

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

In the Matter of)
)
Applications of i2way Corporation) WT Docket No. 02-196
)
)

To: Thomas Sugrue, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau

**COMMENTS
OF
THE LAND MOBILE COMMUNICATIONS COUNCIL**

The Land Mobile Communications Council (“LMCC”), pursuant to Section 1.2 and 1.1206 of the Commission’s Rules, 47 C.F.R. § 1.2 and § 1.1206 , hereby respectfully submits its Comments in the above-captioned proceeding.

I. INTRODUCTION

LMCC is a non-profit association of organizations representing virtually all users of land mobile radio systems, providers of land mobile services, and manufacturers of land mobile radio equipment. LMCC acts with the consensus, and on behalf, of the vast majority of public safety, business, industrial, private, commercial and land transportation radio users on several frequency bands regulated by the FCC. Key to these operations are those bands included in the so-called “Refarming” proceeding. LMCC has been an active participant in all phases of this complex and extended proceeding; the efficient use of the refarmed bands is of paramount importance to the LMCC and its members. Membership includes the following organizations:

- Aeronautical Radio, Inc. (ARINC)

- American Association of State Highway and Transportation Officials (AASHTO)
- American Automobile Association (AAA)
- American Mobile Telecommunications Association, Inc. (AMTA)
- American Petroleum Institute (API)
- Association of American Railroads (AAR)
- Association of Public Safety Communications Officials-International, Inc. (APCO)
- Central Station Alarm Association (CSAA)
- Forest Industries Telecommunications (FIT)
- Forestry-Conservation Communications Association (FCCA)
- Industrial Telecommunications Association, Inc. (ITA)
- Intelligent Transportation Society of America, Inc. (ITSA)
- International Association of Fire Chiefs (IAFC)
- International Association of Fish and Wildlife Agencies (IAFWA)
- International Municipal Signal Association (IMSA)
- Manufacturers Radio Frequency Advisory Committee (MRFAC)
- National Association of State Foresters (NASF)
- Personal Communications Industry Association (PCIA)
- Taxicab, Limousine & Paratransit Association (TLPA)
- Telecommunications Industry Association (TIA)
- United Telecom Council (UTC)

II. BACKGROUND

On June 7, 2002, i2way Corporation (“i2way”) filed a Request for Declaratory Ruling seeking clarification of the ten-channel limit set forth in Section 90.187(e)¹ of the Commission’s rules.² i2way’s Request was related to the Commission’s return of several i2way applications seeking access to frequencies in the 450-470 MHz and 150-174 MHz bands because the Commission held that the applications “did not comply with Section 90.187(e) or the Division sought certification that the applications complied with Section 90.187(e).”³ i2way asserts that it requires a “complement of various types of radio facilities within the same metropolitan area

¹ 47 C.F.R. § 90.187(e) provides in pertinent part that “[n]o more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for in a single application.”

² i2way Corporation Request for Declaratory Ruling (June 7, 2002). (“i2way Request”)

³ Wireless Telecommunications Bureau Seeks Comment on i2way Corporation’s Request for Declaratory Ruling Regarding the Ten-Channel Limit of Section 90.187(e), *Public Notice*, WT Docket 02-196 (July 29, 2002).

and, for this reason, has filed applications for the same areas in many parts of the country.”⁴ i2way’s contention is that Section 90.187, the applicable Commission rule, does not apply to the given circumstances based on the lack of Commission intent and precedent.⁵

III. COMMENTS

LMCC respectfully disagrees with what appears to be the fundamental premise of i2way’s request; its claim that, prior to the codification of Section 90.187(e), “the rules imposed no limit on the number of 450 MHz and 150 MHz channels for which applicants could apply.”⁶ Rather, the FCC rules governing the 150–170 MHz and 450-470 MHz bands did, and still do, state:

Limitation on number of frequencies assignable. Normally only one frequency, or pair of frequencies in the paired frequency mode of operation, will be assigned for mobile service operations by a single applicant in a given area. The assignment of any additional frequency or pair of frequencies will be made only upon a satisfactory showing of need;⁷

Although the FCC routinely has recognized that the communications requirements of many Part 90 applicants warrant more than a single channel assignment in an area, its rules clearly establish a premise of one channel per market absent a justification.

Thus, contrary to i2way’s presumption, the ten-channel limitation expanded rather than curtailed its spectrum opportunities. The introduction of trunking into the bands below 800 MHz, a system design predicated on the availability of multiple channels, required the Commission to consider how to promote the development of this efficient technology while

⁴ i2way Request at 2.

⁵ The FCC Form 601 permits the licensing of multiple fixed locations on a single application, although applicants also are permitted to file individual applications for each fixed location within a system. i2way’s interpretation of the FCC rules requires a determination that the application of the ten-channel limit rests entirely upon the licensing approach selected by the applicant. Such an interpretation defies common sense and cannot be the intent of the FCC’s requirement.

⁶ *Id.* at 5.

ensuring that valuable, scarce spectrum continued to be properly utilized. This concern was highlighted by LMCC which stated that the 450-470 MHz band was “one of the key frequency bands available to the private wireless community” and which urged the FCC to adopt a channel limitation that would permit the deployment of a variety of systems types, including but not limited to trunked systems, in bands in which spectrum historically has been assigned on a shared basis.

The result was a rule that permits the initial licensing of sufficient channels to support a trunked facility, with an opportunity to obtain additional frequencies once already licensed spectrum has been placed in operation. In LMCC’s opinion, the rule properly balances the threat of spectrum “warehousing” with the benefits of flexibility and efficiency in the PLMR shared spectrum bands.^{8 9} It was and continues to be LMCC’s strongly held opinion that without consistent application of the Section 90.187(e) channel limitation, utilization of these bands by conventional and trunked licensees alike could be severely compromised.¹⁰

The purpose of a declaratory ruling is to “terminat[e] a controversy or remov[e] uncertainty.”¹¹ In cases where there is no uncertainty to be removed or controversy to be

⁷ 47 C.F.R. § 90.35(e).

⁸ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Third Memorandum Opinion and Order*, 14 FCC Rcd. 10922, 10930-31 ¶ 18 (1999).

⁹ See In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, *Supplemental Comments of the Land Mobile Communications Council on Petitions for Reconsideration of the Second Report and Order*, PR Docket No. 92-235 (filed July 22, 1998) at para.17.

¹⁰ See, for example, the Informal Request for Initiation of Revocation Proceeding, filed on August 16, 2002, by The Coalition For Accuracy In Licensing.

¹¹ 47 C.F.R. § 1.2.

terminated, a declaratory ruling is not warranted.¹² The existence of ample Commission case law in similarly situated instances removes any question of ambiguity or uncertainty.

For example, in *Valley Industrial*, the Commission stated that a waiver should be submitted by a licensee that wished to apply for spectrum in excess of the Section 90.187 ten-channel limit.¹³ A waiver requires that either the underlying purpose of the rule would not be served by application to the instant case and a waiver is in the public interest, or, due to the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest or the applicant has no reasonable alternative.¹⁴ The Commission subsequently determined that the applicant's request for a twenty-eight channel narrowband trunking system to replace its trunked facilities displaced by an auction was not "sufficient justification" to warrant a waiver.¹⁵ Nonetheless, i2way is free to request appropriate relief if it believes that the public interest benefits of its proposed system justify Commission grant of a waiver of Section 90.187(e).

i2way's request states that "each type of application was specifically designed to fulfill a specialized role in i2way's overall system design."¹⁶ The system that i2way envisions is "two

¹² See, e.g., Petitions to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters, 66 FCC 2d 1021, 1024 n. 13 (1977) (denying request for declaratory ruling "in stark contravention of a clear, comprehensive rule.").

¹³ Valley Industrial Communications, Petition for Reconsideration of Grant of License for Station WPPV640, Order on Reconsideration, 15 FCC Rcd 14823 (August 8, 2000) (*Valley Industrial Communications*). See also RF Data, Inc. Objections to Applications for Licenses in the Private Land Mobile Radio Service at Good Springs, Nevada and Fresno, California, Memorandum Opinion and Order, 15 FCC Rcd 25487 (September 29, 2000); Cumulous Communications Application for Licenses in the Private Land Mobile Radio Service at Sanger, Fresno, Santa Nella, Mariposa, Westley and Cameron Park, in California, Memorandum Opinion and Order, 15 FCC Rcd 12840 (July 20, 2000).

¹⁴ 47 C.F.R. § 1.925.

¹⁵ *Valley Industrial* at note 10.

¹⁶ i2way Request at 2.

way communications in virtually all major urban areas of the country.”¹⁷ In the absence of a more definitive showing as to i2way’s implementation plan for the construction and operation of the system, it is not possible for LMCC, or presumably the FCC, to assess whether waiver relief is warranted.¹⁸ It is clear, based on the existence of the §1.925 waiver option and its application to similarly situated licensees, that a declaratory ruling is not necessary in the instant case.

IV. CONCLUSION

WHEREFORE, the premises considered, it is respectfully requested that the Commission act in accordance with the views expressed herein.

Respectfully Submitted,

Larry Miller
President
Land Mobile Communications Council

1110 North Glebe Road, Suite 500
Arlington, Virginia 22201-5720
(703) 528-5115

Date: August 28, 2002

¹⁷ *Id.*

¹⁸ The timing of i2way’s proposed system deployment is of particular significance since the company has stated it intends to use 6.25 kHz technology. To the best of LMCC’s knowledge, the FCC has not yet certified any 6.25 kHz equipment.