



channels,<sup>5</sup> six applications for Specialized Mobile Radio (SMR) channels,<sup>6</sup> and one application for General Category channels.<sup>7</sup> LMR contemporaneously requested a waiver of Sections 90.175,<sup>8</sup> 90.603,<sup>9</sup> 90.615,<sup>10</sup> 90.621(a)<sup>11</sup> and (b),<sup>12</sup> and 90.631(b),<sup>13</sup> (e)<sup>14</sup> and (f)<sup>15</sup> of the Commission's Rules to establish its proposed AIRSMR system.<sup>16</sup> Numerous licensees filed pleadings opposing LMR's applications and associated waiver request.<sup>17</sup> On January 14, 1993, in response to the pleadings filed against its applications and waiver request, LMR submitted a reply that contained modifications to its applications and waiver request (Waiver II).<sup>18</sup> In Waiver II, LMR explained that it chose to re-engineer its system to utilize (with only one exception) channels in the 900 MHz band from unassigned channels in the SMR, I/LT or Business Categories, and not to use any 800 MHz band channels (particularly, General Category channels).<sup>19</sup> In light of the changes to its system proposal, LMR asserted that only waivers of Sections

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<sup>5</sup> FCC File Nos. 592691 (filed Dec. 1, 1992) (Miami Int'l Airport), 592693 (filed Dec. 1, 1992) (Orlando Airport), 592694 (filed Dec. 1, 1992) (LaGuardia Airport), 592695 (filed Dec. 1, 1992) (JFK Int'l Airport) and 592696 (filed Dec. 1, 1992) (Baltimore-Washington Int'l Airport).

<sup>6</sup> FCC File Nos. 592686 (filed Feb. 8, 1993) (Houston Airport), 592688 (filed Sept. 25, 1992) (Philadelphia Int'l Airport), 592689 (filed Oct. 5, 1992) (Newark Airport), 592690 (filed Oct. 21, 1992) (Chicago O'Hare Airport), 592692 (filed Sept. 25, 1992) (Atlanta Int'l Airport) and 592699 (filed Sept. 25, 1992) (Dallas/Ft. Worth Airport).

<sup>7</sup> FCC File No. 592685 (filed Oct. 1, 1992) (San Francisco Int'l Airport).

<sup>8</sup> 47 C.F.R. § 90.175 requires an applicant to obtain frequency coordination of PLMR channels before submission of its application to the Commission.

<sup>9</sup> 47 C.F.R. § 90.603 prevents the use of PLMR 800 and 900 MHz channels on a commercial, for-profit basis.

<sup>10</sup> 47 C.F.R. § 90.615 prohibits the creation of a trunked 800 MHz system with unassigned General Category channels.

<sup>11</sup> 47 C.F.R. § 90.621(a) restricts the assignment of more than five channels at one time to an 800 MHz SMR station.

<sup>12</sup> 47 C.F.R. § 90.621(b) requires a 70-mile separation between co-channel SMR transmitter sites.

<sup>13</sup> 47 C.F.R. § 90.631(b) requires an applicant for a trunked system to certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant.

<sup>14</sup> 47 C.F.R. § 90.631(e) requires licensees of trunked systems to complete construction within one year.

<sup>15</sup> 47 C.F.R. § 90.631(f) states that a license cancels automatically and must be returned to the Commission if the station is not placed in permanent operation within one year.

<sup>16</sup> See Request for Rule Waivers and Other Relief filed by LMR Systems, Inc. on June 23, 1992 at 5 (Waiver Request).

<sup>17</sup> See LMR Systems, Inc., *Order*, 14 FCC Rcd at 17227, 17229 n.17 (*Order*) (WTB PSPWD 1999).

<sup>18</sup> Consolidated Reply to Comments to Waivers filed by LMR on January 14, 1993 (Waiver II).

<sup>19</sup> *Id.* at 9-11.

90.615, 90.617,<sup>20</sup> 90.621(h),<sup>21</sup> and 90.631(e) and (f) of the Commission's Rules were necessary to operate its proposed system.<sup>22</sup>

3. On May 30, 1996, LMR withdrew its waiver request that had been filed on January 14, 1993.<sup>23</sup> LMR asserted that all of its pending applications could be granted under the Commission's Rules without any waivers.<sup>24</sup> Specifically, LMR averred that the I/LT channels would be used only for purposes consistent with and by persons or entities meeting the I/LT eligibility criteria.<sup>25</sup> LMR also argued that it should be able to charge these eligible end users a reasonable fee for the use of LMR-installed or contracted equipment.<sup>26</sup> Further, LMR contended that it too should be considered eligible to hold these authorizations because it will not engage in any activity other than the "promotion and operation" of the AIRSMR system.<sup>27</sup> In a prior AIRSMR proposal, LMR envisioned that its system would be used by numerous end users including airlines, airport authorities, airline support facilities, baggage handlers, caterers, maintenance organizations, freight and cargo firms, hotels, car rental companies, and ground transportation services, etc.<sup>28</sup> Under its modified proposal, LMR anticipated that its system would be used to coordinate "airport transportation vehicles, safety and service personnel."<sup>29</sup>

4. On October 13, 1999, the Division approved the withdrawal of Waiver II and dismissed all of the amended applications filed on January 14, 1993 as defective pursuant to Section 1.934(d)(2) of the Commission's Rules.<sup>30</sup> The Division determined that, without waiver requests, LMR's applications for I/LT and Business channels were defective because Section 90.179 of the Commission's Rules provides that Private Land Mobile Radio (PLMR) services channels above 800 MHz may be shared only on a not-for-profit basis, and LMR intended to operate for-profit systems.<sup>31</sup> The Division based this determination, in part, on LMR's initial waiver request in which LMR stated that it did not wish to operate the proposed systems on a not-for-profit basis because of the regulatory requirements attached to such operation, and that LMR had applied for I/LT and Business channels only because sufficient SMR

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<sup>20</sup> 47 C.F.R. § 90.617 sets forth the channels in the 800 and 900 MHz bands available for trunked or conventional system use in non-border areas.

<sup>21</sup> 47 C.F.R. § 90.621(h) states that channel numbers 401-410, 441-450, 481-490, 522-530 and 561-570 are available on a co-primary basis to station in Basis Exchange Telecommunications Radio Service as described in Part 22 of the Commission's Rules.

<sup>22</sup> See Waiver II at 11-24.

<sup>23</sup> Letter from Frederick M. Joyce, Counsel to LMR, to Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division Office of Operations - Gettysburg, FCC, dated May 30, 1996 (May 30<sup>th</sup> Letter).

<sup>24</sup> *Id.* at 1.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See Waiver II at 1-2.

<sup>29</sup> May 30<sup>th</sup> Letter at 2.

<sup>30</sup> *Order*, 14 FCC Rcd at 17228 ¶ 1.

<sup>31</sup> *Id.* at 17235-36 ¶¶ 16-18.

channels were not available.<sup>32</sup> Because LMR never explained how or why an option it originally deemed infeasible had become acceptable, and it continued to pursue channels where for-profit operation was permitted, the Division concluded that LMR's application for I/LT and Business channels did not comply with Section 90.179 of the Commission's Rules.<sup>33</sup> The Division also noted that LMR's failure to identify specific entities that would share its systems,<sup>34</sup> and LMR's statement in the May 30<sup>th</sup> Letter that it would "promot[e]" its AIRSMR systems (an activity not ordinarily associated with not-for-profit operations)<sup>35</sup> also were factors the Division considered to be indicative that LMR's proposal was for a commercial, for-profit system.

5. On November 12, 1999, LMR requested Commission review of the Division's *Order*. On January 22, 2002, the Commission determined that eight applications filed by LMR should be returned to pending status<sup>36</sup> and that LMR should be afforded the opportunity to offer additional information to support its claim that its proposed system would operate on a not-for-profit, cost-shared basis.<sup>37</sup> Further, the Commission provided LMR with thirty days from the release of the *MO&O* to offer such supplemental information. LMR filed its supplemental information on February 19, 2002.

### III. DISCUSSION

6. LMR describes its proposed communications system as a not-for-profit, cost-shared operation and states that it will operate its system pursuant to Section 90.179 of the Commission's Rules. In an effort to substantiate its claim that it will operate a not-for-profit, cost-shared system, LMR resubmits a letter dated November 12, 1999 from the National Air Transportation Association (NATA);<sup>38</sup> informs the Commission that it will continue communications with ARINC, Inc.<sup>39</sup> to secure its participation in the LMR system;<sup>40</sup> provides a proposed Agreement for Shared Use of Radio Systems;<sup>41</sup>

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<sup>32</sup> *Id.* at 17236 ¶ 18.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 17237 ¶ 20.

<sup>35</sup> *Id.* (citing, e.g., Amendment of Section 90.631 of the Commission's Rules and Regulation Concerning Loading Requirement for 900 MHz Trunked SMR Station, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914, 4919 (1992)).

<sup>36</sup> See *MO&O*, 17 FCC Rcd 1906 ¶ 11. The *Order* dismissed all 17 applications filed by LMR, but LMR's Application for Review presented arguments only with respect to the 10 applications filed for I/LT and Business channels. *Id.* at n.3. Consequently, the opportunity to supplement the record afforded in the *MO&O* only extended to those 10 applications. The Commission also noted that two of the applications subject to the Application for Review were defective because they failed to comply with 47 C.F.R. § 90.175(e). See *id.* at 1905 ¶ 9. Section 90.175(e) of the Commission's Rules requires that an applicant submit a showing by the appropriate frequency coordinator recommending specific frequencies that are available in accordance with the applicable loading standards and mileage separation criteria. See 47 C.F.R. § 90.175(e).

<sup>37</sup> See *MO&O*, 17 FCC Rcd at 1908 ¶ 13. The Commission rejected LMR's contention that the Division based its decision upon facts that were not properly before it by relying on Waiver I because it was superseded by Waiver II and that the Division misconstrued or ignored 47 C.F.R. §§ 1.925(c)(ii), 1.934(d)(2). *Id.* at 1904 ¶¶ 7-8.

<sup>38</sup> See Supplement at Exhibit 1.

<sup>39</sup> ARINC provides voice and data radio communications to the aviation industry through sharing assigned frequency spectrum, radio facilities and satellites.

and provides a declaration of Donald Goodwin, President of LMR Systems, Inc.<sup>42</sup> We find that this information does not sufficiently demonstrate that the proposed system is in conformance with the Commission's Rules.

7. The Commission has discussed the nature of and criteria for not-for-profit, cost-shared operation meeting the requirements of Section 90.179 of the Commission's Rules in both rulemaking and adjudicatory contexts. The Commission has recognized that legitimate cost-sharing arrangements that allow radio users to combine resources to meet compatible needs for specialized internal communications facilities are not "for profit."<sup>43</sup> However, the Commission also has cautioned that "it was not Congress's intent, nor is it ours, to allow licensees to enter into sham 'not-for-profit' arrangements in an effort to disguise essentially for profit activity."<sup>44</sup>

8. In *Viking Dispatch Services, Inc. (Viking)*, the Wireless Telecommunications Bureau (Bureau) affirmed that when internal communications are not envisioned, greater scrutiny of an application proposing to offer a not-for-profit, cost-shared system is often warranted.<sup>45</sup> In that case, Viking filed applications to construct and operate 900 MHz facilities for two-way mobile dispatch systems on a not-for-profit, cost-shared basis.<sup>46</sup> Even after Viking supplemented its applications to address the Bureau's concerns, the Bureau determined that the proposed systems were not *bona fide* not-for-profit, cost-shared systems.<sup>47</sup> Specifically, the Bureau noted that the proposed systems were not to be used for internal communications.<sup>48</sup> Moreover, Viking had not explained why it would undertake to construct expensive systems and then make them available on a non-profit basis, and Viking had failed to identify particular shared system participants.<sup>49</sup> The Commission affirmed the Bureau's decision and reiterated that identifiable participants, with existing communications needs, are key components of a not-for-profit, cost-shared system and that the lack of specified users indicates the entrepreneurial nature of a system.<sup>50</sup> Furthermore, the Commission stated, "[W]e believe it is possible to develop a list of sincere and committed prospective users before an application is filed. . . . We find that [Viking's] demonstration of some general, loosely-defined need to be met by [Viking] as a third-party provider does not meet the

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<sup>40</sup> *See id.* at 2.

<sup>41</sup> *Id.* at Exhibit 2.

<sup>42</sup> *Id.* at Exhibit 3.

<sup>43</sup> *See* Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411, 1430 ¶ 47 (1994)

<sup>44</sup> *Id.*; *see also* J & W Mobile Radio Association, *Order*, 15 FCC Rcd 1893 (WTB PSPWD 2000) (deciding, *inter alia*, that the applicant did not meet the not-for-profit, cost shared requirements of the Commission's Rules) (*J&W*).

<sup>45</sup> Viking Dispatch Services, Inc., *Order*, 11 FCC Rcd 6685, 6688-89 ¶ 6, 6688 n.19 (WTB 1996) (*Viking*).

<sup>46</sup> *Id.* at 6686-6688 ¶¶ 2-4.

<sup>47</sup> *See id.* at 6691-92 ¶ 14; *see also* Viking Dispatch Services, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 18814, 18818-19 ¶ 8 (acknowledging the Bureau's request that Viking furnished documentation to substantiate Viking's assertion that its system would be non-commercial in nature) (*Viking MO&O*).

<sup>48</sup> *Viking*, 11 FCC Rcd at 6686, 6691 ¶¶ 2,13.

<sup>49</sup> *Id.* at 6691 ¶ 14.

<sup>50</sup> *Viking MO&O*, 14 FCC Rcd at 18817-19 ¶ 7.

PLMRS criteria for current, identifiable users to share costs and expenses.”<sup>51</sup>

9. Finally, in *J&W*, the applicants proposed operating a communications system using Business Category channels pursuant to Section 90.603 of the Commission’s Rules. The applicants furnished proposed user agreements and their corporate documents; however, the applicants failed to produce a list of users who would be served by the proposed cooperative.<sup>52</sup> Further, in *J&W*, the Division noted the absence of a rationale for putting substantial capital at risk in the hope that, at best, users will materialize and the investment will be recovered with no gain realized.<sup>53</sup> In addition, the Division reiterated that the absence of identifiable participants with existing communications needs ignores a key component of a not-for-profit, cost-shared system.<sup>54</sup> As a result, the Division determined that the applicants did not present facts sufficient to demonstrate that a credible non-profit purpose underlay their applications and dismissed the applications.<sup>55</sup>

10. It is against this backdrop that we analyze the subject LMR applications, inclusive of the most recent supplemental filing. Notably, not only was LMR’s initial application to operate a commercial system, but it doubted the feasibility of operating a not-for-profit, cost-shared system.<sup>56</sup> In its own words, “. . . [LMR] has considered that it could license the frequencies in the 900 MHz trunked Business Radio Service and could share the system on a cost-shared, non-profit basis with the airport providers; however, because of the cumbersome administrative paperwork required for such systems, such an arrangement for the many airport providers and airlines utilizing such a system would not be feasible. . . .”<sup>57</sup> LMR still has not explained why it would make a substantial capital investment with only the hopes of operating a not-for-profit, cost-shared system.<sup>58</sup> Consequently, we consider LMR’s proposal to suffer from the same deficiencies as those presented by *Viking* and *J&W*.

11. Additionally, LMR’s supplemental information still fails to include a list of end-users. We find this defect to be a fatal flaw. As the Commission has previously indicated, “demonstration of some general, loosely-defined need to be met by . . . a third party provider” does not meet the Section 90.179 requirements.<sup>59</sup> In the absence of a list of “sincere and committed prospective users,” we believe that LMR has only shown a need it hopes to meet. Moreover, without identifying specific end-users, we are unable to find that LMR’s proposed system would be a vehicle for allowing radio users to combine resources to meet compatible needs for specialized internal communications. While LMR does not have an existing system, a committed end-user has the opportunity to enter into a binding contract for the communications service LMR proposes. This much-needed commitment could be provided with minimal risk to the end-user. For instance, as evidenced in the proposed Agreement, the end-user would have the

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<sup>51</sup> *Id.* at 18820 ¶ 10.

<sup>52</sup> See *J&W*, 15 FCC Rcd. at 1894-95 ¶¶ 3-4.

<sup>53</sup> *Id.* at 1896 ¶ 7.

<sup>54</sup> *Id.* at 1896-97 ¶ 10.

<sup>55</sup> See *id.* at 1898 ¶ 13.

<sup>56</sup> Waiver Request at 21.

<sup>57</sup> *Id.*

<sup>58</sup> See Supplement at Exhibit Two ¶ 8.

<sup>59</sup> *Viking MO&O*, 14 FCC Rcd at 18820 ¶ 10.

authority to terminate the Agreement if the FCC does not grant the authority to LMR to operate the proposed system.<sup>60</sup> With this condition precedent clause in the proposed Agreement, evidencing a commitment to use the proposed LMR system is not onerous. Rather than provide an Agreement signed by NATA, its members or any other entity, LMR resubmits a noncommittal letter of intent to participate and states that communications are underway with other potential end-users.<sup>61</sup> We find this proffer lacking. As a result, based upon review of the information before us and Commission precedent, we conclude that LMR has failed to demonstrate that its proposed AIRSMR system is a bona fide not-for-profit, cost-shared system in compliance with Section 90.179 of the Commission's Rules.

#### IV. CONCLUSION

12. In sum, LMR has not presented information sufficient for us to conclude that it will operate the proposed AIRSMR system on a *bona fide* not-for-profit, cost-shared basis. Consequently, LMR has failed to establish that its proposed system is in conformance with the Commission's Rules and established policies regarding not-for-profit, cost-shared systems. Therefore, LMR's applications will be dismissed.

#### V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(4), and FCC File Nos. 592687, 592691, 592693, 592694, 592695, 592696, 592697, and 592698 SHALL BE DISMISSED.

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 and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>60</sup> Supplement at Exhibit Two ¶ 9.

<sup>61</sup> Supplement at Exhibit One. While LMR states that the thirty-day period provided by the Commission was insufficient for it to secure binding commitments, it neither requests an extension of that period nor suggests that it had a list of committed end-users at the time the applications were filed.