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

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FEDERAL COMMUNICATIONS COMMISSION
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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 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

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To: The Commission

PRO-TEC MOBILE COMMUNICATIONS, INC., ET AL.

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Summary

- The Commission must ensure that any EA licensee has the financial ability to relocate any incumbent. No incumbent licensee should be required to pay any funds out of pocket for forced relocation.

- The Commission failed to examine options other than auction to achieve its purposes.

- Based on the application record before the Commission, the Commission cannot reasonably rely on the honor of wide-area licensees in selecting co-channel station locations; the incumbent licensee should be served with a complete copy of an application of any proposed station to be located at a distance of less than 70 miles from the incumbent's station.

- The Commission should restrict the eligibility of persons for EA licenses to those persons who do not currently hold any wide-area authorization, or, alternatively, limit eligibility to only those operators who possess sufficient spectrum to successfully perform the forced migration necessary for the Commission's scheme to work.

- The Commission failed to reconcile its statement that two years was sufficient time to complete construction of a wide-area system with its determination to provide EA licensees with a five year construction period.

- The Commission unlawfully eliminated the Finder's Preference program. In accord with the Administrative Procedure Act, prior to eliminating the Finder's Preference program, the Commission was obliged to conduct notice and comment rule making.

- Mandatory frequency location is not necessary to achieve the Commission's stated objectives, furthermore, it is improper for the Commission to adopt a scheme of forced frequency migration without having first determined the parameters of the relocation requirements.

- The Commission should amend its rules to prevent EA licensees from using the forced frequency migration system to enable it to poach the customers of the incumbent.

- The Commission does not have authority to delegate its adjudicatory function to a third party and must have the resources to entertain complaints regarding forced frequency migration, or not embark on the scheme.

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To: The Commission

PETITION FOR RECONSIDERATION

Pro-Tec Mobile 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 Systems (SMR), Cellular, and PCS operators. It is clear that the Commission has hoped to

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

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.

Financial Qualifications Are Required

The Commission needs to take stronger measures to protect the security of incumbent licensees who have invested the past twenty years in bringing Specialized Mobile Radio Service-Trunked service to the public on the Upper 200 channels. To protect them adequately, the Commission needs to do three things:

1) Make sure that any person applying for an Economic Area ("EA") license demonstrates the financial qualifications to relocate all incumbent licensees whose 40 dBμ contour covers any part of the EA in the channel block(s) for which the person will bid;

2) Clearly state that it is the Commission's policy that all frequency relocation costs shall be borne by the EA licensee and that an incumbent licensee shall not be required to make any out-of-pocket expenditure to facilitate frequency relocation; and

3) Either require the prepayment of all frequency relocation costs by the EA licensee or require the EA licensee to post a completion bond to assure the payment of all frequency relocation costs.

At paragraph 79 of the FRO, the Commission held that an EA licensee must "guarantee payment of all costs of relocating the incumbent to a comparable facility." However, merely requiring that an EA licensee "guarantee" payment of the costs is insufficient to protect the interests of those persons who are to be required to submit to frequency relocation. As a matter of public policy, the Commission should not put the incumbent licensee to any cost burden or subject the incumbent licensee to any risk of failure by the EA licensee. The Commission is

cutting off the growth opportunities for incumbent local service operators. It should not also require them to bear any of the cost of the development of a competing wide-area system.

The Commission's requirement that an EA licensee guarantee payment of costs could readily be interpreted as allowing the EA licensee to demand that the incumbent licensee initially bear the costs of frequency relocation, with the EA licensee being required only to guarantee reimbursement of those out-of-pocket costs of the incumbent. Since the EA licensee would derive all of the benefit from frequency relocation, the Commission should require that the EA licensee not merely guarantee payment of all costs, but should require that the EA licensee either prepay all costs in the first instance (whether directly to the incumbent or to an escrow agent), or, if agreed to by the incumbent and the EA licensee during the voluntary negotiation period, the EA licensee could be permitted to post a completion bond sufficient to guarantee payment of all relocation costs.

The licensing of 800 MHz band wide-area channels will be substantially different from the licensing of 900 MHz band channels, because no mandatory frequency relocation was authorized at 900 MHz. At 900 MHz, if an applicant were not actually financially qualified, only the applicant and the Commission would have been affected. However, at 800 MHz, the EA licensee will have great power to adversely affect an incumbent licensee by failing to carry out its obligations in mandatory frequency relocation. To protect the public interest in the service currently being provided to the public by incumbent licensees, the Commission should take steps to see that EA applicants are initially qualified and to see that incumbent licensees are

protected against failure of an EA licensee, either through EA bankruptcy, malfeasance, or other error.

To reasonably assure that any person who would be an EA, authorized to require the frequency relocation of an incumbent licensee, will be able to pay all costs of relocating incumbents to comparable facilities, the Commission should require that each applicant demonstrate, as part of its application, that it has the financial qualifications necessary to complete the relocation of all incumbents whose 40 dBμ contours cover any part of the EA for which the applicant intends to bid (except stations for which the applicant is currently the licensee). As a rule of thumb, Petitioners suggest that the Commission should require an EA applicant to demonstrate that it has financial resources reserved for the purpose of frequency relocation in the amount of $25,000 per channel per authorized base station site, plus $10,000 per channel (100 mobiles per channel times $100).[2] The Commission should require a demonstration of financial qualifications by the presentation of a loan commitment or audited financial statement providing sufficient funds for the purpose of completing frequency relocation.

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[2] One of the Petitioners has surveyed its mobile unit fleet and determined that 25 percent of its fleet consists of mobile units which cannot be retuned outside the Upper 200 channels. Those mobile units, therefore, must be replaced, rather than retuned, at substantially higher cost than $100 each. Accordingly, financial responsibility of $100 per mobile unit would probably not be sufficient actually to accomplish the job, but, at the application stage, a demonstration at this level may be seen as sufficient to protect the interests of incumbent licensees against rank speculation by applicants.

Auction Authority Was Not Demonstrated

At paragraph 148 of the FRO, the Commission decided to treat all applicants for EA licenses as "initial applicants". Clearly, they would not be within the terms of the applicable statute. Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §309(j), authorizes the Commission to select among mutually exclusive applications for "any initial license or construction permit which will involve a use of the electromagnetic spectrum," 47 U.S.C. §309(j)(1). However, not all applications can be expected to be for initial licenses for use of the same spectrum within an EA.

In the case in which an incumbent licensee applies for use of a block of spectrum within the EA, that applicant already is authorized for use of at least some of the spectrum within at least some of the EA. Therefore, such a person's application would not be for an "initial license which will involve a use of the electromagnetic spectrum," because that applicant already holds a license for a use of the same electromagnetic spectrum in at least a part of the same area. Therefore, the Commission has no authority to submit such an applicant's application to selection by competitive bidding. In such a case, it is necessary for the Commission to establish a procedure by which it will select among such applications other than by conducting an auction.

Section 309(j)(6) of the Act states that nothing shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, or other means to avoid mutual exclusivity in application and licensing proceedings," 47 U.S.C. §309(j)(6). Nothing in the

FRO, however, indicates that the Commission considered even one of the required means to avoid mutual exclusivity in wide-area SMR application and licensing proceedings.[3] Indeed, it may be suggested fairly that the structure adopted by the Commission would maximize the incidence of mutual exclusivity, compared to any other method of frequency assignment. On reconsideration, the Commission should use the same ingenuity that it demonstrated in creating the first-come-first-served procedure to the problem of meeting the mandated obligation to avoid creating mutually exclusive situations.[4]

Interference Protection

At paragraphs 49-53 of the FRO, the Commission decided to allow EA licensees to "self coordinate" their facilities and to "construct stations at any available site and on any available channel within their respective spectrum blocks," FRO at para. 52, without even having to inform incumbent licensees of their plans. Review of the Commission's records demonstrates that some currently authorized wide-area licensees cannot be relied upon to comply with the

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[3] Even providing for the Commission's discretion in this area, exercise of the Commission's discretion is fully open to judicial review, *See*, Grace Towers Ass'n v. Grace Housing Development Fund Co., 538 F.2d 491 (2d Cir. 1976); Campaign Clear Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds sub nom.* Train v. Campaign Clear Water, Inc., 420 U.S. 136 (1975); Doe v. Campbell, 796 F.2d 1508 (D.C. Cir. 1986).

[4] "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." MCI Telecommunications v. American Tel. & Tel., 114 S.Ct. 2223 (1994)

"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).

Commission's Rules with respect to protecting the rights of existing licensees when selecting a co-channel station location. Given this unfortunate record by current wide-area licensees, the Commission needs to protect incumbent licensees by requiring the filing of an application for each proposed station with the Commission and the service of a complete copy of any such application on any incumbent licensee whose facility is at a distance of less than 70 miles from the EA licensee's proposed station. Also, before proceeding further toward the filing of wide-area applications, the Commission needs to review its data base of authorized wide-area stations with respect to incumbent local-service stations, confirm those authorizations which were made in compliance with the Commission's interference protection, and cancel any wide-area authorization which was erroneously granted.

Considering that the period of time provided for negotiations between EA licensees and incumbents and the time within which the first stage of EA construction must be completed is three years, neither the Commission nor EA licensees should be unduly burdened by requiring an EA licensee to file and serve an application for a proposed EA base station. Provided that no incumbent licensee opposes such an application, the Commission could grant such an application on the thirty-first day after the application had been placed on public notice.

SMR-Trunked systems are entitled to exclusive use of their channels and, to operate at all, many require a higher signal-to-noise ratio than a conventional station. Harmful interference to an SMR system can destroy the service and permanently devastate the reputation of a system

in a matter of hours. Accordingly, the Commission needs to proceed with great care to prevent EA systems from causing harmful interference.

The Commission decided that "to the extent that an EA licensee's system modifications cause harmful interference to an incumbent, the affected incumbent will be able to seek redress under our rules to resolve such interference problems expeditiously," FRO at para. 53. Practical experience demonstrates that expeditious relief from harmful interference is often unavailable from the Commission. In view of an unfortunate record of an apparent inability to respond promptly to non-public safety interference complaints, the Commission should not rely on its interference resolution powers as the first line of defense against interference caused by EA systems. Rather, it should require the EA licensee to file an application for each station which will demonstrate compliance with the co-channel interference protection rules, and the Commission should consider and act on each individually.

Eligibility Should Be Restricted

At paragraph 126 of the FRO, the Commission decided not to restrict the eligibility of persons for EA licenses. However, Petitioners respectfully suggest that the Commission has overlooked an opportunity to substantially increase the extent of competition by restricting eligibility for wide-area licenses on the Upper 200 channels to persons who do not currently hold any wide-area authorization Restricting eligibility in this manner will place far more persons in a position to compete for wide-area authorizations and add to the number of persons providing wide-area CMRS service. Those persons who already hold wide-area authorizations will be

allowed to continue operation of their constructed wide-area systems, will be able to compete with the new wide-area licensees, and the public will best benefit thereby. The public interest might be well served by the Commission's determining that voluntary assignments and transfers of channels from EA licensees to existing wide-area licensees would be presumed to be in the public interest, thereby allowing existing wide-area licensees to expand their systems by acquisitions subsequent to the licensing of EA operators.

In the alternative, if the Commission on reconsideration determines that open eligibility is within the public interest, then the agency should determine whether the public interest is served by a *de facto* limitation on eligibility arising out of the need for a participant to have licensed to it sufficient "comparable spectrum" for migration of incumbent licensees. It is beyond question that an EA licensee can have no assurance of its ability to construct its system without its prior possession of such spectrum or possession of authorizations to operate on the auctioned spectrum across an EA. Indeed, in accord with the decisions within the FRO, even an entity with the resources of an AT&T can have no reasonable expectation that it would ever obtain the necessary authorization to operate an EA-wide system which is dependent on successful migration of incumbent operators. This condition precedent to an entity's deriving any ultimate, tangible benefit out of participation in the auction, or ever being positioned to provide EA licensed services to the public, will limit severely the number and quality of participants in any such auction and the amount of revenue to be raised thereby. Accordingly, the Commission should either articulate its belief that a *de facto* condition to actual eligibility

arising out of prior licensing is in the public interest, or should take such steps as are required to eliminate such unstated condition.

The Construction Period Should Be Reduced

At paragraph 104 of the FRO, the Commission gave as a reason for its providing an EA a five year construction period that "under our current rules, SMR licensees can request up to five years to construct a wide-area system in the 800 MHz band," FRO at para. 104. However, at the same time, the Commission suggested, at paragraph 112 of the FRO, that two years was sufficient time to complete construction of a wide-area system. The inconsistency is obvious and calls into question the reasonableness of the Commission's allowing an EA licensee more than two years to complete the required extent of construction to retain its license. On reconsideration, the Commission should reduce the full construction period for an EA licensee to two years, expedite the negotiation periods, if any, and prevent unnecessary delay in bringing additional service to the public.

Finder's Preference Was Eliminated Unlawfully

The Commission determined, at paragraph 60 of the FRO, that it "eliminate[d Finder's Preference] immediately for the 800 MHz SMR service. Thus, the Commission will no longer accept finder's preference requests following the adoption of" the FRO, FRO at para. 60.

While the Commission was correct in stating that "in the *Third Report and Order*, [the Commission] stated that the function of the finders' preference mechanism with respect to CMRS

services will be addressed in a future rule making proceeding,"Id., the Commission has not commenced such a rule making proceeding. The Commission gave no notice in the above captioned matter that it was proposing to eliminate the finder's preference program with respect to any frequencies, whatsoever. Section 553(b) of the Administrative Procedure Act ("APA"), 5 U.S.C. §553(b), requires the Commission to provide the public with notice of a change in its rules and to provide interested persons with an opportunity to comment on the proposal. The Commission failed to comply with the APA, and, therefore, its elimination of the finder's preference program with respect to SMR frequencies was unlawful.

Section 553(b)(3) of the APA, 5 U.S.C. §553(b)(3) provides for two exceptions to the requirement that the Commission provide notice and opportunity for comment with respect to a possible amendment to its rules. Neither of those exceptions is applicable.

The finder's preference rule provides a substantive right to an informed person to submit information to the Commission and to obtain a direct benefit from the submission. Section 553(b)(3)(A) of the APA, 5 U S.C. §553(b)(3)(A), provides no applicable exception because the rule provides substantive right to a person, rather than being merely interpretative or procedural. In contrast to the establishment of a freeze on the filing of applications, which has been accepted by the courts, the termination of the Finder's Preference program cuts off substantive rights. While the exception of Section 553(b)(3)(A) may be applicable to a freeze on the filing of station license applications, is not applicable to the Finder's Preference program.

Section 553(b)(3)(B) of the APA, 5 U.S.C. §553(b)(3)(B), states the requirements which the Commission must meet to rely on the "good cause" exception to the requirement of notice and comment. To rely on the good cause exception, the Commission is required to "incorporate the finding and a brief statement of reasons therefor in the rules issued that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest". The Commission failed to make the required finding or to provide the required statement. Accordingly, its action was contrary to the clear mandate of the statute.

Section 553(d) of the APA, 5 U.S.C. §553(d), provides three exceptions under which an agency may make a rule making action effective on less than 30 days publication.[4] None of the three exceptions was met by the Commission's action.

The first two exceptions provided by the APA are obviously inapplicable, since the rule provides a substantive right to the public, namely, the right to report a violation and receive a direct and exclusive benefit from the filing of that report. The Commission suggested no cause for eliminating the ability of the public to file Finder's Preference Requests immediately. Because the Commission failed to show good cause, or any cause, whatsoever, for the immediate

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[4] Section 553(d) provides that

> The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule,

5 U.S.C. §553(d).

elimination of the Finder's Preference program with respect to SMR frequencies, its elimination of the finder's preference program was unlawful.

There are sound reasons why the Commission should not eliminate the finder's preference rule with respect to SMR frequencies. Some licensees, particularly some which were granted an extended construction period for a wide-area SMR system, may not have completed construction of their authorized facilities in a timely manner. To avoid slanting the playing field in favor of any such entity, the Commission should retain the finder's preference program for a reasonable period of time to all persons with knowledge of unconstructed facilities, or facilities which have been discontinued to request a finder's preference, take the channels, and provide fair balance among those persons interested in applying for the wide-area SMR frequency blocks.

Mandatory Frequency Relocation Was Not Supported

At paragraph 73 of the FRO, the Commission found that "a smooth and equitable transition to the new licensing framework that we adopt . . . cannot be accomplished without some form of mandatory relocation as part of the relocation mechanism," FRO at para. 73. The Commission's determination is simply incorrect. There is nothing about the licensing framework that requires mandatory frequency relocation. The Commission can just as well grant EA licenses without mandatory relocation and leave to the marketplace the relations between EA licensees and incumbent operators. All interest in mandatory relocation lies entirely external to the new licensing framework

The transaction costs of entirely voluntary frequency relocation would not be imposed on either the public, the Commission, or persons who do not desire to become involved in the process. Nothing in the FRO demonstrates that marketplace forces cannot be relied upon to allow full development of EA systems without any undesired imposition on the incumbent licensees who have developed a highly successful SMR service for the public.

The Commission made a decision which is clearly not supported by the record. The Commission reserved to the Second Further Notice of Proposed Rule Making (FNPRM) the question of what would constitute mandatory relocation. Without having first determined what the requirement shall be, and what is available with which to work, the Commission cannot reasonably determine that the requirement is needed at all.[6]

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[6] "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). In Motor Vehicle Mfrs. Ass'n., the Supreme Court held that "'an agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency . . . must supply a reasoned analysis . . .'" Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 57 (1983); *quoting* Greater Boston Television Corp. V. FCC., 444 F.2d 841, 852 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). "Although an agency must be given flexibility to reexamine and reinterpret its previous holding, it must clearly indicate and explain its action so as to enable completion of the task of judicial review." Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977); *citing*, Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 806-09 (1973). "There must be a thorough and comprehensible statement of the reasons for the decision," Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977). "The Commission must articulate a rational connection between the facts found and the choice made," Ohio Bell Telephone Company v. FCC, 929 F.2d 864, 872 (6th Cir. 1991); *citing*, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962). "It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational -- must demonstrate that a reasonable person upon consideration of all the

The Commission is building a structure. A person building a structure cannot reasonably decide that he needs "vegetative matter" to make the structure strong without first having reviewed considered available plants and plant products against available alternative structural components. If the next level of review finds that only watermelon is available as a source of vegetative matter, while steel I-beams are also available, then the initial decision that vegetative matter must be used was clearly unreasonable. If the Commission is to proceed reasonably, it should first determine what would constitute the details of each alternative, and only then select the most suitable alternative. Only after determining the necessary components of a scheme of mandatory relocation would the Commission be in a position to make a reasoned decision that mandatory relocation is required, or even in the public interest. On reconsideration, the Commission should withdraw and withhold any action on the question of mandating relocation until it first determines what would be all of the components of a plan of mandatory relocation. On reconsideration, the Commission is likely to recognize that any scheme of mandatory relocation would be so demanding of the Commission's scarce administrative resources as not to be justified.

At paragraph 74 of the FRO, the Commission decided that the EA licensee must provide the incumbent operator with "comparable facilities", but held off to the FNPRM a decision as to what would be comparable facilities. As with the necessity of mandatory relocation, the

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points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving." Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992); *see also*, Bowen v. American Hospital Ass'n, 476 U.S. 610, 626-27 (1986) (plurality opinion); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co. 463 U.S. 29, 43 (1983); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

Commission cannot reasonably decide that the provision of comparable facilities is required without first determining a definition for comparable facilities. If the Commission determined that a fair and equitable definition of comparable facilities would place an undue burden on either the EA licensee or the incumbent operator, then the Commission would not have acted reasonably in deciding in the first instance to require the provision of comparable facilities. If the burden on the Commission of assuring the provision of comparable facilities would be excessive, then the Commission would need to review not only the question of requiring comparable facilities, but also the wisdom of providing for mandatory relocation.

At new Rule Section 90.699(c)(3), the Commission adopted a requirement that "the EA licensee must . . . build and test the new system," 47 C.F.R §90.699(c)(3). Included in incumbent SMR systems are hundreds of thousands of mobile units and control stations. Petitioners are deeply interested in protecting their relations with their customers and the confidentiality of their customer information. Petitioners are concerned that Rule Section 90.699(c)(3) could be interpreted as not only permitting, but requiring, an EA licensee to intervene in relations between an incumbent and its customers. Petitioners are concerned that if the Commission permits the EA licensee to demand the opportunity to deal directly with Petitioners' established customers, then the EA licensee will attempt to divert Petitioners' customers to its system, rather than remaining with Petitioners' systems. To protect the existing relationships between incumbent licensees and their customers from interference by EA licensees, Rule Section 90.699(c)(3) should be revised to by adding the following clause:

. . ., except that the incumbent shall have the right to determine who shall relocate the frequencies of end user equipment.

At paragraph 78 of the FRO, the Commission decided that it was necessary to require all EA licensees that intend to relocate an incumbent to negotiate together. However, without having also adopted rules for the sharing of costs, the Commission's action was not reasonable. With respect to the Personal Communications Service, the Commission has come to recognize that rules are needed for the sharing of costs when more than one PCS licensee is benefitted from a frequency relocation. Based on that experience, the Commission's decision to require joint negotiations at all was not reasonable.

At paragraph 277 of the FNPRM, the Commission stated that resolution of mandatory relocation issues "entirely by [the Commission's] adjudication processes would be time consuming and costly to all parties," FNPRM at para. 277. If the Commission recognizes at the outset that it lacks the resources to adjudicate disputes resulting from its regulatory actions in an expeditious manner, that should be a warning sign to the Commission that it is proceeding down a regulatory path which it cannot responsibly follow. With respect to mandatory relocation, the Commission expressed concern about the transactional costs which the absence of mandatory relocation would impose. The Commission should recognize that any program of mandatory relocation would also impose substantial costs on participants and the Commission and act accordingly.

If the Commission does not provide for mandatory relocation, then any transactional costs will be cleared within the marketplace, for which the Commission is reasonably absolved of responsibility. If the Commission imposes transactional costs on the participants by a program of mandatory relocation, then the public should be prepared to bear those costs which are required for the Commission to provide an expeditious dispute resolution mechanism. If the Commission cannot assure participants and the public that the Commission can bear responsibility for the consequences of mandatory relocation and the necessary adjudications flowing therefrom, then it would not act reasonably and responsibly were it to provide for mandatory relocation.

The Commission Must Be Prepared To Adjudicate

The Commission's mandatory relocation scheme will necessitate the Commission, itself, serving as the court of first resort with respect to all mandatory negotiation period disputes, commencing one year after the effective date of the Commission's action. At new Rule Section 90.699(b)(2), 47 C.F.R. §90 699(b)(2), the Commission required that "both the EA licensee and the incumbent must negotiate in 'good faith'." Any complaint that a party is not negotiating in good faith must, therefore, be adjudicated solely by the Commission, for only the Commission has the authority to determine whether a violation of its rules has occured and the authority to enforce its rules. Neither a local court, a Federal District Court, nor a private arbitrator has the authority to determine whether a party is in compliance with the requirement of Rule Section 90.699(b)(2), nor can any of those entities punish a violation of the Rule. If the Commission concludes that it does not have the resources to resolve expeditiously all of the complaints likely

to arise during the mandatory negotiation period, then the Commission should reconsider and withdraw its requirement for mandatory frequency relocation and leave frequency relocation to the marketplace, which is fully capable of determining whether and on what terms frequency relocation shall occur, and has been performing that function for years.

Although the Commission has stated that affected parties should look to alternative fora to resolve disputes arising out of mandatory relocation, the Petitioners hereby explain that no other forum exists which might have jurisdiction over these matters, whether during the mandatory negotiation period, or resulting from mandatory relocation, itself. Mandatory frequency relocation goes directly to a question of whether and how a licensee shall use the electromagnetic spectrum, and that question is solely within the jurisdiction of the Commission. State courts will not find that they possess the necessary expertise, or even the necessary jurisdiction, to determine the relevant issues. Therefore, in accord with relevant case law, state courts will defer making any decision until and unless the Commission rules on the matter insofar as its expertise and jurisdiction are required. Federal courts will reject jurisdiction since the issues do not involve a federal question of law or necessary diversity will be lacking or the amount in controversy cannot be demonstrated to meet the minimum threshold. Again, if the matter is likely to affect the licensing of radio systems, the federal courts will also rely on the Commission's exclusive jurisdiction. Non-judicial fora for dispute resolution will also lack the necessary experience and expertise to render a reasoned decision, and would not likely be willing to invest the resources to gain such expertise for resolution of a finite number of matters over

a limited period of time. In fact, it is altogether likely that upon reconsideration the Commission will determine that only the Commission has jurisdiction over the matter.

The FRO states that if a party is not capable of causing mandatory relocation, the subject incumbent operator will not be required to migrate to alternative frequencies. Accordingly, the forum which decides the matters arising out of any dispute will be rendering decisions which necessarily go to whether an entity may employ the radio spectrum in a particular manner at a specific location. Therefore, such decisions are, by their very nature, licensing questions, and as such, the Commission has exclusive jurisdiction which cannot be avoided by its hope that some other forum might accept responsibility. At the very least, the Commission cannot reasonably determine with necessary assurance that any other forum would accept such jurisdiction or that such jurisdiction might not be successfully challenged by a disappointed participant in any such proceeding. Finally, nothing contained within the Communications Act of 1934, as amended, would provide to the Commission the ability to reject or delegate its exclusive authority. Therefore, if the Commission has determined that exercise of its exclusive jurisdiction to regulate the regime set forth in its FRO is beyond the administrative capacity of the agency, the Commission should terminate the proceeding as impractical in light of its own scarce resources.