Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	DA 99-974
Construction Requirements for	)	PR Docket No. 93-144
Commercial Wide-Area 800 MHz	)	
Licensees Pursuant to	)	
Fresno Mobile Radio, Inc. v. FCC	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Thomas Sugrue, Chief
Wireless Telecommunications Bureau

COMMENTS OF WILLIAM R. MILLER DBA RUSS MILLER RENTAL

In response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on May 21, 1999[1/] and pursuant to Rule Section 1.415 of the Commission's Rules,[2/] William R. Miller dba Russ Miller Rental ("Miller") respectfully submits these comments with respect to the construction requirements for commercial wide-area 800 MHz licences pursuant to Fresno Mobile Radio, Inc. v. FCC.[3/] Mr. Miller supports the adoption of wide-area licensee construction requirements similar to those imposed on Economic Area ("EA") 800 MHz licensees and other systems authorized on a geographic area basis. In support thereof, Miller submits the following:

1/ "Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to Fresno Mobile Radio, Inc. v. FCC," Public Notice, DA 99-974, ___FCC Rcd ___ (rel. May 21, 1999); "New Deadlines for Filing Comments on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees," Public Notice, DA 99-1168, ___ FCC Rcd ___ (rel. June 15, 1999).

2/ 47 C.F.R. § 1.415.

3/ Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 970 (D.C. Cir. Feb. 5, 1999) ("Fresno").

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I. INTRODUCTION

1. Miller is a small SMR operator in the Dallas/Fort Worth, Texas area. He has been in the two-way radio business since 1972 and the SMR business since 1984. On August 8, 1994, Miller submitted to the FCC a Request for Rule Waiver to implement a wide-area, digital trunked SMR system in the Dallas/Fort Worth, Texas area ("Waiver Request"). Miller demonstrated that his proposed system was fully consistent with similar systems already approved by the Commission.[4/] Miller's filing noted that, like previously authorized wide-area SMR systems, his reconfiguration of already operational, aggregately loaded SMR facilities into a fully integrated, wide-area system would enable him to offer superior service to existing and future customers in a spectrum deficient market.[5/] The waiver relief requested was limited to that necessary to permit Miller to reassign his authorized constructed frequencies dynamically for maximum spectrum efficiency, including a five-year period in which to reconstruct or reconfigure analog stations into the integrated system proposed.[6/] Eleven applications associated with the Waiver were filed. All of Miller's applications included intercategory frequencies. As was customary in such situations, Miller bifurcated his filing -- one set of applications for SMR channels only was filed with the FCC directly ("FCC Applications"). Another set of applications including both the SMR and intercategory channels was sent to National Assoication of Business and Educational Radio ("NABER"), now the Personal Communications Industry Association ("PCIA"), for coordination, and received a second, later file number when received by the FCC ("Coordinated Applications").

4/ Waiver Request at ¶¶ 7-8.

5/ Waiver Request at ¶¶ 3-4.

6/ Waiver Request at ¶¶ 5-11.

2. Of the eleven (11) applications for digital facilities associated with Miller's Waiver Request filed on August 8, 1994, only four (4) (File Nos. 683897, 683898, 683900, 683901) were included on the FCC's October 31, 1996, "Backlog" Public Notice.[7] The other applications were omitted from the Public Notice. Miller assumed those frequencies which did not appear on the Public Notice were not granted by the Commission. Therefore, Miller timely filed a Petition for Partial Reconsideration ("Petition") applicable only to those requested frequencies that were not granted.

3. The Petition argued that Miller's wide-area request was consistent with other wide-area requests granted by the FCC. In addition, Miller demonstrated that had the FCC manually processed the subject applications, it would have granted them. For these reasons Miller requested that the Commission reprocess his applications manually and grant the requested frequencies.

4. By Letter dated June 17, 1996, the Chief, Land Mobile Branch, denied Mr. Miller's Petition.[8] The Land Mobile Branch did not assert that Miller's applications were in any way inconsistent with the Commission's rules. Rather, it disagreed with Mr. Miller's argument that the applications were not granted due to a flaw in the software used to process the applications. Instead, according to the FCC, the applications were not granted due to Miller's incomplete data file identifying "friendly" stations and applications.

In his Petition for Further Reconsideration filed on July 17, 1996, Miller argued that the

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[7] "Wireless Bureau Vacates and Supersedes Grants to SMRs Announced by March 17, 1995 Public Notice," Public Notice, No. 52823 (rel. Oct. 31, 1995).

[8] Letter from Terry L. Fishel, Chief, Land Mobile Branch, FCC to Marilyn I. Suchecki, Pamela Gaary (Jun. 1, 1996).

Land Mobile Branch's denial of his Petition was in error.[9/] Miller submitted that the applications which were the subject of the pleading were consistent with the Commission's Rules. The data submitted by Miller in diskette form was consistent with the data routinely provided by wide-area applicants. Neither Miller nor any other wide-area applicant was given any indication by the Commission that the data previously provided was not sufficient for purposes of the software run. As Miller repeatedly demonstrated, the subject applications were in the proper form, conformed to all rule requirements as of the date of filing, and grant of the applications would serve the public interest, convenience or necessity. Accordingly, Miller argued, the Commission must grant the applications.

5. On May 20, 1997 the Wireless Telecommunications Bureau ("WTB") adopted and released an Order which reviewed the submissions filed by thirty-seven SMR licensees to rejustify their extended implementation authority previously granted.[10/] By that Order, it found that twenty-nine licensees had adequately rejustified their Extended Implementation ("EI") authority. Miller was among the twenty-nine.[11/]

6. On August 13, 1998, the Commercial Wireless Division requested clarification from Miller as to whether grant of an EA license or any subsequent transaction had rendered his

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[9/] William R. Miller dba Russ Miller Rental, "Petition for Further Reconsideration," File Nos. 683899, 683902, 683903, 683904, 683905 (filed July 17, 1996).

[10/] Order, PR Docket No. 93-144, 13 FCC Rcd 1533 (1997).

[11/] Id. at ¶ 9, n. 24.

Petitions moot.[12/] Further, the letter instructed Miller to make a showing demonstrating how his pleadings and underlying applications remain ripe for the Division's consideration.

7. Miller responded to the Division's letter on August 28, 1998.[13/] In addition to responding to the specific questions raised, he reiterated his request that the Land Mobile Branch's decision of June 17, 1996 be reversed. To date no action has been taken on any of Miller's pleadings. As result, almost five years after filing his applications and associated waiver request, Miller still does not know whether he has a comprehensive contiguous wide-area system that would support implementation of a technically advanced network.

8. It is in this context, as an 800 MHz wide-area licensee with applications for half of his proposed wide-area system still in limbo, that Miller submits these comments.

II. THE CONSTRUCTION REQUIREMENTS FOR 800 MHZ WIDE-AREA LICENSEES SHOULD PARALLEL THOSE FOR 800 MHZ EA LICENSEES

9. The Commission should adopt construction requirements for wide-area licensees that are consistent in all material respects with those imposed on EA 800 MHz licensees and other systems that are granted on a geographic area basis. As held by the court in Fresno, the Commission has not adequately explained why wide-area licensees are sufficiently different from EA 800 MHz or other geographic-based licensees to warrant different construction requirements.[14/] It was and remains Miller's intention to provide a higher-capacity, technically

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[12/] Letter from Stephen L. Markendorff, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, FCC to Elizabeth R. Sachs, Marilyn Suchecki Mense, ref. no. CWD 98-94 (Aug. 13, 1998).

[13/] Letter from Elizabeth R. Sachs, Marilyn S. Mense, Lukas, Nace, Gutierrez & Sachs to Stephen L. Markendorff, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, FCC, ref. no. CWD 98-94 (Aug. 28, 1998).

[14/] Fresno.

advanced system when, or if, the FCC actually grants all of the facilities included in his original waiver request. While it is doubtful that even the most capacity-enhancing technology available would enable Miller's relative handful of frequencies to compete head-to-head with spectrum-rich cellular, PCS or ESMR systems, Miller's system could compare favorably with the EA authorizations proposed for the lower 230 800 MHz SMR channels and should be subject to comparable construction and coverage requirements.[15/]

10. EA licensees in the lower 230 SMR channels will be required to provide coverage to one-third of the population of their respective EAs within three years of initial license grant and to two-thirds by the end of their five-year construction period.[16/] Alternatively, licensees in these Channel blocks D through V will be permitted to demonstrate that they are providing "substantial service" in their markets at the five-year mark.[17/] Unlike upper 200 channel EA licensees which acquired mandatory relocation rights in addition to spectrum, EA licensees on the lower channels have no such authority and, thus, properly are not subject to a channel use requirement such as that set out in FCC Rule Section 90.685(c) for the upper channel auction winners.[18/]

11. 800 MHz wide-area licensees should be subject to similar requirements since they can be expected to be providing substantially similar services. Moreover, the construction period for such licensees should begin the later of (i) the effective date of the new construction requirements or (ii) the date all pleadings with respect to outstanding wide-area applications are

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[15/] Second Report and Order, PR Docket No. 93-144, 12 FCC Rcd. 19079 (1997).

[16/] First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, PR Docket 93-144, 11 FCC Rcd 1463 ¶ 120 (1995)("First R&O").

[17/] 47 C.F.R. § 90.685(b).

[18/] 47 C.F.R. § 90.685(c).

resolved. A wide-area licensee such as Miller, some of whose applications remain pending years after all relevant pleadings have been submitted, is not able to begin system design, much less system implementation, because he cannot be certain that he will have a comprehensive contiguous wide-area authorization with sufficient frequencies to warrant development. The time for assessing the satisfaction of his construction obligations should not begin to run until those matters are finally and fully resolved.

III. CONCLUSION

12. For the reasons and to the extent described herein, Miller urges the WTB to adopt wide-area licensees construction requirements similar to those imposed on Economic Area ("EA") 800 MHz licensees on Channel blocks D through V, with the construction period beginning the later of the effective date of the new construction requirements or the date all pleadings with respect to outstanding wide-area applications are resolved.

Respectfully submitted,

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July 12, 1999

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this July 12, 1999 caused to be hand delivered a copy of the foregoing Comments to the following:

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