Effects On Competition Are Adverse

The Commission's analysis of the competitive impact of its decisions is wholly superficial. Competition at auction is for naught if competition in the field is disserved by the Commission's actions. The Commission's stated objective is to increase competition among large carriers, providing additional commercial alternatives among cellular, PCS, and now, ESMR systems. The Commission's analysis implies that the competition presently provided by site-specific licensed systems is inadequate and that additional measures are required to enhance competition in the telecommunications marketplace.[27] This unsupported premise appears to be guiding the Commission's analysis. Petitioners respectfully disagree with this premise and the results that this premise have had on the Commission's decision making process.[28]

A review of the Commission's records and the history of SMR operations by site-specific systems will fully demonstrate a sterling record of success. Nothing contained within the Commission's records would demonstrate that the Commission's present system has not created a vital industry which has long and faithfully served the demands of the public. On the other

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[27] "An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties." Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C.Cir. 1994).

[28] The Commission has not addressed the anticompetitive impact of its decision which will be visited upon small businesses via lost business expectancies, among other injuries, to which Petitioners would be fully entitled in a free market, *see, e.g.*, Bacon v. St. Paul Union Stockyards Co., 201 N.W. 326 (1925); Huskie v. Griffin, 74 A. 595 (1909); Wilner v. Silverman, 71 A. 962 (1909). Since the FRO would prevent site-specific licensees from obtaining additional channels or relocating their systems, such actions will directly injure small businesses' ability to enjoy business expectancies which, but for the Commission's action, would have been available to them, strengthening them as competitors.

hand, the Commission's record is bereft of any evidence that consumers have indicated any demand for the services which the Commission envisions in the FRO. Accordingly, the Commission's suggestions that the public would be better served by digital systems, operating across contiguous blocks of spectrum, is unfounded. Nothing contained within the record of this proceeding provides evidence of any substantial demand for wide-area service on contiguous channels. Absent such a showing, the Commission is not positioned to claim that attendant harms to the competitive ability of small business is, on balance, in the public interest.

Assuming, *arguendo*, that the Commission is correct in its presumptions that wide-area 800 MHz systems are required to meet the public's needs, the FRO does not address the problem arising out of overconcentration of spectrum in the hands of few operators. The primary service to be considered is two-way dispatch services from exclusive operations. Such services are provided by 220-222 MHz systems and SMR systems (800 and 900 MHz). Nothing contained within the FRO addresses the problems arising out of monopolistic concentration of market share within the hands of few operators. For example, the Commission could have applied the standard Hefindahl-Hirschman Index ("HHI")[29] to determine whether its decisions

[29] The HHI is a commonly used index which is calculated by squaring the market share of each firm competing in the market, then summing the squares. Presently, Nextel Communications, Inc. claims an approximate 40% market share in 800 MHz customers and an even higher percentage concentration of 800 MHz channels. Nextel, through its wholly owned subsidiary, FCI 900, Inc., is also seeking to acquire numerous blocks of 900 MHz channels across the nation. These facts require examination by the Commission to determine adequately the competitive impact of its FRO.

within the FRO are likely to create an impermissible level of concentration within the market.[30] Absent such an analysis by the Commission, Petitioners must assume that the Commission failed to fulfill its duty to engage in reasoned decision making, including fulfillment of its duties in accord with 47 U.S.C. §309, which requires the Commission to consider the anticompetitive results of its actions.[31] That the Commission has deemed such an analysis to be necessary when

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[30] That the Commission knew or should have known to perform such an analysis can be found in the activity of the United States Department of Justice, which deemed such a review to be necessary to avoid anticompetitive results in the SMR marketplace, *see*, United States v Motorola, Inc. and Nextel Communications, Inc., Civil Action No. 942331 (1994).

[31] "[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).

"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), and

"There must be a thorough and comprehensible statement of the reasons for the decision," Id. "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 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

considering questions of overconcentration can be found at MCI Communications Corp., 77 RR 2d 288 (C.C.Bur. 1994).

Nor does the Commission address the problem which may be suffered by wide-area licensees which attempt to act upon their new authority. The Commission has left the final decision to EA licensees as to whether forced frequency migration will be employed. Since the Commission has stated that migration will be only an option for EA licensees and is not required under its rules, the EA licensee moves at its peril in forcing operators to migrate. Such activity could clearly be found to be actions taken for the purpose of maintaining or creating monopoly power, which is contrary to the tenets of antitrust law, for which EA licensees would not be immune under the rule of Phonetele v. American Telephone & Telegraph Co., 664 F.2d 716, 737, n. 56 (9th Cir. 1981); and McKeon Construction v. McClatchy Newspapers, 19 RR 2d 2029 (N.D. Ca. 1969). Petitioners respectfully suggest that the Commission has a duty to

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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). "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). "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." Id. 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).

consider fully the antitrust implications of its decisions, including those which might easily cause a licensee to move in violation of the Sherman Act.[32]

Petitioners respectfully aver that the Commission's analysis of the competitive impact of its decision was woefully flawed and incomplete and not designed to result in reasoned decision making. The analysis failed to address the adverse competitive impact on small business and site-specific licensees, or to provide any support for such a result; failed to demonstrate any analysis concerned with overconcentration of market share by a few operators, in particular Nextel Communications, Inc.; and failed to demonstrate any consideration of the potential violations of the Sherman Act arising out of licensees' acting in accord with the regulatory regime created. For these reasons, the Commission should reconsider its decision in conformity with its mandate from Congress.

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[32] *See, also,* Storer Cable Communications, Inc. v. City of Montgomery, Alabama, 73 RR 2d 868 (M.D. Al. 1993), whereby the court further found that a cause of action under Section 2 of the Sherman Act can be found arising out of an exclusive relationship between supplier and carrier, such as exists between Motorola, Inc. and Nextel Communications, Inc.

## Conclusion

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

Respectfully submitted,
FRESNO MOBILE RADIO, INC.,
*et al.*

By _____
Dennis C. Brown

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Suite 650
Washington, D.C. 20006
202/223-8837

Dated: March 14, 1996

# EXHIBIT 1

# List of Petitioners

Applied Technology Group, Inc.

Communications Center, Inc., Pierre, South Dakota

Communications Licensing Consultant, San Diego, California

Craig Antenna Service, Pana, Illinois

Custom Radio Communications, Ltd., Kansas City, Missouri

D&D Communications, Inc., Lincoln, Nebraska

D&G Communications, New Iberia, Louisiana

Dakota Electronics, Aberdeen, South Dakota

Domer Communications, North Canton, Ohio

Durham Communications, Inc., Mesa, Arizona

Eden Communications, Inc., Salinas, California

Ernest Concrete & Supply Company, Warren, Michigan

FM Communications, Inc., Tonawanda, New York

Fresno Mobile Radio, Inc., Fresno, California

Greer Communications, Inc., Clarksville, Tennessee

# EXHIBIT 2

February 5, 1996

Dear

We need your help! With the coming 800 mHz auctions and possible relocation of two existing LTR systems we need a plan to keep customers on-the-air and a price quote on backbone equipment.

Seven of our nineteen channels are 860 mHz and subject to relocation to 850 frequencies. We have another system that has five channels of 860 frequencies.

At this time we do not know if any frequencies are available for relocation of our twelve channels.

The main problem is to keep all existing users in service during this reconfiguration. My plan is to build complete new systems at the two radio repeater sites. We need 7-antennas, 300' 7/8" heliax transmission line, connectors, 4 or 5 transmitter combiners, a receiver preselector, a 24 channel receiver distribution panel, 7-Trident TNT-110, 19, power monitors, 500' RG78 and 500' RG-142 interconnecting cables, 19-Viking LTR repeaters. The new repeaters and combiners need to be in cabinets. We need to conserve space as we will be using the center aisle until the existing equipment can be removed.

Installation of antennas and transmission lines will be completed by our staff. Installation and programming and optimizing of the RF needs to done by an experienced LTR technician without the day to day pressures.

We believe that parallel system tuned with area bit "one" instead of our present area bit "zero" can operate during this "relocation." We can not see an alternative but the project should be reviewed by engineering. We will probably need some sort of lockout device to block a mobile from interferring with another call using a different area bit.

In the field, we will need several teams of experienced programmers, radio installers that can re-program and/or replace any radios that cannot tune to the 850 mHz frequencies. Most of our subscriber base is using EFJ LTRs. Some fleets will have other brands that will have to be re-programmed. We have close to 3,000 subscribers, roamers and seasonal users.

The second system of five channels at another radio site will require most of the above equipment, services and programming. Some accounts subscribe to both systems so all mobiles fleets need to be re-programmed together and at a speedy rate.

Our staff will be working full time, with much overtime, doing the scheduling, coordination, and documentation. The project could take two maybe three years. It is important that we receive full and timely support.

Of the three thousand , we estimate that our customers will need about 750 mobiles to replace those units that can not tune to the 850 mHz frequencies.

Mike this is a big project that all auction looser-incumbents will have to face. The good thing is that the winner (Nextel) will have to pay all of our costs to relocate.

We have a special consideration to look at and be mindful. Our firm sits on two Economic Areas "EA" and frequency coordination will be a bear if there are two or more Auction winners. we understand that there maybe six EA winners. Please give all the prices and costs with participation and if you know where to find trained LTR techs or if you could recommend a good field service company(s).

I have prepared a rough budget for the above project as follows:

| | |
|---|---|
| 19 - Channels, combiners, Trident LTR logic, Antennas, etc. | $258,000.00 |
| Local & EFJ labor | $20,000.00 |
| 5 - Channels, combiner, Trident, Antennas, etc. | $74,000.00 |
| Local & EFJ labor | $5,000.00 |
| 3000 - Reprogram, replace, install, coordinate & etc. | $1,090,000.00 |
| Travel, meals and lodging | per diem |
| Frequency Coordination W/up to 6 EA winners | $300,000.00 |
| Lost business | to be determined |
| Hard costs . . . . . estimate | $1,747,000.00 |

Enclosed are photocopys of the two affected SMR licenses. Please give us your best shot.

Best regards,