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FEDERAL COMMUNICATIONS COMMISSION
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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 332 of the Communications Act Regulatory Treatment of Mobile Services	)	**GN Docket No. 93-252**
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	**PP Docket No. 93-253**

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To: The Commission

PETITION FOR RECONSIDERATION

Filed by:

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Date: March 18, 1996

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Summary

The Industrial Telecommunications Association, Inc. ("ITA") requests reconsideration of the First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making adopted by the Federal Communications Commission on December 15, 1995.

In the First Report and Order segment of this decision, the Commission has reallocated 150 channel pairs designated as "General Category" channels exclusively for SMR use. In doing so, the Commission has substantially harmed the interests of non-SMR industrial, business and public safety licensees. The Commission has also failed to take steps to minimize SMR use of the remaining Industrial/Land Transportation and Business pool channels. ITA also believes the Commission has failed to adequately analyze and explain the availability of the 200 "upper block" SMR channels in the Canadian and Mexican border regions.

ITA believes the Commission's 800 MHz decision requires reconsideration for the following reasons:

1. The decision to reallocate the General Category channels solely for use by licensees of SMR systems harms the interests of non-SMR users of these channels.

2. An overwhelming majority of General Category channels are, in fact, already being used and, accordingly, only an insignificant amount of spectrum remains available for purposes of spectrum auctions.

3. The 800 MHz Decision fails to establish a transition plan for removing SMR systems from the 800 MHz industrial and business pool channels.

4. The 800 MHz Decision is flawed insofar as it completely ignores the complexity of General Category licensing issues in the Canadian and Mexican border regions.

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To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, the Industrial Telecommunications Association, Inc. ("ITA") respectfully requests reconsideration of the First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making adopted by the Federal Communications Commission in the above-captioned proceeding on December 15, 1995.[1]

ITA, formerly the Special Industrial Radio Service

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[1] First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making (FCC 95-501), adopted and released on December 15, 1995, 61 Fed. Reg. 6138 (February 16, 1996) (hereinafter "800 MHz Decision").

Association, Inc. (SIRSA), is an association organized under the laws of the District of Columbia. ITA is the Commission's certified frequency coordinator for the Special Industrial Radio Service and the Industrial/Land Transportation 421-430 MHz and 800/900 MHz frequency pools. Up until the 800 MHz General Category channels were reallocated exclusively for SMR use, ITA coordinated General Category channels for those entities: (a) eligible to become Industrial/Land Transportation licensees; (b) wishing to expand trunked systems; or (c) consolidating conventional systems into a trunked system. ITA coordinates in excess of 6,000 applications per year on behalf of applicants seeking Commission authority to operate radio stations on frequency assignments allocated to the Special Industrial Radio Service and the enumerated 800/900 MHz frequency pools.

ITA has been an active participant in this proceeding, filing various Comments and Reply Comments responsive to the Notice of Proposed Rule Making, 8 FCC Rcd. 3950, and the Further Notice of Proposed Rule Making, 10 FCC Rcd. 7970, as well as the Second Further Notice of Proposed Rule Making, 61 Fed. Reg. 6212. ITA has also participated in numerous meetings with the FCC staff and other industry representatives in order to work toward achieving resolution of the difficult issues raised in this proceeding.

In the First Report and Order segment of this decision, the

Commission has reallocated 150 channel pairs designated as "General Category" channels exclusively for SMR use. In doing so, the Commission has substantially harmed the interests of non-SMR industrial, business and public safety licensees. The Commission has also failed to take steps to minimize SMR use of the remaining Industrial/Land Transportation and Business pool channels. Finally, the Commission has failed to adequately analyze and explain the availability of the 200 "upper block" SMR channels in the Canadian and Mexican border regions.

Having examined this reallocation and other aspects of the 800 MHz Decision from several different perspectives, ITA and its industry members reach the following conclusions:

> *first*, the decision to reallocate the General Category channels solely for use by licensees of SMR systems is arbitrary and capricious;
>
> *second*, an overwhelming majority of General Category channels are, in fact, already being used and, accordingly, only an insignificant amount of spectrum remains available for purposes of spectrum auctions;
>
> *third*, the 800 MHz Decision is arbitrary and capricious in failing to establish a transition plan for removing SMR licensees from the 800 MHz industrial and business pool channels;
>
> *fourth*, the 800 MHz Decision is flawed insofar as it completely ignores the complexity of General Category licensing issues in the Canadian and Mexican border regions; and
>
> *fifth*, for the reasons stated above, the 800

MHz Decision is contrary to the public interest and must be reversed.

DISCUSSION

I. The decision to reallocate the General Category channels solely for use by licensees of SMR systems is arbitrary and capricious.

In the Further Notice of Proposed Rule Making, which directly preceded the adoption of the First Report and Order in this proceeding, the Commission stated as follows:

> General Category Channels are expressly designated for use not only by SMR licensees, but also by Public Safety licensees and PMRS providers in the Industrial/Land Transportation and Business service categories. Because we have allocated these channels for extensive PMRS as well as CMRS use, we determined in the *Competitive Bidding Second Report and Order* that these channels are not subject to competitive bidding. [Footnote omitted.] Consequently, we are concerned that continuing to allow SMR applications for these channels could result in a scarcity of frequencies for PMRS use.[2]

In the space of 16 months, the Commission has fundamentally reversed its view of the General Category channels. In 1994, the Commission was concerned that allowing SMR use of the General Category channels could result in a scarcity of frequencies for private mobile radio systems. Now, the Commission has chosen to designate these channels exclusively for SMR use. Similarly, in

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[2] Further Notice of Proposed Rule Making (FCC 94-271), PR Docket No. 93-144 and PP Docket No. 93-253, adopted October 20, 1994, released November 4, 1994, 10 FCC Rcd. 7970, paragraph 52.

1994, the Commission noted that these channels are not subject to competitive bidding. Now, the 800 MHz Decision reflects a pronounced predisposition toward auctioning the General Category channels.

The Commission attempts to explain this startling shift in its treatment of the General Category channels with the statement that

> [a] review of our licensing records indicates that the overwhelming majority of General Category channels are used for SMR as opposed to non-SMR service.[3]

The entire thrust of the 800 MHz Decision demonstrates a profound disrespect for the legitimate rights and requirements of industrial, business and public safety licensees. Equally important, the decision displays an ignorance of the critical public interest role that industrial, business and public safety systems serve in helping to meet the day-to-day needs of the American public.

The 800 MHz Decision offers no explanation for the dramatic shift in the Commission's outlook. Certainly, the usage pattern for the General Category channels has not changed dramatically in

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[3] 800 MHz Decision, para. 137.

the past 16 months.[4] Nor has the scarcity of frequencies for private mobile radio systems been alleviated. The available data does not support the Commission's conclusion that "the overwhelming majority of General Category channels are used for SMR as opposed to non-SMR service."[5]

More than 3,450 non-commercial licensees operate systems in the General Category Pool. This compares with approximately 11,100 SMR licenses, including a very sizeable proportion of systems licensed to speculators. Even including all of the licenses held by speculative applicants, one-fourth of all the licenses issued for the General Category channels are for non-SMR systems.

The decision to redesignate the General Category channels exclusively for SMR purposes will have a particularly severe impact on industrial and business entities that, as a practical necessity, must operate their own communications networks. The redesignation will severely limit the communications options available to non-SMR licensees whose requirements cannot be

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[4] In making this statement, ITA is ignoring the thousands of applicants who, prompted by promises on late-night television of potential riches, filed speculative applications for the General Category channels. It is widely recognized that the vast majority of these speculators, if not all of them, lacked any intent to construct and operate a bona fide radio system. Rather, it was the lure of possible wealth that caused them to file their applications.

[5] 800 MHz Decision, paragraph 137.

satisfied by commercial carriers. There must be sufficient spectrum available to accommodate these non-SMR requirements. The redesignation of the General Category channels greatly exacerbates the scarcity of private mobile channels that the Commission found when drafting its 1994 Further Notice of Proposed Rule Making in this same proceeding.

By further aggravating the existing "scarcity" of 800 MHz channels available for vital industrial, business and public safety radio systems, the reallocation of the General Category channels will have a very significant adverse impact on critical industrial and business activities. As a practical necessity, the licensees of these systems must operate their own communications networks. Redesignating the General Category channels will severely limit the communications options available to non-SMR licensees whose requirements cannot be satisfied by commercial carriers.

The impact will be felt by companies such as Exxon Communications Company, one of ITA's members. Exxon operates a 20-channel trunked 800 MHz system in its Baton Rouge, Louisiana oil refinery complex. The system is currently loaded with more than 2,000 mobile and portable units. Due to the extreme loading, Exxon encounters severe problems during period of heavy use, e.g., plant "turnarounds" or emergencies. In trying to meet future requirements, Exxon's only practical option is to add

additional portable radios to the system. There are no additional 800 MHz private land mobile channels available for licensing in the Baton Rouge area. Five of the twenty channels in use at Exxon's Baton Rouge refinery are from the General Category pool. The reallocation of the General Category channels deprives Exxon of any opportunity to expand its system. For Exxon and all other similarly situated industrial, business and public safety licensees, system expansion is now impossible. ITA must question whether this was the Commission's intent. The result, whether intended or unintended, is both callous and unjustified.

When the Commission expressed concern about the "scarcity" of frequencies available for private land mobile radio use in 1994, it clearly had in mind situations such as the difficulties confronting Exxon in Louisiana. For reasons that are not adequately explained nor justified, the Commission has dramatically reversed its position in the sixteen months since it issued the Further Notice of Proposed Rule Making. The Commission's action is arbitrary and capricious and contrary to the public interest.

II. An overwhelming majority of General Category channels are already being used and, accordingly, only an insignificant amount of spectrum remains available for purposes of spectrum auctions.

ITA has examined in detail the use of ten General Category

channels, selected at random, in the Baltimore/Washington, D.C. market. Exhibits A-1 through A-10 depict geographically the existing use of the ten channels in the Baltimore/Washington area. In the case of each channel, there are already existing users in all of the significant population centers and corridors within the EA.[6] In the most severe cases, as represented by Exhibit A-3, which depicts the channel 851.0625 MHz, there is no discernible unlicensed or "white space" areas in the entire EA.

The total population of the Baltimore/Washington EA is 7,425,606. Exhibit B depicts, for each of the ten General Category channels sampled, the portion of the EA population that is encompassed within the service contours of the existing systems (second column). Exhibit B also depicts, for each channel, the portion of the total EA population that resides in the so-called "white spaces" (third column). Even for 851.2375 MHz, the channel on which a "white space" licensees would have the most sizeable population base from which to draw, only 17% of the EA population is included in the "white spaces." For this channel, therefore, the maximum number of people that a licensee on the white spaces could anticipate serving is less than 1.3 million. For this same channel, the presence of the existing systems would preclude the "white space" licensee from providing

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[6] On the maps provided as Exhibits A-1 through A-10, the circles represent the 22 dbu contours of the service areas covered by the existing systems. These contours are calculated using the R-6602 propagation model.

service to more than 6.1 million people in the EA.

Overall, for each of the ten General Category channels sampled, "white space" licensees would be able to offer service to only 9.2% of the total population of the EA. The "white space" population percentages are comparable for other prominent EAs. Clearly, the areas available for auction will not represent an attractive customer base to potential licensees. Having examined these statistics, ITA concludes that the decision to reallocate the General Category channels exclusively for SMR use does not represent a rational or logical approach to regulation of the radio spectrum. As demonstrated, the General Category channels are already heavily licensed and in use. The benefit of the reallocation to future licensees is minimal.

The harm to industrial, business and public safety licensees, whose telecommunications operations are jeopardized by the decision, is severe. Viewed from this perspective, ITA believes the decision is particularly arbitrary, irrational, and capricious.

Conversely, there is no harm in simply continuing to make the General Category channels available for non-SMR as well as SMR use. With the current intensive use of the General Category channels, there is little potential to use these channels as a relocation pool. Similarly, the channels do not represent a

fertile environment for auctions. There simply is not sufficient unused capacity on these channels. Under these circumstances, ITA must question why the Commission cannot simply allow affected industrial, business and public safety users to continue to have access to these channels, thereby perhaps providing some limited means for accommodating future growth.

III. The 800 MHz Decision is arbitrary and capricious in failing to establish a transition plan for removing SMR licensees from the 800 MHz industrial and business pool channels.

In 1986, the Commission allocated the spectrum in the 896-901/935-940 MHz frequency bands (900 MHz) for use by private land mobile radio licensees.[7] With the implementation of this allocation decision, there were a total of 929 channel pairs in the 800 MHz and 900 MHz frequency pairs that were allocated for the private land mobile radio services, exclusive of the public safety services.[8] Of the 929 total channel pairs, a typical industrial entity such as Exxon Communications was immediately eligible to use 649 channel pairs, or 70% of the total non-public safety private land mobile radio allocation. The only channel pairs that Exxon Communications could not directly access were

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[7] Report and Order, Docket No. 84-1233, adopted July 24, 1986, 2 FCC Rcd. 1825 (1986).

[8] This total of 929 channel pairs included 150 General Category channel pairs, 180 channel pairs in the 809-816/854-861 MHz ranges, 200 channel pairs in the 816-821/861-866 MHz range, and 399 channel pairs in the 896-901/935-940 MHz band.

the 80 SMR channel pairs at 800 MHz and the 200 SMR channel pairs at 900 MHz.

Over time, the Commission has significantly reduced the number of channels available to industrial and business entities. In 1988, it reallocated the 200 channel pairs in the 816-821/861-866 MHz range for SMR use exclusively.[9] The 800 MHz Decision takes away the 150 General Category channels. Consequently, industrial entities such as Exxon Communications are now entitled to use only 299 of the 929 available channel pairs, or 32% of the total non-public safety allocation.[10]

The cumulative effect of these reallocations has been to inflict considerable harm upon industrial and business entities. Further, at the same time that the Commission is reducing the amount of spectrum that industrial and business entities may access, it has made no comparable effort to enhance the small amount of spectrum that is available for non-SMR use.

Of specific concern to ITA is the fact that, through the

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[9] Report and Order, Docket No. 86-404, adopted February 25, 1988, 3 FCC Rcd. 1838 (1988).

[10] This analysis does not even reflect the fact that, during 1995, the Commission imposed a freeze on the ability of industrial and business applicants to access the 800 MHz public safety channels through inter-category sharing procedures. The Commission's freeze had the affect of further limiting the options of industrial and business users who required additional channels to accommodate critical internal communications requirements.

inter-category sharing provisions of Section 90.621, SMR licensees have been able to use Industrial/Land Transportation and Business pool channels in areas where the SMR channels are exhausted. As the Commission proceeds to systematically enhance the SMR allocation at the expense of industrial and business users, ITA believes there is a concomitant obligation upon the Commission to remove SMR systems from the Industrial/Land Transportation and Business pool channels. The Commission has made no effort in this regard.

In net effect, despite the acknowledged "scarcity" of channels available for non-SMR private land mobile systems, the 800 MHz Decision takes away 150 General Category channels from industrial and business users, but makes no comparable effort to safeguard the remaining industrial and business allocation. This failure constitutes further evidence of the arbitrary and capricious nature of the 800 MHz Decision.

IV. The 800 MHz Decision is flawed insofar as it completely ignores the complexity of General Category licensing issues in the Canadian and Mexican border regions.

The 800 MHz Decision treats the EA spectrum blocks throughout the country "on a uniform basis, without distinguishing border from non-border areas."[11] The approach

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[11] 800 MHz Decision, para. 48.

adopted by the Commission is simply to leave the border areas as "matters to be assessed by EA applicants." The Commission takes this approach in the belief that "it is unnecessary to establish a different wide-area spectrum block allocation for the border areas."[12]

ITA believes this approach is faulty. It is not simply a matter that, as the Commission believes, "some 800 MHz SMR channels will not be available in border areas." The actual situation is considerably more complicated than it is portrayed in the 800 MHz Decision. To illustrate, in a large number of the EAs that are adjacent to either the Canadian or Mexican borders, there are no "upper block" frequencies available for SMR use in the wide-area channel block designated as Block A.[13]

Further, with respect to the 60 channel pairs designated as Block B in the 800 MHz Decision, there are also a significant number of EAs where there are no frequencies available for SMR use adjacent to the borders. See Exhibit C-2. Finally, as regards the 120 channels designated as Block C, there are a number of EAs where less than 60 channels are available for wide-area licensing.

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[12] Id.

[13] These areas in which there are no upper block channels available for wide-area SMR licensing are coded with a purple color on the map provided as Exhibit C-1.

ITA is concerned that the 800 MHz Decision considers this very complicated issue in less than a forthright manner. The concern is that potential wide-area SMR bidders will receive the impression that the EAs in the border regions have the same stature and value as other EAs. Only with an intense and detailed analysis will bidders be able to discern that the border area EAs have considerably less intrinsic value than other EAs. Given the dramatic reduction in the number of available channels, ITA believes the Commission has an affirmative obligation to apprise potential bidders of the actual situation.

In ITA's view, the failure to adequately examine the availability of "upper block" channels in the border regions poses a substantial concern. If EA bidders fail to recognize the diminished value of spectrum blocks in the border regions, and ultimately overbid on these blocks, there is the risk that they will seek to compensate for the perceived deficiencies of the spectrum blocks in other ways. They may, for example, attempt to compel the Commission to make comparable "replacement" spectrum available for their use. In attempting to identify suitable replacement spectrum, they may, in turn, look to other frequencies allocated for industrial and business purposes. Any such action would further harm the interests of industrial and business licensees and applicants.

V. The 800 MHz Decision is contrary to the public interest and must be reversed.

In consideration of all the factors discussed above, ITA believes the Commission's 800 MHz Decision is, in significant respects, faulty in its analysis and deficient in the underlying premises. ITA does not believe the decision represents rational public policy.

Examined in its individual components, the decision to reallocate the General Category channels exclusively for SMR systems seems to serve no reasonable public interest purpose. In capsule form, ITA's concerns are as follows:

1. In 1994, the Commission was concerned that its actions not aggravate the "scarcity" of private land mobile radio channels. The concern has evaporated.

2. At a time when there are more than 3,450 non-commercial licensees operate systems in the General Category Pool, the Commission inexplicably concludes that the "overwhelming majority" of these channels are being used for the SMR service.

3. The Commission made absolutely no effort to examine or assess the harm that would be inflicted on non-SMR users of the General Category channels. In fact, the harm is severe.

4. The overwhelming majority of General Category channels are already being used. There is no meaningful opportunity to promote additional SMR use of these channels. These channels do not provide a viable relocation pool and they do not represent a ready supply of "auctionable" channels. In fact, for purposes of both relocation of "upper block" licensees as well as auctions, the General Category channels are the equivalent of swampland. There is no tangible benefit to the reallocation.

5. Given that the reallocation is futile as a means of making meaningful amounts of spectrum available for SMR use, it seems equally pointless to "imprison" the non-SMR systems that currently use the General Category channels.

6. In a situation where the public interest benefits are virtually non-existent and the prospect for harm to existing licensees potentially severe, ITA must question the Commission's motives. The circumstances underlying this decision seem to suggest that there may be some other agenda which the Commission is seeking to promote. It may be that the decision simply is a manifestation of the Commission's aversion to site-by-site licensing. Industrial, business and public safety systems require site-by-site licensing. SMR systems do not. Whether or not the aversion to site-by-site licensing is at the heart of the reallocation, the results do not serve the public interest.

7. Moreover, if the Commission's motivation for the reallocation is to avoid site-by-site licensing, there are other administrative mechanisms available to address this concern. In particular, Congress is considering other alternatives to ease the burden of site-by-site licensing, as witnessed by the recent remarks of Senator Pressler and others.

CONCLUSION

ITA concludes that the decision is arbitrary and capricious insofar as it: (1) reallocates the General Category channels exclusively for SMR use, (2) fails to adopt affirmative measures to remove SMR systems from the Industrial/Land Transportation and Business pool channels, and (3) fails to adequately analyze and explain the significant discrepancies in the number of "upper block" channels available for licensing wide-area systems in border area EAs, as contrasted with non-border EAs.

WHEREFORE, THE PREMISES CONSIDERED, the Industrial Telecommunications Association, Inc. respectfully submits this Petition for Reconsideration and urges the Federal Communications Commission to act in accordance with the views expressed herein.

INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.

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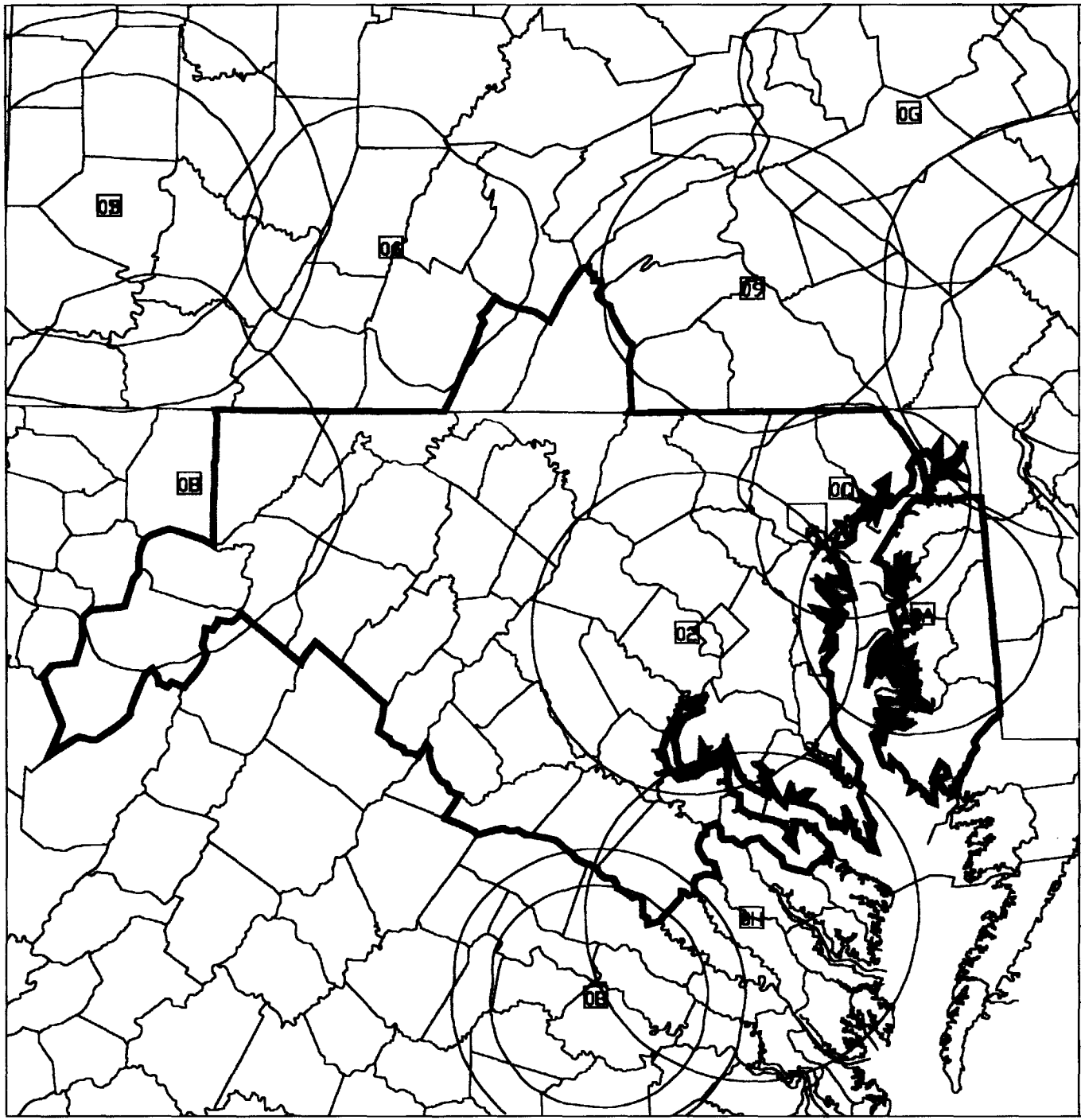
Exhibit A

The ten charts that follow depict a sample of the 22 dBu contours, computed using the R-6602 propagation model, for ten of the General Category channels in the Baltimore/ Washington, D.C. EA.



EA013 (Washington/Baltimore)
Base Map

Frequency: 851.0125 Mhz

Total EA Population: 7,425,606
Population Within EA
Not Covered: 864,231

MILES
20 0 20 40 60 80

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