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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	)	**PP Docket No. 93-253**

To: The Commission

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REPLY COMMENTS
OF THE
INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.
AND THE
TELEPHONE MAINTENANCE FREQUENCY ADVISORY COMMITTEE

Submitted by:

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Association, Inc.

K. M. Falkenthal, Chair
Telephone Maintenance
Frequency Advisory Committee

March 1, 1996

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S U M M A R Y

The Industrial Telecommunications Association, Inc. ("ITA"), and the Telephone Maintenance Frequency Advisory Committee ("TELFAC") are concerned that the AMTA/Nextel/SMR WON consensus plan is not equipped to respect and preserve the operating rights of non-SMR licensees.

The AMTA/Nextel/SMR WON plan seems to assume that the uses of the General Category channels are almost entirely SMR in nature. In fact, there are more than 3,450 non-commercial systems currently licensed on the 150 General Category channels. One licensee alone, Federal Express Corporation, holds licenses for more than 166 base stations operating on a single General Category frequency.

Non-SMR licensees typically design their radio systems to accommodate specific, clearly defined requirements. In most cases, therefore, non-SMR licensees will not be able to compromise on their service requirements or otherwise adjust their operations to fit into an SMR-oriented settlement agreement.

With or without a formal plan General Category Pool incumbents and "relocatees" would, absent a licensing freeze,

have the opportunity to enter into cooperative operating agreements. The only element of the AMTA/Nextel/SMR WON plan that requires significant action by the FCC is the proposal to auction the "non-settled" channels. And that proposal, insofar as it involves the General Category channels, in our view, is suspect. ITA/TELFAC are of the opinion that it may be contrary to the 1993 Budget Act for the Commission to auction the spectrum within the General Category Pool.

The Commission has decided not to distinguish between border and non-border areas for purposes of licensing the General Category channels. In the Commission's view, applicants "will be able to assess the impact of more limited spectrum availability when valuing those market areas for competitive bidding purposes."

Across the eight Canadian border regions and the Mexican border region, less than one percent of the non-border General Category channels would be available for SMR licensing. In view of this facts, ITA/TELFAC must question the validity of the Commission's decision to rely on prospective bidders to ascertain the amount of General Category channels available for licensing in the border regions.

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To: The Commission

REPLY COMMENTS
OF THE
INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.
AND THE
TELEPHONE MAINTENANCE FREQUENCY ADVISORY COMMITTEE

The Industrial Telecommunications Association, Inc. ("ITA"), and the Telephone Maintenance Frequency Advisory Committee ("TELFAC"), sometimes hereinafter referred to as the "Joint Commenters," hereby respectfully submit these Reply Comments in response to the various comments filed regarding the Commission's proposal in this proceeding.

II. COMMENTS

AMTA/Nextel/SMR WON Plan

1. ITA/TELFAC will focus these reply comments primarily on the SMR "industry consensus," which has the general agreement of the American Mobile Telecommunications Association, Nextel Communications and SMR WON. We will also address what we believe to be an oversight in the Commission's approach to licensing the 150 General Category channels in the Canadian and Mexican border regions.

2. According to the comments filed by AMTA, Nextel and SMR WON, the proponents of the SMR "industry consensus," the essential elements of their plan are as follows:

- The 150 General Category channels should be grouped into three blocks of 50 channels each.
- Existing "lower channel" licensees [incumbent licensees on the lower block of 80 channels and on the 150 General Category channels, including licensees who formerly held authorizations for the upper block of 200 SMR channels but have been retuned to other 800 MHz frequencies] would have the opportunity to engage in settlement negotiations aimed at converting their authorizations to EA licenses.
- The lower channel settlement negotiations would take place before auctions are held for the 80 lower block channels and the General Category channels. The period for settlement negotiations would coincide with the period set aside for voluntary negotiations between EA licensees and incumbents in the upper block of 200 channels.

- The lower channel settlement process would proceed as follows:

  - For each of the 230 lower channels that have only one incumbent licensee in an EA, the incumbent could apply for an EA license for that particular channel.

  - For each of the 230 lower channels that have multiple licensees in an EA, these licensees could enter into settlements, buyouts, joint ventures, partnerships, or other arrangements. The end result of the settlement process would be that the surviving entity/licensee would receive an EA license for the channel.

  - "Partitioned" licenses would be awarded to those lower channel licensees who do not wish to join in the settlement process for the channel on which they are licensed.

  - Where there are multiple licensees on the same channel within an EA, these co-channel incumbents could also request an EA license for the frequency before auctions are held and then partition the EA license in a manner agreeable to all of the co-channel incumbent licensees in the EA.

- Before the lower channel auctions are held, the FCC would issue a notice identifying all the lower channels that have been "settled." These "settled" channels would no longer be available for EA licensing.

- The FCC would then auction all of the "non-settled" lower channels. These "non-settled" lower channels would consist of the appropriate lower channel auction blocks minus the channels licensed on an EA basis.

3. In the view of ITA/TELFAC, the most attractive feature of the AMTA/Nextel/SMR WON plan is that it would limit the use of auctions in a band clearly ill-suited for such use. As stated in the Comments filed by the Joint Commenters, ITA/TELFAC are not persuaded that it is in the public interest to apply auctions in such a mature band where there is little hope of identifying mutually exclusive applications, other than those induced through

the regulatory process. To the extent, therefore, that the AMTA/Nextel/SMR WON plan addresses the impropriety of auctions in the General Category Pool, ITA/TELFAC believe there is some benefit.

4. Nonetheless, ITA/TELFAC believe it is somewhat overstated to refer to the AMTA/Nextel/SMR WON plan as an "industry consensus." It is the consensus of three parties whose interests reside within the commercial, SMR industry. However, the "industry" within the General Category Pool extends far beyond Nextel and the combined membership of AMTA and SMR WON. For the plan to truly qualify as an "industry consensus," the views and concerns of non-SMRs are equally as relevant.

5. From the perspective of ITA/TELFAC, the primary weakness of the plan is that it seems to assume that the uses of the General Category channels are almost entirely SMR in nature. It is unlikely that an "overwhelming majority" of non-SMR licensees could or would entertain offers for buyouts, joint ventures, partnerships or similar arrangements. In reality, only SMR licensees would have any real incentive to participate in the proposed settlement negotiations. This is so because non-SMR licensees typically design their radio systems to accommodate specific, clearly defined requirements. In most cases, non-SMR licensees will not be able to compromise on their service requirements or otherwise adjust their operations to fit into an

SMR-oriented settlement agreement.

6. Under the plan, the "settled" channels would not be subjected to auctions. The "non-settled" channels would, however, be auctioned. For the lower block of 80 SMR channels, this arrangement seems acceptable. However, for the General Category channels, the consequences are unacceptable. To take one prominent example, Federal Express Corporation holds licenses for more than 166 base stations that operate on the General Category frequency 854.6125 MHz. Nationwide, this channel accommodates approximately 7,500 mobile units. It is Federal Express's primary 800 MHz channel.

7. It seems unlikely that there would be any significant settlement agreements for the frequency 854.6125 MHz, particularly since Federal Express's use of the frequency is so well-established. In terms of intensity of use, this frequency is apt to be as heavily utilized as any of the other 149 General Category channels. However, because Federal Express's usage patterns do not necessarily conform to the EA boundaries, the channel would likely be designated as "non-settled" and therefore subjected to auctions. Federal Express might then have to contend with a myriad of auction "winners" who would seek to fill in what little "white space" remains for this frequency. On the other hand, for other General Category channels that were deemed "settled," the EA licensee or licensees would not have to contend

with auction winners.

8. Viewed in the best light, the plan would relegate the non-SMR systems operated by critical industries to an afterthought. Viewed in the worst light, the plan is not equipped to respect and preserve the operating rights of non-SMR licensees. It is an SMR-oriented plan -- perhaps adequate for the 800 MHz lower block of SMR channels but not for the General Category channels.

9. A review of the licensing statistics for the General Category channels supports this conclusion. The Commission has licensed more than 3,450 non-commercial systems in the General Category Pool. This compares with approximately 11,100 SMR licenses, including a very sizeable proportion of systems licensed to speculators. Even including all of the licenses held by speculative applicants, one-fourth of all the licenses issued for the General Category channels are for non-SMR systems. It seems likely, therefore, that a large number of existing General Category systems will not be covered by settlement agreements. For this reason, ITA/TELFAC believe that the AMTA/Nextel/SMR WON plan faces an uncertain future.

10. With or without a formal plan, General Category Pool incumbents and "relocatees" would, absent a licensing freeze, have the opportunity to enter into cooperative operating

agreements. In reality, licensees who choose not to enter into settlement agreements may continue to operate under the terms of their original licenses. The only element that requires significant action by the FCC is the proposal to auction the "non-settled" channels. And that proposal, insofar as it involves the General Category channels, in our view, is suspect.

11. ITA/TELFAC are of the opinion that it may not be permissible for the Commission to auction the spectrum within the General Category Pool. The Joint Commenters note that there are many other individuals, in the Congress and in the industry, who have expressed concern that conducting auctions in the manner proposed for the General Category channels is inconsistent with the 1993 Omnibus Budget Reconciliation Act.

12. The Chairman of the Senate Commerce, Science and Transportation Committee, Senator Larry Pressler, has recently concluded that the FCC may not impose auctions on non-mutually exclusive applications and applications that have completed processing.[1] With nearly 15,000 licenses having been issued for the General Category channels nationwide, there is little available "white space" in these channels. Clearly, from a legal perspective, it is questionable whether the well-settled General Category channels represent the type of frequencies that Congress

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[1] February 9, 1996 letter from Senators Pressler and Thomas Daschle to FCC Chairman Reed Hundt. (Copy provided as an Attachment to these Reply Comments.)

had in mind when it authorized auctions.

13. Moreover, Senate Majority Whip Trent Lott, Senator John Breaux, and Representatives Michael Oxley, Edward Markey and Billy Tauzin concluded that auctioning the radio spectrum involves such important public policy considerations that it was irrational to view the spectrum simply as a device for raising money.[2] In the view of these members of Congress, there are larger public policy questions that must be resolved before the Commission subjects the spectrum to auctions.

14. The 1993 Budget Act directed the Commission to make every effort to avoid mutually exclusive application situations. In Congress's mind, the FCC was expected to use frequency coordination and engineering solutions to avoid mutually exclusive cases. Further, under the 1993 Budget Act, the FCC cannot justify the use of auctions "solely or predominantly" because it expects to derive Federal revenues.

15. Even if the Commission and the courts ultimately conclude that it is legally permissible to auction the General Category channels, ITA/TELFAC question whether auctioning these channels represents a rational response to the needs of society. Collectively, the industry has invested millions of dollars to

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[2] *Using Debt Ceiling Bill To Auction Spectrum Denounced By Lawmakers*, WASHINGTON TELECOM WEEK, Feb. 23, 1996, at page 1.

establish private land mobile radio systems on the General Category channels.

16. The conversion of the General Category channels to SMR use, coupled with the conduct of auctions, will have a very significant adverse impact on critical industrial and business activities. As a practical necessity, the licensees of these systems must operate their own communications networks. Redesignating the General Category channels will severely limit the communications options available to non-SMR licensees whose requirements cannot be satisfied by commercial carriers.

Licensing in the Mexican and Canadian Border Areas

17. As the Commission is well aware, there are only a limited number of General Category channels available in the Mexican and Canadian border regions. Nonetheless, in the First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, the Commission has decided not to distinguish between border and non-border areas for purposes of licensing. In the Commission's view, applicants "will be able to assess the impact of more limited spectrum availability when valuing those market areas for competitive bidding purposes."[3]

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[3] Second Further Notice of Proposed Rule Making segment of the 800 MHz Decision, paragraph 319.

18. Consumers Power Company suggests that this approach is ill-advised. Consumers Power expresses concern that the Commission's approach will mislead potential bidders into thinking that there is a desirable segment of spectrum in the border regions. Consumers Power observes that this is simply not the case.[4]

19. The analyses performed by ITA/TELFAC confirm the conclusions reached by Consumers Power. In U.S./Canadian regions 1, 2, 4, 5 and 6, only five of the 150 frequencies assigned to the General Category Pool by the Commission would be available for SMR licensing. The other 145 channels are either already allocated to, and in use by, Public Safety and Industrial/Land Transportation eligibles or are simply not available for U.S. use within the border regions. In region 3, nine of the General Category channels are available for SMR licensing. In regions 7 and 8, there are 18 General Category channels potentially available for SMR licensing. In the Mexican border area, there are no General Category channels available for SMR licensing.

20. Collectively, across the eight Canadian border regions and the Mexican border region, less than one percent of the General Category channels would be available for SMR licensing. In view of this facts, ITA/TELFAC must question the validity of the Commission's decision to rely on prospective bidders to

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[4] Comments of Consumers Power, pages 5-7.

ascertain the amount of General Category channels available for licensing in the border regions. ITA/TELFAC recommend that the Commission, if it cannot resist the urge to conduct auctions, place prospective bidders on clear notice that, in the border regions, there is very little opportunity for SMR use of the General Category channels.

WHEREFORE, THE PREMISES CONSIDERED, the Industrial Telecommunications Association, Inc. and the Telephone Maintenance Frequency Advisory Committee respectfully submit these Reply Comments and urge the Federal Communications Commission to act in accordance with the views expressed herein.

INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.

By: Mark E. Crosby
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Date: March 1, 1996

United States Senate

WASHINGTON, D.C. 20510

February 9, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

We continue to support your efforts and those of the entire Federal Communications Commission ("Commission" or "FCC") to carry out the intent of Congress that the Commission grant mutually exclusive applications for authorizations in certain radio services on the basis of competitive bidding, as authorized by the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act" or "'93 Act").

In granting authority to the FCC to award such authorizations by auction, Congress expressly limited that authority to situations involving mutually exclusive applications. Moreover, Section 117 of the 1993 Budget Act, now codified at 47 U.S.C., section 309(j)(6)(E), directed the Commission to make every effort to avoid mutually exclusive application situations by use, among other things, of engineering solutions such as frequency coordination and amendments to eliminate mutually exclusive situations. The opportunity to generate revenues was not to be used as justification for ignoring this direction.

While some segments of the industry have expressed concern about Commission action regarding allocation of specific portions of the electromagnetic spectrum, our concern is with the larger issue of Commission implementation of Congressionally-imposed responsibilities under the '93 Act. We are particularly interested in the Commission's treatment of it's auction authority under the *Notice of Proposed Rulemaking and Order*, FCC 95-500, (the *"Order"*) covering the proposed revision of rules governing processing of 39 GHz applications.

We wholly support spectrum auctions, where reasonable, appropriate and truly representative of Congressional intent. By virtue of either completing the application process or amending already submitted applications to eliminate mutual exclusivity concerns, applicants have in essence established a fairly reasonable expectation that they would not be subjected to the competitive bidding process. In considering the public interest

to generate revenues under the '93 Act, Congress determined that the promotion of more competitive services for the public and more efficient use of spectrum were of paramount importance when compared to allocation by competitive bidding.

It therefore seems anomalous to the clearly expressed intent of Congress within the Act that applicants who have completed the application process would subsequently be exposed to having to compete for that spectrum in auctions. Clarification of the Commission's reasoning and interpretation of it's auction authority under the 1993 Budget Act would be appreciated.

Thank you for your prompt attention in this matter. We look forward to your reply.

Larry Pressler

Larry Pressler

Tom Daschle

Thomas Daschle

For the foregoing reasons, Adelphia opposes Bell Atlantic's petition for a waiver of the Commission's rules establishing a separate price cap basket for services formerly regulated as video dialtone.

Respectfully submitted,

ADELPHIA COMMUNICATIONS CORPORATION

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Dated: March 1, 1996

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CERTIFICATE OF SERVICE

I, Eve Lehman, do hereby certify that on this 1st day of March, 1996, copies of the foregoing **"OPPOSITION"**, were delivered by first-class, postage prepaid mail upon the following:

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