

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

In the Matter of)
)
Relicensing of Certain Part 90 Frequencies)
To Require Spectrally Efficient Use)

RM No. ~~9075 RM~~ 9705

TO: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

OPPOSITION TO PETITION FOR RULEMAKING

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SUMMARY

Private internal radio systems serve a vital function in the United States economy. These systems allow businesses to effectively manage and coordinate their day-to-day operations, and ensure the safety of personnel, consumers and the general public. AMTA's proposed licensing scheme represents a blatant, overreaching effort to convert the private radio spectrum for commercial use. The proposal, which calls for auctions and wide-area licensing in the 450-470 MHz bands and the forced relocation of hundreds of thousands of licensees to only 2 MHz of spectrum, is not only unfair to incumbent licensees who have invested in technologies pursuant to the Commission's existing rules, but it is entirely unworkable. Moreover, AMTA has not demonstrated a need for this drastic and disruptive course of action, especially when the Commission has just licensed PCS, 220 MHz and other geographic licensees who are positioned to provide the same type of service AMTA now proposes to facilitate. If the Commission disregards its statutory obligation to avoid mutual exclusivity in licensing proceedings and adopts AMTA's proposal, businesses throughout the country will be forced to operate without the benefits of affordable, customized, private radio service. The loss of spectrum for private internal use will have a severe adverse impact on public safety interests and the nation's economy. The clients of Blooston, Mordkofsky, Jackson & Dickens therefore urge the Commission to retain its existing regulatory framework which promotes the efficient use of private radio spectrum in a manner which is fair and equitable to the hundreds of thousands of businesses which rely on private internal radio systems.

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The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its clients listed in Attachment A hereto, and pursuant to Section 1.405 of the Commission's Rules, hereby submits its comments opposing the Petition for Rulemaking (hereinafter "Petition") filed by the American Mobile Telecommunications Association ("AMTA") on July 30, 1999 in the above-captioned proceeding.¹

I. Statement of Interest

Our clients include companies as large as Minnesota Mining and Manufacturing Co. ("3M"), which efficiently uses private radio operations carefully tailored to cover its manufacturing facilities; and many small and mid-sized companies that depend on private radio for internal communications necessary to carry on their business. Many of our clients are rural telephone or electric companies, which use their radios to ensure the

¹ American Mobile Telecommunications Association, Inc., *Petition for Rulemaking*, (July 30, 1999) ("AMTA's Petition").

proper installation, functioning, and maintenance of vital communications and power services in rural America; the Wilkinsburg-Penn Joint Water Authority uses its radios to ensure the proper functioning of public water systems, and to protect the public from emergencies related to these water operations; and others utilize the radios for internal security purposes; for fire and emergency alarms to ensure the safety of workers and property; to monitor industrial machinery; for the dispatch of taxicabs; and to coordinate road paving operations (and prevent automobile accidents around the paving site). Auto clubs such as the Automobile Club of Southern California and AAA Colorado rely on their private radio systems to satisfy the public's need for prompt emergency roadside assistance. As Congress noted in the Conference Report accompanying the Balanced Budget Act of 1997, AAA auto clubs serve a vital public safety role, providing services which "protect the safety of life, health, or property and are not made commercially available to the public."²

II. Introduction

In its Petition for Rulemaking, dated July 30, 1999, AMTA proposes a "fundamental restructuring of the licensing framework"³ governing frequencies in the 450-470 MHz band, and urges the Commission to take "revolutionary action"⁴ to facilitate the conversion of private internal radio spectrum for commercial use. Specifically, AMTA recommends that the Commission divide the existing 12 MHz of

² H.R. Rep. No. 105-217, at 517 (1997).

³ AMTA's Petition, at p. 1.

⁴ Id. at p. ii.

non-public safety spectrum in the 450-470 MHz band and license this spectrum as follows:

- Reserve a mere 2 MHz for continued use by shared systems, including low power systems.
- Re-allocate the remaining 10 MHz for geographic licensing (*i.e.*, auctions to commercial providers) with 25% of that spectrum reserved “temporarily” for private systems.
- Limit all auction applicants to one system per market.
- Restrict the commercial systems to providing service to Part 90 eligibles, and
- Require geographic licensees to implement more spectrally efficient equipment.

With regard to incumbents already operating on the 10 MHz of geographic area spectrum, AMTA proposes that they be forced to either:

- (1) relocate to the 2 MHz shared spectrum, at the expense of the geographic area licensee, or
- (2) accept service from the geographic area licensee, who would replace the incumbent licensee’s existing equipment with spectrally efficient equipment.

As demonstrated below, it would be imprudent, impractical, and adverse to the public interest to replace the Commission’s well-reasoned and efficient site-by-site licensing framework with AMTA’s proposed licensing scheme, which so clearly favors commercial service providers at the expense of private internal radio users. AMTA’s proposed course of action, if followed by the Commission, will lead to the inefficient use of spectrum, undermining progress made in the Commission’s “refarming” proceeding,⁵ and result in a devastating loss of spectrum for private internal radio users. This arrangement would disrupt operations of hundreds of thousands of businesses, and strand

⁵ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10076 (1995).

billions of dollars in existing communications infrastructure, resulting in a severe adverse impact on the nation's economy. Accordingly, the Commission should deny AMTA's Petition.

III. The Existing Licensing Scheme and Regulatory Framework Promotes the Efficient Use of Private Radio Spectrum

The vast majority of commenters in the Commission's private radio spectrum auction proceeding⁶ have urged the Commission to retain the existing frequency-by-frequency, site-by-site licensing method for private radio frequencies, demonstrating that auctions and geographic area licensing are entirely inappropriate for private radio services. AMTA, in recommending that the Commission auction Economic Area ("EA") licenses for most of the spectrum in the 450-470 MHz band, to promote "more intensive use of existing spectrum",⁷ completely ignores the special characteristics and operational needs of the private radio community which mandate that the Commission retain the existing site-based licensing scheme for private radio services.

In its Petition, AMTA notes that the Commission has already converted several site-based licensing systems with auction systems, and argues that the Commission should follow this trend which "produced unprecedented levels of cost-and spectrum

⁶ 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, *Notice of Proposed Rulemaking*, FCC 99-52 (rel. March 25, 1995).

⁷ AMTA's Petition, at p. 17.

efficiencies for Part 90 users.”⁸ AMTA cites to the “SMR experiment” (referring to the Commission’s introduction of auctions for specialized mobile radio (“SMR”) licenses in the 800 MHz band), as a suitable model for the Commission to use when formulating a licensing scheme for frequencies in the 450-470 MHz band.

Contrary to AMTA’s claim, the “SMR experiment” has not produced cost or spectrum efficiencies for Part 90 users. Commercial dispatch users have complained about Nextel’s draconian methods of creating “spectrum efficiencies” in the 800 MHz band, and the unreasonable costs which Nextel has imposed for the use of its commercial system. It appears that Nextel, in converting the traditional SMR systems in the 800 MHz to a wide-area commercial network, has forced private radio users to replace their spectrally efficient radios with higher cost equipment, and has imposed a cost for the use of its commercial system which is four times greater than before.⁹ This cost would be even greater for most internal private radio users, who have established their own networks because it was less costly and more efficient than hiring the cheaper, basic dispatch services which Nextel has replaced. It is clear that the AMTA proposal would

⁸ Id., at p. 12.

⁹ The Commission has recognized that, despite a 50 percent increase in demand for dispatch services, Nextel “converted systems used for analog dispatch service to higher priced digital mobile telephony services.” Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fourth Report*, FCC 99-136 (rel. June 24, 1999), at p. 7. Indeed, as Nextel converts 800 and 900 MHz spectrum to its hybrid cellular/digital dispatch operation, it ceases to provide basic, inexpensive dispatch service. See, e.g., *Nextel to Turn Off S.D. Analog Network*, *Wireless Week*, May 24, 1999, at pp. 1, 3 (Attachment B).

follow in the footsteps of the Nextel model, by establishing wide area 20 channel systems “that licensees [would] be permitted to integrate...freely into larger networks.”¹⁰

In this regard, AMTA fails to recognize that SMR and commercial radio licensees and private internal radio licensees do not have the same communications needs and coverage requirements. In contrast with commercial radio services, which emphasize widespread coverage areas and roaming capabilities, private radio systems are generally designed to serve small or distinct geographic areas. Moreover, the systems are often designed with specially tailored capabilities to suit the private user’s needs. AMTA’s members have not to date found it profitable to customize SMR systems to meet these particular needs, and it is unlikely that they will in the future. Likewise, it is not practical to require that private radio users build out systems for a geographic area which exceeds their operational needs, and such licensing scheme will lead to the inefficient use of spectrum. Therefore, AMTA’s proposal to invite private users to the proposed auction, as a cure for their forced relocation, completely lacks merit.

It is also imprudent to convert the shared private radio channels to exclusive licensing, when the shared licensing system is a far more spectrally efficient system for private users. The existing shared use licensing procedure, which allows several users with different coverage areas and capacity requirements to use the same frequencies effectively, promotes the “efficient and intensive use of the electromagnetic spectrum”,¹¹ one of Congress’ fundamental public interest objectives. The Commission, under Section 309(j)(4)(C) of the Communications Act of 1934 (the “Communications Act” or “Act”)

¹⁰ AMTA’s Petition, at p. 14.

¹¹ 47 U.S.C. § 309(j)(3)(D).

must consider “the public interest, convenience, and necessity, the purpose of this Act, and *the character of the proposed service*” when designing competitive bidding systems.¹² Pursuant to this mandate, the Commission must reject AMTA’s proposal, given the nature of private radio systems which requires site-by-site licensing.

AMTA claims nonetheless that the implementation of its proposal is necessary to promote greater efficiency in the 450-470 MHz bands and to provide an incentive for existing licensees to deploy more efficient equipment. The Commission, however, through its “refarming” initiative, has already adopted extensive rule changes which will provide the private radio industry “with a regulatory framework that promotes efficient use of spectrum, increases technical flexibility, enhances the deployment of new technologies, and promotes the competitive and robust marketplace for product development.”¹³ These rule changes reflect the Commission’s sound reasoning, careful analysis, and full consideration of hundreds of comments and petitions. While it may be true that the implementation of these rule changes has been slow, frustrated by the medical telemetry issue, it will not be long before the industry begins migration to narrowband equipment. This migration will not be entirely “voluntary”. The Commission will soon be licensing high power operations on the 12.5 kHz offset channels in the 450-470 MHz band, making it necessary for low power users and 25 kHz

¹² 47 U.S.C. § 309(j)(4)(C) (as amended by the Balanced Budget Act of 1997, § 3002).

¹³ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-

primary channel users to migrate to narrowband equipment to avoid interference. Moreover, there will soon be very little 25 KHz equipment available, due to changes in the 450-470 MHz equipment approval requirements. Since the conversion to spectrally efficient equipment in the 450-470 MHz bands is imminent, the adoption of AMTA's proposal, which calls for "revolutionary action" after years of planning and analysis, is unnecessary. In any case, if the slow progress of this conversion is AMTA's primary concern, the Commission could simply establish a reasonable time framework for private radio licensees to deploy narrowband equipment. To the extent that AMTA's Petition takes issue with the existing regulatory scheme, it constitutes a grossly late petition for reconsideration of the Commission's action in the refarming proceeding.

IV. The Commission Must Avoid Mutual Exclusivity

AMTA, in urging the Commission to auction geographic licenses in the 450-470 MHz band, has essentially asked the Commission to disregard its statutory obligation to avoid mutual exclusivity. Under Section 309(j)(6)(E) of the Act, the Commission is obligated "to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."¹⁴ If the Commission adopted AMTA's proposal, it would be ignoring this provision of law by artificially creating mutual exclusivity when it does not normally exist in the private radio bands.

235, PR Docket No. 92-257, *Memorandum Opinion and Order*, 11 FCC Rcd 17676 (1996).

¹⁴ 47 U.S.C. § 309(j)(6)(E).

Indeed, several members of Congress have reminded the Commission of its statutory obligation to avoid mutual exclusivity. In a letter to Chairman William Kennard, dated December 28, 1998, six Congressional leaders indicated that they were “concerned that the Commission was ignoring its obligations under Section 309(j)(6)(E)” and that Congress “did not engage in an idle act” when it reaffirmed the Commission’s responsibility to avoid mutual exclusivity in licensing.¹⁵ As noted in their letter, Section 3002 of the Balanced Budget Act of 1997 amended the Commission’s auction authority to read as follows:

*If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.*¹⁶

By including a reference to Section 309(j)(6)(E) in its amendment, Congress clearly intended to prevent the Commission from licensing shared spectrum by competitive bidding. This intent is manifest in the Conference Report to the Balanced Budget Act of 1997, which states that:

Notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission’s obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section

¹⁵ Letter to Chairman William E. Kennard from Rep. John D. Dingell, Rep. W. J. Tauzin, Sen. Tom Daschle, Sen. John B. Breaux, Sen. Spencer Abraham, and Sen. Slade Gorton (December 22, 1998).

¹⁶ Pub. L. No. 105-33, § 3002 (1997) (emphasis added).

309(j)(6)(E), thus overlooking the engineering solutions, negotiations, or other tools that avoid mutual exclusivity.¹⁷

Based on this language, it is clear that the Commission lacks the statutory authority to adopt AMTA's geographic licensing proposal, because this action would flout the purpose and intent of Section 309(j)(6)(E) of the Act by artificially creating mutual exclusivity rather than avoiding it. The express language of Section 309(j), and its legislative history, unequivocally establish that the Commission is obligated to preserve the shared use licensing methodology in the private internal radio services.

V. The Adoption of AMTA's Proposal Will Lead to the Plundering of Private Spectrum by Commercial Service Providers Who Do Not Have an Incentive to Provide Customized Service

AMTA's proposal to allocate most of the private spectrum in the 450-470 MHz bands for commercial use through an auction process threatens the survival of the private internal radio industry. The proposal favors large, commercial service providers at the expense of small and medium-sized businesses which lack the financial resources necessary to participate in auctions and build-out wide area systems. The adoption of AMTA's proposal will make it difficult, if not impossible, for many traditional private users to obtain licenses; and its forced relocation of these users would result in a grand-scale plundering of the private radio spectrum by commercial wireless service providers who will be unable or unwilling to provide, at a reasonable cost, the customized services which hundreds of thousands of businesses need to effectively compete in the global marketplace, and to ensure public safety.

¹⁷ H.R. Conf. Rep. No. 105-217, 105th Cong. 1st Sess., at 572 (1997).

Businesses throughout the United States, both large and small, rely on private radio systems to support their day-to-day operations, and to ensure the safety of personnel, consumers and the general public. As the Commission has stated, “[p]rivate land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories.”¹⁸ Private radio systems are used for dispatch purposes, and to effectively control, monitor and coordinate the activities of workers and machines. Private radio is also used as a vital communications tool during emergencies and inherently dangerous situations. Manufacturers handling hazardous materials, for example, use private radio systems extensively to monitor the safety of workers and for emergency response communications. Other businesses rely on private radio as an emergency backup during natural disasters or other large-scale emergencies, when commercial telephone networks are damaged, or too congested, to enable effective emergency relief communications.

Companies like Western Atlas International, Inc. use radio signals to synchronize the operations of giant seismic sensors which must create vibrations on the earth’s surface with precise timing in order to locate underground oil and mineral deposits. IMC Agrico Company (“IMC”) utilizes low-power radios to control giant 200 horsepower pumps and related pipelines used for gathering and transporting phosphate rock used in the fertilizer manufacturing process. The phosphate rock is embedded in soil which is

¹⁸ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket 92-235, *Memorandum Opinion and Order*, 11 FCC Rcd 17676, 17719 (rel. December 30, 1996).

mined and mixed with water, and the resulting slurry is transported over several miles of pipeline to the IMC processing plant, where the phosphate rock is extracted and the soil is returned to the mining site so that it can be environmentally restored. The radios are vital to this operation, by allowing control of the flow of water to the mining site, control of the flow of slurry, and monitoring of pipeline pressure at each segment, to prevent a potentially deadly explosion or an environmental catastrophe. Experience has shown that commercial communications providers will not see a profit motive in dedicating their spectrum to such specialized radio operations. These types of specialized needs spawned the creation of the current Private Radio allocation years ago, and these needs must be met today and in the future. An effective mineral strike or mining operation may generate little profit for a commercial provider, but can mean millions of dollars for the United States economy.

If the Commission adopts AMTA's proposal and allows further commercial infringement of the private radio spectrum, businesses throughout the United States will be forced to contract with commercial service providers for inadequate service at an unreasonable cost, if such service is available at all. Many businesses will likely have no choice but to do without the benefits of private radio. Without adequate private radio service, these businesses will not be able to manage their businesses as efficiently, and will be less capable of developing and deploying "new technologies, products, or services for the benefit of the public."¹⁹ Moreover, without effective use of private radio systems,

¹⁹ 47 U.S.C. § 309(j)(3)(A).

they will be less capable of protecting the safety of workers, consumers, and the public in general.

The Wireless Telecommunications Bureau (“WTB”), in a 1996 report prepared to provide a background for future policy decisions regarding the private radio services, identified some of the unique needs and requirements of the private radio industry, and described the public safety dangers associated with re-allocating private spectrum for commercial use.²⁰ The WTB observed, for example, that private internal radio users require instant, “push to talk” access to communications channels to ensure public safety and to coordinate daily activities. As the WTB explained, “push to talk”, instant communications is critical in emergency situations, when “dialing phone numbers or access codes could literally be the difference between life and death.”²¹ The Land Mobile Communications Council (“LMCC”), in a Petition for Rulemaking submitted to the Commission on April 22, 1998, noted that instant access is “particularly necessary during disasters and emergencies when public telecommunications circuits are often severed or jammed with calls.”²² The LMCC aptly cited to the Oklahoma City bombing incident, when “local response teams were having difficulty communicating when using cellular telephones” as an example of the private radio industry’s need to communicate instantaneously in order to effectively respond in emergency situations.²³

²⁰ See Wireless Telecommunications Bureau, *Private Land Mobile Radio Services: Background* (December 18, 1996) (“*White Paper*”).

²¹ *Id.* at p. 25.

²² Land Mobile Communications Council, *Petition for Rulemaking*, 21-22 (April 22, 1998) (“LMCC Petition”).

²³ *Id.* at p. 22 (quoting language in a Petition for Rule Making filed by National Communications System in October 19, 1995).

The WTB also acknowledged the need of private radio users to control their own communications networks, “especially in times of emergency or disaster.”²⁴ As discussed in the WTB’s report, private internal radio users rely on precise, absolute control over their communications network to manage their daily production processes and to respond effectively in emergency situations. Forcing private internal radio users to cede the control of these vital functions to a commercial provider raises serious safety concerns, in addition to cost issues. A commercial provider may change its network, merge with or acquire another company, change its equipment, priorities or business plan, or cease to do business altogether, leaving private users with inadequate or no communications capabilities.²⁵

In addition, as discussed in the WTB’s report, private internal radio users have a special need for increased capacity during emergencies or peak hours, unique coverage requirements, a need for flexibility, and a need for specialized equipment which meets regulatory standards and is intrinsically safe and secure. With regard to their unique coverage requirements, the WTB accurately noted in its report that private users “often have specific coverage requirements that are not easily met by commercial service providers.”²⁶ The forest industry, for example, cannot receive adequate services from commercial providers because propagation characteristics make penetration of dense wooded areas difficult for cellular and PCS providers. Airlines and manufacturers also

²⁴ *White Paper*, at p. 25.

²⁵ *Id.*, at pp. 25-26.

²⁶ *Id.*, at p. 28.

have unique coverage requirements which cannot be satisfied by commercial services. Airlines have operations under airports, where commercial services do not penetrate, and manufacturers often need coverage in underground tunnels or in other environments where commercial providers cannot provide service.²⁷ With regard to the private radio industry's specialized equipment requirements, the WTB has acknowledged that many private radio licensees need reliable internal radio communications to coordinate operations in explosive environments (*e.g.*, fuel depots, oil refineries, paint shops, etc.), and therefore require intrinsically safe radios which are designed not to spark when activated. Such radios are not available on commercial systems.

AMTA apparently does not recognize the value of *customized*, private radio systems, or it naively believes that the traditional private radio users will be able to receive such service from commercial providers at a reasonable cost. As discussed above, commercial service providers do not have an incentive to provide the specialized features and capabilities private internal radio users require. It simply would not be cost effective for commercial providers to offer such specialized services, particularly to users in remote areas. As the Wireless Telecommunications Bureau ("WTB") succinctly explained, "[p]rivate systems serve a great variety of communication needs that *common carriers and other commercial service providers historically have not been able or willing to fulfill.*"²⁸ Basing its observations on comments submitted by entities which had been adversely impacted by the Commission's decision to auction geographic licenses in the 800 MHz band, the WTB stated further that "[p]rivate users represent a 'thin and

²⁷ See *Id.*, at pp. 28-29.

²⁸ *Id.*, at p. 7 (emphasis added).

unique market' that commercial providers have little incentive to invest in to serve; there is usually not enough of a return involved to justify the capital investment to serve one or a few private customers."²⁹ The WTB's observations are accurate. Thus, it is clear that traditional private radio users will not be able to receive reliable, specialized private radio service from commercial providers. It is therefore unreasonable for AMTA to suggest that "operational incumbents could elect to receive service from a commercial geographic licensee."³⁰

VI. Businesses Need Private Spectrum, Not More Commercial Services

AMTA has asked the Commission to change its rules to provide commercial opportunities for "Specialized Wireless" users in the 450-470 MHz band which mimic the existing SMR opportunities. According to AMTA's licensing plan, 10 MHz of spectrum would be divided into licenses of approximately .5 MHz of paired, contiguous spectrum, creating twenty licenses for each Economic Area ("EA").³¹ Thus, AMTA proposes to go down the same road that Nextel has already traveled. There would be little room for customization of service. Instead, such EA licensees would be required to provide "plain vanilla" services to create enough revenue to satisfy their auction debt and any build-out requirements the Commission may impose. Thus, as discussed above,

²⁹ Wireless Telecommunications Bureau, *Private Land Mobile Radio Services: Background*, 23-24 (December 18, 1996) ("*White Paper*").

³⁰ AMTA's Petition, at p. 16.

³¹ *See Id.*, at p. 13.

AMTA's proposal would create a disincentive for customization of service, and push users toward inadequate and costly Nextel-like services.

The Commission has already allocated a significant amount of spectrum for commercial mobile wireless services, to the extent that there now appears to be a glut of commercial mobile wireless licenses.³² For example, the Commission has allocated 120 MHz of spectrum to broadband PCS, which has been divided into 6 bands: 3 bands each containing 30 MHz, and 3 bands each containing 10 MHz.³³ Four licensees in each market (Blocks C, D, E and F) are licensed for Basic Trading Area ("BTA") sized service areas, comparable to the EAs which AMTA proposes. Many of these licensees (especially the 10 MHz block holders) will have to focus on "niche" services in order to compete against the larger carriers, and therefore can provide the type of commercial service AMTA contemplates. A total of 50 MHz of spectrum has been allocated to cellular, divided between two cellular carriers, each allocated 25 MHz of spectrum,³⁴ and

³² The reduction in the value of PCS licenses since the first C-Block auction is an indication that there is a glut of wireless services in the market. Wall Street's reevaluation of PCS spectrum value, prompted by a growing awareness of the intense competition among wireless providers, was among the factors that led many original C-Block bidders to declare bankruptcy. See, e.g., Tam Harbert, *Into Thin Air; the FCC's Spectrum Auctions Prove Failures*, *Electronic Bus.*, Feb. 1998, at 42; Jeffrey Silva, *Many People, Motives to Blame for C-Block Auction Debacle*, *Radio Comm. Rep.*, Oct. 6, 1997, at 16.

³³ See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GN Docket No. 90-314, 9 FCC Rcd 4957, 4963, 4970-71 (rel. June 13, 1994).

³⁴ See Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems: Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Band for Private Land Mobile User; Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier

approximately 19 MHz of spectrum is available for use by SMRs, 14 MHz in the 800 MHz band and 5 MHz in the 900 MHz band.³⁵ In addition to the 120 MHz of spectrum allocated for broadband PCS services, the Commission has designated 100 MHz of spectrum in the 1.85 – 2.20 GHz band for emerging technologies, including advanced digital cellular and PCS services,³⁶ and has initiated a plan to allocate additional spectrum to support “third generation” communications systems.³⁷ Moreover, the Commission has indicated that there will be 36 MHz of spectrum available for commercial services as a result of the movement from analog to digital television broadcasting.³⁸ Thus, AMTA’s proposal to create Nextel-like services would be duplicative of these other services.

Services, *Report and Order*, GEN Docket No. 84-1231, 2 FCC Rcd 1825 (rel. September 26, 1986).

³⁵ See Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Annual Report*, FCC 97-75, 12 FCC Rcd 11266, 11309 (rel. March 25, 1997). There is a need for additional 800 MHz and 900 MHz spectrum to allow expansion by existing SMR providers, who have invested heavily in their technology.

³⁶ See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rulemaking*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

³⁷ See Commission Staff Seek Comment on Spectrum Issues Related to Third Generation Wireless/IMT-2000, *Public Notice*, 3 FCC Rcd 16221 (August 26, 1998).

³⁸ See Service Rules for the 746-764 and 776-794 MHz Bands, and Revision to Part 27 of the Commission’s Rules, *Notice of Proposed Rulemaking*, FCC 99-97, WT Docket No. 99-168 (rel. June 3, 1999).

Moreover, the Commission has just licensed numerous systems in the 220 MHz band for the express purpose of promoting dispatch service.³⁹ These systems will operate using multiple channels over discrete service areas, in the same fashion proposed by AMTA for the 450-470 MHz band. The adoption of AMTA's proposal will interfere with the ability of these start-up licensees to attract capital and gain the market share needed to sustain their operations, and will reduce the value of commercial mobile radio licenses already assigned. Considering the results of the PCS C-Block auction, which ended in numerous bankruptcies, and the fall in value of PCS spectrum following that auction, there is a real question as to whether the market can support all the existing commercial providers. There is, however, a demonstrable shortage of private spectrum, and businesses throughout the country have a compelling need for this spectrum.⁴⁰ Businesses which can benefit from the wide-area coverage and telephone-like service provided by these carriers can avail themselves of such services, and thus there is no need to turn private radio spectrum into commercial spectrum. To ensure the survival of the private radio industry, it is imperative that the Commission deny AMTA's Petition.

VII. AMTA's Proposal is Impractical and Will Lead to an Unnecessary Waste of the Commission's Resources

³⁹ 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, *Report and Order*, PR Docket 89-5526 FCC Rcd 2356 (1991).

⁴⁰ See LMCC Petition, at 10 (citing a report by the National Telecommunications and Information Administration which found that "while there was a wide-spread need for additional spectrum across nearly all wireless services, the most critical need was for the land mobile services.").

AMTA's proposal to relocate hundreds of thousands of incumbent licensees to only 2 MHz of spectrum is specious. In essence, AMTA has asked the Commission to create a "ghetto" for incumbent licenses operating in the 450-470 MHz bands. The proposal is unfair to incumbents, who have made significant investments in their systems pursuant to the Commission's existing rules and licensing framework,⁴¹ and may constitute an unconstitutional undertaking. It is also entirely unworkable. Relocating the incumbents will lead to an upheaval of rights, interests, licenses, business expectations, and the circumstances of the private radio marketplace. AMTA indicates that incumbent private users would be able to elect to have their service provided, and equipment replaced free of charge, by the commercial auction winner.⁴² However, AMTA does not address what will happen if the auction winner is unwilling or unable to honor such election. Start-up auction winners will likely not be able to afford to replace all incumbent licensee systems at once, yet interference to these systems may start as soon as the first trunked system is put into place. Moreover, AMTA has not proposed that the auction winner be required to truly replace the incumbent's system, instead taking the position that "geographic licensees must not be obliged to design their more efficient systems to accommodate the operation of existing licensees."⁴³ Moreover, the relocation of hundreds of thousands of licensees will embroil the Commission in numerous controversies, and will require the Commission to devote substantial resources to process

⁴¹ The LMCC estimated in 1993 that \$25 billion of aggregate investment had been made in private radio systems in just the 150-174 and 421-512 MHz bands. Land Mobile Communications Council filed in PR Docket No. 92-235, April 28, 1993, p. 5.

⁴² AMTA's Petition, at p. 16.

⁴³ Id., at p. 15.

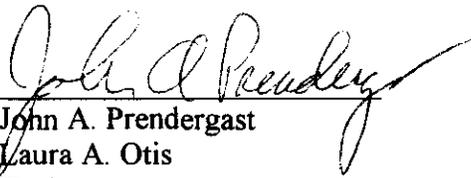
applications and resolve the licensing disputes.⁴⁴ In short, the adoption of AMTA's proposal will create a logistical nightmare, and lead to an unnecessary waste of the Commission's resources.

⁴⁴ AMTA's proposal to serve as a clearing house smacks of the fox volunteering to watch the hen house. Relocating incumbent licensees will be controversial, and the Commission cannot delegate the task to an entity that has an incentive to be biased toward the auction winners. Even if the Commission were to take this clearing house approach, the Commission would no doubt face a flood of complaints.

VIII. Conclusion

Private internal radio systems serve a vital function in the United States economy. These systems allow businesses to effectively manage and coordinate their day-to-day operations, and ensure the safety of personnel, consumers, and the general public. As discussed above, private systems have unique requirements which cannot be satisfied by commercial service providers. If the Commission adopts AMTA's proposal and allows further commercial infringement of the private radio spectrum, businesses throughout the United States will be forced to operate less efficiently, and will be less capable of protecting public safety. Since there are already numerous commercial service providers licensed in each market, and only a small supply of spectrum available for private internal use, the Commission should deny AMTA's Petition and retain the existing regulatory framework which promotes the efficient use of the frequencies in the 450-470 MHz bands in a manner which is fair and equitable to the hundreds of thousands of businesses which rely on private internal radio systems.

Respectfully submitted,



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Filed: September 23, 1999

ATTACHMENT A

Automobile Club of Southern California
AAA Colorado
Betterroads Asphalt Corporation
Bobier Electronics
Caprock Communications
Citizens Telephone Company
Clarkson Construction Co./Total Risk Mgt.
Cross Timbers Oil Company
Electronic Specialties
First Communications
Flash Cab Company
Foster Engineering Company
Hill County Electric Cooperative, Inc.
Hutchinson Telephone Company, Inc.
IMC Agrico Co.
Instant Signal & Alarm Co, Inc.
Lubbock Radio Paging Service, Inc.
Mankato Citizens Telephone Company
Midwest Mobile Radio Service
Minnesota Mining and Manufacturing Co.
Mobilcom
Mobilephone of Humboldt, Inc.
Mobile Communications Service of Miami
Mobile Phone of Texas, Inc.
Nemont Telephone Cooperative
North Pittsburgh Telephone Company
Penasco Valley Telephone
Platte Valley Communications of Kearney, Inc.
Pond Branch Telephone Company, Inc.
Sanborn Telephone Company
Supreme Security Systems, Inc.
Teletouch Communications, Inc.
TXU Communications Telephone Company
UBTA Communications
Webster-Calhoun Cooperative Telephone Association
Western Atlas International, Inc.
Wilkinsburg-Penn Joint Water Authority
W.T. Services, Inc.
XIT Rural Telephone
Zirkelbach Refrigeration, Inc.

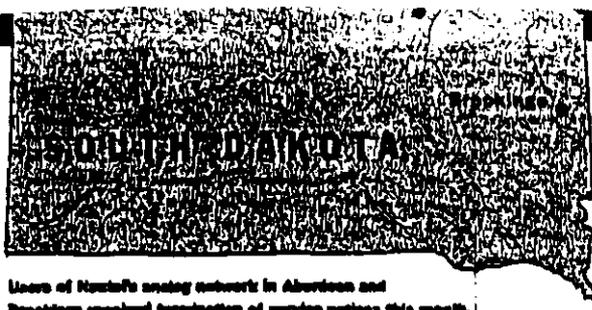
ATTACHMENT B

Nextel from page 1

Many in the industry question why Nextel should be allowed to tap into private spectrum—as well as previously off-limits spectrum in the 900 MHz band—when it cannot support its existing infrastructure and customers. In Ab-

erdeen and Brookings, S.D., for example, Nextel informed customers this month that it will terminate analog dispatch radio or telephone interconnect service Aug. 1.

"Due to reduced customer(s), it is no longer economically feasible to continue operating this sys-



Users of Nextel's analog network in Aberdeen and Brookings received termination of service notices this month.

Nextel To Turn Off S.D. Analog Network

By Carol Carlson

WASHINGTON—Nextel Communications Inc. will shut down analog dispatch service in at least two regions of South Dakota this summer and possibly leave the spectrum there fallow, all the while awaiting FCC waivers to secure more spectrum—this time from private radio.

In the coming weeks, the FCC is expected to decide whether to give Nextel the prerogative—historically the purview of the government—to determine whether spectrum allocated for private systems can be used commercially. While FCC rules prohibit this use, Nextel last fall asked for waivers to acquire 54 private radio licenses and either incorporate them into its nationwide network or use them to relocate licensees the company displaced in the 1997 specialized mobile radio auction.

continued on page 4

tem," Nextel said in service termination notices May 5. Two-way radios used in these markets will become obsolete on the network, and the notices do not offer customers alternative service options. When Nextel pushes customers off its system, competing operators would like to accommodate them but frequently cannot because of spectrum constraints.

The pending waiver requests—the latest in a long history of rule waivers sought and obtained by Nextel—are particularly irksome to business advocates who have watched the traditional dispatch industry dwindle as Nextel gradually amassed the lion's share of 800 MHz SMR spectrum from smaller operators. Some spectrum acquired by the industry giant—including frequencies won at auction—remains unused while other operators are forced to turn away customers for lack of spectrum.

To fight the erosion of the all-too-constrained private radio spectrum base, the Personal Communications Industry Association and Industrial Telecommunications Association are speaking with a united voice. They suggested that the commission grant Nextel its waivers on the condition that the frequencies be used only to relocate private wireless and small private carrier licensees. Five other organizations also representing private wireless users oppose unconditional grant of the waiver requests.

Nextel did not respond to questions about the waiver requests or service termination in South Dakota markets.

Private wireless and small operators have long criticized the commission for "regulation by waiver" in the dispatch radio industry. Many complain that if the current waiver issue is merely the latest step in a broader effort to move private users onto commercial systems, the FCC should act by changing the rules rather than repeatedly bending them.

Converting spectrum for use on its nationwide digital SMR network, Nextel has reduced the number of dispatch suppliers and service options overall. The conversion often means customers lose the value of the investment made in radios, and they are then charged rates by Nextel that are generally higher than those charged by traditional dispatch operators. According to The Strategic Group, last year Nextel dropped 173,000 basic dispatch subscribers from its service. ■

CERTIFICATE OF SERVICE

I, Laura A. Otis, an attorney at the law office of Blooston, Mordkofsky, Jackson & Dickens, hereby certify that on this 23rd day of September, 1999, I caused to be hand-delivered a copy of the foregoing "Opposition to Petition for Rulemaking" to each of the following:

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Federal Communications Commission
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Washington DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th St. S.W., Room 8-B115
Washington DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th St. S.W., Room 8-C302
Washington DC 20554

Commissioner Harold Furchgott-Roth
Federal Communications Commission
445 12th St. S.W., Room 8-A302
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Commissioner Michael Powell
Federal Communications Commission
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