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 Commision's decisions contained and discussed within the FRO will not achieve the Commission's objectives, thus, the Commission's decisions are arbitrary and capricious and must be reconsidered.

- The Commission's decisions unfairly favor larger oeprators over small, without demonstrating any concomitant benefit to the public.

- What the Commission is trying to achieve through its FRO has been occurring through natural marketplace dynamics, thus, the rulemaking is unnessary and intrusive.

- The Commission cannot reconcile its decisions that "alternative" spectrum exists in the 800 MHz frequency band for forced migraiton, with its decision that no "alternative" spectrum exists in the paging bands for forced migration.

- The Commission will not achieve regualtory parity with its FRO because the effect of the FRO is to treat PMRS operators as CMRS operators.

- The Commission's decision will permit operators to continue warehousing spectrum which they have already been warehousing for five years.

- The Commission has provided no protections to the interest of end users.

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To: The Commission

PETITION FOR RECONSIDERATION

Banks Tower Communications, Ltd.; *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 decisions contained and discussed within the FRO are not well considered and are not calculated to achieve the Commission's articulated objectives. Insofar as the Commission's methods for achieving its stated objectives cannot be demonstrated to provide reasonable assurances that its articulated objectives might be met by the regulatory regime contained within the FRO, the Petitioners hereby respectfully request that the FRO be reconsidered in its entirety.[2] As shown *infra*, the Commission's regulatory regime for authorizing by auction wide-area, Economic Area- (EA) based, SMR systems, employing contiguous spectrum to accommodate wideband, digital technology (i) cannot provide realistic, tangible benefits and opportunities for small and minority businesses, including rural telephone companies, contrary to the Commission's auction mandate contained within the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*; (ii) cannot reduce the Commission's administrative burden by limiting or eliminating the need for site specific licensing, contrary to one of the Commission's articulated objectives; (iii) will not provide to the United States Treasury the fullest and fairest return per channel to be auctioned under the Commission's

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[2] "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).

adopted rules; (iv) will not provide necessary assurances that advanced technology will be employed to serve the public from the systems to be created through adoption of the rules contained within the FRO; and (v) will not provide a method of licensing such systems which is calculated to prevent or limit the concentration of spectrum under the license of a single operator in each market, again in contravention of the dictates of the Communications Act of 1934, as amended.[3]

Following careful consideration of the statements and observations made herein, including those which demonstrate that the Commission's intended regulatory regime is ill-considered in accord with relevant statutes and in view of the existing circumstances of the present SMR marketplace, it is incumbent on the agency to reconsider whether the regulatory regime to be achieved by the Commission's efforts is, in fact, a correct and useful application of the Commission's scarce resources. The Commission's attempt to reconcile its desire to deliver wide-area licensing to the market via rule making is fraught with problems and pitfalls that are unlikely to be solved by rule It is more likely that if operators exist who believe that such a

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[3] See, Administrative Procedure Act ("APA") 5 U.S.C. §706(2)(A). Insofar as the Commission's actions did not provide any reasonable expectation that its articulated objectives will be met, the Commission must recognize that its actions were unreasonable, *i.e,* arbitrary and capricious, including those decisions which are properly characterized by one or more of the following descriptions:

> . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, 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. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983).

licensing scheme is beneficial, including the attendant high costs of frequency migration, that such operators would find expedited relief, and provide the most expeditious service to the public, via private contractual activities, rather than through rule making.[4] In fact, the Commission's stated reliance on the actions of licensees in reaching such privately negotiated agreements demonstrates that the agency concurs in this condition precedent to its rules being effective in meeting its articulated objectives.[5]

The rules which exist fully accommodate private parties in reaching arms length negotiations for all purposes stated within the FRO. The Commission is well aware of the number of wide-area systems which presently exist and that they did not require any additional

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[4] A review of the Commission's licensing records will demonstrate the enormous strides made in the creation of wide area systems during the past five years since the introduction of Enhanced SMR operations. This is clear evidence that the marketplace is fully capable of adjusting to the demands of new classes of providers following only a minimum effort by the Commission in the grant of certain, limited waivers; and that the rule changes contained within the FRO are unnecessary and, perhaps, contrary to continued progress in expanding the use of the 800 MHz band in delivering the types of services envisioned within the FRO.

[5] The record in this proceeding and the application/licensing records of the agency demonstrate that wide-area operations are easily obtainable through actions in the marketplace taken between licensees entering into arms length negotiations. The Commission is well aware of the speed in which licensees have acted to create wide-area systems, without any necessity for further agency intervention. The FRO does not consider this obvious alternative to its new rules which has been quite successful to date. Accordingly, the Commission has not explored meaningful, less injurious to small business, alternatives to its decision. Accordingly, the FRO cannot withstand judicial scrutiny if applying the language contained in Ford Motor Credit Corp. v. Milhollin, 444 U.S. 555 (1980), *on remand*, 531 F. Supp. 379 (D.Or. 1981); Skidmore v. Swift and Co., 323 U.S. 134, 140 (1944); Continental Air Lines v. DOT, 843 F.2d 1444, 1453 (D.C. Cir. 1988); and Motor Vehicle Mfrs. Ass'n v. Ruckelshaus, 719 F.2d 1159, 1164 (D.C. Cir. 1983).

rule making to come to the market.[6] Yet, if the decisions contained within the FRO are let stand, the Commission will irrevocably alter the negotiating positions of affected parties, providing undue leverage to one class of operators over another, and eliminating affected parties' abilities to arrive at equitable solutions to balance properly one operator's desire to expand versus another operator's desire to obtain full value for an existing investment. This natural byproduct of the Commission's actions would arbitrarily limit the continuing ability of one class of operators to compete, while providing an unjust enrichment to another class of operator. Nothing contained within the FRO rises to the level of reasoned decision making, which duty requires that the agency demonstrate that the public will be served by this reallocation of competitive benefits among operators, particularly in view of the fact that the class of operators which is most likely to benefit by the Commission's action is quite small in number.[7] Stated simply, the Commission would have to show what it did not even claim, namely, that the public will be better served by the rich.[8,9]

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[6] The Commission is, therefore, not well positioned to claim that "but for" its intended rules within the FRO, such systems cannot be expected to be constructed throughout the United States. In fact, the agency's records weigh in favor of the conclusion that this proceeding is wholly unnecessary to achieve the expressed objectives within the FRO.

[7] 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).

[8] A result of the Commission's decision will be a reduction in the protected service area for local systems, and a reduction in the number of available channels to accommodate the growth of local systems. These facts are in stark contrast to the Commission's statement at Appendix B to the FRO, wherein the Commission found that its intentions in changing its rules were to reach the following objective: "The Commission proposes changes to its rules for the 800 MHz SMR service that are intended to promote the growth of traditional local SMR service

That the SMR marketplace has suffered from five years of overconcentration is already known. The Commission's attention is respectfully directed to its licensing records which clearly demonstrate that a handful of companies has been quite active in acquiring, through purchase and application, large concentrations of 800 MHz spectrum in every market throughout the United States. The ability of these few entities to concentrate spectrum without the requirement that each or any demonstrate need, market demand, or even construction, has provided a foundation for further inequities to be suffered at auction, not the least of which shall be that the resulting revenue to be raised for the benefit of the public by such auctions shall be severely reduced. Nothing contained within the FRO addresses this phenomenon and the manner by which the Commission might protect its future processes from persons who seek to leverage past spectrum warehousing to provide the channel inventory for future forced frequency migration. That the Commission chose to ignore this possible misuse of its licensing processes, or at least did not mitigate the resulting harm to its proposed auction, demonstrates that the Commission has not fully considered the licensing environment which it knows to exist and the

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. . ." (emphasis added). This statement of intentions is fully contradicted by the undeniable effect of the Commission's rules and stands as further evidence of the unreasonableness of the Commission's decision.

[9] "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 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).

effect that past deeds will have on the Commission's ability to reach its articulated objectives.[10] In stark contrast to its duty to demonstrate that its articulated objectives might be met, the Commission has not stated within the FRO that it has performed even a single study of a single EA to determine whom, if anyone, might be possess the necessary "comparable spectrum" to engage in frequency migration to obtain a contiguous block of spectrum throughout an entire EA.

The Commission's perhaps inadvertent leaps in logic or failure to address all of the crucial elements contained within this proceeding are further illustrated by a comparison between its statements make within the FRO to its statements contained in another, similar proceeding, which is currently before it. In WT Docket No. 96-18, the Commission is considering amendment of its rules governing paging systems. At paragraph 37 of its Notice of Proposed Rule Making in WT Docket No. 96-18, the Commission tentatively concluded that "there is no feasible or equitable means of requiring incumbents to relocate to alternative channels, because there are no alternative channels to accommodate incumbents on this basis," (FCC 96-52 Released February 9, 1996) Why would there be no alternative channels available to accommodate incumbent paging licensees? There are two reasons: 1) Potential alternative channels have already been assigned, or 2) To assign alternative channels would require conducting auctions among mutually exclusive applications. The same two reasons explain why

[10] In the alternative, the Commission might have determined outside the language of the FRO that existing ESMR operators are the only intended beneficiaries of its FRO. If this decision was made and the agency failed to properly express this decision or the basis for same, then the FRO should be reconsidered to correct this oversight.

adoption of the Commission's plan for mandatory frequency relocation was unreasonable in the 800 MHz SMR band. To the extent that alternative channels have already been assigned, they are not available to all applicants for wide-area licenses, and to the extent that they may not have been assigned, the Commission could not reasonably allow those channels to be obtained without conducting auctions, with no assurance that EA licensees would win those channels at auction.

Review of the Commission's records will show that there are no alternative channels to accommodate incumbents in the 800 MHz SMR band. To the extent that channels have already been assigned, not only are they not available, but there are two consequences which would not be in the public interest. Assuming that an incumbent which becomes an EA licensee was already licensed for channels that it intended to use for the purpose of mandatory relocation, it should be using those channels to provide competitive service. Were that licensee to use the channels for purposes of relocating another incumbent, the amount of competitive service provided to the public would be reduced, because service would be terminated in the service area of the EA licensee's station on those channels. Assuming, however, that an incumbent was already licensed for channels that it intended to use for the purpose of mandatory relocation and it was not providing any service on those channels, it would have been warehousing those channels — a practice which the Commission should not condone and upon which the Commission should not rely as the basis for its plan for mandatory relocation.

The Commission has not proposed to make any spectrum available to any person, either concurrently with its auction of the Upper 200 channels or subsequent to that auction, for the

purpose of using it for mandatory relocation. Accordingly, if an EA applicant does not already hold licenses for spectrum which it can use for frequency relocation, no alternative spectrum is available to it.

In sum, the tentative conclusion which the Commission reached in WT Docket 96-18 is equally applicable to the instant proceeding. On reconsideration, the Commission should recognize that, except as a licensee may be warehousing spectrum, there are no alternative channels onto which incumbents can be relocated and it should strike mandatory relocation as an element of its plan of re-regulation in the 800 MHz SMR band.

The Commission cannot reconcile the fact that it examined two comparably occupied frequency bands and came to two different conclusions, 1 -- that "alternative" spectrum exists in the 800 MHz band for purposes of involuntary relocation of licensees and 2 -- that alternative spectrum does not exist in all of the paging bands. No attempt was made, nor could be made, by the Commission to distinguish or reconcile the two.

The Petitioners, therefore, respectfully request that the Commission, upon reconsideration, terminate this proceeding as incapable of resulting in rules which are in accord with law, equity and logic, and as well as being unlikely to provide any benefit to the public for which the actions of an unfettered market would not ultimately produce without the necessity or the advisability of Commission action. Accordingly, in an effort to assist the Commission in

its reconsideration of the FRO and to show the many problems which continue to plague this effort, the following specific observations are made.

Regulatory Parity Was Thwarted By The Commission's Order

The Commission stated that it was motivated to take its actions by the terms of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312, 392 (1993), codified at 47 U.S.C. §332[11] ("the Budget Act"), see, FRO at para. 5. Employing the language of this Congressional action, the Commission found that its regulatory treatment of SMR services as CMRS services required that the Commission employ geographic licensing, auctions, and other similar regulatory treatments to provide regulatory parity as among other CMRS providers, like cellular and PCS. Although the Commission has articulated the provision of regulatory parity as an objective to be reached via its newly adopted rules, the Commission has not created regulatory parity. Instead, the Commission has created a system of inequitable treatment of classes of operators, favoring large operators over small, without adequate justification or legal support.

The Commission's scant discussion of its duty in accord with the Budget Act leaves much to the imagination. Nowhere within the FRO does the Commission address the fact that its provision of alleged regulatory parity will also adversely affect private land mobile radio service

[11] The specific language of §6002(d)(3)(a) of the Budget Act sets forth a one year time period for the Commission's action to achieve regulatory parity. Accordingly, the Commission's authority under that section appears to have lapsed by its own terms and the Commission can no longer change the rules governing private land mobile services for purposes of achieving regulatory parity.

(PMRS) operators, improperly subjecting such operators to treatment as CMRS operators, despite the fact that the Commission's rules do not provide PMRS operators equal rights with CMRS operators.[12] This effect of the Commission's new rules is neither discussed nor reconciled within the FRO and the disparate treatement among operators is summarily glossed over.[13]

Nor does the Commission explain how forced channel relocation of one group of CMRS operators (incumbent SMR operators which are unsuccessful at auction) to the benefit of EA licensees, creates regulatory parity between these groups.[14] The Commission also does not provide any basis for its claim that its regulatory treatment to create EA-based SMR systems is

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[12] Even assuming, *arguendo*, that the Commission's actions are, in fact, directed at compliance with the Budget Act, the Commission's actions would not withstand scrutiny under 47 U.S.C. §332(a) since the Commission's decisions do not provide for efficient spectrum use or reduced regulatory burdens or serve the operational and marketplace requirements of PMRS operators. To the contrary, the Commission's actions are entirely contrary to its mandate to create rules in support of PMRS operations.

[13] "Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier." Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1481 (D.C.Cir. 1994). While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance." Id.

[14] The Commission's claim of an open auction procedure to allow access to EA-based licensing for all persons, including small incumbents, is wholly illusory, because of the effects of past spectrum warehousing and the condition subsequent to auction of possession of comparable spectrum for the purposes of necessary relocation of incumbents for the creation of EA-based SMR systems employing contiguous spectrum.

equivalent to its methods for creating cellular systems or, most recently, PCS systems. In sum, the Commission's claimed victory in creating regulatory parity is hollow.

A more careful review of the Budget Act would show that the Commission was charged to take only such actions which were "necessary and practical" to provide regulatory parity. As shown herein, the Commission's actions are neither necessary nor practical to achieve the articulated objectives and, in fact, have and will result in substantial delays in bringing increased offerings of local and wide-area service to the marketplace. That the Commission's decisions are impractical is without question. The creation of a total upheaval in the marketplace, including a reduction in the competitive capacity of incumbent operators and the attendent harm to end users' businesses inflicted by relocation cannot be found to be practical for any purpose.

In accord with the foregoing, it is apparent that the Commission cannot rely on its directions provided by Congress within the Budget Act, which authority has lapsed. It is not positioned to reasonably claim that its new rules will create parity among <u>all</u> affected CMRS operators. Its actions are not necessary and cannot be found to be practical for any purpose. Finally, its actions cannot be supported by any competitive analysis (which analysis is not found in the FRO or referred to in support of the FRO) which Petitioners reasonably expect the Commission would have performed in accord with 47 U.S.C. §332(c)(1)(C), in particularly the competitive effect of carriers possessing a dominant share of the market.[15,16] Since the

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[15] Such analysis would also require a determination of demand for services. Employing any yardstick, the Commission will discover that the public demand for SMR service is overwhelmingly local, analog, and for services which are priced below the cost for cellular

Commission's actions cannot be justified or supported in accord with the whole of the Communications Act of 1934 as amended, and not just a single, lapsed section of the Budget Act, the Commission should reconsider its decision to take such actions which will comply with the totality of the Act.[17]

"[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 the instant situation, the Commission's interpretation of Congress's directive that it provide opportunities for small business would have the opposite of the intended effect. The Commission's action would stunt the growth of small businesses, by preventing them from obtaining additional spectrum to serve additional customers. Further, the

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service, which demand is now met by incumbent SMR licensees. While there has been some migration of end users to digital service, the Commission should not allow itself to believe that the absence of choice for users equals demand for a service which displaces the service to which they have become accustomed.

[16] "Integral to the notice requirement [of notice and comment rulemaking] is the agency's duty 'to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.'" Solite Corp. V. U.S. E.P.A., 952 F.2d 473, 484 (D.C.Cir. 1991), *citing*, Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 530-32 (D.C.Cir), *cert. denied*, 459 U.S. 835 (1982)

"To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport." Id.

[17] "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 800 MHz auction is devised so that no entity which does not already possess sufficient, unloaded, unused spectrum can participate. The Commission has been, for years, penalizing small operators who have been forced to play by the Commission's rules. The small operator has had to load each channel to 70 units before being permitted to request an additional channel. The small operator has not been permitted to locate unloaded systems within forty miles of each other. The small operator has had to construct each granted system within either eight months or one year, depending. Yet, the larger operator has had none of this burden.

The larger operator has been permitted to apply for as many frequencies as desired, at virtually any location, and has been given a five year construction deadline. The Commission has not even enforced its application rules for these larger operators. Applications which should have had, in accord with Commission Rules, engineering showings, evidence of frequency coordination and certifications that they have been served upon co-channel licensees have sped through the Commission's processes as if accompanied by papal dispensation. Indeed, license grants for a certain large operator bear a grant and print date of a Saturday immediately prior to a freeze on application processing having been imposed. In the interest of the Commission's stated goal of "regulatory parity," Petitioners recommend that parity begin by and through a correction of past inequitites between the Commission's treatment of oeprators, prior to providing any additional advantages for the privileged class of wide-area operators.

Subscribers Are Not Considered

Within the whole of the FRO, the Commission has demonstrated little, if any, consideration of the burden to be imposed on end users and subscribers arising out of the promulgation of the new rules. Nowhere does the agency address the catastrophic losses to subscribers whose equipment is rendered obsolete or unuseable following a forced relocation of the frequencies employed by incumbent operators by EA-based licensees.[18] One may presume that this problem will be relieved, to some degree, by the costs to be borne by the EA-based licensee seeking to relocate incumbents, but within the FRO there is lacking a direct statement upon which hundreds of thousands of end users may rely. Petitioners request that on reconsideration, the Commission better articulate how adversely affected end users will obtain all necessary relief required by relocation.[19]

Nor does the Commission explain how adversely affected subscribers will be compensated for their cost of participation in any relocation scheme. End users' vehicles and personnel will be idle for some time to allow for retuning or installation of new equipment.

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[18] Nor has the Commission addressed the adverse effect on the U.S. Treasury arising out of claimed tax deductions for these losses which might easily exceed the value to the U.S. Treasury to be gained by the proposed auction of 800 MHz licenses.

[19] In a previously related matter, Motorola, Inc., 77 RR 2d 1226 (Wireless Bureau 1995), the Commission dismissed the notion that subscribers would suffer higher pricing for services following grant of certain ESMR licenses which would add greater concentration to the marketplace. However, the Commission was obviously incorrect as the records of Nextel Communications, Inc. will demonstrate that the cost to its subscribers who have been forced to accept digital service is at least 50% higher than previous analog service, see, Exhibit 2 attached hereto. This demonstrated increase in costs for affected subscribers requires that each be provided an ability to seek redress or protection prior to succumbing to relocation.

During the forced idle period, those same personnel and vehicles will be unable to produce revenue for the affected subscriber, yet the FRO is silent on the issue of just compensation for this obvious consequence. That the Commission has failed to formally recognize the consequences of its actions as it relates to hundreds of thousands of members of the general public is quite telling and suggests that its actions are without necessary reasoning.

Finally, the Commission has failed to recognize that adversely affected subscribers are entitled to be represented in any negotiation between EA-based licensees and incumbents. The agency's suggested methods of negotiation do not reflect the protectable interests of subscribers and provide no method for inclusion by subscribers in any negotiation process. That subscribers have a protectable interest which fully entitles each to be represented in the negotiation process is beyond question. The Commission's history of protection of affected subscribers, customers and users of common carrier facilities is more than an ample demonstration of the Commission's long held belief that the public is entitled to demonstrate when the actions of a carrier will adversely affect customers' business interests, and to petition the agency for relief. The rules and decisions set forth in the FRO fail to provide this class of affected persons any avenue for participation or petition to avoid costly, unncessary and unjustifiable injury to each customer's respective business or to obtain any relief.

The Commission may not reasonably find that the interests to be protected by site specific licensees are equal to their customers'. Although the site specific licensee might be concerned with its out-of-pocket expenses, that same licensee may have little, if any, interest in protecting

its subscribers against injury. The site specific licensee may also negotiate with EA-based licensees in a manner which favors the licensee over its customers, compromising on issues related to customer compensation to gain an advantage for itself.

This issue is of paramount importance when one considers that the investment in specific frequencies might easily be far greater for a customer than it is for the carrier. It is typical for SMR customers to have purchased their equipment. If the agency considers normal loading standards, the agency will quickly discover that the cost of retuning or replacing a repeater may easily be less than the cost of retuning or replacing 100 customer owned mobile units. Accordingly, the cognizable interests of customers will often exceed the interests of carriers. This fact makes its necessary for the Commission to invite participation by customers in the negotiation process, including the calculation of escrow payments to be made by the EA-based licensee seeking to relocate a carrier and its subscribers.

That the Commission did not consider the effects of its rules on hundreds of thousands of subscribers, to enable each to protect directly their interests in assuring continuity in their ability to produce revenue and to protect their interests in existing investments in thousands of control and mobile units, is a grave oversight which demonstrates the capricious nature of the Commission's decision. Petitioners respectfully request reconsideration of the FRO to protect customers' interests as they might be affected by action of the Commission's new rules and policies and to provide the necessary due process protections to which customers are fully entitled.

The Effects Of New Section 90.685(b)Are Adverse To The Public Interest

The newly-created Section 90.685(b) of the Commission's Rules requires reconsideration to become equitable and workable. Although properly directed at setting forth minimum construction requirements to assure that EA-based systems are not employed for the warehousing of spectrum, the Commission's Rule falls short of assuring that this goal will be met in a rational manner. To begin, subsection (b) provides EA licensees a five-year construction period for development of EA-based systems, commencing on the date of license issuance. Standing alone, this rule appears wholly consistent with the Commission's past actions, granting five-year construction periods for wide-area systems. However, the Commission has taken the unusual step of granting the same construction period to "any stations that may have been subject to an earlier construction deadline arising from a preexisting authorization." As the Commission is fully aware, five years ago, many such stations were authorized under wide-area waivers which allowed for a five-year construction period. To date, it is unclear how many of these systems, which are approaching their construction deadlines, have actually been built. By creating this rule, the Commission does nothing to ameliorate the numerous instances of spectrum warehousing that have developed to date and, in fact, provides an avenue for additional unjust enrichment of those entities which have perpetrated this activity.[20]

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[20] That the Commission has long held that spectrum warehousing is wholly inapposite to its goals is well known, e.g. Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service, 89 FCC 2d 1199, 1202 (1982). If, by its decision, the Commission intends a sudden departure from this policy, it must provide "a persuasively reasoned explanation for modifying its earlier position that is itself rationally grounded in the evidence before the agency," Telecommunications Research and Action Ctr. v. FCC, 836 F.2d 1349, 1357-1358, n. 19 (D.C. Cir. 1988). *See also*, Page America of New York, Inc., 8 FCC 2d 4167 (1993); Yankee Microwave, Inc., 7 FCC 2d 3233 (1992); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970).

A licensee which received a waiver to construct a wide-area system has not been required actually to construct the system and bring service to the public employing the licensed channels, due to the extended construction deadlines. Instead, persons receiving such waivers have been allowed to sit upon their authority, without agency oversight of progress in construction and operation. The result has been a substantial amount of spectrum warehousing throughout the industry, which is evidenced in part by the pending requests for Finder's Preferences filed by Chadmoore Communications, Inc. and Peacock Radio, Inc., for over 200 SMR channels. But these are only two examples of the evidence of widespread abuse of the Commission's processes which have plagued the regulation of ESMR systems from the beginning. Although such activity should have been fully examined by the Commission prior to its issuance of the FRO,[21] to assure that the adverse effect of such activity would not undermine its efforts within this proceeding, no such effort was undertaken [22] The result, then, of adoption of new Section 90.685(b) is the unjust enrichment of those persons who have engaged in spectrum warehousing.[23]

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[21] Petitioners respectfully suggest that, absent Commission action to clean up its present licensing to eliminate all such incidents of spectrum warehousing, the Commission is not properly positioned to engage in any auction which might result in unjust enrichment to a perpetrator of spectrum warehousing.

[22] Nothing contained within the Commission's decision provides rational support for any conclusion that extension of the construction period for previously authorized channels is appropriate to further any legitimate goal in serving the public interest. Absent any reasoned balancing of the expected harm of allowing prolonged spectrum warehousing to continue versus any alleged benefit in allowing such persons to be enriched unjustly at and after auction, the Commission's decision cannot withstand legal scrutiny in accord with the Commission's auction authority which is conditioned on avoiding unjust enrichment of licensees.

[23] Petitioners recommend that the Commission immediately demand evidence of construction of all wide-area ESMR systems granted under waiver, cancelling authority for all systems which have been licensed greater than two years and which licensees have not yet constructed at least 50% of the licensed channels. In accord with its decision in this proceeding, two years has been found by the Commission to be adequate for construction of SMR systems

Section 90.685(b), in concert with the remainder of the Commission's new rules, would allow spectrum warehousing participants in the Commission's auction to be unjustly enriched in three ways. First, the spectrum which is licensed to and warehoused by these entities would be employed to lower the number of activity units to be used for calculating bid increments, thereby lowering the costs to be paid by all persons at auction, including the incumbent, spectrum warehousing, participant. Second, the warehoused spectrum will create a natural deterrent to other, interested bidders who believe that the channels are too encumbered to be of any use to a competing bidder. Third, if the spectrum warehousing bidder is successful, the Commission's new Rule 90.685(b) will allow the bidder a new lease on its warehouse, extending the time for construction for an additional five years. The net result being that previous improper behavior will reap enormous rewards for the perpetrators, allowing them to employ warehoused spectrum to gain an unfair advantage at auction and an unfair advantage in extending the time period for construction of previously authorized facilities.[24]

To avoid these improper results, the Commission should reconsider its decision and set forth rules which deal with these circumstances.[25] Petitioners respectfully request that the Commission, at the least, remove this portion of its new rules, placing the same requirements

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which do not require relocation of incumbent operators.

[24] Spectrum warehousing has long been found to be an abuse of the Commission's processes and, as such, the effect of such abuses is relevant to a determination of eligibility to participate in any future auction, David Ortiz Radio Corp. v. FCC, 69 RR 2d 1011 (D.C. Cir. 1991); Shawn Phalen, 70 RR 2d 855 (Rev. Bd. 1992).

[25] If the Commission is convinced that it must discriminate in favor of parties which have engaged in spectrum warehousing, the Commission must demonstrate how its decision is consistent with the court's holding in Melody Music, Inc. v. FCC, 345 F.2d 730 (1965).

on EA licensees as the Commission has determined are appropriate for site specific licensees. Nothing contained within the Commission's decision provides any extended construction period for site specific systems arising out of the occasion of the auction, mandatory relocation, or the like. Therefore, the desire to provide regulatory symmetry should direct the Commission's actions to assure that either all classes of operators are provided extended construction time periods for previously authorized systems, or that none is given that advantage. To do otherwise is to create an unjust enrichment of one class of operator over another, without any concurrent justification. Petitioners suggest that neither class of operator should be entitled to this benefit.[26]

New Sections 90.685(c)&(d) Require Merger For Clarity

As adopted by the FRO, Sections 90.685(c)&(d) provide an opportunity for unintended mischief by EA licensees, with wholly irrational results for all affected persons. Based on the Commission's stated objective the public would reasonably expect that the Commission's Rules would require that EA licensees will construct and operate a system using contiguous spectrum across the whole or a substantial portion of the geographic area of an EA. Petitioners also expect that the Commission intended that EA licensees would be required to provide a service employing, contiguously, a substantial portion of the spectrum to be assigned. However, despite these reasonable expectations the Commission's rules do not provide the necessary threshold

[26] To further correct this problem, Petitioners suggest that the Commission change the language at Section 90.685(e) to read, ". . . would not result in the loss of any facilities authorized to the licensee constructed prior to the date of the commencement of the auction for the EA licenses." Again, licensees should be provided no advantage for failure to construct facilities in a timely manner