

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

In the Matter of)	
)	
Amendment of Part 90 of the Commission's Rules)	
and Policies for Applications and Licensing of)	WT Docket No. 01-146
Low Power Operations in the Private Land Mobile)	RM-9966
Radio 450-470 MHz Band)	

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 2004

Released: September 8, 2004

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a petition for reconsideration of the *Report and Order* in this proceeding¹ filed by American Association of Paging Carriers (AAPC).² AAPC requests that the Commission prohibit the licensing of stations on frequencies (or channels) 12.5 kHz removed from eight specific Part 90 450-470 MHz band paging frequencies.³ For the reasons set forth below, we deny the AAPC petition.

II. BACKGROUND

2. The Commission has permitted the use of frequencies 12.5 kHz removed from regularly assignable 25 kHz frequencies in the Part 90 450-470 MHz band (often referred to as "offset channels") on a secondary basis for low power operations for many years.⁴ During this time, these offset channels have been extensively used by hospitals and industrial/business entities for low power communications.

¹ Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band, *Report and Order*, WT Docket No. 01-146, 18 FCC Rcd 3948 (2003) (*Low Power R&O*).

² Petition for reconsideration (AAPC petition) filed May 21, 2003. *See Public Notice*, Report No. 2616, released July 7, 2003.

³ The eight paging frequencies in question are 462.7500 MHz, 462.7750 MHz, 462.8000 MHz, 462.8250 MHz, 462.8500 MHz, 462.8750 MHz, 462.9000 MHz and 462.9250 MHz. These frequencies may be licensed as either Commercial Radio Mobile Service (CMRS) systems or Private Land Mobile Radio (PLMR) systems. The frequencies are administered under Part 90 of the Commission's Rules (47 C.F.R. Part 90) and available only on a shared basis. The frequencies 12.5 kHz removed from these frequencies that AAPC is concerned with are 462.7625 MHz, 462.7875 MHz, 462.8125 MHz, 462.8375 MHz, 462.8625 MHz, 462.8875 MHz, 462.9125 MHz and 462.9375 MHz.

⁴ For example, the Commission first authorized the use of offset channels in the old Business Radio Service in 1973. *See* Amendment of Parts 2 and 91 of the Commission's Rules to Permit Medical Telemetry and Other Low Power Uses of Offset Frequencies in the Business Radio Service, *First Report and Order*, Docket No. 19478, 41 FCC 2d 8 (1973).

Low power operations on these frequencies include medical telemetry, remote operation of heavy machinery, meter reading, wireless data communications and alarm transmissions. In 1995, however, to promote more efficient use of the spectrum, the Commission established a new channeling plan for the PLMR 450-470 MHz band. Under the new plan, the vast majority of 12.5 kHz offset channels were made available for high power operations on a primary basis (*i.e.*, regularly assignable channels).⁵ The Commission, however, did not make the eight offset channels adjacent to the eight 450-470 MHz band paging frequencies available for high power operations. Instead, it maintained a low power secondary restriction on these offset channels.⁶

3. In adopting the new channel plan, the Commission recognized a continuing need for low power operations and provided the Part 90 frequency coordinators with the authority to identify specific 12.5 kHz channels to be reserved for low power use.⁷ It was envisioned that the frequency coordinators would develop a low power channel plan – namely, identify specific channels along with a migration plan for moving low power operations on the new high power channels to the designated low power channels. Before the 1995 band plan rules took effect, however, the Wireless Telecommunications Bureau (WTB) granted a request to “freeze” the filing of applications for high power operations on the offset channels in the 450-470 MHz band.⁸ WTB suspended the acceptance of applications for high power operations on the offset channels in order to prevent high power operations from interfering with in-hospital medical telemetry operations on these offset channels.

4. In 1997, the Commission consolidated the twenty PLMR services below 512 MHz into two pools – a Public Safety Pool and an Industrial/Business Pool.⁹ The Commission confirmed the importance of designating low power channels and gave the frequency coordinators until October 17, 1997, to develop a consensus plan identifying specific frequencies for low power operations in the two pools.¹⁰ In response, the Land Mobile Communications Council (LMCC) filed a Low Power Consensus Plan (Consensus Plan) in June 1997 that identified specific frequencies for low power use.¹¹ The Consensus Plan, however, included several provisions that could not be implemented without changes to the Commission’s Rules. In August 1997, the LMCC filed a modified Consensus Plan that did not require rule changes.¹² Specifically, the Low Power Plan listed ninety Industrial/Business Pool channel

⁵ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 92-235, 10 FCC Rcd 10,076 (1995) (*Refarming R&O*).

⁶ See 47 C.F.R. § 90.35(c)(67) (1997).

⁷ *Refarming R&O*, 10 FCC Rcd at 10110 ¶ 64; 47 C.F.R. § 90.267(a).

⁸ See Freeze on the Filing of High Power Applications for 12.5 kHz Offset Channels in the 450-470 MHz Band, *Public Notice*, PR Docket No. 92-235, 10 FCC Rcd 9995 (WTB 1995).

⁹ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Second Report and Order*, PR Docket No. 92-235, 12 FCC Rcd 14,307, 14,315-19 ¶¶ 15-21 (1997).

¹⁰ *Id.* at 14,340-41 ¶ 63.

¹¹ See Letter from Larry Miller, President, LMCC to Daniel Phythyon, Acting Chief, Wireless Telecommunications Bureau, FCC, dated June 4, 1997. The LMCC is a non-profit association of organizations representing virtually all users of land mobile radio systems, providers of land mobile services and manufacturers of land mobile equipment. LMCC’s membership includes all of the Commission’s certified Part 90 frequency coordinators.

¹² See Letter from Larry Miller, President, LMCC to Daniel Phythyon, Acting Chief, Wireless Telecommunications Bureau, FCC, dated August 21, 1997 (Low Power Plan). The intent was to determine the specific low power frequencies first and then, at a later date, initiate a notice and comment rule making proceeding to address possible changes in the operating parameters for these frequencies.

pairs and fourteen Public Safety Pool channel pairs to be designated for low power use. The Commission, however, deferred a decision on acceptance of this Low Power Plan until it resolved the issue of possible interference to medical telemetry devices operating on offset channels.

5. In 2000, the Commission took action regarding the potential for interference to medical telemetry devices operating in the 450-470 MHz band. On June 8, 2000, the Commission adopted a *Report and Order* establishing the Wireless Medical Telemetry Service (WMTS) and allocating fourteen megahertz of spectrum in the 608-614 MHz, 1395-1400 MHz and 1429-1432 MHz bands for medical telemetry use.¹³ In making this allocation, the Commission stated that its goal was to provide spectrum where medical telemetry equipment can operate without interference, but also to encourage medical telemetry users to migrate out of the 450-470 MHz band.¹⁴ As a result of this action, WTB, on June 29, 2000, released a *Public Notice* accepting the Low Power Plan.¹⁵

6. On September 11, 2000, LMCC filed a Petition for Rule Making requesting the commencement of a proceeding to consider various changes to the rules concerning low power operations (*i.e.*, in general, changes needed to make the rules consistent with LMCC's original plan – the Consensus Plan).¹⁶ In response to this request, the Commission adopted a *NPRM* seeking comment on LMCC's proposed revisions.¹⁷ On February 14, 2003 the Commission adopted a *Report and Order* in this proceeding.¹⁸ In general, the *Low Power R&O* adopted LMCC's recommendations, including making seven of the eight offset channels referenced in the AAPC petition¹⁹ available for itinerant operations

¹³ See Amendment of Parts 2 and 95 of the Commission's Rules to Create a Wireless Medical Telemetry Service, *Report and Order*, ET Docket No. 99-255, 15 FCC Rcd 11,206 (2000) (*Medical Telemetry R&O*). The spectrum available for medical telemetry in the 1429-1432 MHz band was later slightly modified. See Amendments to Parts 1, 2, 27, and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Report and Order*, WT Docket No. 02-8, 17 FCC Rcd 9980 (2002).

¹⁴ *Id.* at 11,225 ¶ 57.

¹⁵ See Wireless Telecommunications Bureau Accepts LMCC Low Power Plan for Part 90 450-470 MHz Band, *Public Notice*, 15 FCC Rcd 11,598 (WTB 2000). In a companion public notice released the same day, the Bureau announced it was lifting the freeze on the 450-460 MHz segment. See Freeze on Filing of High Power Applications for 12.5 kHz Offset Channels in the 450-470 MHz Band to be Lifted January 29, 2001, *Public Notice*, 15 FCC Rcd 9996 (WTB 2000). The freeze on the 460-470 MHz segment of the band was to remain in effect until October 2003, in order to allow hospitals adequate time to migrate their medical telemetry operations to the WMTS bands. *Medical Telemetry R&O*, 15 FCC Rcd at 11,227-28 ¶ 65. The freeze subsequently was extended to ensure an orderly transition. On July 8, 2004, the Wireless Telecommunications Bureau released a *Public Notice* announcing the freeze on high power use of the 460-470 MHz band offset channels will be lifted effective January 1, 2006. See The Wireless Telecommunications Bureau Extends the Freeze on High Power Use of the 460-470 MHz Band Offset Channels until December 31, 2005, *Public Notice*, DA 04-2071 (WTB rel. July 8, 2004).

¹⁶ Land Mobile Communications Council Petition for Rule Making, RM-9966, filed September 11, 2000.

¹⁷ Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band, *Notice of Proposed Rule Making*, WT Docket No. 01-146, 16 FCC Rcd 14946 (2001).

¹⁸ *Low Power R&O*, 18 FCC Rcd 3948.

¹⁹ There is a discrepancy in the current Commission Rules. Section 90.35 lists the offset channel 462.9375 MHz as being assigned to Group C in the Low Power Pool and subject to the provisions of 47 C.F.R. § 90.267. See 47 C.F.R. § 90.35(b)(3). However, in Section 90.267(e) of the Commission's Rules, which sets forth the Group C frequency table, this frequency is not listed. See 47 C.F.R. § 90.267(e). A review of the Appendix to the *Low Power R&O* and the Federal Register summary associated with this item shows that the frequency 462.9375 MHz is not assigned to Group C. This frequency is a low power frequency available on a secondary basis and operations are limited to 2 watts output power.

(Group C) and converting the power limit for mobile operations on these frequencies from two watts transmitter output power to six watts effective radiated power (ERP).

III. DISCUSSION

7. In its petition, AAPC describes itself as a newly organized trade association representing the interests of paging carriers throughout the United States.²⁰ AAPC notes that it was not formed until after the comment period had closed in the *NPRM* and therefore could not have participated during the comment stage.²¹ As a result, AAPC argues that the rules adopted in the *Low Power R&O* have been decided without adequate consideration of their impact on paging carriers.²²

8. AAPC contends that reconsideration is warranted for two reasons.²³ First, it argues that the use of 12.5 kHz offset channels adjacent to the 450-470 MHz band paging frequencies is fundamentally inconsistent with the Omnibus Budget Reconsideration Act of 1993 (OBRA).²⁴ In this regard, AAPC states that a requirement under OBRA is that Part 90 CMRS licensees be “subject to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services.”²⁵ It argues that because CMRS licensees under Part 22 operate with 25 kHz spacing between assignable channels, the Commission should eliminate the licensing of stations on these offset channels in order to assure that CMRS operations on the Part 90 450-470 MHz paging frequencies are substantially similar to Part 22 paging operations (*i.e.*, 25 kHz to the next assignable channel).²⁶

9. Second, AAPC contends that regardless of OBRA, the non-coordinated, nationwide itinerant use of these offset frequencies is fundamentally incompatible with adjacent channel paging operations. More specifically, AAPC argues that such operation poses an unacceptable risk of harmful interference to paging operations on the adjacent frequencies.²⁷ In addition, AAPC claims that the lack of documented interference to paging operations to date from offset operations does not provide any useful guidance since the offset frequencies in question were substantially used for very low power in-hospital telemetry operations.²⁸ It again asks that the offsets adjacent to the paging channels be eliminated.²⁹

10. We are unpersuaded by AAPC’s arguments. As an initial matter, we conclude that to the extent that the AAPC petition requests these offset channels be eliminated it is untimely filed. As noted above, the *Low Power R&O* did not establish these channels; they have been available for years.³⁰ Also, eliminating these channels was not an issue squarely raised in the context of this proceeding. In addition, we note that the Commission previously addressed the issue of whether to extend Part 22 rules to

²⁰ AAPC petition at 2.

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.*

²⁴ See Pub. L. 103-66, Title VI, § 6002 (d)(3), 107 Stat. 397 (OBRA).

²⁵ AAPC petition at 3.

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 5.

²⁸ *Id.* at 6.

²⁹ *Id.* at 7-8.

³⁰ See note 4, *supra*.

reclassified Part 90 services.³¹ A request to eliminate licensing of the subject eight offset channels would have been the proper subject of a reconsideration petition then or in the *Refarming R&O* when the Commission decided to establish a new band plan for the PLMR 450-470 MHz band.³² Likewise, to the extent the AAPC petition indirectly challenges earlier Commission decisions it is also procedurally flawed because it is an impermissible collateral attack³³ on final Commission decisions.³⁴

11. We also take this opportunity to address AAPC's contention that, based on OBRA, the Commission is obligated to make sure Part 90 CMRS paging operations are subject to the same technical requirements as Part 22 paging operations.³⁵ We disagree. In this connection, we note that there are several differences in the rules governing Part 22 and Part 90 paging operations below 800 MHz besides channel spacing. For example, Part 90 450-470 MHz band paging frequencies are shared channels and licensed on a site-by-site basis where Part 22 paging frequencies in this band are exclusive channels and are now licensed on a geographic area basis. Further, we point out that OBRA requires the Commission to modify its rules, to the extent "necessary and practical," to ensure that substantially similar services are subject to "comparable" technical requirements.³⁶ As mentioned in the *Further Notice*, OBRA also confers substantial discretion on the Commission to determine how this objective should be accomplished.³⁷ Thus, contrary to AAPC's contention, the statutory language indicates that the Commission is not compelled to modify existing rules if such modification is unnecessary to achieve regulatory symmetry or is otherwise impractical. The Commission has recognized this point in the past and declined to conform rules applicable to Part 90 and Part 22 CMRS operations.³⁸ There is nothing in the record before us to support that making such a change would further regulatory symmetry or that the public interest would be served.

12. AAPC also contends that making these frequencies available for non-coordinated, nationwide itinerant operation, even with the adopted low power parameters, will likely result in unacceptable interference to paging receivers operating on the 462 MHz paging frequencies. In support,

³¹ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Further Notice of Proposed Rule Making*, GN Docket No. 93-252, 9 FCC Rcd 2863 (1994) (*Further Notice*). See also, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*Third R&O*).

³² Although AAPC was not formed at that time, one or more of the licensees it represents could have filed a reconsideration with the Commission if they felt aggrieved.

³³ See e.g., MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., *Memorandum Opinion and Order*, 5 FCC Rcd 216, 228, n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).

³⁴ See 47 U.S.C. §§ 402(c), 405(a); 47 C.F.R. § 1.429(d).

³⁵ AAPC asserts that because the channel spacing for CMRS paging channels under Part 22 is 25 kHz and Part 90 CMRS paging operations are substantially similar to Part 22 operations, the channel spacing for the Part 90 462 MHz paging frequencies should be consistent -- channels spaced every 25 kHz.

³⁶ OBRA, § 6002(d)(3).

³⁷ *Further Notice*, 9 FCC Rcd at 2864-69 ¶¶ 21-24.

³⁸ In the *Third R&O* the Commission declined to conform several rules applicable to Part 90 CMRS operations below 800 MHz to those in Part 22. For example, the Commission decided that power and antenna height limits applicable to Part 90 services on shared channels should not be conformed to the somewhat higher maximum limits applicable to Part 22 services. See *Third R&O*, 9 FCC Rcd 7988. Later, the Commission declined to convert certain Part 90 shared paging channels to exclusive channels. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Paging Systems, Implementation of Section 309(j) of the Communication's Act – Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, PR Docket No. 93-253, 12 FCC Rcd 2732, 2756-2757 ¶¶ 40-41 (1997).

AAPC contends that the *Low Power R&O* changed the fundamental use of these offset frequencies. It states that prior to the *Low Power R&O*, these offset frequencies were primarily used for very low power medical telemetry operations. As a result, according to AAPC, there was little risk of interference to paging operations and therefore the lack of documented interference does not provide any useful guidance on the likelihood of interference under the new rules. AAPC argues, however, that the intended new users (construction companies, small businesses, etc.) will be operating in the same location as paging receivers thus resulting in an increased potential for adjacent channel interference. According to AAPC, the likelihood of interference is further increased by the fact that these offset channels will be licensed on a non-coordinated, itinerant basis.

13. Contrary to AAPC's contention, these frequencies were available prior to the *Low Power R&O* for construction and small business use. Thus, we believe the lack of interference complaints to date is significant. Further, we note here that both the Part 90 paging channels and the 12.5 kHz offset channels are available only on a shared basis. Thus, entities are not entitled to specific interference protection and should expect other operations in the same area.³⁹ Also, while the Commission did eliminate the coordination requirement on these offset channels in the *Low Power R&O*, we do not believe non-coordinated use will result in a significant change to the radio operating environment because of the way low power operations on these offset operations were licensed. Typically, these offset channels were licensed for mobile operation on a point-radius basis. For example, an entity could operate anywhere within a twenty-mile radius from a set of coordinates. Thus, a frequency coordination requirement did not eliminate offset users operating in the same area as paging receivers.

14. Finally, we note that this situation is not similar to other situations, as argued by AAPC, where the Commission determined that itinerant use was incompatible with existing operations.⁴⁰ The cases where itinerant use was deemed incompatible with certain existing operations involved co-channel operation and powers approximately equal to or much less than the itinerant operation.⁴¹ Paging operations are operating on adjacent channels and at a power level substantially higher than the maximum power for Group C frequencies. Thus, we are not persuaded by the AAPC petition that the final rules adopted in the *Low Power R&O* should be changed to avoid harmful interference to Part 90 462 MHz band paging frequencies. Further, we continue to believe that the paging and low power operations can compatibly coexist in the 450-470 MHz band as currently authorized under the Commission's Rules.

15. For the reasons stated above, we are not persuaded that we should prohibit licensing of stations on frequencies 12.5 kHz removed from the eight Part 90 450-470 MHz band paging frequencies as requested by AAPC. Therefore, we deny the AAPC petition.

16. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the petition for reconsideration filed by American Association of Paging Carriers IS DENIED, and THIS PROCEEDING IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁹ See 47 C.F.R. § 90.173(b). We also note that, in general, PLMR stations operating with 25 kHz channels are not protected from other PLMR stations operating on channels 12.5 kHz removed.

⁴⁰ AAPC petition at 3.

⁴¹ *Low Power R&O*, 18 FCC Rcd at 3971-73 ¶¶ 57-60.