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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

EXPEDITED PETITION FOR TOLLING OF CONSTRUCTION DEADLINE OF ROBERTS LICENSEES

ROBERTS LICENSEES

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Dated: August 8, 1997

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SUMMARY

On June 18, 1997, the Roberts Licensees filed with the Wireless Telecommunications Bureau ("WTB") both a Petition For Reconsideration and an Expedited Petition For Tolling of Construction Deadline relating to the WTB's May 20, 1997 Order denying rejustification of the Roberts Licensees previously-granted extended implementation authorization ("EIA"). The May 20 Order of denial left the Roberts Licensees with six (6) months (i.e., until November 20, 1997) to complete their EIA. Both pleadings remain pending with the WTB. In the meantime, the clock is running on the six-month period.

The Roberts Licensees, in their June 18, 1997 Petition For Reconsideration, have demonstrated that the Commission committed reversible error in denying the Roberts Licensees rejustification of their extended implementation authorization for a wide-area 800 MHz Specialized Mobile Radio System. Failure to toll the greatly-reduced six-month construction period, pending Commission action on the Petition For Reconsideration, would cause the Roberts Licensees irreparable harm. The tolling of the construction period will not substantially harm other interested parties. The public interest will be served by tolling the running of the six-month construction period.

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EXPEDITED PETITION FOR TOLLING OF CONSTRUCTION DEADLINE OF ROBERTS LICENSEES

The Roberts Licensees,[1] acting through counsel and pursuant to Section 705 of the Administrative Procedure Act ("APA")[2] and Section 1.43 of the Commission's Rules,[3] hereby

[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] 5 U.S.C. § 705.

[3] 47 C.F.R. § 1.43. See also 47 C.F.R. § 1.41.

request that the Commission toll the running of the November 20, 1997 construction deadline imposed on the Roberts Licensees by the Bureau's *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).[4] The Roberts Licensees request that the Commission act on this tolling request expeditiously, by not later than September 1, 1997, because of the ongoing depletion of the greatly-reduced construction period imposed by the May 20 Order.

1. On June 18, 1997, the Roberts Licensees filed a similar Expedited Petition For Tolling of Construction Deadline, in conjunction with their Petition for Reconsideration. A copy of the Petition For Reconsideration is attached. Both Petitions remain pending and, although the WTB informally has indicated that it plans to act thereon by the end of September 1997, the Roberts Licensees cannot rely on such representations as an alternative to duly exhausting their administrative remedies. The fact is that, by inaction on the Expedited Petition For Tolling and underlying Petition For Reconsideration, the Commission may defeat the Roberts Licensees' appellate rights under Section 402 of the Act by allowing any unconstructed licenses automatically to expire.[5]

2. As set forth in the pending Petition for Reconsideration, without prior notice the Commission changed the standard for rejustification of extended implementation authority ("EIA") to construct a wide-area 800 MHz Specialized Mobile Radio ("SMR") system, to

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[4] Hereinafter "May 20 Order".

[5] The May 20 Order was effective upon release, 47 C.F.R. §§ 1.4, 1.103, and stated that the Roberts Licensees' authorizations will automatically cancel if construction is not completed by November 20, 1997.

something other than the standards published in December 1995, in clear violation of established principles of administrative law. Moreover, the Commission's treatment of the Roberts Licensees under the May 20 Order constitutes arbitrary and capricious conduct. The Commission has treated the Roberts Licensees differently, without any rational explanation, from a nearly-identical EIA rejustification request in which it granted two additional years to construct. Tolling the construction deadline set by the May 20 Order while the Commission acts on the pending Petition for Reconsideration is necessary to preserve the stations.

I. The Commission's Standards For Grant Of A Stay Are Clear And Well Established And Compel A Tolling Of The Construction Period Pending Action On The Petition For Reconsideration.

3. A stay pending the outcome of another proceeding is appropriate when (1) the party seeking the stay is likely to prevail on the merits of its appeal (or upon later reconsideration of its case by the Commission); (2) the party seeking the stay will be irreparably injured without the stay; (3) the issuance of the stay will not substantially harm other interested parties; and (4) grant of the stay is in the public interest. Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958); see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); National Cable Television Ass'n v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973). This Commission adopted a similar test. LeFlore Broadcasting Co., Inc., 43 RR 2d 807 (1978); Pocahontas Cable TV, Inc., 64 FCC 2d 698 (1977); see also Magdalene Gunden Partnership, 3 FCC Rcd 488, 490 (¶ 10) (Rev. Bd. 1988) (subsequent history omitted). The Commission previously conceded that a petition for reconsideration of the denial of an extended construction period operates to toll the running of that construction period. PSWF Corp. v. F.C.C., 108 F.3d 354, 358 (D.C. Cir. 1997).

4. As will be demonstrated below, the law and the facts in the instant case demonstrate that the Roberts Licensees satisfy each of these four showings and are, therefore, entitled to a tolling of the six-month construction deadline imposed by the May 20 Order.

II. The Roberts Licensees Have Been Subjected To Shifting Standards On The Issue Of Their EIA.

5. The Roberts Licensees have faithfully and with attention to detail navigated through the Commission's difficult regulatory landscape for 800 MHz SMR license grants and construction requirements since 1993, at which time the Roberts Licensees first began the process of obtaining their 800 MHz SMR authorizations. The Roberts Licensees filed most of their applications in October and November of 1993. Nine months later, in August 1994, the large majority of these applications remained pending. When the Commission proposed 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.

6. On January 25, 1995 the Roberts Licensees filed a request for EIA under Section 90.629 of the Commission's Rules. The request was detailed and complete, and included a proposed construction schedule. It reflected a joint plan to develop their existing and expected licenses. The Roberts Licensees committed to construct and place in operation by December 31, 1996 the number of base stations necessary to use at least ten percent (10%) of the channels associated with the Roberts Licenses, including any that might be subsequently granted.

7. The Commission granted the EIA request on March 3, 1995, having "determined that there is sufficient justification to warrant extended implementation." At that time, the

Commission granted the Roberts Licensees 5 years to develop their proposed 800 MHz SMR system (*i.e.*, until March 3, 2000).

8. On October 31, 1995, the Commission announced that it had processed and granted a number of the pre-August 1994 applications.[6] However, some six months passed before the Commission began (in May and June of 1996) to actually issue licenses reflecting the grants. This delay and various reconsideration petitions created regulatory uncertainty as to the status of most of the Roberts Licensees' authorizations, as well as those of others. Moreover, it made it extremely difficult to firm up plans for financing and implementation of their EIA. As the result of a number of inquiries by similarly-affected applicants, the Commission was forced to give notice that the licenses were in effect and that the time for completion of construction was running. FCC Public Notice, "Wireless Telecommunications Bureau Provides Guidance to 800 MHz SMR Applicants Granted Authorizations on October 31, 1995", 11 FCC Rcd 5788 (1996). Despite these serious obstacles interposed by the Commission's own procedures, the Roberts Licensees continued to implement their combined business plan in light of their EIA grant, although that grant was now subject to the further uncertainty of "rejustification."

9. Rejustification was now necessary because in December of 1995, the Commission adopted a plan to auction 800 MHz SMR spectrum on a wide-area basis.[7] In doing so, to

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[6] The Commission originally announced the grant of applications in March 1995. Public Notice, Mimeo 52823, released March 17, 1995. But the Commission was later was forced to condition and recant those grants. 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] 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 (con't....)

maximize the amount of spectrum available for competitive bidding, the Commission barred any future EIA requests, truncated the duration of all existing EIA plans and made all existing plans subject to rejustification. Id. In requiring rejustification of previously-approved EIAs, the Commission publicly put those who would seek to rejustify on notice of the standard that they would be required to meet. Id. Under that standard the key date for purposes of facilities construction was December 15, 1995. Id. As will be seen, however, in the May 20 Order the Commission in fact employed a different or additional standard.

10. The Roberts Licensees filed their rejustification on June 4, 1996, and supplemented it on June 12, 1996 as additional formatting requirements were announced. They sought an extension of two years from the date of a rejustification grant, the time which the Commission's now revised rules normally allowed.

11. The Roberts Licensees made a rejustification showing that complied with the standards set forth in the December 1995 Order. Additionally, they received explicit representations from the Bureau's Land Mobile Branch that their rejustification request had already been reviewed and deemed in compliance with the rejustification criteria. Nonetheless, the May 20 Order applied a different set of standards in acting on individual rejustification requests and denied the Roberts Licensees.[8/]

[7/](....con't)

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).

[8/] See Roberts Petition at Exhibit A.

III. The Roberts Licensees Have Demonstrated That They Will Succeed On The Merits Of Their Petition For Reconsideration.

12. The May 20 Order caused several injuries to the Roberts Licensees. In each instance, the Roberts Licensees have demonstrated the clear error of the Commission's actions with respect to the Roberts Licensees. First, the Commission imposed a new and different standard for evaluation of the EIA request than that published in the December 1995 Order. Second, the Commission treated the Roberts Licensees differently from other, similarly-situated licensees. As set forth in greater detail in the Roberts Petition, the Roberts Licensees have a substantial likelihood of prevailing on the merits of each of these points. The demonstrable errors by the Commission meet the first prong of the Virginia Petroleum Jobbers test.

A. Imposition Of Different Standards Without Prior Notice To Drastically Reduce The Roberts Licensees Construction Period Is Clearly Erroneous, Arbitrary And Capricious.

13. With respect to the notice of standards under which their EIA request would be evaluated, it is well established that if the Commission is going to hold applicants or licensees to a regulatory standard, it must inform them beforehand of 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) ("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).

14. 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). The Commission may not reject an application for failing to meet a standard of which the applicant was never previously notified. An agency 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 Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551, 1560 (D.C. Cir. 1987). The Commission committed reversible error by denying the Roberts Licensees a benefit for which they earlier had been found qualified, when the denial was based on standards of which the agency gave no notice.

15. The December 1995 Order set out in a detailed manner the criteria to be satisfied to merit rejustification of the EIA. 11 FCC Rcd at 1525 (¶ 111). Among other things, these criteria required a certification that facilities due to be constructed by December 15, 1995 had been constructed. The Roberts Licensees were in compliance with that requirement. They had another year in which to complete their initial phase of construction. In addition, the Roberts Licensees met all other announced standards contained in the December 1995 Order.[9/] See

[9/] The December 1995 Order required "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*."

Roberts Petition, at p. 12 (¶ 16). The Roberts Licensees' rejustification met the December 1995 Order criteria. It should have been granted.

16. Neither the December 1995 Order nor Section 90.629 of the Rules gave any notice that some other construction requirement, and not the December 1995 Order benchmark, would be the yardstick for determining whether rejustification of the EIA should be granted. Yet the May 20 Order, without any notice, applied a different standard. See Roberts Petition, at p. 13 (¶ 18).

17. The Commission itself has only recently reaffirmed the principle 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 authorizations for cellular RSA facilities 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 find themselves in a situation comparable to that of the Algreg permittees. The Roberts Licensees confront the possible loss of privileges, in the form of time critical to the successful implementation of their EIA plan. This loss of privileges arises directly from the Commission's finding that the Roberts Licensees had not taken steps to order equipment and begin construction of the system. May 20 Order, at pp. 10-11 (¶22). If the Commission had announced that it would assess EIA rejustification requests based on steps taken toward construction without regard to the requirements of each individual EIA plan, the Roberts Licensees could have demonstrated compliance or requested a

waiver of the standard for good cause. But the Commission did not provide actual notice of the standard under which the Robert Licensees' EIA would, in fact, be measured. See also Salzer v. F.C.C., supra. Under the Commission's own standards as recently set forth in Algreg, this bait and switch procedure is reversible error. As a result of the Bureau's error, there is a substantial likelihood of the grant of the Roberts Petition. Virginia Petroleum Jobbers, supra.

B. Disparate Treatment Of Similarly-Situated Applicants Constitutes Precisely The Type Of Agency Action Prohibited By the APA.

18. The Roberts Licensees have also demonstrated beyond peradventure that the Commission has subjected them to treatment different from that accorded other, similarly-situated licensees. The United States Court of Appeals for the D.C. Circuit specifically warned the Commission not to engage in such disparate treatment. In Green Country Mobilephone, Inc. v. F.C.C., 765 F.2d 235, 237 (D.C. Cir. 1985), the Court warned, "a 'sometime-yes, sometimes-no, sometimes-maybe policy ... cannot be squared with our obligations to preclude arbitrary and capricious management of [an agency's] mandate'". 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). The decisions in the May 20 Order turned on whether licensees demonstrated initiation of construction as of the date on which the rejustification requests were filed, without regard to whether such construction might be required under a given licensee's original EIA and without regard to the December 1995 Order benchmark. Even applying this new standard, however, there is no discernible difference between the situations of the DCL Associates, Inc. ("DCL") and the Roberts Licensees.[10/] Yet DCL's EIA rejustification

[10/] DCL had completed construction of only one test site which itself was not a part of the EIA of DCL. DCL Rejustification, p. 5, Exhibit A.

was approved granting two years to complete implementation; the Roberts Licensees' rejustification was denied. This blatantly disparate result is nowhere explained on any basis by the FCC and is not explainable under any standard announced by the FCC. The D.C. Circuit has long held that an agency must provide adequate explanation before it treats similarly situated parties differently. The failure to treat similarly-situated applicants in the same fashion, without any rational explanation, is reversible error. Petroleum Communications, Inc. v. F.C.C., 22 F.3d 1164, 1172 (D.C. Cir. 1994). The denial of the Roberts Licensees rejustification request and the grant of the DCL rejustification request was inconsistent and was not explained. The denial of the Roberts Licensees rejustification request was reversible error. The Roberts Licensees therefore are likely to succeed on the merits.

19. Even assuming *arguendo* that the Roberts Licensees could not demonstrate with some degree of mathematical probability that they will prevail on reconsideration on the issues outlined above, the serious legal questions raised by them in and of themselves compel grant of the stay, where as here, the other three factors strongly favor grant of a stay. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., supra, 559 F.2d at 843; see also Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam); Costandi v. AAMCO Automatic Transmissions, Inc., 456 F.2d 941 (9th Cir. 1972).[11/] As the D.C. Circuit of the U.S. Court of Appeals has noted, in interpreting the standard enunciated in Virginia Petroleum Jobbers, supra:

> An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable harm on the movant. There is

[11/] As the Charlie's Girls Court held: One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury *or that serious questions are raised and the balance of hardships tips sharply in his favor.* Id., at 954 (emphasis supplied).

substantial equity and the need for judicial protection, *whether or not movant has shown a mathematical probability of success [on the merits]."*

Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., supra, 559 F.2d at 844 (emphasis supplied).

IV. Failure To Grant Stay Would Irreparably Harm The Roberts Licensees.

20. Irreparable injury inflicted on the Roberts Licensees also compels a tolling of the May 20 Order's reduced construction period. Virginia Petroleum Jobbers, supra. The Commission has held that such an injury must be certain and great, and must be actual and not theoretical. Private Land Mobile Radio Services (Consolidation), 1 CR (P&F) 838 (Wireless Bur. 1995). The Roberts Licensees have clearly suffered such injury.

21. The Roberts Licensees' EIA originally gave them 5 years (i.e., until March of the year 2000) to complete construction and initiate operation of their facilities. The December 1995 Order, which came 9 months after grant of the EIA and before the Roberts Licensees had even received the bulk of their licenses, indicated that, at best, the extended period would be cut back severely. Rejustification would cut back the Roberts Licensees' construction period to two years from the date on which the Commission granted the rejustification. The Roberts Licensees filed for rejustification, answering each question posed by the December 1995 Order. Having complied with the announced standard the Roberts Licensees proceeded with the reasonable expectation that they would now have to compact their combined 5 year business plan into a maximum of two years after rejustification.

22. Now, however, as the Roberts Licensees are implementing the condensed business plan, despite the uncertainty created by the pending rejustification request, they are told

that they have six months to complete construction of the rest of their facilities. Yet they have constructed a number of their licensed facilities, have secured financing and begun a detailed implementation schedule to complete construction prior to May 20, 1999.[12/]

23. The consequence of the failure to timely complete construction is automatic cancellation of the authorizations. May 20 Order, at ¶ 29. Yet the Roberts Licensees are faced with the daunting task of completing in 6 months an EIA that, in terms of licenses, only filled out in the spring of 1996. Thus, given the impossibility of completing the construction of all the Roberts Licensees within the drastically-shortened time period prescribed, the severely-reduced construction deadline now set by the May 20 Order constitutes a harsh and extreme (i.e., irreparable) injury. In the absence of tolling this deadline, this injury will be visited upon the Roberts Licensees notwithstanding the clear error of the Commission in imposing such a sanction on the basis of a standard of which the Roberts Licensees had no notice.[13/] See Salzer v. F.C.C., supra.

[12/] As noted in the Roberts Petition, since the rejustification filing the Roberts Licensees have entered into management agreements with entities wholly-owned by an established, publicly-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. Furthermore, as of the date of the Petition's filing certain of Roberts Licensee stations were 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 were to be brought on line in the next 90 days in Gulfport, Mississippi; Bay City, Michigan; Mobile, Alabama; Ft. Myers, Florida; and Lake Charles, Louisiana.

[13/] The potential economic injury resulting from the loss of the Roberts Licensees' authorizations is far greater than the mere expenditure of funds pending an appeal, which the Virginia Petroleum Jobbers court deemed an insufficient injury. Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., supra, 559 F.2d at 843, n. 2.

24. The harm that the Roberts Licensees will suffer is also unquestionably "irreparable" in that the Roberts Licensees have no remedy at law to compensate for what will be unrecoverable economic losses -- the canceled authorizations and the destruction of their ability to deploy a wide-area system -- if the Commission fails to act to toll promptly the construction period. The D.C. Circuit considers such a loss significant. In Wisconsin Gas, Inc. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1985), the Court said "monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." The Roberts Licensees' injury is not merely the loss of profits but also the loss of an entire business as a result of the May 20 Order. See also Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., supra, 559 F.2d at 843 n. 2.

25. The threat of such unrecoverable economic loss clearly qualifies as irreparable harm. Iowa Utilities Board v. F.C.C., 109 F.3d 418, 426 (8th Cir. 1997). Therein the Eighth Circuit granted a stay lest local exchange carriers be forced to charge below-cost rates. The Roberts Licensees cannot simply bring suit to recover damages. Compare National Ass'n of Broadcasters v. F.C.C., 554 F.2d 1118, 1122 n. 3 (D.C. Cir. 1976).[14/] Like the incumbent local exchange carriers who would not be able to bring suit to recover their loss and thus found entitled to stay by the 8th Circuit, Iowa Utilities v. F.C.C., 109 F.3d at 426, the Roberts Licensees will not be able to recover business damages from the Commission for the loss of their authorizations and resulting thwarting of their wide-area system, even if the Commission later

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[14/] In NAB, the licensees could sue to recover the fees paid to the FCC. In this case, suit for money damages would not be sufficient to replace licensees that will expire because of the Commission's error.

reversed the May 20 Order (or if the Order was reversed on appeal).[15] The authorizations would have likely already canceled.

26. The Roberts Licensees clearly have demonstrated and the D.C. Circuit will clearly agree that they will suffer an irreparable injury in the absence of a tolling of the construction period. The Court, in the PSWF Corporation case, supra, already recognized that the expiration of the licenses would moot any opportunity to obtain judicial review. PSWF Corporation v F.C.C., No. 96-1097, Order, April 25, 1997.

V. The Issuance Of The Stay Will Not Substantially Harm Other Interested Parties.

27. No interested party will be substantially harmed if the subject request for stay is granted. The Roberts Licensees have demonstrated the errors of law in the May 20 Order which would mandate reversal of the order on reconsideration. Moreover, no other applicant has a vested interest in the forfeiture of the Roberts Licensees' authorizations. See generally Crosthwait v. F.C.C., 584 F.2d 550, 555 (D.C. Cir. 1978) (applicant has no vested interest in disqualification of competing applicant, citing Azalea Corp., 31 FCC 2d 561, 563 (1971); see also RRAD, Inc., 104 FCC 2d 876, 879 (¶ 8) (1986) (no applicant had vested interest in competing applicant's dismissal).

28. Potential bidders on wide-area 800 MHz SMR authorizations will not be substantially harmed. The presence of the Roberts Licensees will not delay any auction that the Commission might schedule as the Commission must allow all other rejustifications which were

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[15] See Toomer v. Witsell, 334 U.S. 385, 391-92 (1948) (no adequate remedy at law where

granted to run their course. As the Commission is well aware, the 800 MHz SMR service is extremely mature and there are many other incumbents particularly in the more valuable, metropolitan area locations. Furthermore, although the Commission has just issued final rules for 800 MHz SMR auctions and has scheduled an auction, said rules are likely to be subject to reconsideration and further litigation. So it is unlikely that any new licenses would be issued before next year. At that point, the Roberts Licensees would be heading into the final year of their EIA (as rejustified), while the new wide-area licensees would have 3 years themselves to meet their first construction benchmark. Moreover, the location and extancy of the Roberts Licensees will be known to all bidders.

VI. Grant Of The Requested Stay Is In The Public Interest.

29. The public interest is served by deployment of fully developed 800 MHz SMR service throughout the country. As more fully developed in the Petition for Reconsideration, the Roberts Licensees 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 widely available.[16/] Indeed, the approach would be of continued assistance to existing, smaller companies already operating in some of these areas.[17/] Providing service to such areas assists the Commission in carrying out its statutory mandate to provide service to the many states and

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16/ 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.

17/ See Letter of James L. Flather, Infrastructure Sales Manager, Motorola Communications and Electronics, Inc., dated May 13, 1996, Roberts Licensees Extended Implementation Rejustification, Exhibit 8.

communities, 47 U.S.C. § 307(b), not just the larger, more commercially attractive markets. The public interest represents all these potential users of 800 MHz SMR service. Accordingly, the public interest would be served by granting a stay to prevent the potential loss of service to smaller communities to be provided by the Roberts Licensees.

30. In addition, the Roberts Licensees are uniformly small businesses, many owned and controlled by women, cooperatively working to implement a consolidated business plan, 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.[18/] The public interest is thus served by the Commission's assisting the Roberts Licensees, in accordance with the mandate of Section 257 of the Telecom Act.

VII. Conclusion

The Roberts Licensees have demonstrated beyond peradventure that the serious legal errors by the Bureau compel a stay of the constructing deadline pending actions on their pending Petition for Reconsideration. Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., supra. The December 1995 Order set forth the criteria. The Roberts Licensees met all the criteria for EIA rejustification contained in the December 1995 Order. Commencement of construction by December 15, 1995 or even the date of the filing was not one of these criteria. The Commission cannot now subject the Roberts Licensees to loss of the benefit earlier accorded them and the possible loss of their authorizations due to the imposition of a new and different

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18/ See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), FCC 97-164, released May 8, 1997 ("Small Business Barriers Report").

standard without prior notice. Salzer v. F.C.C., supra; Algreg Engineering, supra. In addition, the disparate treatment accorded the Roberts Licensees and is arbitrary and capricious conduct prohibited by the APA. Petroleum Communications v. F.C.C., supra; Green County Mobilephone, Inc. v. F.C.C., supra. Further, the Roberts Licensees have demonstrated the irreparable injury that they will suffer if the stay is not granted -- loss of their authorizations. No injury will be suffered by any third party. Finally, the public interest will be served by grant of the stay because it increases the likelihood of 800 MHz SMR service in smaller markets that might otherwise receive less competitive service. These factors compel the tolling of the May 20 Order's deadline pending reconsideration of that erroneous decision.

WHEREFORE, in light of the foregoing, the Roberts Licensees request that the Commission toll the running of the November 20, 1997 EIA construction date stated in the May 20 Order for completion of construction of their 800 MHz SMR authorizations pending action on the Roberts Licensees Petition For Consideration.

Respectfully submitted,

ROBERTS LICENSEES

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Dated: August 8, 1997

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

In the Matter of	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: Chief, Wireless Telecommunications Bureau

PETITION FOR PARTIAL RECONSIDERATION BY ROBERTS LICENSEES

ROBERTS LICENSEES

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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.

Before the
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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