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



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AUG 10 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Auction of the Phase II)
220 MHz Service Licenses)
)
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 Sections 3(n))
and 332 of the Communications Act)
)
Regulatory Treatment of Mobile)
Services)
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding, 220-222 MHz)

PR Docket No. 89-552
RM-8506

GN Docket No. 93-252

PP Docket No. 93-253

To the Commission:

PETITION FOR DECLARATORY RULING

Net Radio Group Communications, L.L.C. ("NRG"),^{1/} by its attorneys, and pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. 1.2, hereby requests that the Commission issue a declaratory ruling to clarify the status of numerous Phase I 220 MHz licensees and certain license renewal procedures applicable

^{1/} NRG is an entrepreneurial telecommunications entity formed in 1997 to acquire and operate 220 MHz and other communication systems. NRG has executed purchase contracts for over 40 Phase I non-nationwide 220 MHz licenses since its formation and is actively pursuing additional 220 MHz channels. In furtherance of its business plan, NRG plans to participate in the upcoming 220 MHz auction.

thereto.^{2/} For the reasons set forth below NRG urges that the Commission promptly provide written public clarification of all Phase I 220 MHz renewal applications.

I. Introduction

In March of 1997, the Commission restructured the licensing framework that governs the 220 MHz Service.^{3/} Site-specific licensing, used in the Phase I 220 MHz Service, is to be replaced with a geographic-based system in the Phase II 220 MHz Service which is the subject of the upcoming auction. This geographic-based licensing methodology is similar to that used in other commercial mobile radio services ("CMRS"). The geographic areas for the licenses were created based upon Economic Areas ("EAs"), developed by the Bureau of Economic Analysis of the U.S. Department of Commerce. The Economic Area Groupings ("EAGs"), developed by the Commission, include groupings of EAs and encompass the sum total of all EAs. Three Nationwide licenses, each including the

^{2/} In a separate action filed this date, NRG requested that the Commission temporarily stay the auction of the Phase II 220 MHz service licenses scheduled for September 15, 1998 ("Auction Date") and of the mandatory pre-auction filings by parties intending to participate in this auction. See, Public Notice, "Auction of the Phase II 220 MHz Service Licenses, DA 98-1010" (rel. May 29, 1998) ("Auction Notice").

^{3/} 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).

geographic territory of all of the EAGs, are also to be offered in the Phase II 220 MHz Service auction.

There are a number of incumbent Phase I 220 MHz licensees operating on frequencies that will be subject to the upcoming auction. Such incumbents must be protected from harmful interference by Phase II 220 MHz licensees in accordance with the Commission's Rules. See, 47 C.F.R. §90.763. These limitations may restrict the ability of such Phase II geographic area licensees to use certain portions of the electromagnetic spectrum or provide service to certain areas in their geographic license areas that are licensed to these Phase I licenses.

The need to obtain accurate information regarding incumbents is crucial to bidders having a core understanding of the utility and economic value of the spectrum upon which they seek to bid. When the Commission first licensed 220 MHz non-nationwide spectrum, it granted as many applications as could be granted on an exclusive licensing basis, consistent with the order of selection in its lottery.^{4/} Thus, since the 220 MHz spectrum in most important markets was applied for and licensed, if all parties that were initially licensed were to have remained licensed, there would be precious little spectrum in the important markets available at the auction.

A number of parties initially licensed for 220 MHz are no longer licensed. Some never constructed. Others have elected not

^{4/} Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (1991).

to have their license renewed. However, many additional licensees have maintained their licenses through construction and renewal. Unfortunately, for reasons set forth in greater detail below, Commission processes need to be clarified in order to permit prospective bidders to obtain accurate information with respect to the renewals of a great number of those incumbents' licenses. Reference to the Commission's database for 220 MHz licensees will reveal only that renewal applications are pending. There is no statement that the applications have been granted, and questions exist with respect to the ultimate disposition of a great number of renewal applications. It is this uncertainty that robs prospective bidders of reasonable certainty on this major incumbency issue which is necessary to develop and execute their bidding strategies, including raising capital and determining prices to bid.^{5/}

^{5/} The above major uncertainty stands in stark contrast to numerous open issues of lesser importance to prospective bidders about which the Commission has formally urged prospective bidders to be aware. For example, the Commission warned potential bidders that there are certain unresolved matters including applications, waiver requests, petitions for reconsideration and applications for review which could have an impact on the availability of spectrum for EA and EAG licensees. The Commission provided a list of such matters that it was aware of as an attachment to the Auction Notice. These uncertainties, while regrettable, are the types of uncertainties that exist in virtually all auctions and which carry relatively minimal risks to bidders. They stand in stark contrast to the incumbency issue discussed above.

II. Uncertainty Regarding the Commission's Disposition of 220 MHz Renewal Applications Makes Investigating and Evaluating Incumbent Licenses' Impact on EA or EAG Licenses and Their Values Impossible.

The Commission is returning a great number of the 220 MHz renewal applications to the licensees with a notice that they must provide the renewal expectancy showing required by Section 90.743 of the rules.^{6/} This is so despite the fact that when the FCC sent the FCC Form 574R renewal application package to all 220 MHz licensees, licensees were instructed only to check the accuracy of the information, sign and date the application by an authorized

^{6/} Section 90.743 provides that (a) All licensees seeking renewal of their authorizations at the end of their license term must file a renewal application in accordance with the provisions of §90.149. Licensees must demonstrate, in their application, that: (1) They have provided "substantial" service during their past license term. "Substantial" service is defined in this rule as service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal; and (2) They have substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.

(b) In order to establish its right to a renewal expectancy, a renewal applicant must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) For an EA, Regional, or nationwide licensee, an explanation of its record of expansion, including a timetable of the construction of new stations to meet changes in demand for service;

(3) A description of its investments in its system;

(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and

(5) A list of any pending proceedings that relate to any matter described in this paragraph.

person, and return the package to the Commission.^{2/} There was never any mention of submitting the renewal expectancy showing as required by Section 90.743. Most, if not all, 220 MHz licensees complied with the Commission's instructions but failed to submit the renewal expectancy showing.

The Commission's return of numerous applications presents several problems with respect to the upcoming auction. First, it deprives prospective bidders of the threshold level of knowledge regarding incumbency that is required for those parties to make informed bidding decisions. Simply put, without having sound information vis-a-vis the status of Phase I licensees, bidders literally would not know what they are buying at the auction.

The problem is compounded because the Commission is returning certain but not all renewal applications to licensees with an opportunity to submit the renewal expectancy. At this point, it is not clear whether the Commission is returning every renewal application or how the Commission will treat those that were submitted without a renewal expectancy but have not been returned. Many licensees that own multiple licenses have had only certain of their renewal applications returned with a request for the renewal expectancy supplement. There are certainly questions and concerns about how the Commission may treat those applications that were not returned. It is also not clear what standard the Commission is

^{2/} The form indicates that the estimated amount of time to comply with the Commission's instructions for submitting the renewal expectancy supplement is 30 days.

applying with respect to acceptable responses to its requests for showings under Section 90.743, or what will happen in the event of a non-response.

III. Relief Requested.

Without consistent policy and application, parties intending to bid in the upcoming auction, including NRG, cannot determine what licenses, will be or will likely be (i.e., have an "expectancy" to be) renewed. Without this determination bidders have no way of knowing which channels in an EA or EAG will be protected under incumbent Phase I licenses and thus factor this information into a reasonable bid for an EA or EAG which includes these incumbent channels. Accordingly, it becomes critically important for the Commission to quickly and publicly articulate its policy on the renewal expectancy showing and how it will treat all 220 MHz renewal applications. Such clarification must be provided as soon as possible so that potential bidders can analyze properly the Commission's database and make the necessary determinations on how to bid. The clarification should explain whether the Commission will require all renewal applicants to submit a Section 90.743 showing (something that to date remains uncertain); whether parties who filed renewals without such showings will have an opportunity to supplement their filings; and how will licensees who do not supplement their filings, for whatever reason, be treated.

Accordingly, Petitioner requests that the Commission provide such declaratory ruling by August 24, 1998. Otherwise, the auction should be postponed until at least 90 days after the Commission has

clarified its policy with respect to the 220 MHz renewal applications. By that time, licensees will have had an opportunity to comply with the clarified policy and potential bidders will have had sufficient time to review FCC records regarding such compliance and then to formulate an appropriate bidding strategy.

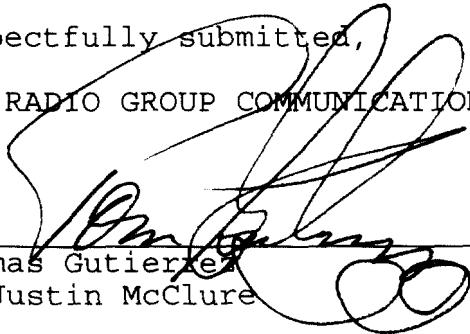
IV. CONCLUSION

NRG has demonstrated the uncertainty surrounding the renewal application process for Phase I 220 MHz licensees. All Phase I 220 MHz licensees and the public interest in general would be well served by the Commission providing adequate and timely clarification of the requirements for 220 MHz renewal applications and a schedule for such applications to be properly processed.

Wherefore, NRG urges the Commission to promptly issue a declaratory ruling providing clarification of the requirements for filing Phase I 220 MHz renewal applications and providing the status of all Phase I 220 MHz renewal applications. Such action must be provided in a timely manner in order to allow prospective auction participants to adequately prepare for the 220 MHz auction scheduled for September 15, 1998.

Respectfully submitted,

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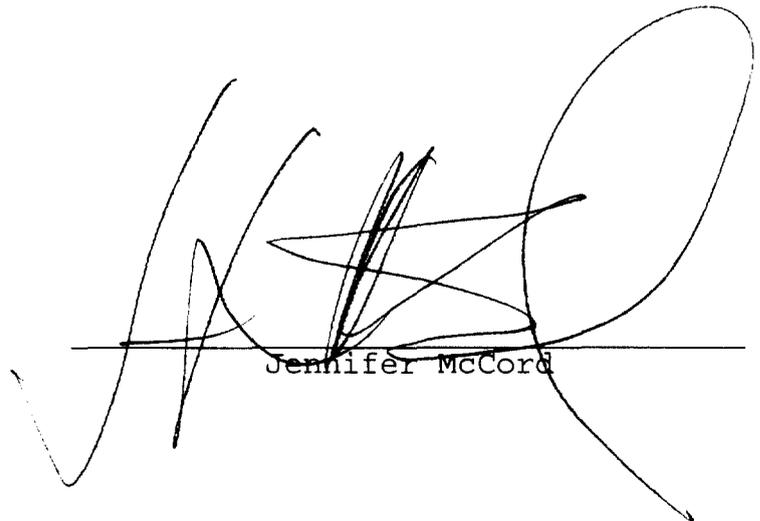
August 10, 1998

CERTIFICATE OF SERVICE

I, Jennifer McCord, a legal assistant in the law firm of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have had hand delivered on this 10th day of August, 1998, the foregoing "PETITION FOR DECLARATORY RULING" to the following:

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