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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 Section 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket No. 93-253

To: The Commission

PETITION
FOR
PARTIAL RECONSIDERATION AND CLARIFICATION

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: Alan S. Tilles, Esquire
David E. Weisman, Esquire
Meyer, Faller, Weisman
& Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015
(202) 362-1100

By: Mark J. Golden
Vice President, Industry Affairs
Personal Communications
Industry Association
500 Montgomery Street
Suite 700
Alexandria, Virginia 22314-1561
(703) 739-0300

Date: August 28, 1997

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The Personal Communications Industry Association ("PCIA"), hereby respectfully requests partial reconsideration and clarification of the Federal Communications Commission's ("FCC") Second Report and Order in the above-captioned proceeding.

Because the Commission has rejected the Industry Proposal, PCIA urges the Commission to provide that, at least during the initial round of applications for market area licenses, only existing licensees already serving 70 percent or more of the population of a particular geographic service area be eligible to submit an application for the market area license for 856-860 MHz SMR channels. The approach adopted by the Commission in the Second Report & Order will promote speculative filings and will likely increase the number of individuals defrauded by the sales pitches of applications mills. PCIA's request will limit such activity.

In PCIA's view, the Commission has not yet recognized the extreme difficulty of mandatory relocation. Although for the most part the Commission properly addressed the cost issues of relocation for operators, PCIA requests that the Commission confirm PCIA's understanding of the recoverability of customer costs in the relocation process.

PCIA requests reconsideration of the FCC's decision to allocate the General Category frequencies in 50 channel blocks. PCIA originally opposed allocation of General Category channels in anything other than single channel blocks. Later, PCIA's support of larger channel blocks was specifically dependant on the FCC's acceptance of the "Industry Proposal", which included the opportunity for acquisition of geographic licenses on lower channels by incumbent licensees. As the Commission has rejected the Industry Proposal, PCIA reiterates its original position that these channels should be auctioned on a single channel basis

By failing to create a "per-channel" construction requirement, the Commission has failed to provide any incentive to an auction winner to disaggregate spectrum won at auction. PCIA strongly opposes the "substantial service" alternative for market area licensees to meet applicable coverage requirements. The availability of this option provides the incentive and opportunity for both speculators and fraudulent application mills to take advantage of the Commission's auction process to profit at the expense of the public interest. As shown herein, the Commission should eliminate the substantial service option.

The Second Report & Order requires only that a prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. As a result, an applicant may simply check the "all" box on its Form 175, thus creating mutual exclusivity for all licenses, but submit only a minimal upfront payment that permits the applicant to bid on only a handful of licenses per round. PCIA believes that the Commission must require an upfront payment for each license in order to ensure that bidders are sincere, deter speculation and, to some extent, ensure that bidders are qualified.

In the Second Report and Order, the Commission adopted a new standard for licensees on "lower" SMR channels seeking to modify their systems. More importantly, however, is the criteria for which the Commission will permit incumbent modifications. PCIA requests that the Commission clarify the standard it will utilize for modifications.

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To: The Commission

PETITION
FOR
PARTIAL RECONSIDERATION AND CLARIFICATION

The Personal Communications Industry Association ("PCIA")[1], through its counsel and pursuant to Section 1.106 of the Commission's Rules, 47 C F R §1.106, hereby respectfully requests

[1]PCIA is the only international trade association representing the interests of both commercial mobile radio service ("CMRS") and private mobile radio service ("PMRS") users and businesses involved in all facets of the personal communications industry. PCIA's Federation of Councils include: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, PCIA is the FCC-appointed frequency coordinator for the Business Radio Service, the 800 and 900 MHz Business Pools, 800 MHz General Category frequencies for Business eligibles and conventional SMR systems, and for the 929 MHz paging frequencies.

partial reconsideration and clarification of the Federal Communications Commission's ("FCC") Second Report and Order ("Second Report and Order") in the above-captioned proceeding.[2]

I. BACKGROUND

The First Report and Order in this proceeding established technical and operational rules for new licensees in the upper 10 MHz block with service areas defined by the U.S. Department of Commerce Bureau of Economic Areas (EAs), and defined the rights of incumbent SMR licensees already operating or authorized to operate on these channels.[3] The Eighth Report and Order established competitive bidding rules for the upper 10 MHz block.[4] In the Second Further Notice of Proposed Rule Making ("Second FNPRM") the FCC set forth proposals for new licensing rules and auction procedures for the "lower 80" SMR and General Category channels.[5] In the Second Report and Order, the Commission resolved some of the issues raised in the Second FNPRM and established technical and operational rules for the lower 230 channels in the 800 MHz band.

II. PETITION FOR RECONSIDERATION AND CLARIFICATION

Although PCIA continues to object to the Commission's initiation of an auction for this spectrum, PCIA believes that further "freezes" and delays are more injurious to the SMR industry than any auction. Therefore, PCIA is not requesting any reconsideration of the Commission's decision to conduct an auction for the "Upper 200" channels in the 800 MHz band. However, there

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[2]Second Report and Order, PR Docket No. 93-144, 62 FR 41190 (July 31, 1997).

[3]First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1995).

[4]Id.

[5]Id.

are certain flaws in the Second Report and Order which, in PCIA's view, make the auction and relocation process unworkable. These flaws are minor in the overall scope of the Commission's effort in this proceeding, but nevertheless each flaw greatly impacts the ability of independent SMR operators and user licensees to continue to operate in the band.

A. The Commission Should Limit Initial Lower Channel Auctions To Incumbents

Since the beginning of this proceeding, PCIA has repeatedly requested that incumbents be permitted to obtain geographic licenses for their occupied EAs. In the early portions of the proceeding, PCIA pointed out the Commission's authority to limit eligibility for geographic licenses. Later, PCIA's support of the "Industry Proposal" was conditioned on an incumbent being able to acquire a geographic license without an auction by "cleaning up" a frequency in the lower bands.

The Commission's rejection of the main tenet of the Industry Proposal is unfortunate. However, PCIA believes that the Commission should consider a more limited application of the Industry Proposal. Specifically, as discussed below, the Commission should limit initial eligibility for any licensee on the "Lower 80" SMR Channels (856-860 MHz) to an incumbent licensee providing service to at least seventy percent (70%) of the EA.[6]

In addition to applications from entities legitimately interested in serving the public (incumbents and otherwise), the rules and policies adopted by the Second Report & Order create an environment that is highly conducive to the filing of fraudulently-induced and speculative applications.

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[6]The limited eligibility should only be with regard to an incumbent licensee(s) versus a non-incumbent. If an incumbent licensee provides service to 80% of the EA, and another incumbent provides service to some smaller percentage of the EA, both incumbents should be permitted to apply for the channel(s), but no applications for non-incumbents should be accepted. Relocated upper channel licensees should also be eligible to participate in the initial auction. Further, if the Commission reconsiders its decision to create 50 channel blocks in the General Category (as requested by PCIA herein), PCIA's proposal should also apply to the General Category frequencies.

One critical element contributing to this environment is the Commission's refusal in the geographic license application process to recognize the significant activities of incumbents that already provide coverage in the geographic service area at levels exceeding those required by the new rules. Instead, the Commission will allow any entity meeting minimal eligibility qualifications to apply for market area licenses.

Because the Commission has rejected the Industry Proposal, PCIA urges the Commission to provide that, at least during the initial round of applications for market area licenses, only existing licensees already serving 70 percent or more of the population of a particular geographic service area be eligible to submit an application for the market area license for 856-860 MHz SMR channels. The approach adopted by the Commission in the Second Report & Order will promote speculative filings and will likely increase the number of individuals defrauded by the sales pitches of applications mills. This is particularly the case when the Commission's "open eligibility" policy is considered in combination with its substantial service alternative for meeting the required coverage requirements. Thus, contrary to the Congressional directive to seek methods for minimizing the filing of mutually exclusive applications,[7] the Commission's decision will encourage the filing of unnecessary and illegitimate competing applications.

PCIA understands that the Commission desires to ensure that all parties legitimately interested in providing service in a particular market will have the opportunity to do so. This objective, however, must be balanced against the real harm to the public interest that will result from the widespread filing of applications for anticompetitive or speculative purposes as well as applications filed at the behest of fraudulent mills, and the winning of market area licenses by such entities.

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[7] 47 U.S.C. § 309(j)(6)(E) (1994).

Moreover, the Commission cannot, consistent with the public interest, favor new entrants, who have made no effort to serve a market, over those carriers who have invested substantial resources in bringing service to the public.

There are numerous harms in the auction process about which PCIA is concerned. Initially, the mere participation of insincere applicants in the auctions will drive up the price of geographic service area licenses, even if the incumbent is successful in obtaining the license. Unnecessarily high license costs have clear implications for carrier activity to meet customer needs most effectively with advanced technologies.

The Commission's records reflect the widespread filing of applications by speculators and uninformed individuals who have been led to believe that they can make a lot of money in the paging market with a limited investment. This history, as well as the experience in the IVDS auctions, suggests that there is no reason to believe that adoption of a competitive bidding process is a complete solution to the filing of speculative applications Some of these applicants will not have enough knowledge to understand the implications of participating in the 800 MHz auctions.

Moreover, if one of the insincere applicants wins the market area license, it can impede service to the public. For example, an uninformed applicant, induced to participate by promises of a large return on its investment, may not realize until it holds the license that a substantial portion of the market is already covered by a protected incumbent. The non-incumbent geographic licensee may seek to rely upon the "substantial service" coverage test by building a single transmitter. Even if the Commission ultimately concludes that the licensee has failed to meet the license requirements and cancels the license, for five years that non-incumbent geographic licensee will be able to prevent expansion by incumbents serious about providing service to the public. Thus, contrary to the

Commission's unsupported conclusion that its policy should promote further wide area coverage of services, so-called "open eligibility" could in fact detract from further wide area coverage.

The Commission accordingly must give greater recognition to the highly developed, competitive marketplace that exists in the SMR services. Further, it must acknowledge the very real expenditure of resources by incumbents striving to serve the public and the harm that can result from the submission of speculative and other ill-considered applications. PCIA believes that the balancing of competing goals can best be achieved by adopting the proposal to permit an incumbent licensee providing coverage to 70 percent or more of the population of a geographic service area to have sole initial eligibility to seek the market area license.[8]

B. Mandatory Relocation Must Be Clarified

1. Customer Costs Must Be Recognized

In PCIA's view, the Commission has not yet recognized the extreme difficulty of mandatory relocation. Although for the most part the Commission properly addressed the cost issues of relocation for operators, PCIA requests that the Commission confirm PCIA's understanding of the recoverability of customer costs in the relocation process.

It is the Commission's view, a view with which PCIA agrees, that the relocation process should be "... transparent to the end user to the fullest extent possible."[9] This transparency must be from the perspective of the end user. However, the Commission has failed to recognize the effort which will be necessary to achieve the transparency. In the microwave relocation process, generally

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[8]PCIA's request is substantially similar to the position taken by PCIA in the "Narrowband PCS" proceeding. See, PCIA's Petition for Reconsideration in WT Docket No. 96-18, filed April 11, 1997.

[9]Second Report and Order, supra at para. 89.

links can be relocated one at a time, or a redundant system can be constructed and then begin operation. Thus, "downtime" can be almost non-existent. However, the SMR relocation process involves customers who are not licensees, and who have numerous mobile units which must be brought in from remote locations in the field. These customers can seek service from other providers (including the auction winner) if they are displeased with their SMR service provider.[10] Further, these customers do not understand (or care about) the intricacies of what the Commission is attempting to accomplish. Instead, they only understand that their communications are being interrupted for a period of time, and that they wouldn't necessarily have the same interruption if they were taking service from another. This only makes the operator look bad in the eyes of the customer and tarnishes the relationship. No amount of financial remuneration can compensate for this loss of goodwill.

The amount of "downtime" which many SMR customers will have to endure will be significant. The Commission recognized in the First Report and Order that relocation may mean that "... it may be necessary to operate the old system and the new system simultaneously to ensure a seamless transition".[11] In addition, the relocation must be "... transparent to the end user to the fullest extent possible."[12] It is therefore PCIA's understanding that compensable costs include customer costs, as well.

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[10]It will be important that it is the incumbent licensee who deals with the end users in the relocation process and not leave the task to the auction winner.

[11]Second Report and Order, supra at para. 119. In paragraph 91 of the Second Report and Order, "system" is defined as including both base station facilities and mobile units.

[12]Second Report and Order, supra at para. 89.

The actual reprogramming of mobile units can take from 15 minutes to several hours per radio, depending on the unit. Since all units must be reprogrammed before operation can begin, this means that a customer with multiple units may be without service for days! Costs to the end user can therefore be are significant. The Commission should also keep in mind that during the past several years it has engaged in a conscious effort to promote the use of commercial systems by public safety and quasi-public safety users by actions such as reallocating the General Category channels for SMR use and refusing to allocate additional spectrum for these users.[13] As a result, many more public safety and quasi-public safety users have begun to utilize Specialized Mobile Radio systems. Requiring the shut-down of such users, even for a brief period, is unthinkable.

The only methodology that PCIA can envision to minimize customer downtime is a redundant mobile system, in addition to a redundant backbone (i.e., repeaters and antennas). Even this option will not eliminate downtime for larger users, but it will at least minimize this harm. PCIA believes that the Commission's definition of "system", which includes mobile units, and recognition that a redundant "system" may be necessary and cost recoverable, means that these customer costs are recoverable. However, PCIA requests that the Commission confirm PCIA's understanding about the recoverability of customer costs.

In addition, the Commission must reconsider its decision not to include systems which are "operationally separate" from its definition of "system".[14] The Commission's definition is that only co-located transmitters can constitute a "system". However, many SMR customers access more than

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[13]See, for example, Report and Order, GN Docket No. 96-228, 6 CR 771 (1997)(the Wireless Communications Service or WCS).

[14]Second Report and Order, supra at n. 189.

one "operationally separate" SMR system. The Commission's definition would require multiple reprogramming down times for customers as each separate transmitter site is retuned, possibly over a period of years, making an intolerable situation worse. If reprogramming/replacement is required for a customer, it should only be required once.

2. The Commission Should Clarify That Incumbents Can Request Progress Payments

Most SMR incumbent licensees who are relocated from 861-865 MHz frequencies will need to actively participate in the relocation process. This will include the expenditure of substantial sums of money and time by the incumbent. Certainly, the Commission has anticipated that the incumbent will be compensated for these costs by the EA licensee. The Commission must recognize that incumbent licensees will need to be assured in the negotiation process that the auction winner has the ability to pay the relocation costs. Therefore, it should be commonplace for incumbents to require progress payments, escrow payments, or other reasonable financial showings or arrangements, as part of the agreement to insure that reimbursement costs are paid on a timely basis. Incumbents should not be required to undertake any financial task without the knowledge that their efforts will be actually reimbursed.

Paragraph 123 of Second Report and Order, the Commission discusses, with regard to cost-sharing, when a EA licensee who has benefitted from a prior relocation must compensate the relocating EA licensee. The Commission states that "... reimbursement payments should be due when the frequencies of the incumbent have been cleared." PCIA believes that the word "reimbursement" only applies to the benefitting EA licensee's compensation to the relocating EA licensee, and does not apply to when an EA licensee must compensate the incumbent licensee who is relocating. This would create an untenable situation for the incumbent licensee, who often will be unable to "front"

the substantial sums of money that relocation will require. PCIA requests confirmation of its understanding of this paragraph.

C. General Category Frequencies Should Be Assigned In Smaller Blocks

PCIA requests reconsideration of the FCC's decision to allocate the General Category frequencies in 50 channel blocks. PCIA originally opposed allocation of General Category channels in anything other than single channel blocks. Later, PCIA's support of larger channel blocks was specifically dependant on the FCC's acceptance of the "Industry Proposal", which included the opportunity for acquisition of geographic licenses on lower channels by incumbent licensees. As the Commission has rejected the Industry Proposal, PCIA reiterates its original position that these channels should be auctioned on a single channel basis.[15]

PCIA appreciates the difficulty in conducting separate auctions in each EA for each General Category channel. However, this is the only methodology which will permit any incumbent licensee other than the largest SMR systems in the country to acquire a geographic license. In most EAs, only the incumbent licensee(s) will be able to construct a usable system on a General Category frequency.[16] Thus, these channels are of little value to anyone other than the incumbent. However, by allocating the channels in fifty (50) channel blocks (and prohibiting pre-auction settlements) the Commission

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[15]In paragraph 20 of the Second Report and Order, the Commission specifically recognized that the Industry Proposal with regard to channel blocks was tied to channel-by-channel settlements prior to auction. However, the Commission adopted the channel block proposal and rejected the settlement proposal. Thus, for the Commission to state in paragraph 22 that it "adopted" the Industry Proposal is incorrect.

[16]The "construction" would most likely consist of the original, site-based construction, some limited expansion of the original construction, or some modification of the original transmitter site.

is forcing each incumbent to either bid on a fifty channel block (forty-nine of which the incumbent can't use), or forego obtaining a geographic license.

If the Commission assigns the General Category frequencies in single channel blocks, PCIA expects that the Commission will have few auctions to conduct for these channels. Primarily, the incumbent will be the sole applicant for an encumbered frequency because of the inability of a non-incumbent to construct the channel in the geographic area. Therefore, such an allocation would not be overly burdensome for the Commission, and would be consistent with the Commission's obligation to "... continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing procedures."[17]

The Commission declined to adopt a single channel block proposal for several reasons: (1) to accommodate applicants who want contiguous spectrum; (2) to ensure economic opportunities for a wide variety of entities; and (3) to prevent applicants from keeping track of 150 auctions at one time.[18] The Commission's analysis is flawed. While the Commission recognizes that the General Category channels are "highly encumbered",[19] it fails to continue its analysis and discuss whether it would be possible to assemble contiguous General Category spectrum which is "highly encumbered"

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[17]House Conf. Rep. No. 103-213, 103d Cong. 1st Sess. (1993) at p. 1174.

[18]Second Report and Order, supra at para. 21-22.

[19]Id. at para. 21.

by multiple licensees without mandatory relocation and pre-auction settlements. In fact, it will not be possible, nor is there any support in the record for creating this situation.[20]

The adoption of large channel blocks for the General Category channels will not "ensure economic opportunities for a wide variety of entities"; it limits such opportunities, since the overwhelming majority of incumbent licensees will not be able to participate in the acquisition of a geographic license. This will particularly impact non-SMR incumbents, including public safety entities and private users, which will not have the economic ability to participate in a large block auction. In addition, auctioning the General Category frequencies on a channel-by-channel basis will not force applicants to keep track of 150 auctions. Rather, it will allow more applicants to participate and allow applicants to "keep track of" the auction on the limited number of frequencies on which they are an incumbent.

D. The Commission Must Eliminate "Substantial Service"

The Commission justifies its large block auction of General Category frequencies by arguing that...

> ... small system licensees will have the opportunity to acquire smaller amounts of spectrum compatible with their existing technology through the newly-created disaggregation rules...[21]

PCIA believes that the Commission's expectation will not be fulfilled, because auction winners will not have an incentive to disaggregate their spectrum to incumbent licensees. The Commission's

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[20]In footnote 42 of the Second Report and Order, the Commission lists the American Mobile Telecommunications Association ("AMTA"), SMR WON, and Genesee Business Radio Systems as supporting large General Category channel blocks. However, AMTA and SMR WON's support was conditioned on the adoption of a pre-auction settlement mechanism, which the Commission declined to adopt.

[21]Second Report and Order, supra at 22.

failure to adopt a "per-channel" construction requirement[22] as proposed by PCIA means that auction winners will merely continue to hold a license for frequencies which they cannot construct because of the incumbent licensee in the hope that at sometime in the future the incumbent licensee will discontinue operation.

By failing to create a "per-channel" construction requirement, the Commission has failed to provide any incentive to an auction winner to disaggregate spectrum won at auction. Certainly, an incumbent licensee could provide a monetary incentive to the auction winner, but if the incumbent licensee could afford the monetary incentive, the incumbent licensee would have participated in the auction in the first place. Thus, incumbent licensees will not be able to realize the benefits of geographic licensing.

The Second Report & Order concludes that adoption of coverage requirements for market area licensees can serve a number of significant objectives.[23] In support of these goals, the Second Report & Order requires a geographic area licensee to "provide coverage to one-third of the population within three years of the license grant, and to two-thirds of the population within five years of the license grant."[24] Undercutting the chance to attain these objectives, however, the Commission also would permit market area licensees to meet their construction obligations by demonstrating that they "provide substantial service to the geographic license area within five years of license grant."[25] The sole definition of "substantial service" is that it is "service that is sound,

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[22]Second Report and Order, supra at 34.

[23]Id. at para. 34.

[24]Id.

[25]Id.

favorable, and substantially above a level of mediocre service, which would barely warrant renewal. For example, a licensee may demonstrate that it is providing a technologically innovative service or that it is providing service to unserved or underserved areas."[26] Given the Commission's rejection of PCIA's request that construction be on a "per-channel" basis, this means that a EA licensee could obtain a 50 channel block of "General Category" channels for which they are an incumbent on 3 of the channels, construct those 3 channels throughout the EA and not construct or provide any service whatsoever on the remaining 47 channels. Alternatively,

PCIA strongly opposes the "substantial service" alternative for market area licensees to meet applicable coverage requirements.[27] The availability of this option provides the incentive and opportunity for both speculators and fraudulent application mills to take advantage of the Commission's auction process to profit at the expense of the public interest. Even where pre-existing SMR operations in a market preclude the deployment of an effective SMR system on a particular frequency, an application mill can advertise SMR applications on the basis of being able to meet the substantial service test. Failure to construct and operate a system meeting the substantial service requirement would not even be determined until five years after the grant of the authorization, by which time the application mill perpetrators or other insincere applicants will be long gone (and service will have been delayed to the public in the interim).

These adverse effects are aggravated by the fact that the Commission's definition of "substantial service" is virtually meaningless. Provision of service to an "unserved area" could include

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[26] Id.

[27] PCIA also objected to the adoption of a "substantial service" standard in the "Narrowband PCS" proceeding. See, PCIA Petition for Reconsideration, WT Docket No. 96-18, filed April 11, 1997.

a single, low power transmitter on the top of a mountain, or in a valley, where there is no customer base. It is absolutely unclear what showing of service would be required to meet the substantial service test, and what level of service would be inadequate. This lack of definitional clarity suggests that the Commission's substantial service test could easily be satisfied. Moreover, this lack of specificity likely will invite litigation as to a licensee's compliance with the requirement.

The Commission views the substantial service option as a mechanism for promoting the "rapid deployment of new technologies and services and will expedite service to rural areas.[28] Regardless whether this objective should be elevated over a recognition of the substantial efforts of incumbent operators to provide service to the public, the Commission must also confront the fact that the substantial service alternative provides plenty of opportunity for mischief in promoting the filing of speculative or fraudulently induced applications. Harm results from the mere participation in the auctions by insincere applicants as well as from the award of geographic licenses to entities with no intent or no ability to build out a viable system. Retention of the coverage standard will promote the filing of unnecessary mutually exclusive applications, contrary to statutory mandate.[29] The Commission accordingly should delete the substantial service test and require construction standards to be met on a "per-channel" basis. Specific coverage requirements alone will, as the Commission set out to do, ensure that service is provided to meet public need, maximize coverage within service areas and deter spectrum warehousing, and deter the activities of speculators and fraudulent applications mills.

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[28]Id. at para. 34.

[29]47 U.S.C. § 309(j)(6)E).

E. Applicants Should Be Required To Post An Upfront Payment For Each And Every License Block On Which They Propose To Bid

The Second Report & Order requires only that a prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round.[30] As a result, an applicant may simply check the "all" box on its Form 175, thus creating mutual exclusivity for all licenses, but submit only a minimal upfront payment that permits the applicant to bid on only a handful of licenses per round. PCIA believes that the Commission must require an upfront payment for each license in order to ensure that bidders are sincere, deter speculation and, to some extent, ensure that bidders are qualified.

This problem is particularly egregious with regard to the 856-860 MHz SMR channels. In this band, the Commission will auction licenses in the same five channel blocks as the original assignments. Because of the limited geographic area of an EA, it is likely that only a single entity, the incumbent, can build in the geographic area (similar to the General Category frequencies). Therefore, it is likely that only the incumbent licensee(s) will want to participate in an auction for that particular set of five channels. However, by giving applicants the option of checking the "all" box, such licenses would automatically make all licenses mutually exclusive, and give applicants the incentive to "park bids" on those blocks for which they could not build and do not want in order to maintain their eligibility level. This artificially inflates the prices for licenses which only the incumbent could build. As the Commission has seen in the PCS auction, inflation of the true value of the license beyond its worth only leads to disaster for the Commission and the licensee.

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[30] Second Report and Order, supra at para. 257.

In fact, the Commission's upfront payment policy, particularly when combined with the ability of applicants to check a single box in order to apply for all frequencies in all service areas, will promote participation in auctions by speculators and others lacking a legitimate intent to provide service to the public. Likewise, this approach serves as an open invitation to application mills to "ply their trade" by enabling their participation in the auctions.

The Commission instead should adopt a requirement that each applicant submit an upfront payment for each and every authorization on which it seeks to bid, particularly for the lower channel auctions. Including such a requirement will help to ensure that every applicant has given some consideration to the licenses for which it seeks to bid. This assurance is particularly significant in light of the fact that, for most of the frequencies in most of the geographic service areas, existing licensees already are providing service throughout a large portion of the market. Moreover, given the likely level of the required upfront payments, applicants could still pursue backup strategies.

Without this requirement, particularly when combined with the application "all" box, an existing operator may find itself confronted with a mutual exclusivity situation for the duration of the auction involving the geographic license encompassing its existing service area. It may be that, in some cases, no competitive bidding occurs except sporadically (at least during the early stages of the auction) so that an applicant can satisfy the required activity level associated with its minimal upfront payment. The existing operator nonetheless will have expended funds in support of its preparations for the auction, and may find that it must pay a higher amount for the authorization than would have been the case if the Commission had required some indication of the licenses in which an applicant was actually interested. PCIA's concern that numerous applicants will simply check the "all" box and

submit a much smaller upfront payment is borne out by the history of prior auctions for wireless spectrum.

Moreover, the Commission's approach would promote the filing of mutually exclusive applications, contrary to the statutory mandate.[31] Even where the filing of so-called "phantom" mutually exclusive applications does not result in the eventual licensee paying more for its authorization than otherwise would be the case, it would delay the licensee in receiving the geographic area authorization and in taking full advantage of the rights associated with such a license.

Requiring upfront payments for each authorization on which an applicant will be permitted to bid also will help to deter participation by individuals persuaded to apply by fraudulent application mills. If such applicants must submit only a minimal upfront payment (collected by the application mill), they can more readily be induced to invest in "the chance of a lifetime." In contrast, if potential investors solicited by the application mills must make an initial payment for each license on which they might bid, at least some of them would have greater insight into what is implicated by participating in the auction. Moreover, the increased level of investment alone might well prevent application mills from being able to defraud unwitting investors.

F. Other Issues

1. Clarification Of Modification Standard

In the Second Report and Order, the Commission adopted a new standard for licensees on "lower" SMR channels seeking to modify their systems.[32] The Commission will permit such incumbent licensees to modify their systems (and receive protection from EA licensees) utilizing an

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[31] 47 U.S.C. § 309(j)(6)(E).

[32] Second Report and Order, supra at para. 67.

18 dBu signal strength contour.[33] However, such modifications can only be with the consent of co-channel incumbent licensees.[34] Since co-channel incumbents have little incentive to agree to such moves, this option will be of extremely limited use in all but the most rural areas.

More importantly, however, is the criteria for which the Commission will permit incumbent modifications. Recently, PCIA has been made aware that a question has arisen as to the standard which a 800 MHz licensee on SMR Pool and General Category frequencies should use when it is necessary to modify the transmitter location for the station, specifically with regard to a station which was not originally licensed on a short-space basis and which was licensed for less than the maximum permissible ERP (1000 watts, assuming the station's composite HAAT is less than 1000 feet).

Section 90.693 of the Commission's Rules reads in part that:

> An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu field strength contour and its interference contour shall be defined as its originally-licensed 22 dBu field strength contour. Incumbent licensees are permitted to add, remove or modify transmitter sites within this existing service area without prior notification to the Commission so long as their original 22 dBu field strength contour is not expanded and the station complies with the Commission's short-spacing criteria in §90.621(b)(4) through 90.621(b)(6).

Section 90.693 does not specify the manner in which an existing licensee calculates the "originally licensed" contour. One interpretation could be that the licensee should utilize maximum

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[33]It is PCIA's understanding from the text of the Second Report and Order that the incumbent flexibility also applies to non-SMR incumbent licensees on former General Category channels, as the discussion in the Second Report and Order never differentiates SMR incumbents from non-SMR incumbents in Section IV(B)(3)(i). However, PCIA believes that the Commission should amend new Section 90.693 to delete "all 800 MHz SMR licensees" and add "all 800 MHz licensees utilizing SMR Category channels".

[34]Id.

power (1000 watts ERP) and the maximum HAAT (1000 feet HAAT). Another interpretation would be that the licensee utilize the licensed power and licensed composite HAAT (of course, the licensed composite HAAT is often wrong). However, in both methodologies the resulting curves would only be a circle.

A third interpretation is that the licensee should use the maximum permissible ERP for the composite HAAT and the actual HAAT along each radial. This interpretation is supported by Section 90.621(b)(6)(one of the sections cited in Section 90.693). Section 90.621(b)(6) reads:

> A station located closer than the distances provided in this section to a co-channel station that was authorized as short-spaced under paragraph (b)(4) of this section shall be permitted to modify its facilities as long as the station does not extend its 22 dBu contour beyond its maximum 22 dBu contour (i.e., the 22 dBu contour calculated using the station's maximum power and antenna height at its original location) in the direction of the short-spaced station.

Additionally, this interpretation is supported by the "short-space" chart in Section 90.621(b)(4) of the Commission's Rules. The chart protects existing licensees at maximum power, and actual HAAT in the direction of the co-channel station.[35]

Based upon this analysis, it has been PCIA's opinion that licensees should perform an actual analysis of the directional HAAT utilizing maximum power permitted for the composite HAAT. However, recently PCIA has been made aware that application processors in Gettysburg have returned applications prepared using this criteria. PCIA seeks clarification on this issue.

It has been the Commission's objective to always permit an existing SMR System to increase its ERP. This policy appeared in PR Docket No. 90-34, where the Commission created Section

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[35]See, footnote 3 of the "short-spacing" chart.

90.621(b)(6), which provides that incumbent stations which had been short-spaced by others could move based upon no change in the 22 dBu contour at maximum power. It was the Commission's intention not to permit a short-spaced station "to infringe upon an existing licensee's reasonable expectation that it be able to modify its facilities.."[36]

In fact, the Commission's adoption of Section 90 693 was based upon the presence of Section 90.621(b)(6). In the Commission's consideration of new 800 MHz rules, the Commission originally intended to utilize a 40 dBu contour to govern where an existing licensee could move. In response, PCIA met with Commission officials (including a meeting between Wireless Telecommunications Bureau staff and PCIA's SMRA Council in Tampa in 1994), and pointed to Section 90.621(b)(6) as an existing rule which should continue to be utilized for these types of modifications.

From a practical standpoint, this approach makes sense. The Commission should not give more flexibility to licensees which have been short-spaced, compared to those who have not. It is the licensee who has been short-spaced who poses a greater interference danger from a greater modification than a licensee who has not been short-spaced. It was the Commission's original intention to protect incumbent licensees who had been short-spaced and couldn't move because they could no longer meet the short-space chart if they needed to move. Now, with geographic overlay licenses, the impact has been that an incumbent licensee is being short-spaced everywhere, by the presence of the overlay license. The same rationale applies to this licensee, too.

Since the geographic licensee (or any other co-channel licensee) needs to protect the incumbent's system at full power at the original site, it is consistent with the Commission's Rules, and

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[36]Memorandum Opinion and Order, PR Docket No. 90-34, 7 FCC Rcd 6069 (1992) at para. 6.