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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

PETITION FOR RECONSIDERATION

The Automobile Club of Southern California ("ACSC"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules [47 C.F.R. § 1.429], hereby requests reconsideration of the Commission's actions in its Second Report and Order (PR Docket No. 93-144, GN Docket No. 93-252 and PP Docket No. 93-253), FCC 97-223, released July 10, 1997, ("Second R&O"). In promulgating the Second R&O, the Commission has failed to adequately consider the interests of non-SMR incumbents and small SMR operators in the 800 MHz band. It would be contrary to the public interest for the Commission to auction the 800 MHz General Category channels, especially in blocks of 50 channels. The proposed auction scheme would not accommodate the licensees which the FCC has previously recognized as the primary users of this spectrum.

I. STATEMENT OF INTEREST

The ACSC is one of two major auto clubs serving the state of California and is

responsible for providing emergency road service to the southern portion of the state, including the freeway-dependent Los Angeles area. ACSC is currently licensed to operate on the General Pool channel 853.6875 / 808.6875 MHz under the licenses for Conventional stations WNSC920 and WPIB934 at various locations in Southern California. Together these licenses authorize 580 mobile units, 10 fixed base stations, 25 base stations at temporary locations, and 125 other temporary-fixed transmitters. Therefore, ACSC's operation is a substantial one, making efficient use of the channel pair to deliver valuable emergency road services to Southern California. In this regard, ACSC uses the channel to dispatch towing operations on a prioritized basis to the scene of accidents, so that road hazards can be cleared before secondary collisions can occur. ACSC also often transports accident victims from the scene, where they would otherwise be vulnerable to harm from other high-speed vehicles, or from crime. In the conference report accompanying the Balanced Budget Act of 1997, Congress explicitly recognized the important safety role played by entities such as the auto clubs, noting that "the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public. This service exemption also includes radio services used by not-for-profit organizations that offer emergency road services, such as the American Automobile Association (AAA)."[1]

II. THE AUCTION SCHEME FAILS TO RECOGNIZE THE EXEMPTION FROM AUCTIONS GRANTED BY CONGRESS FOR EMERGENCY ROAD SERVICES

In light of its recognition of the important safety purposes fulfilled by emergency road services, Congress provided an express exemption from the Commission's competitive bidding

[1] H.R. Rep. No. 105-217, at 572 (1997).

authority to such spectrum users. In particular, Section 309(j)(2) of the Communications Act has been amended by Section 3002(a) of the Balanced Budget Act of 1997 to read as follows:

> (2) EXEMPTIONS -- The competitive authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission --
>
> (A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that --
>
> (i) are used to protect the safety of life, health, or property; and
>
> (ii) are not made commercially available to the public;

As indicated in the Conference Report language quoted previously, the purpose of the exemption provided in Section 309(j)(2)(A) is to ensure that emergency road services can continue to provide the valuable safety-related services they furnish to the public. This exemption is *not* limited to any particular channel allocation, but instead applies to *any* licenses or construction permits issued to emergency road services. The Commission's auction scheme for the General Category channels fails to provide for this exemption. Certainly, since the frequency pair 853.6875 / 808.6875 MHz is licensed to an emergency road service provider throughout most of Southern California, this channel pair should be exempted from the upcoming auction, for the relevant EAs.

III. IT WOULD BE CONTRARY TO THE PUBLIC INTEREST TO AUCTION THE 800 MHz GENERAL CATEGORY CHANNELS FROM BENEATH NON-SMR INCUMBENTS

It would be contrary to the public interest for the Commission to license the 800 MHz General Category channels by auction, since these channels are heavily congested with non-CMRS licensees that rely upon these channels for their internal use operations, and for important

safety purposes. These non-CMRS users typically operate systems having just one or two channels and can coordinate the expansion of their systems with co-channel licensees in adjacent areas. As a practical matter, little "white space" exists in most metropolitan areas where there is demand for 800 MHz spectrum, but existing licensees must have the flexibility to make modifications and add transmitters within their composite interference contours, as the need arises. The proposed auction scheme would not accommodate the licensees which the Commission has previously identified as the primary users of this spectrum. Moreover, the proposed auction (including the 50-channel block licensing scheme) violates the Commission's statutory authority, because it manufactures mutual exclusivity rather than avoiding this result, it fails to recognize the characteristics of the existing service, and it ignores the Congressional directives of avoiding excessive concentration of licenses and encouraging small business participation in the provision of advanced telecommunications services.

A. The Proposed Auction Scheme Would Not Accommodate the Licensees Which the Commission Has Previously Identified As the Users of this Spectrum.

The FCC's conclusion that the 150 General Category channels should be licensed in three contiguous 50-channel blocks is inconsistent with its most recent findings regarding the likely use of this spectrum. As such, the proposed auction scheme would not accommodate non-SMR licensees, such as ACSC, which utilize one to five channels to perform important public safety functions or for internal business use. At paragraph 100 of its Memorandum Opinion and Order on Reconsideration (PR Docket No. 93-144, GN Docket No. 93-252 and PP Docket No. 93-253), FCC 97-223, released July 10, 1997, ("Reconsideration Order") the FCC indicated:

> We also anticipate that with the advent of geographic area licensing on the upper 200 channels, there will be substantial demand for General Category channels among legitimate *small* SMR operators, including incumbents who relocate from

the upper 200 channels. Reconsideration Order, at ¶ 100 (*emphasis added*).

Since these "small SMR operators" were licensed in blocks of five channels, and many continue to operate systems having five channels or less, the Commission's decision in the Second R&O to license these channels in blocks of 50 will effectively preclude their participation in an auction. Many other incumbent operators utilize their 800 MHz General Category channels internally, for non-SMR purposes. With such little time remaining before the short-form filing deadline for an auction as early as next spring, there is no practical likelihood that such a diverse group of small SMR and non-SMR licensees could effectively form a bidding consortium and agree upon a bidding strategy to protect the channels which they currently control. Unless such entities can win the geographic area rights for their existing channels at auction, they will be unable to effectively modify their systems, in response to, *e.g.*, the loss of an antenna site, propagation problems, or a change to their area of operation. For ACSC, this loss of licensing flexibility could hamper its ability to rescue stranded motorists and clear road hazards, in direct contravention of the public safety directive of Section 1 of the Communications Act of 1934, as amended (the "Act").[2] To guarantee the licensing flexibility which currently allows such licensees to adapt their systems to meet changing traffic patterns and/or communications needs, they will be forced to chose between: (1) participating in an auction and bidding on channel blocks which contain frequencies that they do not need and cannot afford, or (2) entering into negotiations with an auction winner that has every incentive to run incumbent users off the air and gain rights to their spectrum. Neither option is feasible for the vast majority of General Category users.

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[2] 47 U.S.C. §151.

B. The Proposed Auction and 50-Channel Licensing Scheme Violates the Commission's Statutory Authority.

In addition to overlooking the exemption for safety-related uses, the proposed auction of 800 MHz channels violates the Commission's statutory authority in three significant ways. As proposed in the Second R&O, the auction scheme: (1) manufactures mutual exclusivity among licensees rather than avoiding it; (2) fails to recognize the characteristics of the proposed service; and (3) ignores the Congressional directives of avoiding excessive concentration of licenses and encouraging small business participation through service area definitions and bandwidth assignments.

1. The Auction Scheme Manufactures Mutual Exclusivity Rather than Avoiding It.

While the ACSC applauds the Commission's choice to license the General Category channels along smaller Economic Area ("EA") service areas, rather than using Metropolitan Trading Areas ("MTAs"), the decision to license the 150 General Category channels in three 50-channel blocks is fundamentally unfair to licensees seeking to use these channels for non-SMR or small SMR systems. For these licensees, a 50-channel grouping *manufactures* mutual exclusivity, rather than avoiding it, since licensees whose channels were relatively remote from one another may now be brought into, and become competitors for, the same 50-channel block.

When creating the statutory framework for competitive bidding, Congress was careful to limit the Commission's statutory authority to instances where the auction of spectrum would be in the public interest. Congress did *not* intend for auctions to become a means for the Commission to avoid all responsibility for thoughtful spectrum management. In particular,

Congress instructed the Commission that the use of competitive bidding should not "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity."[3] By choosing a 50-channel block, the Commission ignores this continuing obligation.

In the Balanced Budget Act of 1997, Congress both extended and expanded the FCC's authority to auction electromagnetic spectrum. However, in the Conference Report which accompanied the legislation, Congress noted its concern "that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity."[4] The planned 50-channel block allocation, imposed on top of numerous *existing* single channel operations, ignores this warning from Congress.

2. The Auction Scheme Fails to Recognize the Characteristics of the Proposed Service

As the Commission is well aware, the 800 MHz band is already heavily licensed and many of the licensees have small systems (including internal use operations) using relatively few channels. By failing to allow potential bidders the flexibility to bid on smaller channel blocks, or to bid on just one channel, the Commission's auction scheme fails to recognize the characteristics of the proposed service, which must accommodate these incumbent users.

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[3] 47 U.S.C. § 309(j)(6)(E) (1993).

[4] H.R. Rep. No. 105-217, at 572 (1997).

Section 309(j)(4)(C) of the Act imposes an obligation on the Commission, consistent with the public interest, *and the characteristics of the proposed service*, to prescribe area designations and bandwidth assignments that promote an equitable distribution of licenses and services among geographic areas and that promote economic opportunity for a wide variety of applicants, including small businesses.[5] The Commission has ignored these important obligations, and the current characteristics of the General Pool, in adopting its auction scheme for these channels in the Second R&O. Instead of accommodating existing operators and helping them in the transition to market area licensing, the Commission has adopted a plan which strongly favors the interests of large commercial carriers, such as Nextel, and the speculative interests of well-heeled spectrum predators. The Commission is, in essence, trying to overlay a "cellular-like" service on a portion of the spectrum that has been used for discreet but important radio operations. For the sake of introducing the *ninth* or *tenth* cellular-like service in each market,[6] the Commission will severely undercut the ability of existing users, like ACSC, to continue providing focused services of great benefit to the public.

In other existing services which have transitioned to market area licensing, such as paging, the Commission expressly recognized the need to afford some accommodation to incumbent users, by, *e.g.*, allowing incumbents a filing window during which they could apply

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[5] 47 U.S.C. § 309(j)(4)(C) (1993).

[6] There are already two cellular carriers, three 30 MHz broadband PCS licensees, up to three 10 MHz broadband PCS licensees, and Nextel (operating a broadband SMR service) in each market. Time will tell whether the marketplace will support this glut of providers, but the stock prices of PCS licensees has already fallen substantially, and many are in financial trouble.

to expand their operating area by 40 miles in each direction, prior to any auction.[7] The Commission makes no such effort in this proceeding. When auctioning already-licensed spectrum, the Commission must recognize the equities of the incumbent licensees. In the 800 MHz band, this means licensing the General Category channels individually, or at least in smaller channel groupings, so that incumbents can have a realistic opportunity to be successful in an auction and protect their ability to expand and modify their existing systems.

3. The Proposed Use of 50-Channel Blocks Ignores the Congressional Directives of Avoiding Excessive Concentration of Licenses, and Encouraging Small Business Participation Through Service Area Designations and Bandwidth Assignments

Both Sections 309(j)(3)(B) and 309(j)(4)(C) of the Act require the Commission to avoid excessive concentration of licenses and by disseminate licenses among a wide variety of applicants, including small businesses. As indicated above, Section 309(j)(4)(C) specifically instructs the Commission to promote this result through its choice of service area designations and bandwidth assignments. Since 50-channel blocks represent much more spectrum than most existing users need, the interest of small businesses are hardly served by such large allocations. Instead of resulting in a diversity of licensees, including small businesses, the 50-channel block is likely to concentrate license ownership in the hands of a few giant carriers.

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[7] *See*, First Report and Order, WT Docket No. 96-18, 11 FCC Rcd 16570 (1996) (Incumbent licensees allowed to expand outside of auction, because "[existing] operators need flexibility, not only to make modifications within their existing service areas, but to add sites that extend the coverage of their systems into areas of new growth... The record shows that allowing incumbents with operating systems to expand those systems is in the public interest, ..."). *Id.*, at paras. 21, 27.

CONCLUSION

WHEREFORE, for good cause shown, ACSC requests that this petition be granted and the Commission should refrain from auctioning the General Category channels altogether, since such auction would appear to be improper under the Commission's Congressional authority; even if it were assumed, *arguendo*, that the proposed auction was not fatally flawed under the statute, the Commission must reconfigure the licensing scheme to auction channels separately. In the alternative, the Commission should expressly exempt the relevant EAs from the auction, for ACSC's General Category channel pair.

Respectfully submitted,

THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA

By: John A. Prendergast

D. Cary Mitchell
Its Counsel

Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Washington, D.C. 20037
(202) 659-0830

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