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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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 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	)	PP Docket No. 93-253

To: The Commission

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Dated: March 14, 1996

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Summary

- The Commission has not adequately justified its decision to change from site specific licensing to geographic licensing. The Commission recognized as early as 1969 that it suffered from a scarcity of resources, yet established the site-specific licensing plan.

- The Commission should look to its experience with the 900 MHz auction and realize that the benefits provided to small business were not sufficient to guarantee small business auction participants a real opportunity to secure a 900 MHz MTA license and take the opportunity to ensure more meaningful participation by small business in any future 800 MHz auction.

- The Commission should obtain an adequate record to determine if provisions for disseminating licenses among businesses owned by women and minorities are necessary and prudent.

- The Commission should adjust any use of the "activity unit" concept to the realities of licensing in the 800 MHz band.

- The Commission should reconsider its decisions in the FRO in light of the adoption of the Telecommunications Act of 1996.

- The Commission failed to act upon an earlier-filed Motion to Defer Action on the above-cpationed subject.

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To: The Commission

PETITION FOR RECONSIDERATION

Supreme Radio Communications, Inc..; *et al.*[1] (the Petitioners), by their attorneys, respectfully request that the Commission reconsider its action in the above captioned matter, titled First Report and Order. Eighth Report and Order, and Second Further Notice of Proposed Rule Making, released December 15, 1995 (FCC 95-501) ("FRO"). In support of their position, Petitioners show the following.

Introduction

The Petitioners do not doubt the Commission's sincerity in its attempts to reach its perceived mandate to create regulatory parity among wide-area Specialized Mobile Radio

[1] The list of Petitioners is attached hereto as Exhibit 1.

Systems (SMR), Cellular, and PCS operators. It is clear that the Commission has hoped to discover some means of accomplishing its stated goals. However, it is also clear that the Commission's efforts have not resulted in legally supportable rule making even if one accepts the validity of the Commission's stated objectives.

The Commission's Justification Was Inadequate

The Commission's justification of its decision to move from site-specific licensing to geographic licensing was inadequate. The Commission stated that its scarce resources were the impetus behind the shift. However, the Commission's oft-repeated mantra of scarce resources does not rise to the level contemplated by the Administrative Procedure Act.

The Commission has suffered from inadequate funding for almost thirty years. In 1969, Commissioner Lee cited the workload of the Commission in his dissent from the proposal to create the Commission's Equal Employment Opportunity rules, *see*, 18 FCC 2d. 240, at 246-47. The Commission created the 800 MHz Specialized Mobile Radio site-by-site licensing scheme well after it recognized the limitation of its resources. The Commission must demonstrate what has changed since the establishment of the original licensing scheme before it can invalidate that scheme as unworkable.

The Provision of Opportunities to Designated Entities Was Insufficient

In accord with the auction/construction/channel use requirements promulgated by the Commission's new Rules, the opportunities for small business necessary to justify the

Commission's actions in accord with the applicable portions of the Communications Act were insufficient to provide any reasonable assurance of participation in EA-based licensing by small- or minority-owned businesses The natural anticompetitive results of these circumstances would create greater concentration of the market into the hands of only the largest entities and undermine the Commission's authority to go forward with its plan to auction 800 MHz spectrum.

Under the new rules, a Designated Entity would be required to participate in auctions and bear the costs associated with submission of a winning bid. Based on the Commission's most recent experience gained through its holding of the 900 MHz auction, it is apparent that the present benefits provided to small business in that auction process simply were not effective in avoiding overconcentration of spectrum into the hands of a few, large, publicly traded companies.[2] Since the Commission has not expressed any reason why the results would be any different in the 800 MHz auction covered by the new rules, the Commission is not positioned reasonably to claim that its provisions to create opportunity for Designated Entities will be at all effective.

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[2] In assessing the effectiveness of regulatees' compliance with EEO efforts, the Commission has employed a "results test" to determine whether the EEO efforts resulted in representation of a protected class in accord with its rules, see, *e.g.* WPIX, Inc., 68 RR 2d 985 (M. M. Bu. 1990). Employing the same method of analysis as is used by the agency, the results of the 900 MHz auction clearly show that the procedures used for the specific purpose of providing access to benefits for small business arising out of the auction are simply inadequate and their representativeness in the award of licenses is dramatically less than their percentage of the market as a whole.

In fact, it is a certainty that participation by small businesses will be less at the 800 MHz auction than in the 900 MHz auction. At 900 MHz, the construction requirements did not include relocation of existing operators and their thousands of end users. Coupled with the Commission's EA licensee construction/channel use requirements, it is extremely doubtful whether a small business could afford to construct any system for which it might be authorized via the 800 MHz auction.[3] Yet, the FRO focused only upon the cost to be borne at auction, ignoring totally the effects of its other rules on the cost of operation. The Commission suggests that its examination of the opportunities to be provided to small business need go no further than the government's expected returns from the auction. Petitioners aver that the Commission's short-sighted, incomplete performance of its duties to provide tangible and realistic opportunities for small business undercuts any presumption that the Commission was acting within its authority in the creation of the 800 MHz auction.

The reasonably expected non-participation of small business in the 800 MHz auction is particularly vexing, since many small businesses are incumbent operators on the subject frequencies. If ever the Commission should provide realistic opportunities for small business to participate in auctions, it should do so in this proceeding. Yet, contrary to its Congressional mandate, the Commission has done little more than create the illusion of access for small

[3] Petitioners note that the Order does not even address this problem, nor suggest a method for resolving it to the benefit of small business. Instead, this undeniable fact is merely ignored as an unhandy consequence of the Commission's rush to auction.

business, without providing the necessary assurances that the exercise of its auction authority demands.[4]

Nor may the Commission justify its announced plans to auction the upper 800 MHz channels by claiming that, in the event that auctions occur for the lower 800 MHz channels, it might, perhaps, create entrepreneur blocks. Nothing contained within the Communications Act or the Administrative Procedure Act would allow the Commission to justify its failure to provide reasonable opportunity in one auction by a suggestion that it might do better in the future. The Commission's Congressional mandate requires that the Commission perform properly every time, for each auction.[5]

Since the Commission failed to demonstrate that it has provided real opportunity for small business to participate in its auction of the upper 800 MHz channels, the Commission was without authority to go forward in its efforts. Upon reconsideration, the Commission should

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[4] "An agency rule is arbitrary and capricious if an agency 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Radio Ass'n v. U.S. Dept. Of Transp. Fed. Hwy. Admin., 47 F.3d 794 (6th Cir. 1995), *citing*, Motor Vehicle Mfrs. Ass'n of the United States v State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

[5] "In reviewing an agency's interpretation of a statute, the court must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement." Van Blaricom v. Burlington Northern Railroad Co., 17 F.3d 1224, 1225 (9th Cir. 1994); *see also*, Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 n. 9 (1984).

either address these concerns to demonstrate complete satisfaction of its Congressional mandate or abandon this proceeding.[6]

Auction Procedures Are Not Reasonable

At paragraphs 200 through 202 of the Eighth Report and Order (ERO), the Commission decided to require an upfront payment of two cents per pop per megahertz, with a minimum upfront payment of $2,500. The Commission rejected the comments of Pittencrief Communications, Inc. that there was a value difference between PCS and 800 MHz SMR spectrum. The Commission said that the record "does not indicate that such costs in the 800 MHz context are so great that they will prevent successful bidders from being able to satisfy their payment obligations," FRO at para. 201. With due respect to Pittencrief and the Commission, however, the issue is not whether a successful bidder can pay the upfront payment, but whether any applicant should be required to make an unreasonable upfront payment.

There is an obvious difference in value amongst PCS spectrum, 900 MHz SMR spectrum, and 800 MHz SMR spectrum, both in their per pop value and in their minimum assumed value. Accordingly, if the Commission is to act reasonably, it should set a per pop value and a minimum value for the upfront payment which reasonably reflects the differences which it determines in the value of 800 MHz SMR spectrum, compared to 900 MHz and PCS

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[6] The Commission, by failing to provide a reasoned explanation, based upon the record, is opening itself up for reversal by the Court of Appeals. "Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action," Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C.Cir. 1994).

spectrum. The Commission's undifferentiated response to the issue was both unreasonable and arbitrary and capricious. On reconsideration, the Commission should determine the relative values and set the upfront payment accordingly.[7]

At paragraph 248 of the ERO, the Commission adopted the same relief for small business at 800 MHz as it had adopted for that designated entity at 900 MHz. However, since the Commission had found in its ERO that the 800 MHz EA construction and operation will be more capital intensive than wide area systems at 900 MHz, it was arbitrary and capricious of the Commission to grant exactly the same relief when confronted with what it admits are different burdens. On reconsideration, the Commission should provide additional relief for small business, compared to the relief provided at 900 MHz, in reasonable relationship to its finding of the extent of capital requirements.

The Commission found, at paragraph 250 of the ERO, that it had an insufficient record to support the adoption of regulations solely benefitting minority- and women-owned businesses. However, the Commission cannot avoid its statutory duty merely because of an inadequate record. The Commission is required by Section 309(j) of the Act to disseminate licenses among a wide variety of applicants including businesses owned by members of minority groups and women. It cannot shirk that duty and do nothing merely because the Commission's efforts to

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[7] "An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties." Id.

ascertain a sufficient record were not adequate.[8] The Commission must either obtain an adequate record for reconsideration and adopt reasonable provisions for disseminating licenses among businesses owned by women and minorities, or do the best it can in the absence of a record to adopt regulations which it can reasonably expect will be affirmed on appeal.

Activity Units Should Be Adjusted

In recognition of the fact that there are incumbent licensees, at 900 MHz the Commission applied the "activity unit" concept and assigned an activity unit value to each channel block in each market area. On reconsideration, the Commission should adjust its use of the activity unit concept to the realities of the current licensing of the 800 MHz band.

All of the 900 MHz band stations which were ever going to be licensed and constructed on a site-by-site basis had long been authorized and, with the exception of a small number newly granted as the result of grants of finder's preference, all had been constructed by the time that 900 MHz band activity units were determined. Such is not the case at 800 MHz. At 800 MHz, the Commission's records show that a large number of stations are authorized, but have not yet been reported as having been constructed. To avoid unjustly enriching any entity which holds an unconstructed authorization, the Commission should include in its calculation of activity units

[8] The Commission requires licensees which are subject to equal employment opportunity requirements not only to succeed in providing opportunities to designated groups, but also requires that their efforts be sufficient, as well. The public should expect no less from the Commission in its carrying of its duties to provide opportunities to women and minorities.

an adjustment only for constructed facilities. Truly existing incumbent stations would result in a downward adjustment of the activity units, but non-constructed stations would not.

Here is the problem: Assume that Widgetcom now holds licenses for stations on all of the lowest 20 of the Upper 200 channels in the Anytown EA, but has not yet constructed any of them. Were the Commission to adjust its activity units on the basis of Widgetcom's unconstructed stations, it would give Widgetcom an unfair advantage (unfair as against the public interest) of a low activity unit figure for the channel block. Widgetcom could bid low and be unreasonably enriched by being able to bid in a number of other markets because it would have consumed few activity units by its low bid. Therefore, to avoid unjust enrichment of an applicant which holds an unconstructed authorization, the Commission should take into account only stations which are reported as constructed in determining its activity units on each channel block in each market.

New Facts Must Be Considered

Since the release, and prior to the effective date of the FRO, the Communications Act was substantially amended. In the Telecommunications Act of 1996, Congress ordered that

> (a) Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

> (b) NATIONAL POLICY- In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

47 U.S.C. §257.

Entrepreneurs and other small businesses are vitally effected by the actions taken in the FRO. Before acting on the instant Petition, the Commission should complete the proceeding required by Section 257 of the Act and determine whether market entry barriers for the persons sought to be protected by new Section 257 can best be eliminated by, upon reconsideration, terminating the instant proceeding without action. Because the rules adopted in the FRO impose, rather than eliminate, new burdens on entrepreneurs and small businesses, the Commission can most economically proceed by not taking any further action to implement the new rules until it has considered them in the new context of Section 257.[9]

An Issue Was Left Unanswered

On December 4, 1995, Petitioners and others filed a Motion to Defer Action on the above-captioned matter, pending the expected holding of hearings by Congress. The Commission, however, failed even to acknowledge the filing in its action and failed to resolve the issue raised therein. Accordingly, it would appear that the Commission's entire action was contrary to law and, on reconsideration, should be set aside in its entirety.

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[9] "[T]he FCC is obligated to reevaluate its policies when circumstances affecting its rulemaking proceedings change," People of State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990). As the Commission is obligated to examine its policies when circumstances change, so it should reexamine its rulemaking since the Telecommunications Act of 1996 has been adopted.

That the Commission was compelled to take action on the subject Motion is easily found at 5 U.S.C. §553(e) which requires the agency to provide,

> [p]rompt notice [which] shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Accordingly, the Commission was required by law to provide prompt notice of denial, if that was its intention, including a brief statement of the grounds for denial. Nothing done by the Commission to date could be deemed to have satisfied its statutory obligation and, therefore, the Commission is not properly positioned procedurely to even decide the FRO, resulting in nullity of the whole of the FRO.

Conclusion

For all the foregoing reasons, the Commission should grant reconsideration as suggested herein.

Respectfully submitted,
SUPREME RADIO COMMUNICATIONS, INC.
et al.

By _____
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Dated: March 14, 1996

EXHIBIT 1

List of Petitioners

Paging Plus, Glendale, California

Palomar Communications, Inc., Escondido, California

Peak Relay, Inc., Valley Center, California

R.F. Communications, Catawissa, Pennsylvania

R.W. Brown Electronics, Inc., Sycamore, Illinois

Radicom, Inc., McHenry, Illinois

Secom Communications, Inc., Fairview Heights, Illinois

Speciality Electronics Systems Co. Inc., Lynchburg, Virginia

Specialty Communications, Albuquerque, New Mexico

Supreme Radio Communications, Inc., Peoria Heights, Illinois

Trad, Inc., Buckley, Illinois

Two-Way Radio Service, Inc., Cumberland, Maryland

Vantek Communications, Sioux Falls, South Dakota

Viking Communications, Milwaukee, Wisconsin

Wise Electronics, Brawley, California