

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 93-144
Commission's Rules to Facilitate)	RM-8117, RM-8030,
Future Development of SMR)	RM-8029
Systems in the 800 MHZ Frequency Band)	
)	
)	
Implementation of Sections 3(n) and 322)	GN Docket No. 93-252
of the Communications Act -- Regulatory)	
Treatment of Mobile Services)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive Bidding)	

To: The Commission

Petition for Clarification and Reconsideration

1. The Industrial Telecommunications Association, Inc., pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully requests that the Commission clarify certain statements, and reconsider certain policies adopted in the *Second Report and Order*, and *Memorandum Opinion and Order on Reconsideration* in the above referenced proceeding.¹

¹ *Second Report and Order* (FCC 97-223), and *Memorandum Opinion and Order on Reconsideration* (FCC 97-244), PR Docket No. 93-144, adopted June 23, 1997, released July 10, 1997, (hereinafter "*Second Report*" and "*Memorandum Opinion*" respectively).

I. Introduction

2. The Industrial Telecommunications Association (“ITA”) is a Commission certified frequency advisory committee and coordinates in excess of 6,000 applications per year on behalf of applicants seeking Commission authority to operate radio stations on frequency assignments allocated between 30-900 MHZ.

3. ITA enjoys the support of a membership that includes more than 6,000 licensed two-way land mobile radio communications users and the following trade associations:

- Alliance of Motion Picture and Television Producers
- Aeronautical Radio, Inc.
- Associated Builders & Contractors, Inc.
- Florida Citrus Processors Association
- Florida Fruit & Vegetable Association
- National Mining Congress
- National Propane Gas Association
- National Ready-Mixed Concrete Association
- National Utility Contractors Association
- New England Fuel Institute
- United States Telephone Association

4. ITA has been an active participant in this proceeding, filing various comments, reply comments, petitions for reconsideration, and *ex parte* comments dating back to 1993. Throughout this proceeding, ITA has maintained that the overlaying of commercial licensing schemes on spectrum that is heavily occupied by private users is unsound spectrum policy. However, the Commission has decided that the development of SMR systems as a viable competitor to cellular and PCS systems is a policy objective that overrides the continued development of private non-SMR systems in the 800 MHZ band. Therefore, ITA requests that the Commission clarify the level of protection afforded to incumbent licensees in the General

Category pool, and reconsider its general policy determination that internal radio systems can satisfy their spectrum needs within the context of a commercial licensing scheme.

II. Request for Clarification

- a. **The Commission should clarify what constitutes “consent” in the context of incumbent licensees modifying their systems within an 18 dBμ interference contour.**

5. Although the Commission imposed a freeze on applications in the 800 MHz band that effectively prevented incumbents from modifying their systems pending the outcome of this proceeding, the Commission has decided in the *Second Report* to grant incumbents some flexibility to modify their systems. Incumbent licensees on the lower 230 channels will be permitted to make system modifications within their interference contours without prior Commission approval, and incumbents currently using a 40 dBμ signal strength contour for their service area contour and a 22 dBμ signal strength for their interference contour will be permitted to utilize their existing 18 dBμ signal strength contour for their interference contour so long as they obtain the consent of “all affected parties to do so.”²

6. ITA seeks clarification on two points related to this added flexibility. First, ITA requests that the Commission clarify that an incumbent seeking to modify a system may provide, *in lieu* of consent, a statement from a Commission certified frequency advisory committee that a modification will not affect any adjacent licensees. This certification would prevent disputes among adjacent incumbents that could defeat the Commission’s stated intention to permit limited

² *Second Report*, ¶ 67.

modifications. ITA believes that these disputes could arise in areas where a non-SMR incumbent is located in the vicinity of a SMR incumbent, and the SMR incumbent intends to bid in the auction, and the non-SMR incumbent does not.

7. Secondly, ITA seeks clarification that once an incumbent has made modifications within its 18 db μ , EA licensees will be barred from challenging the modification. So, if an EA licensee constructs a system in such a location that its 36 db μ service area contour is overlapped by an incumbents 18 db μ interference contour, the EA licensee will have to tolerate the interference. If adjacent incumbent licensees agree amongst themselves to accept interference in order modify their systems, these modifications should be accepted by the Commission.

III. Petition for Reconsideration

a. The Commission's policies ignore its obligations under Section 309(j)(4)(C) of the Communications Act

8. The Commission's decision to impose geographic licensing on non-SMR systems in the General Category pool is inconsistent with its obligations under the Telecommunications Act of 1934 ("the Act"). The Commission's auction authority stems from the codification of Section 309(j) of the Act, and is not without restrictions.³ The Commission, in designing its system of competitive bidding is charged by Congress to consider "the characteristics of the proposed service" in order to "prescribe area designations and bandwidth assignments that promote (I) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity

³ 47 U.S.C. § 309(j).

for a wide variety of applicants, including small businesses.”⁴ By deciding to implement a commercial licensing scheme for non-SMR systems in the General Category pool, the Commission has completely ignored the characteristics of the proposed service, and has prescribed area designations that actively reduce -- rather than promote -- economic opportunities for small businesses.

9. Earlier in this rule making proceeding, the Commission recognized the fact that the General Category channels were used for a variety of services, and an unlikely candidate for auction:

General Category channels are expressly designated for use not only by SMR licensees, but also by Public Safety licensees and PMRS providers in the Industrial/Land Transportation and Business service categories. Because we have allocated these channels for extensive PMRS as well as CMRS use we determined . . . that these channels are not subject to competitive bidding.⁵

However, when the Commission proposed the rules that were generated by the *Further Notice of Proposed Rule Making* in which this statement appeared, it decided that “the overwhelming majority of General Category channels are used for SMR as opposed to non-SMR service.”⁶ Nowhere in this proceeding has the Commission ever reconciled the two statements cited above, the only explanation for its change of view is that to categorize the General Category pool as “overwhelmingly” SMR justifies an auction.

10. More than 3,450 non-commercial licensees operate systems in the General Category

⁴ 47 U.S.C. § 309(j)(4)(C).

⁵ *Further Notice of Proposed Rule Making* (FCC 94-271), PR Docket No. 93-144, 10 FCC Rcd. 7970, ¶ 52.

⁶ *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, (FCC 95-501), PR Docket No. 93-144, 61 Fed. Reg. 6138, ¶ 137.

pool, and approximately 11,000 SMR licensees operate in the same bands. When the Commission decided that this 31% to 69% ratio translated to the General Category pool being “overwhelmingly” SMR, it decided to restrict all future applications in the pool to SMR systems.⁷ In the *Memorandum Opinion*, the Commission reconsidered this decision, and decided to continue to allow non-SMRs to be eligible for the General Category pool channels, but maintained that these channels be licensed geographically, and auctioned.⁸

11. Geographic licensing schemes have proven to be an efficient means of licensing commercial radio systems, however, they are particularly ill suited to the needs of private radio systems. By requiring private radio system users in the General Category pool to bid for geographic areas in order to expand their systems, the Commission has made it effectively impossible for non-SMR system operators to meet their future spectrum needs in the 800 MHz assignments for which they are authorized. The Commission’s statement that non-commercial licensees “may not only apply individually for geographic area licenses, but may also participate in joint ventures (with other non-commercial operators, or with commercial service providers) or obtain spectrum through partitioning and disaggregation to meet their spectrum needs,”⁹ is indicative of the mischaracterization and misunderstanding of the non-commercial services in the General Category pool.

12. The companies that operate non-SMR private systems in the General Category pool are not communications companies. They are construction companies, trucking companies,

⁷ *Id*

⁸ *Memorandum Opinion*, ¶ 101.

⁹ *Id*, ¶ 102.

taxicab and livery companies, petroleum companies, airlines, and many other small businesses, none of which are in the business of providing communications services. They simply do not have commercial incentive to dedicate the resources or the staff to absorb the transactional costs associated with forming a joint venture for bidding in the auction. In essence, what the Commission is asking, is that in order to satisfy their spectrum needs, non-commercial radio system operators should *become* telecommunications companies. Because it is highly unlikely that non-commercial system operators will be successful in the auction, the Commission's policies with regard to the General Category pool are going to have the effect of dramatically decreasing the variety of applicants, with the largest decrease being among small businesses. This is the exact opposite result that Congress intended when it drafted Section 309(j)(4)(C).

13. ITA respectfully requests that the Commission reconsider its decision to auction non-SMR licenses in the General Category pool, and reconsider its general policy determination that commercial licensing schemes are an appropriate mechanism for the licensing of non-commercial systems.

b. The Commission's policies ignore its obligations under Section 309(j)(6)(E) of the Communications Act

14. Section 309(j)(6)(E) of the Act states that nothing in the competitive bidding statute should "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."¹⁰ By implementing a wide area geographic licensing scheme for private radio systems, the Commission has not only failed to make any attempt to

¹⁰ 47 U.S.C. § 309(j)(6)(E).

avoid mutual exclusivity, it has created mutual exclusivity where it does not naturally exist.

15. In the *Second Report*, the Commission reads Section 309(j)(6)(E) to require attempts to avoid mutual exclusivity only when the Commission finds such efforts to be in the public interest.¹¹ This is not a “plain language” interpretation of the Act. Section 309(j)(6)(E) states that nothing shall “relieve the Commission of the obligation in the public interest.”¹² Congress has affirmatively determined that the avoidance of mutual exclusivity is in the public interest, and has not left that determination to the Commission.

16. Consistent with this interpretation of Section 309(j)(6)(E) is the statement made by the House and Senate Budget Conferees in the recently adopted Budget Reconciliation Report.

[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission’s obligations under section 309(j)(6)(E). The conferees are **particularly concerned** [emphasis added] 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.¹³

The fact that Congress makes a point of reminding the Commission of this obligation is strong evidence that Congress sees this obligation as mandatory, and not up to the discretion of the Commission.

17. The Section 309(j)(6)(E) obligation is particularly important as it relates to non-commercial services. Because internal private radio systems are generally implemented in distinct

¹¹ See *Second Report*, ¶ 62.

¹² 47 U.S.C. § 309(j)(6)(E).

¹³ Conference Report, 1997 Budget Reconciliation Act, Title III -- Communication and Spectrum Allocation Provisions, Section 3002(a).

geographic areas with significant frequency sharing, they rarely generate mutually exclusive applications. It is only when several private radio applicants are forced to file for a single wide area that encompasses all of the sites that each wanted individually that conflicting applications are filed.

18. In the private radio services, there are number of engineering, negotiation, and service regulation tools at the Commission's disposal to avoid mutual exclusivity. Chief among these are the several certified frequency advisory committees that process applications and recommend available frequencies for applicants in the private radio services. Timely processed and well coordinated private radio applications will rarely result in mutual exclusivity. In the rare cases where competing applications cannot be resolved through coordination, a "first in time" settlement coupled with engineering solutions has proven to be both efficient and equitable.

19. Accordingly, ITA requests that the Commission reconsider its determination that wide area geographic licensing is an appropriate mechanism for the licensing of private internal radio services. Further, ITA urges the Commission to take advantage of the ability of its several certified frequency advisory committees to prevent mutually exclusive applications in the private radio services.

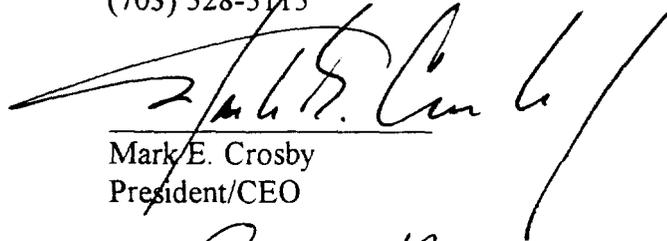
III. Conclusion

20. From ITA's perspective, the Commission has misinterpreted and neglected its Congressionally mandated obligations by adopting the policy that auctions are always the best licensing policy for all services. ITA believes this policy is misguided, and contrary to Congressional intent. ITA urges the Commission to reexamine this policy, and to refrain from the

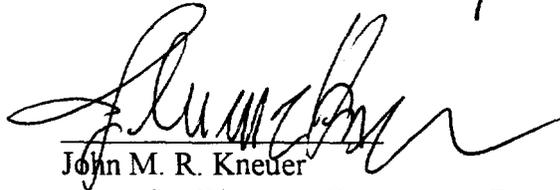
continued overlaying of commercial licensing schemes on spectrum occupied by private radio services.

Respectfully Submitted,

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Certificate of Service

I, Barbara Levermann, the Executive Assistant to the President and CEO of the Industrial Telecommunications Association do hereby certify that a copy of the foregoing Petition for Reconsideration and Clarification has been served this 2nd day of September, 1997 by mailing U.S. First-Class, postage prepaid to the following:

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