 MHz SMR coverage rule be "read to permit licensees ... to satisfy the FCC's coverage requirements through a 'substantial service' showing at any construction benchmark deadline." Putting aside whether the Request should have at least been filed at the time with the Commission as an *ex parte* presentation, it is extraordinary that the Bureau would have effectively acted upon this Request, without seeking public comment, and without even referencing it in the "Second Erratum."

The unreported filing of this Request, followed so quickly by the Bureau's Erratum should make it abundantly clear to any neutral observer that the Second Erratum involved more than an agency simply correcting some grammatical error in a rule on its own motion. Instead, this was a substantive change in the rules, made in response to the urging of one party and unnamed others, without opportunity for public comment, and made at a time just before the commencement of auctions, when the Bureau knew competing interests would be substantially effected. Such one-sided rulemaking implicates all of the dangers that the Commission's public notice and comment procedures are meant to address. By circumventing those procedures in this case, the Bureau has failed to comport with the most elemental principles of administrative law and, therefore, its new rule should not stand.

CONCLUSION

The "Second Erratum" was issued in substantial violation of the Commission's procedural rules, the Administrative Procedures Act, and elementary principles and of administrative due process and fairness to

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[14] See Note 1 supra.

interested parties. Because the 900 MHz SMR auction is ongoing, each day that the Second Erratum stands compounds the injury that it has caused. It should be rescinded forthwith.

Respectfully submitted,

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January ~~8~~ 11, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply was sent by U.S. mail, postage prepaid, this ~~8th~~ 12th day of January, 1996, to each of the following:

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