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Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 18 1997

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

To: Chief, Wireless Telecommunications Bureau

PETITION FOR PARTIAL RECONSIDERATION
BY ROBERTS LICENSEES

ROBERTS LICENSEES

Paul C. Besozzi
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5292

Dated: June 18, 1997

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SUMMARY

The Commission improperly denied EIA rejustification for the Roberts Licensees. They met the rejustification criteria announced and published by the FCC in December 1995 and again in June 1996, but the Commission, without any notice, applied a new and different standard in its May 20 Order. In addition, the Commission treated the Roberts Licensees diametrically different, without any factual or rational basis for doing so, from a nearly-identical EIA rejustification request which it granted two years to complete construction. These actions are examples of arbitrary and capricious conduct which have long been held unsustainable by fundamental principles of administrative law. Contrary to the Commission's factual finding, the Roberts Licensees were in complete compliance with their construction plan and Section 90.629 of the Commission's rules on the relevant date, December 15, 1995. Moreover, the Roberts Licensees have completed construction and commenced commercial operation on a number of their licensed stations. The denial of rejustification severely jeopardizes their ability to further expand service in the second-tier markets which they plan to serve. For these, and the other reasons set forth in this Petition, the Commission must reconsider its May 20 Order and find that the Roberts Licensees satisfied the criteria for rejustification of their EIA established by the FCC on December 15, 1995 and must be granted two years from the date of the Commission's order granting reconsideration to complete construction of their EIA.

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To: Chief, Wireless Telecommunications Bureau

PETITION FOR PARTIAL RECONSIDERATION BY ROBERTS LICENSEES

The Roberts Licensees, acting through counsel and in accordance with 47 U.S.C. § 405 and Sections 1.106 and 1.405 of the Commission's rules, hereby seek reconsideration of the Wireless Telecommunications Bureau's ("WTB") Order in Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, 12 FCC Rcd ___ (Wireless Bur.) (DA 97-1059, released May 20, 1997) (May 20 "Order"), to the extent that the WTB therein denied rejustification of an extended implementation authorization ("EIA") previously-granted to the Roberts Licensees for

construction of a wide-area 800 MHz Specialized Mobile Radio ("SMR") system.[1] In support of their Petition, the Roberts Licensees state the following:

I. BACKGROUND

1. The Roberts Licensees are uniformly small businesses, many owned and controlled by women, seeking entry into the competitive telecommunications marketplace. As such, by the Commission's own admission, they face a continuing array of entry and other barriers not confronted by large, established telecommunications enterprises.[2] They have combined their efforts to engineer and develop one large SMR system, targeting underserved, secondary markets throughout the United States. That large system originally was granted an EIA to stage implementation over a five-year period scheduled to end in the year 2000. It was not until seven months later, however, that the real scope of the EIA was defined by FCC action.

2. The Roberts Licensees began the process of obtaining and developing their 800 MHz SMR licenses in early 1993. Their combined application strategy and business plan

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[1] As listed by the Commission in the May 20 Order the Roberts Licensees consist of the following: Harrowby TV, Inc., USITV, Inc., MTI TV, Inc., Ooh Baby! Productions, Inc., Aschroft ITV, Inc., Italia TV, Inc., O'Neil TV, Inc., HGTV, Inc., SGTV, Inc., RMTV, Inc., JMTV, Inc., Joan Moore, Inc., Elizabeth Martone, Inc., Bill Roberts, Inc., Mary Francis Martone, Inc., Shelly Curttright, Inc., Maureen Widing, Inc., Dru Jenkinson, Inc., Joseph Martone, Inc., Jana Green, Inc., Kathy Recos, Inc., Jeff Roberts, Inc., Patricia Fleming, Inc., Tad Dobbs, Inc., Wes Dalton, Inc., Steve Dowdy, Inc., David X. Crossed, Inc., Scott Mayer, Inc., Hunter ITV, Inc., Tenth Street TV, Inc., BBTV, Inc., JBTV, Inc., Lynn Adams, Inc.

[2] See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd ____ (FCC 97-164, released May 8, 1997) ("Small Business Barriers Report"). The Roberts Licensees believe that the Commission's action in denying rejustification ignores these findings and is, therefore, directly inconsistent with and in violation of the Commission's obligations under Section 257 of the Communications Act of 1934, as amended ("Act"). 47 U.S.C. § 257. See Section V, infra.

focused on identifying and engineering transmitter sites in areas that were underserved, many in second-tier cities or more rural areas where 800 MHz SMR service was not yet, or only partially, available.[3/] Indeed, the approach would also be of assistance to existing, smaller operators already in some of these areas.[4/] Very substantial time and resources were expended in preparing and filing applications to implement this strategy, particularly the engineering to comply with applicable spacing requirements. The bulk of the Roberts Licensees' applications were filed in October and November of 1993.

A. The Commission's Application Processing Suspension

3. Nine months later, in August 1994, applications for almost ninety percent (90%) of their licenses and proposed channels remained pending. Thus, when the Commission decided to propose the use of auctions to award wide-area licenses for 800 MHz SMR and barred any new applications, the Roberts Licensees, along with many other applicants, had the processing of their long-pending applications suspended. This suspension significantly impacted the ability of the Roberts Licensees to proceed with their business plans because it obscured the real scope and magnitude of their project. Prudent and realistic planning for site leases, channel density per site, equipment ordering, revenue projections and, as a result, financing requirements requires some certainty as to what facilities will be built and operated. The processing suspension severely

[3/] As noted by the Industrial Telecommunications Association, Inc. ("ITA"), "[b]y design, the proposed systems will accommodate communications requirements in predominantly smaller markets - markets that are likely to be relegated to second-tier status by larger commercial providers." Affidavit of Mark E. Crosby in support of Extended Implementation Re-justification, May 17, 1996, Roberts Licensees Rejustification Submission, Exhibit 8.

[4/] See Letter of James L. Flather, Infrastructure Sales Manager, Motorola Communications and Electronics, Inc., dated May 13, 1996, Roberts Licensees Rejustification Submission, Exhibit 7.

hampered such planning by leaving up in the air just how many channels the system would comprise, and what areas would ultimately be served.

B. The EIA Request

4. In the meantime, due to the scope of their proposed combined system, on January 25, 1995 the Roberts Licensees collectively filed a consolidated request for EIA under Section 90.629 of the Commission's Rules.[5/] The request was detailed and complete, and included a proposed 3-year construction schedule, with the then commitment to construct and place in operation by December 31, 1996 the number of base stations necessary to operate at least ten percent (10%) of the channels associated with the Roberts licenses, including any that might be granted as a result of applications pending prior to August 9, 1994. This schedule was supplied to the Commission based on the reasonable assumption that the Commission would, promptly act on the pending applications, which ultimately comprised approximately ninety percent (90%) of the channels in their wide-area proposal. On March 3, 1995, the Commission granted the EIA request for five years in which to construct, having "determined that there is sufficient justification to warrant extended implementation."

C. The October 1995 Grants

5. In the fall of 1995, two years after they were filed, the Commission completed processing the pending pre-August 1994 applications. On October 31, 1995, the Commission announced that a list of grants was available on the Internet. FCC Public Notice, "FCC Processes 40,000 Wireless License Applications", October 31, 1995.[6/] However, some 6 months

[5/] As noted in the May 20 Order, the Roberts Licensees' proposed system now involves 5,554 channels in 200 cities.

[6/] The Commission originally announced the grant of applications in March of 1995. FCC (con't....)

went by before the Commission actually began (in May and June of 1996) to issue licenses reflecting the grants. In the meantime, a number of petitions for reconsideration concerning the continued applicability of the short-spacing tables employed in the Roberts applications were filed, all of which lent an air of confusion and regulatory uncertainty to the status of most of the Roberts licenses, as well as others.[7/] This air of uncertainty was especially troubling to the Roberts Licensees as small, women-owned businesses preparing to launch a nationwide system. Indeed, the Commission had to issue a Public Notice confirming the fact that the 6300 licenses granted on October 31, 1995 were in effect and the construction period for those stations was running, despite the pendency of any reconsideration petitions, including those relating to rule changes occurring during the period of time the applications were pending. FCC Public Notice, "Wireless Telecommunications Bureau Provides Guidance To 800 MHz SMR Applicants Granted Authorizations On October 31, 1995", 11 FCC Rcd 5788 (1996). The delay in issuance of licenses, the pending petitions for reconsideration and the demand for rejustification created a climate in which uncertainty was the only certainty. Nonetheless, during this entire period, the Roberts Licensees made every effort to comply with each of the Commission's rule changes and to proceed to implement their combined EIA plan, and to rejustify it.

6/ (....con't)

Public Notice, Mimeo 52823, released March 17, 1995. But then the Commission was forced to condition those grants pending further processing. In the Matter of Grant of Applications for 800 MHz SMR, Business, Industrial/Land Transport and General Category Channels Received Between November 8, 1993 and August 10, 1994, 10 FCC Rcd 6635 (1995).

7/ Indeed, the Roberts Licensees, over the course of this period and to this very day, have continued to receive Petitions For Reconsideration, Applications For Review and other filings relating to the Commission's October 31, 1995 actions. See e.g., Petition For Reconsideration of Domer Communications, Inc., May 22, 1997, relating to Call Sign KNRP(315) (File No. 641069); Joint Application For Review of CellCall, Inc., April 18, 1997, relating to Call Signs KNRP392, KNRP817 and KNRP275 (File Nos. 641284, 642109 and 640988, respectively).

D. The Commission's Announced Criteria For Rejustifying Extended Implementation Authorizations

6. Rejustification now was necessary because on December 15, 1995, the Commission had adopted a plan to auction 800 MHz SMR spectrum on a wide-area basis. In doing so, to be able to assess the landscape in preparation for competitive bidding, the Commission discontinued acceptance of future EIA requests for 800 MHz SMR stations under Section 90.629. In addition, the Commission truncated the duration of all existing EIA plans. And each licensee with a previously-granted EIA was made subject to rejustification. In requiring rejustification of previously-approved EIAs, the Commission put those who would seek rejustification on notice of the standard that they would be required to meet.

> "Specifically, a licensee seeking to retain extended implementation authority must: (a) indicate the duration of its extended implementation period (including commencement and termination date); (b) provide a copy of its implementation plan, as originally submitted and approved by the Commission, and any Commission-approved modifications thereto; (c) demonstrate its compliance with Section 90.629 of our rules if authority was granted pursuant to that provision, including confirmation that it has filed annual certifications regarding fulfillment of its implementation plan; and (d) certify that all facilities covered by the extended implementation authority proposed to be constructed as of the adoption date of this *First Report and Order* are fully constructed and that service to subscribers has commenced as defined in the CMRS *Third Report and Order*. These showings must be submitted within 90 days from the effective date of this *First Report and Order*."[8/]

[8/] Amendment of Part of the Commission's Rules to Facilitate Future Development of the SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463, 1525 (¶ 111)(1995) ("December 1995 Order"); see FCC Public Notice, "Recommended Filing Format for 800 MHz SMR Licensees Rejustifying Need for Extended Implementation Authority", 11 FCC Rcd 6579 (1996).

As noted above, the December 1995 Order was adopted on December 15, 1995. Rejustification filings were ultimately due by July 15, 1997.[9]

7. The Roberts Licenses timely filed their rejustification submission on June 4, 1996, and supplemented it on June 12, 1996, with additional information requested by the Commission on June 4, 1996. They specifically requested the two-year construction period proposed in the December 1995 Order.

8. At that time the Roberts Licensees were at a critical juncture in implementation of their combined EIA business plan. For example, their representative was in negotiations with potential system managers and equipment suppliers regarding the build-out and operation of the whole system, as they now knew the universe of markets and stations to be developed. As a result, the Roberts Licensees desired reasonably prompt Commission action on their straightforward rejustification request in order to provide the regulatory and associated business certainty necessary to completion of the key business arrangements under discussion. To that end, two and a half months after filing the EIA rejustification, the Roberts Licensees contacted the WTB's Land Mobile Branch ("LMB"), with which the submission had been filed. At that time, both the Chief and Deputy Chief of the LMB informed the Roberts Licensees that the rejustification request had already been reviewed and deemed in compliance with the rejustification criteria outlined in the December 1995 Order, but the LMB was awaiting instruction from the WTB as to how to proceed with disposition of the approval, in light of other filings seeking more than two years. The LMB suggested that the Roberts Licensees raise their

[9] 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, 11 FCC Rcd 7094 (Com. Wir. Div. 1996).

concerns about timing with the WTB. The Roberts Licensees contacted the WTB in September 1996. See Exhibit A attached.[10/]

E. The May 20 Order

9. Nearly a year after the Roberts Licensees submitted their original EIA rejustification the Commission issued its May 20 Order. In the May 20 Order the Commission recited the criteria that it had established in the December 1995 Order. May 20 Order, at p. 3 (¶ 4). But then it proceeded to apply a series of different, additional standards in acting on individual applications.

10. Rather than assess the rejustification requests in light of the criteria established in the December 1995 Order, the Commission split the requests into two, never-before-defined categories. First, based on its "review of their rejustification submissions", the Commission granted rejustification to twenty-seven licensees "with existing analog SMR systems" who "sought EI authority for the purpose of converting . . . [those] systems into digital systems."[11/] Id., at p. 5 (¶9). The Commission stated that because the licensees "have taken reasonable and concrete steps to utilize their licensed channels and make the transition to digital technology," rejustification was appropriate. Id. For most of this group, these steps apparently included "significant construction of new digital systems and some have commenced digital operation." Id. In addition, the Commission added that because these "licensees were previously utilizing

[10/] The Roberts Licensees are fully aware of the Commission precedent relating to an applicant's ability to rely to any degree on the representations of the Commission's Staff. Still, the inability to give any credibility to such representations makes it decidedly more difficult for small and women-owned businesses such as the Roberts Licensees to implement their collective business plan by committing capital to an uncertain outcome.

[11/] The Commission broke down the rejustification applicants into two classes, although the criteria announced in the December 1995 Order embodied no such stratification.

most or all of their licensed SMR channels in an analog mode," extending their EI authority would not "significantly affect the availability of spectrum for geographic area licensing" (i.e., auctions). Id. The May 20 Order did not mention or assess these rejustification requests in accordance with the criteria announced in the December 1995 Order. In particular, it ignored the December 15, 1995 adoption/benchmark date explicitly set forth as the compliance point in that Order.

11. Next, the Commission examined the EIA rejustification filings of the ten remaining licensees who "applied initially to construct digital SMR systems rather than convert existing analog facilities." Id., at p. 6 (¶11). Because two of them had "indicated in their filings that they have begun construction of their systems", the Commission granted their rejustification requests. Id. However, examining the filings of the remaining eight licensees, including the Roberts Licensees, the Commission found they "do not possess existing analog SMR systems and indicate in their filings that they have not undertaken any construction since receiving EI authority." Id., (¶12). As a result, the Commission concluded that "licensees who have no existing facilities and have failed to commence construction of new facilities do not meet the standard for continuation of their EI authority." Id., at p. 6-7 (¶ 12).[12/] The May 20 Order then reviewed how each of these eight licensees had, in particular, fallen short, including failure to order equipment or begin construction. It was principally on this ground -- the failure to order equipment or otherwise begin construction -- that the Roberts Licensees' request for rejustification was denied. Id., at pp. 10-11 (¶¶ 20-22).

[12/] Neither the possession of existing SMR systems nor the owning of existing facilities were a precondition to originally obtaining the EIA grant or recited as criteria for rejustification in the December 1995 Order.

12. The Commission denied the Roberts Licensees' request for rejustification because they had not commenced construction, without regard to the criteria the Commission established for determining whether to grant such rejustifications. The Commission did not analyze the state of the Roberts Licensees' stations as of December 15, 1995, in light of the obligations imposed by the Roberts Licensees' EIA or in light of Section 90.629 of the Commission's rules.[13/] Yet this was the date of measurement that the Commission itself had established in the December 1995 Order. The Commission did not regard the Roberts Licensees' full compliance with the EIA plan and Section 90.629 of the Commission's rules as relevant, although the December 1995 Order stated that these would be the criteria on which the rejustification request would be judged.

13. Nor did the Commission address whether any construction was in fact required as of the December 1995 benchmark date under each particular EIA as originally granted. The Commission did not consider whether the Roberts Licensees were in compliance. In fact, the Roberts Licensees were not subject to any construction benchmarks to be achieved prior to or on December 15, 1995 -- the adoption date of the December 1995 Order.

[13/] Of course, December 15, 1995, is the date the Commission itself designated as the date for measuring compliance with the EIA plan and Section 90.629 of the Commission's rules. See Section II.D., (¶ 7, note 8), supra.

II. THE COMMISSION CHANGED THE STANDARD FOR REJUSTIFICATION WITHOUT GIVING NOTICE

14. Reconsideration is warranted because the Roberts Licensees met the rejustification standard announced by the Commission in its December 1995 Order, as confirmed by the representations made by the Chief and Deputy Chief of the LMB. However, without any prior notice to the Roberts Licensees, the Commission, in the May 20 Order, applied a new and different set of standards.

15. As noted previously, the criteria established in the December 1995 Order are (a) duration of EIA; (b) a copy of original EIA plus modification; (c) compliance with Section 90.629 and (d) compliance with the EIA as of December 15, 1995. In their rejustification, the Roberts Licensees met each of these requirements: (a) they specified the duration of their EIA period, including the commencement and termination dates; (b) they submitted a copy of their original implementation plan and any modifications; (c) as they had in order to obtain EIA, the Roberts Licenses demonstrated their compliance with Section 90.629; and (d) the Roberts Licensees demonstrated compliance with the previously-approved EIA construction plan.

16. Because the first construction benchmark under their original EIA came in time after the benchmark established by the December 1995 Order (and even the July 1996 deadline for submitting rejustification requests), the Roberts Licensees need not have begun construction of any station to have been in compliance with the criteria announced in the December 1995 Order. As noted above, the Chief and Deputy Chief of the LMB at least had concluded that the Roberts Licensees had met the standard for rejustification and the LMB was prepared to approve the two-year rejustification period. See Exhibit A attached.

17. However, instead of applying the criteria established in the December 1995 Order, the Commission examined the Roberts Licensees' rejustification submission to determine if construction had commenced as of its filing, even though the EIA, as originally approved by the Commission, required no construction for a year after the announced December 15, 1995 benchmark (i.e., until the end of December 1996). Either the Commission mistakenly believed that the Roberts Licensees had an earlier construction benchmark or it imposed one as a new condition to rejustification without any prior notice to the Roberts Licensees. Either way, the Commission erred.

18. It has long been the rule that the Commission cannot require its applicants and licensees to adhere to standards not previously published. If the Commission is going to hold applicants or licensees to a regulatory standard it must inform them beforehand what are the components of that standard. See Bamford v. F.C.C., 535 F.2d 78, 82 (D.C. Cir.), cert. denied, 429 U.S. 895 (1976). In Bamford, the D.C. Circuit said that "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected." This is particularly the case where the Commission expects strict adherence to those standards. See Salzer v. F.C.C., 778 F.2d 869, 875 (D.C. Cir. 1985); see also, Radio Athens, Inc. (WATH) v. F.C.C., 401 F.2d 398, 404 (D.C. Cir. 1968). Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a regulatory standard without first providing adequate notice of the substance of the rule. Satellite Broadcasting Co., Inc. v. F.C.C., 824 F.2d 1, 3 (D.C. Cir. 1987). Yet the Commission would drastically reduce the Roberts Licensees' EIA for failure to comply with a standard of which they had no notice. This

result is clearly contrary to the concepts of due process the D.C. Circuit found so compelling in Satellite Broadcasting.

19. Indeed, in the case of the Roberts Licensees, the situation is even worse. The Commission announced a specific standard in the December 1995 Order. The Roberts Licensees complied with that standard, as instructed.[14/] Then, the Commission changed the standard, without any notice, and applied it to deny the Roberts Licensees' rejustification. In no circumstances does this bait and switch procedure provide clear standards of what is expected or adequate notice of the substance of the rule which was ultimately applied to deprive the Roberts Licensees of their EIA rejustification. It is clear that the Commission may not reject an application for failing to meet a standard of which the applicant was never previously notified or previously held accountable to meet. See Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1560 (D.C. Cir. 1987). Clearly, the Commission cannot now deprive the Roberts Licensees of privileges for which it previously found them qualified because the Roberts Licensees failed to meet a standard the Commission never announced.

20. The Roberts Licensees submitted a request for rejustification which satisfied the criteria announced in the December 1995 Order, the only criteria of which the Commission gave notice. The Roberts Licensees cannot now be penalized for failing to meet criteria of which they were never notified. In fact, the May 20 Order does just that. The D.C. Circuit has determined

[14/] The Commission implicitly equates the failure to construct as of rejustification submission with a failure to comply with "their own implementation schedules." May 20 Order, at p. 7 (¶12). But the Roberts Licensees were in full compliance with their previously-approved schedule on December 15, 1995, the relevant date. Moreover, they were in full compliance in June of 1996 when they filed for rejustification and in July, when it ultimately was due.

that the Commission "commits reversible error when it penalizes an applicant based on standards of which the agency failed to provide notice." CHM Broadcasting Limited Partnership v. F.C.C., 24 F.3d 1453, 1457 (D.C. Cir. 1994); see Glaser v. F.C.C., 20 F.3d 1184, 1187 (D.C. Cir. 1994). With respect to the denial of the Roberts Licensees rejustification request, reconsideration must be granted.

21. The Commission has only recently restated its own understanding that holders of authorizations are entitled to prior notice of the scope and consequences of rules where failure to comply might result in the loss of valuable license privileges. Algreg Cellular Engineering, 12 FCC Rcd ____ (FCC 97-178, released June 3, 1997, p. 14, ¶¶ 32-33). In Algreg, the Commission reversed the Review Board's revocation of rural cellular authorizations because the applicable rule had not provided sufficient notice that its violation would subject the permittees to loss of their authorizations. Id. The Roberts Licensees are in a situation comparable to that of the Algreg permittees. The Roberts Licensees now face the possible loss of privileges, namely time critical to the successful implementation of their plan, as a direct result of the failure of the Commission to provide actual notice of the standard under which their EIA rejustification would, in fact, be assessed. Thus, the Commission's decision in Algreg also dictates that the WTB reconsider the May 20 Order and grant the Roberts Licensees the full two-year construction period.

III. THE COMMISSION FAILED TO TREAT SIMILAR APPLICANTS IN A SIMILAR FASHION

22. In addition, even assuming arguendo the Commission could apply such a new and unannounced standard, the Commission additionally failed to treat similarly-situated applicants

in similar fashion. Such a requirement has long been a fundamental precept of administrative law. The employment of a "'sometime-yes, sometimes-no, sometimes-maybe policy . . . cannot be squared with [the Commission's obligation] to preclude arbitrary and capricious management'" of its statutory mandates. Green Country Mobilephone, Inc. v. F.C.C., 765 F.2d 235, 237 (D.C. Cir. 1985); see also McElroy Electronics Corp. v. F.C.C., 990 F.2d 1351, 1365 (D.C. Cir. 1993); Melody Music v. F.C.C., 345 F. 2d 730 (D.C. Cir. 1965).

23. In the same May 20 Order which denied the Roberts Licensees' request, the Commission granted the rejustification of DCL Associates, Inc. ("DCL"), indicating that based on a review of its rejustification submission, DCL was one of the licensees that "had constructed significant portions of their digital systems." A thorough review of DCL's rejustification submission indicates that both as of December 15, 1995 and the June 17, 1996 filing of its rejustification, DCL had, at most, constructed a single test site, which was not itself included in the previously-approved EIA. DCL Rejustification, at p. 5, Exhibit A.[15/] Indeed, DCL's rejustification submission indicated that its plan was to construct ten percent (10%) of its channels by the end of December 1996, the same benchmark approved for the Roberts Licensees. Id. Yet DCL's EIA had been granted in August 1994, over six months before the Roberts Licensees' grant. DCL and the Roberts Licensees had identical construction requirements as of December 15, 1995. As to stations included in their respective EIAs, DCL and the Roberts Licensees had identical progress in construction. There is no practical difference between DCL and the Roberts Licensees based on the December 15, 1995 standard as published.

[15/] Moreover, there is no indication that as of the time of its rejustification filing DCL had accomplished any additional construction. DCL's licenses were also in smaller, second-tier markets like those of the Roberts Licensees.

24. DCL's rejustification was granted and the licensees given two years to complete construction. The Roberts Licensees' rejustification request was denied. This blatantly disparate result is nowhere adequately explained on any basis by the FCC. The Court of Appeals has consistently held that such disparate treatment of similarly-situated licensees without explanation is reversible error. See Adams Telecom, Inc. v. F.C.C., 38 F.3d 576, 581 (D.C. Cir. 1994); Federal Election Commission v. Rose, 806 F.2d 1081, 1089 (D.C. Cir. 1986); Public Media Center v. F.C.C., 587 F.2d 1322, 1331 (D.C. Cir. 1978); see also New Orleans Channel 20, Inc. v. F.C.C., 830 F.2d 361, 366 (D.C. Cir. 1987). In Petroleum Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994), the D.C. Circuit specifically reiterated this principle, noting "[w]e have long held that an agency must provide adequate explanation before it treats similarly situated parties differently." Here, there was no relevant explanation at all.

25. In granting DCL's rejustification request and denying the Roberts Licensees' rejustification request the Commission violated this principle. The Commission cannot announce a standard and then piecemeal pick and choose when and who among equals will be required to meet it. Such an unequal application of the rules "is not reasoned decision-making, but the very sort of arbitrariness and capriciousness" that the courts are empowered to correct. See Telephone and Data Systems, Inc. v. F.C.C., 19 F.3d 655, 658 (D.C. Cir. 1994). Since the Commission ruled that DCL met the rejustification standard, then so did the Roberts Licensees.[16/]

[16/] It is true that DCL's wide-area system involved a smaller number of channels than the Roberts Licensees' planned system. But that was not the distinction on which the Commission announced its decision to reject the Roberts Licensees' rejustification; nor was it delineated in the December 1995 Order. Constructions status was, and on that basis DCL and the Roberts Licensees were virtually the same.

On this basis alone reconsideration is required and the Roberts Licensees rejustification request must be granted.[17]

IV. THE COMMISSION FAILED TO CONSIDER RELEVANT FACTORS BEYOND THE ROBERT LICENSEES CONTROL AND IGNORED SECTION 257 OF THE COMMUNICATIONS ACT

26. The Commission gave short shrift to the difficulties created for the Roberts Licensees by regulatory uncertainty and delay.[18] These factors raised questions as to the ultimate scope and capital requirements necessary to successfully implement their business plan, thereby only compounding the obstacles that the Commission already has conceded face small businesses seeking to enter into the telecommunications field. See Small Business Barriers Report, supra.

27. The fact is that the 800 MHz SMR application processing freeze, which held up grant of almost ninety percent (90%) of the Roberts Licensees applications until two years after

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[17] The May 20 Order's treatment of the Roberts Licensees' EIA rejustification also constitutes prohibited modification of the Roberts Licensees authorization by rulemaking. Although the substance of the May 20 Order is an adjudication of the rejustification requests, the matter is styled as a rulemaking (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) despite the fact that the WTB Chief's authority to act in rulemaking matters is seriously limited. 47 C.F.R. § 0.331(d). The Commission appropriately employs its rulemaking power when issues "involve legislative rather than adjudicative facts, and have prospective effect and classwide applicability." Telocator Network v. F.C.C., 691 F.2d 525, 551 (D.C. Cir. 1982) (footnotes omitted). An agency cannot engage in "individual action masquerading as a general rule." American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624, 631 (D.C. Cir.), cert. denied., 385 U.S. 843 (1966) (challenge to valid rulemaking that changed carriers' authorizations rejected). The Commission has not here revised the criteria for all 800 MHz SMR licenses, but rather has singled out and modified individual licenses, specifically the authorizations of the Roberts Licensees, in a rulemaking, a procedure prohibited the Commission. Aeronautical Radio, Inc. v. F.C.C., 928 F.2d 428 (D.C. Cir. 1991).

[18] A number of these same factors were raised in the DCL rejustification submission.

they were filed, and the ensuing delay in the issuance of the licenses, had a detrimental impact on the Roberts Licensees ability to finalize financing and move forward with their collective business plan. Certainly the processing freeze was a circumstance that was not in the Licensees control, but rather uniquely in the Commission's control. This unknown left definitive and basic business parameters up in the air about system capacity, required capital, equipment needs, and site lease requirements and created a very significant additional hurdle for small businesses attempting to implement a reasonable business plan. It wasn't until early November 1995 that the Roberts Licensees even knew what stations might ultimately comprise their system. Yet the Commission, a short 6 weeks later, asked the Roberts Licensees to report on the progress of their EIA implementation, when they had not even received the bulk of their licenses and were already being subjected to petitions for reconsideration of the grants, based on Commission rules that changed during the process. Nevertheless, the Roberts Licensees did comply with that reporting mandate and were in compliance with every aspect.

28. Atop the delays, the Commission imposed its decision to cut back the previously authorized EIA and require rejustification. The Roberts Licensees complied and answered the questions set forth in the December 1995 Order. Then the Commission left the Roberts Licensees rejustification request adrift for almost a year, just as those Licensees were finalizing system management and financial arrangements. Then the Commission applied new criteria to deny the rejustification request. Still the Commission dismisses such problems as normal business risks that it need not consider. Normal business risks are those that are inherent in the chosen industry, not unannounced freezes, shortening implementation schedules and applying standards not previously revealed.

29. In its Small Business Barriers Report the Commission recognized the difficulty in obtaining financing as "a primary market entry obstacle for small businesses." Small Business Report, at p.23 (¶ 35). For the Commission to ignore the impact of the historical delays on small businesses and the implementation of modified business plans like the Roberts Licensees' flies in the face of its purported commitment in that Report. Moreover, it is inconsistent with the Commission's obligations under Section 257 of the Act, as added by the Telecommunications Act of 1996.

30. The Commission cannot ignore such external factors. It has not done so in the past, whether it be pendency of judicial proceedings, accessibility of equipment or, as noted most recently for PCS, accessibility of capital.[19/] The failure to consider these factors constitutes another sound basis for granting reconsideration in this matter.

31. Since filing for rejustification, the Roberts Licensees have made "reasonable and concrete" progress in constructing their planned wide-area system. They have entered into management agreements with entities controlled by an established publically-traded SMR operator to provide for the ongoing construction of the licensed facilities. Through these agreements the Licensees have gained access to a $5 million financing by Motorola. Equipment has been ordered, received and has been installed and scheduled for installation pursuant to the management agreements.

[19/] See e.g., In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 9 FCC Rcd 1739 (Priv. Rad. Bur. 1994) (extending construction deadline due to pendency of Court appeal); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220 MHz Band by the Private Land Mobile Radio Services, 10 FCC Rcd 3356 (Wireless Tel. Bur. 1995) (extending construction deadline to accommodate equipment manufacturers).

32. Furthermore, certain of Roberts Licensee stations are constructed and commercially operational in the cities of Lewiston, Maine; Pinebluff, Arkansas; Fayetteville, North Carolina; Naples, Florida; Mankato, Minnesota; Portland, Maine; Bowling Green, Kentucky; Syracuse, New York and Baton Rouge, Louisiana. Additional commercial operations will be brought on line in the next 90 days in Gulfport, Mississippi; Bay City, Michigan; Mobile, Alabama; Fort Myers, Florida; and Lake Charles, Louisiana.

V. CONCLUSION

33. The denial of the Roberts Licensees' rejustification violates fundamental principles of administrative law. It applies a standard for rejustification different from that announced in the December 1995 Order. Denial treats the Roberts Licensees differently than other similarly-situated applicants. In addition, it ignores the principles of Section 257 of the Communications Act by erecting an additional regulatory barrier to a group of small businesses.[20/] For all these reasons the decision to deny the Roberts Licensees EIA rejustification should be reconsidered and the EIA should be extended until 2 years after reconsideration is granted.

[20/] In addition, the Roberts Licensees believe that a principal motivation of the Commission's action in denying rejustification was the expectation of enhanced revenues from competitive bidding. As such the Commission's action is inconsistent with and violates the requirements of Section 309(j) of the Act. 47 U.S.C. § 309(j).

Respectfully submitted,

ROBERTS LICENSEES

By: _____

Paul C. Besozzi
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5292

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EXHIBIT A