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

In the Matter of	)	
	)	
1998 Biennial Regulatory Review— 47 C.F.R. Part 90—Private Land Mobile Radio Services	)))	WT Docket No. 98-182 RM-9222
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them	)))	PR Docket No. 92-235
	)	
and	)	
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services	)))	

REPLY OF MOTOROLA, INC.

Pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), Motorola, Inc. ("Motorola") hereby submits this reply to various comments and oppositions filed in response to Motorola's Petition for Reconsideration in this matter.[1] As discussed in detail below, the record contains substantial support for Motorola's request that the Commission either (1) amend the rules governing the new Mulit-Use Radio Service ("MURS") to ensure that the five VHF frequencies contained therein are used primarily for their original designated purpose – business and industrial applications – as opposed to general consumer use; or alternatively (2) reinstate the licensing requirement for the five MURS channels and return them to Part 90. As also discussed below, the arguments of various commenters opposing the relief requested by

[1] *See* Motorola, Inc., Petition for Reconsideration, WT Docket No. 98-182, *et al.*, (filed Nov. 13, 2000).

Motorola are premised on a fundamental misunderstanding of pre-MURS operations on the subject channels and for this reason, as well as others, should not stand in the way of Motorola's recommended course of action.

I. Background

The Commission's *Notice of Proposed Rule Making* ("*NPRM*") in this proceeding solicited comment on whether five low power VHF frequencies in the Part 90 Industrial/Business pool – known in the parlance as the "color dot" frequencies – should be reallocated from Part 90 to Part 95 so that the licensing requirement could be eliminated.[2] In proposing this action, the Commission noted that it had also proposed to eliminate the coordination requirement for these channels, and cited indications in the record that many users on these channels were unlicensed.

Motorola and several other commenters supported the Commission's proposal. Motorola conditioned its support, however, on continued reservation of the subject frequencies for business and industrial use *only*. In its subsequent *Report and Order*, the Commission adopted its proposal,[3] but did not clarify that the frequencies would remain available solely for business and industrial applications. In fact, although neither the *NPRM* nor the *Report and Order* foreshadowed such a step, the Commission's new rules define the MURS as a "private, two-way, short-distance voice, data or image communications service for personal or business activities of the general public."[4] In allowing general consumer uses, this definition significantly expands the

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[2] *1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services,* 13 FCC Rcd 2133, 21143-44 (1998) (Notice of Proposed Rule Making).

[3] *1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services,* WT Docket No. 98-182, *et al.*, at ¶ 31.

[4] *See* 47 C.F.R. § 95.401.

scope of permissible operations on the five MURS frequencies. Motorola filed its Petition for Reconsideration in an effort to correct this apparent error.

In its Petition for Reconsideration, Motorola explained that it is essential for the Commission to limit use of the MURS frequencies to business and industrial applications in order to prevent interference to existing and future business-related operations. Motorola noted that, if the MURS rules are not revised, manufacturers will likely develop radio applications that will be marketed to a broad consumer population. That, in turn, would increase congestion and interference to the detriment of business and industrial users – the very entities the Commission's rule changes sought to assist through elimination of the Part 90 licensing requirement. In its subsequent reconsideration comments, Motorola explained that the MURS technical rules exacerbate the problem by arguably rendering operations authorized under Part 90 invalid.[5]

In short, in their existing form, the MURS rules do not serve the public interest and are legally unsound. As a policy matter, general consumer use of the MURS frequencies as provided for in the new MURS rules is contrary to the public interest because it will erode the reliability of existing and future business communications. As a legal matter, the Commission's rule changes allowing expanded use of the MURS channels cannot stand because the Commission never raised the issue of broadened consumer access to these channels nor did it discuss its rationale for such a rule change or consider opposing views, such as Motorola's.

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[5] Comments of Motorola, Inc., WT Docket No. 98-182, *et al.*, at 3-4 & n.4 (filed Jan. 3, 2001).

II. The Record Supports Adoption Of Operational And Eligibility Rules Ensuring That MURS Frequencies Are Used Primarily For Business And Industrial Applications

The record contains substantial support for Motorola's request that the Commission adopt rules restricting the MURS frequencies to business and industrial uses. In particular, the Industrial Telecommunications Association, Inc. ("ITA") filed comments on November 27, 2000, supporting Motorola's reconsideration request. In its comments, ITA notes that:

> [A]llowing business and personal communications users to operate within the same band could saturate radio communications in a given area and could ultimately result in harmful interference to daily business operations. Since traditional business and industrial users deploy their systems to foster smooth business operation, reductions in potential interference are vital.[6]

ITA further observes that business-only operation on the MURS channels, with technical parameters similar to those set forth for low power Part 90 licensees, "would increase the spectrum efficiency that the private wireless industry boasts."[7]

Two other commenters, MRFAC, Inc. ("MRFAC") and RadioShack Corp., ("RadioShack") raise similar points. For example, MRFAC states that, "if [the MURS] frequencies are . . . left in Part 95 at all, it should be with restrictions designed to ensure that they continue to be used primarily for business and industrial use."[8] In support of this position, MRFAC notes that, "the MURS approach will lead to serious spectrum congestion . . . especially

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[6] Comments of the Industrial Telecommunications Association, Inc. ("ITA"), WT Docket No. 98-182, *et al.*, at 2 (filed Nov. 27, 2000).

[7] *Id.*

[8] Comments of MRFAC, Inc., WT Docket No. 98-182, *et al.*, at 3 (filed Jan. 3, 2001).

in and around larger metropolitan areas where so many manufacturers have their plants."[9] RadioShack likewise urges the Commission to continue reserving the MURS frequencies for business and industrial use only, and supports Motorola's request that the new service category for these frequencies be called the "Low Power Industrial/Business Service."[10] RadioShack shares Motorola's concern that placement of the subject frequencies in the MURS will inevitably lead to extensive consumer usage. In addition, RadioShack echoes Motorola's view that, "by allowing these frequencies to be used for non-business/industry use, quality . . . will suffer due to overcrowding and result in the degradation of the quality of service that business and industrial users expect from these frequencies."[11]

In short, a review of the record reflects concurrence among four key commenters with extensive knowledge of operations on the color dot frequencies – namely, Motorola, ITA, RadioShack, and MRFAC – that, in order to safeguard these channels for effective business and industrial communications, it is essential that the Commission continue restricting their use for business and industrial communications purposes only. Substantial weight should be given to these comments, which represent virtually the entire range of affected constituents and are well familiar with the needs of both the industrial and consumer radio markets.

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[9] *Id.* at 2. Like Motorola, MRFAC also notes that the MURS technical rules – or, more precisely, the lack of sufficient technical restrictions for the MURS – "compound[ ] the potential for interference." *Id.* at 3.

[10] Comments of RadioShack Corp., WT Docket No. 98-182, *et al.*, at 2.

[11] *Id.*

III. The Record Is Devoid Of Any Valid Basis For Denying Motorola's Petition

The commenters opposing Motorola's reconsideration request premise their arguments on the assertion that unlicensed operations on the color dot frequencies are already prolific.[12] Several of these commenters argue that Motorola, as a principal manufacturer for products used on the relevant frequencies, has benefited from extensive unlicensed operations on these channels, and thus, should not be heard to complain about rule changes making these operations "legal."[13] These claims miss the fundamental point that pre-MURS unlicensed operations were conducted primarily by business and industrial eligibles in accordance with the applicable Part 90 technical requirements. Virtually all of the pre-MURS operations on the color dot frequencies, whether licensed or unlicensed, were messages of short duration transmitted on low power, push-to-talk radios. These operations, which are identical to the business and industrial uses permitted on the channels, are likely to be significantly different from the unlicensed *consumer* applications now permitted in the MURS.[14]

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[12] *See, e.g.*, Opposition to a Petition for Reconsideration, Personal Radio Steering Group, Inc., WT Docket No. 98-182, *et al.*, at 2-3 (filed Jan. 3, 2001); Opposition to Petition for Reconsideration, Bennett Z. Kobb, WT Docket No. 98-182, *et al.*, at 2-3 (filed Jan. 3, 2001); Comments in Opposition, Michael C. Trahos, WT Docket No. 98-182, *et al.*, at 4 (filed Jan. 2, 2001); Comments on Petitions for Reconsideration, John R. Scheuchenzuber, WT Docket No. 98-182, *et al.*, at 2-5 (filed Jan. 3, 2001); Comments on the Petitions for Reconsideration, Scott R. Havens, WT Docket No. 98-182, *et al.*, at 3 (filed Dec. 31, 2000).

[13] *See, e.g.,* Opposition to a Petition for Reconsideration, Personal Radio Steering Group, Inc., WT Docket No. 98-182, *et al.*, at 4; Comments on Petitions for Reconsideration, John R. Scheuchenzuber, WT Docket No. 98-182, *et al.*, at 5; Comments on the Petitions for Reconsideration, Scott R. Havens, WT Docket No. 98-182, *et al.*, at 3 (filed Dec. 31, 2000).

[14] Possible consumer applications on the MURS frequencies include cordless telephones, baby monitors, and an entire range of voice, data, and imaging services that are not characterized by push-to-talk messages of short-duration.

Simply put, the claims of certain commenters' that no additional harm will result from general consumer operations under the existing MURS rules are based on a misunderstanding of the pre-MURS environment and are incorrect. Juxtaposition of pre-MURS operations with the new MURS rules makes plain that, in creating the MURS, the Commission did not simply "legalize" unlicensed operations previously occurring on the color dot frequencies; rather, by opening those frequencies to broad consumer uses, the Commission significantly increased the likely scope of permissible operations and with it, the potential for congestion and interference.

A reading of the *NPRM* and *Report and Order* makes plain that the Commission never intended to do anything other than alleviate a regulatory burden – the licensing requirement – for eligible business and industrial users. The agency never sought comment on a proposal to permit broad consumer use of the color dot frequencies, and the record generated in response to the *NPRM* did not present the issue. Likewise, in its *Report and Order* establishing the MURS, the Commission never discussed how or why it decided to broaden access to include consumer applications, nor did it address the issue of shared use of the MURS channels by business and personal users. Rather, the agency simply adopted a definition that contemplates consumer access and expanded permissible operations. Motorola submits that this is not the type of "reasoned decision making" required by the Administrative Procedure Act and well-established case law interpreting it.[15]

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[15] It is a fundamental tenet of administrative law that agency action must be "based on a consideration of the relevant factors," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and must be premised on reasoned decision making in which "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs .Ass 'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 77 (1983). In addition, "reasoned decision making" requires that changes in an agency's policies or procedures must be accompanied by "a reasoned explanation for doing so," *Committee for Effective Cellular Rules v. FCC*, 53 F.3d

(Continued...)

Various commenters opposing Motorola's position also argue that, because the color dot frequencies make a suitable home for consumer applications, the Commission should permit consumer uses on the MURS channels.[16] This argument is plagued by two separate problems. First, the instant rule making is neither an appropriate time nor an appropriate place for debate of this issue. The Commission's proposals relating to the color dot frequencies did not seek to expand the frequencies available for consumer use; they simply sought to eliminate the licensing requirement as applied to business and industrial users of the color dot channels.[17] As a result, the suitability of the subject channels for consumer applications is irrelevant; the issue was not raised – or, for that matter, discussed – by the Commission or commenting parties in the course of WT Docket No. 98-182. If commenters or other parties believe it appropriate to remove the color dot – or any other – channels – from their designated uses and make them available for consumer applications, they are free to file a petition for rule making advancing that request.

(...Continued)
1309, 1317 (D.C. Cir. 1995), and must be "based on a consideration of the relevant factors . . . ." *State Farm*, 463 U.S. at 43. Here, the Commission never gave notice or otherwise discussed its intent to open the "color dot" channels to general consumer use, nor did it address the comments in the record – including those filed by Motorola – cautioning against any such action.

[16] *See, e.g.*, Opposition to a Petition for Reconsideration, Personal Radio Steering Group, Inc., WT Docket No. 98-182, *et al.*, at 2; Comments on Petitions for Reconsideration, John R. Scheuchenzuber, WT Docket No. 98-182, *et al.*, at 6.

[17] This point is directly raised by the Petition for Reconsideration filed by the Personal Radio Steering Group, which notes that "the NPRM proposed changes only to the requirement that these stations must be licensed. Specifically, the NPRM did not propose to make other changes . . . . *In the absence of the FCC having proposed such changes, the PETITION is the first opportunity during which PRSG can raise these issues.*" Petition for Reconsideration, Personal Radio Steering Group, Inc., WT Docket No. 98-182, *et al.*, at ¶ 4 (filed Nov. 13, 2000) (emphasis added).

Second, commenters' claims that the color dot channels are particularly well suited for consumer applications only serve to strengthen the concerns of Motorola, ITA, RadioShack, and MRFAC that the existing MURS rules will result in congestion and interference to business users. As they currently stand, the MURS rules invite a plethora of consumer devices that are incompatible with existing business and industrial operations. Particularly as they proliferate, these consumer operations will inevitably undermine the level of reliability necessary for effective business communications. This being the case, the claims of certain commenters advocating "peaceful coexistence"[18] among business and consumer users simply ignore reality. The Commission has always endeavored to segregate business/industrial users and consumer users, and there is no reason to assume that a contrary approach would work better here.[19]

IV. Conclusion

For the reasons set forth above, Motorola urges the Commission to reconsider its decision reallocating the five low power "color dot" frequencies into the Part 95 Multi-Use Radio Service ("MURS"). In failing to preserve the frequencies reallocated to the MURS for business and industrial uses, the Commission's final rules governing the new MURS category create a significant risk of intolerable interference to existing and future business operations.

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[18] Opposition to a Petition for Reconsideration, Personal Radio Steering Group, Inc., WT Docket No. 98-182, *et al.*, at 3.

[19] In fact, in the course of PR Docket No. 87-265, the PRSG actively opposed allowing "commercial and organizational entities" to use the General Mobile Radio Service ("GMRS") frequencies. *See Amendment of Subparts A and E of Part 95 To Improve the General Mobile Radio Service (GMRS)*, 65 Rad. Reg. 2d 739, 742 (1988).

Accordingly, Motorola requests that the Commission either adopt rules limiting the use of these channels to business and industrial operations or reinstate the licensing requirement and return the frequencies to Part 90.

Respectfully submitted,

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