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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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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 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	)	PR Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION OF SMALL BUSINESS IN TELECOMMUNICATIONS TO MEMORANDUM OPINION AND ORDER

SMALL BUSINESS IN TELECOMMUNICATIONS

Robert H. Schwaninger, Jr.,
Its General Counsel

Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006
202/223-8837

Dated: September 2, 1997

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Summary

SBT and its members are acutely aware of the history and effect of the Commission's efforts to consolidate into contiguous blocks the Upper 200 channels in the 800 MHZ band for the purpose of auction, and the resulting problems which will emerge from adoption of this program. It is these problems, both legal and practical, that SBT seeks to have the agency avoid in its efforts. The Commission reiterated an earlier conclusion that the allocation and licensing of contiguous blocks of spectrum was "essential to the competitive viability of SMR service because they will permit the use of spread spectrum and other broadband technologies and eliminate delays and transaction costs associated with site-by-site licensing." Nothing in the MO&O provided any factual support for this conclusion or its continued validity. Neither did the Commission present any evidence in the MO&O to show that, nearly two years after the Commission had initially reached its initial conclusion, anyone had yet come forward to express an intent to use spread spectrum or other broadband technologies, including CDMA or GSM, MO&O at para. 16, if contiguous spectrum were provided in the SMR service.

The Commission's reiterated determination in the MO&O concerning contiguous spectrum and efficiency, when compared to the Commission's reasons and actions in Refarming, presents a contradiction. If the Commission is asserting that the use of contiguous spectrum and broadband operation would be more efficient than current operations, then the Commission's narrowing of bandwidths in Refarming would appear to have been entirely in error.

Nothing in the MO&O demonstrated that the Commission had engaged in any analysis to find out whether, in view of the passage of time and in the light of full knowledge, the new scheme would now have the effect of benefitting any particular entity.

Section 309(j)(6)(E) does not give the Commission any discretion to decide not to take steps to avoid mutual exclusivity. Rather, it says that the Commission has an obligation to continue to use the enumerated methods to avoid mutual exclusivity. The Commission adopted a Form 175 application which directly facilitates the filing of mutually exclusive applications by allowing applicants to check a box named "ALL".

The Commission provided no notice that it intended to eliminate the Finder's Preference Program. The Commission must find that it did not provide adequate notice and opportunity for interested persons to comment to an explicit proposal, in accord with the agency's plain duty under 5 U.S.C. §553(b). The Commission said, without any record to support such a conclusion, that eliminating the finder's preference program in favor of an EA licensee preference will reduce the number of "unnecessary" site based licenses. The Commission's expression shows the agency's predilection toward its own unsupported conclusions regarding the competitive impact of EA licensed systems versus existing site licensed systems.

The Commission should take the steps necessary to exclude from participation any person who has engaged in faux construction or operation. By its own words and deeds, the agency did not act to disseminate licenses among a variety of licenses nor can anyone reasonably expect that such dissemination will occur. The Commission has failed to demonstrate any rational basis between its setting of the bidding credits and the elimination of installment payments, and its duty to disseminate licenses among designated entities. The elimination of installment payments makes useless any information gathered to date regarding past participation in auctions by designated entities.

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To: The Commission

PETITION FOR RECONSIDERATION

Small Business in Telecommunications (SBT) hereby respectfully requests that the Commission reconsider its decisions within its Memorandum Opinion and Order (MO&O) within this proceeding, released July 10, 1997 and published in the FEDERAL REGISTER on July 31, 1997, and in supports states the following:

SBT's Interest

SBT is a non-profit association of hundreds of small businesses serving within the telecommunications industry, whose livelihoods and futures are affected by the regulatory agenda set forth by the Commission. Its members operate SMR facilities and related businesses which will be adversely affected by the Commission's decisions within its MO&O. As a previous commentor within this proceeding, SBT has attempted to guide the Commission toward a path that will be less detrimental to its members and which better reflects the Commission's

statutorily imposed duties to designated entities under Section 309 of the Communications Act of 1934 (as amended) ("the Act"). Accordingly, SBT and its members are acutely aware of the history and effect of the Commission's efforts to consolidate into contiguous blocks the Upper 200 channels in the 800 MHZ band for the purpose of auction, and the resulting problems which will emerge from adoption of this program. It is these problems, both legal and practical, that SBT seeks to have the agency avoid in its efforts. The inertia with which this rule making has been pushed forward is a blind path toward ruination of many small businesses which depend on equality before the law and a fair distribution of opportunity. The language within Section 309 of the Act requires that the Commission give small business a better chance to survive and to prosper. It requires positive action on the part of the agency to assure the dissemination of licenses among small businesses and other designated entities. The Commission's efforts to date do not evidence the agency's exercise of its authority in accord with that obligation.

Unsupported Conclusions About Contiguous Spectrum

The Commission reiterated an earlier conclusion that the allocation and licensing of contiguous blocks of spectrum was "essential to the competitive viability of SMR service because they will permit the use of spread spectrum and other broadband technologies and eliminate delays and transaction costs associated with site-by-site licensing," MO&O at para. 9. Nothing in the MO&O provided any factual support for this conclusion or its continued validity.[1] Rather,

[1] SBT is not requesting reconsideration of the Commission's actions in its 800 MHZ Report and Order. Rather, SBT is requesting reconsideration of the continued validity of the Commission's conclusion as reiterated in the MO&O.

evidence arising in the nearly two years since the Commission first stated the above quoted conclusion gives good cause to doubt the continuing validity of the conclusion.

The Commission did not present any evidence in the MO&O to show that the competitive vitality of the SMR service was either inadequate or threatened in any way. Neither did the Commission present any evidence in the MO&O to show that, nearly two years after the Commission had initially reached its initial conclusion, anyone had yet come forward to express an intent to use spread spectrum or other broadband technologies, including CDMA or GSM, MO&O at para. 16, if contiguous spectrum were provided in the SMR service. Neither did the MO&O include any factual or reasoned basis for concluding or continuing to conclude that the use of spread spectrum or other broadband technologies would improve the competitive viability of the SMR service. Lacking evidence to support a conclusion that underlies the entire MO&O, the Commission's actions were unreasonable, and arbitrary and capricious.

Section 1 of the Communications Act of 1934, as amended, provides that among the Commission's duties is making available a rapid and efficient radio communication service, 47 U.S.C. §151. The Commission reaffirmed its conclusion that contiguous spectrum was needed to provide for broadband services, MO&O at para. 9, but did not provide any technical showing that broadband technologies provide any greater efficiency or rapidity in the delivery of services to the public.[2] Given the Commission's earlier conclusion that narrowing the bandwidth used

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[2] Certainly, the Commission's explanation of its treatment of border areas at para. 23-26 of the MO&O fails to demonstrate that the limited amount of available spectrum in these areas will result in the type of operation intended by the Commission. Is there enough spectrum in

by each land mobile station would increase the efficiency of spectrum use, see, Report and Order and Further Notice of Proposed Rule Making in PR Docket No. 92-235, 10 FCC Rcd. 10076 ("Refarming"), the Commission's conclusion now that the use of spread spectrum and other broadband technologies will make more efficient use of the spectrum appears to have been unreasonable or arbitrary and capricious. "An agency rule is arbitrary and capricious if an agency offered an explanation for its decision that runs counter to the evidence before the agency . . . ," Radio Ass'n v. U.S. Dept. of Transp. Fed. Hwy. Admin., 47 F.3d 794 (6th Cir. 1995). An agency is required to publish or make available critical data, such as scientific methodology, so that persons commenting on the rule can make meaningful submissions and criticisms, see, Portland Cement Association v. Ruckleshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). The Commission did not present a technical demonstration of the reasonableness of its two actions, taken together. Therefore, basing the Commission's actions on purported benefits of broadband operation was either unreasonable, or arbitrary and capricious, or violated the Administrative Procedure Act, 5 U.S.C. 554.

The Commission's reiterated determination in the MO&O concerning contiguous spectrum and efficiency, when compared to the Commission's reasons and actions in Refarming, appears to present a contradiction. If the Commission is asserting that the use of contiguous spectrum and broadband operation would be more efficient than current operations, then the

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those areas to achieve the goals articulated by the agency? The Commission failed to explain how its objectives can be met in the border areas in a manner which would justify the changes in regulation adopted by the Commission.

Commission's narrowing of bandwidths in Refarming would appear to have been entirely in error. Because it cannot be ascertained from the MO&O whether the Commission was wrong then or is wrong now, the MO&O should be reconsidered.

It is possible that SBT misunderstood the Commission's statement in the MO&O; it is possible that the Commission does not claim that contiguous spectrum and broadband operation would be a more efficient use of the spectrum than licensing in smaller, non-contiguous channels. However, if the Commission is not claiming that the use of contiguous spectrum and broadband operation would be more efficient, then the Commission failed to answer the obvious question of whether regulations for the "competitive viability of SMR service" are worth the cost to the public of decreased efficiency of spectrum use. That is, the Commission failed to consider whether maintaining the competitive viability of SMR service was worth the cost to the public of changing its Rules in a manner which would be contrary to the mandate of 47 U.S.C. §151.

If the Commission was asserting that greater efficiency of spectrum use will result from authorizing contiguous spectrum and broadband operation, then it failed to reconcile that conclusion with the conclusions reached in Refarming. If, on the other hand, the Commission harmonizes the apparent contradiction between its reasoning in the instant matter and its reasoning in Refarming by asserting that contiguous spectrum and broadband operation will not be as efficient as the licensing and operation of non-contiguous, narrowband spectrum, then the Commission needs to explain why saving SMR service is worth the loss in spectrum efficiency

and how a loss in spectrum efficiency can be reconciled with the efficiency mandate of 47 U.S.C. §151. While the Commission may be entitled to take the efficiency of its operations into account in constructing a regulatory scheme, the Commission would need to demonstrate some reasonable equivalency for the public interest between a gain of efficiency in its operations and a loss of spectrum efficiency. Where the agency is the proponent of the proposed rules, the duty falls on the agency to produce that necessary record. "Although an agency must be given flexibility to reexamine and reinterpret its previous holding, it must clearly indicate and explain its action to as to enable completion of the task of judicial review." Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977). Therefore, on further reconsideration, the Commission should explain its action in way that is susceptible to judicial review.

At paragraph 14 of its First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making in PR Docket No. 93-144, 11 FCC Rcd. 1463 (1995) (800 MHZ Report and Order), the Commission had said that its "new scheme [of authorizing contiguous spectrum on a geographic basis] is not designed to benefit any particular entity". A year and a half passed between the release of that statement and the publication of the MO&O. Nothing in the MO&O demonstrated that the Commission had engaged in any analysis to find out whether, in view of the passage of time and in the light of full knowledge, the new scheme would now have the effect of benefitting any particular entity. One may reasonably suggest that the new scheme can now be seen clearly as benefitting one particular entity, specifically, an entity which holds a large number of authorizations for a large number of channels that can be

used for relocating incumbents, which has obtained licenses for such a large number of channels in many geographic areas that any other applicant would be precluded from either relocating incumbents or providing substantial service, and who can be expected to pay no more than one uncontested dollar for many licenses. Unless the Commission has, without acknowledging the change of position, decided that its new scheme can reasonably benefit one particular entity, the Commission needs to reexamine the statement from its MO&O and, if necessary, take additional steps to assure the continuing validity of that statement.

The Commission said in the 800 MHZ Report and Order that it did not design its new scheme to benefit any particular entity. However, as the Commission has held in enforcement matters, to show willful action, it is not necessary to show intent. It is only necessary to show that an action was taken which had an improper result. To avoid being willfully responsible for an undesirable consequence of its actions, the Commission needs to reexamine the circumstances which existed at the time of its MO&O to assure itself and the public that no particular entity will be benefitted by the new scheme. If any entity would be benefitted, the Commission should reconsider and revise the scheme to be sure that no particular entity would be benefitted.

Alternatives To Auction

The Commission's decision not to consider methods of avoiding mutual exclusivity was based on an obvious misreading of 47 U.S.C. §309(j)(6)(E). Section 309(j)(6)(E) of the Act does not say what the Commission said at footnote 227 of the MO&O. Section 309(j)(6)(E) does not provide "that when it is in the public interest, the Commission should 'continue to use

engineering solutions, negotiations, threshold qualifications, service regulations, and other means' to avoid mutual exclusivity," MO&O at n. 227. Section 309(j)(6)(E) does not give the Commission any discretion to decide not to take steps to avoid mutual exclusivity. Rather, it says that the Commission has an obligation, which Congress determined was in the public interest, to continue to use the enumerated methods, and others, to avoid mutual exclusivity. Continuing to disregard Congress's direction, the Commission, subsequent to the MO&O proceeded to adopt a Form 175 application which directly facilitates the filing of mutually exclusive applications by allowing applicants to check a box named "ALL". In doing so, the Commission aggravated its disregard of its mandate by going beyond a refusal even to consider methods of avoiding mutual exclusivity by actually promoting the filing of mutually exclusive applications for all licenses.

The Finder's Preference Problem

At paragraphs 30-31 of the MO&O, the Commission attempted to justify its actions in eliminating the finder's preference program by stating that the action eliminating the program was inherent in its newly adopted licensing scheme and the proceeding leading up to it. The Commission was simply wrong. No such implied inclusion of this provision existed in the agency's proposals and the agency cannot demonstrate that any such suggestion existed.[3] Nor

[3] A "substantial change" in an agency's original plan may be made, so long as it is "in character with the original scheme" and 'a logical outgrowth' of the notice and comment already given," BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1974), *citing*, South Terminal Corp. v. EPA, 504 F.2d 646, 658-59 (1st Cir. 1974). Termination of the Finder's Preference program for SMR channels was not a logical outgrowth of the Commission's new licensing scheme; the Finder's Preference program permits an applicant to request a dispositive preference to use the authorized parameters of an existing licensee when that applicant proves

could one simply guess at the Commission's "implied" intentions. Why should any member of the public expect or understand that a finder would not be able to target an EA licensee's system or any other SMR system for failure to meet construction requirements? More importantly, why would any person believe that the agency intended to preclude such a right by the tenor of the proceeding to date? In fact, a careful reading of the adopted rules suggests that the agency did not eliminate the program. Rather, it limited the eligibility for the Finder's Preference to EA licensees, with no notice of any such intention, and thereby unjustly enriched EA licensees who paid nothing at auction for the additional spectrum to be obtained from site-specific stations.

No commentor could have reasonably inferred that the Commission intended to violate another section of the Act by limiting the finder's preference for SMR channels to EA licensees. Section 309(j)(6)(D) of the Act would preclude the Commission from extending to EA licensees a right which was not simultaneously provided to SMR licensees who did not receive authority via competitive bidding. By eliminating the availability of the preference to site-specific licensees, while providing a dispositive preference to only the EA licensee, the Commission would contradict this section of the Act. The Commission could remedy this violation by

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to the satisfaction of the Commission that the target license canceled automatically as the result of violation of a Commission rule. Since the applicant would take that for which the target was licensed, which is not within the control of the geographic licensee, the Finder's Preference program could readily continue and thrive, with no effect on the geographic licensee. It does not at all follow that the geographic licensing scheme necessarily precludes the Finder's Preference program; both can exist quite peacefully, neither affecting the other. Since the Finder's Preference program could logically and practically exist in a scheme of geographic licensing, the Commission's abolition of the program was not "a logical outgrowth" of the change to geographic licensing. Accordingly, the Commission failed to give notice and provide an opportunity for comment concerning a proposed termination of the program.

restoring the Finder's Preference program. Alternatively, the Commission could deem the area served by a canceled station to be a partition of one or more EAs, accept applications for one or more licenses for the area, and, if mutually exclusive applications are filed, conduct an auction for the partition. What the Commission cannot do under Section 309(j)(6)(D) is give the EA licensee the right to take channels or area on which another licensee has defaulted without providing the same right to all other SMR licensees.

One could also have reasonably assumed that, even if EA licensees' systems were not to be eligible targets under a continued finder's preference program, a site-based licensee would still be eligible to employ the program in targeting another site-based system. Nothing within this proceeding would have suggested any contrary assumption to any commentor. And nothing in the Commission's explanation contained in the MO&O suggested that such an assumption would have been unreasonable. Accordingly, upon reconsideration, the Commission must find that it did not provide adequate notice and opportunity for interested persons to comment to an explicit proposal, in accord with the agency's plain duty under 5 U.S.C. §553(b).[4]

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[4] It has been held that "the essential inquiry is whether commentors have had a fair opportunity to present their views on the contents of the final plan," BASF Wyandotte v. Costle, 598 F.2d 637, 642 (1st Cir. 1979). In the instant proceeding, the commentors have not had such a fair opportunity. Notice was not given regarding the intended abolition of the Finder's Preference program with respect to SMR channels.

The Commission said, without any record to support such a conclusion, that eliminating the finder's preference program in favor of an EA licensee preference will reduce the number of "unnecessary" site based licenses. The use of the word "unnecessary" is curious and illustrative. The Commission's expression suggests a dismissal and rejection of all operations which are based on site specific licensing. It connotes an unhealthy bias against those small businesses that have moved in good faith reliance upon the Commission's rules. It suggests that the continued existence of site-based licenses and operators is improper, distasteful, or inconsistent with the public interest. In sum, it shows the agency's predilection toward its own unsupported conclusions regarding the competitive impact of EA licensed systems versus existing site licensed systems. The Commission's pejorative use of the word "unnecessary" is both demeaning and improperly lodged upon the thousands of small businesses and entrepreneurs who created the SMR industry, one customer at a time, and whose customers will likely be stranded by the Commission's actions. This kind of invidious discrimination has no place in balanced, reasoned decision making and should be seen for what it is -- another clear indication of the agency's bias against the designated entity of small business in favor of larger entities which have the resources to fill the U.S. Treasury via auctions. Were such a demeaning statement made in a social setting, rather than a regulatory proceeding, one would have to demand a retraction or a visit to the alley. Without a record to support the conclusion that site based licenses are unnecessary, which conclusion underlay much of the Commission's action, the Commission violated the APA's requirement for reasoned decision making.

A New Requirement For Filing And Bidding

At para. 63 the Commission stated, "we are requiring incumbents seeking geographic licenses to show that their facilities are constructed and operational . . . within the designated geographic area." Put another way, the Commission will require evidence of construction and operability for all incumbent applicants for those markets in which they seek to operate EA wide systems. SBT seeks clarification of this statement and, in fact, (assuming, *arguendo*, that auctions occur) applauds this one element of the Commission's actions. To carry out the requirement, SBT suggests that the Commission proceed, as follows:

To prepare for auction, the Commission should issue a public notice, informing each applicant that it will be required within its Form 175 to demonstrate by something more than a signed statement that the bidder has constructed and made operational a separate transmitter on each frequency at each location which has been authorized for its use. Absent such a showing, the Commission should bar that entity from participation so as to avoid unjust enrichment of that bidder in reliance on a warehouse of unconstructed, non-operational channels to dilute the bidding price.[5] Such a required showing would also provide the bidder's bona fides in any future relocation effort which relies on the incumbent's construction of any of the lower 230 channels.

[5] Were the Commission to apply the requirement to any person other than an applicant for an initial EA license, but not impose the same requirement on applicants for initial EA licenses, the Commission would clearly be in violation of the requirements of Section 309(j)(6)(D) of the Act.

To avoid any difficulties, the Commission should set forth strict reporting requirements and a means for bringing forth conclusive evidence, which would be made available for review and comment by the public. In the event that any such entity were to commit fraud upon the agency by falsely declaring that a frequency was properly constructed and currently operational, the agency could exclude that entity from the auction and take whatever punitive actions the Commission deems appropriate under Titles 47 and 18 of the United States Code.

To further assure that the Commission's actions will be successful in avoiding unjustly enriching incumbent participants, the Commission should take the steps necessary to exclude from participation any person who has engaged in faux construction or operation. For example, systems which rely on magnetic mounted antennas atop or inside structures, rather than at the authorized position on the antenna structure should be deemed not to have been constructed. Stations employing amplified mobile transceivers, instead of full powered repeaters, should also be deemed not to have been constructed. Stations authorized for trunked operation which are not capable of simultaneous operation on all authorized channels and providing simultaneous service to multiple mobile units should be held to be either not constructed or not operational. The application of any person who is found to have engaged in one of these "dodges" should be dismissed and the person barred from obtaining a grant of an initial EA license.[6] Each of these deceptions and more exist in the marketplace and should not be accepted as constituting construction or operational status.

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[6] Such debarment should apply to all parents, subsidiaries, and sister entities of any such person.

The agency's demand for proof of construction and operational status of incumbent systems is fully consistent with its rules and policies; and is required to meet the Commission's mandate in its use of competitive bidding procedures. To do otherwise would be to create an avenue for mischief, unjust enrichment, and denial of an appropriate share of the value of a license to the U.S. Treasury. For example, if an incumbent applicant were able to influence the number of applications or the size and number of the bids based on a false impression of the constructed and operational status of one or more stations, then the EA licensee would be unjustly enriched by making the subject spectrum appear to be more encumbered than, in fact, it was and denying the American public "recovery . . . of a portion of the value of the public spectrum resource . . . ," 47 U.S.C. §309(j)(3)(C).

Additionally, the Commission's requirement would be consistent with its past requirements on SMR operators which required that each demonstrate construction, operational status, and loading prior to being eligible for additional channels. Such requirements worked well for assuring efficient and intensive use of the spectrum and a similar program would assist the agency in meeting its mandate in accord with 47 U.S.C. §309(j)(3)(D).

The Commission Again Failed To Comply With Section 309(j)

At paragraph 114 of the MO&O, the Commission stated that it had fulfilled its statutory mandate by "providing opportunities for small businesses." Nowhere within 47 U.S.C. §309 will the Commission find language to support its position. The statute clearly mandates an objective for the Commission of "disseminating licenses among a wide variety of licensees,

including small businesses." By its own words and deeds, the agency did not act to disseminate licenses among a variety of licenses nor can anyone reasonably expect that such dissemination will occur.

That the Commission's proposed auction and the Commission's methods are not consistent with its duty to disseminate licenses among designated entities is made more apparent by its continued and repeated failure to bring forth a single study that demonstrates that any designated entity is positioned so as to be at all likely to be able to operate on even a 20-channel block of contiguous spectrum across an entire EA. Certainly, the agency has not demonstrated and cannot demonstrate that any small business is positioned to obtain a license for or use a 120-channel block of contiguous spectrum in any EA.[7] Absent clear evidence that demonstrates that the Commission's rules will, or even can, accomplish the objective, the agency must reconsider whether it has adopted a scheme which has no opportunity for success in accord with the requirement of 47 U.S.C. §309(j)(4)(C)(ii).

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[7] It would not be sufficient for the Commission create conditions under which a small business, a woman, a minority, or a rural telephone company could obtain only a license for the smallest frequency block. The standard to be used by the Commission should be the same used to determine the success of a CMRS licensee in meeting its Equal Employment Opportunity obligations for certain of the designated entities. The Commission must create conditions under which each of the four categories of designated entity can reasonably be expected to be granted licenses for EA systems which will allow service to a portion of the population which is approximately equal to that designated entity's representation within the nation's population. To date, the Commission has failed to meet its own standard. Therefore, unless the Commission creates conditions which will make it possible for each of the designated entities to obtain an appropriate share of EA licenses, it will have created a situation in which the designated entities are separate from and unequal to all other applicants.

The Commission unlawfully lumped together all designated entities, including small business, rural telephone companies, woman-owned businesses and minority-owned businesses, in its analysis of whether it has acted in accord with its mandate. Yet, SBT cannot discern any benefit even alleged to have been provided to any class of designated entity, except small business. Congress did not lump these classes together in its construction of the applicable statute, therefore, one cannot find any authority in the agency for combining all together under the single banner of small business. Absent a showing that the agency has also met its mandate to cause the "disseminating" of licenses to each of the protected classes, the Commission should reconsider its MO&O to determine what additional steps are necessary and reasonable to meet its obligations to these other classes of designated entities.[8]

The Commission defaulted on its duty to provide opportunities for each of the four classes of designated entities. Congress directed the Commission to provide opportunities to each of four classes. It is not the Commission's position to determine the constitutionality of Congress's mandates and the Commission does not have the authority to decide that it will not comply with a statute because the statute, or action taken pursuant to statute, might not be constitutional. It is the Commission's duty to comply with the mandates of Congress, and to leave to the courts the task of determining the constitutionality of statutes. Congress told the Commission to provide opportunities for four enumerated classes of designated entities, yet the

[8] Given the agency's already poor record in providing tangible benefits to rural telephone companies and those entities' often articulated need for spectrum to provide BETRS services, it is wholly appropriate for the agency upon reconsideration to reexamine its efforts within this proceeding.

Commission did nothing to extend any opportunity to women, minorities, or rural telephone companies, as such. The Commission's assumption that businesses owned by minorities and women would be small businesses was arbitrary and capricious and unfair to women, to minorities, and to small business. The Commission's assumption that women, minorities and small business should receive exactly the same type or extent of assistance was not supported by fact or reason. If the Commission failed to obtain a record to support measures to provide for the dissemination of licenses to any of the four classes of designated entities, then the Commission must try harder until it has a sufficient record to provide for dissemination of licenses to each of the designated entities.

Upfront Payments

The Commission must reconsider its auction rules, because they violated the requirements for notice and comment rule making of the Administrative Procedure Act as the APA applies to the level of upfront payments. At paragraphs 119-122 of the MO&O, the Commission affirmed the level of upfront payments at 2 cents per megahertz per pop. However, the Commission also provided to the Bureau delegated authority to change the amount, without the benefit of notice and comment rule making. Although the Commission specified some factors which the Bureau may "take into account", the Commission's decision did not prescribe a formula for the Bureau to follow which left no discretion in the Bureau as to how to change the amount. Thereby, the Commission unlawfully delegated to the Bureau the power to change substantive rules in an undefined manner without providing notice to the public and an opportunity for comment.

Bidding Credits and Installment Payments

The Commission has failed to demonstrate any rational basis between its setting of the bidding credits and the elimination of installment payments, and its duty to disseminate licenses among designated entities. The elimination of installment payments makes useless any information gathered to date regarding past participation in auctions by designated entities. Accordingly, the Commission is not now able to demonstrate, via previously received comments or otherwise, that the new bidding credits will create any level of participation by small business in the auctions which resembles past auctions.

The only reasonable expectation is that the elimination of installment payments will reduce dramatically small business participation in auctions, even in view of higher bidding credits. Higher bidding credits do little to assist small business in capitalizing participation, whereas installment payments provide the means for most small business participation. Even the agency has pointed to its past use of installment payments as a major method for attracting small business participation in its Report regarding elimination of market barrier entries for designated entities, prepared in accord with 47 U.S.C. §257.

In the SMR field, the Commission has long provided effective action to rid itself of defaulting licensees. The Commission's Rules have long provided for automatic cancellation of a license upon the occurrence of certain events. With a little greater exercise of imagination, the Commission can maintain effective control over the licenses which it grants and provide for the installment payments which were an essential element of the Commission's success, to date,

in fulfilling its duties to disseminate licenses to designated entities. For these reasons, SBT respectfully requests that the Commission reconsider its elimination of installment payments for small business and reinstate this method of participation, which was eliminated without adequate notice and comment in accord with 5 U.S.C. §553.

Highest And Best Use Is Required

At paragraph 17 of the MO&O, the Commission made the surprising statement that its "geographic licensing scheme is not designed to maximize spectrum value". Indifference to spectrum value in designing a licensing scheme does not comport with the obligation imposed on the Commission by Sections 309(j)(3)(C)&(D) of the Act to

> [recover] for the public a portion of the value of the public spectrum resource made available for commercial use and [avoid] unjust enrichment through the methods employed to award uses of that resource; and [assure] efficient and intensive use of the electromagnetic spectrum,

47 U.S.C. §§309(j)(3)(C)&(D). If the Commission knows that one use of the spectrum would be more efficient and intensive than others and the Commission does not require that use, then the Commission cannot recover a fair, reasonable, and appropriate portion of the value of the public resource and cannot avoid unjust enrichment of someone. If the Commission knows that broadband modulation, spread spectrum modulation, or GSM is more efficient and intense a use of the spectrum than other uses, then failure to require the highest and best use of spectrum and to sell licenses at a commensurate price would constitute a failure to recover a reasonable portion of the value for the public, a failure to avoid unjust enrichment, and a failure to assure the efficient and intensive use of the electromagnetic spectrum.

Insufficient Time Was Allowed

The Commission led small businesses to believe that installment payments would be available and the MO&O appears to have withdrawn this opportunity. New Section 309(j)(3)(E) of the Communications Act of 1934, as inserted by the Balanced Budget Act of 1997, H.R. 2015 (hereinafter, the "Balanced Budget Act"), which became effective on August 5, 1997, requires that the Commission "ensure that, in the scheduling of any competitive bidding, an adequate period is allowed after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services," 47 U.S.C. §309(j)(3)(E) (1997). In view of the Commission's entirely unexpected decision not to provide installment payments for small businesses, the dates for the filing of applications, the making of upfront payments, and the start of the auction do not begin to provide sufficient time for interested parties to develop business plans, assess market conditions and evaluate the availability of equipment for the relevant services.

Small businesses must now develop new business plans and seek financing based on the non-availability of installment payments. Particularly in view of the Commission's requirement that prospective bidders investigate and evaluate the extent to which the spectrum is actually encumbered (a task which the Commission, itself, has not completed after nearly 20 years of granting SMR licenses and maintaining a large data base), and evaluate the extent to which pending matters may affect the value of spectrum, the MO&O and the Commission's recent public notices of July 31 and August 6, 1997, did not give interested small businesses sufficient

time to assess market conditions before the date for filing applications, making upfront payments, and commencing an auction.

The Commission is not presently in a position to know how long a period of time after the issuance of the bidding rules interested persons will require. Since the MO&O did not even consider the matter of providing sufficient time for interested persons to prepare, and commentors had not been requested to comment on the matter of sufficient time prior to the release of the MO&O, the Commission does not appear to have any choice but to conduct further notice and comment rule making to consider the views of interested persons concerning how much time will be sufficient, in accord with the Balanced Budget Act.

Additionally, the new requirement of the Balanced Budget Act would appear to require the Commission to withdraw the authority which it delegated to the Bureau to change bidding rules after the start of the auction. Since any change in the bidding rules would require that the Commission provide an additional period for comment on the question of how much time will be sufficient, and provide interested persons with sufficient additional time to prepare to proceed under the revised rules, it would appear that the Balanced Budget Act requires the Commission to fix the bidding rules prior to commencement of the auction and not change them after the auction has begun.[9]

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[9] The Commission could, conceivably, continue to delegate authority to the Bureau to change the rules after the start of the auction, but it would be entirely impracticable because, with each change of the rules, the Commission would have to initiate a new period of notice and comment to solicit the views of interested persons as to how much additional time would be sufficient to develop revised business plans and assess market conditions in light of the changed