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

SEP 6 - 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Guidelines for Evaluating the Environmental
Effects of Radiofrequency Radiation

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ET Docket No. 93-62

~~CONFIDENTIAL~~

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**PETITION FOR RECONSIDERATION AND CLARIFICATION
OF AMERITECH MOBILE COMMUNICATIONS, INC.**

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SUMMARY

Ameritech Mobile Communications, Inc. (Ameritech), pursuant to Rule Section 1.429, is requesting reconsideration and/or clarification of the Commission's Report and Order in ET Docket No. 93-62, Mimeo No. FCC 96-326, 61 Fed. Reg. 41,006 (August 7, 1996). Ameritech, through its subsidiaries and affiliates, is licensed to provide cellular, paging and Personal Communications Service (PCS). Ameritech wholeheartedly supports the Commission's efforts to ensure that communications services are provided in a way that will harm neither radio users nor the public in general. Ameritech realizes that, due to the rapidly changing state of technology and research on the effects of radiofrequency (RF) radiation on humans, the Commission's RF exposure rules will have to be updated on an ongoing basis. Ameritech is prepared to comply with all reasonable requirements that will accomplish the goal of safe radio use. However, certain aspects of the Report and Order are vague, and place wireless service providers in an unnecessarily difficult position from a compliance and liability standpoint. Therefore, Ameritech is requesting that the Commission (1) clarify the steps necessary to ensure compliance with the new rules (which clarity may be provided in large part by the issuance of the updated OST Bulletin No. 65); (2) ensure that all affected parties are given an opportunity to participate in the formulation of the OST Bulletin No. 65 guidelines, given the importance of these guidelines; (3) appoint a task force made up of members of the industry and the scientific community to make specific recommendations for the new guidelines, and resolve

some of the remaining issues concerning RF protection; (4) clarify that licensees will not be required to comply with the new rules, and will not be subject to liability, until a reasonable period of time after the issuance of the updated Bulletin; (5) establish a Federal rule of liability in RF radiation matters; (6) reexamine its elimination of the categorical exclusion for Commercial Mobile Radio Service (CMRS) operations; and (7) establish clearcut protocols for multiple transmitter situations.

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I. The Commission Should Clarify the New RF Exposure Standards, And Compliance Measures.

The Commission should clarify the new RF exposure standards adopted in the Report and Order, especially the measures which must be taken to ensure compliance. Ameritech agrees with the Commission that the vast majority of cellular, PCS, paging and other CMRS operations will easily comply with the new guidelines. However, the Commission's Final Regulatory Flexibility Analysis (Report and Order at Appendix A) indicates that there will be a number of stations which may not comply. Because a violation can trigger substantial liability

considerations, it is important that all carriers know exactly what is necessary to measure and achieve compliance. While the Report and Order goes into a fair amount of detail, it deals with a complex subject matter. Several issues remain which do not appear to be answered by the Report and Order. Some of these issues are listed below:

1. How is the impact of multiple transmitters to be assessed? Are transmitters to be segregated based on frequency band, to match the division of frequency bands in the new radiation standards (e.g., 30 MHz-300 MHz, and 300 MHz-1500 MHz)? Or are all facilities to be lumped together?
2. Will facilities which are categorically excluded from performing an environmental assessment nonetheless count toward an evaluation of cumulative radiation from a given building or tower?
3. If multiple transmitters cumulatively exceed the exclusion benchmark, the Commission indicates that licensees at the antenna site have "shared" responsibilities to remedy this problem. Are licensees expected to share equally in the cost, or should costs be divided proportionate to the power of each licensee's operation? What procedures apply if one or more licensees refuse to cooperate?
4. The Commission says that the new guidelines "are generally applicable to all facilities, operations and transmitters regulated by the Commission." However, an environmental assessment is only required of the licensees identified in Table 1. Does an exemption from the environmental assessment requirement also exempt the licensee from liability for harmful radiation? Or must the exempted licensees nonetheless perform the radiation measurements that will be required to ensure compliance?
5. If a radio facility is excluded from the environmental assessment requirement, and otherwise complies with the harmful radiation standard, can this licensee be subject to liability nonetheless, if a subsequent high-powered facility is installed at the same antenna site?
6. Do Radiax or other types of in-building transmitters or signal boosters require environmental evaluation and/or create potential liability? Are warning signs and locked doors adequate to achieve compliance if the transmitter and antenna are located inside the building, rather than on the

rooftop? Must rooftop transmitters be considered in evaluating the compliance of an in-building transmitter?

7. While existing mobiles and portables are grandfathered, will carriers and resellers nonetheless be subject to liability if these radios do not meet the new standard for subscriber equipment?
8. What is the meaning of the terms "transient" and "incidental," for purposes of determining whether the controlled/occupational standard applies?

The Commission has indicated that many of the questions surrounding measurement and compliance will be resolved by the issuance of an updated version of OST Bulletin No. 65. Report and Order at ¶ 45. Ameritech requests that the above issues be addressed in the updated Bulletin, or separately on reconsideration, as appropriate. As discussed below, Ameritech also requests that the Commission suspend any requirement for compliance until after these issues are resolved.

A. The Industry Should Not Be Required To Comply Until A Reasonable Period After the OST Bulletin No. 65 Update.

Ameritech realizes that the Commission was required by Congress to adopt rules concerning RF emissions within 180 days of the Telecommunications Act of 1996, and the issuance of the Report and Order appears to meet this deadline. Ameritech further agrees that the immediate implementation of safety standards for the manufacture of portable and mobile radios serves the public interest, since the Commission has avoided unnecessary disruption to the industry and consumers by grandfathering existing equipment. However, it is respectfully submitted that the public interest would be best served by delaying any compliance requirement

for base stations until at least one year after the issuance of the updated OST Bulletin No. 65. There was overwhelming support for this approach in the record of this proceeding. See Comments of Arizona Department of Public Safety at 8; National Association of Broadcasters (NAB) at 36; Association of Federal Communications Consulting Engineers (AFCCE) at 6; Society of Broadcast Engineers Reply Comments at 4. Because the updated Bulletin will govern such important details as how to measure compliance with the new standards, how to achieve compliance if the measured radiation surpasses these standards, and whether protective clothing and other innovations can be used for compliance, the Bulletin constitutes an integral part of the RF exposure standards. Requiring compliance before the industry is in possession of these important guidelines places the cart before the horse, and runs counter to the Commission's goal of avoiding undue burdens on the industry. See Report and Order at ¶ 94 ("We recognized that compliance with new guidelines could impose new and significant burdens on some licensees and equipment manufacturers and stated that we would seek to minimize this impact wherever possible.").

It is a fundamental tenet of administrative law that regulated entities must be given full and fair notice of the rules with which they are expected to comply. See McElroy Electronics Corporation, 990 F.2d 1356 (D.C. Cir. 1993) (Agencies must "make every reasonable effort to ensure . . . that the regulation . . . [p]rovides a clear and certain legal standard for affected conduct." [citing Executive Order No. 12,778, Civil Justice Reform, 56 Fed. Reg. 55,195-96 (Oct.

25, 1991)))). It is respectfully submitted that the Commission can delay the requirement to comply with the new rules until the related guidelines are finalized. The Commission has delayed or staggered compliance deadlines in other contexts, such as the tower registration requirement. See Report and Order, Streamlining Antenna Structure Clearance Procedures, 61 Fed. Reg. 4359 (Feb. 6, 1996) at ¶ 19. The Commission should do the same in this instance, to ensure that the industry has a full and fair opportunity to comply with the new standards. Following such course would also help to mitigate the liability issues (both civil and regulatory) which carriers may face during the interim period when they are required to be in compliance, but may not have adequate guidance on how to do so. Even if the updated Bulletin is issued prior to the January 1, 1997 implementation date, there may not be enough time for the industry to digest the new guidelines and conduct the necessary measurements and calculations needed to ensure compliance.¹ Cellular carriers filing renewal applications may have to account for the environmental compliance of hundreds of transmitters when submitting a single renewal form.

¹ The industry can take little comfort in the Commission's suggestion that waiver requests will be considered for a one-year period (Report and Order at ¶ 112), unless the Commission clarifies that the absence of updated Bulletin No. 65, and/or inadequate time to review and apply the guidelines therein, constitute the "good cause showing" which will justify a waiver.

B. All Affected Parties Should Be Given An Opportunity To Participate In the Formulation of the New Guidelines.

The Commission indicates at paragraph 114 of the Report and Order that an updated draft of OST Bulletin No. 65 will be circulated "in the near future," and that comment will be sought from "individuals and organizations who are active and knowledgeable in this area." The Office of Engineering and Technology (OET) has informally indicated that the revised draft is likely to be circulated within two to three weeks, with the goal of issuing the updated Bulletin by early December 1996. Because of the importance of the details for compliance that will be formulated in the Bulletin, it is respectfully submitted that the draft Bulletin should be made available for comment by all interested parties. While this may add some delay in the process, the Commission is likely to receive more useful comments from industry members who are faced with concrete compliance situations, and therefore have a much greater incentive than academia or others to focus on the practical impact which the new guidelines may have on the industry.

Ameritech also agrees with those parties who commented in the initial rulemaking that a task force should be formed to resolve some of the policy issues which will have to be addressed when updating OST Bulletin No. 65. See, e.g., Comments of NABER (now PCIA) at 8. Several of the unresolved issues are listed above. While the Commission indicates that it will rely on the NCRP Report No. 119 and ANSI/IEEE C95.3-1992 for guidance in deciding compliance issues, there are no doubt differences between these documents, just as there are

differences between the NCRP and ANSI/IEEE standards which form the basis of new Rule Section 1.1307. Resolution of these issues will involve not only a study of the technical aspects, but also the making of policy choices. Full industry input during this process is vital. As the NAB noted in its comments, the Commission needs to specify with some certainty the procedures and instruments to be used in ensuring compliance, so that there is no room for rule violations based on a vague standard. See Comments of the NAB at 4.

II. The Commission Should Resolve Differences In the Scientific Information Underlying the New RF Exposure Standards.

The record in this proceeding seems to reflect that contradictory evidence exists concerning the need to eliminate the categorical exclusion for CMRS operations such as paging and cellular. On the one hand, manufacturers such as Ericsson and Motorola, as well as industry groups such as the Land Mobile Communications Council (LMCC) and the American Mobile Telecommunications Association (AMTA) indicate that the justification for categorically excluding such operations is still valid. Motorola submitted a technical analysis to support this conclusion. See Report and Order at ¶ 77. See also Reply Comments of McCaw at 8; PacTel Corporation Comments at 7; PCIA Reply Comments at 5; TIA Comments at 19; EEPA Comments at 5-8; Glenayre Electronics, Inc. Comments at 2; Paging Network, Inc. Comments at 4-6. On the other hand, studies by Doty-Moore Tower Services and Richard Tell Associates indicate that, under certain circumstances, the NCRP or ANSI/IEEE guidelines could be exceeded by

combinations of paging, cellular and other land mobile operations at the same site. See Report and Order at ¶ 85.

The Report and Order does not make it clear why the industry studies supporting a continued exclusion were not persuasive, or even address the details of these studies. "Administrative agencies must give reasoned consideration to all the material facts and issues presented to them in the rulemaking proceeding and must articulate with reasonable clarity their reasons for decision." P.A.M. News Corp. v. Hardin, 440 F.2d 255, 258 (D.C. Cir. 1971). Because of the potential burden imposed on the industry by removing these operations from the categorical exclusion, it is respectfully submitted that the Commission should allow an industry task force to further study the relevant data, and determine whether the categorical exclusion can be narrowed rather than eliminated altogether. Perhaps the same task force that should be created to resolve OST Bulletin No. 65 issues could examine the categorical exclusion issue as well.

III. The Commission Should Preempt State Regulation And Tort Liability For RF Exposure.

The Commission has taken an important step by preempting State and local regulation of the "placement, construction and modification" of personal wireless service facilities on the basis of the environmental effects of radiofrequency emissions. See 47 CFR 1.1307(e). However, it is respectfully submitted that the Commission should further exercise its powers under Section 704 of the Telecommunications Act of 1996 by preempting State and local regulation of the operation

of such facilities. "Congress [has] decided that once the federal government has promulgated a standard, the states usual role in setting safety standards [is] subordinated in the interest of national uniformity . . . [and] the states are prohibited from establishing a non-identical standard." Wood v. General Motors Corporation, 865 F.2d 395, 412 (1st Cir. 1988).

Further, the Commission should specify a Federal rule of liability for torts related to the environmental effects of radiofrequency emissions, so that licensees can avoid unnecessary and conflicting lawsuits by ensuring that they comply with the Commission's guidelines, as they are amended from time to time. As the record in this proceeding has shown, there can be differences of opinion within the scientific community as to what constitutes a harmful environmental effect, and at what level, distance, etc. radiofrequency radiation causes such effects. Therefore, providers of telecommunications services face the danger of liability based on a study which is not necessarily consistent with the standards adopted by the Commission. In order for the wireless industry to move ahead with capital-intensive advanced telecommunications services, in a highly competitive environment, it is vital that the industry have a single standard to follow, and that it can steer clear of liability by following this standard. Preemption is appropriate "where the state law stands as an obstacle to the accomplishment of the full objectives of Congress." Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69 (1986). It is within the authority of the Commission to exercise this power, for "a federal agency acting within the scope of its authority may pre-

empt state regulation." Id. at 369. In South Carolina Public Service Authority v. FERC, 850 F.2d 788 (D.C. Cir. 1988), the court stated that an administrative agency may have the "power to specify a rule of liability governing its licensees if it were essential to achieving the goals of the Act." Id. at 793. Far from achieving the goals of the Act, its purpose would be frustrated by permitting individual states to adopt, through their courts, common law tort rules that would permit liability to be imposed on licensees even though they had adhered to Commission standards.

Imposing such liability at the state level would have the same effect as the regulation that section 704 prohibits because it would force licensees to abandon plans to locate equipment in certain areas for fear of expensive litigation and catastrophic damage judgments. "Regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

Section 704 of the Act recognizes the importance of Federal regulation without conflicting state and local requirements in the area of RF radiation standards. This same concern dictates a Federal rule of liability if the goals of the Act are to be attained.

IV. The Commission Should Establish Clearcut Protocols For Multiple Transmitter Situations.

The Commission's new RF radiation standards require for the first time that paging, cellular and other CMRS licensees evaluate the impact of their facilities in combination with all other operations on the same rooftop or tower. It will be burdensome and in some case impossible for licensees to meet this requirement. Therefore, Ameritech requests that the Commission adopt the suggestion of Paging Network, Inc. and others that the site owner be made responsible for such compliance. See Report and Order at ¶ 101. Individual licensees have no control over which operations are allowed on a given structure or tower, since such access is governed by the site owner. Moreover, it is difficult if not impossible for an individual licensee to be aware of changes that may cause an antenna site to fall out of compliance with the RF radiation standard, since paging fill-in transmitters can be established at a given site without the filing of an application or notification to the Commission. See Notice of Proposed Rule Making, WT Docket No. 96-18, released February 8, 1996, at ¶ 140. Similarly, interior cell sites can be established without a Commission filing under Rule Section 22.163(e). Therefore, it would be more appropriate for the site owner to be responsible for ensuring compliance in multiple transmitter situations.

In this regard, of all of the unresolved issues listed above, one which requires definitive Commission action is the etiquette for resolving multiple transmitter compliance issues. It is not clear from the Report and Order whether all licensees on a site must share equally in the cost of ensuring compliance, or

if instead this burden falls on the "newcomer" licensee. Because the compliance requirement is imposed on renewal applicants, the first party at an antenna site who must file their renewal application may be unfairly subjected to the full burden of compliance by the coincidence of their license expiration date. The Commission should establish clearcut procedures to resolve such issues, with input from the industry.

Conclusion

In light of the foregoing, Ameritech requests that the Commission reconsider its Report and Order as specified above, and clarify the numerous issues which have arisen from the new RF radiation rules.

Respectfully submitted,



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