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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
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

PETITION FOR PARTIAL RECONSIDERATION OF THE FIRST REPORT AND ORDER

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Dated: March 18, 1996

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EXECUTIVE SUMMARY

Entergy Services, Inc. ("Entergy") and its subsidiaries provide electric utility services to over 2.3 million customers. In conducting these critical utility operations, the companies heavily rely on 800 MHz land mobile operations in order for emergency personnel to communicate effectively. The Commission's decision in this proceeding to recategorize the General Category channels to SMR use profoundly affects the viability of Entergy's 800 MHz communications system.

Entergy submits this Petition for Partial Reconsideration of the First Report and Order in order to address two specific issues. First, the Commission's "notice" of its proposal to reallocate the General Category to exclusive SMR use was inadequate to inform Private Mobile Radio Service ("PMRS") licensees or eligibles that their rights might be affected by these proceedings which largely had been Commercial Mobile Radio Service ("CMRS") proceedings. For this reason, PMRS licensees, like Entergy, were not afforded an adequate opportunity to participate in these proceedings.

Second, the Commission failed to discharge its obligation under the Administrative Procedures Act ("APA") to articulate a reasoned basis for its decision to

reallocate the General Category to exclusive SMR use. The Commission's decision to reallocate rests on the unsupported prediction that future demand for these channels by SMR providers will be greater than the future demand for these channels by non-SMR providers. As such, the Commission's decision was arbitrary and capricious.

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PETITION FOR PARTIAL RECONSIDERATION
OF THE FIRST REPORT AND ORDER

Entergy Services, Inc. ("Entergy"), through its undersigned counsel and pursuant to section 1.429 of the Commission's rules, submits this Petition for Partial Reconsideration of the First Report and Order, FCC 95-501, released February 16, 1996 (hereinafter "First R&O"), in the above-captioned proceedings.[1/]

[1/] First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, adopted Dec. 15, 1995, 61 Fed. Reg. 6138 (February 16, 1996).

I. INTRODUCTION

1. Entergy is one of the largest electric utility holding companies in the country; its subsidiaries include five electric utility operating companies (or "OPCOs") -- Gulf State Utilities, Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Company. Collectively, Entergy and its OPCOs hold numerous authorizations for land mobile radio facilities in the 800 MHz frequency band.

2. To address its land mobile radio needs, Entergy has initiated an extensive upgrade of its land mobile communications network over the past several years. The principal goal of the upgrade is to implement a wide-area 800 MHz system for all of Entergy. This upgrade is critical to the more efficient utilization of ratepayers' resources over the long term and to meet demands for ever-safer, more reliable electric service. In developing its 800 MHz land mobile radio system, Entergy and its OPCOs have secured channels from the General Category, Business, and Industrial/Land Transportation Pools. However, Entergy's ability to maintain its 800 MHz system and to meet internal and customer service demands is now seriously compromised by

rules set forth in the First R&O relating to General Category channels. Accordingly, Entergy has standing to seek reconsideration of the First R&O for the reasons set forth below. See Panhandle Eastern Pipeline Co., 4 F.C.C.R. 8087, 8088 (1989).

3. To summarize, Entergy seeks reconsideration of the Commission's decision in Paragraph 137 of the First R&O to redesignate the General Category exclusively for SMR use. It is Entergy's position that the Commission's decision violates section 4 of the Administrative Procedures Act ("APA") because the Commission failed to adequately provide interested parties a reasonable opportunity to participate in the rule making. In addition, the Commission's action violates section 10 of the APA because the Agency failed to provide a reasoned basis for its decision, and thus its decision is arbitrary and capricious.

II. THE COMMISSION FAILED TO PROVIDE SUFFICIENT NOTICE OF AGENCY ACTION

A. APPLICABLE LEGAL STANDARDS

4. Section 4 of the APA, 5 U.S.C. § 553 specifically provides:

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through

> submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection.

"[A]n agency proposing informal rule making has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." Home Box Office v. Federal Communications Comm'n, 567 F.2d 9, 36 (D.C. Cir. 1977).

5. This "notice" of proposed rule making must be "adequate to afford interested parties a reasonable opportunity to participate in the rule making process." Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988). "This requirement serves both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" MCI Telecommunications Corp. v. Federal Communications

Commission, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (citing National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

6. The D.C. Circuit consistently has found notice of agency action to be inadequate where such notice is placed in an agency publication, or a particular section of an agency publication, that an interested party is unlikely to read. See MCI Telecommunications Corp., 57 F.3d at 1142 (finding that notice placed in a footnote in the background section of a Further Notice of Proposed Rule Making was inadequate to afford interested parties a reasonable opportunity to participate in the rule making process); National Air Transp. Ass'n v. McArtor, 866 F.2d 483, 485 (D.C. Cir. 1989) (discussing the importance of subject-matter headings in guiding reader of agency publications, and warning that notice may be inadequate when placed in section that interested party is unlikely to read); McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (finding notice inadequate where the relevant issue was raised only in "Supplemental Information" section of notice and admonishing that "an agency may not introduce a proposed rule in such a crabwise fashion").

7. In addition, the D.C. Circuit has repeatedly held that interested parties are not required to monitor the comments filed by all others in order to receive notice of an agency's proposal. As such, the comments received do not cure the inadequacy of the notice given. MCI Telecommunications Corp., 57 F.3d at 1142; Horsehead Resource Development Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994); American Fed'n of Labor v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985). Finally, the rule adopted must bear some logical relationship to the agency notice. Shell Oil Co. v. EPA, 950 F.2d 741, 747 (D.C. Cir. 1991).

B. THE COMMISSION PROVIDED INSUFFICIENT NOTICE OF ITS INTENTION TO REALLOCATE THE GENERAL CATEGORY CHANNELS.

8. Except for a few items affecting Private Mobile Radio Service ("PMRS") licensees, such as regulatory classification and the new FCC Form 600, the several rule makings and orders released in Docket Nos. 93-144 and 93-253 largely have focused on Commercial Mobile Radio Service ("CMRS") and, in particular, the 800 MHz Specialized Mobile Radio ("SMR") service. In fact, the Commission's primary goal of the Further Notice of Proposed Rule Making ("FNPRM")[2/] is its proposal for a "new comprehensive

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[2/] In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR (continued...)

regulatory structure for licensing of 800 MHz SMR providers."[3] Consequently, Entergy, as a PMRS licensee, like many other similarly situated entities, initially decided not to be an active participant in these proceedings because these proceedings simply did not apply to PMRS licensees.

9. Many PMRS licensees may not even be aware that the Commission has reallocated the General Category pool to SMR use. Others may have first became aware of the possibility that these proceedings might substantially affect them only after learning of Nextel's Comments which propose to limit access to the General and Business Category spectrum to relocated SMR parties only.[4] As a result of Nextel's Comments, Entergy filed its Reply Comments in this proceeding in an effort to respond to Nextel's proposal which Entergy considered to be outside the scope of these proceedings.[5] Significantly, however, it was only as a

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[2] (...continued)
Systems in the 800 MHz Band; Implementation of Section 309(j) of the Communications Act--Competitive Bidding 800 MHz SMR, PR Docket No. 93-144, PP Docket No. 93-253, Further Notice of Proposed Rule Making, adopted October 20, 1994, 59 Fed. Reg. 60,111 (Nov. 22, 1994).

[3] FNPRM at ¶ 12.

[4] Nextel's Comments at 9.

[5] Entergy Reply Comments ¶¶ 12-16.

result of Nextel's Comments that many PMRS licensees became aware of the possibility that the Commission was considering reallocating the General Category for exclusive SMR use.

10. The Commission's FNPRM failed to adequately inform PMRS licensees of this significant shift in these CMRS proceedings. There are over 3,450 non-commercial licensees who operate systems on the General Category channels. According the Association of Public-Safety Communications Officials-International, Inc. ("APCO"), there were nearly 300,000 public safety radio units licensed on General Category channels to over 450 State and local government public safety agencies.[6/] Even though the vast majority of these licensees had not been following these proceedings, neither the title, table of contents nor the Summary of the Commission's "Further Proposal" indicate that the Commission was considering re-allocating the General Category channels. Indeed, the Commission's "notice" of this re-categorization appears for the first time in paragraph 53 of the FNPRM. Because the Commission's proposal to reallocate the General Category channels represents such a significant shift in these SMR proceedings, and because the Commission failed to properly notify a vast majority of interested parties, including PMRS licensees, of this decision, the Commission's

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[6/]Comments of APCO at 3.

notice in paragraph 53 regarding reallocation of the General Category channels is inadequate as a matter of law.

11. In the instant proceedings, the Commission's "notice" was placed in an agency publication that PMRS licensees simply would not have read because the proceedings largely were considered CMRS proceedings.[7] Moreover, similar to the EPA's notice in McClouth, neither the FNPRM's headings, nor the summary, make any reference to the reallocation of the General Category channels. Rather, both the Summary and the headings merely reference the licensing of "SMRs on General Category Channels & Inter-category Sharing."[8] Through its placement of the "notice" in paragraph 53 of an agency publication largely concerning CMRS providers without revealing the substance of the "notice" in the title, summary or headings of the FNPRM, "the Commission has practiced just the sort of obscuration that the APA abjures." MCI Telecommunications Corp., 57 F.3d at 1142.

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[7] Indeed, the Commission acknowledge that these proceedings were an outgrowth of and influenced by the Commission's findings and conclusions in the CMRS proceeding. FNPRM ¶ 2 n. 3.

[8] FNPRM § IV.D.

III. THE COMMISSION'S DECISION TO REALLOCATE THE GENERAL CATEGORY AS SMR IS ARBITRARY AND CAPRICIOUS

A. APPLICABLE LEGAL STANDARDS

12. Pursuant to section 10 of the APA, 5 U.S.C. § 706(2)(A), a court will set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether agency action is arbitrary and capricious, a reviewing court will first consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). The agency must articulate a "rational connection between the facts found and the choice made." City of Brookings Mu. Tel Co. v. Federal Communications Comm'n, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, L. Ed. 2d 207, 83 S. Ct. 239 (1962)). A reviewing court "will not supply the basis for the agency's action, but instead rely on the reasons advanced by the agency in support of the action." Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752, 758 (6th Cir. 1995) (citation omitted). The United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." Motor Vehicle Ass'n v. State

Farm Mutual Automobile Ins. Co., 463 U.S. 29, 48-49, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)(citing Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)). "[A]n agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct." FEC v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986).

B. THE COMMISSION'S FAILURE TO ARTICULATE A REASONED BASIS FOR ITS DECISION TO REALLOCATE THE GENERAL CATEGORY TO EXCLUSIVE SMR USE EPITOMIZES ARBITRARY AND CAPRICIOUS AGENCY ACTION

13. The Commission rationalizes the reallocation of the General Category channels simply by pointing to the historical demand for the channels between SMR and non-SMR licensees.[9/] Based on past demand for the channels, the Commission summarily concludes that the "demand for additional spectrum by SMR providers is significantly greater than the demand by non-SMR services."[10/] Although the Commission uses historical demand as the basis for its predictive judgment as to the possible future behavior of licensees, the Commission fails to explain the nexus between past practice and future demand. Thus, the only rationale stated by the Commission for its reallocation of the General Category is its desire to accommodate the perceived spectrum

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9/ First R&O ¶ 137.

10/ Id.

requirements of SMR providers in relation to the perceived spectrum requirements of non-SMR providers, and to adopt a spectrum allocation scheme that will accommodate auctions.

14. Similar to the Commission decision that was reversed by the Sixth Circuit in Cincinnati Bell Telephone Co. as arbitrary and capricious, here, the Commission has provided nothing resembling support for its forecast of possible future demand. See 69 F.3d at 760. The Commission did not perform any statistical analysis to support its conclusion that future demand for the General Category by SMRs providers will be greater than the demand by non-SMR eligibles. Equally significant, because the Commission did not provide non-SMRs with adequate notice, the Commission did not have sufficient facts before it to assess the future use plans of non-SMR eligibles.

15. Equally important, absent from the Commission's reasoning is any consideration of the public interest in such a radical change with past practice and policy. Courts have warned that where the FCC's actions involve numerous departures from prior policies and precedents, they will carefully scrutinize the FCC's actions to ensure that all relevant factors and available alternatives were given adequate consideration in the course of the rule making

proceeding. Office of Communications of the United Church of Christ v. Federal Communications Comm'n, 707 F.2d 1413, 1424-25 (D.C. Cir. 1983). Although an agency may change its view of what is in the public interest, it must supply a reasoned analysis for its decision. Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 57, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)). In these proceedings, the Commission's failure to properly consider the public interest is particularly suspect given the inadequacy of the notice to non-SMR providers. It seems doubtful that the Commission could have adequately evaluated the public interest in reallocation when such a significant number of interested parties were not provided a real opportunity to participate.

16. As alluded to above, Entergy is licensed for a number of General Category channels throughout the Entergy service territory. Entergy secured these channels initially in the New Orleans area during the early licensing of its wide-area system as a result of spectrum congestion in the other 800 MHz spectrum categories. In an effort to implement an appropriate channel re-use scheme throughout its service territory, Entergy and its OPCOs have licensed or are in the processing of licensing these General Category

channels across Arkansas, Louisiana, Mississippi, and Texas. The viability of the Entergy system hinges on its ability to re-use this group of General Category channels. The Commission is well aware that the efficiency of vehicular mobile and portable radio units is greatly enhanced by a licensee's ability to re-use channels across an operating territory.

17. Entergy would like to emphasize that it and many other similarly situated licensees have relied on the General Category as either the basis of or a significant supplement to their PMRS communications systems. For example, in this proceeding the Association of Public-Safety Communications Officers-International ("APCO") noted the extensive use of the General Category by public safety entities. In fact, APCO reported that 300,000 public safety radio units are licensed on General Category channels to over 450 state and local government public safety agencies.[11/]

18. While Entergy acknowledges that speculative SMR applications have given rise to the appearance that the General Category is primarily licensed by SMRs, it respectfully suggests the Commission seek to distinguish

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[11/] APCO Comments (Jan. 5, 1995) at 3.

between licensed and constructed facilities and merely licensed facilities. Also, the Commission must never lose sight of the public interest considerations in limiting the ability of utilities, public safety and other PMRS entities to expand their existing systems. The Supreme Court has noted that, "'[a]n agency's view of what is in the public interest may change. . . . But an agency changing its course must supply a reasoned analysis.'" Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 57, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

19. In these proceedings, the Commission failed to balance the hardship on the 3,450 non-commercial licensees who operate systems on the General Category channels and any prospective non-commercial licensees who planned to operate on the General Category channels with any potential public interest gain from redesignation to exclusive SMR use.[12] Although the Commission states that its decision is motivated by its desire to put the spectrum to its most efficient use,[13] the Commission's analysis fails to weigh

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[12] See Comments of the Industrial Telecommunications Association, Inc. and the Telephone Maintenance Frequency Advisory Committee (Feb. 15, 1996) at 6.

[13] First R&O at 137.

the public interest served by utilities, public safety and other PMRS entities versus the public interest served by reallocating the entire General Category for exclusive SMR use. To allocate the General Category exclusively to SMR use would be shortsighted and would punish those noncommercial entities that have made substantial investments in developing PMRS 800 MHz land mobile radio communications systems with General Category frequencies. Because the Commission failed to adequately explain its decision to redesignate the General Category channels to exclusive SMR use and to adequately consider the public interest, the Commission's actions were arbitrary and capricious, and therefore must be reconsidered by the Commission.

20. For the reasons stated above, the Commission should vacate its decision to reallocate the General Category channels for exclusive SMR use and allow interested parties a reasonable opportunity to participate in the rule making concerning the future of General Category channels.

IV. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Entergy Services, Inc. urges the Commission to consider this Petition for Partial Reconsideration of the First R&O and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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