

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 0

[FCC 95-213]

#### Changes in the Delegated Authority of Various Bureaus

**AGENCY:** Federal Communications Commission.

**ACTION:** Correcting amendments.

**SUMMARY:** This document contains corrections to the final regulations (FCC 95-213), which were published July 10, 1995 (60 FR 35503). The regulations related to the delegated authority of various bureaus.

**EFFECTIVE DATE:** December 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Sue McNeil, (202) 418-0660.

#### SUPPLEMENTARY INFORMATION:

##### Background

The final regulations that are the subject of this correction modify the delegated authority of various bureaus.

##### Need for Correction

The correction is needed because the final regulations inadvertently reinstated language in the delegation of authority of the Compliance and Information Bureau which had been modified while adoption of the regulations was under consideration by the Commission.

##### List of Subjects in 47 CFR Part 0

Authority delegations (Government agencies), Organization and functions (Government agencies).

Accordingly, 47 CFR Part 0 is corrected by making the following correcting amendments:

### PART 0—COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

#### § 0.311 [Amended]

2. In § 0.311, paragraph (f), the phrase "deemed relevant in the investigation of an alleged violation or violations of section 301 (unlicensed operation) or 302a (illegal marketing of radio frequency devices) of the Communications Act of 1934, as amended" is revised to read "relating to investigations under the authority of the Communications Act of 1934, as amended. Before issuing a subpoena, the bureau shall obtain the approval of the Office of General Counsel".

Federal Communications Commission.

William F. Caton,

*Acting Secretary.*

[FR Doc. 95-27299 Filed 11-30-95; 8:45 am]

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### 47 CFR Part 90

[PR Docket No. 92-235, DA 95-2354]

#### Private Land Mobile Radio Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; denial of requests for stay.

**SUMMARY:** On June 15, 1995, the Commission adopted a *Report and Order* which established technical rules and guidelines aimed at improving the efficiency of the PLMR spectrum and facilitating the introduction of advanced technologies into the private mobile services (60 FR 37152, July 19, 1995). In addition, the *Report and Order* mandated the consolidation of the Part 90 Private Land Mobile Radio (PLMR) services, including the Public Safety Radio Services. The PLMR industry was given three months from the effective date of the rules in the *Report and Order* to develop and submit a comprehensive consolidation consensus plan. The *Report and Order* stated that the industry report on radio service consolidation would be required to be submitted on November 20, 1995. The Public Safety Communications Council, the Association of Public-Safety Communications Officials-International, Inc., the International Municipal Signal Association, and the International Association of Fire Chiefs request that the Commission stay consolidation of the Part 90 Public Safety Radio Services until such time as the charter of the Public Safety Wireless Advisory Committee (Advisory Committee) has expired and the Commission has had the opportunity to review and consider the recommendations of the Advisory Committee. Included in the work of the Advisory Committee is the examination of the definition, structure, functions, and ways to enhance telecommunications for the existing Public Safety Radio Services. According to its Charter, the Advisory Committee report is due by September 11, 1996. This order denies the requests for stay as the Petitioners do not meet the standards required for grant of a stay. Specifically, Petitioners have failed to make the required showing of irreparable harm as both the Advisory Committee and the Commission would benefit by the submission of proposals or comments as to how best to

accomplish the consolidation of the radio services. Second, Petitioners' requests for stay will harm other Public Safety Radio Services parties and non-public safety radio services as it will remove a specific class of land mobile services from the consolidation planning process and unnecessarily delay and detrimentally affect the PLMR community efforts to achieve more efficient and flexible spectrum use. Finally, we find that a stay is contrary to the public interest because the Commission should continue its efforts to examine and discuss the range of issues facing public safety communications and a failure to submit proposals and comments would delay efforts to consolidate the radio services.

**EFFECTIVE DATE:** December 1, 1995.

**FOR FURTHER INFORMATION CONTACT:** Sonia Greenaway of the Wireless Telecommunications Bureau at (202) 418-0680.

#### SUPPLEMENTARY INFORMATION:

Adopted: November 20, 1995.

Released: November 20, 1995.

By the Deputy Chief, Wireless Telecommunications Bureau.

1. *Introduction.* On June 15, 1995, the Commission adopted a *Report and Order*<sup>1</sup> that, among other matters, mandated consolidation of the Part 90 Private Land Mobile Radio (PLMR) services, including the Public Safety Radio Services.<sup>2</sup> The Public Safety Communications Council (PSCC),<sup>3</sup> the Association of Public-Safety Communications Officials-International, Inc. (APCO), the International Municipal Signal Association (IMSA), and the International Association of Fire Chiefs (IAFC) request that the Commission stay consolidation of the Part 90 Public Safety Radio Services until such time as the charter of the Public Safety Wireless Advisory Committee (Advisory Committee) has expired and the Commission has had the opportunity to review and consider the recommendations of the Advisory Committee.<sup>4</sup> For the reasons stated below, we deny the requests for stay.

<sup>1</sup> *Report and Order*, PR Docket No. 92-235, FCC 95-255, 60 FR 37152 (July 19, 1995).

<sup>2</sup> The Part 90 Public Safety Radio Services (subpart B) include the Fire, Emergency Medical, Forestry-Conservation, Highway Maintenance, Local Government and Police Radio Services, 47 CFR subpart B.

<sup>3</sup> We note that the Executive Committee members of the Council include the Association of Public-Safety Communications Officials-International, Inc. and the International Municipal Signal Association/International Association of Fire Chiefs. PSCC also seeks a stay with respect to the Subpart C Special Emergency Radio Service.

<sup>4</sup> Parties emphasize that this request for stay does not relate to non-public safety radio services.

2. *Background.* The *Report and Order* established technical rules and guidelines aimed at improving the efficiency of the PLMR spectrum and facilitating the introduction of advanced technologies into the private mobile services. In addition to the technical rules adopted, the Commission concluded that the number of PLMR service pools should be reduced and consolidated. The Commission decided that maintaining twenty service pools is administratively burdensome and that consolidating the PLMR services into 2–4 service pools would lead to greater operational efficiency for users and promote more flexible use of the spectrum.<sup>5</sup> Instead of dictating a specific plan and structure for the radio services under a consolidated system, the Commission encouraged the PLMR community, including users, manufacturers, and frequency coordinators, to submit a consensus plan that would reflect the interests and needs of the community which in turn would assist the Commission in consolidating the service pools. The PLMR industry was given three months from the effective date of the rules in the *Report and Order* to develop and submit a comprehensive consolidation consensus plan. This industry report on radio service consolidation is due November 20, 1995. The Commission stated in the *Report and Order* that it would issue its final rule amendments on consolidation approximately six months after the effective date of the *Report and Order*. Further, it noted that consolidation of the PLMR services will incorporate the PLMR community's recommendations if consensus is achieved but will proceed regardless of the participation of the PLMR community.<sup>6</sup>

3. Independently of this rulemaking, the National Telecommunications and Information Administration (NTIA) and the Commission have established the Advisory Committee to prepare a final report to the NTIA and the Commission on operational, technical and spectrum requirements of Federal, state and local public safety entities through the year 2010. Included in the work of the Advisory Committee is the examination of the definition, structure, and

functions of the existing Public Safety Radio Services. According to its Charter, the Advisory Committee will submit a report to the Commission within twelve months of the first formal meeting.<sup>7</sup>

4. *Contention of the Parties.* Petitioners each present similar reasons in support of their requests for stay of the Public Safety Radio Service consolidation, including the filing of a proposal as to how best to consolidate the services pursuant to the Commission's *Report and Order*. Petitioners argue that it would be premature and inappropriate for the Commission to require the filing of a consensus plan and immediate consolidation of the existing Public Safety Radio Services before the Advisory Committee has completed its work.<sup>8</sup> According to PSCC "[i]t would be needlessly expensive and burdensome on all involved, including the Commission, for the Public Safety services to implement changes \* \* \* and then have to make significant changes again at the conclusion of the (Advisory Committee's) studies and recommendations."<sup>9</sup> IMSA and IAFC further contend that they are entitled to a stay under the four-prong test<sup>10</sup> set forth in *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (*Holiday Tours*).<sup>11</sup> We will address each applicable "prong" below.<sup>12</sup>

5. *Irreparable Harm.* First, IMSA/IAFC contend that failure to allow the Advisory Committee to do its job and provide crucial information which would determine the best way to consolidate existing stations could cause irreparable harm to new applicants as well as existing licensees. They argue that a stay will allow the Commission sufficient time to ensure that policies developed for the Public

Safety Radio Services maximize interoperability, efficiency and enhancement of public safety telecommunications and minimize chances for interference or mismanagement of these important services.<sup>13</sup>

6. A stay is an extraordinary remedy which the Commission grants upon request in limited circumstances. Based on the factors presented by the above parties, we conclude that Petitioners do not meet the standards required for grant of a stay. Specifically, we find that Petitioners have failed to make the required showing of irreparable harm. To show irreparable harm, "the injury must be both certain and great; it must be actual and not theoretical."<sup>14</sup> We believe that Petitioners overstate the impact of not granting their request.

7. The Advisory Committee's work and recommendations will be an important vehicle in the Commission's endeavor to ensure that public safety communications are effective, efficient and respond to the increasing demands placed on the public safety community. The consolidation of services is but one of a myriad of issues that the Advisory Committee may address within the extremely confined time frame it is working under. The Advisory Committee will be meeting throughout the coming months to examine issues and make recommendations. The resolution of every issue does not necessarily await articulation in the Advisory Committee's final report. Throughout the process, a number of recommendations may emerge as consensus agreements or be acted upon formally. Importantly, because of its time constraints, the Advisory Committee itself would benefit by the submission of proposals or comments as to how best to accomplish the consolidation of services. Moreover, the Commission's review and analysis of consolidation alternatives can commence while still affording the Advisory Committee an opportunity to make a recommendation on the issue. Under these circumstances, as both the Advisory Committee and the Commission would benefit by the submission of proposals or views addressing the consolidation of services, we find that Petitioners have failed to

<sup>7</sup> The first formal meeting of the Advisory Committee was held on September 11, 1995. The Advisory Committee report therefore is due by September 11, 1996.

<sup>8</sup> See, for example, APCO petition at 2, PSCC petition at 4, and IMSA/IAFC petition at 2.

<sup>9</sup> Public Safety Communication Council comments at 5.

<sup>10</sup> Under this test, a party moving for a stay must show: (1) A strong likelihood of prevailing on the merits; (2) irreparable harm; (3) issuance of a stay will not harm others; and (4) that granting a stay will serve the public interest. IMSA/IAFC note, however, that its pleading addresses only three prongs of the test as there is no underlying litigation and no issue with respect to prevailing on the merits.

<sup>11</sup> See also *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>12</sup> We do not herein address "likelihood of prevailing on the merits." This prong is inapposite because these petitions are not filed in conjunction with a contested cause of action between opposing parties.

<sup>13</sup> IMSA/IAFC comments at 6.

<sup>14</sup> *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *In the Matter of Cincinnati Bell Telephone Company, Requests for Stay of Orders Finding Violations of the Commission's Rate of Return Prescriptions*, 8 FCC Rcd 6709 (1993).

<sup>5</sup> The twenty (20) PLMR services which are the focus of this proceeding are the Public Safety Radio Services (Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation and Emergency Medical) the Special Emergency Radio Service, the Industrial Radio Services (Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Business, Manufacturers, and Telephone Maintenance), and the Land Transportation Radio Services (Motor Carrier, Railroad, Taxicab, and Automobile Emergency).

<sup>6</sup> *Report and Order* at para. 55.

make the required showing of if irreparable harm.<sup>15</sup>

8. *Harm to Others.* Second, IMSA/IAFC allege that the stay will benefit, not harm, other Public Safety Radio Service parties because the Commission's grant of this request will aid in the establishment of a fair and safe frequency coordination process, avoid the implementation of a consolidation plan that conflicts with the intent and direction of the Advisory Committee report, and avert the disruption of dismembering and reconstructing the finalized consolidation plan should the plan prove unworkable in light of the Advisory Committee's recommendations.<sup>16</sup> Further, IMSA/IAFC maintain that non-public safety radio services will remain unaffected as this request for stay does not relate to non-public safety radio services.

9. As we have stated, we are not faced with the circumstance of proceeding in light of contrary recommendations of the Advisory Committee. Those recommendations have not been formulated and in fact, both the Advisory Committee and Commission would benefit by the proposals and comments of industry of how best to accomplish the consolidation of services. Significant potential for harm to others in the PLMR community will accrue if we were to impose a stay in the consolidation of the Public Safety Radio Services. In the *Report and Order*, the Commission noted that it sought a consensus from all users in the PLMR community in developing a consolidation plan. The Commission recognized that this action represented a significant change for all PLMR services. The Commission viewed consolidation as a unified effort by the PLMR community to maximize the effective and efficient operations of the private services. The *Report and Order* emphasized the importance of developing a consolidation plan for all of the PLMR services. A specific comprehensive consolidation plan must include clear guidelines for the structure of the Public Safety Radio Services. Should the public safety community not participate in discussions to develop a consensus for consolidating the radio services, the PLMR community efforts to achieve more efficient and flexible spectrum use could be unnecessarily delayed and

detrimentally affected. In short, removing a specific class of land mobile services from the consolidation planning process would significantly and adversely affect the entire "Refarming" initiative.

10. *Public Interest.* Third, IMSA/IAFC argue that it is in the public interest to use the Advisory Committee to its maximum potential, and not to risk conflicting directives from the Advisory Committee and the rulemaking proceeding concerning the consolidation of the Public Safety Radio Services.<sup>17</sup> Moreover, these parties state that the delay resulting from this request will be minimal. Again, the Commission is not at a point where it risks even a potential conflict with a recommendation of the Advisory Committee. The Commission is committed to a process that provides the Advisory Committee an opportunity to examine the range of issues facing public safety communications. Our pervading interest is that proposals and comments on the consolidation of services be submitted so that the Commission can continue its efforts in implementing the Refarming initiative, which includes the benefit of any Advisory Committee recommendation addressing the consolidation of services. A stay would likely delay these efforts and be contrary to the public interest.

11. *Conclusion.* For these reasons, and pursuant to § 1.43 of the Commission's rules, the Requests for Stay filed by the Association of Public-Safety Communications Officials-International, Inc., the International Municipal Signal Association and the International Association of Fire Chiefs, and the Public Safety Communications Council are denied.

12. The deadline for filing a consensus plan for consolidation remains November 20, 1995. We will consider, however, the views of the petitioners and the Advisory Committee in conjunction with the recommendations submitted November 20th, prior to issuing a final order on consolidation of the PLMR services.

Federal Communications Commission.

Gerald P. Vaughan,

Deputy Chief, Wireless Telecommunications Bureau.

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 219

[Docket No. RSOR-6; Notice No. 43]

RIN 2130-AA81

#### Random Drug Testing: Announcement of 1996 Minimum Testing Rate; Designation of New Laboratory for Post-Accident Toxicology Testing

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule and notice of determination.

**SUMMARY:** Using data from Management Information System (MIS) annual reports, FRA has calculated that the rail industry random drug testing positive rate for 1994 was 0.808 per cent. Since the industry-wide random drug positive rate continues to be below 1.0 per cent, the Federal Railroad Administrator (Administrator) has determined that the minimum annual random drug testing rate for the period January 1, 1996 through December 31, 1996 will remain at 25 percent of covered railroad employees.

This rule also announces that FRA intends to award a contract to Northwest Toxicology, Inc. (Northwest), to conduct post-accident toxicological analysis, effective December 1, 1995.

**DATES:** This final rule is effective December 1, 1995.

The minimum annual random drug testing rate is 25 percent of covered railroad employees for the period January 1, 1996 through December 31, 1996.

**ADDRESSES:** Any petition for reconsideration should be submitted to the Docket Clerk, Docket No. RSOR-6, Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street, SW., Room 8201, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Lamar Allen, Alcohol and Drug Program Manager, Office of Safety Enforcement, Operating Practices Division, Federal Railroad Administration, 400 7th Street, SW., Room 8314, Washington, DC 20590, (Telephone: (202) 366-0127) or James T. Schultz, Chief, Operating Practices Division, Office of Safety Enforcement, Federal Railroad Administration, 400 7th Street, SW., Room 8314, Washington, DC 20590, (Telephone: (202) 366-9178).

<sup>15</sup> "The most important of [the] factors is irreparable harm, without which other factors need not be considered." *In the Matter of Cincinnati Bell Telephone Company, Requests for Stay of Orders Finding Violations of the Commission's Rate of Return Prescriptions*, 8 FCC Rcd at 6710, note 23.

<sup>16</sup> Comments of IMSA/IAFC at 7.

<sup>17</sup> IMSA/IAFC comments at 8.