

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

In the Matter of Applications of )
CALIFORNIA WATER SERVICE COMPANY )
For Authority to Provide Multiple Address System )
Service in the States of California and Washington )
CITY & COUNTY OF SAN FRANCISCO )
For Authority to Provide Multiple Address System )
Service in the Area of San Francisco, California )
SAN DIEGO GAS & ELECTRIC )
For Authority to Provide Multiple Address System )
Service in the Areas of Fallbrook, Escondido, San )
Clemente, San Juan Capistrano and Vista )
California )
CONTRA COSTA WATER DISTRICT )
For Authority to Provide Multiple Address System )
Service in the Area of Nortonville, California )

FCC File Nos. 0000079079, 0000079084,
0000079277, 0000079282, 0000079294,
0000079302, 0000079321, 0000079326,
0000079570, 0000079576, 0000079585,
0000079878, 0000079895, 0000079924,
0000079947, 0000080090, 0000080591,
0000080592, 0000080603, 0000080629,
0000080904, 0000080941, 0000080959,
0000080970, 0000082835, 0000082851,
0000082860, 0000082870, 0000082894 and
0000082905

FCC File Nos. 0000138901, 0000138914,
0000138925, 0000222488 and 0000472773

FCC File Nos. 0000072213, 0000072220,
0000072221, 0000072543 and 0000072547

FCC File No. 0000083147

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2003

Released: June 3, 2003

By the Commission:

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## I. INTRODUCTION

1. We have before us an application for review (AFR) filed by the City and County of San Francisco (San Francisco) on July 31, 2002.<sup>1</sup> In the AFR, San Francisco seeks review of a Public Safety and Private Wireless Division (Division) *Order*.<sup>2</sup> In the *Order*, the Division (1) dismissed a proposed settlement agreement between San Francisco and California Water Service Company (Cal Water) (Settlement Agreement), (2) dismissed five applications filed by San Francisco, and (3) denied San Francisco’s objection to certain Cal Water Multiple Address Systems (MAS) applications (Objection).<sup>3</sup> San Francisco requests that we reconsider its Objection and proposed settlement and treat its Objection as a request for a waiver of the [Commission’s] MAS “first-filer rule.”<sup>4</sup> Additionally, it seeks a grant of its AFR and approval of the Settlement Agreement.<sup>5</sup> For the reasons discussed below, we deny the AFR.

## II. BACKGROUND

### A. MAS Proceeding

2. On February 27, 1997, the Commission initiated a proceeding to examine ways to maximize spectrum use allocated to MAS.<sup>6</sup> In this proceeding, the Commission sought to establish a flexible regulatory framework for spectrum allocations that, among other things, would provide

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<sup>1</sup> Application for Review (filed July 31, 2002).

<sup>2</sup> Applications of: California Water Service Company, For Authority to Provide Multiple Address System Service in the States of California and Washington; City and County of San Francisco, For Authority to Provide Multiple Address System Service in the Area of San Francisco, California; San Diego Gas & Electric, For Authority to Provide Multiple Address System Service in the Areas of Fallbrook, Escondido, San Clemente, San Juan Capistrano and Vista California; Contra Costa Water District, For Authority to Provide Multiple Address System Service in the Area of Nortonville, California, *Order*, 17 FCC Rcd 12746 (PSPWD 2002) (*Order*).

<sup>3</sup> *Id.*

<sup>4</sup> AFR at 9. We interpret San Francisco’s phrase “first-filer rule” as referring to the Commission’s processing of MAS applications on a “first-come, first-served” site-by-site basis with frequency coordination. See 47 C.F.R. § 101.101 note 1.

<sup>5</sup> AFR at 9.

<sup>6</sup> Amendment of the Commission’s Rules Regarding Multiple Address Systems, *Notice of Proposed Rulemaking*, WT Docket No. 97-81, 12 FCC Rcd 7973 (1997) (*MAS NPRM*).

opportunities for continued development of competitive new service offerings by allowing flexible use of spectrum, expedite market entry through modified licensing procedures, and promote technological innovation by eliminating unnecessary regulatory burdens.<sup>7</sup> In order to permit the orderly and effective resolution of the issues in the MAS proceeding, the Commission immediately froze<sup>8</sup> applications in the 932/941 MHz bands, except certain pending applications, applications for minor modifications, and applications for license assignment or transfer of control, during the pendency of the rulemaking.

3. On January 19, 2000, the Commission streamlined and restructured its MAS rules and procedures.<sup>9</sup> As part of these modifications, the Commission designated twenty of the forty MAS channel pairs in the 932/941 MHz band for public safety/Federal Government and private internal services, and the Commission provided for the licensing of these channels on a “first-come, first-served” site-by-site basis with frequency coordination.<sup>10</sup> Additionally, the Commission rescinded the freeze on portions of the 932/941 MHz bands designated for public safety and private internal use.<sup>11</sup> Thus, commencing on January 20, 2000, the Commission began accepting applications to operate MAS systems on the 932/941 MHz bands designated for public safety and private internal use on a “first-come, first-served” site-by-site basis with frequency coordination. To receive consideration as mutually exclusive applications, applicants must have filed applications proposing overlapping operations with one or more applications for 932/941 MHz MAS channels on the same day.<sup>12</sup>

## B. MAS Applications

4. Shortly thereafter, San Diego Gas & Electric (SDG&E), Cal Water, San Francisco, and Contra Costa Water District (Contra Costa) each filed applications seeking authorization to operate MAS stations in California. On January 20 and 21, 2000, SDG&E filed five applications requesting authorization to operate MAS stations in the areas of Fallbrook,<sup>13</sup> Escondido,<sup>14</sup> San Clemente,<sup>15</sup> San

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<sup>7</sup> *Id.* at 7974 ¶ 1.

<sup>8</sup> Meaning that the Commission immediately suspended the acceptance and processing of such applications.

<sup>9</sup> Amendment of the Commission’s Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11,956 (2000) (*MAS R&O*).

<sup>10</sup> *Id.* at 11,968 ¶ 31, 11,971 ¶ 37, 11,976 ¶ 53 (designated five of the channel pairs for public safety services).

<sup>11</sup> *MAS R&O*, 15 FCC Rcd at 12,004-5 ¶ 114.

<sup>12</sup> *Id.* See also 47 C.F.R. § 101.101 note 1.

<sup>13</sup> FCC File No. 0000072213 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000.

<sup>14</sup> FCC File No. 0000072220 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000.

<sup>15</sup> FCC File No. 0000072221 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000.

Juan Capistrano<sup>16</sup> and Vista,<sup>17</sup> California, respectively. As filed, each SDG&E application was defective because SDG&E filed the applications without the required frequency coordination.<sup>18</sup>

5. On February 3, 2000, Cal Water filed four applications to operate in the areas of Lancaster,<sup>19</sup> Hawthorne,<sup>20</sup> East Los Angeles,<sup>21</sup> and Redonda Beach,<sup>22</sup> California, respectively. Cal Water requested three frequencies in the 932/941 MHz MAS band for each station. As filed, the proposed operations in Cal Water's Lancaster and Hawthorne applications and the proposed operations in SDG&E's San Juan Capistrano application did not comply with the co-channel separation (short-space) requirements on 932/941.38125 MHz.<sup>23</sup> Additionally, the proposed operations in Cal Water's East Los Angeles application and the proposed operations in SDG&E's San Clemente, Escondido and Fallbrook applications did not comply with the short-spacing requirements on 932/941.26875 MHz and 932/941.40625 MHz. Finally, the proposed operations in Cal Water's Redondo Beach application and the proposed operations in SDG&E's Vista application did not comply with the short-spacing requirements on 932/941.39375 MHz.

6. Between February 2 and February 8, 2000, Cal Water filed an additional twenty-six applications for new MAS stations in California and the state of Washington.<sup>24</sup> On February 17, 2000,

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<sup>16</sup> FCC File No. 0000072543 (filed Jan. 21, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000, and (non-Major) June 26, 2000.

<sup>17</sup> FCC File No. 0000072547 (filed Jan. 21, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000, and (non-Major) June 26, 2000.

<sup>18</sup> See Automated Return Letter for FCC File No. 0000072213 (dated May 2, 2000); Automated Return Letter for FCC File No. 0000072220 (dated May 2, 2000); and Automated Return Letter for FCC File No. 0000072221 (dated May 2, 2000). FCC File Nos. 0000072543 and 0000072547 were amended by SDG&E before they were returned by L&TAB. See also 47 C.F.R. § 101.103. See e.g. San Diego Gas & Electric Company, *Order on Reconsideration*, 16 FCC Rcd 13,089 (WTB PSPWD 2001) (*SDG&E Recon Order*).

<sup>19</sup> FCC File No. 0000079277 (filed Feb. 3, 2000).

<sup>20</sup> FCC File No. 0000079302 (filed Feb. 3, 2000).

<sup>21</sup> FCC File No. 0000079576 (filed Feb. 3, 2000).

<sup>22</sup> FCC File No. 0000079895 (filed Feb. 3, 2000).

<sup>23</sup> For site-based multiple address stations in the 928-929/952-960 MHz and the 932-932.5/941-941.5 MHz bands, 47 C.F.R. § 101.105(c)(3)(i) requires a minimum separation of from all existing stations and pending applications of 145 km (90mi.).

<sup>24</sup> See FCC File No. 0000079079 (filed Feb. 2, 2000), FCC File No. 0000079084 (filed Feb. 2, 2000), FCC File No. 0000079282 (filed Feb. 3, 2000), FCC File No. 0000079294 (filed Feb. 2, 2000), FCC File No. 0000079321 (filed Feb. 2, 2000), FCC File No. 0000079326 (filed Feb. 2, 2000), FCC File No. 0000079570 (filed Feb. 3, 2000), FCC File No. 0000079585 (filed Feb. 3, 2000), FCC File No. 0000079878 (filed Feb. 3, 2000), FCC File No. 0000079924 (filed Feb. 3, 2000), FCC File No. 0000079947 (filed Feb. 3, 2000), FCC File No. 0000080090 (filed Feb. 3, 2000), FCC File No. 0000080591 (filed Feb. 3, 2000), FCC File No. 0000080592 (filed Feb. 3, 2000), FCC File No. 0000080603 (filed Feb. 3, 2000), FCC File No. 0000080629 (filed Feb. 3, 2000), FCC File No. 0000080904 (filed Feb. 8, 2000), FCC File No. 0000080941 (filed Feb. 8, 2000), FCC File No. 0000080959 (filed Feb. 8, 2000), FCC File No. 0000080970 (filed Feb. 8, 2000), FCC File No. 0000082835 (filed Feb. 8, 2000), FCC File No. 0000082851 (filed Feb. 8, 2000), FCC File No. 0000082860 (filed Feb. 8, 2000), FCC (continued....)

Contra Costa filed an application for a new MAS station in the Nortonville, California area.<sup>25</sup> The operations proposed in Contra Costa's Nortonville application and the operations in Cal Water's Stockton application, one of the above twenty-six applications, did not comply with the short-spacing requirements on 932/941.28125 MHz.<sup>26</sup>

7. On March 9, 2000, San Francisco attempted to obtain frequency coordination for four MAS master stations sites.<sup>27</sup> Comsearch informed San Francisco that entities had filed applications for all newly available MAS channels.<sup>28</sup> At this point, San Francisco knew no channels were available in the San Francisco area.<sup>29</sup>

8. On May 16, 2000, San Francisco objected to seven applications filed by Cal Water to provide service in California.<sup>30</sup> In its Objection, San Francisco argues that we should deny Cal Water's applications because the applications would conflict with its planned stations and because granting a significant amount of spectrum available in one area to one applicant would not be in the public interest.<sup>31</sup> At this time, San Francisco had not filed any applications in the 932/941 MHz band to operate MAS stations. On May 23, 2000, SDG&E amended its five applications to include the required frequency coordination.<sup>32</sup> The Division granted these five applications in the August through

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File No. 0000082870 (filed Feb. 8, 2000), FCC File No. 0000082894 (filed Feb. 8, 2000) and FCC File No. 0000082905 (filed Feb. 8, 2000). Note, however, that FCC File Nos. 0000079585 and 0000082851 were dismissed on May 10, 2001. FCC File No. 0000079585 was dismissed because Cal Water amended the proposed structure height, but did not obtain FAA clearance or file FCC Form 854. *See* Automated Dismissal Letter for FCC File No. 0000079585 (dated May 10, 2001). FCC File No. 0000082851 was dismissed because Cal Water amended the proposed transmitter antenna height and the newly proposed height exceeds the proposed structure height. *See* Automated Dismissal Letter for FCC File No. 0000082851 (dated May 10, 2001).

<sup>25</sup> FCC File No. 0000083147.

<sup>26</sup> FCC File No. 0000079570. On August 17, 2000, the Division granted Contra Costa's Nortonville application. Cal Water did not file an objection or a petition for reconsideration against the grant of the Contra Costa application.

<sup>27</sup> *See* Objection to California Water Service Company's Applications for 932/941 MAS Licenses, filed May 16, 2000 (Objection).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Objection (San Francisco objected to FCC File Nos. 0000079079, 0000079282, 0000079326, 0000079878, 0000080904 0000082851, and 0000082860). San Francisco stated that the related MAS applications "are known to conflict with the MAS master radio stations that the SFPUC [San Francisco] intends to license." *Id.* at 1.

<sup>31</sup> *Id.* at 5-7.

<sup>32</sup> *See* para. 4, *supra*; *see also* note 18, *supra*, and accompanying text regarding SDG&E applications and amendments: FCC File No. 0000072213, FCC File No. 0000072220, FCC File No. 0000072221, FCC File No. 0000072543, and FCC File No. 0000072547.

October 2000 period.<sup>33</sup> Cal Water did not file an objection or a petition for reconsideration against the grant of SDG&E's applications. Between May 24, 2000 and September 20, 2000, San Francisco filed four applications<sup>34</sup> for MAS licenses, although it recognized that no MAS channels were available and its applications would overlap with the seven relevant Cal Water applications.<sup>35</sup>

9. On February 7, 2001, the Division returned Cal Water's thirty applications and requested that Cal Water further justify, within sixty days, the need for the proposed stations.<sup>36</sup> In response, on April 6, 2001, Cal Water filed additional information with regard to twenty-nine of the thirty applications<sup>37</sup>.

10. On April 9, 2001, San Francisco and Cal Water filed the aforementioned Settlement Agreement.<sup>38</sup> This agreement contained four elements. First, Cal Water would withdraw its requests

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<sup>33</sup> FCC File No. 0000072213, as amended, was granted on Sept. 28, 2000; FCC File No. 0000072220, as amended, was granted Sept. 28, 2000; FCC File No. 0000072221, as amended, was granted Oct. 2, 2000; FCC File No. 0000072543, as amended, was granted Aug. 25, 2000; and FCC File No. 0000072547, as amended, was granted Aug. 25, 2000.

<sup>34</sup> FCC File No. 0000138901 (filed May 24, 2000), FCC File No. 0000138914 (filed May 24, 2000), FCC File No. 0000138925 (filed May 24, 2000), and FCC File No. 0000222488 (filed Sept. 20, 2000).

<sup>35</sup> FCC File No. 0000138901 at Exhibit C; FCC File No. 0000138914 at Exhibit C; FCC File No. 0000138925 at Exhibit C; and FCC File No. 0000222488 at Exhibit C. *See also* Objection at 5.

<sup>36</sup> *See* Automated Return Letter for FCC File No. 0000079079 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079084 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079277 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079282 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079294 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079302 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079321 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079326 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079570 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079576 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079585 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079878 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079895 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079924 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000079947 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080090 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080591 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080592 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080603 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080629 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080904 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080941 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080959 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000080970 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082835 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082851 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082860 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082870 (dated Feb. 7, 2001); Automated Return Letter for FCC File No. 0000082894 (dated Feb. 7, 2001); and Automated Return Letter for FCC File No. 0000082905 (dated Feb. 7, 2001).

<sup>37</sup> FCC File No. 0000082835 was dismissed on April 30, 2001 because Cal Water did not respond to the Commission's request for additional information. *See* Automated Dismissal Letter for FCC File No. 0000082835 (dated April 30, 2001).

<sup>38</sup> *See* Settlement Agreement: California Water Service Company and the San Francisco Public Utility Commission, (dated Apr. 9, 2001) (Settlement Agreement). On Dec. 31, 2001, the parties amended the Settlement (continued....)

for certain channels in the applications identified in the Objection as well as two other channels that San Francisco did not previously dispute.<sup>39</sup> Second, San Francisco would withdraw its Objection to Cal Water's applications.<sup>40</sup> Third, the parties would negotiate a short-spacing agreement for service areas proposed in the future by San Francisco that overlap service areas already proposed by Cal Water.<sup>41</sup> Finally, the Settlement Agreement would be null and void if the Commission failed to approve it and failed to grant San Francisco's four applications.<sup>42</sup>

11. On May 24, 2001, San Francisco filed an additional MAS application for the area of San Francisco, California.<sup>43</sup> San Francisco acknowledged that its application was short-spaced with two Cal Water applications.<sup>44</sup> As provided in the Settlement Agreement, San Francisco promised to negotiate a short-spacing agreement with Cal Water.<sup>45</sup>

12. On July 1, 2002, the Division dismissed the Settlement Agreement, dismissed San Francisco's five MAS applications, and denied San Francisco's Objection to the Cal Water MAS applications.<sup>46</sup> At the same time, the Division noted conflicts between certain Cal Water applications and certain previously granted applications of SDG&E and Contra Costa.<sup>47</sup> In the *Order*, the Division

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Agreement to reflect the sharing of only one of the frequency pairs, 932/941.30625. *See* Settlement Agreement, as amended, (Dec. 31, 2001).

<sup>39</sup> *See id.* at 1-2. The previously undisputed channels were requested by Cal Water in FCC File Nos. 0000079282 and 0000080090.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2-3.

<sup>43</sup> FCC File Nos. 0000472773 (filed May 24, 2001).

<sup>44</sup> *See* FCC File Nos. 0000079570 & 0000080591. We note that San Francisco failed to report that its application, FCC File No. 0000472773, was also short-spaced with a third Cal Water application, FCC File No. 0000080904.

<sup>45</sup> *See* FCC File No. 0000472773 at Attachment A, Cover Letter.

<sup>46</sup> *See Order, supra* note 2.

<sup>47</sup> *Id.* Specifically, Cal Water applications: FCC File No. 0000079277 (filed Feb. 3, 2000); FCC File No. 0000079302 (filed Feb. 3, 2000); FCC File No. 0000079576 (filed Feb. 3, 2000); FCC File No. 0000079895 (filed Feb. 3, 2000); FCC File No. 0000079570 (filed Feb. 3, 2000); FCC File No. 0000079282 (filed Feb. 3, 2000); FCC File No. 0000082860 (filed Feb. 8, 2000). SDG&E applications: FCC File No. 0000072213 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000; FCC File No. 0000072220 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000; FCC File No. 0000072221 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000; FCC File No. 0000072543 (filed Jan. 21, 2000), amended (Major – with freq. coord.) May 23, 2000, (non-Major) May 25, 2000, and (non-Major) June 26, 2000; FCC File No. 0000072547 (filed Jan. 21, 2000), amended (Major – with freq. coord.) May 23, 2000, (non-Major) May 25, 2000, and (non-Major) June 26, 2000. Contra Costa application: FCC File No. 0000083147 (filed Feb. 17, 2000, amended (non-Major) June 29, 2000)). *Order*, ¶¶ 1, 3-5, 11. The Contra Costa application was granted on August 17, 2000.

recognized that the SDG&E and Contra Costa applications were granted in error;<sup>48</sup> however, the Division also noted that Cal Water failed to file a petition to deny applications, request to set aside the license grants, or a petition for reconsideration of the license grants,<sup>49</sup> and that it would therefore be improper for the Division to set aside the SDG&E and Contra Costa authorizations.<sup>50</sup>

13. The Division stated that after the thirty-day period reflected in Section 1.113 of the Commission's rules, which allows for correction of action taken, the Division could only correct the grants if they were due to some ministerial error, and such was not the case here.<sup>51</sup> The Division concluded that it could not grant Cal Water's request to operate on certain frequencies in the 932/941 MHz band in the areas of Lancaster, Hawthorne, East Los Angeles, and Redonda Beach, California because such a grant would conflict with the final licensing grants to SDG&E.<sup>52</sup> The Division could not grant a similar request by Cal Water to operate on certain frequencies in the 932/941 MHz band in the areas of Stockton, San Carlos and Dillon Beach, California because such a grant would conflict with the license grant to Contra Costa.<sup>53</sup> The Division then directed the Licensing and Technical Analysis Branch (L&TAB) to process Cal Water's applications in accordance with the *Order*.<sup>54</sup> Accordingly, L&TAB processed the Cal Water application resulting in partial grants of the applications because the Division *Order* excluded the grant of certain frequencies in the 932/941 MHz

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<sup>48</sup> The Division recognized that Cal Water's applications, which were filed in February, 2000, were short-spaced with the SDG&E applications. It noted that ordinarily, it would be expected that Cal Water's applications would have been dismissed as untimely because the SDG&E applications were filed first. However, it noted that the January 2000 applications filed by SDG&E were defective because they were filed without the required frequency coordination. On May 23, 2000, SDG&E amended its applications to include frequency coordination. Such amendments are major pursuant to 47 C.F.R. § 1.929. Therefore, ordinarily such an amended application is treated as a new application, thereby initiating a new filing date. Consequently, the Division noted that SDG&E's applications should have received a filing date of May 23, 2000, which would have been considered untimely with regards to Cal Water's applications. *Id.*, ¶ 8. Similarly, the Division noted that on August 17, 2000, Contra Costa's Nortonville application was granted while Cal Water's earlier filed Stockton, San Carlos and Dillon Beach applications for frequency 932/941.28125 MHz were pending. *Id.*, ¶ 11. It noted that Contra Costa's application was filed nearly two weeks after Cal Water's Stockton, San Carlos and Dillon Beach applications and should have been dismissed as untimely pursuant to 47 C.F.R. § 1.934(f). *Id.* It further noted, however, that Contra Costa's Nortonville application was erroneously granted on August 17, 2000, and the last day to set aside the application or request reconsideration of the license grant was Friday, September 22, 2000. *Id.* The Division indicated that the errors described above are not ministerial and cannot be reversed after the set aside period has passed. Consequently, SDG&E and Contra Costa obtained exclusive rights to operate in the spectrum. *Id.*

<sup>49</sup> *Order*, ¶¶ 4-5.

<sup>50</sup> *Id.* ¶¶ 9-11.

<sup>51</sup> *Id.* See *infra* note 76 and accompanying text.

<sup>52</sup> *Id.* ¶¶ 9-10.

<sup>53</sup> *Id.* ¶ 11.

<sup>54</sup> *Id.* ¶¶ 1, 20.



band.<sup>55</sup>

14. San Francisco filed its AFR on July 31, 2002.<sup>56</sup> In its AFR, San Francisco raises three matters that it believes should result in the reversal of the Division *Order*. First, San Francisco contends that the Division *Order* fails to consider the merits of the Settlement Agreement, ignores equities in favor of procedure,<sup>57</sup> and fails to address San Francisco's objections to Cal Water's applications.<sup>58</sup> Moreover, San Francisco maintains that its Objection should be treated as a request for a waiver of the Commission's rule regarding the dismissal of untimely filed applications.<sup>59</sup> We disagree and address the arguments below.

### III. DISCUSSION

#### A. Settlement Agreement

15. San Francisco contends that the Division failed to consider the merits and equities in favor of accepting the Settlement Agreement. Section 1.935 of our Rules permits parties to file settlement agreements when applicants that have mutually exclusive applications enter into settlement agreements to resolve the mutual exclusivity.<sup>60</sup> Also under Section 1.935, a party that has filed an informal objection against an application and then seeks to withdraw or request dismissal of the objection must obtain the approval of the Commission.<sup>61</sup>

16. In the *MAS R&O*, the Commission stated that it would license the subject MAS channels on a first-come, first-served, site-by-site basis with frequency coordination.<sup>62</sup> Thus, San Francisco could only file mutually exclusive MAS applications with Cal Water if both applicants filed applications on the same day and they proposed overlapping operations. In this instance, Cal Water filed its applications between February 3, 2000 and February 8, 2000. However, San Francisco did not file its applications until May 24, 2000, September 20, 2000, and May 24, 2001, respectively. Because these applications are not mutually exclusive, Cal Water and San Francisco did not satisfy the threshold requirements to file a settlement agreement pursuant to Section 1.935.

17. San Francisco filed an objection against Cal Water's applications. Section 1.935 requires the party filing an objection against an application to obtain the approval of the Commission in order

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<sup>55</sup> See Wireless Telecommunications Bureau Site-By-Site Action, *Public Notice*, Report No. 1238 (rel. July 24, 2002).

<sup>56</sup> See *supra* note 1.

<sup>57</sup> AFR at 3.

<sup>58</sup> *Id.* at 3, 5-6.

<sup>59</sup> *Id.* at 3-4; see also 47 C.F.R. § 1.934(f).

<sup>60</sup> 47 C.F.R. § 1.935.

<sup>61</sup> *Id.*

<sup>62</sup> *MAS R&O*, 15 FCC Rcd 11,976 ¶ 53.

to request dismissal or withdrawal of the objection.<sup>63</sup> This rule deters frivolous protests, filed primarily for anticompetitive or abusive reasons<sup>64</sup> and prevents the filing of speculative applications and pleadings (or threats of the same) designed to extract money from applicants.<sup>65</sup>

18. In this instance, the Division properly considered and disapproved of the Settlement Agreement.<sup>66</sup> San Francisco and Cal Water sought approval of the Settlement Agreement in order to obtain MAS channels. However, as the Division *Order* indicates, approval of the Settlement Agreement would have placed San Francisco at an unfair advantage over other entities who had filed earlier than San Francisco on the same frequencies, or who otherwise had an interest in applying for frequencies in this band but may not have filed applications in recognition of the Commission's first-come, first-served licensing principle.<sup>67</sup> San Francisco incorrectly presumes that there were no other interested applicants for these channels because the Division *Order* does not state the names of the other interested entities.<sup>68</sup> Indeed, subsequent to the filing of Cal Water's MAS applications, several other entities filed applications on the same frequencies that were eventually the subject of the Settlement Agreement.<sup>69</sup> These other entities' applications were filed earlier than San Francisco's applications on the same frequencies, which were the subject of the Settlement Agreement.<sup>70</sup> The Division dismissed these other entities' applications as late-filed in accordance with the rules.<sup>71</sup>

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<sup>63</sup> 47 C.F.R. § 1.935.

<sup>64</sup> See Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Third Report and Order*, 9 FCC Rcd 7988, 8131 ¶ 319 (1994).

<sup>65</sup> See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use Of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2,639, 2686 ¶ 126 (1995).

<sup>66</sup> For key provisions of the Settlement Agreement, see para. 10 *supra*,

<sup>67</sup> *Order*, 17 FCC Rcd at 12,753-4 ¶ 14. The *Order* cites the case of Plaincom Inc., *Memorandum Opinion and Order*, 15 FCC 11889, 11893 ¶ 10 (2000) (*Plaincom MO&O*), which indicates that Commission approval of a general process that does not adhere to the established first-filed application standard "would be unfair to tardy interested parties that refrain from filing" upon learning of a conflicting application.

<sup>68</sup> See AFR at 5.

<sup>69</sup> The following three applications were short-spaced with Cal Water applications that were the subject of the Settlement Agreement: (1) California American Water Company, FCC File No. 0000098115 (filed Mar. 20, 2000) was short-spaced with earlier filed Cal Water applications 0000079326 (filed Feb. 2, 2000) and 0000082851 (filed Feb. 8, 2000) on 941/932.35625 MHz.; (2) Contra Costa Water District, FCC File No. 0000083153 (filed Feb., 2000) was short-spaced with earlier Cal Water applications 0000080090 (filed Feb. 3, 2000), and 0000080904 (filed Feb. 8, 2000) on 941/932.30625 MHz.; and (3) Santa Clara Valley Water District, FCC File No. 0000078129 (filed Feb. 7, 2000) was short spaced with earlier Cal Water applications 0000080090 (filed Feb. 3, 2000), 0000080591 (filed Feb. 3, 2000), and 0000080904 (filed Feb. 8, 2000) on 941/932.30625 MHz.

<sup>70</sup> As seen in the Appendix by examining the listed untimely applications that conflict with Cal Water application FCC File Nos. 0000079326, 0000080090, 0000080591, 0000080904, and 0000082851.

<sup>71</sup> They were late-filed in the sense that they did not comport with the first-come, first-served standard contemplated by the Commission for processing MAS applications. See e.g. letter from Mary Shultz, Chief, L&TAB to California American Water Company, dated Oct. 3, 2000, in reference to FCC File no. 0000098115; see (continued....)

Additionally, numerous other entities filed untimely applications on the other frequencies requested in Cal Water's MAS applications.<sup>72</sup> As noted earlier, SDG&E and Contra Costa Water District filed late-filed applications, which the Division granted in error.<sup>73</sup> Nonetheless, the Division did not receive a request to set aside the license grants, nor a petition for reconsideration of the license grants. The thirty-day period to set aside the grants passed.<sup>74</sup> The Commission may correct erroneous grants of applications *sua sponte* more than thirty days after they become final only where the grants occur because of, or contain, a ministerial error.<sup>75</sup> The Commission's authority to revisit final actions is limited to the correction of clerical errors that underlie or occur in the process of taking action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.<sup>76</sup> As the SDG&E and Contra Costa erroneous grants did not occur because of, or contain, ministerial error(s), these grants are final.<sup>77</sup>

19. The Commission may approve settlement agreements that are in the public interest, and

(Continued from previous page) \_\_\_\_\_

*also* letter from Mary Shultz, Chief, L&TAB to Contra Costa Water District, dated Sept. 14, 2000, in reference to File No. 0000083153; *see also* letter from Mary Shultz, Chief, L&TAB, to Santa Clara Valley Water District, dated Sept. 14, 2000, in reference to FCC File No. 0000078129.

<sup>72</sup> *See* Appendix for a list of entities that filed untimely applications on frequencies requested in Cal Water's MAS applications.

<sup>73</sup> *See* note 49, *supra*. SDG&E, FCC File No. 0000072543 (filed Jan. 21, 2000), amended (Major – with freq. coord.) May 23, 200, (non-Major) May 25, 2000, and (non-Major) June 26, 2000, was short-spaced with earlier Cal Water applications 0000079277 (filed Feb. 3, 2000) and 0000079302 (filed Feb. 3) on 941/932.38125 MHz. Contra Costa Water District, FCC File No. 0000083147 (filed Feb. 17, 2000), amended (non-Major) June 29, 2000) was short-spaced with earlier Cal Water applications 0000079282 (filed Feb. 3, 2000), 0000079570 (filed Feb. 3, 2000) and 0000082860 (filed Feb. 17, 2000) on 941/932.28125 MHz. SDG&E, FCC File No. 0000072221 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000) was short-spaced with earlier Cal Water application 0000079576 (filed Feb. 3, 2000) on 941/932.26875 MHz. SDG&E, FCC File No. 0000072213 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000) was short-spaced with earlier Cal Water application 0000079576 (filed Feb. 3, 2000) on 941/932.40625 MHz. SDG&E, FCC File No. 0000072220 (filed Jan. 20, 2000), amended (Major – with freq. coord.) May 23, 2000, and (non-Major) May 25, 2000) was short-spaced with earlier Cal Water application 0000079576 (filed Feb. 3, 2000) on 941/932.40625 MHz. SDG&E, FCC File No. 0000072547 (filed Jan. 21, 2000), amended (Major – with freq. coord.) May 23, 2000, (non-Major) May 25, 2000, and (non-Major) June 26, 2000) was short-spaced with earlier Cal Water application 0000079895 (filed Feb. 3, 2000) on 941/932.39375 MHz.

<sup>74</sup> 47 C.F.R. § 1.113(a) states: "Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set aside on its own motion."

<sup>75</sup> *See* County of San Mateo, California, *Memorandum Opinion and Order*, 16 FCC Rcd 16501, 16504 ¶ 10 (2001).

<sup>76</sup> *Id.*

<sup>77</sup> The Court of Appeals for the D.C. Circuit has stated that "granting an application 'due to the failure to engage in a comparative evaluation of competing applications,' as occurred here, is not the type of error that an agency may correct after the action becomes final. *Hirschey v. FERC*, 701 F.2d 215, 219 (D.C. Cir. 1983).

disapprove those settlement agreements that are contrary to the public interest.<sup>78</sup> San Francisco argues that approval of the Settlement Agreement is in the public interest because San Francisco and Cal Water negotiated an agreement to avoid a protracted fight over the channels.<sup>79</sup> We agree with the Division that approval of the Settlement Agreement is inconsistent with the public interest because San Francisco would receive an unfair advantage over other interested entities. Accordingly, we believe that disapproval of the Settlement Agreement is the proper disposition here. While we encourage negotiation between parties, we will not approve of negotiated results that contravene our rules--such as the first-come, first-served requirement<sup>80</sup> involved here--absent a showing that a waiver of the requirement is warranted.

## B. San Francisco's Objection

20. We next consider the merits of San Francisco's arguments with respect to the Division's denial of San Francisco's Objection. San Francisco maintains that the Division did not provide a reasoned explanation for the denial of its objection. In its Objection, San Francisco provides a summary of its implementation of its Supervisory Control and Data Acquisition (SCADA) system<sup>81</sup> and its reasons for seeking MAS channels.<sup>82</sup> San Francisco asserts that it needs the MAS channels because the operation and functioning of its water system depends on its use of these channels to monitor, maintain, and repair its facilities and identify emergencies.<sup>83</sup> In light of its efforts to implement its SCADA system, San Francisco asserts that denial of Cal Water's seven applications would serve the public interest.<sup>84</sup> Specifically, San Francisco asserts that the public interest would be served by denying Cal Water's applications because thirty-three retail water agencies in the San Francisco Bay area, including Cal Water, rely on San Francisco's water system, to deliver reliable and safe water to citizens.<sup>85</sup> Although San Francisco noted the Commission's decision to authorize an unlimited number of MAS channels to a single licensee in each geographic area, San Francisco contends that granting fourteen of twenty MAS channel pairs to one entity in the San Francisco Bay Area would be inconsistent with the goal of utilizing the MAS spectrum to its fullest potential.<sup>86</sup>

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<sup>78</sup> See, e.g., DCT Greater Philadelphia, LLC, DCT Transmission, LLC, Applications for 39 GHz Point-to-Point Microwave Radio Station Authorization, 16 FCC Rcd 5706, 5707 (2001); Progressive Cellular III B-2; Application for Authorization to Construct a New Domestic Public Cellular Radio System for the Alaska 3-Haines RSA (Market No. 317A), 15 FCC Rcd 1868, 1869 (2000); see also 47 C.F.R. § 1.935.

<sup>79</sup> AFR at 5.

<sup>80</sup> See, e.g., Liberty Productions, L.P., et al., Memorandum Opinion and Order, 16 FCC Rcd 12061, 12065-67 ¶¶ 10-13 (2001).

<sup>81</sup> Objection at 2-3. San Francisco's current system uses telephone lines complemented by VSAT for communication. *Id.* at 4.

<sup>82</sup> *Id.* at 3 San Francisco plans to use the channels to provide coverage of seventy-eight remote sites. *Id.* Eventually coverage will extend to over 300 remote sites. *Id.*

<sup>83</sup> See e.g. File No. 0000138925 Exhibit B at 2.

<sup>84</sup> *Id.* at 1 citing File Numbers 79079, 79282, 79326, 79878, 80904, 82851, 82860.

<sup>85</sup> *Id.* at 8.

<sup>86</sup> *Id.* at 6.

Essentially, San Francisco argues that it has a better use for the channels than Cal Water has for the channels and that the Division erred in denying its objection and dismissing its applications.<sup>87</sup>

21. Cal Water supplemented its applications by summarizing the implementation of its SCADA system.<sup>88</sup> Cal Water asserts that each application represents the channel needs in a separate district, which will have its own independent SCADA system. Cal Water plans to use the channels to distribute reliable and safe water on a day-to-day and emergency basis.<sup>89</sup> Cal Water asserts that it needs the channels because it will have a very high number of remote facilities to monitor and control.<sup>90</sup> Both Cal Water and San Francisco maintain that they need the channels to monitor and control remote facilities. The Division declined to grant San Francisco's objection because San Francisco did not cite any Commission rule that precluded Cal Water from applying for this spectrum.<sup>91</sup> Cal Water submitted timely applications for spectrum that was available. As explained above, Cal Water's applications were not mutually exclusive with any other applications.

22. San Francisco asserts that granting fourteen of twenty MAS channels to one entity in the San Francisco area would not serve the public interest. San Francisco acknowledges that during the MAS proceeding, that the Commission declined to impose a limit on the number of MAS channels that a single licensee could hold in each geographic area.<sup>92</sup> In the *MAS R&O*, the Commission determined that site-based licensees may aggregate unlimited spectrum in any MAS band.<sup>93</sup> No entity sought reconsideration of this determination.<sup>94</sup> Accordingly, this decision is final.<sup>95</sup> The Division's denial of

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<sup>87</sup> *Id.* at 7.

<sup>88</sup> *See e.g.* File No. 0000079079 Exhibit B.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> San Francisco Objection at 6.

<sup>93</sup> *MAS R&O*, 15 FCC Rcd at 11,985 ¶ 74; 47 C.F.R. § 101.1323(b).

<sup>94</sup> Amendment of the Commission's Rules Regarding Multiple Address Systems, *Memorandum Opinion and Order*, 16 FCC Rcd 12,181, 12,184 ¶ 6 (2001).

<sup>95</sup> Pursuant to Section 1.108 of our Rules, the Commission may, on its own motion, set aside any action made or taken by it within thirty days from the date of public notice of the action. *See* 47 C.F.R. § 1.108; Revisions to Cable Television Rate Regulations, *Order*, 17 FCC Rcd 15,974 (2002). For purposes of the *MAS R&O*, public notice of the Commission's action commenced on the day of the Federal Register publication date, April 3, 2000, 47 C.F.R. § 1.4(b)(3), and the decision became final on the same date. Our authority to revisit final actions is limited to the correction of clerical errors that underlie or occur in the process of taking action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision. County of San Mateo, California, *Memorandum Opinion and Order*, 16 FCC Rcd 16,501, 16504 ¶ 10 (2001).

San Francisco's objection was proper.<sup>96</sup>

23. Finally, we note that Cal Water did not request dismissal of its applications. As such, San Francisco presented no basis to dismiss Cal Water's applications. Furthermore, assuming the Division dismissed Cal Water's applications, the Division would not have automatically granted the related frequencies to San Francisco. As noted previously, several other entities were seeking MAS frequencies in the San Francisco area.<sup>97</sup>

24. We believe that the Division's denial of the Objection was warranted. The Commission established MAS licensing for the 932-941 channels on a first-come, first-served basis. San Francisco filed its applications even though it recognized that the applications were short-spaced with the Cal Water applications.<sup>98</sup> Having been satisfied on the merits of Cal Water's application and with adequate justification showing Cal Water's need for additional spectrum, the Division properly denied San Francisco's request for denial of Cal Water's applications. Thus, we do not find the *Order* to be arbitrary and capricious, as San Francisco contends.<sup>99</sup>

### C. Waiver of Application Filing Deadline

25. Finally, San Francisco asserts that its Objection essentially sought a waiver of Section 1.934(f) of our Rules.<sup>100</sup> San Francisco contends that by presenting information about San Francisco and Cal Water in its Objection, it sought to "secure comparative consideration of San Francisco's needs and uses in relation to those of Cal Water"<sup>101</sup> and, therefore, the Objection was tantamount to a request for a waiver of the Commission's rule<sup>102</sup> allowing dismissal of untimely applications.<sup>103</sup>

26. We find this argument unpersuasive. An applicant may obtain a waiver of our rules under two scenarios. First, the applicant must demonstrate that the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the

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<sup>96</sup> See Nextel Communications, Inc., *Order*, 14 FCC Rcd 11,678, 11,693 ¶ 34 n.124 citing *Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission itself); see also, Daniel R. Goodman, Receiver; Dr. Robert Chan, 13 FCC Rcd 21,944 21,965-21966 ¶ 38 n.141 citing Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4707-4708 ¶ 22 (1991) (requested relief is not available where it would be contrary to an applicable statute or rule).

<sup>97</sup> Withdrawn frequencies become available for applicants to file for them after the withdrawal appears on Public Notice. See *Plaincom MO&O*, 15 FCC Rcd at 11,893 ¶ 9.

<sup>98</sup> San Francisco Objection at 5; (FCC File No. 0000138901 at Exhibit C; FCC File No. 0000138914 at Exhibit C; FCC File No. 0000138925 at Exhibit C; and FCC File No. 0000222488 at Exhibit C (May 24, 2000 Applications, Exhibit C); FCC File No. 0000472773 (filed May 24, 2001).

<sup>99</sup> Objection at 8-9.

<sup>100</sup> *Id.* at 3-4.

<sup>101</sup> *Id.* at 4.

<sup>102</sup> 47 C.F.R. § 1.934(f).

<sup>103</sup> AFR at 3-4.

requested waiver would be in the public interest.<sup>104</sup> In the alternative the applicant must demonstrate that in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>105</sup> Applicants for waiver face a high hurdle and must plead the facts and circumstances which warrant a waiver.<sup>106</sup> Furthermore, an applicant for a waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.<sup>107</sup> Initially, we note that San Francisco did not cite any rule in its Objection for which it sought a waiver. Consequently, even if we were to deem the filing to be a waiver request, it would be a defective waiver request because San Francisco did not plead with particularity the facts and circumstances which warrant a waiver.

27. Assuming, *arguendo*, that San Francisco did request a waiver of Section 1.934(f) of our Rules, we must assess whether the request satisfies the waiver standard. We must interpret Section 1.934(f) in conjunction with Section 101.101 note 5. Although Section 1.934(f) permits the dismissal of applications that are premature or late filed,<sup>108</sup> Section 101.101 note 1 determines when the application is premature or late-filed.<sup>109</sup> As against late-filers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the Commission's rules.<sup>110</sup>

28. San Francisco has not shown that the public's interest in administrative finality and prompt issuance of licenses as well as Cal Water's diligent compliance with our Rules and need for the channels to monitor and control its SCADA system is outweighed by San Francisco's need for channels to monitor and control its SCADA system. Moreover, San Francisco did not address the waiver factors. Its sole justification for denial of Cal Water's applications is that it *believes* it needs the channels more. We decline to grant a waiver based on this rationale. Cal Water filed its application several months before San Francisco filed its applications. We find that San Francisco has not submitted sufficient reasons to warrant grant of a waiver in this context.

29. Finally, we note that San Francisco has an alternative to the resolution it seeks here. The parties may implement the intent of the Settlement Agreement by Cal Water assigning channels to San Francisco. In addition, three entities, Paging Systems, Inc., TelBeeper of New Mexico, Inc., and MilkyWay Communications, LLC, were awarded channel blocks in the 932/941 MHz MAS band in the San Francisco-Oakland-San Jose market.<sup>111</sup> We permit MAS assignment applications pursuant to

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<sup>104</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>105</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>106</sup> *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) *aff'd*, 459 F.2d 1203 (1972) cert. denied, 409 U.S. 1027 (1972) *citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968); *Birach Broadcasting Corporation, Memorandum Opinion and Order*, 2003 WL 202677 (2003).

<sup>107</sup> *WAIT Radio v. FCC*, 413 F.2d at 1157 n.9; *Family Stations, Inc. v. Directv, Inc, Memorandum Opinion and Order*, 2002 WL 31841569 ¶ 7 (2002).

<sup>108</sup> 47 C.F.R. § 1.934(f).

<sup>109</sup> 47 C.F.R. § 101.101 note 1.

<sup>110</sup> *See e.g. McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996).

<sup>111</sup> Wireless Telecommunications Bureau Announces the Grant of Licenses to Operate in the Multiple (continued....)

Sections 1.948 and 101.1321(b) of the Commission's rules.<sup>112</sup> Additionally, pursuant to Section 101.1323 of our rules,<sup>113</sup> we permit MAS geographic area licenses to partition and/or disaggregate their spectrum to third parties. San Francisco might consider approaching an MAS geographic area licensee to determine whether a contractual arrangement to acquire spectrum is possible. In addition, San Francisco might consider exploring other spectrum bands that are licensed on a site-by-site basis for its operations, such as the 450-470 MHz and 1.4 GHz bands. We decline to grant San Francisco's Objection or to waive the Commission's rules.

#### IV. CONCLUSION

30. Accordingly, we sustain the Division's *Order* and decline to reconsider San Francisco's Objection and proposed settlement. Additionally, we decline to treat San Francisco's Objection as a request for a waiver of the MAS first-filer rule.

#### IV. ORDERING CLAUSE

31. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5) and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by the City and County of San Francisco on July 31, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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Address Bands, *Public Notice*, 17 FCC Rcd 5956 (2002).

<sup>112</sup> 47 C.F.R. §§ 1.948 and 101.1321(b).

<sup>113</sup> 47 C.F.R. § 101.1323.



## APPENDIX

The following chart depicts MAS applications referenced in this *Memorandum Opinion and Order*:

Timely Filed Applications			Frequency	Untimely Filed Applications		
Applicant	File Number	Filing Date		Applicant	File Number	Filing Date
Cal Water	0000079079	2/2/00	941/932.31875 MHz	San Francisco	0000138901	5/24/00
Cal Water	0000079277	2/3/00	941/932.38125 MHz	SDG&E**	0000072543	5/23/00
Cal Water	0000079282	2/3/00	941/932.28125 MHz	Contra Costa**	0000083147	2/17/00
Cal Water	0000079282	2/3/00	941/932.34375 MHz	San Francisco	0000138925	5/24/00
Cal Water	0000079294	2/2/00	941/932.41875 MHz	SDG&E	0000072216	5/23/00
Cal Water	0000079302	2/3/00	941/932.38125 MHz	SDG&E**	0000072543	5/23/00
Cal Water	0000079326	2/2/00	941/932.26875 MHz	Contra Costa, County of	0000081801	2/7/00
Cal Water	0000079326	2/2/00	941/932.35625 MHz	California American Water Company  San Francisco	0000098115  0000138914	3/20/00  5/24/00
Cal Water	0000079570	2/3/00	941/932.28125 MHz	Contra Costa**	0000083147	2/17/00
Cal Water	0000079576	2/3/00	941/932.26875 MHz	SDG&E**	0000072221	5/23/00
Cal Water	0000079576	2/3/00	941/932.30625 MHz	City of Burbank Police Department	0000090927	2/22/00
Cal Water	0000079576	2/3/00	941/932.40625 MHz	City of Long Beach  SDG&E**  SDG&E**	0000091533  0000072213  0000072220	3/1/00  5/23/00  5/23/00
Cal Water	0000079585	2/3/00	941/932.36875 MHz	Sacramento Municipal Utility District	0000102062 0000102108	4/4/00 4/4/00
Cal Water	0000079878	2/3/00	941/932.25625 MHz	San Francisco	0000222488	9/20/00
Cal Water	0000079895	2/3/00	941/932.39375 MHz	SDG&E**	0000072547	5/23/00
Cal Water	0000079947	2/3/00	941/932.28125 MHz	SDG&E  Southern California Gas Company	0000083045  0000080195	2/17/00  2/11/00
Cal Water	0000080090	2/3/00	941/932.26875 MHz	Contra Costa, County of	0000081801	2/7/00
Cal Water	0000080090	2/3/00	941/932.30625 MHz	Santa Clara Valley	0000078129	2/7/00

				Water District Contra Costa Water District San Francisco	0000083153 0000472773	2/17/00 5/24/01
Cal Water	0000080591	2/3/00	941/932.30625 MHz	Santa Clara Valley Water District San Francisco	0000078129 0000472773	2/7/00 5/24/01
Cal Water	0000080603	2/3/00	941/932.28125 MHz	Southern California Gas Company SDG&E Victor Valley Water District SDG&E	0000080195 0000083045 0000671485 0000454593	2/11/00 2/17/00 11/28/01 5/9/01
Cal Water	0000080603	2/3/00	941/932.33125 MHz	Union Pacific Railroad	0000093303	3/14/00
Cal Water	0000080603	2/3/00	941/932.43125 MHz	SDG&E SDG&E	0000072170 0000454626	5/23/00 5/9/01
Cal Water	0000080629	2/3/00	941/932.28125 MHz	Texaco Communications, Inc Chevron USA, Inc	0000249307 0000426887	10/30/00 4/13/01
Cal Water	0000080629	2/3/00	941/932.31875 MHz	Kern County Water Agency	0000154499	5/30/00
Cal Water	0000080904	2/8/00	941/932.30625 MHz	Santa Clara Valley Water District Contra Costa Water District San Francisco	0000078129 0000083153 0000472773	2/7/00 2/17/00 5/24/01
Cal Water	0000080904	2/8/00	941/932.35625 MHz	San Francisco	0000138914	5/24/00
Cal Water	0000080941	2/8/00	941/932.36875 MHz	Sacramento Municipal Utility District	0000102062 0000102108	4/4/00 4/4/00
Cal Water	0000080970	2/8/00	941/932.29375 MHz	Chevron USA, Inc North of the River Municipal Water District	0000103074 0000287128	4/5/00 11/14/00
Cal Water	0000082835	2/8/00	941/932.34375 MHz	Placer County Water Agency	0000091666	3/6/00
Cal Water	0000082851	2/8/00	941/932.35625 MHz	California American Water Company San Francisco	0000098115	3/20/00

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					0000138914	5/24/00
Cal Water	0000082860	2/8/00	941/932.25625 MHz	San Francisco	0000222488	9/20/00
Cal Water	0000082860	2/8/00	941/932.28125 MHz	Contra Costa Water District**	0000083147	2/17/00

\*\* = granted in error