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

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
	)	
Implementation of Sections 3(n) and 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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Summary

- The Commission's decisions contained and discussed within the FRO will not acheive the Commission's objectives, thus, the Commission's decisions were arbitrary and capricious and must be reconsidered.

- The Commission justified the rulemaking on its belief that contiguous spectrum is necessary for wide-area licensing, however, nothing within the Commission's new rules requires that contiguous blocks of spectrum will be created or used for offering innovative or competitive service.

- Although the Commission intends to bestow extreme competitive advantages on EA licensees, it does not require that EA licensees produce the type of operation and services envisioned by the Commission in the FRO.

- There is no evidence on the record to demonstrate that the Commission's EA licensing/frequency migration plan will work. Without having examined such evidence, the Commission cannot claim to have engaged in reasoned decision making.

- The Commission's new regulatory scheme will not alleviate the burdens of site-specific licensing, but will increase the burden as site-specific licnesees are forcibly migrated and EA licensees modify their licenses to delete exchanged spectrum.

- The division of the Upper 200 SMR channels into blocks of 20, 60 and 120 channel blocks will not result in greater competition, as mandated by Congress.

- The Commission recognized that some commentors suggested that the wide-area licensing plan would have an adverse impact on the already established SMR industry, but failed to address those concerns.

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To: The Commission

PETITION FOR RECONSIDERATION

Fresno Mobile Radio, 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 Essential Component Is Missing

At paragraph 14 of the FRO, the Commission stated that "we believe that contiguous spectrum is an essential component of the wide-area licensing proposal we adopt today." Indeed, were the Commission not to have decided that operation across contiguous spectrum was of paramount importance, most of the decisions made and the Rules promulgated would be wholly irrational. It is this determination, standing alone, which creates the offered justification for forced frequency migration. It is this regulatory belief which is at the heart of the Commission's statements regarding the hoped-for provision of services to compete with cellular and PCS licensees. Stated in another way, if the Commission had determined that the creation of contiguous blocks of spectrum in the 800 MHz band were not necessary, one might expect that this entire rule making might be abandoned.

Yet, despite the level of importance afforded this essential component, nothing within the new rules requires that contiguous blocks of spectrum will ever be created and used for the purpose of offering any innovative or competitive service. For this reason alone, the Commission should reconsider the FRO, since its rules cannot be found to provide even a

scintilla of assurance that its objective, to obtain and maintain this essential component, will ever be met.

To illustrate this point, the following is shown:

1. There is no reference to use of contiguous blocks of spectrum in the Commission's new Rule Section 90.7, defining an EA-based or EA-license.

2. There is no requirement created under new Rule Section 90.683 that operation be accomplished or that service to subscribers be provided on contiguous spectrum.

3. There is no requirement under new Section 90.685 that an EA licensee ever construct or operate a facility employing contiguous spectrum.

What then, one must ask, has happened to this essential component? For all of the importance placed upon it in the text of the FRO, it did not appear in the rules adopted. Given the fact that this essential component was central to all of the Commission's objectives and provided an essential basis for the Commission's reallocaton of spectrum, the Commission failed to create rules which provided guarantees that this essential result would come to pass.[2]

Upon reconsideration, the Commission should return to the touchstone of its actions and reinvigorate its motivation to create contiguous blocks of spectrum for the purpose of delivering innovative, competitive services to the public; if, upon reconsideration, the Commission is still convinced that such is a laudable and achievable goal in view of the chaos to be visited on the SMR telecommunications industry in reaching it. In addition, the Commission should explain

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[2] "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).

why creating blocks of contiguous spectrum is so important that it justifies disruption of an entire industry. Should the Commision's justification involve the creation of new technologies, one can argue that new technologies could very well be developed using the present statutory scheme.

Petitioners aver that given the unusual collection of benefits and competitive advantages to be bestowed upon EA licensees, it is reasonable and equitable to demand that EA licensees produce the type of operations and services envisioned by the Commission in the FRO. Petitioners respectfully suggest that, if the Commission determines upon reconsideration that this proceeding still has merit, the following sections must be added to the Commission's new Rules to meet its oft articulated objective, described to be an "essential component" of the totality of the Commission's actions in this proceeding:

[New subsection under Section 90.685]

> **Only base stations which employ at least 50 percent of the total channels included in the spectrum block, which channels create a contiguous block of spectrum for use by the EA licensee, shall be considered in determining whether an EA licensee has met its requirements under this Section.**

[New subsection (a) under Section 90.687]

> **(a) An assignment or transfer in accord with this Section will be presumed to be in the public interest only if the EA licensee demonstrates that such assignment or transfer is for the specific purpose of creating a contiguous block of spectrum to meet its requirements under Section 90.685. To be awarded such presumption, the EA licensee must be licensed for adjacent channels, which channels are constructed within the service area of an entity subject to Sections 90.153 and 90.609(b), or if the EA licensee demonstrates reasonable assurance of its ability and commitment to obtain and construct adjacent channels within the service area of the entity subject to Sections 90.153 and 90.609(b).**

Absent the above amendments to the Commission's new Rules, the Commission cannot be found to have created the regulatory regime to meet its articulated objectives. Instead, the Commission will have unfairly placed incumbent licensees at EA licensees' mercy, demanding that each cooperate with relocations that will not create the contiguous channel use deemed essential by the agency. Such actions cannot be found to be reasoned decision making, employing the Commission's own threshold of reasonableness stated at paragraph 14 of its FRO. Without the foregoing changes, the Commission is stating that it would be content merely with the possibility of creating systems employing contiguous blocks of spectrum, but is unconcerned with whether such systems are ever, in fact, created.[3] This interpretation flies in the face of the entire FRO and would not serve as a justification for the upheaval of rights, interests, licenses, business expectancies, technology, and the circumstances of the entire SMR marketplace, which is the reasonably expected result of the Commission's decisions within this proceeding.[4]

If, upon reconsideration, the Commission determines that the above-suggested rule changes cannot be reasonably adopted, then the Commission should abandon this entire proceeding. By rejecting the creation of necessary assurances of contiguous spectrum operation within its rules, the Commission would demonstrate that the central basis for and the "essential

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[3] "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).

[4] "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).

component" to this proceeding is without merit. Having found this, there is no reason to continue this proceeding for any legally supportable purpose.

The Commission's Licensing Plan/Construction Requirements Are Contrary To Its Stated Objectives

The Commission's stated objectives are to create a licensing scheme which enables operators to employ contiguous blocks of spectrum for creation of EA-based systems to provide innovative, competitive services to the public. For the promulgated rules to be deemed rational, reasoned, decision making, there must have been created an avenue for success which would allow the public to perform the following, in accord with the Commission's articulated objectives:

1. Maintain the business opportunities created via the present licensing scheme, to enable incumbent operators to continue to operate comparable facilities.

2. Allow the public equitable participation in the auction process, including participation by small businesses, minorities and women.

3. Provide protection against the unjust enrichment of operators and auction participants in the regulation of the 800 MHz band.

4. Encourage the construction and operation of EA-based systems in accord with the Commission's construction and channel use plans.

As stated, *supra*, many of these goals will not be met under the Commission's decision for an abundance of reasons. However, the one trapdoor which lies beneath the Commission's plan is the condition subsequent for participation in the operation of EA-based systems, the EA licensee must possess the channels necessary to provide comparable facilities to incumbent licensees. Without this possession, no operator can reasonably expect to amass the necessary

contiguous spectrum to meet the Commission's goals, regardless of the Commission's intentions. This condition, standing alone, militates against full or even significant participation in the Commission's intended auctions. How much comparable spectrum is necessary is a calculable quantity, yet nothing with the Commission's FRO demonstrates that the Commission has performed any study to determine whether any operator possesses such comparable spectrum to serve an EA from a system constructed in accord with the Commission's construction/channel use requirements.[5]

To successfully meet the Commission's construction requirements, an EA licensee would need to possess either the licenses for up to 50% of the total channels within its spectrum block, or sufficient comparable spectrum to relocate incumbents to gain use of 50% of such channels, across a geographic area which contains two-thirds of the population of the EA. To determine whether the circumstances exist which would enable an operator to obtain these channels, the Commission must at least analyze those highly populated areas which contain 33.4% of the population or more in each EA. If, employing the rights created by the Commission new Rules, a required portion of the EA licensee's system cannot be constructed in that region because the

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[5] "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.

EA licensee does not have and cannot obtain use of 50% of the total channels within its spectrum block, due to a lack of previously authorized channels or licenses for comparable spectrum, it cannot be found that the Commission's newly created rules provide any assurance that its articulated goals can or will be met and, therefore, the Commission cannot be found to have engaged in reasoned decision making. Concurrently, if it is found that existing licensing will create a benefit via EA licensing for only a discreet group of operators, the Commission's rules also will not withstand legal scrutiny and will fail the Commission's own self-imposed requirement that, "[t]his new scheme is not designed to benefit any particular entity, but to provide opportunities for a variety of licensees of different sizes to participate in the provision of wide-area service," FRO at para. 14 (emphasis added).[6]

Although the foregoing suggested initial analysis is an obvious requirement in determining whether the Commission's new rules are appropriate and reasonable in delivering EA-based licensing within an equitable legal environment, the FRO does not demonstrate that the Commission has studied its own licensing records to determine whether its new licensing scheme will pass or fail a simple reality test. Petitioners respectfully suggest that absent such an analysis, the Commission cannot be found to have engaged in reasoned decision making.[7] The

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[6] Petitioners respectfully suggest that the Commission's licensing scheme fails any test of providing opportunity to small business, due to the large and necessary costs arising out of meeting the costs of relocation, and the required cost of construction, even assuming that a small business is the only applicant in an area, and, therefore, is not required to participate in an auction.

[7] "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

impact on the marketplace is too great to subject hundreds of thousands of subscribers to the Commission's best guess.[8] The Commission's obligations in the creation of rules require more than mere speculation. The Commission has the facts concerning existing licensing, but there is no indication in the FRO that it examined the crucial facts. Therefore, the Commission would, absent such a showing that an adequate study of its licensing records was performed, fail to demonstrate its authority to employ its auction authority. The Communications Act clearly states that the Commission's auction authority is intended solely for the selecting among mutually exclusive applications. At present, the Commission does not have before it mutually exclusive applications for EA licenses. One might speculate that such mutually exclusive applications might be created. However, the Commission has not employed a simple review of its data base to determine whether such mutual exclusivity will ever occur or whether this proceeding is based on an erroneous presumption. Accordingly, the Commission's speculation regarding whether EA-based systems might be capable of construction in accord with its new rules equates to an unsupported guess regarding its authority to employ auctions for any purpose.

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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).

[8] Nor should the Commission subject well-meaning auction participants to the Commission's speculation, encouraging bidding for licenses which must later be forfeited in accord with the Commission's construction/channel use requirements at new Section 90.685(e).

The Site-Specific Administrative Burden Was Not Relieved

At paragraph 4 of the FRO, the Commission indicated that one of the objectives of its action was to reduce the administrative burden for the Commission of licensing SMR stations on a site-specific basis. Petitioners sympathize with the Commission's problems, but the regulatory scheme adopted by the Commission cannot reasonably be expected to reduce that burden to any substantial extent.[9] Instead, it is more likely that the burden on the Commission will be increased. Each frequency exchange between an EA licensee and an incumbent will require the filing of at least two applications, one by the licensee requesting a frequency change and one by the licensee which is the source of the relocation channels requesting deletion of the relocation channels from its license, or, alternatively, a reciprocal assignment of licenses between the incumbent licensee and the licensee which the source of the relocation channels.[10] Since most incumbent licenses span all three EA frequency blocks, relocating the most common type of incumbent will require the filing of at least four, and possibly more, applications, each of which must be placed on public notice and processed to grant by the Commission. Since it does not appear that the Commission has undertaken any study of the new, additional burden, compared to the burden which it carries from the current licensing method, the Commission's

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[9] "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).

[10] If the EA licensee currently holds a license for the channels which it will provide to the incumbent, then the EA license must be modified to delete those channels. If the EA licensee arranges with a third-party to provide channels for the incumbent, then that person's license must be modified to delete the channels.

action would appear to be unreasonable, or arbitrary and capricious, and should be reversed on reconsideration.[11,12]

That the Commission's decision should be reversed, if based on reducing the Commission's administrative burden, is thoroughly discussed herein. The level of administrative burdens invited by the Commission via its decision are enormous compared to its present responsibilities in 800 MHz band SMR licensing. However, perhaps the most telling fact regarding the unreasonable conclusion reached by the Commission regarding site-specific licensing is the following: nothing contained within the FRO eliminates a single site-specific system. Rather, the Commission's decision *adds* potentially three non-site-specific systems, but does not eliminate any site-specific system, whatsoever. Accordingly, the Commission's analysis is wholly flawed and should be rejected upon reconsideration.[13]

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[11] 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).

[12] "Pursuant to the Administrative Procedure Act, agency decisions must be set aside if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Van Blaricom v. Burlington Northern Railroad Co., 17 F.3d 1224, 1225 (9th Cir. 1994), *citing*, 5 U.S.C. § 706(2)(A).

[13] 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).

The Allocation Was Not Optimal

The Commission determined that the public interest would best be served by allocating the Upper 200 SMR channels in three blocks of contiguous channels, one of 120 channels, one of 60 channels, and one of 20 channels. The public interest would be better served, however, by the allocation of the Upper 200 channels to wide-area use in the same five channel blocks as the channels are currently allocated. It is true that at least one currently existing wide-area licensee would benefit from an allocation of contiguous channels. It is clear that few, if any, incumbent licensees would be so benefitted. It is not clear that the public would so benefit.

The Commission is under a mandate to provide opportunities for three designated entities, specifically, small business, rural telephone companies, and businesses owned by women and minorities. The Commission's decision to allocate large, contiguous channel blocks does not accommodate the interests of the designated entities by providing them inclusion within the field. By licensing the channels for wide-area use in the currently allocated five channel blocks, the Commission can achieve a variety of benefits for the public, and, in particular, for designated entities.

The aggregation of between 20, 60 and 120 *contiguous* channels restricts the number of small business entities which can reasonably be expected to compete at auction, compared to allocation of five channel blocks. Allocation of small blocks will provide the largest number of opportunities for the greatest number of competitors, both large and small.

The record indicates that there are some entities which desire to operate wide-area systems on contiguous channels. However, the record is not sufficient to support the Commission's revising its current allocation to group currently allocated channels into contiguous blocks. Not only is the record not sufficient, but the public would be deprived of a full and fair recovery of a part of the value of the spectrum if the Commission does not revise its allocation.[14,15,16]

While some entities may desire to operate contiguous channel systems, the market is fully capable of deciding whether such systems will be economically justified, if only the Commission allocates wide-area frequencies in five channel blocks, with channels spaced at intervals of one megahertz. By so allocating, the Commission can facilitate bidding by designated entities, while allowing an entity which desires contiguous spectrum to bid aggressively only for that spectrum which it desires and decides that it should acquire.[17] By such a structure of requiring those who

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[14] Since the Commission is determined to award spectrum to those who value it most highly, it should require those who value contiguous spectrum highly to pay a premium for it.

[15] "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).

[16] "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).

[17] If an EA applicant is assured of obtaining adjacent channels, unjust enrichment of such an applicant may result, compared to the applicants having to bid for non-adjacent blocks of channels. Rather than being assured of obtaining adjacent channels without competing vigorously at auction, when an EA applicant must bid aggressively and smartly to obtain adjacent spectrum, the public will recover its share of the full fair market value of the spectrum.

desire contiguous spectrum to compete fully and to pay the full market clearing price at auction, the public will receive a full measure of recovery from the winning applicant's bid.

Because of the large number of incumbent stations currently authorized, it is likely that in some markets it would not be possible for any person to operate on 20 to 120 contiguous channels, and in those cases, it is likely that no one would request even a block of 20 channels. Consider, for example, a situation in which there are four separately owned stations already serving the population heart of an EA on the four five-channel blocks which constitute the lowest 20 of the Upper 200 channels. Those stations could either be co-located, or situated around the EA in such a manner as to preclude any person who did not have either a full spectrum warehouse or the financial resources to relocate the incumbents on all 20 channels from establishing a wide-area base station that would provide service to a sufficient portion of the EA population to meet the Commission's minimum service requirements. The necessity of an EA licensee's relocating incumbent licensees on 20 or more channels has three undesirable consequences.

The first consequence is that the complexity of negotiations among at least five parties would be great.[18] The second consequence is that no one may bid and no wide-area service will be made available to the public. The third consequence is that small business will be precluded

[18] We shall disregard the likely necessity of negotiations involving multiple co-channel incumbents and/or multiple EA licensees. The five-member Commission knows from its own experience the difficulty of successfully and expeditiously conducting five-way negotiations. When individual economic interests of five parties are added to the mixture, the difficulties can be expected to multiply.

from participating in the auction for two reasons, namely, the fact that relocation channels will either be unavailable or impracticably costly and that the costs of relocating 20 or more channels will be unbearable for a small business.

By licensing in five channel blocks, the Commission can dramatically reduce, and in many cases, eliminate the burdens flowing from mandatory frequency relocation. By reducing the number of persons who must be involved in each negotiation, if any occurs, the Commission can expedite the settlement of negotiations and speed the provision of wide-area service.[19] Obviously, if mandatory relocation is either entirely unnecessary or is much reduced in its complexity, the burden of the process on the Commission's administrative resources will be much lower.[20]

There is no requirement that four incumbent licensees in the instant example either sell their stations to anyone prior to the auction or enter into any type of bidding arrangement with one another. Indeed, their wisest, and perfectly lawful, choice may be to sit on their assets and make it impossible for a wide-area competitor to enter the market, thereby preserving their

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[19] In many EAs, there would be only one EA negotiation with only one incumbent licensee on each channel block, rather than at least three EA licensees' having to negotiate with an incumbent in almost every case.

[20] At paragraph 14 of the FRO, the Commission is simply in error in suggesting that licensing in non-adjacent frequency blocks would involve a "substantial amount of time and preparation devoted to the filing of numerous applications," FRO at para. 14. As it did in its 900 MHz band auction, the Commission can design an application process that allows an applicant to file only one application for its choice among a variety of geographic areas and frequency blocks.

shares of the market. Reducing the size of the blocks to five channels will avoid such a stalemate and maximize the amount of service to be provided to the public.

As shown by the edited letter attached as Exhibit 2 hereto, one of the Petitioners has estimated to a vendor that it expects the cost of replacing its 19 channels to exceed $1.4 million, apart from the cost of the replacement spectrum. A business which has a history of gross revenues of less than $3 million for each of the past three years cannot reasonably be expected to be able to be included in the opportunities which are mandated by Section 309(j) of the Act if the Commission does not revise its wide-area frequency allocation.

On reconsideration, the Commission should provide additional opportunities for designated entities, simplicity in the negotiations, and a full measure of recovery for the public of the value of the spectrum by allocating the wide-area licenses, if at all, in the currently existing blocks of five channels.

Other Effects On Small Business Are Adverse

At paragraph 11 of the FRO, the Commission observed that some commentors had suggested that wide-area licensing "would have a negative impact on the already established SMR industry, particularly operators of SMR systems and licensees operating in rural areas," FRO at para. 11. Having recognized the existence of the problem, the Commission failed totally at paragraphs 13 and 14 of the FRO to deal with the problem in any way. On reconsideration, the Commission should take the steps necessary to deal forthrightly with the perceived problem

and ameliorate the negative impact of its actions on small businesses in the already established SMR industry.[21]

The Commission decided, at paragraph 44 of the FRO, not to limit the number of channel blocks which an EA licensee could aggregate. However, it is not reasonable to believe that such a decision is in compliance with the Commission's statutory duty under the Communications Act to be sure that auctioning will "avoid excessive concentration of licensees and by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women," 47 U.S.C. §309(j)(3). Only by limiting an EA licensee to something less than the entire 200 channels can the Commission expect to disseminate licenses among a wide variety of applicants.

The Conference Committee on the Omnibus Budget Reconciliation Act of 1993 indicated that it did "not intend that the Commission should apply any particular antitrust or other test in order to avoid concentration of licenses, but rather should apply a common sense approach. If a single licensee dominates any particular service, of if it dominates a significant group of services, then the Commission should take that into account," in formulating its future licensing plans, H. Rpt. 103-111 at 254 (1993). It does not appear from the FRO that the Commission either analyzed the current state of concentration of the SMR industry, determined whether any

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[21] "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).

entity dominates current licensing of SMR systems or could be expected to dominate the licensing of wide-area SMR systems, or took a common sense approach toward the existing facts and the resonably foreseeable results of the Commission's actions. On reconsideration, the Commission should take into account the extent of concentration of SMR licensing, determine the extent to which the Commission's plan can be expected to maintain or increase concentration, and take a common sense approach toward diminishing any concentration and avoiding the creation of concentration of licenses by its actions.[22,23]

To assure that at least two of the three categories[24] of designated entities are given adequate, simultaneous opportunities to compete, the Commission should not permit any EA licensee to be authorized for more than one third (67) of the Upper 200 channels in any EA.[25] Limiting each licensee in an EA to no more than one-third of the channels will both avoid excessive concentration of licenses and provide adequate opportunties for designated entities.

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[22] "[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).

[23] "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).

[24] One may assume that rural telephone companies would not be interested in participating in wholly urban EAs.

[25] The same requested limitation would apply without regard to whether the Commission allocated and accepted applications for large or small frequency blocks.

Additionally, on reconsideration the Commission should determine whether it is likely that any small business might be positioned to derive any ultimate benefit from participation in the auction process. Nothing contained within the FRO addresses the natural problems confronted by small business in obtaining all of the elements necessary to benefit by the Commission's intended actions, *i.e.*, the financial resources to a) participate at auction; b) achieve victory at auction; c) perform the studies and negotiation necessary to attempt frequency migration of incumbent licensees; d) obtain necessary "comparable spectrum" to offer incumbents for migration; e) bear fully the sum of the costs arising out of migration of an incumbent system; f) design a system for delivery of wide-area services; and g) construct a system which meets the construction requirements contained within the FRO in a timely manner. The totality of the costs, therefore, weighs heavily against any presumption of small businesses' ability to engage in meaningful participation in the construction of EA licensed systems. If, upon reconsideration, the Commission logically deduces that small businesses are not likely to possess such necessary resources for achieving the operational goals and attendant opportunities espoused by the FRO, the Commission should take such steps as are necessary to provide greater assurances to small business that its participation will not be wholly fruitless or impossible.[26]

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[26] "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).