DOCKET FILE COPY ORIGINAL **ORIGINAL**

Schwaninger & Associates, P.C. *Attorneys at Law*

1835 K Street, N.W., Suite 650, Washington, DC 20006
Internet Address - http://www.sa-lawyers.net
telephone - (202) 223-8837
facsimile - (202) 659-0071

Robert H. Schwaninger, Jr.
Michael L. Higgs, Jr.†
Delaney M. DiStefano
Benjamin J. Aron
Richard P. Hanno †
†Admitted in Maryland

Vic Jackson
Interconnection Consultant

September 28, 1999

via Next Day Mail

RECEIVED

SEP 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Attn: Ms. Magalie Roman Salas
Federal Communications Commission
445 12th Street, SW
Counter TWA325
Washington, DC 20554

Re: Comment to American Mobile Telecommunications Association, Inc.'s Request for Relicensing of Certain Frequencies to Require Spectrually Efficient Use; Report No. 2356
Petition for Rulemaking; RM No. 9705

Dear Ms. Salas:

We serve as General Counsel for Small Business in Telecommunications (SBT). On behalf of SBT, we hereby submit their Comment in response to American Mobile Telecommunications Association, Inc.'s Petition for Rulemaking - Request for Relicensing of Certain Frequencies to Require Spectrually Efficient Use. The requisite number of copies are enclosed herein. Please fee free to contact us should you have any questions.

Very truly yours,

Benjamin J. Aron

BJA:cfh

No. of Copies rec'd 0+4
List ABCDE

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

RECEIVED

SEP 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Petitioner: American Mobile Telecommunications Association, Inc.	)	
Request for Relicensing of Certain Frequencies to Require Spectrually Efficient Use	)	Report No. 2356

To: The Commission

COMMENTS OF
SMALL BUSINESS IN TELECOMMUNICATIONS

Submitted by:

Robert H. Schwaninger
General Counsel
Small Business In Telecommunications

Benjamin J. Aron
Schwaninger & Associates, P.C.
Associate

Table of Contents

Introduction 1

A Clear Consensus Exists to Reject Competitive Bidding for the Private Radio Spectrum 3

Competitive Bidding is Not Authorized By Congress in Section 309(j) 4

AMTA's Petition Ignores the Use of Private Radio Spectrum for Public Safety Uses by Non-Public Safety Licensees 5

AMTA's Petition Erroneously Promotes Alleged Efficient Spectrum Usage Over Practical, Operational User Efficiency 7

AMTA's Inconsistent Proposals 11

Conclussion 12

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

Petitioner: American Mobile Telecommunications Association, Inc.	)	
Request for Relicensing of Certain Frequencies to Require Spectrually Efficient Use	)	Report No. 2356

To: The Commission

COMMENTS OF SMALL BUSINESS IN TELECOMMUNICATIONS

Introduction

Small Business in Telecommunications (SBT) is a non-profit association of over 400 independent businesses, whose members use private radio spectrum for operation of private carrier systems, community repeaters, SMR, paging, and a great many other services. Its local shop owners provide radios for customers' design and operation of private internal radio systems and to provide shared radio service, unique to the need of individual business and industrial users. SBT offers assistance to the Commission, so that the Commission is better equipped to understand the needs of small business and its owners and employees, which depend on the agency to provide continued opportunities for members to compete in the telecommunications marketplace.

SBT's Comments to the Commission's Notice of Proposed Rulemaking (NPRM)[1] regarding employment of competitive bidding procedures for future licensing of private radio spectrum and its subsequent Reply Comments fully voice SBT members' opposition to competitive bidding for the private radio spectrum. Likewise, SBT opposes the American Mobile Telecommunications Association, Inc.'s (AMTA) petition, as AMTA supports competitive bidding for private radio spectrum–even in the face of overwhelming opposition from the industry.[2] Specifically, SBT and over 25 other parties commenting to the NPRM, representing thousands of licensees, oppose the competitive bidding proposals, joining in the opinion that auctions of private spectrum was not intended by the Communications Act nor its 1997 amendments.

Furthermore, AMTA's petition includes specific proposals for the "reconfiguration" of the 450-470 MHz Band. Those radical proposals are inappropriate in view of two extremely important issues: (1) AMTA ignores the controversy surrounding the use of private radio spectrum for public safety uses by non-Public Safety licensees, and those exemptions to competitive bidding mandated by Congress; and (2) AMTA's proposals ignore the relocation and operational injury to the non-Public Safety licensees that will be certain by-products of the Commission's adoption of the AMTA proposals. These issues are of great importance to SBT's members, despite AMTA's having glossed over the real world effects of adoption of its proposals. That AMTA fails to address these issues

---

[1] The NPRM referred to throughout these comments is the *Notice of Proposed Rulemaking,* WT Docket No. 99-87, 14 FCC RCD ___ (re. Mar. 25, 1999).

[2] Over eighty commenting parties responding to Commission's NPRM proposing competitive bidding for the private radio spectrum, opposed the proposal, while only one supported it.

demonstrates its unwillingness or inability to address all of the practical and legal consequences of adoption of its proposals.

A Clear Consensus Exists to
Reject Competitive Bidding for the Private Radio Spectrum

The industry is united in the belief that competitive bidding for the private radio spectrum is inappropriate. In the Commission's recent NPRM proposing competitive bidding for licensing of private radio spectrum, only one commenting party supported the agency's proposal, while over eighty commenting parties, representing thousands of Commission licensees, opposed it.[3] While AMTA's petition introduces an alternative proposal, the AMTA proposal advocates competitive bidding for all private radio systems, eventually.[4]

SBT respectfully suggests that this rule making be discontinued in favor of that proceeding under WT Docket 99-87, which proceeding fully encompasses those issues presented by AMTA herein. It is obvious that the parties which would reject use of competitive bidding procedures in response to the Commission's proposals within 99-87, would similarly and, perhaps, more vehemently oppose AMTA's proposals as being an even greater threat to the continued viability of private internal systems and other uses of the private radio spectrum. AMTA raises the specter of

---

[3] Or opposed any use of auctions to license channels employed by that commenting party's industrial segment.

[4] AMTA's proposal includes an initial traditional licensing procedure, reserved for private internal radio, however, it states that this "...eligibility restriction should sunset, perhaps after three (3) years, to permit marketplace rationalization of what is an imprecise attempt to predict user requirements." AMTA Petition for Rulemaking at ¶ 25.

massive frequency relocation for millions of systems, with attendant inestimable costs for all affected parties, in addition to a reduction in continued operational efficiency and growth for private radio users. SBT cannot contemplate any scenario by which a party commenting in opposition to the Commission's proposals would otherwise deem AMTA's proposals to be acceptable. Accordingly, it is deemed appropriate and prudent to either discontinue the instant rule making or to combine this matter with WT Docket 99-87 to avoid duplication of effort for all.

Competitive Bidding is
Not Authorized By Congress in Section 309(j)

Section 309(j)(1) of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997, grants the Commission the authority to engage in competitive bidding procedures "if consistent with the obligations described in paragraph (6)(E)" and if "mutually exclusive applications are accepted [by the Commission] for any initial license or construction permit..." 47 U.S.C. § 309(j)(1). Subsection (6)(E) requires the commission to "...continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."

Over 25 parties commenting to the NPRM averred that, under 309(j) the Commission is required to meet its obligations under (6)(E) *before* it endeavors to conduct auctions. SBT agrees. However, of further relevance is Section 309(j)(1) which makes mutual exclusivity a precondition of competitive bidding. *See, e.g.,* Amtech Comments to NPRM at 6. Since the present licensing methods for private radio presently preclude the Commission's receipt of mutual exclusive

applications, the Commission's adoption and effecting the AMTA proposals would result in a clear violation of applicable statutory language. The language of Section 309(j)(1) is clear, "if mutually exclusive applications are accepted" then the Commission has statutory authority to implement competitive bidding. If and first x, then y.

Under the statutory dictates, the Commission must take steps to avoid mutual exclusivity in those manners prescribed under Section 309(j)(6)(E) and if such avoidance is otherwise unsuccessful, the Commission is empowered to employ auctions to decide among mutually exclusive applications received. Therefore, what the statute makes clear is that Congress did not authorize the Commission to *create* mutual exclusivity via a statute that requires that the Commission work towards *eliminating* or *avoiding* mutual exclusivity.

AMTA's proposals either fully accept the Commission's authority to employ competitive bidding or AMTA is simply not concerned with the Commission's obligations under Section 309(j)(6)(E). Taken either way, AMTA's proposals lack sufficient legal support for its contention that its re-engineering plans are supported by necessary statutory authority.

AMTA's Petition Ignores
the Use of Private Radio Spectrum for
Public Safety Uses By Non-Public Safety Licensees

AMTA's petition fails to address the important controversy regarding the use of private radio spectrum for public safety, by non-Public Safety licensees and those exemptions created by Congress

to protect the safety of lives and property in the operation of private internal systems. AMTA does not appear to be bothered by any effort to auction spectrum which is presently employed for these purposes, contrary to the admonitions of Congress.[5]

SBT will not repeat herein its full argument presented in its comments to the NPRM and, instead, incorporates those comments by reference. However, SBT does note that the implications of AMTA's proposals include a variation of those commenters to the NPRM which suggested a third pool of channels be created to solve the circumstances created by Congress' stated exemptions to use of auctions in licensing of private spectrum. Whereas, commenters like CII proposed a third pool made up of presently allocated channels which have been typically employed by certain industries, AMTA proposes a more radical solution involving scrapping the entire present allocation method and, instead, moving all operators wholesale to one pool or another based on whether systems are deemed private internal radio or not. For the same reasons that SBT opposed creation of a third pool in comments to the NPRM, SBT opposes such creation here. Further, SBT avers that even those commenters to the NPRM which supported creation of a third pool would oppose AMTA's proposals as being far too disruptive in the continued operation of vital systems employed by those commenters.

---

[5] 47 U.S.C. § 309(j)(2)(A).

AMTA's Petition Erroneously Promotes Alleged Efficient Spectrum Usage Over Practical, Operational User Efficiency

AMTA's petition preaches spectrum efficiency on the first page, the last page, and nearly every page in between. Unfortunately, the efficiency referred to in AMTA's proposal is too simplistic to be employed as a basis for adoption. SBT accepts that promotion of spectrum efficiency is a laudable goal. However, SBT does not agree that, standing alone, spectrum efficiency is a sufficient foundation for the adoption of rules. Concurrent with any such examination of efficiencies must be operational efficiencies, costs, industrial efficiencies, safety issues, and a myriad of other considerations which, in the total, make up a public interest analysis. For example, the Commission had found that efficiency of spectrum use and operation justified the operation of cellular radio facilities by a single entity, AT&T. However, concerns about what effect a monopoly cellular operator would have on the competitive landscape caused the Commission to adopt rules which create two cellular carriers per market. Spectrum efficiency and administrative efficiency properly took a back seat to the needs of the public in receiving competitive carrier services. And consumers have benifitted.

In the instant matter, AMTA has given such priority to alleged spectrum efficiency, that all other reasonable and necessary considerations have become lost in the proposal. Its re-engineering scheme alleges that the efficient use of the radio spectrum is the only or the paramount goal of the Commission. SBT disagrees. The paramount goal of the Commission is to serve the public in the delivery to the market of communications services which enhance the economic well being of the Nation, while providing cost-efficient use of the radio spectrum which concurrently is employed to

protect the safety of lives and property. Not coincidentally, this is exactly what the present licensing system of private radio spectrum provides.

Adoption of AMTA's proposals would (i) eliminate the benefits in operation of private internal systems obtained via customized design and use; (ii) decrease the number of private operators in favor of greater commercialization of the band; (iii) increase the pace and level of market consolidation; (iv) subject to auction and the attendant costs of same those persons which desire to employ only local systems which do not provide service to the public; (v) visit upon the industry the enormous cost and uncertainty of relocation without concurrent benefit to the relocated parties; and (vi) expend considerable resources of the Commission to achieve the objectives set forth in the AMTA proposals.

Nor does AMTA recognize the operational efficiencies of private systems which are designed exclusively for the use of the licensee. An in-plant operations which supports and enhances to efficiency of the plant and its workers, results in lower costs and higher profitability for the licensee. This positive result of present private radio use is overlooked in AMTA's analysis or simply discounted in favor of transmitter throughput. Yet, the telecommunications industry does not exist in a vacuum and the Commission is not relieved of its obligation to consider the overall effect of its regulation, including upon persons whose primary interest is not the delivery of radio services.

To speak of spectrum efficiency to the exclusion of user efficiency is an ivory tower approach that does not benefit members of the private radio industry, nor provide to the agency

sufficient assistance in assessing the merits of AMTA's proposals. Nor does AMTA explain why the evolution of the radio art,[6] refarming of private radio spectrum, and the increasing use of efficient technologies is insufficient for reaching AMTA's objectives. Finally, AMTA overlooks the most obvious method of relieving any shortfall in available spectrum to serve the increasing demands of industry – allocation of additional spectrum.

While new technologies are certain to meet some of the objectives cited within AMTA's proposals, SBT joins with commenters to the NPRM which recommend that the agency should not reweave the tapestry of private radio licensing. Instead, what is required is additional spectrum to expand the present use of private radio. Private radio and its licensing methods have been highly successful and the agency should invest further in this success by allocating at least six megahertz of additional spectrum for private radio use. SBT avers that sufficient spectrum has been allocated over the past five years to satisfy the demands of purely commercial operators. It is now time to take care of localized operations which require additional private spectrum to avoid the high cost of commercial carriage in the creation of private internal systems that are customized for the unique purposes and needs of private concerns.[7]

---

[6] The agency and the courts have long rejected efforts to engage in "technology forcing" upon industry segments with its attendant regulatory obsolescence of purchased equipment.

[7] AMTA's reservation of 2 MHz of spectrum to be auctioned for private internal systems is an internally inconsistent position. AMTA does not explain why a company operating a private system within the confines of a single plant would purchase the right to serve an entire EA.

AMTA agrees that additional spectrum is required, AMTA petition at 5, but appears to be fully accepting of the fact that such spectrum will not be made available by the agency. This pessimism appears to be the driving force behind AMTA's radical proposal to re-engineer the private radio spectrum in the manners proposed. Conversely, SBT believes that the Commission will find necessary relief for private radio users in the form of additional spectrum and does not support proposals which presuppose the Commission's insensitivity to the increasing needs of the private radio community.

And AMTA bemoans the unavailability of spectrum to deploy "advanced, primarily dispatch networks" to serve its members' demands, AMTA at 11. What AMTA's analysis ignores is the effect that manufacturers of equipment have on this issue. To date, there is little equipment available which is cost-effective in migrating traditional analog spectrum to digital trunked operation. The systems presently offered by the manufacturers typically require enormous capitalization and those systems presuppose that operators will provide interconnected service over a wide geographic area, like an EA. What AMTA is citing, in fact, is the lack of manufacturer support for equipment that will provide digital, trunking operations which does not include interconnection capabilities in design and which provides for a migration on a channel-by-channel basis to the use of this technology to provide for a logical investment/operations schedule for local operations. Oddly, however, AMTA's proposals, if adopted, would exacerbate the problem, creating demand for large systems to be constructed over entire Economic Areas. Manufacturers would continue to ignore the high and increasing demand demonstrated by local private operators who wish to migrate, not be catapulted into future.

AMTA's Inconsistent Proposals

Finally, AMTA's petition for rulemaking submitted to the Commission on July 30 does not mesh with AMTA's comments to the NPRM. AMTA's petition contains an extremely broad sweep of the 450-470 MHz band to create 10 MHz for auctioning and 2 MHz for shared licensing, initially.[8] AMTA's comments to the NPRM, however, promote the Commission's "band manager" concept. SBT asserts that AMTA's sweeping "reconfiguration" proposal, which does not mention band managers, is inconsistent with the Commission's "band manager" concept.

Does AMTA still support relocation of millions of users in favor of auctions of blocks of channels? Do AMTA's proposals require or support the creation of that entity described by the Commission as a band manager? Would AMTA superimpose band managers upon its proposals and, if so, how? Perhaps AMTA's own comments to this proceeding will sort out these questions. But, at this time, SBT is unable to discern AMTA's present position, which may have altered between rule making proceedings.

Interestingly, AMTA incorporates its July 30 petition into its comments to the NPRM. Although allowable, such incorporation without reconciliation of what might be viewed as inconsistent positions fails to provide direction to those entities commenting within this proceeding. To avoid further confusion of this nature and to provide necessary clarity to interested parties, SBT

---

[8] *See* n. 4, *supra.*

DOCKET FILE COPY ORIGINAL

recommends that this proceeding be deemed combined into WT Docket 99-87 or discontinued in favor of that proceeding.

Conclusion

SBT feels that AMTA's proposal is fatally flawed in a number of ways. First, the majority of commenting parties, and the industry, is strongly opposed to AMTA's proposal. Second, by adopting AMTA's proposal, the Commission would violate its duties under section 309(j)(6)(E) of the Communications Act of 1934. Third AMTA ignores the fact that there are public safety uses of the subject spectrum by non-public safety licensee in operation of private internal systems. Fourth, AMTA's single minded focus on efficient spectrum usage ignores numerous competing and important benefits, including competition, customized system design, and others. Finally, AMTA's petition are inconsistent with its own comments to the NPRM. For all the foregoing reasons, SBT opposes AMTA's proposals for the reasons stated above and respectfully requests that this proceeding be discontinued.

Respectfully submitted,
SMALL BUSINESS IN TELECOMMUNICATIONS

By: _____
Robert H. Schwaninger
Benjamin J. Aron

Its Attorneys

September27, 1999
Schwaninger and Associates, P.C.
1835 K Street, NW, Suite 650
Washington, D.C. 20006
202/223-8837