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	)	RM-8117, RM-8030
SMR Systems in the 800 MHz Frequency Band	)	RM-8029
	)	
Implementation of Sections 3(n) and 332 of	)	GN Docket No. 93-252
the Communications Act -- Regulatory	)	
Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253
Communications Act -- Competitive Bidding	)	

THIRD ORDER ON RECONSIDERATION

Adopted: January 26, 2001 **Released:** February 2, 2001

By the Commission:

I. Introduction

1. On January 19, 2000, the American Mobile Telecommunications Association (AMTA)[1] and Petroleum Communications, Inc. (Petrocom)[2] filed separate petitions for reconsideration of the Commission's *Second 800 MHz Memorandum Opinion and Order on Reconsideration*.[3] In that order, the Commission completed the implementation of a new licensing framework for the 800 MHz Specialized Mobile Radio Service (SMR).[4] In this order, we deny the petitions filed by AMTA and Petrocom for the reasons discussed below.

II. Background

2. In the *800 MHz First Report and Order*, we restructured the licensing framework that governs the 800 MHz SMR service.[5] For the upper 200 channels, we replaced site-specific and frequency-specific licensing with a geographic-based system similar to those used for other Commercial Mobile Radio

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[1] AMTA Petition for Reconsideration filed January 19, 2000 (AMTA Petition).

[2] Petrocom Petition for Reconsideration filed January 19, 2000 (Petrocom Petition).

[3] *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*, 14 FCC Rcd. 17556 (1999) (*Second 800 MHz MO&O on Reconsideration*).

[4] *Id*. at 17558 (¶ 1).

[5] *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, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd. 1463 (1995) (*800 MHz First Report and Order*).

Services ("CMRS").[6] We designated the upper 200 channels of 800 MHz SMR spectrum for geographic licensing, and created 120-, 60-, and 20-channel blocks within the Economic Areas ("EAs") designated by the U.S. Department of Commerce Bureau of Economic Analysis.[7] We concluded that mutually exclusive applications for these licenses would be awarded through competitive bidding. Additionally, we granted EA licensees the right to relocate incumbent licensees out of the upper 200 channels to comparable facilities elsewhere in the 800 MHz band.[8]

3. In the *800 MHz Second Report and Order*, we established EAs as the licensing areas for the lower band 800 MHz channels, which include the lower 80 SMR channels and the 150 General Category channels.[9] We established competitive bidding rules for resolving mutually exclusive applications for EA licenses in these lower 230 channels, determined that incumbents on the lower 230 channels would not be subject to mandatory relocation, and defined the rights of incumbent licensees on those channels. The Commission also provided further details concerning the mandatory relocation rules for the upper 200 channel block and established partitioning and disaggregation rules for 800 MHz SMR licensees.

4. The Commission conducted the auction of upper band 800 MHz spectrum beginning in December 1997, and awarded EA licenses soon thereafter. The process for the relocation of incumbents from the upper 200 channels consists of three phases.[10] The first was a one-year voluntary negotiation period that commenced on December 4, 1998, during which the EA and incumbent licensees were free to negotiate any mutually agreeable relocation arrangement.[11] If no agreement was reached during this voluntary negotiation period, the parties then entered the one-year mandatory negotiation period. During this period, which began on December 4, 1999, the parties are required to negotiate with each other in "good faith."[12] If the parties still fail to reach an agreement in the mandatory negotiating period the EA licensee may then initiate involuntary relocation of the incumbent's system[13] to new frequencies on the 800 MHz band, so long as the EA licensee provides the incumbent with "comparable facilities."[14] The Commission has

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[6] *Id*. at 1476-1480 (¶¶ 9-14).

[7] *Id*. at 1476-1497 (¶¶ 9-37).

[8] *Id*. at 1503-1510 (¶¶ 65-79).

[9] 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, *Second Report and Order*, 12 FCC Rcd. 19079, 19088-89 (¶15) (1997) (*800 MHz Second Report and Order*).

[10] *800 MHz First Report and Order*, 11 FCC Rcd. at 1509-10 (¶¶ 77-79). *See also*, *Public Notice*, Wireless Telecommunications Bureau Announces the Commencement of the Voluntary Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band, 13 FCC Rcd. 23381 (1998) (*Negotiation Period Public Notice*) (DA 98-2434). In the *Second 800 MHz MO&O on Reconsideration*, the *Negotiation Period Public Notice* was erroneously cited as DA 99-283. *See Second 800 MHz MO&O on Reconsideration*, 14 FCC Rcd. at 17577, n.120 (¶ 37).

[11] *Negotiation Period Public Notice*, 13 FCC Rcd. at 23381.

[12] *Id.* at 23382. *See also*, *800 MHz MO&O on Reconsideration*, 12 FCC Rcd. at 9989 (¶ 52). *Public Notice*, "Wireless Telecommunications Bureau Extends Mandatory Negotiation Period for the Relocation of Incumbent Licensees In the 800 MHz Band until March 5, 2001," DA 00-2672 (rel. Nov. 27, 2000).

[13] *Id.* at 23382.

[14] In the *800 MHz Second Report and Order*, the Commission defined comparable facilities as facilities that will provide the same level of service as the incumbent licensee's existing facilities. *800 MHz Second Report and* (continued….)

further determined that the relocation of an incumbent licensee must be accomplished without significant disruption to the incumbent's operations.[15]

5. In the *Second 800 MHz MO&O on Reconsideration*, the Commission denied requests by AMTA and PCIA that we require EA licensees to make progress payments to incumbents during the relocation process.[16] The Commission concluded that the payment of relocation costs to incumbents should not be due until the incumbent has been fully relocated and the frequencies are free and clear.[17] In support of its conclusion, the Commission stated that this issue had been decided in the *Second 800 MHz Report and Order* and that it was reiterating the decision made in that order.[18]

III. Discussion

A. AMTA Petition

6. AMTA requests that the Commission reconsider its decision with respect to the timing of EA licensee payments to incumbent licensees who are involuntarily relocated to new frequencies.[19] Specifically, it urges the Commission to require EA licensees to make "reasonable progress payments to the incumbent if requested."[20] AMTA argues that the *Second 800 MHz MO&O on Reconsideration*'s decision to make payments for incumbent relocation costs due at the end of the relocation process is unsupported by our rules or previous decisions.[21] According to AMTA, the *Second 800 MHz MO&O on Reconsideration* incorrectly relied on the *800 MHz Second Report and Order*, because the referenced discussion in the *800 MHz Second Report and Order* "did not relate to the timing of payments from EA licensees to incumbents during the retuning process" but instead concerned the "timing of payments among EA licensees when the relocation of an incumbent by one EA licensee would result in the availability of a channel(s) to another EA

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Order, 12 FCC Rcd. at 19112 (¶ 89). Because we concluded that the determination of whether facilities are comparable should be made from the perspective of the end user, we identified four factors relevant to this determination: system equivalence, capacity, quality of service, and operating costs. *Id*. at 19112 (¶ 90). *See also*, 47 C.F.R. § 90.699(d).

[15] *800 MHz First Report and Order*, 12 FCC Rcd at 1508 (¶ 74); *800 MHz Second Report and Order*, 12 FCC Rcd at 19122 (¶ 119). Before an EA licensee may request involuntary relocation of an incumbent licensee's system, the EA licensee must: (a) guarantee payment of all costs of relocating the incumbent licensee to a comparable facility; (b) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and (c) build and test the new system. *800 MHz First Report and Order*, 12 FCC Rcd. at 1510 (¶ 79); *see also* 47 C.F.R. § 90.699(c).

[16] PCIA Petition for Reconsideration; AMTA Reply to Opposition to Petitions for Reconsideration filed October 20, 1997.

[17] *Second 800 MHz MO&O on Reconsideration*, 14 FCC Rcd. at 17584-5 (¶ 57-8).

[18] *Id*. (citing *800 MHz Second Report and Order*, 12 FCC Rcd. at 19123 (¶ 124)).

[19] AMTA Petition at 1. *See Public Notice*, Petitions for Reconsideration of Action in Rulemaking Proceeding, Report No. 2395 (rel. March 16, 2000), 65 Fed. Reg. 15907 (Mar. 24, 2000).

[20] AMTA Petition at 3, n.4 (citing AMTA's October 20, 1997 Reply to Opposition to Petitions for Reconsideration of the *800 MHz Second Report and Order*).

[21] AMTA Petition at 3-4 (¶¶ 6-7).

licensee, one that had not paid any of the associated relocation costs…."[22] AMTA reiterates that the Commission's decision not to require progress payments to incumbent licensees will render them especially vulnerable after the involuntary relocation period begins because each incumbent will have lost any bargaining power it previously possessed vis-à-vis the EA licensee.[23]

7. Upon further review, we conclude that AMTA is correct that neither the *800 MHz Second Report and Order* nor the *Second 800 MHz MO&O on Reconsideration* adequately addressed the question of when incumbent licensees should be repaid for their involuntary relocation costs.[24] On reconsideration of this issue here, however, we affirm our decision that EA licensees should not be required to make progress payments of an incumbent's relocation costs. We believe that this policy is consistent with the involuntary relocation procedures established in our *800 MHz Second Report and Order* and adopted in Section 90.699(c) and (d) of the Commission's rules.[25] Section 90.699(c)(1) requires that the EA licensee guarantee repayment of relocation costs, "including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses…."[26] Additionally, Section 90.699(c)(2) states that the EA licensee must "[c]omplete all activities necessary for implementing the replacement facilities [of the incumbent], including all engineering and cost analysis of relocation and, if radio facilities are used, identifying and obtaining, on the incumbent's behalf, new frequencies and frequency coordination."[27] Furthermore, Section 90.699(c)(3) requires that EA licensees must "build the replacement system and test it for comparability with the existing 800 MHz system."[28] Section 90.699(d) requires that the "replacement system" provided by the EA licensee to an incumbent licensee during this involuntary relocation process "must be at least equivalent to the existing 800 MHz system" with respect to the system itself, capacity, quality of service, and operating costs.[29]

8. In view of the requirements of Sections 90.699(c) and (d) that the EA licensees directly bear the cost of building and testing the replacement system, it is clear that the primary cost burden for involuntary relocation rests on the EA licensees, not the incumbent. To the extent that the incumbent may incur additional relocation costs, the rule further requires the EA licensee to guarantee payment of those costs. However, because we anticipate that EA licensees will bear most relocation costs directly we believe that it is equitable for the incumbent to be repaid for any remaining costs that it has incurred after relocation has occurred. We note that such reimbursable costs may include costs that reflect the time-value of money, such as reasonable and customary interest expenses incurred by incumbents who must borrow or finance the funds needed to relocate. We pointed out previously that this approach is unlikely to prejudice incumbents inasmuch as EA licensees "have a large financial incentive to relocate the incumbent licensees,

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[22] AMTA Petition at 4 (¶ 7)(referring to the costs set forth in 47 C.F.R. § 90.699(f)(4)(i)).

[23] AMTA Petition at 4-5 (¶ 8), 6-7 (¶¶ 11-13).

[24] The cited discussion in the *800 MHz Second Report and Order* concerns cost-sharing among EA licensees, not the payments EA licensees must make to involuntarily relocated incumbents. *See 800 MHz Second Report and Order*, 12 FCC Rcd. at 19123 (¶ 124).

[25] 47 C.F.R. §§ 90.699(c), (d).

[26] 47 C.F.R. § 90.699(c)(1).

[27] 47 C.F.R. § 90.699(c)(2).

[28] 47 C.F.R. § 90.699(c)(3).

[29] 47 C.F.R. § 90.699(d).

construct their facilities, and begin operating."[30] We also stated in the *Second 800 MHz MO&O on Reconsideration* that "parties are free to negotiate when reimbursement of relocation costs will occur, and may agree to reimbursement as such expenses are incurred."[31] Thus, we have consistently encouraged EA and incumbent licensees to arrange for the payment of relocation costs as they see fit, and we continue to do so.

9. AMTA does not present any new arguments to support its current request that the Commission require EA licensees to make progress payments to incumbent 800 MHz licensees during their involuntary relocation. Moreover, there is nothing currently before us in the record that would prompt us to change our decision. In its opposition, Nextel, the predominant winner of EA licenses in the upper 200 channel auction, states that it has initiated relocation discussions with over ninety percent of the nation's upper 200 channel incumbents and has already reached voluntary agreements to acquire or relocate over fifty percent of the total number of incumbent channels that it, as an EA licensee, will be allowed to relocate.[32] Nextel recommends that the timing of payments for relocation expenses should continue to be left to the negotiation process and the common sense of the parties "to select the payment schedule and other terms that meet the unique requirements of the individual transaction."[33] Nextel also points out that neither AMTA nor PCIA has cited any instance in which an EA licensee did not agree to some form of progress payments or an incumbent has been harmed by the current rule structure.[34] We also note that the Commission did not adopt a progress payments method when it established policies relocating 2 GHz microwave licensees by PCS MTA and BTA licensees.[35] For these reasons, we deny AMTA's petition.

10. We also disagree with AMTA's contention that incumbent licensees will be especially vulnerable after the involuntary relocation period begins because they will not be in a position to negotiate with the EA licensee.[36] As our discussion above demonstrates, an EA licensee that seeks to involuntarily relocate an incumbent licensee assumes a broad range of obligations to the incumbent that must be met before the incumbent can be required to relocate. Because the burden of providing comparable facilities and paying relocation costs rests on the EA licensee, we do not believe that an incumbent will be prejudiced by the process.

B. Petrocom Petition

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[30] *Second 800 MHz MO&O on Reconsideration*, 14 FCC Rcd. at 17584-5 (¶ 57-8).

[31] *Id*.

[32] Opposition of Nextel Communications, Inc., to Petition for Reconsideration of the American Mobile Telecommunications Association, Inc., filed on April 10, 2000, at 2 (Nextel Opposition).

[33] Nextel Opposition at 5.

[34] *Id*. AMTA and PCIA agree that the relocation process has proceeded successfully. AMTA Petition at 2; PCIA Comments at 3.

[35] Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8825, 8838 (¶ 23) (incumbent must be made "whole," which includes being provided with "comparable facilities"). Section 101.75 requires the payment of relocation costs to the incumbent but envisages that this will occur after the relocation process is completed, not according to a progress payments system. *See* 47 C.F.R. § 101.75.

[36] AMTA Petition at 4-5 (¶ 8), 6-7 (¶¶ 11-13).

11. In its petition,[37] Petrocom, which holds site-specific SMR licenses as well as one of the cellular licenses for the Gulf of Mexico, requested that the Commission include the Gulf of Mexico as an additional Economic Area (EA) in the then-upcoming 800 MHz auctions for the 150 General Category channels (Auction 34) and the Lower 80 channels (Auction 36). Petrocom acknowledged that it had not previously raised this issue in the 800 MHz proceeding.[38]

12. Since Petrocom filed its petition, both Auction 34 and Auction 36 have concluded.[39] Although neither of these auctions provided for EA licensing in the Gulf, we note that Petrocom has filed a similar petition for rulemaking in the *Gulf Cellular* proceeding,[40] and that we have sought comment in that proceeding as to whether we should establish a Gulf EA in the 800 and 900 MHz SMR services for possible future licensing. Because this issue is before us in the *Gulf Cellular* proceeding, and because Petrocom has not raised it previously in this proceeding, we decline to address it here. Therefore, we dismiss Petrocom's petition.

IV. Ordering Clauses

13. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 405 of the Communications Act as 1934, as amended, 47 U.S.C. §§ 154(i), 405, the petition for reconsideration filed by the American Mobile Telecommunications Association IS DENIED.

14. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 405 of the Communications Act as 1934, as amended, 47 U.S.C. §§ 154(i), 405, the petition for reconsideration filed by the Petroleum Communications, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[37] Petrocom Petition at 1.

[38] *Id*.

[39] Auction 34 concluded on September 1, 2000, and Auction 36 concluded on December 5, 2000.

[40] *See* In re Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, WT Docket No. 97-112, *Second Further Notice of Proposed Rule Making*, 12 FCC Rcd. 4578, 4600 (¶ 62) (1997), 65 Fed. Reg. 24168 (Apr. 25, 2000) (*Gulf Cellular Second Further Notice*). The Commission took notice in the *Gulf Cellular Second Further Notice* of Petrocom's petition for rulemaking. *Id*. at 4600-1 (¶ 62) (citing Letter from Kenneth W. Burnley, Myers Keller Communications Law Group, to David Furth, FCC, dated February 21, 1997).