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May 2, 1997

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC. 20554

Via Messenger

Re: National Communications Group, et al.

PR Docket No. 89-552

GN Docket No. 93-252

PP Docket No. 93-253

Petition for Partial Reconsideration or Clarification

Dear Mr. Caton:

Transmitted herewith on behalf of National Communications Group, Capital Communications Group, Columbia Communications Group, Lonesome Dove Communications, All-American Communications Partners, and Shiner Bock Group (collectively "Petitioners") is an original and eleven (11) copies of a Petition for Partial Reconsideration or Clarification of the Commission's decision adopting rules of the Phase II auction of 220 MHz authorizations. See 220 MHz Auction, 12 FCC Rcd \_\_\_\_\_ (FCC 97-57, released March 12, 1997) (PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253) (Third Report and Order; Fifth Notice of Proposed Rulemaking), summarized 62 FR 15977 (April 3, 1997).

Please contact this law firm if you have any questions with respect to this matter.

Respectfully submitted,



William J. Franklin  
Attorney for Petitioners

Encls.

cc: National Communications Group  
Capital Communications Group  
Columbia Communications Group  
Lonesome Dove Communications  
All-American Communications Partners  
Shiner Bock Group

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

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to Provide	)	<b>PR Docket No. 89-552</b>
for the Use of the 220-222 MHz	)	<b>RM-8506</b>
Band by the Private Land Mobile	)	
Radio Service	)	
	)	
Implementation of Sections 3(n)	)	<b>GN Docket No. 93-252</b>
and 332 of the Communications	)	
Act	)	
	)	
Implementation of Section 309(j)	)	<b>PP Docket No. 93-253</b>
of the Communications Act --	)	
Competitive Bidding	)	

To: The Commission

**PETITION FOR PARTIAL  
RECONSIDERATION OR CLARIFICATION**

Pursuant to Section 1.429 of the Commission's Rules, National Communications Group, Capital Communications Group, Columbia Communications Group, Lonesome Dove Communications, All-American Communications Partners, and Shiner Bock Group (collectively "Petitioners") by their attorney hereby seek partial reconsideration or clarification of the Commission's March 12, 1997, decision adopting rules of the Phase II auction of 220 MHz authorizations.<sup>1/</sup> As set forth herein, upon reconsideration of the 3rd R&O, the Commission should clarify certain rights of the Petitioners.

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<sup>1/</sup> 220 MHz Auction, 12 FCC Rcd \_\_\_\_\_ (FCC 97-57, released March 12, 1997) (PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253) (Third Report and Order; Fifth Notice of Proposed Rulemaking) ("3rd R&O"), summarized 62 FR 15977 (April 3, 1997). Pursuant to Section 1.429(d), this Petition is timely filed within 30 days of the date of public notice of the 3rd R&O.

## PRELIMINARY MATTERS

Factual Background. Each of the Petitioners filed an application for authority to construct and operate a five-channel, nationwide, commercial 220 MHz SMR system. In the random selection between the applications for such authorizations, none of the Petitioners' applications were selected. However, based on their review of the application of lottery winner Global Cellular Communications, Inc. ("GCCCI"), Petitioners challenged GCCCI's qualifications to receive its authorization.

GCCCI received its authorization (NC station WFP444) on September 19, 1994. Since that date, Petitioners have unsuccessfully sought reconsideration from the Wireless Telecommunications Bureau and a review of that decision by the Commission.<sup>2/</sup> On October 18, 1996, Petitioners filed a timely Petition for Reconsideration of the GCCCI MO&O, which Petition remains pending before the Commission.

At present, then GCCCI holds a non-final five-channel, nationwide, commercial 220 MHz SMR (Phase I) authorization, and each of the Petitioners remains active before the Commission as a party opposing the grant of GCCCI's authorization. In the normal course of events, the Commission would issue a decision on the merits of the Petition for Reconsideration, the losing party might seek review of that decision by the D.C. Circuit, and

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<sup>2/</sup> See, e.g., Global Cellular Communications, Inc., 11 FCC Rcd 11366 (1996) (Memorandum Opinion and Order) ("GCCCI MO&O").

ultimately GCCI would either receive a final authorization or its application would be dismissed by final order.

Relief Requested; Standing. Perhaps inadvertently, the 3rd R&O threatens to deny due process to GCCI and the Petitioners. Specifically, the 3rd R&O states that:

[A]ll pending nationwide ... 220 MHz applications, together with the appropriate filing fees, will be returned to applicants, without prejudice.<sup>3/</sup>

Petitioners have standing to seek reconsideration or clarification of that portion of the 3rd R&O because the cited language could prejudice their rights vis a vis GCCI.

Changed Circumstances. The filing of this Petition is appropriate because it relies upon the specific text of the 3rd R&O, a fact which could not have been known to Petitioners previously. See Section 1.429(b) of the Commission's Rules.

**THE COMMISSION SHOULD CLARIFY THAT THE 3RD R&O DOES NOT PREJUDICE THE RIGHTS OF GCCI AND THE PETITIONERS.**

As the Petitioners interpret the 3rd R&O, the specific language quoted above plausibly could be interpreted in any of three ways:

Scenario 1: Because the reasoning supporting the quoted text is applicable specifically to non-commercial nationwide 220 MHz systems,<sup>4/</sup> the 3rd R&O has no effect upon GCCI and Petitioners.

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<sup>3/</sup> 3rd R&O, supra, at 148 (¶354). The 3rd R&O bases this decision on a finding that returning all pending applications "is in the public interest...." Id. at 96 (¶197).

<sup>4/</sup> See id. at 96 (¶199) ("[W]e no longer believe that it serves the public interest to designate these channels for non-commercial use.").

Scenario 2: Relying upon the cited text of the 3rd R&O and the non-final nature of GCCCI's authorization, the Commission dismisses all applications, i.e., GCCCI's application and the six Petitioner applications, and makes the spectrum formerly licensed to GCCCI available for Phase II licensing.

Scenario 3: Relying only upon the cited text of the 3rd R&O, the Commission dismisses the six Petitioner applications, and then (because they no longer have pending nationwide commercial applications) dismisses their Petition against the GCCCI MO&O as moot.

Petitioners believe that Scenario 1 (no effect upon the pending GCCCI litigation) accurately reflects the Commission's intent. Upon reconsideration of the 3rd R&O, the Commission should clarify this intent.

On the other hand, the Commission cannot lawfully follow Scenario 3, dismissing only the Petitioners' applications.<sup>5/</sup> Section 405 of the Communications Act of 1934, as amended, requires the Commission to provide "a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part...." Thus, Section 405 requires the Commission to provide a decision on the merits of the Petitioners' challenge to GCCCI's authorization.

Further, the Commission cannot lawfully dismiss the Petitioners applications under the 3rd R&O but nevertheless affirm the grant of GCCCI's authorization. As the Commission has long recognized, it must give comparative consideration to all bona

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<sup>5/</sup> Petitioner take no position whether the Commission may lawfully dismiss the nationwide, commercial 220 MHz SMR applications of the other applicants who have not challenged the grant of GCCCI's authorization.

fide mutually exclusive applications.<sup>6/</sup> Without doubt, Petitioners and GCCI's applications are bona fide mutually exclusive applications. Thus, Ashbacker and its progeny require that the Commission apply the 3rd R&O similarly to all these applications, either retaining or dismissing all of them.<sup>2/</sup>

#### CONCLUSION

Accordingly, as set forth herein, Petitioners respectfully request that the Commission clarify that it did not intend that the Third Report and Order result in the dismissal of Petitioner's pending Phase I nationwide commercial 220 MHz applications or

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<sup>6/</sup> See Amendment of Part 90, 5 FCC Rcd 6401 (1990), ¶26 (Notice of Proposed Rulemaking) (PR Docket No. 90-481), citing Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). Accord, Reuters Limited v. FCC, 781 F.2d 946, 951 (D.C.Cir. 1986). Cf. Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C.Cir. 1965) (Commission must either "treat[] similarly situated parties alike or provid[e] an adequate justification for disparate treatment").

<sup>2/</sup> Although Scenario 2 (dismissal of all applications) would be lawful because GCCI's authorization has not become final, Petitioners do not believe that this result represents sound public policy. On the other hand, if GCCI's authorization were to become final, this scenario would be foreclosed.

otherwise foreclose a decision on the merits of Petitioners' challenge to GCCI's authorization.

Respectfully Submitted,

National Communications Group  
Capital Communications Group  
Columbia Communications Group  
Lonesome Dove Communications  
All-American  
Communications Partners  
Shiner Bock Group

By: William J. Franklin  
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