

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

**ORIGINAL**

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AUG 11 2003

Federal Communications Commission  
Office of Secretary

WT Docket No. 99-87

In the Matter of )  
 )  
Implementation of Sections 309(j) and 337 )  
Of the Communications Act of 1934 )  
as Amended )  
 )  
Promotion of Spectrum Efficient Technologies )  
on Certain Part 90 Frequencies )

To: The Commission

**MOTION FOR STAY**

IPMobileNet, Inc. ("IPMobileNet" or "Company"), by its attorneys and pursuant to Section 1.429(k) of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully requests the FCC to stay the effectiveness of recently-adopted FCC Rule Section 90.209(b)(6) until the FCC either clarifies or reconsiders that provision as it applies to mobile data and other applications that satisfy the efficiency standard defined in FCC Rule Section 90.203(j)(5).<sup>1</sup> New Rule Section 90.209(b)(6) prohibits the acceptance of any application in the 150-174 MHz and 421-512 MHz bands that requests a bandwidth exceeding 11.25 kHz, effective as of January 13, 2004.<sup>2</sup> For the reasons detailed below and in IPMobileNet's Request for Clarification or, In the Alternative, Request for Reconsideration ("Request") being filed shortly, that rule is contradictory to and effectively eviscerates FCC Rule Section 90.203(j)(5), as well as newly-adopted Rule Section 90.203(j)(10), which permit the

<sup>1</sup> See WT Docket No. 99-87, *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 03-34 (rel. Feb. 25, 2003) ("2<sup>nd</sup> R&O")

<sup>2</sup> See WT Docket No. 99-87, *Report and Order*, FCC 03-34, 68 FR 42296 (2003)

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continued manufacture and use of 25 kHz bandwidth equipment, provided that the equipment meets a spectrum efficiency standard of one voice channel per 12.5 kHz of channel bandwidth.

## **I. INTRODUCTION**

IPMobileNet is a manufacturer and distributor of wireless data and next generation IP voice and data networking systems, primarily for the private land mobile radio (“PLMR”) user community. Its products facilitate the convergence of wireless mobile voice and data communications with the Internet. Its patented Intelligent Diversity Reception™ technology, combined with voice over Internet protocol, provides a highly reliable open architecture for IP voice and data networking. Its time division multiplex access system operates with up to four simultaneous voice over IP connections, 19.2 Kbps data transmissions, or a combination of both voice and data over a single 25 kHz channel and can be used in the 150 MHz, 450 MHz and 800 MHz bands. The Company believes its products fill an important niche for PLMR licensees, as usable land mobile spectrum becomes increasingly scarce, thereby heightening the need for improved efficiency on existing spectrum resources.

Because IPMobileNet’s current mobile data technology transmits on the equivalent of four voice paths in a 25 kHz bandwidth channel, or 19.2 Kbps, it satisfies the previously established spectrum efficiency equivalency standard for data systems in these bands. Based on the rules adopted over almost a ten-year period, the Company has been working with a number of PLMR users on the design, implementation or expansion of highly efficient mobile data networks using 150 MHz and 450 MHz spectrum. Several of its customers, including the States of Utah and Wisconsin, are local government entities that are in the process of deploying and testing extensive mobile data systems that will be used for a variety of mission critical public safety functions.

If FCC Rule Section 90.209(b)(6) becomes effective, it will prevent existing users from expanding or modifying their current authorizations, as is needed in virtually every instance, and will prohibit entirely any new entities from securing licenses for equipment that the rules permit IPMobileNet to manufacture and sell. Therefore, the Company has a significant, direct interest in the resolution of this issue

**II. STAYING THE EFFECTIVENESS OF FCC RULE SECTION 90.209(b)(6) WILL PERMIT THE FCC TO RECONCILE THE INCONSISTENCY BETWEEN THAT PROVISION AND PREVIOUSLY ADOPTED RULES GOVERNING THE MANUFACTURE AND USE OF 25 kHz BANDWIDTH EQUIPMENT IN THE 150 MHz AND 450 MHz BANDS THAT MEETS THE FCC'S SPECTRUM EFFICIENCY STANDARD.**

FCC Rule Section 1.429 specifies the procedures for requesting reconsideration of a final action taken in a rule making proceeding such as the 2<sup>nd</sup> R&O. As noted above, IPMobileNet will be filing its separate Request seeking Commission clarification or reconsideration of the issue raised herein. However, it is not possible to anticipate when the FCC will act on the Request. In the interim, numerous parties, including, but not limited to, the Company and its customers, will be irreparably injured should FCC Rule Section 90.209(b)(6) become effective. Therefore, for the reasons detailed below, the Company respectfully requests the FCC to stay the effectiveness of that rule pursuant to FCC Rule Section 1.429 (k) which states the following:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement. However, upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration.

The four criteria considering by the FCC when evaluating requests for injunctive relief are well-established: (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted;

and (4) a demonstration that a stay will be in the public interest.<sup>3</sup> As detailed *infra*, each of these criterion are satisfied in this instance.

A IPMobileNet's Request for Clarification or Reconsideration is Likely to Succeed on Its Merits

The Company is confident that its Request will be granted since it appears that the obvious inconsistency between FCC Rule Section 90.209(b)(6) and the FCC's carefully crafted spectrum efficiency standard was inadvertent.

Throughout the course of the FCC's more than decade-long effort to "refarm" the PLMR bands below 512 MHz, the objective has been consistent: "promote highly effective and efficient use of the PLMR spectrum and facilitate the introduction of advanced technologies into the private mobile services."<sup>4</sup> Although this initiative generally relied on a migration to narrowband technologies to achieve those goals, the Commission recognized that alternative technological approaches might achieve the same result and better suit the requirements of particular PLMR users:

The rules we adopt today establish a new channelling plan and provide technical flexibility which will enable private wireless users to make equipment investment decisions to accommodate their diverse needs.<sup>5</sup>

Thus, while the channelization plan for these bands was premised on users migrating to narrower channel bandwidths, from the outset the FCC acknowledged that certain advanced technologies would require 25 kHz bandwidth channels to achieve comparably efficient operations:

We establish a narrowband channel plan based on current channel centers. Technology that provides either narrowband or the equivalent efficiency will be

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<sup>3</sup> See, e.g., PR Docket No. 92-235, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 7051 at ¶ 7 (1999); ET Docket No. 01-75, *Order*, DA 03-1141 at ¶ 5 (rel. April 15, 2003); CC Docket No. 92-115, *Order*, 10 FCC Rcd 4146 at ¶ 7 (1995) ("PCIA Stay"); also see *Virginia Petroleum Jobbers Association v FPC*, 259 F.2d 921 (D.C. Cir. 1958), modified in *Washington Metropolitan Area Transit Commission v Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>4</sup> PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 10,076 at ¶ 1 (1995) ("Refarming R&O")

<sup>5</sup> *Id*

allowed. We allow the flexibility of aggregating up to the equivalent of 4 NB channels provided that spectrum-efficient technology is employed (e.g. 4-TDMA in 25 kHz). This approach will enable users to employ the most spectrally-efficient technology available, while causing the least disruption to their own and other existing operations. This channeling plan establishes a channelization framework that is flexible, technology-neutral, and can easily be adapted to user fees or competitive bidding, if authority to use these mechanisms is obtained.<sup>6</sup>

It further explained its spectrum efficiency standard, including its standard for data systems, as follows:

In accordance with the transition dates for equipment in the 150-174 MHz VHF and 421-512 MHz UHF bands, we are adopting a spectrum efficiency standard of one voice channel per 12.5 kHz of channel bandwidth for equipment type accepted after August 1, 1996, and a spectrum efficiency standard of one voice channel per 6.25 kHz for equipment type accepted after January 1, 2005. Additionally, after August 1, 1996, equipment designed for data operation that uses more than a 6.25 kHz channel bandwidth, must meet a minimum efficiency standard of at least 0.768 bits per second per Hertz.<sup>168</sup> At the chosen standard of 0.768 bps/Hz, the 6.25 kHz equipment will have a data rate of 4800 bps, and the 12.5 kHz equipment will have a data rate of 9600 bps. These are standard data rates. Based on the comments, we believe that this standard is readily attainable. This standard will be incorporated into the type acceptance process by having equipment manufacturers certify as part of their application for type acceptance that their equipment meets the spectrum efficiency standard. Therefore, licensees and new applicants would be assured that any equipment they purchase would comply with the spectrum efficiency standard.<sup>7</sup>

This decision was codified in FCC Rule Section 90.203(j)(5) almost ten years ago, and has not been revisited since that Order was adopted.

In fact, the FCC reaffirmed its spectrum efficiency standard on reconsideration the following year, although the standard itself was not challenged; rather certain parties asked the FCC to permit alternative showings as well which the FCC declined to do:

In the R&O, we adopted spectrum efficiency standards for newly type accepted equipment at each transition date. Specifically, we require at least one voice channel per 12.5 kHz of channel bandwidth for equipment type accepted after August 1, 1996, and at least one voice channel per 6.25 kHz of channel bandwidth for equipment type accepted after January 1, 2005. Additionally, after August 1,

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<sup>6</sup> *Id.* at ¶ 7 (footnote omitted)

<sup>7</sup> *Id.* at ¶ 97

1996, equipment designed for data operation must be capable of supporting a minimum data rate of 4800 bits per second per 6.25 kHz of bandwidth.<sup>8</sup>

The Commission also has referenced the standard in various other rule making proceedings:

We nonetheless take this opportunity to reiterate and expound upon the determinations that we have made regarding operations on the 700 MHz band General Use channels. First, we note that we established a standard channel bandwidth of 6.25 kHz for all narrowband segments of the 700 MHz band (which includes both General Use and Interoperability channels). In this connection, consistent with our approach in the Refarming proceeding, we adopted a data rate efficiency (channel efficiency standard) of 4.8 kbps for narrowband channels. We also indicated that 6.25 kHz channels could be combined to create 12.5 kHz and 25 kHz channels, provided that a spectrum use efficiency of 4.8 kbps is maintained.<sup>9</sup>

We desire to encourage new and innovative efficient technologies to benefit users of this band and the public. Therefore, as we did in our recently adopted Refarming Reconsideration Order, we will provide manufacturers with additional flexibility to design spectrally efficient transmitters. Manufacturers may obtain type acceptance for equipment that does not meet the voice or data efficiency standard if: (1) the manufacturer submits a technical analysis with its application for type acceptance demonstrating that the equipment will provide more spectral efficiency than that which would be provided by use of the voice or data efficiency standard; and (2) this technical analysis is deemed to be satisfactory by the Commission's Equipment Authorization Division. Licensees may employ equipment that does not meet the spectrum efficiency standard only if such equipment has been type accepted in this manner.<sup>10</sup>

Indeed, it even referenced the standard in footnote 6 in the instant 2<sup>nd</sup> R&O which states, in pertinent part:

...we note that the Commission, in the Refarming R&O and FNPRM, stated that narrowband or NB refers to channel spacings of 7.5 kHz in the VHF PLMR band and 6.25 kHz in the UHF PLMR bands....In that connection, the Commission added NB technology or NB equipment will include all advanced technologies designed to operate with channel bandwidths of 6.25 kHz or less or equipment with 6.25 kHz equivalent efficient such as TDMA (2 channels in 12.5 kHz or 4 channels in 25 kHz).<sup>11</sup>

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<sup>8</sup> PR Docket No 92-235, *Memorandum Opinion and Order*, 12 FCC Rcd 17,676 at ¶ 19 (1996) (footnote omitted).

<sup>9</sup> WT Docket No 96-86, *Fourth Report And Order And Fifth Notice Of Proposed Rule Making*, 16 FCC Rcd 2020 ¶ 82 (2001) *citing* WT Docket No. 96-86, *First Report and Order*, 14 FCC Rcd 152, 172-173 ¶¶ 37-38 (1998).

<sup>10</sup> PR Docket No 89-552, *Third Report And Order, Fifth Notice Of Proposed Rulemaking*, 12 FCC Rcd 10943 ¶ 118 (1997) (footnotes omitted)

<sup>11</sup> 2<sup>nd</sup> R&O at n 6

Thus, the Commission's position on this point – the permissibility of satisfying the spectrum efficiency standard set out in FCC Rule Section 90.203(j)(5) as an alternative to meeting the narrowband requirements – has remained consistent throughout a decade of decision making on this issue. There is no indication in either the Further Notice that resulted in this Order or in the 2<sup>nd</sup> R&O itself that the FCC intended to revisit the matter.<sup>12</sup> Indeed, any attempt to modify or eliminate the standard in the 2<sup>nd</sup> R&O would be in violation of the Administrative Procedure Act (APA) since no such change was proposed in the BBA FNPRM and, therefore, the public had no opportunity to comment on it. There is no question but that this rule has a substantive, not procedural, impact. It directly affects the radio systems applicants may operate and equipment manufacturers may sell. Therefore, it is subject to the APA requirement that an administrative agency must provide notice of a proposed rule that includes either the terms or substance of the proposal or a description of the subjects and issues involved.<sup>13</sup> Notice is required precisely so that interested parties such as IPMobileNet have an opportunity to participate in the FCC's decision making process through the submission of written or oral comments.<sup>14</sup> No such notice was provided in the BBA FNPRM. Since the Company is confident that the FCC did not intend to circumvent the APA in enacting this rule, it assumes that the language of new FCC Rule Section 90.209(b)(6) inadvertently failed to incorporate provisions for applications that satisfy the requirements of FCC Rule Section 90.203(j)(5) and should be clarified or corrected accordingly.<sup>15</sup>

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<sup>12</sup> See WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22,709 (1999) (“BBA FNPRM”).

<sup>13</sup> 5 U.S.C. § 553(b)(3) See, e.g., PCIA Stay at ¶ 6, n. 3 *supra*

<sup>14</sup> 5 U.S.C. § 553(c)

<sup>15</sup> New FCC Rule Section 90.203(j)(10) also should be amended to reference the alternative efficiency standards in FCC Rule Section 90.203(j)(5)

B. IPMobileNet, Its Customers and Other Parties Intending to Deploy Systems that Meet the Section 90.203(j)(5) Standard Will Be Irreparably Harmed if a Stay is Not Granted.

As written, FCC Rule Section 90.209(b)(6) will prohibit the acceptance of applications from parties that meet the FCC's requirements for spectrally efficient equipment until the Commission clarifies or corrects that provision for the reasons described *supra*. In the interim, entities such as the States of Utah and Wisconsin, and surely many others, will be precluded from pursuing system plans that, in many instances, have taken years to develop, approve and fund and are at crucial stages of deployment. They will be left with systems that are half-built with no way to move forward. They will not even be able to secure the spectrum they know they will need once the FCC corrects this error and system implementation can continue because their applications will be deemed unacceptable. Companies or governmental entities that otherwise would be inclined to select mobile data or other efficient technologies will be denied the opportunity to do so. Those that have a pressing need to select a technology path during this period will have no choice but to forego those options.

This result is entirely antithetical to the Commission's avowed objective in this proceeding to "provide technical flexibility which will enable private wireless users to make equipment investment decisions to accommodate their diverse needs."<sup>16</sup> It is inconsistent with virtually every initiative the FCC has endorsed in recent years, including its recent Spectrum Policy Task Force report.<sup>17</sup> It clearly will cause irreparable harm to those users who have proceeded in reliance on the spectrum efficiency standard in the FCC's rules, as well as those who wish to do so.

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<sup>16</sup> See n. 5 *supra*

<sup>17</sup> Spectrum Policy Task Force Report, ET Docket No 02-135 (rel Nov 15, 2002)

C. No Party Will Be Harmed by the Grant of a Stay.

Until the FCC adopted the 2<sup>nd</sup> R&O, the PLMR industry had every expectation that the spectrum efficiency standard adopted almost ten years ago would remain valid. There was no indication in the BBA FNPRM or in any other FCC action that it intended even to revisit this issue, much less reverse that decision. To the contrary, the agency's statements in all matters relating to refarming, and even those in unrelated proceedings,<sup>18</sup> confirmed the effectiveness of the standard set out in FCC Rule Section 90.203(j)(5). Thus, no interested party would be harmed by a stay that would have the effect of preserving the efficacy of a rule that was not known to be the subject of further consideration.

D. The Public Interest Would Be Served by the Grant of a Stay.

The FCC itself has determined on numerous occasions that the public interest will be served by allowing PLMR users flexibility in their equipment choices, provided that their selections satisfy efficiency standards established by the FCC.<sup>19</sup> That flexibility will be sacrificed for an indeterminate period unless a stay is granted. Indeed, such a chilling effect at this critical time of PLMR system migration may well foreclose the introduction of these highly efficient technologies for the foreseeable future. It is evident that the public interest demands issuance of a stay of the effectiveness of FCC Rule Section 90.209(b)(6) until it is clarified or modified to permit the acceptance of applications that meet the efficiency requirements of FCC Rule Section 90.203(j)(5).

### III. CONCLUSION

For the reasons described herein, IPMobileNet respectfully requests that the FCC stay the effectiveness of FCC Rule Section 90.209(b)(6) until it is clarified or modified to permit the

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<sup>18</sup> See, e.g., n 9 and n 10 *supra*

<sup>19</sup> See, e.g., n 6 and n 7 *supra*

acceptance of applications that meet the efficiency requirements of FCC Rule Section 90.203(j)(5).

Respectfully Submitted,

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Date: August 11, 2003

**CERTIFICATE OF SERVICE**

I, Linda J. Evans, J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this August 11, 2003 caused to be mailed, first-class, postage prepaid, a copy of the foregoing Motion for Stay to the following:

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