

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

JAN 19 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 90 of the Commission's)	PR Docket No. 93-144
Rules to Facilitate Future Development of)	RM-8117, RM-8030,
SMR Systems in the 800 MHz Frequency Band)	RM-8029
)	
Implementation of Sections 3(n) and 322 of the)	GN Docket No. 93-252
Communications Act -- Regulatory Treatment)	
of Mobile Services)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive Bidding)	

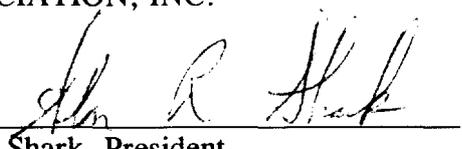
To: The Commission

**PETITION FOR RECONSIDERATION OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

By:



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January 19, 2000

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully requests reconsideration of one aspect of the Memorandum Opinion and Order on Reconsideration in the above-entitled proceeding.¹ Specifically, AMTA urges the FCC to reconsider and reverse its decision in respect to the timing of payment to incumbents whose systems are "retuned" pursuant to FCC Rule Section 90.699. Contrary to the explanation in the Order, the position articulated in the MO&O had not been adopted previously by the Commission. It is not consistent with Commission precedent or with the public interest. Moreover, it is imperative that the FCC move promptly to reverse this decision since any correction will be meaningless after relocation arrangements consistent with the current rule have been negotiated. In support thereof, the following is shown:

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. By virtue of its representation of the 800 MHz SMR industry, AMTA's interest in this proceeding is substantial and well-detailed in earlier stages of the rule making.

II. BACKGROUND

2. The history of this proceeding is extensive, having been initiated some seven years ago, and need not be reiterated in detail here. In this proceeding, the Commission adopted a new

¹*Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, 64 Fed Reg. 71042, (rel. Oct. 8, 1999) ("MO&O" or "Order").

licensing framework for the 800 MHz SMR service. That framework provided for the issuance of geographic-based licenses awarded by competitive bidding and, as to the "upper 200" 800 MHz channels, for the voluntary or mandatory relocation of incumbents from those frequencies by the Economic Area ("EA") auction winner. FCC Rule Section 90.699 establishes a one-year voluntary negotiation period, followed by a one-year mandatory period, after which the EA licensee still will retain the right to relocate incumbents to other spectrum as long as the EA licensee is able to provide "comparable facilities", as defined in the FCC's rules, and is prepared to guarantee payment of relocation costs. 47 C.F.R. § 90.699.

3. The one-year voluntary negotiation period ended on December 3, 1999, and the industry is now in the mandatory negotiation period. In general, to the best of the Association's knowledge, the relocation process to date has proceeded without significant problems. A number of incumbents reached relocation agreements with Nextel Communications, Inc. ("Nextel")² during the voluntary period and the retuning of their systems has been completed.³ Other retuning efforts are in progress. It is reasonable to assume that a significant percentage of upper 200 incumbent arrangements will have been reached before the involuntary negotiation period commences.

²Nextel was the auction winner for some 475 licenses (90%) of the upper 200 MHz EA licenses awarded. Although other EA licensees also may have negotiated relocation agreements with incumbents, Nextel's dominant status as geographic licensee in this band means that its activities are of preeminent importance to the industry.

³As evidenced by the Commission's licensing records, a significant number of 800 MHz upper 200 channel incumbents have elected to sell their systems to Nextel rather than undertake the retuning process, assuming that Nextel would have been able to provide comparable facilities.

AMTA is encouraged by what it understands to have been a relatively smooth transition process to date, and supports a continued, mutually cooperative effort by the parties involved.

4. However, from the outset of this proceeding, it has been the Association's firm conviction that for the relocation process to work effectively, and the retuning of systems and the subscribers relying on them to proceed seamlessly, the interests of EA licensees and incumbents must be properly balanced. While the Commission has determined that the public interest supports the right of EA licensees to relocate incumbents off the upper 200 channels, those incumbent should not have to rely on the good will or the largesse of the EA licensee to protect the incumbent's vital interests in what is, under the best of circumstances, a complex, costly and difficult process.

5. For that reason, the Association has focused throughout this proceeding on clarifying the rights and obligations associated with the Commission's relocation rules. AMTA initially urged the FCC to detail more specifically the full range of relocation costs that would be reimbursable by the EA licensee. The Association subsequently asked the Commission to confirm that, contrary to Nextel's interpretation, an EA licensee's retuning obligation must include reasonable progress payments to the incumbent if requested.⁴

6. The instant MO&O denies that aspect of AMTA's reconsideration request. The Order states the Commission previously had determined that "payment of relocation costs will not be due until the incumbent has been fully relocated and the frequencies are free and clear."⁵ In

⁴AMTA's October 20, 1997 Reply to Opposition to Petitions for Reconsideration of the *Second Report and Order*, PR Docket No. 93-144, 12 FCC Rcd 19079 (1997) ("2nd R&O").

⁵MO&O at ¶ 58.

support of its contention that this issue had been considered and decided previously by the FCC, the Order cites to an earlier Order in this proceeding.⁶

7. The MO&O is incorrect in its reliance on that citation and in its claim that the question of interim incumbent relocation payments had been disposed of previously in this proceeding. The decision cited did not relate to the timing of payments **from EA licensees to incumbents** during the retuning process. Rather, it addressed the timing of payments **among EA licensees** when the relocation of an incumbent by one EA licensee would result in the availability of a channel(s) to another EA licensee, one that had not paid any of the associated relocation costs, a decision codified in FCC Rule Section 90.699(f)(4)(i). That provision is irrelevant to the question of relocation payments to incumbents, an issue the FCC had not addressed in the context of the upper 200 channel relocation rules and which, unlike the timing of payments among EA licensees, had not been specified in the Commission's rules.

8. Moreover, AMTA disagrees that an FCC rule denying interim relocation payments to incumbents, except when agreed to by the EA licensee, "strikes an appropriate balance between the rights and responsibilities of EA licensees and incumbent licensees during the course of relocation."⁷ The conclusion that "parties are free to negotiate when reimbursement of relocation costs will occur, and may agree to reimbursement as such expenses are incurred"⁸ ignores the fact that incumbents already are in the position of negotiating with EA licensees pursuant to the

⁶Id. at n. 170, citing to 2nd R&O.

⁷Id. at ¶ 58.

⁸Id.

Commission's own **mandatory** negotiation provisions, and will be subject to the **involuntary** negotiation rules in the future. Their negotiating options will be limited by the FCC's rules which, in accordance with the instant Order, specifically decline to impose an interim payment obligation on EA licensees. Under those circumstances, the ability of an incumbent to bargain for such payments is illusory: securing them will be entirely at the discretion of the EA licensee, not the result of any negotiation process. This is precisely the outcome opposed by the Association as contrary to a balanced relocation approach and to the public interest.

III. THE RELOCATION PROCESS WILL WORK MOST EFFICIENTLY AND WILL BEST PROTECT THE INTERESTS OF THE PUBLIC IF RELOCATION COSTS INCLUDE REASONABLE PROGRESS PAYMENTS

9. To the extent the 800 MHz relocation process to date can be characterized as successful, that success is due in no small measure to the balanced rights and obligations of the parties pursuant to the FCC's rules. The interests of EA licensees with a financial incentive to relocate incumbents so they can secure access to their spectrum are weighed against the incumbents' recognition that their bargaining ability will diminish over time pursuant to the Commission's relocation rules. This balance has resulted in the negotiated acquisition or relocation by EA licensees of a significant number of 800 MHz incumbents, particularly in markets of greatest capacity constraint and economic potential, and with relatively minimal disruption for the subscribers on migrated systems pursuant to the rules governing the **voluntary** negotiation procedures.

10. While AMTA hopes the relocation process will continue to work smoothly, that result will be most likely if the FCC's rules preserve an appropriate balance of the parties' rights and obligations. As the relocation process moves from a voluntary into a mandatory and then

involuntary period, and shifts from urban markets where spectrum is scarce to more rural areas in which an EA licensee's channel requirements are likely to be less compelling, it is imperative that the Commission not abrogate the rights of the remaining incumbents.

11. As an initial matter, incumbents are largely powerless to determine whether their relocation negotiations are conducted during the voluntary versus mandatory versus involuntary period. With effectively a single EA licensee nationwide, it is not surprising that activity during the voluntary period was concentrated largely on larger, rather than smaller, systems and on urban, rather than rural, areas. Incumbents, like EA licensees, might have the theoretical capacity to delay relocation negotiations once initiated, but, in practical terms, only EA licensees have the ability to trigger their commencement. Incumbents should not be penalized for that fact. Rather, the rules should ensure that an equilibrium is maintained as the relocation process shifts to spectrum which is of less immediate importance to an EA licensee.

12. As described in the Association's earlier-filed Opposition, and as clearly recognized in the FCC's rules, there can be significant costs associated with achieving the seamless transition of 800 MHz SMR systems to comparable facilities. Relocation agreements negotiated during the voluntary period, and those involving spectrum for which the EA licensee has a more urgent need, are likely to include up-front or progress payments to the incumbent reflective of those out-of-pocket expenses. However, once the negotiation process is no longer voluntary, and when there is no particular time urgency for securing use of the spectrum, there will be every economic reason for an EA licensee to resist making progress payments since, without them, incumbent reimbursement rights will be limited to those costs they are able to fund up-front.

13. For example, it may be that the seamless transition mandated by the FCC rules demands the construction of a duplicative system for migration purposes. However, if an incumbent must pay for the construction and operation of such a system himself and wait for reimbursement from the EA licensee, he may have to forfeit his, and his customers, right to seamless transition for lack of available funds. Incumbents should not be denied rights afforded them under the FCC rules because of insufficient financial resources and should not have to bargain away other rights to secure them. The Commission's decision improperly shifts to incumbents and their customers whose systems are being migrated for the benefit of a third party and its customers an unreasonable financial burden.

IV. THE FCC MUST MOVE PROMPTLY TO REVERSE THIS PART OF ITS DECISION ON 800 MHz INCUMBENT REIMBURSEMENT RIGHTS

14. The public interest rationale for reversing the MO&O's mistaken decision regarding the timing of 800 MHz incumbent reimbursement payments is clear. Further, it is imperative that the Commission do so expeditiously as the value of the relief provided diminishes with each day that passes. The 800 MHz relocation process already has passed from the voluntary to the involuntary negotiation period. In less than a year, 800 MHz incumbents will be limited to those rights afforded under the mandatory relocation rules. Relocation agreements negotiated under the current rules will not necessarily be susceptible to correction without the consent of both parties. If an incumbent is forced to relinquish rights that otherwise would be available because of an inability to fund the associated costs himself, those rights may be unrecoverable. For this reason, AMTA urges the Commission to act immediately to correct the MO&O's error and to affirm the

right of 800 MHz incumbents to progress payments from EA licensees covering documented, reimbursable relocation costs.

V. CONCLUSION

15. AMTA is encouraged that many incumbent systems have been acquired or migrated during the voluntary negotiation period. It anticipates that EA licensees and incumbents will continue to work cooperatively to effect a seamless transition that is minimally disruptive to incumbent customers and supportive of the Commission's policy goals in this proceeding even during the mandatory and involuntary negotiation periods.

16. The Association remains convinced that a critical ingredient in achieving that objective is a provision for interim, progress payments by the EA licensee to fund the relocation of incumbent systems. Absent such a requirement, incumbents may have to forego rights purportedly guaranteed them under the Commission's rules to the detriment of their customers and to the timely completion of the 800 MHz migration process.

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 January 19, 2000 caused to be mailed, first-class, postage prepaid a copy of the foregoing Petition for Reconsideration to the following:

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