

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Improving Public Safety Communications
in the 800 MHz Band

WT Docket No. 02-55

Consolidating the 800 and 900 MHz
Industrial /Land Transportation and
Business Pool Channels

Amendment of Part 2 of the Commission's
Rules to Allocate Spectrum Below 3 GHz
for Mobile and Fixed Services to Support
the Introduction of New Advanced
Wireless Services, including Third
Generation Wireless Systems

ET Docket No. 00-258

Petition for Rule Making of the Wireless
Information Networks Forum Concerning
the Unlicensed Personal Communications
Service

RM-9498

Petition for Rule Making of UT Starcom,
Inc., Concerning the Unlicensed Personal
Communications Service

RM-10024

Amendment of Section 2.106 of the
Commission's Rules to Allocate Spectrum
at 2 GHz for use by the Mobile Satellite
Service

ET Docket No. 95-18

**MOTION FOR PARTIAL STAY
OF THE
LAND MOBILE COMMUNICATIONS COUNCIL**

The Land Mobile Communications Council (LMCC) hereby respectfully submits this Motion for Partial Stay in the above-captioned proceeding. LMCC asks the Commission to stay the effective date of its new Rule Section 90.621(f), 47 C.F.R. § 90.621(f), permitting immediate

conversion of operations on 896-901/935-940 MHz Business or Industrial/Land Transportation pool frequencies to commercial services.¹ The Stay should be limited to affect only those stations whose licenses were granted since the adoption date of the *Report and Order* in the instant proceeding.² Due to the current January 21, 2005, effective date of the new Rule section, LMCC requests that this Motion be considered expeditiously.

I. Introduction

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 radio equipment. LMCC acts with the consensus, and on behalf, of the vast majority of public safety, business, industrial, private, commercial and land transportation radio users, as well as a diversity of land mobile service providers and equipment manufacturers. Membership includes the following organizations:

- Aeronautical Radio, Inc. (ARINC)
- American Association of State Highway and Transportation Officials (AASHTO)
- American Automobile Association (AAA)
- American Mobile Telecommunications Association, Inc. (AMTA)
- American Petroleum Institute (API)
- Association of American Railroads (AAR)
- Association of Public Safety Communications Officials-International, Inc. (APCO)
- Central Station Alarm Association (CSAA)
- Forest Industries Telecommunications (FIT)
- Forestry-Conservation Communications Association (FCCA)
- Industrial Telecommunications Association, Inc. (ITA)
- Intelligent Transportation Society of America, Inc. (ITSA)

¹ LMCC is preparing another filing to the Commission on the issue of 900 MHz private land mobile radio (PLMR) services that recommends an alternative to the immediate conversion included within § 90.621(f). However, pursuant to § 1.44(e), this Motion for Partial Stay is being filed separately.

² Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, FCC 04-168, released August 6, 2004 (“R&O”).

- International Association of Fire Chiefs (IAFC)
- International Association of Fish and Wildlife Agencies (IAFWA)
- International Municipal Signal Association (IMSA)
- Manufacturers Radio Frequency Advisory Committee (MRFAC)
- National Association of State Foresters (NASF)
- PCIA – The Wireless Infrastructure Association (PCIA)
- Telecommunications Industry Association (TIA)
- United Telecom Council (UTC)

Many of LMCC’s member organizations have members themselves that are licensees in the 900 MHz PLMR band and will be impacted by the likely effect of the new Rule. In addition, nearly all of LMCC’s members are FCC-certified frequency coordinators that would be processing the required modifications to incumbent licenses under the new Rule. Thus, LMCC and its members are interested parties in this matter.

II. Discussion

Section 1.429(k) of the Commission’s rules provides that the Commission may stay the effective date of an order pending reconsideration by the Commission upon a showing of “good cause.”³ In evaluating whether good cause exists, the Commission has used the criteria set forth in *Virginia Petroleum Jobbers Association v. FPC*,⁴ as explained in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*⁵ Under the *Holiday Tours* standard, the Commission must consider whether (1) the petitioner is likely to prevail on the merits, (2) the petitioner will be irreparably injured without such relief, (3) other interested parties will be harmed if the stay is granted, and (4) the public interest favors grant of a stay.⁶ In considering these four factors, the Commission need not find that the petitioner’s ultimate success is a

³ 47 C.F.R. § 1.429(k).

⁴ 259 F.2d 921 (D.C. Cir. 1958).

⁵ 559 F.2d 841 (D.C. Cir. 1977).

⁶ *Id.* at 842.

“mathematical probability.”⁷ Instead, the degree of possibility of success required will vary according to the other factors.⁸ Based upon these criteria, a stay of the effective date of the applicability of potential commercial conversions at 900 MHz is warranted and legally mandated.

LMCC is likely to prevail on the merits. A Petition for Reconsideration in the instant proceeding, filed by an LMCC member, MRFAC, Inc., (MRFAC) and the National Association of Manufacturers, is likely to prevail on its merits. MRFAC correctly noted the FCC’s desire to prohibit speculation and trafficking when it created commercial conversion rules for 800 MHz PMRS licensees.⁹ At 900 MHz, however, the Commission declined to adopt anti-trafficking rules since it “observed no speculative runs on 900 MHz PLMR spectrum.”¹⁰ New evidence since the adoption of the Commission’s 800 MHz Order may indicate otherwise, and will likely be provided as evidence in comments to the Petition.

⁷ *Id.* at 843.

⁸ *Id.* at 843-844 (noting that if “the other three factors strongly favor interim relief [, the Commission] may exercise its discretion to grant a stay if the movant has made a *substantial* case on the merits”) (emphasis added).

⁹ Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial /Land Transportation and Business Pool Channels; Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service; and Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service, WT Docket No. 02-55, ET Docket No. 00-258, RM-9498, RM-10024, and ET Docket No. 95-18, *Petition for Reconsideration of the National Association of Manufacturers and MRFAC, Inc.*, filed on Dec. 22, 2004 (MRFAC Petition). (All Petitions referenced herein were filed in this docket.)

¹⁰ R&O at ¶ 337.

Today's action, and forthcoming comments, by the LMCC on this issue represents a new industry-wide position that has not been presented to the Commission heretofore. Considering the breadth of the associations represented under LMCC and their memberships, which make up virtually every licensee at 900 MHz, the LMCC's comments on this petition should be met with substantial satisfaction by the Commission.

LMCC believes that after comments have been filed in response to this Petition, the Commission will see the potential for speculation and trafficking, as well as the pitfalls of permitting commercial systems on 900 MHz B/ILT channels without an appropriate holding period and without appropriate interference protections. Under these circumstances, LMCC believes that it is highly probable that this reconsideration will prevail on the merits.

LMCC's member organizations and their constituencies will be irreparably injured without such relief. Without this stay, land mobile operators at 900 MHz, including critical infrastructure entities such as Exelon Energy,¹¹ railroads nationwide,¹² and manufacturing facilities,¹³ among many others, could be subject to harmful interference resulting from fundamentally incompatible system designs that was decidedly unacceptable at 800 MHz and the primary impetus for this proceeding. This interference could cause irreparable harm to employees and the public at large, as well as system investments that have become a critical resource to the public. As a result, LMCC's member organizations and their constituencies will be irreparably injured without this relief.

¹¹ Petition for Reconsideration of Exelon Corporation, filed December 22, 2004.

¹² Petition for Reconsideration of The Association of American Railroads, filed on December 17, 2004.

¹³ MRFAC Petition.

Other interested parties will not be harmed if the stay is granted. Currently, 900 MHz licensees are providing viable communications solutions that would not be harmed if they were not permitted to convert their authorizations immediately to commercial operations. In fact, no application received by the Commission prior to the implementation of its freeze on 900 MHz new station applications¹⁴ sought to provide commercial service. As such, other parties will not be harmed if the stay is granted.

The public interest favors grant of a stay. The consequences of permitting incompatible system architectures at 900 MHz, particularly the potential for interference that was deemed unacceptable at 800 MHz for similar mission-critical entities, far outweigh the potential benefits of immediate commercial operations on a limited number of these channels in few geographic areas. The public interest dictates a stay of this conversion potential until the Commission completes its review of MRFAC's Petition and subsequent comments.

¹⁴ FCC Public Notice, DA-04-3013, Wireless Telecommunications Bureau Freezes Applications In The 900 MHz Band, rel. Sept. 17, 2004.

Given the reasons listed above, the LMCC urges the Commission to stay immediately the effective date of Section 90.621(f) of its Rules, permitting 900 MHz CMRS conversion without a holding period – for those stations granted licenses since the adoption date of the R&O, pending review on Reconsideration.

Respectfully submitted,

LAND MOBILE COMMUNICATIONS COUNCIL
8484 Westpark Drive, Suite 630
McLean, Virginia 22102
(703) 528-5115

By: /s/ Jim Pakla
Jim Pakla
President

January 12, 2004