

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Implementation of Sections 309(j) and)
337 of the Communications Act of 1934)
as Amended)
)
Promotion of Spectrum Efficient)
Technologies on Certain Part 90)
Frequencies)
)
Establishment of Public Service Radio)
Pool in the Private Mobile)
Frequencies Below 800 MHz)

WT Docket No. 99-87

RM-9332

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OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

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SUMMARY

The American Mobile Telecommunications Association ("AMTA") and its members hereby submit these comments on changes to the Federal Communications Commission ("FCC" or "Commission") rules and policies to implement its new statutory authority to conduct spectrum auctions in certain heretofore exempted Private Land Mobile Radio ("PLMR") services. AMTA supports an investigation of the PLMR regulatory framework. The Association has become convinced that neither the current regulatory framework, nor the changes proposed in the instant *Notice of Proposed Rule Making* ("NPR") or other recent FCC proceedings, will produce efficiency improvements adequate to satisfy PLMR user requirements within any reasonable time frame. The Association urges the Commission to proceed promptly to act in a manner consistent with the following:

Multiple licensed systems and cooperatives have been an integral part of the Part 90 regulatory environment for decades and should be retained as permissible licensing arrangements or permitted to convert to SMR status to ensure that the full range of PLMR user requirements continue to be satisfied.

To the extent third party commercial providers permit communications among employees of entities independently eligible under Part 90 of the FCC's rules, and do so at a lower-cost and likely with higher levels of spectrum efficiency and a broader menu of offerings than a comparable "purely internal" system, there is no question but that they serve the interests of the customers that use them and the public interest in deriving intensive use from limited spectrum.

Congress intended to distinguish consumer-oriented services such as cellular, paging, PCS and ESMR from internal and commercial systems serving the individualized requirements of the PLMR community. "Private" systems, whether internal or commercial, should be limited to those whose capacity is used by PLMR eligibles.

AMTA does not oppose the Band Manager concept. AMTA does agree with the FCC that it must properly balance the agency's desire to "privatize" its licensing process with its core statutory obligations. If the Commission determines to pursue this concept, among other matters, it must ensure that eligibility is sufficiently broad to permit participation by all interested, qualified parties and that the technical parameters governing use of the spectrum are not so broad as to discourage equipment development.

AMTA addressed the issue of whether non-commercial channels in the 800 MHz band should be assigned for commercial use in its Comments on the Nextel Waiver Requests which is incorporated by reference herein. AMTA's position has not changed. The spectrum in question has been licensed for over twenty years and is fully utilized in all but the most remote areas. If otherwise qualified licensees now wish to enter into voluntary assignment arrangements in respect to their authorizations, they should be permitted to do so.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Comments in the above-entitled proceeding.¹ The described purpose of the Notice is to seek comment on changes to the Commission's rules and policies to implement its new statutory authority to conduct spectrum auctions in certain heretofore exempted Private Land Mobile Radio ("PLMR") services.²

AMTA supports an investigation of the PLMR regulatory framework. Changes during the last decade in the business and governmental environment in which these systems operate demand an objective re-evaluation of their composition and their purpose. However, although AMTA endorses the FCC's initiative, the Association cautions that the instant proceeding is not sufficiently broad to solicit an overall consideration of the nature of these services and their regulatory future.

The PLMR industry is at a critical time in its history. It is experiencing increasingly intractable spectrum shortages while faced with unceasing demand for communications capability. The spectrum allocated to it generally is not fulfilling its full utilization potential since it typically is populated, indeed overpopulated, by what now is referred to euphemistically as "legacy" equipment and technology. This equipment was designed to meet the efficiency and operational demands of previous decades. It not only is incapable itself of supporting this industry's growing

¹ 47 C.F.R. § 1.415; *Notice of Proposed Rule Making*, WT Docket No. 99-87, 14 FCC Rcd ___ (rel. Mar. 25, 1999) ("Notice" or "NPR").

² Notice at ¶ 1. The FCC's auction authority was expanded when Sections 309(j) and 337 of the Communications Act of 1934 were amended by the Balanced Budget Act of 1997. Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) ("Balanced Budget Act").

requirements, but actively discourages the implementation of new, more efficient and advanced technologies in existing bands.

For that reason, AMTA submitted to the Commission last week a more revolutionary proposal for the revitalization of the 450-470 MHz PLMR spectrum, the working horse band for non-Public Safety PLMR operations. For the reasons described in the Petition and iterated in these Comments, the Association has become convinced that neither the current regulatory framework, nor the changes proposed in the instant NPR or other recent FCC proceedings, will produce efficiency improvements adequate to satisfy PLMR user requirements within any reasonable time frame. Therefore, the Association recommended the FCC adopt rules that provide geographic licensing opportunities on those channels, with a requirement to implement more efficient technology. AMTA further proposed a migration of incumbent licensees who do not obtain geographic authorizations either to a portion of the band that would be reserved for internal, shared use or to the more efficient, technically advanced systems implemented by geographic licensees. This combination of geographic licensing, advanced technology and channel clearing is essential to permit meaningful improvements in spectrum efficiency, an objective which, in the Association's opinion, must include quality of service in addition to number of radios accommodated. The Association hereby incorporates its July 30 Petition for Rulemaking to Relicense Certain Part 90 Frequencies to Require Spectrally Efficient Use by reference.³

³The Notice requests comment on AMTA's 1998 petition proposing that the FCC implement geographic licensing and efficiency standards on certain PLMR bands. Notice at ¶ 71. AMTA Petition for Rulemaking, RM-9332 (filed June 19, 1998). That Petition was placed on Public Notice. *Public Notice*, Report No. 2288 (rel. July 31, 1998). AMTA will not comment further on its original Petition in light of its more recently-filed Petition addressing many of the same matters.

I. INTRODUCTION

1. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry. The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") operators, licensees of wide-area SMR systems and commercial licensees in the 220 MHz and 450-512 MHz bands.

These members provide commercial wireless services throughout the county to the PLMR user community. Much of the spectrum on which AMTA's members operate has been available to commercial providers and operators of private, internal systems alike. Some was allocated for one or the other purpose but now supports both types of systems as channels became co-mingled through inter-service sharing provisions. Because the Notice addresses how and to whom this spectrum will be assignable in the future, the Association and its members have a significant interest in the outcome of the proceeding.

II. BACKGROUND

2. The genesis of the instant proceeding was the 1997 Congressional determination to expand the FCC's authority to include PLMR services that heretofore had been exempt from auction provisions. The 1993 legislation that first provided the Commission with statutory authority to assign licenses through competitive bidding procedures limited the applicability of that authority to spectrum, the principal use of which was reasonably likely to involve the licensee receiving compensation from subscribers, *i.e.* commercial services.⁴ The Commission concluded

⁴Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387, *as codified*, 47 U.S.C. § 309(j) ("1993 Budget Act"). That legislation also reclassified all land mobile services from their previous common carrier versus private designations to a Commercial Mobile Radio Service ("CMRS") or Private Mobile Radio Service ("PMRS") status. 1993 Budget Act at § 6002(b).

that authorizations in "private services", including PLMR systems used to transmit communications that are internal to the licensee's business, were not subscriber-based and, therefore, were not auctionable.⁵

3. Congress broadened the FCC's auction authority in 1997. It amended Section 309(j) to require the Commission to select among mutually exclusive applications for initial authorizations using competitive bidding procedures, except for the limited exemptions specified in the legislation. The exception at issue in the instant proceeding is defined as follows:

- (A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—
 - (i) are used to protect the safety of life, health, or property; and
 - (ii) are not made commercially available to the public.⁶

4. The "public safety" definition in the statute unquestionably is broader than the scope of the long-recognized Part 90 Public Safety Radio Services.⁷ Thus, the core issues in this proceeding are: (1) how to define the "public safety radio services" that remain exempt from

CMRS was defined generally as the provision of interconnected service to the public for profit. PMRS was defined as non-CMRS. 47 U.S.C. § 332(d)(2). Because not all commercial land mobile systems are interconnected with the Public Switched Network ("PSN"), there are commercial, as well as private internal, systems properly classified as PMRS.

⁵*Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) ("Competitive Bidding Second Report and Order"). By contrast, commercial PMRS systems satisfy the statutory standard for auctionability and have been awarded by auction in a number of instances. *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7,988 ¶¶ 337, 341 (1994); *Third Report and Order*, PP Docket No. 89-552, 12 FCC Rcd 10943 ¶¶ 216-218 (1997).

⁶47 U.S.C. § 309(j)(2).

⁷90 C.F.R. § 90.20.

auctions; and (2) adoption of an appropriate licensing framework for those PLMR services that do not fall within that definition and are, therefore, now auctionable.

III. DISCUSSION

A. Public Safety Definition

5. AMTA's members provide commercial communications services to PLMR users, including those that would be classified as public safety entities either under the FCC's current definition or pursuant to the statutory language. The Association's member/operators would not themselves be so defined under any circumstance. Therefore AMTA will defer from recommending a position on this highly controversial subject except to note that whatever decision is made necessarily will impact the allocation of spectrum between the recently established Public Safety and Industrial/Business Radio Pools.⁸

B. Private Wireless Issues

1.) Shared Use Systems

6. In addition to deciding how to license auctionable PLMR systems prospectively, the Notice seeks comment as to whether certain currently permissible PLMR licensing arrangements, such as multiple licensed systems and cooperatives, are distinguishable from commercial systems

⁸One highly positive aspect of the Commission's ongoing "refarming" proceeding was elimination of the multiplicity of outdated Part 90 Radio Services in favor of a Public Safety and an Industrial/Business Radio Pool. *Second Report and Order*, 12 FCC Rcd 14307 (1997). The existing Part 90 channels were similarly sub-divided. To the extent the FCC determines it is required to expand its Public Safety definition to conform to the statutory language, there could be a corollary requirement to redistribute channels from the Industrial/Business to the Public Safety Pool. Further, AMTA would hope that whatever decision is reached in respect to the Public Safety definition would obviate the need to consider the so-called "Critical Infrastructures Industries" effort to avoid potential auctionability by seeking to have themselves reclassified as Public Service (Public Safety-like) licensees with a separate frequency pool. Notice at ¶ 41.

authorized to provide service on a for-profit basis.⁹ To the extent both commercial and private, internal PLMR systems now are subject to competitive bidding, this issue arguably is significant primarily to ensure that this licensing option does not exempt what otherwise would be auctionable Public Safety operations.¹⁰ However, in considering the Commission's inquiry it is instructive to understand the role such systems have played in serving the needs of the PLMR user community.

7. It is essential to recall that all Part 90 spectrum was available only on a shared basis until the FCC reallocated certain channels and bands above 470 MHz to land mobile from the broadcast services.¹¹ Most Part 90 bands and channels remain shared today, with a very recent, modest provision for a type of channel exclusivity below 800 MHz.¹² Frequencies were available on a party line basis with a requirement that licensees monitor before transmitting to avoid disrupting co-channel transmissions.

8. The licensees of these PLMR systems range from the largest corporate entities such as General Motors and IBM to a plumber with a base station and two mobile units. Their commonality is that radio communications is a tool they use to operate their primary businesses, not a business in and of itself. The largest companies have always been financially and technically capable of selecting, implementing and operating their own systems, and sometimes have an

⁹Notice at ¶¶ 45-51.

¹⁰As noted previously, new § 309(j)(2) exempts only those public safety services provided by not-for-profit organizations. 47 U.S.C. § 309(j)(2).

¹¹*First Report and Order*, Docket No. 18261, 23 FCC 2d 325 (1970); *Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974).

¹²47 C.F.R. § 90.187.

individual or department devoted to the maintenance of their facilities.¹³ By contrast, many small companies have neither the time, the money nor the inclination to develop an expertise in communications or to implement a system that would adequately accommodate their communications needs.¹⁴

9. For example, most Part 90 licensees would not be able to afford independently the monthly site rent for a tower or rooftop which would provide the necessary coverage, particularly as low-band and high-band channels became intensively used and users were encouraged to operate on higher frequencies with more limited range. Moreover, if each such entity was required to construct a separate system, it would become increasingly difficult to coordinate their shared channel use to permit any of them to enjoy a viable communications capability

10. These practical realities were the genesis of cooperative and multiple licensed systems, or community repeaters, which have been determined by the Commission to be "permissible practices as a matter of law and desirable as a matter of public policy."¹⁵ These arrangements allowed PLMR users access to equipment, sites and operational capabilities that

¹³Of course, even very large Part 90 eligibles may elect to contract with a third-party equipment supplier or local service shop to perform a variety of functions, including building, maintaining and managing their radio facilities.

¹⁴ We emphasize that licensees in the PLMRS have not, and do not now, provide their own equipment or maintain it, at least as a general rule. Instead, they rely heavily on third-party equipment companies to provide them with the necessary communications gear, to install it, and to service and maintain it. *Tentative Decision and Further Inquiry and Notice of Proposed Rule Making*, Docket No. 18921, 49 RR 2d 1085 at n. 8 (1981).

¹⁵*Report and Order*, Docket No. 18921, 51 RR 2d 355, 359 (1982).

otherwise would have been unavailable to them, particularly smaller users. The multiple licensed system was the predecessor to today's private carrier in the bands below 800 MHz¹⁶ and the SMR system in the bands above 800 MHz¹⁷, both of which have contributed significantly to the availability of more advanced, higher-capacity communications capability for PLMR users. They have permitted more efficient, more intensive use of the available PLMR spectrum than could have been achieved had each radio user been required to implement its own system. They have been an integral part of the Part 90 regulatory environment for decades¹⁸ and should be retained as permissible licensing arrangements¹⁹ or permitted to convert to SMR status to ensure that the full range of PLMR user requirements continue to be satisfied.

¹⁶ A "private carrier" is defined as "[a]n entity licensed in the private services and authorized to provide communications service to other private services on a commercial basis." 47 C.F.R. § 90.7.

¹⁷An SMR system is defined as:

A radio system in which licensees provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this part, federal government entities and individuals. 47 C.F.R. § 90.7.

¹⁸The FCC's renewed interest in these licensing arrangements initially was triggered when it first was permitted to auction spectrum being put to commercial use. *See, Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411, 1430. The instant inquiry was initiated by the subsequent expansion of the Commission's auction authority. Nonetheless, the Association is confident that disposition of this issue will be determined by the FCC's consideration of its public interest obligations rather than the economic implications, if any, of its decision.

¹⁹This assumes, of course, that such systems are operated in compliance with applicable FCC rules and policies. To the extent they are not, as implied in the Notice, the FCC can exercise its enforcement authority on a case-by-case basis as it does in other compliance proceedings.

2.) Commercial Private Systems

11. As discussed above, it is the very diversity of the PLMR user community in terms of company size and resources, both human and economic, as well as individual communications requirements that has dictated the availability of a broad variety of communications options. Some needs are met by implementing a private internal system. Others are well-suited to operation on a multiple licensed system or as part of a cooperative. However, another alternative is to receive service from a third party commercial provider such as the Association's members. To the extent these systems permit communications among employees of entities independently eligible under Part 90 of the FCC's rules, and do so at a lower-cost and likely with higher levels of spectrum efficiency and a broader menu of offerings than a comparable "purely internal" system, there is no question but that they serve the interests of the customers that use them and the public interest in deriving intensive use from limited spectrum.

12. This same analysis is applicable to the inquiry in the NPR regarding the proper interpretation of the statutory phrase "to the public".²⁰ The Association has long argued that this language was intended by Congress to mean more than the difference between an internal and a commercial system since the phrase is part of a definition that also includes the delimiting term "for profit".²¹ AMTA has taken the position, one it believes is supported fully by the Report language describing the CMRS/PMRS delineation, that Congress intended to distinguish consumer-oriented

²⁰Notice at ¶ 51.

²¹This term was first included in the 1993 definition of CMRS. *See*, 47 U.S.C. § 332(d)(1).

services such as cellular, paging, PCS and ESMR from internal and commercial systems serving the individualized requirements of the PLMR community.²²

13. "Private" systems, whether internal or commercial, are limited to those whose capacity is used by PLMR eligibles. The Specialized Wireless providers referenced in AMTA's recent Petition, which constitute the Association's membership, always have served the PLMR user marketplace. They typically have had neither the channel capacity nor the geographic scope to support an investment in infrastructure that would, in turn, enable them to market their systems as a communication option for the general public. Most commercial systems licensed under Part 90 have technical characteristics and operational parameters essentially identical to their internal counterparts, and entirely dissimilar from the consumer-oriented cellular, paging, PCS and ESMR systems Congress intended to define as CMRS. However the FCC defines the term "to the public" for purposes of the public safety issues raised in the Notice, AMTA urges the agency to reconsider its previous conclusion that all commercial systems provide service "to the public" and therefore are classified as telecommunications carriers and that all interconnected commercial systems are considered CMRS for the same reason -- irrespective of the amount of spectrum or geography for which they are authorized.

²²AMTA, Comments, GN Docket No. 93-252 (filed Nov. 8, 1993); AMTA, Petition for Reconsideration, GN Docket No. 93-252 (filed May 19, 1994) incorporated herein by reference; H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993).

3.) Band Manager Concept

14. In the Notice, the Commission also solicits comment on whether the public interest would be served by creating a new licensee category known as a "Band Manager".²³ The NPR envisions an entity that would acquire a license through competitive bidding and be required to use the spectrum purchased to serve PLMR requirements. It contemplates permitting the Band Manager licensee to sublicense portions of its authorization to defined eligible PLMR users through private contractual arrangements. The FCC questions how this concept conforms to the agency's spectrum management responsibilities and its statutory obligation to determine whether the public interest, convenience and necessity is served by the grant of authority to a particular entity for the use of particular spectrum.

15. In many respects, the Band Manager is analogous to the existing private carrier or SMR operator. The latter already are commercial licensees, subject to whatever competitive bidding procedures the FCC elects to implement. They provide service to PLMR eligibles as a result of their independent business judgement, not regulatory obligation. To the extent they hold geographic licenses, they are permitted to partition their geographic area and/or disaggregate their channels. They operate in a highly competitive environment and thereby "ensure that available spectrum is used in the most economically efficient manner to meet the varied and assorted needs of the private user community."²⁴

²³Notice at ¶¶ 88-95.

²⁴Notice at ¶ 92.

16. Thus, AMTA does not oppose the Band Manager concept. It is strikingly similar to the Wireless Service Provider definition above, to which virtually all of the Association's members conform already. AMTA does agree with the FCC that it must properly balance the agency's desire to "privatize" its licensing process with its core statutory obligations. If the Commission determines to pursue this concept, among other matters, it must ensure that eligibility is sufficiently broad to permit participation by all interested, qualified parties and that the technical parameters governing use of the spectrum are not so broad as to discourage equipment development. As AMTA and others noted in their recent comments on the proposed 746-806 MHz reallocation, the public is not necessarily served when the technical rules governing an allocation are so "flexible" that manufacturers are unable to identify a market of adequate size to support an investment in research and development.²⁵

4.) Auction Design

17. AMTA believes it is premature for the Commission to finalize its auction design for the services under consideration. Until decisions are reached regarding the types of licenses and the spectrum to be included, it is not possible to provide meaningful comment on this subject. In light of the extensive work the FCC has already completed in respect to its auction rules generally, the Association is confident that provisions specific to this proceeding will be able to be finalized expeditiously once the necessary policy decisions have been reached.

²⁵*Notice of Proposed Rule Making*, WT Docket No. 99-168: AMTA, Comments at 3-6; Motorola Comments at 3-6; Industrial Telecommunications Association, Inc. ("ITA") Comments at 5; Personal Communications Industry Association (PCIA) Comments at 2 (filed July 19, 1999).

5.) Nextel Waivers

18. On July 21, 1999, the Commission issued an Order conditionally granting in part and denying in part certain Requests for Waiver filed by Nextel Communications, Inc. ("Nextel") requesting FCC consent to assignment of 800 MHz Business and Industrial/Land Transportation channels from various licensees to Nextel.²⁶ The Waiver Requests stated that Nextel proposed to use the channels acquired either as replacement spectrum for incumbents relocated from the upper 200 800 MHz SMR channels or to expand Nextel's own digital iDEN system.²⁷

19. The Commission granted the Waiver Requests for purposes of relocating 800 MHz incumbents, but denied them to the extent Nextel proposed to incorporate the channels in its own system.²⁸ The FCC considered the practical effect of the latter as establishing a rule of general applicability pursuant to which the channels in question would be assignable to all qualified SMR licensees, and determine that such an issue must properly be decided in the context of a rule making proceeding.²⁹ Since the issue of the Nextel Waiver Requests had been cited in the NPR, the FCC has incorporated the independent record developed on the Waiver Requests into the instant proceeding, and requested comments on whether non-commercial channels in the 800 MHz band should be assignable for commercial SMR use.³⁰

²⁶*Order*, DA 98-2206, 14 FCC Rcd ____ (rel. July 21, 1999).

²⁷*Id.* at ¶ 6.

²⁸*Id.* at ¶¶ 26-27.

²⁹*Id.* at ¶ 31.

³⁰*Id.* at ¶ 32.

20. AMTA has already addressed this issue in its Comments on the Nextel Waiver Requests which it incorporates herein by reference. The Association stated:

...the FCC already had endorsed this type of flexibility in respect to the 800 MHz frequencies under consideration when it provided for inter-category sharing among categories of eligibles. This option was available for much of the almost twenty years that these frequencies have been licensable. Because the 800 MHz band proved extremely attractive to non-commercial and commercial licensees alike, virtually all available B/ILT spectrum has been assigned in and around even third and fourth tier markets for a number of years; to the extent 800 MHz spectrum remains unassigned, it is only in the most remote geographic areas. Much of this spectrum is licensed to and operated by non-commercial licensees, but numerous SMR systems also include B/ILT channels acquired pursuant to inter-category sharing provisions, frequencies that may continue to be used in these commercial operations. To the extent that approval of the Requests would impact only already authorized spectrum, and would permit by voluntary agreement what has been permitted extensively already by regulation, AMTA supports their grant, as well as the grant of any similar requests.³¹

21. The Association's position has not changed. The spectrum in question has been licensed for over twenty years and is fully utilized in all but the most remote areas. If otherwise qualified licensees now wish to enter into voluntary assignment arrangements in respect to their authorizations, they should be permitted to do so.³²

³¹AMTA, Comments, *Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Nextel Communications, Inc. Waiver Requests Associated with its Proposed Acquisition of Private Mobile Radio Service Business Channels," DA 98-2206 at 5 (filed Nov. 27, 1998).

³²By contrast, in its Petition regarding a new licensing framework for the 450-470 MHz band, AMTA has recommended that some portion of that spectrum be reserved at the outset for non-commercial geographic licenses. The Association believes that "set-asides" are appropriate in an initial licensing process to promote broad participation by all interested, eligible entities.

IV. CONCLUSION

22. For the reasons described above, AMTA urges the Commission to proceed promptly to act in a manner consistent with the positions expressed herein.

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 August 2, 1999 caused to be hand delivered a copy of the foregoing

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