

ORIGINAL

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

In the Matter of

Amendment of Part 90 of the Commission's
Rules to Adopt Regulation for Automatic
Vehicle Monitoring Systems

PR Docket No. 93-61
DA 98-2144

RECEIVED

NOV - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Comments of Hennepin County to MicroTrax's Request for Temporary Delay of Location and
Monitoring Service Spectrum Auction No. 21

Kelly Cameron
David C. Quam
Powell, Goldstein, Frazer & Murphy LLP
1001 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20004
(202) 347-0066

Attorneys for Hennepin County

November 2, 1998

No. of Copies rec'd 0+3
List A B C D E

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

In the Matter of

Amendment of Part 90 of the Commission's
Rules to Adopt Regulation for Automatic
Vehicle Monitoring Systems

PR Docket No. 93-61
DA 98-2144

Comments of Hennepin County to MicroTrax's Request for Temporary Delay of Location and
Monitoring Service Spectrum Auction No. 21

Hennepin County ("Hennepin"), by its attorneys hereby submits its comments on MicroTrax's request to temporarily delay the Location and Monitoring Service spectrum auction currently scheduled for December 15, 1998.

I. Introduction

Hennepin agrees with MicroTrax that the Federal Communications Commission ("FCC" or "Commission") should stay the December 15, 1998 LMS auction and corresponding application deadlines. Hennepin believes that the FCC must postpone the deadline for filing the LMS applications until the Commission has had an opportunity to address Hennepin's Petition for Partial Reconsideration ("Petition") of the Commission's LMS auction rules. Hennepin, however, disagrees with MicroTrax's request that the Commission postpone the LMS application filing deadline for a specific period of time. Rather, Hennepin argues that the Commission should stay the auction and application deadlines indefinitely pending resolution of Hennepin's Petition. When the Commission

completes action on Hennepin's Petition is should allow a reasonable time, perhaps an additional 45 days, to allow interested parties to complete their applications.¹

II. Grounds for Staying the Auction

Hennepin agrees with MicroTrax that the auction should be delayed. More specifically, Hennepin believes that the FCC should stay the auction to give the Commission adequate time to determine the applicability of the public safety radio service exemption from competitive bidding to the LMS auction.

Hennepin submits that the factual scenario and legal arguments submitted in its Petition support a stay of the LMS auction. The criteria the Commission uses when granting a stay were established in *Virginia Petroleum Jobbers v. Federal Power Commission*.² According to *Jobbers*, the Commission must consider whether: 1) petitioner is likely to prevail on the merits; 2) petitioner will suffer irreparable injury if a stay is not granted; 3) other interested parties will be harmed if the Commission grants the requested relief; and 4) the public interest favors granting the stay. Hennepin believes that the facts and legal arguments set forth in its Petition satisfy the *Jobbers* criteria and require the FCC to stay the LMS auction and application deadlines.

- A. Hennepin's claim that that the public safety radio service exemption from competitive bidding applies to the LMS auction is likely to succeed on the merits.

¹ MicroTrax's request is in fact based on the new requirement that "in the scheduling of any competitive bidding... an adequate period is allowed...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." Balanced Budget Act of 1997, P.L. 105-33 § 3002, 111 Stat. 251 (1997) ("BBA").

² *Virginia Petroleum Jobbers v. Federal Power Commission*, 259 F.2d 921 (1958).

As Hennepin demonstrated in its Petition, its intended use of LMS services meets the criteria Congress set forth in the Balanced Budget Act of 1997 (“BBA”) to be exempt from competitive bidding. Specifically, Hennepin’s intended use of LMS to enhance its fire, rescue, medical, law enforcement and corrections capabilities qualifies the service as a non-commercial public safety radio service designed to protect the safety of life, health, or property.³ Unfortunately, in its Second Report and Order, the Commission determined that the exemptions detailed in the BBA did not apply. This erroneous conclusion was based in part on the FCC’s view that LMS is principally a commercial service.⁴ In its Petition, Hennepin argues that the BBA eliminated the “principal use” test, that Congress intended the public safety exemption to be read broadly, that application of the exemption to the LMS auction would be consistent with the FCC’s policy of granting greater flexibility to public safety service providers, and that commercial LMS service could not adequately meet Hennepin’s needs.⁵

Because Hennepin has demonstrated that its use of LMS meets the criteria for the public safety exemption outlined by Congress, the FCC is legally required to make provision for qualified public safety applicants for LMS spectrum outside of the competitive bidding process. The FCC must therefore stay the LMS auction and application deadlines in order to give it time to change its rules and preserve Hennepin’s right to participate using its exempt status.

³ Hennepin County Petition for Partial Reconsideration, In the Matter of Amendment of part 90 of the Commission’s Rules to Adopt Regulation for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, August 31, 1998. (“Hennepin Petition”).

⁴ Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, Second Report and Order, PR Docket No. 93-61, FCC 98-157, ¶¶ 8-9 (1998) (“Second Report and Order”). *See also*, Amendment of Part 90 of the Commission’s Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, PR Docket No. 93-61, 12 FCC Rcd 13942, ¶72 (1997).

⁵ *See generally*, Hennepin Petition, 7-14.

B. Hennepin will suffer irreparable harm unless the auction is stayed.

If the LMS auction proceeds as scheduled without the Commission making a determination as to Hennepin's ability to use the public safety exemption, Hennepin will either have to forego the opportunity to enhance its public safety services or use its tax dollars to compete for a license against well financed commercial interests. Since, as MicroTrax points out in its request, LMS licenses in the 902-928 MHz band can only be obtained through this auction, Hennepin would suffer irreparable harm in the absence of a stay to allow the Commission to evaluate its Petition.

C. Other parties will not suffer significant harm from a stay of the LMS auction.

Entities planning on participating in the LMS auction will not be harmed if the Commission stays the auction and the application deadlines. Indeed, MicroTrax, a commercial entity looking to participate in the auction, states that it needs additional time to complete its business plan and secure financing to participate in the auction. Those parties prepared to participate in the December auction would suffer only a slight inconvenience from a stay, particularly in comparison to the irreparable harm Hennepin would suffer absent a stay.

D. The public interest is best served by staying the auction.

As Hennepin demonstrated in its Petition, the public interest will best be served by enabling local governments to provide LMS service to enhance their public safety capabilities. Because Hennepin is unlikely to be able to effectively compete with commercial applicants in the LMS auction, the public interest would best be served by staying the auction and application deadlines to allow the FCC time to consider Hennepin's Petition and restructure the auction rules as necessary. Moreover, if the Commission proceeds with the scheduled auction and later grants Hennepin's Petition, the FCC will then have to invalidate the results of the auction in order to give Hennepin an

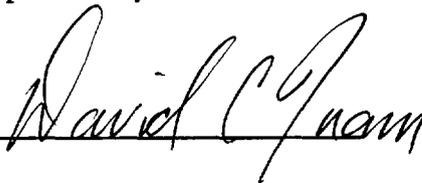
opportunity to apply for an LMS license under the terms envisioned by Congress in the Balanced Budget Act of 1997. This result would not only be costly in terms of lost time and investment; it would also unduly burden all auction participants and LMS service subscribers.

III. Conclusion

Hennepin agrees with MicroTrax that a stay of the auction and the application deadlines is warranted. The FCC must stay the auction to give it sufficient time to consider Hennepin's Petition for Partial Reconsideration and revise its rules to allow parties offering exempt public safety service to participate in the LMS spectrum distribution. We therefore urge the Commission to stay the auction for an indefinite period pending its consideration of Hennepin's petition.

Respectfully submitted,

Hennepin County

By: 

Kelly Cameron
David C. Quam
Powell, Goldstein, Frazer & Murphy LLP
1001 Pennsylvania Ave, N.W.
Suite 600
Washington, D.C. 20004
(202) 347-0066
Attorneys for Hennepin County

CERTIFICATE OF SERVICE

I, Carla Littlejohn, a secretary at the law firm of Powell, Goldstein, Frazer & Murphy, do hereby certify that on this 2nd day of November 1998, I caused copies of the foregoing "Comments to the Request for Temporary Delay of Location and Monitoring Service Spectrum Auction No. 21" to be served via hand delivery to the following:

Magalie R. Salas (Original and 4 Copies)
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Daniel Phythyon, Bureau Chief
Federal Communications Bureau
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, DC 20554

Amy Zoslov, Chief
Federal Communications Bureau
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5202
Washington, DC 20554

Counsel to MicroTrax
Gregg P. Skall, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, DC 20006


Carla Littlejohn