

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
)  
Possible Revision or Elimination of Rules )  
Under the Regulatory Flexibility Act, )  
5 U.S.C. § 610 )  
)  
Extended Implementation Authority for )  
Certain 800 MHz Licenses )  
)

ORDER

Adopted: December 13, 2001

Released: December 17, 2001

By the Chief, Private Wireless and Public Safety Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 24, 1999, the Commission issued a *Public Notice*,<sup>1</sup> pursuant to the Regulatory Flexibility Act of 1980 as codified in 5 U.S.C. § 610(b), seeking comment on certain of the Commission’s Rules. The *Public Notice* focused on Rules published from 1986 through 1989. Section 610 requires the Commission to review such Rules and determine whether the Rules should be continued without change, amended or rescinded to minimize “any significant impact . . . upon a substantial number of small entities.”<sup>2</sup> On December 10, 1999, the Commission received comments filed by Small Business in Telecommunications (SBT)<sup>3</sup> requesting amendment of Section 90.629 of the Commission’s Rules.<sup>4</sup> After careful review of SBT’s comments, we conclude that a rulemaking proceeding to amend Section 90.629 of the Commission’s Rules along the lines suggested by SBT is not warranted at this time.

<sup>1</sup> *Public Notice*, “FCC Seeks Comment on Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. § 610,” (rel. Sept. 24, 1999). This document was published in the *Federal Register* on October 14, 1999. 64 Fed. Reg. 55671 (Oct. 14, 1999).

<sup>2</sup> 64 Fed. Reg. at 55671.

<sup>3</sup> “SBT is a nonprofit organization formed to forward the interests of small business in the area of regulation and legislation in an effort to improve the competitiveness and future opportunities for small businesses in telecommunications.” See <http://www.sbthome.org/>

<sup>4</sup> 47 C.F.R. § 90.629. Comments of Small Business in Telecommunications (SBT Comments) filed on December 10, 1999, regarding Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act.

## II. BACKGROUND

2. In December 1995, the Commission adopted a wide-area geographic area licensing approach for Specialized Mobile Radio (SMR) systems operating in the 800 MHz frequency band.<sup>5</sup> As part of this licensing approach, the Commission adopted construction and coverage requirements for Economic Area (EA)<sup>6</sup> licensees similar to those required of broadband Personal Communications Services (PCS) and 900 MHz band SMR licensees.<sup>7</sup> Contiguous blocks of spectrum throughout defined service areas are awarded to single licensees on an exclusive basis.<sup>8</sup>

3. As a general matter, private land mobile radio (PLMR) systems above 800 MHz must be constructed and placed in operation within one year.<sup>9</sup> For those 800 MHz PLMR systems that are not constructed and placed in operation within one year, the licenses cancel automatically.<sup>10</sup> A PLMR applicant that needs more than 12 months to place its 800 MHz station(s) in operation may be permitted to take up to five years for constructing and placing a system in operation, provided that the applicant meets certain terms and conditions specified in Section 90.629 of the Commission's Rules.<sup>11</sup> Specifically, Section 90.629 of the Commission's Rules outlines the circumstances under which a licensee may be granted extended implementation or "slow growth" authority.<sup>12</sup> Section 90.629 requires the applicant to file a statement justifying the amount of time needed to construct and place its radio station in operation.<sup>13</sup> In

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<sup>5</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463 (1995) (*800 MHz Report and Order*). Prior to the adoption of geographic licensing, qualified applicants were awarded licenses on a site-by-site, channel-by-channel basis.

<sup>6</sup> The Bureau of Economic Analysis has divided the Nation into regional economic areas that consist of metropolitan areas that are centers of economic activity and their economically related surrounding counties. See Final Redefinition of the BEA Economic Areas, 60 Fed. Reg. 13114 (March 10, 1995). There are a total of 175 Economic Areas. See 47 C.F.R. § 90.7 [*Economic Areas (EAs)*].

<sup>7</sup> *800 MHz Report and Order* at 1521 ¶ 104. The Commission had previously determined that interconnected SMR services fell within the new category of mobile services known as commercial mobile radio services (CMRS), such as cellular and broadband PCS licensees. See Implementation of Sections 3(N) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1448-58 (1994); Implementation of Sections 3(N) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8042-43 (1994) (*Third Report and Order*).

<sup>8</sup> *Third Report and Order*, 9 FCC Rcd 7988, 8042 ¶ 94 (1994).

<sup>9</sup> See 47 C.F.R. §§ 90.631(e) [for non-SMR trunked systems]; 90.633(c) [for non-SMR conventional systems].

<sup>10</sup> See 47 C.F.R. §§ 90.631(f) [for non-SMR trunked systems]; 90.633(d) [for non-SMR conventional systems].

<sup>11</sup> 47 C.F.R. § 90.629; see also 47 C.F.R. §§ 90.631(e), 90.633(c).

<sup>12</sup> See 47 C.F.R. § 90.629.

<sup>13</sup> 47 C.F.R. § 90.629 (a). Specifically, this section states that the statement “must describe the proposed system, state the amount of time necessary to construct and place the system in operation, [and] identify the number of base stations to be constructed and placed in operation during each year of the construction period . . . .” *Id.*

addition to a statement of justification, the applicant must also show that at least one of three conditions set forth in Section 90.629 is satisfied.

- (1) The proposed system will require longer than twelve (12) months to construct and place in operation because of its *purpose, size, or complexity*; or
- (2) The proposed system is to be part of a coordinated or integrated wide-area system which will require more than twelve (12) months *to plan, approve, fund, purchase, construct, and place in operation*; or
- (3) The applicant is required by law to follow a multi-year cycle for planning, approval, funding, and purchasing the proposed system.<sup>14</sup>

4. SBT states that Sections 90.629(a)(1)-(2) of the Commission's Rules benefit only large "wide-area system" operators because they fail to consider the unique "factors that prevent a small operator from timely constructing" its stations.<sup>15</sup> SBT further states that the "purpose, size, or complexity" criteria of Section 90.629(a)(1) is unjust to small operators because it subjects them to a "strict scrutiny" level of review.<sup>16</sup> In addition, SBT alleges that it is "not aware of any case where the Commission has granted extended implementation relief to a commercial operator of a single channel system or single trunked system."<sup>17</sup>

5. As a result, SBT contends that the Commission's Rules should be amended to permit "small businesses" to receive extended implementation authority for the construction of radio systems on the basis of financial hardship and other reasons.<sup>18</sup> Specifically, SBT recommends that Section 90.629 of the Commission's Rules be amended to include a new Section 90.629(f) with the following language:

Those bases under which extended implementation authority may be granted under this section for applicants who proposed to operate non-wide area systems shall include delays or hardships in obtaining financing, physical incapacity of an applicant (if an

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<sup>14</sup> 47 C.F.R. §§ 90.629(a)(1)-(3) (emphasis added).

<sup>15</sup> SBT Comments at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

individual), and the rural or remote location proposed to be served by the applicant.<sup>19</sup>

### III. DISCUSSION

6. The Regulatory Flexibility Act of 1980 requires us to review the Commission's Rules to "minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes."<sup>20</sup> The Regulatory Flexibility Act of 1980 outlines five factors that we must consider in making our determination: (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules and, to the extent feasible, with State and local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.<sup>21</sup>

7. After careful review of SBT's comments and our analysis of the applicable Regulatory Flexibility Act 1980 factors, we are not persuaded that Section 90.629 of the Commission's Rules should be amended at this time. Initially, we note that the "slow growth" provisions of Section 90.629 should be considered in the context of the Commission's overall construction requirements for Part 90 PLMR systems. It is a very specific exception to the Commission's general requirement that PLMR systems be constructed and placed in operation within a specified period of time.<sup>22</sup> As noted herein, by adopting uniform construction deadlines for PLMR systems, the Commission has determined that the specified construction period of one year is a reasonable amount of time to construct and place in operation traditional PLMR systems.<sup>23</sup> In this regard, the slow growth provisions under Section 90.629 is most appropriately characterized as a limited exception to the uniform construction periods for Part 90 PLMR systems, adopted for certain very specific public interest reasons.<sup>24</sup>

8. SBT's proposed amendment would permit a single, non-wide area licensee to cite - *at any time during the construction process* - financial distress or the sudden death of its principal as grounds for extended implementation authority. We believe that SBT's proposal would add uncertainty and unpredictability to our licensing process, thus undermining the Commission's overall goal to promote the build-out of this spectrum in an efficient and expeditious manner.<sup>25</sup> Specifically, SBT's proposal would entail creating a provision to authorize extended implementation for reasons that are not available under the

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<sup>19</sup> *Id.* at 4.

<sup>20</sup> 5 U.S.C. § 610(b).

<sup>21</sup> 5 U.S.C. § 610(b)(1)-(5).

<sup>22</sup> Section 90.629 is not available for commercial (SMR) systems. *See* 47 C.F.R. § 90.629(e).

<sup>23</sup> *See* general discussion at ¶ 3, *infra*.

<sup>24</sup> *Id.* *See also* 47 C.F.R. § 90.629(a). In this connection, we note that often the entities subject to the slow growth provisions are utilities and state and local governments.

<sup>25</sup> *See 800 MHz Report and Order* at 1529 ¶¶ 120-121 (citing the potential for licensees to abuse extended implementation authority, resulting in spectrum warehousing or the inability of EA licensees to utilize or acquire frequencies that are subject to extended implementation authority).

current Part 90 rules. The Commission has previously stated that “[t]his new scheme is not designed to benefit any particular entity, but to provide opportunities for a variety of licensees of different sizes to participate in the provision of wide-area service.”<sup>26</sup> We believe that SBT’s proposal would be in direct conflict with this policy. To the extent that SBT observes that an operator of a single channel system has not received extended implementation authority, we agree because such operator would not satisfy the requirements set forth in Section 90.629. Consequently, it was not envisioned that such operators would benefit from the relief extended under Section 90.629 and, as a result, it should not be viewed as inconsistent, inequitable or unequal treatment that they have not done so.

9. We also reject the second portion of SBT’s proposed amendment that would provide for extended implementation authority expressly on the basis of a station’s rural or remote location.<sup>27</sup> In this connection, we note that two of the three conditions under which extended implementation authority is warranted need not be inherently tied to large or wide-area systems, and, thus arguably are available to small or rural licensees. Specifically, although size of a system is one reason warranting extended implementation under Section 90.629(b)(1), purpose or complexity of a system are equally valid independent reasons. Additionally, the exemption of Section 90.629(b)(3) is prospectively available to any entities, both small and large, including states, local governments, small police or fire departments, and small public utilities (including rural utilities) that face multi-year cycles for planning, approval, funding and purchasing systems.<sup>28</sup> As a result, we believe that modification of Section 90.629 for this purpose is unnecessary.

10. Further, to the extent that entities, including small business entities, are interested in seeking additional time to construct their systems, we reiterate that they may do so without availing themselves of the provisions of the narrowly-tailored “slow growth” provisions set forth in Section 90.629. The Commission’s Rules expressly provide for requests for extensions of time to construct under Section 1.946(e).<sup>29</sup> We note, however, that these provisions are to accommodate involuntary loss of site or other matters beyond the control of the licensee,<sup>30</sup> rather than to accommodate failures to obtain financing, to obtain an antenna site, or to order equipment in a timely manner.<sup>31</sup> Nor are they designed to accommodate failures to meet construction deadlines caused by transfers of control or an intention to assign licenses.<sup>32</sup> Thus, to the extent that SBT wishes to address these types of concerns, it would appear, as a general matter, that a request for extension of time pursuant to Section 1.946(e) may not be an appropriate source of relief under such circumstances. We nonetheless note that the Commission’s Rules also provide another

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<sup>26</sup> *800 MHz Report and Order* at 1479 ¶ 14.

<sup>27</sup> SBT Comments at 4.

<sup>28</sup> *See* 47 C.F.R. § 1.925.

<sup>29</sup> 47 C.F.R. § 1.946(e).

<sup>30</sup> 47 C.F.R. § 1.946(e)(1).

<sup>31</sup> 47 C.F.R. § 1.946(e)(2).

<sup>32</sup> 47 C.F.R. § 1.946(e)(3).

potential avenue for relief should the circumstances presented so warrant. Specifically, Section 1.925 generally provides guidelines for the filing of a request for waiver of the Commission's Rules.<sup>33</sup>

11. We also note that SBT fails to show duplicity, overlap, or conflict between the current rule and other Federal rules, or how changes in technology or economic conditions require that Section 90.629 of the Commission's Rules be amended. The Commission has amended Section 90.629 on several occasions,<sup>34</sup> but, on no occasion has the Commission been petitioned to amend Section 90.629 as SBT now recommends. In fact, SBT is the only entity to submit comment on the issue in the instant proceeding. Indeed, Section 90.629 reflects the Commission's response to a significant and growing interest by applicants in operating technically innovative, wide-area systems.<sup>35</sup> In addition, Section 90.629 is consistent with the Commission's goal to facilitate the efficient use of spectrum through a wide-area, geographic-based licensing scheme. Finally, while we recognize that both small and large radio operators face a highly competitive marketplace, we are not convinced that Section 90.629 of our Rules poses a significant economic impact on a substantial number of small entities, in such a way as to support adoption of SBT's proposal.

#### IV. CONCLUSION

12. In the absence of a showing that Section 90.629 of the Commission's Rules poses a "significant economic impact . . . on a substantial number of small entities," and pursuant to our review under the Regulatory Flexibility Act of 1980, we conclude that amendment of Section 90.629 of the Commission's Rules, as requested by SBT, is not warranted. Thus, we have decided that there is a continuing need for Section 90.629 as it is currently constituted, and have decided not to amend Section 90.629 as SBT proposes.

#### V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), and 303(r), Sections 1.401(e) and 90.629 of the Commission's Rules, 47 C.F.R. §§ 1.401(e) and 90.629, and Section 610 of the United

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<sup>33</sup> See 47 C.F.R. § 1.925.

<sup>34</sup> See Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Period, *Report and Order*, PR Docket No. 92-210, FCC 93-256, 8 FCC Rcd. 3975 (1993) (amending Section 90.629 to lengthen the maximum extended implementation period from 3 to 5 years); 11 FCC Rcd 1463 (1995); *800 MHz Report and Order*, *supra* note 5 (ceasing acceptance of requests for extended implementation authority); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Memorandum Opinion and Order on Remand*, FCC 99-399, 14 FCC Rcd 21679 (1999) (concluding that SMR licensees granted extended implementation authority are sufficiently similar to EA licensees that they have similar flexibility with respect to construction requirements), *remanded by Fresno Mobile Radio Inc., et. al. v. Federal Communications Commission*, 165 F. 3d 965 (D.C. Cir., Feb. 5, 1999).

<sup>35</sup> See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Notice of Proposed Rulemaking*, PR Docket No. 93-144, FCC 93-257, 8 FCC Rcd 3950 (1993) (proposing rules on methods of allowing wide-area and advanced system implementation in the 800 MHz SMR services); Fleet Call, Inc., *Memorandum Opinion and Order*, FCC 91-56, 6 FCC Rec. 1533 (1991) (granting a request for waiver to authorize extended construction period as in the public interest, convenience and necessity).

States Code, 5 U.S.C. § 610, that the Comment and Petition for Rulemaking filed by Small Business in Telecommunications, on December 10, 1999, IS HEREBY DENIED.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety & Private Wireless Division  
Wireless Telecommunications Bureau