

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

In the Matter of)	
)	
Amendment of Part 90 of the Commission's)	PR Docket No. 93-144
Rules to Facilitate Future Development of)	
SMR Systems in the 800 MHz Frequency)	
Band)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 2, 2000

Released: August 4, 2000

By the Commission:

1. In this *Memorandum Opinion and Order*, we address the construction requirements that the Commission should impose on incumbent 800 MHz Specialized Mobile Radio (SMR) commercial licensees operating wide area systems¹ that include Business and Industrial / Land Transportation (BI/LT) channels obtained prior to 1995 through inter-category sharing.² For the reasons described herein, we will allow incumbent wide-area 800 MHz SMR licensees using BI/LT channels who were within their construction periods at the time of the decision in *Fresno Mobile Radio v. FCC*³ to apply the same construction requirements as were given by our recent *Fresno Remand Order*⁴ to wide-area incumbents operating on SMR channels.

I. BACKGROUND

2. The 800 MHz band is divided into four channel groups – SMR, General Category, BI/LT, and Public Safety, each with its own eligibility rules. 800 MHz SMR channels are designated for commercial use, while 800 MHz BI/LT channels are designated for non-commercial internal use by the licensee. Prior to 1995, in certain circumstances, the Commission allowed SMR licensees to apply for BI/LT channels under inter-category sharing rules, which the SMR licensee could then use commercially despite the eligibility criteria that otherwise reserved these channels for private internal use.⁵ Inter-category sharing by

¹ See 47 C.F.R. § 90.629. See also Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Remand*, 14 FCC Rcd. 21679, 21680, n.6 (¶ 4)(*Remand Order*).

² See 47 C.F.R. §§ 90.615(a)(1994), 90.621(e)(1994).

³ *Fresno Mobile Radio, Inc., et al. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999) (*Fresno*).

⁴ *Remand Order* at 21679 (¶ 1).

⁵ See 47 C.F.R. §§ 90.615(a) and 90.621(e) (1994); see also Inter-Category Sharing of Private Mobile Radio Frequencies in the 806/821/851-866 MHz bands, *Order*, 10 FCC Rcd. 7350 (WTB: 1995) (*Inter-Category Freeze Order*). In April of 1995, the Wireless Telecommunications Bureau (Bureau) stopped accepting applications for such inter-category sharing.

SMR licensees was permitted if the BI/LT channel sought by the SMR licensee was unoccupied and if there were no SMR channels available in the licensee's service area.⁶

3. On December 23, 1999, in response to a remand of its *800 MHz SMR Reconsideration Order*⁷ by the District of Columbia Circuit in *Fresno*,⁸ the Commission released an order determining that incumbent 800 MHz SMR licensees who had obtained extended implementation ("EI") authority to build wide-area systems and who were within their extended construction periods at the time of the *Fresno* decision could apply construction requirements similar to those given to SMR Economic Area ("EA") licensees in the 800 MHz band.⁹ In the *Remand Order*, however, we granted relief only to wide-area incumbents operating on SMR channels. We did not address the construction status of wide-area incumbents operating on non-SMR channels obtained through inter-category sharing, because we concluded that this issue was beyond the scope of the proceeding.¹⁰ We indicated that we would determine the construction requirements for wide-area licensees on these channels in WT Docket No. 99-87, the pending Balanced Budget Act (BBA) proceeding.¹¹

4. Upon further reflection, the Commission decided to determine the construction status of BI/LT channels used by wide-area 800 MHz SMR licensees in the *Fresno Remand* proceeding, rather than in the BBA proceeding. On March 2, 2000, therefore, we released a *Public Notice* seeking comment on whether we should adopt construction rules for wide-area incumbent 800 MHz SMR licensees using BI/LT channels that would be similar to those adopted in the *Remand Order* for wide-area SMR licensees using SMR channels.¹² We also requested comment on the applicable construction requirements (*e.g.*, substantial service or population-based) for wide-area incumbent 800 MHz SMR licenses using BI/LT channels.¹³

⁶ *Inter-Category Freeze Order*, 10 FCC Rcd. at 7350 (¶ 2).

⁷ See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 9972 (1997) (*800 MHz SMR Reconsideration Order*) (Commission affirmed decision that rejustified extended implementation ("EI") licensees would receive maximum of two years to complete construction of facilities, and any site-specific license within a licensee's wide-area "footprint" not constructed by the two-year deadline would automatically cancel, with unconstructed channels reverting to the EA licensee); see also *Remand Order* at 21682-3 (¶¶ 6-8).

⁸ See *Fresno*, *supra*, n.3.

⁹ *Remand Order* at 21679 (¶ 1). Also, see *Remand Order* at 21679-21685 (¶¶ 2-10) for detailed background, including the procedural history of the *Fresno* matter, descriptions of the relevant groups of licensees, and explanations of the relevant sets of construction requirements.

¹⁰ *Remand Order* at 21689 (¶ 20). The Bureau had previously granted the Southern Company and Nextel Communications, Inc. extensions of their extended implementation periods for their BI/LT channels until final rules regarding licensing of the BI/LT channels take effect in the context of the Commission's rulemaking proceeding to implement the Balanced Budget Act of 1997. See Southern Company Request for Waiver of Section 90.629 of the Commission's Rules, *Memorandum Opinion and Order*, 14 FCC Rcd. 1851 (WTB: 1998); In the Matter of Nextel Communications, Inc., *Order*, 15 FCC Rcd. 93 (WTB: 1999). Since we now settle the issue of what construction requirements apply to these channels, the extensions granted to Southern and Nextel shall end on the dates that apply to each according to the formula set forth in paragraph ten of this *Memorandum Opinion and Order*.

¹¹ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, 64 Fed. Reg. 23571 (1999).

¹² See *Public Notice*, Commission Requests Comment, Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, on the Construction Requirements for Commercial, Wide-Area 800 MHz Licensees Operating on Non-SMR Channels Through Inter-Category Sharing, 15 FCC Rcd. 5436 (2000) (*BI/LT Comment PN*).

¹³ *Id.*

5. In response to the *BI/LT Comment PN*, we received four comments and one reply comment.¹⁴ All but one of the commenters contend that wide-area 800 MHz SMR licenses using BI/LT channels should receive the same construction requirements established by the *Remand Order* for wide-area incumbents using SMR channels.¹⁵ In its comments, Southern Company (Southern) points to the *CMRS Third Report and Order* as evidence that the Commission has already determined that all CMRS licensees should have similar coverage requirements, and that there is no rational basis for singling out SMR licensees using BI/LT channels as the only CMRS providers that are not entitled to flexible coverage requirements.¹⁶ Nextel Communications, Inc. (Nextel) maintains that regulatory parity requires giving wide-area 800 MHz SMR licenses using BI/LT channels the same flexible construction requirements as those given to other CMRS providers because they provide similar services.¹⁷ The American Mobile Telecommunication Association, Inc. (AMTA) maintains that all channels properly licensed to a wide-area SMR system under the Commission's rules are part of that system and should be subject to the same regulatory treatment.¹⁸ Finally, Chadmoore Wireless Group, Inc. (Chadmoore) supports revision to the construction requirements for wide-area SMR licensees using BI/LT channels only if the Commission provides similar construction relief to Chadmoore and certain other 800 MHz licensees that were expressly denied relief by the *Fresno Remand Order*.¹⁹

II. DISCUSSION

6. On the basis of the record before us, we conclude that wide-area incumbent 800 MHz SMR licensees operating on BI/LT channels are sufficiently similar to wide-area incumbent 800 MHz licensees operating on SMR channels that they should have the same flexibility with respect to construction requirements. The record demonstrates that some of the wide-area SMR licensees who received EI authorizations from the Commission are licensed to operate both on SMR channels and on BI/LT channels that they obtained through inter-category sharing for commercial use. In Southern's case, the vast majority of channels in its wide-area SMR system are BI/LT channels obtained through inter-category sharing. The record further demonstrates that wide-area SMR licensees such as Southern use inter-category BI/LT channels interchangeably with SMR channels, and that the BI/LT channels licensed on this basis are used to provide service that is similar, if not identical, to that provided on SMR channels by 800 MHz EA and incumbent wide-area SMR licensees.²⁰ Accordingly, we agree with Southern, AMTA, and other supporting commenters that wide-area 800 MHz SMR licensees using BI/LT channels should be subject to the same

¹⁴ See Attachment A.

¹⁵ See *Remand Order* at 21686 (¶ 12).

¹⁶ Southern Comments at 5-8.

¹⁷ Nextel Comments at 1-2, 5-6. Nextel also comments that the Commission should allow BI/LT licensees the flexibility to assign or transfer control of BI/LT spectrum to commercial users. *Id.* at 2-3, 6-9. This issue is before the Commission in the BBA proceeding and we will address it in that context. See *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Licensing of PMRS channels in the 800 MHz Band for Use in Commercial SMR Systems, 14 FCC Rcd. 11795 (1999); see also Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No. 99-87, *Notice of Proposed Rule Making*, 14 FCC Rcd. 5206 (1999). In the *BI/LT Comment PN*, we specifically limited comments to the narrow issue of the appropriate construction requirements for wide-area 800 MHz SMR licenses using BI/LT channels.

¹⁸ AMTA Comments at 5.

¹⁹ Chadmoore Comments at 2-3.

²⁰ Nextel Comments at 5-6; Southern at 2-3, AMTA at 2.

construction requirements given to 800 MHz SMR EA licensees by our rules and to eligible wide-area SMR licensees by our *Remand Order*.

7. Recognizing that these licensees may already have constructed their systems in accordance with the requirements in place at the time (*i.e.*, site-by-site, channel-by-channel), we will give eligible wide-area 800 MHz SMR licenses using BI/LT channels the option of complying with the site-specific construction requirements associated with their EI authorizations or applying the EA population coverage requirements to their wide-area systems. This option applies only to wide-area 800 MHz SMR licensees using BI/LT channels obtained through inter-category sharing. We believe that giving wide-area 800 MHz SMR licenses using BI/LT channels the choice between applying site-specific requirements or the EA coverage requirements will establish regulatory parity among all similarly situated wide-area 800 MHz SMR licensees.

8. Chadmoore supports granting the *Fresno* relief to incumbent wide-area 800 MHz SMR licenses using BI/LT channels only if the Commission retroactively extends the relief outlined in the *Remand Order* to any 800 MHz SMR incumbent licensee that has ever sought EI authority, whether or not such authority was granted.²¹ We decline to address this issue in the context of this Order. As noted above, the *BI/LT Comment PN* sought comment only on the issue of the appropriate construction requirements for wide-area SMR licenses using BI/LT channels, and did not address Chadmoore's request for retroactive relief. Chadmoore has previously raised the same issue in its pending petition for reconsideration of the *Remand Order*,²² and we will address it in that context.

9. **Construction Period.** We did not receive any comment on when the five-year construction period should begin for BI/LT channels licensed to wide-area SMR licensees that elect to apply the EA construction requirements. We therefore adopt the framework outlined in the *Remand Order*, which begins the construction period from the licensee's EI grant date. Therefore, an eligible wide-area SMR licensee that elects to apply the EA construction requirements to its BI/LT channels must have constructed and placed into operation a sufficient number of base stations to provide coverage to at least two-thirds of the population of its wide-area system, or must provide substantial service to the licensed area, within five years of EI grant plus the tolling period described below.²³

10. **Effect of Tolling on Construction Deadline.** For all licensees entitled to relief under this decision, we will add 546 days to their construction periods, representing the amount of time between the *Fresno* decision and the release of this order. Therefore, the applicable construction deadline for any eligible wide-area licensee that elects to apply the EA coverage requirements will be five years from the date of EI grant plus 546 days. Likewise, the applicable construction deadline for eligible licensees that do not elect the EA requirements will be 546 days after the EI deadline established in the *800 MHz Rejustification Orders*.²⁴

²¹ Chadmoore Comments at 2-3.

²² Petition for Reconsideration, filed by Chadmoore Communications, Inc., dated January 23, 2000.

²³ *Remand Order* at 21686-7, (¶¶ 13-14). Because the BI/LT channels are interlaced with the "lower 80" SMR channels in the 800 MHz band, the alternative construction requirements available to licensees granted relief under the present Order are the same as those outlined in the *Remand Order* for the "lower 230" channels (which include the "lower 80" SMR channels and the 150 General Category channels). *Id.* at 21687 (¶ 14). The requirements applicable to the "upper 200" channels are not relevant to the present *Memorandum Opinion and Order*.

²⁴ *Remand Order* at 21683, n.29 (¶ 7), citing Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Order*, 13 FCC Rcd. 1533 (WTB: 1997), *recon.*, 12 FCC Rcd. 18349 (WTB: 1997) (collectively, *800 MHz Rejustification Orders*).

11. **Certification Filing.** A wide-area SMR licensee that is eligible for relief under this Order must certify in a filing with the Bureau that it has either met the EA construction requirements, as set out herein, or complied with the terms of its EI authorization. In addition to the certification, if a licensee chooses to meet the EA requirements for channels in the lower 230 channels using the substantial service option, it must demonstrate in the same filing with the Bureau how it is providing substantial service. All filings must be made within fifteen (15) days after the licensee's applicable construction deadline,²⁵ as defined *supra*, or sixty (60) days after the publication of this *Memorandum Opinion and Order* in the Federal Register, whichever is later.

12. **Area of Coverage.** When determining if an eligible licensee has met a specific coverage requirement (*i.e.*, covering two-thirds of the population), the population should be measured using the licensee's wide-area "footprint" as established in the licensee's EI rejustification submission. For this purpose, we adopt the guidelines in the *Remand Order*, *i.e.*, the licensee should compute the population covered within its footprint on a county basis using 1990 U.S. Census information.²⁶ In cases in which the footprint does not align with county boundaries, the licensee should include the entire population of the county if the licensee covers any portion of it.

III. CONCLUSION

13. For the reasons given above, any incumbent wide-area 800 MHz SMR licensee that uses BI/LT channels obtained through inter-category sharing and was still in its construction period as of the date of the *Fresno* decision may choose to apply either the existing site-by-site, channel-by-channel construction requirements or the alternative construction requirements set forth in this *Memorandum Opinion and Order*. Eligible licensees must certify in a filing with the Commission their compliance with one of the enumerated requirements within the later of fifteen days from their applicable construction benchmarks, as defined herein, or sixty days from the effective date of this decision.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

14. To assist the public in determining the possible impact on small entities of the requirements adopted in this *Memorandum Opinion and Order*, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA), set forth in Appendix B. The Office of Public Affairs, Reference Operations Division, will send a copy of the *Memorandum Opinion and Order*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.²⁷

B. Paperwork Reduction Act of 1995 Analysis

15. This *Memorandum Opinion and Order* contains a modified information collection that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

²⁵ See 47 C.F.R. § 1.946(d).

²⁶ *Remand Order* at 21687 (¶ 14).

²⁷ See 5 U.S.C. § 601 *et. seq.*

C. Further Information

16. For further information concerning this *Memorandum Opinion and Order*, contact Don Johnson, Commercial Wireless Division, Policy & Rules Branch, Wireless Telecommunications Bureau at (202) 418-7240.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), incumbent wide-area 800 MHz Specialized Mobile Radio licensees using Business and Industrial / Land Transportation channels eligible for relief as described herein must comply with the terms of their extended implementation authorizations or apply the alternative construction requirements described herein.

18. IT IS FURTHER ORDERED that incumbent wide-area 800 MHz Specialized Mobile Radio licensees using Business and Industrial / Land Transportation channels eligible for relief as described herein must certify in a filing with the Wireless Telecommunications Bureau their compliance with the construction requirements as described herein within the later of fifteen days after the licensee's applicable construction deadline, as described herein, or sixty days after publication of this *Memorandum Opinion and Order* in the Federal Register.

19. IT IS FURTHER ORDERED that the extensions of Extended Implementation Authority granted by the Wireless Telecommunications Bureau to Southern Communications, Inc. and Nextel Communications, Inc. on December 4, 1998 and December 30, 1999, respectively, ARE MODIFIED to expire in accordance with the requirements outlined in Paragraph 10 of this *Memorandum Opinion and Order*.

20. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, the Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A: LIST OF THE PARTIES

Comments

American Mobile Telecommunications Association, Inc. (AMTA)
Chadmoore Wireless Group, Inc. (Chadmoore)
Nextel Communications, Inc. (Nextel)
Southern Company (Southern)

Reply Comments

Southern Company (Southern)

APPENDIX B:

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

To assist the public in determining the possible impact on small entities of the provisions in this *Memorandum Opinion and Order*, the Commission has prepared this Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA).

Need for, and Objectives of, the *Memorandum Opinion and Order*

This *Memorandum Opinion and Order* was initiated by public notice. The Commission sought comment to determine whether incumbent wide-area 800 MHz SMR licensees granted extended implementation (EI) and operating on non-SMR channels (*e.g.*, Business and Industrial / Land Transportation (BI/LT) channels) through inter-category sharing should receive construction requirements similar to those received by Economic Area (EA) 800 MHz SMR licensees and incumbent wide-area 800 MHz SMR licensees granted relief on remand of the order of the United States Court of Appeals for the District of Columbia in the case of *Fresno Mobile Relays, Inc. v. Federal Communications Commission (Fresno)*.¹ In *Fresno*, the court stated that the Commission had not adequately explained why incumbent wide-area 800 MHz SMR licensees granted extended implementation (EI) must construct and operate all channels at all sites or lose the unconstructed channels, while Economic Area (EA) 800 MHz SMR licensees need only provide coverage to a certain percentage of the population within their licensed areas. This *Memorandum Opinion and Order* allows incumbent wide-area 800 MHz SMR licensees operating on BI/LT channels who were within their construction periods at the time of the *Fresno* decision to choose between complying with the terms of their EI authorizations or applying construction requirements similar to those given to EA licensees. Therefore, this *Memorandum Opinion and Order* (1) gives the incumbent licensees greater flexibility to leave certain sites and channels unconstructed (for potential future use); (2) establishes reasonable regulatory parity between incumbent wide-area licensees and EA licensees in the 800 MHz SMR service, without prejudicing the interests of either; and (3) provides the 800 MHz SMR service with a degree of certainty for both current and future EA licensees.

Summary of Significant Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis

As noted above, this *Memorandum Opinion and Order* was initiated by public notice released by the Commission. Therefore, there was no Initial Regulatory Flexibility Analysis.

Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The Regulatory Flexibility Act (RFA) directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by our rules.² The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³ In addition, the term "small business"

¹ *Fresno Mobile Radio, Inc., et al. v. FCC*, 165 F. 3d 965 (D.C. Cir. 1999).

² 5 U.S.C. § 603(b)(3).

³ 5 U.S.C. § 601(6).

has the same meaning as the term "small business concern" under the Small Business Act.⁴ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁶ The provisions adopted in this *Memorandum Opinion and Order* will apply to approximately 30 - 35 current incumbent 800 MHz SMR operators, most of which may be considered small entities.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This *Memorandum Opinion and Order* gives eligible wide-area 800 MHz SMR licensees operating on BI/LT channels through inter-category sharing the option of complying with the terms of their EI authorizations or applying EA-type construction requirements to their wide area footprints. If an eligible licensee chooses the former, it need only comply with the requirements already imposed by the Commission's rules. If an eligible licensee chooses the latter, it must determine if it meets the coverage requirement. The licensee must then certify compliance with these requirements in a filing with the Wireless Telecommunications Bureau (Bureau) at its applicable construction deadline. In lieu of the specific coverage requirements, an eligible licensee may demonstrate that it is providing substantial service. If a licensee chooses this option, it must provide in a filing with the Bureau a description of how it is providing substantial service.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The action taken by this *Memorandum Opinion and Order* not only gives eligible incumbent wide-area 800 MHz SMR licensees greater flexibility to leave certain sites and channels unconstructed (for potential future use), but also establishes reasonable parity between incumbent wide-area licensees and EA licensees in the 800 MHz SMR service. Eligible incumbent licensees need only report their compliance with the construction requirements in the same fashion that EA 800 MHz licensees do (*i.e.*, in a certification and, if the substantial service option is elected, a demonstration).

Report to Congress

The Commission shall send a copy of this Supplemental Final Regulatory Flexibility Analysis, along with this *Memorandum Opinion and Order*, in a report to Congress pursuant to the Small Business Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Supplemental Final Regulatory Flexibility Analysis will also be published in the Federal Register.

⁴ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

⁵ Small Business Act, 15 U.S.C. § 632 (1996).

⁶ 5 U.S.C. § 601(4).