

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

In the Matter of:

**Amendment of the Commission's Rules
Concerning Maritime Communications**

**Petition for Rule Making filed
RegioNet Wireless License, LLC**

PR Docket No. 92-257

RM-9664

PETITION FOR RECONSIDERATION

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Dated: August 23, 2002

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SUMMARY

The Federal Communications Commission, by reducing the service area contours and co-channel interference protection of the Automated Maritime Telecommunications Service ("AMTS"), has harmed the ability of incumbent AMTS carriers to provide continuous coverage to the maritime community and land mobile public. The action has also taken the incumbent carriers out of compliance with the FCC Rules and Regulations. Continuity of service is a Part 80 requirement for an AMTS operation since the chief responsibility of an AMTS operator is to provide service for the safety of life and property at sea and on inland waterways. Further, the Commission, by importing the service area contour and the co-channel interference protection from the Part 90 licensing scheme, will allow a geographic licensee to construct and operate a new transmitter location within the incumbent's previous overlapping contours and disrupt the incumbent's continuous service.

By changing the AMTS rules and allowing another carrier to operate within the incumbent's former contours, the Commission has engaged in an unlawful "taking" of property interests that requires an obligation to pay the incumbents just compensation pursuant to the Fifth Amendment of the United States Constitution.

The Commission action disserves the public interest and therefore, it should reconsider its decision and allow 17 dBu contours and 18 dB carrier to interference ratio for incumbents' operations.

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To: The Commission

PETITION FOR RECONSIDERATION

Paging Systems, Inc. ("PSI"), by its attorneys and pursuant to Section 1.106(b)(1) of the Federal Communications Commission ("FCC or Commission") Rules and Regulations, hereby submits its Petition for Reconsideration of the Second Memorandum Opinion and Order and Fifth Report and Order ("Second Order").¹ As discussed below, PSI requests that the Commission reconsider its actions in the above referenced proceeding which will harm PSI's Automated Maritime Telecommunications Service ("AMTS") provision of services to the public.

I.

BACKGROUND

In this Petition, PSI concurs with and incorporates the arguments and the engineering exhibits set forth in the Petition for Reconsideration filed in this proceeding

¹ Second Memorandum Opinion and Order and Fifth Report and Order, FCC 02-74, released April 8, 2002.

by Mobex Communications, Inc. ("Mobex") on August 23, 2002. Mobex has requested that the FCC reconsider its action which would reduce the AMTS incumbents' service area from 17 dBu contours to 38 dBu contours by importing Part 90 amplitude modulation ("AM") service rules into the Part 80 frequency modulation ("FM") rules that govern Maritime Services. The FCC also imports a 10 dB AM co-channel interference protection for use with FM AMTS operations, which should require 18 dB interference protection.

II.

STATEMENT OF INTEREST

PSI is a Commercial Mobile Radio Service ("CMRS") provider offering service to the maritime community and land mobile public over AMTS licenses under Part 80 of the Commission's Rules, on the west coast of the United States from Mexico to Canada and in Hawaii; on the east coast from Maine to Puerto Rico; and in the Great Lakes region.

PSI filed comments in the referenced proceeding. Because the Commission's new rules will impair its ability to provide efficient service to the public, PSI will be injured by the FCC's actions. Accordingly, it has standing to file this Petition for Reconsideration.

III.

DISCUSSION

A. The Original Plan for AMTS.

As originally envisioned, in Inland Waterways Communications Systems,² AMTS reflected the best thinking of the public and the FCC. Based on the needs of the towing

² 84 F.C.C.2d 875 (1981), recon., 88 F.C.C.2d 678 (1981), aff'd sub nom. WJG Tel. Co., Inc. v. F.C.C., 675 F.2d 386 (D.C. Cir. 1982).

and barge industry and other vessels, a high quality voice and non-voice communications system had been sought for ten years. The 216-220 MHz band was chosen because the propagation characteristics were superior, which reduced the number of coast stations needed throughout the system.³ The important element in AMTS coverage was the concept of continuity of service, which was demanded by the prospective users of the system because of unpredictable river communications in the past.⁴

The new frequency allocation for AMTS was then incorporated by the Commission into Part 80 of the rules. The Commission stated that due to its closeness to present maritime bands, existing equipment and technology would be readily adaptable.⁵ It further stated that it agreed with the majority of commenters that the Commission should not adopt detailed technical standards, "Our intent is to provide a framework under which system development can begin but which will not unduly hinder innovation and flexibility."⁶ What technical standards that were adopted were based on the Part 80 rules and in particular, with VHF operations.⁷ The Part 80 rules provide for 17 dBu contours for the other Part 80 maritime services, including the VHF Public Coast Service, which 17 dBu contours were retained by the Commission in Auction 20.

The fact that the 216-220 MHz band was close to the maritime bands and that it was placed in the Part 80 rules indicates that AMTS was envisioned to operate within the engineering requirements of the maritime services, with the additional requirement that AMTS provide continuity of service. Thus, AMTS was to have parity with the other

3 84 F.C.C.2d at ¶24.

4 84 F.C.C.2d at ¶3.

5 Supra at ¶75.

6 Supra at ¶78.

7 Supra at ¶¶84-86.

Part 80 licensees, along with the flexibility. As recently as November 16, 2000, the Commission continued to offer more flexibility to AMTS with respect to siting, construction and technical flexibility.⁸ However, the arbitrary and capricious decision by the FCC to impose a 38 dBu contour -- a Part 90 service contour -- and a 10 dB co-channel protection for AMTS flies in the face of all of the AMTS history and destroys the existing carriers ability to provide continuity of service, the prerequisite for AMTS operation.⁹

B. The New Rules Disrupt the AMTS Operating Systems.

As originally envisioned, AMTS was designed to be a superior operating system. Its propagation characteristics allowed for excellent coverage over water, which is ideal for its primary purpose, "to provide for the safety of life and property at sea and on inland waterways."¹⁰ AMTS providers must be able to provide clear communication regarding life safety emergencies in rough seas where the pitch and roll of the communicating vessel are severe.

The Davidson Consulting Engineering, Inc. ("Davidson") and Trott Communications Group, Inc. ("Trott") Studies, incorporated herein by reference from the Mobex Petition for Reconsideration, both demonstrate that Delivered Audio Quality ("DAQ") 3¹¹ is needed for understandable speech; with DAQ 3.4 recommended for public safety. Both studies conclude that a 38 dBu contour does not provide DAQ 3

8 Fourth Report and Order and Third Further Notice of Proposed Rule Making, 15 FCC Rcd 11585 (2000).

9 47 C.F.R. §80.475(a).

10 Second Order at ¶3.

11 TIA/EIA TSB-88A, published June 1999, pp.23 TABLE 1 and pp. 105 TABLE A-1.

speech.¹² If speech cannot be understood, then it follows that there cannot be continuity of service -- at least in the way that the incumbent systems are currently configured. Thus, because the FCC has changed its Rules in mid-stream, the incumbents now are not in compliance with Part 80 and because of the AMTS application freeze, they cannot bring their systems into compliance.

Ironically, in an FCC letter, DA 02-2024, released August 15, 2002, the Chief, Public Safety and Private Wireless Division, stated:

You also seek guidance regarding the meaning of the word 'integrated' in the AMTS definition. In the context of AMTS, the term 'integrated' **conveys the requirement that the base stations in an AMTS system must be connected, thereby ensuring seamless communication throughout the system** for a vessel traveling along a served waterway. (Emphasis Added.)

Unfortunately, as the Engineering Exhibits point out,¹³ the Commission has effectively insured that the incumbents' systems do not conform to its rules. On that basis alone, importation of the 38 dBu contour from Part 90, which is applicable to the 220-222 MHz Band, is not acceptable under the established requirement of a continuity of service.

Likewise, the 10 dB co-channel interference protection of the 220-222 MHz Band is inadequate for AMTS incumbents using FM. In response to the FCC's challenge,¹⁴ Trott points out at pages 2-3, that frequency band and propagation character are not relevant to interference performance of radio equipment since the subscriber equipment produced by most vendors has similar sensitivity and interference rejection specifications for like modulation types, regardless of band. Trott emphasizes that the important issue

12 Davidson at 6-8; Trott at 1-2.

13 See Davidson at 9; Trott at 2.

14 Second Order at ¶33.

is the AMTS operator's use of FM 12.5 kHz channels with a deviation of ± 2.5 kHz. These channels and radio equipment parameters are used in 900 MHz, UHF and VHF bands and there should be no difference between the equipment performance in these bands or the AMTS band.

In sum with the rule changes, as the Davidson study points out at Figure 1, page 9, the 17 dBu field strength occurs 146.5 km from the incumbent's coast station, but the 38 dBu field strength with 10 dB protection from the geographical licensee, occurs only 85 km from the incumbent station. Therefore, "much coverage from this incumbent coastal station is lost" under the new rules.

Further, contrary to the FCC's position that it will not be possible for a geographic licensee to insert a facility between co-system incumbent stations,¹⁵ both engineers demonstrate that a geographic licensee could place a site between two presently overlapping sets of contours of the incumbent.

As modified by the Commission in the Second Report, the AMTS operating systems will not provide continuity of service and may not provide adequate communications for safety for life and property at sea and on inland waterways. Therefore, the Commission must reconsider the 38 dBu service contour and 10 dB co-channel protection.

C. The Commission's Action is An Unlawful Taking.

The effect of the reduction of the service contour and co-channel protection is to reduce the geographical scope of licensed service areas and/or interference protection as detailed by the engineering studies. PSI has expended significant sums to design and

15 Second Order at ¶32.

build-out its existing licensed service areas. This build-out was predicated upon the standards of contours, co-channel separation and interference protection which has been part of the AMTS initial regulatory framework for 20 years.

With these rule changes, the Commission has engaged in a "taking" of property interests for which it lacks authority and for which it would face an obligation to pay just compensation pursuant to the Fifth Amendment of the United States Constitution. The Commission has taken a portion of the economic benefit on which incumbent licensees have relied and jeopardized any fill-in transmitters that were permitted.

In determining when federal agency action qualifies as a "taking" forbidden by the Fifth Amendment, the Supreme Court has primarily relied on ad hoc factual inquiries into the circumstances of each case.¹⁶ To aid in this factually oriented determination, however, the Court has increasingly looked to three factors as bearing particular significance:¹⁷

- ? The extent to which the regulation has interfered with distinct investment-backed expectations;
- ? The character of the governmental action; and
- ? The economic impact of the challenged regulation on the claimant.

The proposed modification of existing incumbent AMTS licenses through imposition of the reduced AMTS contours does, in the context of these guidelines, qualify as a compensable taking.

16 Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224 (1986).

17 Id., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982).

1. Interference with Distinct Investment-Backed Expectations

In articulating this guideline, the Supreme Court has confirmed that a “taking” can occur when the interest at stake is a form of economic benefit to a private party which falls short of full, titled ownership of goods or realty. In Shanbaum v. United States,¹⁸ the U.S. Claims Court recognized that it had jurisdiction under the Tucker Act for a Fifth Amendment “taking” claim for just compensation resulting from the plaintiff’s loss of a television broadcast license as a result of a Commission order. That decision is consistent with the contemporary recognition that FCC license rights, while constituting less than a “full-fledged indefeasible property interest,” are more than a “non-protected interest, defeasible at will.”¹⁹

In each of its license applications, PSI provided the Commission with the 17 dBu contour of its proposed station. The Commission’s grant of a PSI license necessarily incorporated the contour shown in the application as the authorized contour to be protected against future intrusion.

PSI has acted in reliance on the terms of its licenses, as originally issued, to invest in the design and construction of transmitting facilities to provide service within the contours for which it was originally awarded. The Commission cannot now reduce these existing service areas through the present proceeding without incurring an obligation to compensation to PSI for the reduced value of its investment.

18 1 Ct. Cl. 177 (1982), aff’d 723 F.2d 69 (Fed. Cir. 1982)

19 In re Atlantic Business and Community Development Corp., 994 F.2d 1069, 1073-76 (3d Cir. 1993); In re Beach Television Partners, 38 F.3d 535, 537 (11th Cir. 1994); Orange Park Florida T.V., Inc. v. F.C.C., 811 F.2d 664, 674 n.19 (D.C. Cir. 1987).

2. Nature of the Commission's Action

The fact that the Commission's decision on replacement interference and contour requirements is advanced in the context of a rulemaking does not shield it from liability for damages which the new rule would cause to incumbent licensees. The Fifth Amendment "taking" clause is intended to compensate private parties whose interests are adversely affected by the government's exercise of its regulatory authority.²⁰

Turning to the specific nature of the proposed Commission action, it is significant that the effect of the new rules is to reduce the geographic scope of the area within which an incumbent AMTS licensee can provide commercial service. The Supreme Court has held that an unconstitutional taking may more readily be found when the interference with property "can be characterized as a physical invasion" by the government. In such cases, the governmental action represents more than "interference" which "arises from some public program adjusting the benefits and burden of economic life to promote the common good."²¹ When the effect of governmental regulation is "physical intrusion [which] reaches the extreme form of a permanent physical occupation, a taking has occurred." In such cases, "the character of the government action" becomes "determinative" of whether a taking has occurred.²² Moreover, the government's invasion of interests in property, other than full ownership, such as an easement, can also give rise to an unconstitutional taking.²³

20 The use of the rulemaking procedure to adopt new contour requirements modifying existing licenses satisfies only procedural due process concerns and Administrative Procedure Act rights of the affected licensees, not the separate Constitutional safeguard against a taking of private interests for public use. California Citizens Band Ass'n v. United States, 375 F.2d 43, 52-53 (9th Cir. 1967); Florida Rock Industries v. United States, 791 F.2d 893, 898-900 (Fed. Cir. 1986).

21 Loretto v. Teleprompter Manhattan CATV Corp., *supra* at 426.

22 Id.

23 Kaiser Aetna v. United States, 444 U.S. 164, 175-176 (1979).

Moreover, it is evident that the referenced taking is for a “public use” within the meaning of the Fifth Amendment, as it would advance the Commission’s stated purpose of awarding geographic licenses pursuant to competitive bidding.²⁴

The Fifth Amendment’s guaranty that private property not be taken for public use without just compensation is designed to bar the government from forcing some people to assume burdens which should be borne by the public as a whole.²⁵ The Commission should not attempt to secure a public financial benefit at the expenses of individual licensees who have relied in good faith and have made investment decisions on the basis of existing license terms. Accordingly, the Commission should reconsider its new rules or compensate the incumbent AMTS carriers for their losses.

3. The Economic Harm to PSI

With the adoption of the new rule, the FCC circumscribes the geographic region in which PSI understood it had exclusive rights to provide services and to enjoy interference protection. Redesign and redeployment of transmitting facilities necessitated by the new service contours would represent further monetary damages to PSI. Affected licensees would have an opportunity to prove such damages after the taking has been effected.²⁶

More importantly, however, the constitutional implications of the adoption of new contour requirements call into question the Commission’s statutory authority to effect such modification of incumbent AMTS operators’ licenses. The Supreme Court follows the “cardinal principle” of interpreting statutes and administrative decrees in a manner

24 See Ruckelshaus v. Monsanto Co., *supra* at 1014-1015.

25 Armstrong v. United States, 364 U.S. 40, 44, 46 (1960).

26 See Ruckelshaus v. Monsanto Co., *supra*, at 1016-1017.

which avoids, where "fairly possible," constitutional infirmities. In the case of United States v. Security Industrial Bank,²⁷ the Court held:

[W]e decline to construe the [Bankruptcy] Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the Takings Clause.

Here, the Commission's action would also give rise to a "taking," and no provision has been made for compensation of potentially affected licensees. Because the Communications Act cannot be interpreted to authorize the Commission to effect an uncompensated taking,²⁸ it is unlikely that the Commission has authority to impose the new AMTS contour requirements.

D. The Commission's Decision Disserves the Public Interest.

In its initial Order, the Commission described the necessity for an AMTS river wide operation that would provide a continuity of service for the safety of tug, towboat and barge operators.²⁹ Thus, AMTS was allocated in the public interest in order to provide a safety system for waterways.

In 1997, the Commission stated, "The Maritime Service provides for the unique distress, operational, and personal communications needs of vessels at sea and on inland waterways. This service provides a vital emergency radio link, similar to the terrestrial '911' system, to ensure safety of life and property in the marine environment"³⁰ It added

27 459 U.S. 70, 81 (1982).

28 See Bell Atlantic Telephone Co. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

29 84 F.C.C.2d at ¶3.

30 Second Report and Order and Second Further Notice of Proposed Rule Making, 12 FCC Rcd 16950, 16953 (1997).

that "the primary purpose of this service is to provide for safety of life and property at sea."³¹

With the new rules, the safety of the public is being threatened with the inevitability of non-continuous service, not just for the maritime community but the nation as a whole. This assault on AMTS coverage takes place at a time when the safety of the nation can ill afford it. With the increased demands for protection of the nation's bridges, dams and other industrial complexes located near bodies of water because of the possibility of terrorists' acts on or around the water, continuity of coverage of AMTS operations is imperative for homeland security.

The Commission's decision to modify the contours of the AMTS incumbents, reducing continuous coverage and providing the opportunity for a geographic licensee to place new stations within the incumbent's previously overlapping contours reduces the ability of AMTS providers to protect the public. Thus, the rule changes are not in the public interest. The Commission must reconsider its actions.

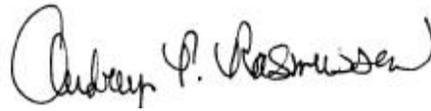
31 12 FCC Rcd 16956.

IV.
CONCLUSION

WHEREFORE, the above premises considered, PSI respectfully requests that the Commission reconsider its decision in the above-referenced proceeding to allow 17 dBu contour for incumbents and to adopt a 18 dB Carrier to Interference Ratio.

Respectfully submitted,

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Dated: August 23, 2002

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