BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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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
	)	
Implementation of Sections 3(n) and 322 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

To: The Commission

REPLY COMMENTS
OF
DOW CHEMICAL TELECOMMUNICATIONS CORP.

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Dated: March 1, 1996

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SUMMARY

Dow Chemical Telecommunications Corp. ("DCTC") urges the Commission to protect incumbent licensees in the upper 800 MHz 200-channel block from relocation to non-comparable systems. DCTC supports adoption of the Commission's proposal to require that all licensees of an Economic Area ("EA") negotiate with an affected incumbent. However, this proposal should be expanded so that all EA licensees who are interested in an incumbent's system be required to negotiate together with the incumbent, regardless of where that EA licensee is located.

DCTC urges the Commission not to give EA licensees an inequitable advantage in the negotiation process by enabling EA licensees to foist a "bad faith" determination upon incumbents during the mandatory negotiation period.

DCTC generally agrees with those participants that support the Commission proposals to enable incumbents to receive equivalent or superior facilities in the relocation process. However, DCTC must receive 800 MHz facilities as replacement for its existing system. The Commission must guarantee that incumbents that are involuntarily relocated will receive 800 MHz assignments.

Non-SMR incumbents should not become victims of the Commission's decision to auction these channels to commercial providers. These licensees must be permitted to modify and expand their systems indefinitely.

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To: The Commission

REPLY COMMENTS
OF
DOW CHEMICAL TELECOMMUNICATIONS CORP.

Dow Chemical Telecommunications Corp. ("DCTC"), by its attorneys, hereby respectfully submits these Reply Comments in response to the Second Further Notice of Proposed Rule Making ("Notice"),[1] in which the FCC proposed to auction the upper block of two hundred (200) 800 MHz channels to wide area Specialized Mobile Radio (SMR) Service providers.

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[1] FCC Report No. DC-95-150 (December 15, 1995), First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making.

I. PRELIMINARY STATEMENT

1. DCTC, a subsidiary corporation of the Dow Chemical Company ("Dow"), is the licensee of a twenty-channel 800 MHz trunked system that is used by Dow to operate an extensive petrochemical plant in Freeport, Texas.[2/] This plant employs 7,000 persons, who perform demanding tasks in a plant environment which involves highly toxic and volatile chemicals and related, pressurized substances. In addition to the workplace safety demands inherent in the operation of any chemical plant of this magnitude, effective communications are also essential for the well being of the surrounding population and the environment.

2. The Dow system is used for internal communications to support day-to-day operations, including the dissemination of critical instructions and the dispatch of personnel, equipment and supplies required for the safe operation of the plant. This communications system is loaded with over 2,600 portable and vehicular transceivers. DCTC utilizes these facilities in 301 talk groups to facilitate communications among workers charged with the

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[2/] The DCTC system is composed of twenty paired 800 MHz assignments, sixteen of which are located in the upper 200-channel block.

operation of 105 plants within this 300-square-mile area. DCTC also depends upon this communications capability to facilitate communications with internal and external emergency response personnel. Finally, this communications capability is essential for the monitoring and data transfer capacity which is so critical for safe operation of the plant on a day-to-day basis.

3. The Dow 800 MHz telecommunications system is the epitome of the traditional trunked system, designed to provide dispatch service to a single, well-defined locale. Congress did not instruct the FCC to restrict the growth and viability of single user, internal systems in order to create regulatory parity between wide-area SMRs, cellular, PCS, and other commercial mobile radio services. DCTC opposes mandatory relocation of incumbent licensees because it will unduly burden these users through imposition of an imbalanced bargaining structure, unwarranted disruption of services, potential equipment difficulties, and placement in less desirable spectrum with limited potential for future growth.

II. COMMENTS

A. Negotiation Rules Must Encourage System-wide Relocation

4. The FCC has proposed that 800 MHz incumbents who are notified by several Economic Area ("EA") licensees of an intention to relocate may require that negotiations to relocate the incumbent include all EA licensees who have notified the incumbent. DCTC supports the many participants in this proceeding that embraced this proposal. PCIA at 15; Duke Power Company at 8. DCTC believes that the scope of this proposal should be broadened to enable incumbents to compel one negotiation among all licensees interested in any portion of an incumbent's system. In this way, an incumbent with a system that traverses multiple EAs or frequency blocks can negotiate simultaneously with those multiple EA licensees and can more readily receive an offer for systemwide relocation.

B. The Commission Should Not Adopt a Rebuttable Presumption of Good Faith During the Mandatory Negotiation Period

5. The Commission plans to impose a rebuttable presumption of good faith upon any offer for comparable

facilities which is made during the mandatory negotiation period. DCTC agrees with the participants in this proceeding who pointed out that this proposal to apply a rebuttable presumption of good faith is unfair to incumbents. Duke Power Company at 10; Fresno Mobile Radio, Inc. at 20. Incumbents must not be forced into accepting an offer which may technically meet the parameters for comparable facilities but which, for very valid reasons, would be insufficient as a replacement for the incumbent's present system. In addition, any presumption should work in favor of the party making the offer, not just the EA licensee/offeror.

C. The Definition of Comparable Facilities Should Include a Guarantee of 800 MHz Spectrum

6. The Commission's proposed Section 90.699 provides that:

> [A]n EA licensee may relocate incumbent licensees in its EA by providing "comparable facilities" on other frequencies in the 800 MHz band. Such relocation is subject to the following provisions:
>
> > (a) EA licensees may negotiate with incumbent licensees . . . for the purpose of agreeing to terms under which the incumbents would relocate their operations to other channels in the 800 MHz band, or alternatively, would accept a sharing arrangement with the EA licensee that may result in an otherwise

> impermissible level of interference to the incumbent licensee's operations . . . .

47 C.F.R. § 90.699. DCTC believes that Section 90.699 must be clarified so that incumbent licensees are conclusively guaranteed relocation within the 800 MHz spectrum.

7. Only the 800 MHz spectrum offers true comparability. In the case of the Dow System, replacement of 16 of the 20 channels with assignments from some other portion of the spectrum would be incompatible and totally unacceptable. This system can transmit through the concrete walls and around the steel vessels and other obstacles present in the Dow plant. This system offers high voice resolution, so that transmissions of safety and operational information are not misunderstood by the intended recipient at a distant site in the plant or at an outside location.

8. The Commission's definition of comparability, while extensive, must guarantee relocation to other 800 MHz channels. DCTC agrees with those commenters that expressed the view that only 800 MHz will suffice to replace their systems and meet their operational needs. Council of Independent Communication Suppliers at 4; Industrial

Telecommunications Association, Inc. at 10; Keller Communications, Inc. at 4; Puerto Rico at 6; SMR WON at 30.

9. An ironclad guarantee of 800 MHz replacement spectrum is needed in light of the congestion in those areas designated for relocation by the Commission. Indeed, the lower 80 channel block and General Category channels are severely over-crowded. E.F. Johnson Company at 8; Fresno Mobile Radio, Inc. at 23; Pittencrieff Communications, Inc. at 8; SMR WON at 5. Although the Commission has proposed lifting the freeze on General Category applications in order to enable relocations from the upper 200 channels, the high occupancy of these channels means that many incumbents will not be relocated to 800 MHz facilities unless the Commission rules guarantee such relocation.[3/]

10. This situation is exacerbated by the Commission's proposal to auction the remaining channels in the lower

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[3/] DCTC agrees with the participants that urged the Commission to permit expansion and modification of existing non-SMR licensee systems. Duke Power Company at 12; E.F. Johnson Company at 6; General Motors Communications Corporation at 4; Industrial Telecommunications Association, Inc. at 8; PCIA at 18. These licensees should have the absolute right to continue to operate as they do today. In addition, these licensees should be permitted to expand and modify their systems in the future as their business needs evolve. These non-SMR licensees should be considered Private Mobile Radio Service licensees, not Commercial Mobile Radio Service licensees. E.F. Johnson Company at 8.

80-channel block and General Category channels. DCTC agrees with participants that urged the Commission to refrain from auctioning the lower 80-channel block and the General Category channels, at least until incumbents have been successfully relocated from the upper 200 channel block. Pittencrieff Communications, Inc. at 8; PCIA at 14; Fresno Mobile Radio, Inc. at 23. The Commission must recognize the inherent qualities of 800 MHz systems, and protect DCTC and other licensees who have made large investments in reliance on the quality and safety aspects of 800 MHz systems. Dow simply cannot accept an inferior system and continue to operate its petrochemical plant with the same level of safety now available.

11. During the voluntary negotiation period, incumbents are free to accept offers for replacement facilities located in alternative portions of the spectrum. However, if no voluntary agreement can be reached, incumbents must not be forced to accept facilities in other portions of the spectrum. Unless the Commission includes a guarantee of 800 MHz spectrum for all incumbents relocated involuntarily, then incumbents will be relocated to inferior portions of the spectrum. This, in essence, means that incumbents will receive replacement systems which provide lower quality communications.

D. The Definition of Comparable Facilities Needs to Be Broadened

12. The Commission proposed that comparable facilities be defined as: (i) the same number of channels with the same bandwidth; (ii) relocation of the incumbent's entire system, not just those channels desired by a particular EA licensee; and (iii) providing the relocated incumbent with a 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of its original system. DCTC believes this definition is a good start. However, DCTC shares the concerns of many participants that the Commission needs to address additional issues. For example, DCTC agrees with U.S. Sugar that a fourth element, serviceability, should be included in the definition of comparable facilities. United States Sugar Corporation at 9.

13. DCTC believes that reimbursable costs should include all reasonable expenses of relocation. SMR WON at 37. For example, the Commission should permit reimbursement of reasonable engineering, attorney's and consultant's fees incurred by incumbents during the relocation process.

E. The Negotiation Timetable Will Embroil the FCC in Disputes

14. In the PCS proceeding, the Commission permitted a two-year voluntary period followed by a one-year involuntary period. ET Docket No. 92-9; GEN Docket No. 90-314. The same time frame was proposed in the Mobile Satellite Service proceeding, WT Docket No. 95-18. DCTC fails to see why the Commission should alter this framework now and impose a one-year voluntary period and a two-year mandatory period. Council of Independent Communication Suppliers at 6; Duke Power Company at 7.

15. Given the highly contentious nature of the rebuttable presumption and comparable facilities proposals, DCTC believes that incumbents, EA licensees, and the Commission would all be better served by a lengthier period in which parties may voluntarily negotiate the terms of relocation. The Commission should permit parties to negotiate in the spirit of give-and-take for a two-year period, rather than impose arbitrary delineations upon participants and provide them only one year in which to reach a mutually satisfactory agreement.

III. CONCLUSION

16. DCTC supports adoption of the Commission's proposal to require that all EA licensees with interests in an incumbent system negotiate simultaneously. However, this proposal needs to be modified so that incumbents can sit down with all licensees interested in any portion of the incumbent system both from a spectral and geographic point of view.

17. The onus of "good faith" negotiation is unnecessary. However, if it is adopted in the manner contemplated by the Commission, it should be applied to both incumbents and EA licensees.

18. The Commission's definition of comparable facilities is a good start. DCTC believes it should be clarified so that incumbents are assured of relocation to 800 MHz spectrum. Additionally, the Commission should ensure that all relocations from the upper 200-channel block are completed before determining whether to auction the lower 80 channels and 150 General Category channels.

WHEREFORE, THE PREMISES CONSIDERED, Dow Chemical Telecommunications Corp. respectfully submits the foregoing

Reply Comments and requests that the Federal Communications Commission take action in a manner consistent with the views expressed herein.

Respectfully submitted,

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