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JUL 13 1998

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Part 90 of the)
Commission's Rules To Provide)
for the Use of the 220-222 MHz Band)
by the Private Land Mobile)
Radio Service)
)
Implementation of Section 3(n) and 332)
of the Communications Act)
)
Regulatory Treatment of Mobile Services)
)
Implementation of Section 309(j) of the)
Communications Act – Competitive)
Bidding)

PR Docket No. 89-552

GN Docket No. 93-252

PP Docket No. 93-253

**PETITION FOR RECONSIDERATION
OF INTEK GLOBAL CORP.**

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**PETITION FOR RECONSIDERATION
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INTEK Global Corp. (INTEK), by its attorneys, and pursuant to Commission Rule Section 1.429,¹ hereby petitions the Commission to reconsider that portion of its May 21, 1998, Memorandum Opinion and Order on Reconsideration in the above-captioned matter² where the Commission for the first time ordered Phase I non-nationwide licensees to “modify their

¹ 47 C.F.R. §1.429. Section 1.429(i), in part, provides that “[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order.” As fully set forth herein, INTEK submits that the Commission’s *Reconsideration Order* modified the *Third Report and Order*. Therefore, the *Reconsideration Order* is subject the same procedural rules as the *Third Report and Order*.

² See *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, *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, Memorandum Opinion and Order on Reconsideration, FCC 98-93 (May 21, 1998) (“*Reconsideration Order*”). See also 63 Fed. Reg. 32580 (June 12, 1998).

authorization to reflect the ERP at which they were operating at the time the decisions in the *Third Report and Order* in this proceeding became effective.”³ The *Third Report and Order* became effective nearly one year ago, on August 21, 1997.⁴ Thus, if the *Reconsideration Order* is allowed to stand, a Phase I licensee not operating at its full effective radiated power (“ERP”) on August 21, 1997 is now precluded from doing so. As demonstrated below, by arbitrarily choosing a date in the past to trigger the reduction in ERP, the Commission has effectively modified the authorizations of Phase I licensees without notice or opportunity for comment in violation of due process rights under Section 316 of the Communications Act of 1934, as amended (the “Act”). Moreover, the illegal modification of Phase I licenses is unprecedented, discriminatory, and contrary to the public interest. Accordingly, INTEK respectfully requests the Commission to reconsider its decision on this issue.

I. INTRODUCTION AND SUMMARY

In the *Third Report and Order*, the Commission, among other things, addressed the issue of whether to implement its proposal to establish 120 kilometers as a minimum co-channel separation between Phase I and Phase II licensees to prevent subsequently-licensed EA and Regional Phase II licensees from causing interference to incumbent co-channel Phase I licensees.⁵ All of the parties commenting on this subject, including INTEK’s Roamer One subsidiary, opposed the Commission’s proposal, arguing for greater co-channel protection for

³ *Id.* at ¶¶75, 212. See *Amendment of Part 90 of the Commission’s Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, 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, Third Report and Order; Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943 (1997) (“Third Report and Order”).*

⁴ *Reconsideration Order* at ¶70 n. 122.

Phase I licensees. In particular, Roamer One and several other parties advocated the adoption of 10dB protection to a Phase I licensee's 28 dBu service contour, greater than the 38 dBu contour already established for co-channel protection between Phase I licensees.

Despite the unanimity of the comments in favor of greater protection for Phase I licensees, the Commission nevertheless adopted the co-channel separation criteria as proposed, applying the same 120 kilometer co-channel separation and 38dBu service contour standards between Phase I and Phase II licensees as it applied between Phase I licensees.⁶ In doing so, the Commission added that:

[t]he predicted 38dBuV/m contour of the Phase I licensee will be calculated based on the licensee's authorized effective radiated power (ERP) and antenna height-above-average-terrain (HAAT) – not on the maximum allowable ERP and HAAT provided in our rules. Licensees shall be required to operate at their initially authorized ERP and HAAT, and will not be permitted to seek modification of their authorization to operate at a higher ERP or HAAT. *Licensees operating at power levels lower than their initially authorized ERP shall be required to seek modification of their authorization to reflect the lower ERP.* . . . Because Phase II licensees will have sought authorization for a large geographic area, we believe that it is appropriate to allow them to serve any portion of their licensed geographic area, except for the portions of the area already being served by co-channel Phase I licensees. We also believe that it is likely that Phase II licensees will want to provide service to those areas that would have been protected if we had assumed herein that Phase I licensees are operating at maximum allowable height and power.⁷

In response to the *Third Report and Order*, the Commission received eleven petitions for reconsideration or clarification. On the issue of the protection of Phase I systems and the calculation of service contours, four parties, including INTEK, sought reconsideration of

⁵ *Third Report and Order* at ¶169.

⁶ *Id.* at ¶173.

⁷ *Id.* at ¶174 (footnote omitted) (emphasis added).

the Commission's decision (1) to define the service area based on Phase I licensees' initially authorized ERP rather than on maximum allowable operating parameters, and (2) to require Phase I licensees to modify their authorizations to reflect the system's actual ERP. With respect to the first issue, the Commission reaffirmed its decision in the *Third Report and Order* to calculate the 38dBu service contour based on initially authorized ERP, despite petitioner's arguments that doing so is contrary to previous Part 90 policy and strikes the wrong balance between the interests of Phase I and Phase II licensees.⁸

The Commission also reaffirmed its decision to require those Phase I licensees operating at power levels lower than their initially authorized ERP to modify their authorizations to reflect their actual ERP. In support of its decision, the Commission stated, first, that *the Third Report and Order* reserved for Phase II licensees "any portion" of their geographic area "except for the portions of the area already being served by co-channel Phase I licensees," and that the "area being served" by co-channel Phase I licensees "plainly cannot be calculated based on an assumption of the use of . . . maximum allowable operating parameters."⁹ Similarly, the Commission found that this "area being served" could not be calculated based on the authorized ERP if a licensee was not operating at the authorized ERP.¹⁰ Third, the Commission found that it could not assume that licensees operating at a lower than authorized ERP would "some day increase the ERP to their authorized power level," and that "to protect a Phase I licensee's base station in accordance with a power level that the licensee *might* employ at some time in the future could deny service to the public."¹¹

⁸ *Reconsideration Order* at ¶¶69-75.

⁹ *Id.* at ¶70.

¹⁰ *Id.*

¹¹ *Id.* at ¶74 (emphasis in original).

Although INTEK disagrees with each of these conclusions and the reasoning behind them, the instant petition for reconsideration, focuses instead on the Commission's novel determination that the *Third Report and Order* somewhere concluded that Phase I licensees are required to modify their licenses to reflect their actual ERP *at the time the decisions adopted in the Third Report and Order became effective, i.e., August 21, 1997*. Notably, none of the petitioners seeking reconsideration of the *Third Report and Order* raised the issue of the impact of a retroactive determination of a Phase I licensee's actual ERP. INTEK submits that the reason for this is obvious. Nothing in the Commission's decision in the *Third Report and Order* indicated that such an action was even contemplated, let alone decided. Indeed, incumbent licensees first realized that they may no longer have the ability to operate at their authorized ERP only when the Commission released the text of the *Reconsideration Order*.

As demonstrated below, the Commission's *Reconsideration Order* impermissibly and without notice modifies the *Third Report and Order* by arbitrarily and retroactively fixing a time at which a Phase I licensee's actual ERP is determined. In doing so, the Commission has effectively modified the authorizations of Phase I licensees without notice or opportunity for comment in violation of due process rights under Section 316 of the Act. Moreover, the illegal modification of Phase I licenses is unprecedented, discriminatory, and contrary to the public interest.

II. THE COMMISSION'S REQUIREMENT THAT PHASE I LICENSEES MODIFY THEIR AUTHORIZATIONS TO REFLECT THE ERP AT WHICH THEY WERE OPERATING ON AUGUST 21, 1997 VIOLATES PHASE 1 LICENSEES' DUE PROCESS RIGHTS UNDER SECTION 316 OF THE ACT.

Under Section 316 of the Act,¹² the Commission cannot require licensees to modify their authorization without first providing proper notice to the licensees and affording

¹² See Section 1.87 of the Commission's Rules, 47 C.F.R. § 1.87.

them an opportunity to protest the proposed modification. Specifically, Section 316 of the Act provides that any “license . . . may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or any treaty ratified by the United States will be more fully complied with.” Section 316, however, also states that “no such . . . modification shall become final until the holder of the license . . . shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification.”¹³ Moreover, under Section 316(b), “[i]n any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.”¹⁴

In the *Reconsideration Order*, the Commission for the first time required that Phase I licensees modify their authorization to reflect the ERP at which they were operating on August 21, 1997, the date the *Third Report and Order* became effective. By setting the date on which Phase I licensees’ actual ERP was to be determined on a retroactive basis, the Commission effectively ordered the modification of all Phase I licensees operating at lower than their authorized ERP. The *Third Report and Order* made absolutely no mention of setting a date for determining an incumbent licensee’s actual ERP.¹⁵ Instead, the *Third Report and Order* merely indicated that Phase I licensees operating at ERPs lower than initially authorized “shall be required to seek modification of their authorization to reflect the lower ERP,” and “shall

¹³ See 47 C.F.R. § 187 (same); See *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299 (1997) (noting that “Section 316 of the Communications Act permits licensees 30 days in which to challenge modifications to their license”).

¹⁴ 47 U.S.C §316(b).

¹⁵ Nor was any such date identified in the ordering clauses of the *Third Report and Order*.

receive less protection” than they would have otherwise received.¹⁶ Nothing in this language, however, suggests that the Commission intended to take away a licensee’s ability to decide for itself whether it wanted to operate at its authorized power or remain at its reduced power and modify its license as directed by the Commission. It was not until the *Reconsideration Order* inexplicably fixed a date prior in time by which to measure ERP that the Phase I licensee’s choice in the matter was eliminated and the *de facto* modification of such licenses occurred. Thus, the setting of the retroactive date in the *Reconsideration Order* triggered the application of Section 316 of the Act.

As noted above, under Section 316, the Commission has the burden of proof and initiates the action, usually by issuing an order to show cause why a licensee’s license should not be modified.¹⁷ In this case, however, the Commission failed to serve written notice on any Phase I licensees operating at lower than authorized ERP as required by Section 316 and the Commission’s Rules.¹⁸ Moreover, if the modification became effective on August 21, 1997, the Commission did not afford the licensees an opportunity to protest the modification, in violation of Section 316 of the Act.¹⁹ In sum, the Commission’s unprecedented action of unilaterally and without notice or opportunity for hearing effectively modifying the licenses of all Phase I licensees operating at lower than authorized ERPs cannot stand.

¹⁶ *Third Report and Order* at ¶174.

¹⁷ *See In the Matter of Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act*, 2 FCC Rcd 3327 (1987).

¹⁸ *See* 47 C.F.R. § 1.87(i).

¹⁹ *See Western Broadcasting Co. v. FCC*, 674 F.2d 44 (1982) (holding that appellant’s claim, alleging that grant of another station’s application for a construction permit may create objectionable interference, raises a legally cognizable issue under Section 316 of the Act. Accordingly, the court held that appellant was entitled to notice and an opportunity to show cause in a public hearing why the proposed order of modification should not issue).

Although the Commission offers no direct authority supporting its decision to set the August 21, 1997 date, it suggests that the use of the effective date of the *Third Report and Order* nevertheless is mandated by certain language in the *Third Report and Order*. Specifically, the Commission argues that the Commission's goal in the *Third Report and Order* was to "provide 220MHz service to the public," and the *Third Report and Order* reserved for Phase II licensees "any portion" of their geographic area "except for the portions of the area already being served by co-channel Phase I licensees."²⁰ From these statements, the Commission on reconsideration reasons that the area "already being served" by co-channel Phase I licensees should not be calculated "based on the licensee's authorized ERP if the licensee is not operating at its authorized ERP."²¹ "Rather," the Commission continues, "it is the area the licensee was serving at the time the decisions adopted in the [*Third Report and Order*] became effective, and must therefore be calculated based on the licensee's ERP and HAAT at that time."²²

In other words, the Commission's adoption of the August 21, 1997 date derives entirely from its wholly unsupported interpretation that the phrase "already being served" has a singular temporal connotation meaning at the time of the effective date of the *Third Report and Order*. INTEK submits that, based on the language in the *Third Report and Order*, the phrase "already being served" more appropriately refers to being served at a time after Phase II licensees have "sought authorization" -- *i.e.*, applied for licenses after winning them in the 220MHz auction. Specifically, the sentence in the *Third Report and Order*, relied upon by the Commission on reconsideration, states that "[b]ecause Phase II licensees *will have sought*

²⁰ *Third Report and Order* at ¶174.

²¹ *Reconsideration Order* at ¶70.

²² *Id.*

authorization for a large geographic area, we believe that it is appropriate to allow them to serve any portion of their licensed geographic area, except for the portions of the area already being served by co-channel Phase I licensees.”²³

Even if the Commission somehow determines that its interpretation is correct, the ambiguity of the Commission’s language in the *Third Report and Order* makes it impossible to conclude that Phase I licensees had anything approximating clear and adequate notice that their ERP had been fixed as of August 21, 1997. For the foregoing reasons, the Commission’s unsupported adoption of the August 21, 1997 date is arbitrary, capricious and wholly eviscerates the due process rights afforded licensees under Section 316 of the Act.

III. THE COMMISSION’S ACTION EFFECTIVELY MODIFYING THE INITIALLY AUTHORIZED ERP OF CERTAIN PHASE I LICENSEES IS ENTIRELY UNPRECEDENTED, DISCRIMINATORY, AND CONTRARY TO THE PUBLIC INTEREST.

In addition to violating the due process rights associated with Section 316, the Commission’s treatment of Phase I licensees operating at lower than authorized ERP is wholly unprecedented and inconsistent with that accorded other similarly-situated licensees. As set forth below, this discriminatory treatment forms another basis for the conclusion that the Commission acted arbitrarily and capriciously in setting the August 21, 1997 date.²⁴

In particular, the Commission’s action in affirmatively requiring incumbent licensees to modify their licenses to reduce their ERP to the actual level at which they are operating in advance of an auction is entirely unprecedented and discriminatory. For example, in the 800MHz SMR service, the Commission faced a virtually identical situation regarding the co-

²³ *Third Report and Order* at ¶174 (emphasis added).

²⁴ An agency must provide an adequate explanation before it treats similarly situated parties differently. *Petroleum Communications, Inv. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (cases cited therein).

channel interference protection to provide incumbent licensees in the context of the adoption of a wide-area licensing scheme prior to an auction of geographic area licenses. There, the Commission required prospective geographic area licensees to afford interference protection to incumbent licensees in accordance with the existing co-channel separation and short-spacing criteria, finding that such an approach would adequately protect incumbent operations without hampering the ability of geographic area licensees to construct stations throughout their authorized service areas.²⁵ Notably, nowhere did the Commission even contemplate requiring incumbent 800MHz licensees operating below their authorized ERP to modify their licenses to reflect their actual ERP.

To the contrary, the Commission went out of its way to provide incumbent licensees maximum operational flexibility, permitting such licensees to add new transmitters in their existing service area, without prior notification to the Commission, to fill in "dead spots" in coverage or to reconfigure their systems to increase capacity within their service area, so long as their 22 dBu interference contours were not expanded.²⁶ Moreover, the Commission chose to use a 22 dBu criterion, rather than a 40 dBu criterion, so as to give incumbent licensees more operational flexibility without adversely impacting the geographic area licensee's ability to build a viable wide-area system in the same market.²⁷

Likewise, for 900MHz systems, the Commission grandfathered the secondary site applications of incumbent licensees in advance of the 900MHz auction in order to allow those

²⁵ See *First Report and Order, Eighth Report and Order, Second Notice of Proposed Rulemaking*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1516 (1995).

²⁶ *Id.*

²⁷ *Id.* at 1514.

licensees to better serve their markets.²⁸ Again, despite a virtually identical situation regarding incumbent licensees and the adoption of a wide-area licensing scheme prior to an auction of geographic area licenses, along with a stated concern to provide service to the public, the Commission made no attempt to reduce the ERP of the incumbent 900MHz licensees. Instead, the Commission balanced the interests of the incumbent licensee against those of the prospective geographic area licensee and came down on the side of more operational flexibility for the incumbent operator.

Based on the foregoing precedent, it appears that only 220MHz incumbent licensees come out on the short end of the Commission's balancing of interests. In the two most relevant proceedings involving incumbent licensees prior to geographic area licensing by auction, the Commission not only never considered reducing an incumbent's authorized ERP, it took steps to increase operational flexibility. 220MHz incumbents, rather than receive similar treatment, have their ERP reduced without notice, thereby severely limiting operational flexibility.²⁹ Such unprecedented and discriminatory treatment of similarly-situated entities violates longstanding administrative law precedent holding that such entities not be treated in an injuriously different manner.³⁰

The Commission's only stated rationale for not protecting an incumbent's authorized ERP (and therefore its interference protection contour) is to avoid giving the

²⁸ See *Second Report and Order on Reconsideration and Seventh Report and Order*, PR Docket No. 89-553, PP Docket No. 93-253, GNDocket No. 93-252, 11 FCC Rcd 2639, 2656 (1995), at para. 43.

²⁹ Although the Commission in its *Reconsideration Order* recognized the need for Phase I licensees to have greater flexibility to modify their authorizations, and for example permitted licensees to add additional transmitter sites and otherwise modify their authorizations provided they do not expand their 38dBu service contours, the Commission's action at issue here is directly contrary to and significantly defeats the additional flexibility that it was attempting to provide.

³⁰ *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

incumbent "greater protection . . . than necessary," which would "potentially deny service to the public."³¹ However, INTEK submits that service to the public is *already* being provided by incumbent licensees throughout 38dBu service contours calculated using maximum and/or authorized power and antenna height, even though the incumbent licensees may be operating at less than maximum and/or authorized power levels. This fact was amply demonstrated by the numerous technical showings submitted by various petitioners in this proceeding, including INTEK.³² Thus, there is no basis in logic or reality to the Commission's argument that, in furtherance of service to the public, incumbent operators should have to reduce their ERP to ensure that sometime in the future another currently unknown and as yet unlicensed entity can serve the area already being served by the incumbent.

IV. CONCLUSION

For the foregoing reasons, INTEK urges the Commission to reconsider its action consistent with the arguments set forth herein.

Respectfully submitted,

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³¹ *Reconsideration Order* at ¶73.

³² Some of the showings demonstrated a reliable service area out to an 18dBu contour using significantly less than maximum power.