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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
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
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

COMMENTS OF SMR WON
IN RESPONSE TO
SECOND FURTHER NOTICE OF RULE MAKING

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February 15, 1996

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SUMMARY OF ARGUMENT

SMR WON, a trade association representing small business SMR incumbent licensees in the 800 Mhz band, among others, has reached tentative agreement, subject to Commission approval, with other representatives of the 800 MHz SMR industry, for the management of the Lower 230 Relocation Channels, i.e., the Lower 80 SMR channels and the General Category Band.

Under the joint industry proposal, existing SMR and private radio licensees, including relocated incumbents, would be permitted to enter into full market settlements prior to auction on constructed and operating co-channels in an EA market in the Lower 230 Relocation Channels, thereby eliminating mutual exclusivity, and would, as a result, obtain EA licenses for those channels. Channels so settled would be subtracted from the blocks of frequencies available for auction. In return for permitting incumbents and relocatees to obtain shared EA licenses as a result of market settlements prior to auction in the Lower 230 Relocation Channels, the designated entity eligibility restrictions would be lifted on two of the three proposed 50 channel blocks in the General Category Band. All blocks would be subject to the subtraction of channels on which incumbent co-channel licensees and relocatees have reached full market settlements prior to the auction notice(s) for the Lower 230 Relocation Channels, and a sufficient period of time would be

available to permit relocation, determination of which licensees share co-channels following the relocation process, and to permit the negotiation of full market settlements among co-channel incumbents.

SMR WON's other comments incorporate this industry compromise proposal. SMR WON's comments throughout are designed to provide an effective competitive environment for incumbents, prevent the creation of "second class" licenses, and protect incumbent rights in the relocation process.

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COMMENTS OF SMR WON
IN RESPONSE TO
SECOND FURTHER NOTICE OF RULE MAKING

SMR WON, by its attorneys, hereby submits its comments in response to the Federal Communications Commission's ("Commission" or "FCC") Second Further Notice of Proposed Rule Making in the above docket.[1/]

[1/] By Public Notice of January 16, 1996, the comment period was extended to February 15, 1996.

SMR WON is a trade association formed in 1994 to assist members in the Specialized Mobile Radio (SMR) industry -- primarily small businesses providing SMR and paging services to the public throughout the United States.

In response to this Second Further Notice of Proposed Rule Making ("Second Notice") SMR WON conducted a survey of its members. As a result of this survey, SMR WON initiated many of the proposals set forth in these comments and initiated a series of continuing discussions with major industry representatives and other trade associations. SMR WON is pleased to report that many of its initiatives for the Lower 230 Relocation Channels, among others, have received widespread favorable response from the SMR industry. The discussions have been fruitful and productive. SMR WON has reached agreement with industry representatives and AMTA on many of the proposals advanced herein. The industry understands the importance of continued competitive service from small business local and regional network service to mid-sized and rural market populations, and that such communications business structures can and should co-exist in a robust, growing, integrated economy.

I. Introduction

SMR WON's Charter - Ensure Small Business Competitiveness in Providing Mobile Communications Services

SMR WON always has had as its core mission the economic survival of displaced incumbents. SMR WON believes this is the Commission's stated goal, also. "Relocation" to "comparable facilities" assumes continuity of service; included within continuity of service is the ability to compete effectively on the new "communications superhighway" resulting from the proposed displacement of incumbents.

If, however, relocation does not permit effective competition in the redefined EA markets, i.e., were relocation indirectly or inadvertently to create uneconomic conditions or reduce the small business incumbents to "second class" competitive status, small businesses, and the special bundle of services they offer to the public, will be destroyed in this proceeding by government fiat. SMR WON's goals are to ensure that the solutions reached in this proceeding, through regulatory management of the Relocation Blocks (Lower 230 Relocation Channels) and through resolution of the "comparable facilities" definition, will permit effective competitive conditions for small business incumbents <u>within</u> the new geographic exclusivity markets created by the Commission in this proceeding to benefit Nextel's proposed new Communications Superhighway Bypass.

Most encouraging in the past two months has been the developing industry consensus on a compromise solution to permit incumbents to compete effectively following relocation. The industry solution calls for management of the Relocation Blocks to ensure effective competition, a level playing field, and fairness in the treatment of incumbents.

II. FCC Request for Comments

Having determined in the First Report[2/] to clear the top 200 SMR channel band, auction it to nationwide service providers, and relocate incumbents, various questions remain regarding fair and effective relocation of small business incumbents which required further study. SMR WON reserves all rights to challenge or seek reconsideration of the First Report. It's comments herein to the Second Notice should not be construed as acquiescence to the decisions made in the First Report.

Accordingly, the Commission requested comment in the Second Notice on the following issues, among others:

- Licensing of Lower 230 Relocation Channels, including:
- Geographic Area Licensing
- Service Areas
- Channel Assignments

[2/] First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking in PR Docket 93-144, released December 15, 1995. The FCC's decision will be hereafter referred to as the "First Report." The Second Further Notice of Proposed Rulemaking will be referred to as "Second Notice."

- Operational and Eligibility Restrictions
- Channel Aggregation Limits.
- Definition of "comparable facilities"
- Definition of "good faith negotiations", and the relation between "good faith negotiations" and "comparable facilities".
- Channel Block Disaggregation - Upper 200 Channels
- Partitioning - Upper 200 Channels
- Mandatory Relocation Issues - Cost Sharing

To some extent this requires re-examination of the Commission's First Report conclusions about the Lower 230 Relocation Channels presently reserved for SMR licensees. To the extent that SMR WON's comments reflect a need to reconsider those First Report decisions, these comments may be taken as a timely petition for reconsideration. SMR WON may file a formal Petition for Reconsideration or otherwise preserve its rights at the appropriate time. In addition, the industry consensus described herein promises to present the Commission with a workable solution to the contentious relocation and economic Darwinism problems presented in this docket.

A. General Comments - The Present and Future Characteristics of the Lower 230 Relocation Channels

There are certain indisputable facts about the Relocation Blocks - the Lower 230 Relocation Channels:

1. The General Category Band and, to a significantly lesser extent, the Lower 80 Channel SMR Band, will serve as the relocation site.

2. The Lower 230 Relocation Channels presently are fully licensed.

3. The Lower 80 Channel Band is fully constructed. Many small business incumbents who will be displaced from the Upper 200 Band presently operate facilities in this band.

4. The General Category Band is partially constructed. To the extent constructed, it is occupied by private operators,[3/] small business SMR incumbent operators who have been providing SMR service to their markets for many years, and new licensees who have been constructing facilities in the past 3 years. The unconstructed General Category channels are licensed primarily to two categories of SMR operators - a) Nextel and other wide-area operators who are approximately half-way through their extended construction periods, and b) those licensees without extended implementation periods.

[3/] Private operator licensing represents a minority of such facilities.

The Lower 230 Relocation Channel blocks have been selected for the imposition of three conflicting regulatory programs:

1. The blocks will continue to serve as the site for "wide area", local SMR and private radio licensees operating within their existing 22 dBu contours;

2. The General Category block, and the Lower 80 channel block, will serve as the new home for relocated licensees from the Top 200 channel band;

3. The Commission proposes to auction the band to Designated Entities.

These three regulatory goals cannot and will not peacefully coexist. They are too complex to effectively implement; there will be a hodge-podge of differing exclusive licenses -

a) wide area licenses,
b) licenses defined by 22 dBu site-specific contours,
c) "geographic consolidation licenses" defined by a licensee's overlapping 22 dBu contours, and
d) EA licenses.

The result is a regulatory and market competition mess. The small, 150-channel General Category band has become the dumping ground for conflicting regulatory prescriptions which the Commission did not fully resolve in the First Report.

The Lower 230 Relocation Channel SMR bands cannot serve as effective competition relocation sites for incumbents, and also be auctioned in their entirety, as the Commission proposes. While the Commission has made a number of significant proposals

in the Second Notice to limit auction eligibility, impose construction periods, and make other concessions to incumbents in the proposed auctioning of the Lower 230 Relocation Channels, parameters which SMR WON can support in some measure[4] if an industry solution does not emerge, SMR WON believes an industry solution is preferable, and is continuing to work toward that end. Many of the comments simultaneously being filed herein reflect the general agreement on the consensus proposals advanced by major representatives of the industry.

B. SMR WON's Industry Solution for Regulatory Management of the Lower 230 Relocation Channels.

SMR WON supports using the Lower 230 Relocation Channels for relocation of incumbents. Since the band substantially is licensed already, this means wide area licensees with sufficient available channels in the General Category Band and who win EA market auctions, will relinquish existing frequencies to incumbents they are relocating, or purchase them from others.[5]

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[4] See discussion at Section III. The Commission's proposals generally are summarized at ¶s 309 - 318 of the Further Notice.

[5] An outstanding question is whether EA winners in the top 200 band may transfer unconstructed facilities to relocated incumbents, or must only transfer constructed facilities. §90.609(b) presently would prevent "channel swaps" between constructed and unconstructed facilities.

SMR WON is concerned about assignment of unconstructed facilities, since its members have been the ones most harmed by the Commission's numerous waivers and exceptions to this rule in the past. SMR WON believes §90.609(b) and the newly incorporated (continued...)

To create a level playing field for relocated incumbents, to ensure effective competition, to avoid imposing "second class", site-specific licenses, to create a secure and easily manageable relocation site, and to eliminate the conflicting regulatory objectives (relocation vs. auction) currently imposed on the Lower 230 Relocation Channels, among other public interest considerations, SMR WON proposes the following solution. Following the pre-auction and post-auction voluntary negotiation periods, and possibly following the mandatory relocation periods applicable to the Top 200 Channel auction, and prior to any auctions of the General Category channels, all licensees in the Lower 230 Relocation Channels, including voluntary and mandatory relocated incumbents, private

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[5](...continued)
§90.609 (d) is appropriately applied in most instances, and should remain.

Presumably the FCC envisions the relocation mechanism working as follows: First, incumbents and an existing licensee enter into an agreement concerning the relocation facilities, during the voluntary and mandatory renegotiation period applicable to the Top 200 Channel Block. The Commission is informed of these agreements. Then, the EA licensee or proposed licensee constructs those facilities. Following construction, the licensee files an application for assignment of the constructed relocation frequencies, the assignment is granted, and then the incumbent licensee is relocated.

SMR WON proposes that the Commission accept requests for waiver of 47 CFR § 90.609 from applicants proposing to transfer unconstructed facilities to incumbents as part of a relocation plan. The applicant must demonstrate that the proposed transfer is pursuant to an agreement to clear incumbents from the Top 200 channel band, either through channel "swaps", or an agreement by an EA licensee to relocate an incumbent. The transferor must demonstrate that it complies or will comply fully with the Commission requirements for relocation.

radio licensees, and constructed wide area licensees in each EA, will be permitted to enter into channel-by-channel settlements, joint ventures, consortia, or other agreements, including EA market partitioning and channel disaggregation, to eliminate mutual exclusivity on the Lower 230 Relocation Channels within the EA. If such agreements result in an "EA market" settlement between licensees on the Lower 230 Relocation Channels, the Commission would award an EA license to the resulting "joint venture" licensee, including the award of "partitioned" licenses to those not desiring to join in the settlement, and that channel would not be auctioned.[6]

To encourage market settlements, to provide equality of treatment of all licensees and incumbents in the Lower 230 Relocation Channels, SMR WON proposes that the Commission adopt the industry consensus by which a single incumbent on any

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[6] Such partitioned licenses could be awarded based on an existing licensee's 22 dBu service area. For example, if four SMR licensees and one private radio licensee have constructed facilities and are operating on the same General Category or Lower 80 SMR channel in an EA, and the private radio licensee and three of the four SMR operators agree to form a partnership to operate that frequency in the EA, except in the territory of the fourth SMR operator's 22 Dbu service area, then two licenses would be awarded - one to the resulting joint venture, and one to the non-participating SMR operator, who may not want to participate in the capital calls necessary to build out the frequency throughout the EA. This is not to assume that market settlement joint ventures would be limited to SMR operators. SMR WON would encourage all licensees to enter into such arrangements. However, if two or more of the licensees on the same channel are willing to make joint arrangements for the provision of communications services, they should not be prevented from obtaining an EA license, less the partitioned area licensed to those who for, whatever reason, do not wish to join in such a constoria.

frequency in a market, or all co-channel incumbents within the EA, may request an EA license on that frequency without an auction and be permitted to partition the EA license subsequently.

SMR WON believes this industry approach will encourage market settlements during the voluntary negotiation periods. However, SMR WON believes it may still be necessary to include incumbents relocated during the mandatory relocation period in this plan. The Commission has established voluntary and mandatory negotiation periods for good reason - it does not know whether the economic incentives made available during the "voluntary negotiation" period are sufficient to existing licensees; further the Commission does not know how successful the period will be, because its success depends upon the pre-auction initiation and completion of discussions by a presumed EA winner - a tall order, indeed.

Therefore, the level playing field and effective competition solutions may not effectively be implemented for all relocated incumbents until after the mandatory relocation period has passed.

The proposed market solution would promote competition by creating additional EA licensees from among those currently providing service to the public -- existing constructed licensees

and relocated incumbents. This proposal is a fair, reasonable, and equitable solution to relocation and incumbent rights. It presents a different "balancing of competing interests" than that arrived at by the Commission in the First Report. Based on its discussions with other industry organizations, SMR WON understands that AMTA, Nextel, and others support this plan in general. SMR WON also understands that the proposal is similar to that made by PCIA in its opening comments and reply comments to the First Report. While PCIA's proposed "market settlement" was not accepted by the Commission for the Top 200 channels, a market settlement plan is to be encouraged on the Relocation Bands, i.e., the Lower 230 Relocation Channels in order to afford relocated incumbents an opportunity to compete effectively.

The Commission has used eligibility restrictions and mutual exclusivity settlements to facilitate mobile radio licensing in the past. In cellular telephone licensing, the FCC permitted both wireline and non-wireline applicants to enter into full market settlements to avoid mutual exclusivity. The program has proven it can reduce regulatory burdens, and promote the public interest and rapid deployment of services. Many highly successful mobile communications ventures, both wireline and non-wireline, resulted from such full-market settlements and are operating today.

The full-market cellular MSA settlements accelerated the introduction of service. The joint venture or partnership resulting from the full-market settlement usually was the first to provide cellular service; the introduction, or mere imminence, of first service then generally accelerated the incentives for the other operator to settle whatever disputes were outstanding (usually at the FCC in the form of Petitions to Deny) and move more rapidly toward providing service.

In cellular, the FCC recognized the public interest advantages of creating competitive economic conditions for those most qualified, based on past service, to provide service to the public. Accordingly, the Block B wireline set-aside resulted. All local exchange carriers were eligible to apply, and full market settlements were the rule, not the exception, in the Metropolitan Statistical Area licensing (MSAs). Full or partial settlements also were very common in the Rural Service Area (RSA) licensing. The FCC found that those already in the industry were well positioned to provide rapid and efficient mobile communications services, and had a strong incentive to settle questions of mutual exclusivity and get on with the business of providing mobile service.

The Lower 230 Relocation Channels should be the home for small business and private radio licensees already licensed there. The General Category Block should encourage market

settlements to permit displaced licensees to compete effectively with EA licenses. At the end of the process proposed by SMR WON and others, following the relocation sort-out, there would be virtually no site-specific, "second class" licenses - there would be only EA licenses held by single or joint venturer incumbents already providing service in the market, a large majority of whom the Commission has forcibly displaced through this rule making in order to clear and create the "Supervalue Superhighway" in the Top 200 channels. There would be only the occasional site-specific license held by a few operators - or as a result of market partitioning. The overwhelming majority of the licenses would be EA licenses.

III. Auctions in the General Category Band -Comments on Specific Proposals

The Commission has made the following proposals for the General Category bands:

1. The FCC "tentatively concludes" that the "lower 80 and General Category channels should be converted to geographic area licensing."[7]

2. EAs are the most appropriate service areas for the Lower 230 Relocation Channels.[8]

3. There will be "no mandatory relocation mechanism for SMR operators in the lower 80 and General Category Band."[9]

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[7] Second Notice, ¶294.

[8] Id. ¶297.

[9] Second Notice, ¶315.

4. No incumbent would be allowed to expand beyond its existing service area and into the geographic area licensee's territory without the prior consent of the geographic area licensee.

5. An incumbent's 22 dBu contour is protected.

6. Comment is sought on whether the proposal "strikes the appropriate balance between the competing interests of market-area and incumbent licensees."

7. Conversion of incumbent site-specific licenses to geographic licenses is permitted.[10]

SMR WON's comments are presented consistent with the preceding discussion concerning full market settlements in the Lower 230 Relocation Channels.

A. Auctions in the Lower 230 Relocation Channels. Any auctions must be subject to, and follow, implementation of the industry consensus outlined herein. If industry consensus is not reached, there should be no auctions in these bands.

B. Lower 80 Band Auctions. In the lower 80 bands, auctions are a complete waste of resources if the Commission proposes that mandatory relocation not be required, since there is no other place for incumbents to go. The band is fully licensed to existing operators, who will remain there, unless the winners of the upper 200 band auction use a portion of the lower 80 band otherwise constructed and operated by them for relocation. There is unlikely to be any excess capacity for

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[10] Id., ¶317.

auction on these few channels, given the present spectrum congestion. SMR WON does not support mandatory relocation; indeed, SMR WON supports the Commission's proposal that there not be mandatory relocation on the Lower 230 Relocation Channels.[11]

There is, however, another problem with the Commission's proposal. Since there is no mandatory relocation in a band that is already fully licensed, such as the Lower 80 Channel blocks, the Commission is forcing incumbents to buy back spectrum that: a) they either presently are licensed on, or, b) to which they have been relocated involuntarily as a result of this rule making. For the relocated incumbent, this is a double blow. First, the incumbent is forced off the most valuable Upper 200 channels, forced to relocate and retune customer equipment to new channels, and then is forced to buy back the frequencies on which he has been relocated.

The Commission recently has taken the position in a number of cases that auction procedures cannot be applied to applications filed prior to August 10, 1993, the date on which the Commission received auction authority. The same should apply to licenses for frequencies originally issued to licensees prior to 1993. This should be so especially where incumbents are relocated. The Lower 230 Relocation Channels should not be subject to auctions.

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[11] See Second Notice, ¶315.

C. General Category Auctions. In the General Category Band, the impact of auctions is more complex. Following relocation, the General Cateorgy Band will look much different than it does now. Small business incumbents currently located in the Top 200 Band will be substantially relocated to this band. Nationwide licensees who currently have licenses in the General Category Band will be relinquishing these licenses in favor of incumbents. Those wide area licensees who fail to construct will relinquish their licenses within the next two to three years, unless they obtain waivers or extensions as set forth in the First Report's decisions. Implementing the industry consensus solution on eligibility and eliminating mutual exclusivity in an EA will further the goals of the First Report.

D. The Spectre of Auction Speculation: Vigorous Enforcement Mechanisms are Necessary

If the Lower 230 Relocation Channels are auctioned as proposed in the Second Report, incumbents could be placed at a severe competitive disadvantage. In any auction, the likely players would be:

1. Incumbent designated entities, i.e., small businesses - existing licensees who are currently operating in the Lower 80 SMR Band, and who have been relocated to the General Category Band.[12]

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[12] SMR WON assumes, and proposes, that any auctioning of the Lower 80 SMR Band and General Category Band cannot take place until the relocation process is completed. Otherwise, the Commission's promise not to disturb relocated incumbents further would not be fulfilled, and auction winners in advance would not know the full extent of the impediments to building out the band at the time of auction.

2. Designated entities supported by big players whose stated ownership interest is less than 20%, but whose resources committed to the auctions far exceed those of incumbent designated entities.

3. Speculators.

Currently, as the Commission, the FTC, and the SEC are aware, unscrupulous promoters are taking advantage of a controversial loophole in the securities laws - namely, the General Partnership "exemption" from registration.[13] These promoters, using infomercials and aggressive telemarketing techniques, induce unsophisticated members of the general public to invest in communications general partnerships. Currently these promoters are recruiting the public to invest in Designated Entity auctions. By investing 10% of the auction price, the pitch goes, the investor can "leverage" his $10,000 or $20,000 investment into a bid for PCS narrowband Designated Entity auctions, for example, or other auctions, to obtain a valuable resource.

Even if these speculators do not win the auction, their presence, even for a few rounds, drives up the bidding to artificially high and uneconomic prices. Rather than awarding the license through auction to the winner who "values the spectrum the most", the Commission, in the Designated Entity

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[13] The general partnership exemption is not a complete exemption from the securities laws. See SEC v. Howey, 318 US 293 (1946); United Housing Foundation v. Forman, 421 US 837 (1975); SEC v. Glenn W. Enterprises, 474 F. 2d 476 (9th Cir., 1973); Hocking v. Dubois, 885 F. 2d 1449 (9th Cir), cert. den. 494 US 1078 (1990); Kick v. Hankins, 928 F. 2d 1471 (9th Cir. 1991); Bailey v. J.W.K. Properties, Inc.. 904 F. 2d 918 (4th Cir. 1990)

auctions, actually is creating an artificial economic structure, by failing to enforce the securities laws and FCC processes to keep speculators from artificially driving up auction prices.

Thus, SMR WON's small business designated entity members are likely to find themselves unable to win the Lower 230 Relocation Channel auctions based on their present resources[14], and thereby preserve the very frequencies that the FCC has attempted to reserve for them at paragraphs 315-317 of the Second Notice.

The industry consensus solution would prevent such rank speculation in portions of the Lower 230 Relocation Channels by limiting eligibility to incumbent licensees, including relocatees following the Top 200 Channel auction, and permitting market settlements to eliminate mutual exclusivity.

E. Geographic Area Licensing: SMR WON supports this concept within the context of an industry settlement permitting incumbents to form pre-auction consortiums within EAs, and to obtain EA licenses. All licensees, not just auction winners, must have the same license exclusivity area to compete effectively.

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[14] SMR WON's small business members have concentrated their capital investments into improving their systems, not to accumulating capital for the auctions.

F. EA License Areas. The Commission has proposed to use EA geographic markets for auctions on the Lower 230 Relocation Channels. SMR WON supports EA geographic markets for auctions so long as the Commission provides EA licenses as part of full market channel settlements to eliminate mutual exclusivity among incumbent licensees in the band. See SMR WON's discussion infra concerning fair and equitable compensation, under the "comparable facilities" discussion. Relocated incumbents should not be penalized for being displaced from their valuable spectrum, simply to be later hounded out of the market because the Commission will not compensate them adequately to create a level playing field. The proposed industry solution resolves this issue.

G. No Expansion of Incumbent Service Areas. The Commission has proposed that incumbents, i.e., those who cannot be relocated, be confined to their 22 dBu contours for providing customer service. SMR WON opposes this rule as discriminatory, confiscatory, unequal treatment of similarly situated licensees, unless the market settlement proposed herein is adopted to create an opportunity for existing licensees to obtain EA licenses.

Under the industry plan proposed, incumbents would obtain EA licenses through settlement in addition to the 22 dBu coverage area they currently enjoy. The EA market settlements among incumbents in the Lower 230 Relocation Channels would be