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

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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 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	)	PP Docket No. 93-253
	)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC. ON THE SECOND REPORT AND ORDER

Respectfully submitted,

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By: _____

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September 2, 1997

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SUMMARY

The American Mobile Telecommunications Association, Inc. requests clarification or reconsideration of various aspects of the Commission's Second Report and Order regarding the future licensing of the lower 80 SMR and the 150 General Category channels at 800 MHz. It also urges the Commission to proceed expeditiously to address these issues so that licensing will not be further delayed on spectrum that has been frozen during a period of significant competitive activity.

The Association asks the Commission to clarify its definition of integrated systems for purposes of defining spectrum comparability in the context of mandatory retuning of upper 200 SMR channels at 800 MHz. Specifically, AMTA requests that the FCC clarify that integrated systems include those in which users manually access multiple base stations and that such systems might be under common management rather than ownership. The Association further asks the FCC to confirm whether or not incumbents on the lower 80 SMR and General Category frequencies will be protected by Economic Area licensees only on the basis of a 36/18 dBuV/m contour analysis, even if the incumbent has expanded its operation throughout its 18 dBuV/m contour. It asks the FCC to calculate those contours based on the incumbent's maximum permissible effective radiated power, rather than its currently authorized power. Finally, it urges the FCC to confirm that incumbents operating at sites afforded greater than normal co-channel separation in accordance with Section 90.621(b) of the FCC's rules will remain entitled to the same levels of protection as currently provided under the FCC's rules.

AMTA requests reconsideration of certain rules relating to the auction process for the lower SMR and General Category frequencies to facilitate successful small business participation. The Association recommends that the General Category channels be auctioned in blocks of between 10 and 25 channels per block, rather than the 50-channel blocks adopted by

the FCC. It also urges the FCC to adopt provisions for small business installment payments, rather than deferring that decision to the outcome of the proceeding involving the general auction rules.

Finally, AMTA has volunteered to act as a non-profit clearinghouse for the upper 200 channel retuning process.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully requests clarification or reconsideration of certain aspects of the Second Report and Order in the above-entitled proceeding.[1] This long-awaited Order will permit the licensing of whatever additional capacity remains available in the lower 80 SMR and 150 General Category 800 MHz frequency bands (collectively, the "lower 230 channels" or "frequencies"), some of which has been frozen for more than three years.[2] AMTA and its members are eager for the FCC to initiate that process. The Association has, therefore, limited the changes or clarifications proposed herein to those considered essential to achieving the FCC's and the industry's objective of promoting regulatory symmetry between 800 MHz Specialized Mobile Radio ("SMR") service operators in this band and other competing providers of Commercial Mobile Radio Service ("CMRS"), while providing meaningful opportunities for small businesses, particularly incumbent small businesses, to operate in these bands.

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[1] Second Report and Order, PR Docket No. 93-144, FCC 97-223 (rel. July 10, 1997) ("2nd R&O" or "Order").

[2] Third Report and Order, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994); Order, DA 95-2119, 10 FCC Rcd 13190 (1995).

I. BACKGROUND

1. The history of this proceeding is both lengthy and highly contentious.[3] The conversion of the regulatory structure for heavily congested 800 MHz SMR spectrum from its traditional site-by-site and first-come, first-served licensing approach to one in which authorizations will be awarded on a geographic area basis through an auction process has proven exceedingly difficult. Perhaps most critically, the Commission's determination to prohibit additional licensing of this spectrum until the conversion process was implemented has resulted already in a more than three-year freeze on the licensing of new and even most modified facilities in the 800 MHz SMR service. The fact that this freeze has coincided with a period of extraordinary growth in the subscribership of competitive CMRS offerings such as cellular and Personal

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[3] AMTA and other members of the SMR community responded to the Commission's entreaty for an industry consensus on how to resolve the issues relating to the relicensing of these bands by formulating an approach which came to be known as the "Consensus Plan" or, as referred to in the instant Order, the "Industry Proposal". The Industry Proposal represented an extensive effort and a series of compromises by the great majority of SMR industry members. It was clearly identified to the FCC as a package proposal which had to remain essentially intact if the consensus was to be maintained. The Commission was advised that if any segment of the proposal was rejected or replaced, there could be no assurance that any of the remaining portions would have continued support by all or any consensus participants.

The essence of the plan for licensing the lower 230 channels was a pre-auction settlement process. Co-channel incumbents within an EA that could agree on how to utilize a particular frequency within that EA would be permitted to file an application for the geographic rights to the frequency without triggering the acceptance of mutually exclusive applications. Frequencies on which no agreement was reached, as well as those on which there was no incumbent, would be awarded through the auction process. The proponents of the Consensus Plan asserted that it reflected a compromise between the needs of wide-area and site-specific licensees, and a proper balance between the rights of incumbents which had developed businesses and were serving the public on this spectrum versus the interests of prospective new entrants.

By virtue of adopting the instant Order which does not include a pre-auction settlement process, the FCC has implicitly rejected the Industry Proposal. Thus, AMTA's position on various aspects of the FCC's lower 230 channel decision may be different from that espoused by the Association as part of the Industry Proposal.

Communications Service ("PCS") makes resolution of this proceeding and implementation of a regulatory process by which licensing can again proceed in these bands a matter of the highest priority for the Association.

2. The need for regulatory closure so that operators may begin to respond to an ever increasing number of competitive offerings is one imperative. However, AMTA considers it equally critical that the regulatory process provide both the maximum possible protection for incumbents already operating on the lower 230 channels and a genuine opportunity for small business operators to participate in the future licensing of these bands. The modifications and clarifications suggested herein are intended to foster all of these objectives.

II. REQUESTS FOR CLARIFICATION AND RECONSIDERATION

A. THE FCC SHOULD CLARIFY OR MODIFY CERTAIN ISSUES REGARDING INCUMBENT RIGHTS AND EA LICENSEE OBLIGATIONS

1) The FCC Should Clarify its Definition of Integrated Systems for Purposes of Defining Spectrum Comparability

3. One of the most controversial aspects of the FCC's 800 MHz SMR licensing approach was the agency's decision to permit "mandatory retuning" of incumbents from the upper 200 SMR channels to the lower 230 frequencies.[4] Although the decision to do so was reached in an earlier Report and Order in this proceeding[5], the FCC deferred until this Order its definition of what constitutes comparability for purposes of triggering an Economic Area ("EA"), geographic-based licensee's mandatory retuning rights.

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[4] 47 C.F.R. § 90.699.

[5] First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, PR Docket No. 93-144, 11 FCC Rcd 1463 (1995) ("800 MHz Report and Order" or "Second Further Notice").

4. AMTA concurs with the FCC's definition of spectrum comparability as facilities that will provide the same level of service as the incumbent's existing facilities, and endorses the agency's specific directive that the relocation process be transparent to the end user to the fullest extent possible. Order at ¶ 89. Those general precepts, as well as the enumeration of four factors by which comparability will be measured -- system, capacity, quality of service, and operating costs -- should provide meaningful guidance to both incumbents and EA licensees, and thereby minimize retuning disputes.

5. There is one aspect of the comparability definition that AMTA believes would benefit from further clarification. The Order states that the term "system" should be defined functionally from the user's perspective. It notes that base station facilities that operate on an "integrated" basis might consist of facilities sharing a common switch or those otherwise operated as a unitary system with the end user having the ability to access all of the facilities. Order at ¶ 91. It specifically excludes from the definition of a single "system" facilities that are operationally separate such as neighboring systems over which users can roam or individually licensed systems under common management. Order at n. 189.

6. AMTA has advised the FCC in other contexts that only a very small minority of SMR systems have in-network switching capability.[6] The more typical multi-site system consists of multiple, often geographically-adjacent base station facilities to which users have immediate, if not automatic, access through a manual switch within the mobile unit. Users are instructed how to switch from one base station to the next as they drive through an area. The stations involved

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[6] AMTA Petition for Declaratory Ruling, CC Docket No. 94-54, CC Docket No. 94-102, CC Docket No. 95-116, ET Docket No. 93-62 (Dec. 16, 1996).

may be under common ownership or common management, but nevertheless are perceived as an integrated system by the customer who typically is billed for access to all of the available facilities on an integrated basis. By contrast, in the analog SMR environment roaming arrangements normally require a customer to take special measures to access facilities other than those on which it routinely operates, and the user then is billed by the operator of the "foreign" system rather than the customer's regular service provider. While the latter situation is one that would not satisfy the FCC's definition of an integrated system, the former would appear to qualify from an operational perspective. AMTA urges the FCC to clarify both that integrated systems may be those in which users manually access multiple base stations and that the facilities involved need not be commonly owned.

2) The FCC Should Clarify or Modify the Interference Protection for Lower Channel Incumbents vis-a-vis both other Incumbents and EA Licensees

7. The FCC has confirmed that, as a general matter, existing co-channel protection criteria will be retained for CMRS licensees even when site-specific licensing is replaced by geographic licensing provisions. Order at ¶ 73. The instant Order further provides that incumbents on the lower 230 channels will be permitted to use the 18 dBuV/m contour as the basis for modifying and expanding their systems, provided they obtain the consent of potentially affected co-channel incumbents. In light of this greater incumbent flexibility, the Order also specifies stricter interference criteria by which EA licensees must protect co-channel incumbents. Specifically, the Order states that EA licensees must either: (1) provide 173 km (107 mile) separation between their facilities and those of co-channel incumbents; or (2) comply with co-channel separation standards based on a 36/18 dBuV/m standard rather than the existing 40/22 dBuV/m standard.

Order at ¶ 75.

8. Certain aspects of this part of the FCC's Order require clarification. First, it appears that a number of incumbents interpret the new protection criteria to require EA licensees to protect operations within an incumbent's 18 dBuV/m contour if the incumbent is able to avail itself of this greater flexibility. By contrast, it is AMTA's understanding that an EA licensee is required only to ensure that its own 18 dBuV/m interference contour does not overlap the incumbent's 36 dBuV/m protection contour, even if the incumbent is providing coverage throughout its 18 dBuV/m contour under the more flexible rules adopted in this Order. The former interpretation would certainly be more beneficial to incumbents, but the most critical issue is to clarify the protection criteria. If AMTA is correct, interference problems will develop unless incumbents understand that they may expand their operations throughout their 18 dBuV/m contour, but that they do so essentially at their own risk since the EA-protected service area will be limited to a 36 dBuV/m contour.

9. Second, AMTA urges the FCC to modify its rules to provide that lower 230 channel incumbents be entitled to protection based on the station's licensed height above average terrain ("HAAT") and the maximum permissible effective radiated power ("ERP") authorized for that HAAT rather than on the "originally-licensed" parameters of the station.[7] Using the maximum permissible ERP instead of the currently licensed ERP would yield standards consistent with those provided for incumbent-to-incumbent protection by the existing 800 MHz co-channel

[7] See new 47 C.F.R. § 90.693(c). AMTA assumes that by the term "originally-licensed" the FCC means the currently authorized station parameters. It is possible that a number of incumbent facilities were "originally" licensed for power levels and antenna heights different from those currently reflected on their authorizations.

separation table which assumes that all stations are operating at their maximum permissible ERP.[8] The Commission has not articulated any basis for providing a lesser level of protection vis-a-vis EA-to-incumbent operations when, in fact, the possibility of multiple, geographically-proximate EA stations may result in a greater probability of interference potential.

10. Finally, AMTA urges the FCC to clarify that the new rules will not in any way diminish the protection afforded licensees operating on those sites or in those geographic areas on the West Coast for which the FCC has determined greater geographic separation between co-channel facilities is required. For example, it is unclear from which co-channel licensees concurrence will be required in areas involving the "high" West Coast sites for an incumbent to enjoy the 18dBuV/m expansion opportunity. Moreover, in instances in which an EA licensee elects to rely on contour, rather than mileage, protection, the applicable criteria must be consistent with the greater protection levels currently afforded licensees covered under Section 90.621(b) of the FCC's rules, particularly for those licensees operating in the geographic region covered by Section 90.621(b)(2) where co-channel separation requirements may be determined on a case-by-case basis. These matters should be clarified so that the rights and obligations of all parties are clearly defined.

B. THE FCC SHOULD MODIFY CERTAIN RULES REGARDING THE LOWER 230 CHANNEL AUCTION PROCESS

1) The General Category EA License Block Size Should be Reduced

11. In the Second Further Notice in this proceeding, the FCC proposed alternative General Category block sizes: (1) a 120-channel, 20-channel and 10-channel block; (2) six 25-channel

[8] See 47 C.F.R. § 90.621(b).

blocks; or (3) fifteen 10-channel blocks.[9] The instant Notice purports to adopt the Industry Proposal and allocate three contiguous 50-channel blocks. Order at ¶ 22.

12. AMTA requests reconsideration of the allocation of three 50-channel General Channel blocks. The Association's support for that approach was predicated specifically and explicitly on the assumption that the number of frequencies actually auctioned in those blocks would be reduced substantially as agreement was reached on various channels by co-channel incumbents within the EA. The frequencies remaining in the blocks to be auctioned would be those on which no agreement could be reached and those on which there was no incumbent within the EA.

13. Since the FCC has rejected the Industry Proposal for pre-auction settlements, there is no longer an Industry Proposal supporting General Category licensing in three contiguous 50-channel blocks. The Association instead endorses either the earlier-proposed fifteen 10-channel blocks or, at most, six 25-channel blocks as the maximum reasonable for the auctions contemplated herein.

14. The vast majority of incumbents on General Category frequencies are licensed for only a few channels in that band and, in general, operate systems of only a relatively small number of frequencies. It will be difficult for them to acquire the EA geographic rights to the frequencies on which they already operate in any auction process because of their relatively small size and limited economic resources. The task will be even more difficult because the channels in which they are interested were assigned randomly from the available channel pool, but will be auctioned in some sized contiguous channel block. This will require them to bid on

[9] 800 MHz Report and Order at 1592, ¶ 301.

channels on which they do not currently operate and on which there are incumbents that will be entitled to protection.[10] Presumably they will do so only if they have some reasonable expectation of being able to trade their EA rights to the incumbent and if the cost of acquiring the block is not entirely beyond their means.[11] It is obvious that as the size of the block increases, so do the obstacles to participation by small business incumbents. It is imperative that the FCC reduce the size of the blocks to a reasonable number of frequencies if it intends to provide any meaningful opportunity for small business incumbents and new entrants.

2. AMTA Supports the Use of Five Regional Auctions

15. The Order specifies that the FCC will conduct five regional auctions for purposes of issuing EA licenses for the lower 230 channels. Order at ¶ 238. Although the Second Further Notice did not specifically propose such an approach, AMTA supports it as likely to reduce the burden of auction participation, particularly on licensees with more limited financial and human resources.

16. This approach is not without disadvantages: some parties may find it more difficult to implement certain auction strategies since they will be forced to complete their acquisitions in one area without knowing what they will be able to acquire in other, perhaps adjacent, markets. Nonetheless, AMTA is persuaded that regional auctions, on balance, will be beneficial. They

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[10] Unlike the upper 200 SMR channels, the FCC has rejected the concept of mandatory retuning for the lower 230 channels.

[11] The concepts of license partitioning and disaggregation are likely to prove of little value for heavily encumbered spectrum such as that to be auctioned herein. By contrast with PCS spectrum, on which partitioning or disaggregating might yield sufficient capacity and/or geography to satisfy the requirements of certain types of users, lower 230 channel EA licensees will be required to protect incumbent operations. The likelihood of some subsegment of an EA authorization being of practical value to any entity other than the incumbent is very small.

will enable participants with identifiable, localized spectrum interests to reduce the time and resources they must devote to auction participation, a factor of considerable significance to smaller businesses.[12]

3. The FCC Should Reinstate Installment Payment Provisions

17. In its Second Further Notice, the Commission proposed to offer an installment payment option for successful small businesses on lower 230 channel spectrum.[13] The instant Order defers the decision on whether to adopt installment payment provisions for this spectrum until the FCC completes action on its generic auction rule making proceeding in which it queried whether there were effective alternatives to promote opportunities for small businesses, such as enhanced bidding credits.[14]

18. AMTA has advised the FCC in numerous other proceedings that its members consider an installment payment option **the** most significant means to promote meaningful small business participation in spectrum auctions.[15] While enhanced bidding credits also are useful, even the most successful small businesses often are unable to secure financing to enable them to pay for spectrum immediately, even at reduced bidding credit rates. Unlike publicly traded companies that can finance their spectrum acquisitions with public monies, most small operators deal with local banks and other local lending institutions. Those establishments, like all organizations

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[12] AMTA Comments, Notice of Inquiry, GN Docket No. 96-113, (Sept. 27, 1996); Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket No. 97-82, FCC 97-60 (March 27, 1997).

[13] Second Further Notice at 1630, ¶ 397.

[14] Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997).

[15] See n. 10, supra.

extending credit, must be confident that their loans are secured. In the most typical arrangement, financing is secured with a lien on the asset being acquired with the monies loaned. However, the FCC's rules generally prohibit lenders from taking security interests in the Commission license wherein most of the value of the asset lies. The problem is compounded by the fact that, unlike a piece of property or machinery, an FCC license is not the type of asset that can be easily valued, or even understood. Not surprisingly, the less sophisticated, local banks and other institutions to which small businesses must turn for financing are not typically eager to loan money on assets they have difficulty understanding and as to which they cannot perfect a security interest. Unless prospective bidders have other unencumbered assets sufficient to satisfy the lending institution's requirements, they will not be able to bid on the geographic right to spectrum on which they already operate.

19. Installment payments alleviate this small business impediment by allowing companies to fund the acquisition of the spectrum they need to support future growth out of the revenues generated by the spectrum itself. Like the land purchased by farmers and the machinery bought by manufacturers, SMR operators use spectrum to provide the services by which they generate profits. Like farmers or manufacturers, they would be hard-pressed to pay in full at the outset for the very asset they intend to put to productive, remunerative use. The ability to pay for such an asset over time is commonplace in our economy, and is essential to the development of all, but particularly smaller, businesses. To the extent normal lending institutions are unable or unwilling to extend credit for the acquisition of spectrum rights, because of the encumbrances placed on those rights by the FCC itself, it is imperative that the Commission identify alternative approaches to ensure that small business is not priced out of the auction process. Installment

payment provisions are highly valuable, proven methods of addressing that problem.

20. The FCC's concern about retention of the installment payment option appears to be related directly and specifically to the problems that have arisen in the PCS C Block auction, in conjunction with the agency's growing conviction that it is not well suited to act as the banker for the communications industry. AMTA understands that the FCC has been advised, at least informally, that the Treasury Department is unwilling to assume the Commission's current role in the installment payment process.

21. Whatever administrative difficulties the Commission has encountered in fulfilling its obligations in that process must be weighed against the impact on small business of eliminating the option entirely. As an initial matter, AMTA would again note that the FCC has had only relatively minor problems with which to deal in administering 900 MHz SMR installment payments. That experience should constitute evidence that problems are the rare exception, not the rule, when the small businesses involved are ongoing concerns with reasonable business plans and other interests that make bankruptcy essentially a non-option as a solution for economic difficulties. There simply is no evidence to date that small business installment payments do not accomplish precisely their intended objective: to enhance successful auction participation by small business.

22. The fact that the program may be cumbersome for the Commission to administer is not a basis for eliminating it. Thousands, perhaps tens of thousands of small businesses recently have been required to wade through a maze of new regulatory requirements, including the enormously complicated calculations required to complete their TRS filings and Universal Service worksheets. In the case of the latter, they were obligated to do so with only minimal

preparation time and essentially no timely, useful guidance from the Commission. Most would have preferred not to have to expend the human and other resources needed to perform those tasks, to say nothing of their preference for avoiding the economic obligations themselves, but Congress and the FCC determined that their efforts were necessary to achieve important societal goals.

23. The same is true for the FCC's responsibility in the instant matter. Elimination of the installment payment option would be entirely contrary to the Commission's statutory obligation to promote small business participation in the auction process.[16] Therefore, AMTA urges the FCC to retain the installment payment option, an essential tool for small business participation in a band intensively populated by small business operators eager to secure geographic rights to the frequencies on which they already provide service.

C. AMTA VOLUNTEERS TO ACT AS A NON-PROFIT CLEARINGHOUSE FOR THE UPPER 200 CHANNEL RETUNING PROCESS

24. The 2nd R&O defines the process by which EA licensees will be entitled to reimbursement from one another in the event one such licensee benefits from the relocation of an incumbent(s) that was paid for by a different EA licensee. Order at ¶¶ 96-130. Similar to, but less complex than, the provisions governing PCS relocation of incumbent microwave licensees[17], these rules generally require all benefitting EA licensees to share the relocation costs on a pro rata basis, and specify when and how reimbursement obligations are to be triggered. In the Order, the FCC explains that, unlike the PCS/microwave clearinghouses, the cost-sharing

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[16] 47 U.S.C. § 309(j).

[17] First Report and Order, 11 FCC Rcd 8825 ¶¶ 69-85 (1996).

plan it has adopted for the expenses associated with relocation of upper 200 SMR channel licensees will not require the agency to designate a plan administrator. However, the Commission also notes that it will not prohibit an industry-supported, not-for-profit clearinghouse established for purposes of administering the cost-sharing plan adopted for the 800 MHz relocation process. Order at ¶ 132.

25. AMTA hereby volunteers to act as that clearinghouse. The majority of parties whose systems may be eligible for retuning, as well as the likely retuners, all are members of the Association. AMTA also has spent considerable time reviewing alternative dispute resolution ("ADR") procedures, and is confident that it will be able to facilitate prompt, reasonable resolution of any disputes that might arise in the context of EA reimbursement rights

III. CONCLUSION

26. For the reasons detailed above, AMTA urges the Commission to clarify or modify the rules adopted in the instant Order consistent with the recommendations contained herein.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this September 2, 1997, caused to be hand carried a copy of the foregoing Petition for Reconsideration to the following:

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