

. Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DA 95-1669

In the Matter of )  
 )  
Inter-Category Sharing of )  
Private Mobile Radio )  
Frequencies in the )  
806-821/851-866 MHz )  
Bands. )

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1995

Released: July 28, 1995

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. UTC, the Telecommunications Association (UTC or Petitioner), seeks reconsideration of the Wireless Telecommunications Bureau's (Bureau) Order<sup>1</sup> suspending the acceptance of applications for inter-category sharing<sup>2</sup> of 800 MHz Private Mobile Radio Service (PMRS) frequencies<sup>3</sup> allocated to the Public Safety, Industrial/Land Transportation (I/LT) and Business Radio Services.<sup>4</sup> Reconsideration of the Bureau's action also is requested in a petition filed jointly by Central and South West Corporation, Indianapolis Power and Light Company and Union Electric Company (CIU or Petitioner).<sup>5</sup> In addition, the Industrial Telecommunications Association (ITA) asks for

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<sup>1</sup> Order, DA 95-741, released April 5, 1995, 60 Fed. Reg. 20247 (1995).

<sup>2</sup> In the Order, we referenced 47 C.F.R. § 90.621(g)(1), (2), (3), as the rule providing for inter-category sharing of frequencies in the 806-821/851-866 MHz bands (in non-border areas) by eligibles in the Public Safety, Industrial/Land Transportation, Business, General and SMR categories. This rule designation recently has been changed to 47 C.F.R. § 90.621(e)(1), (2), (3).

<sup>3</sup> These frequencies are in the 806-821/851-866 MHz bands. As noted in the Order (notes 3 and 5), the number of channels and the actual frequencies in the U.S./Canada and U.S./Mexico border areas differ from non-border areas.

<sup>4</sup> Petition for Reconsideration filed by UTC (UTC Petition) on April 10, 1995.

<sup>5</sup> Petition for Reconsideration filed by CIU (CIU Petition) on May 5, 1995.

clarification of the Order.<sup>6</sup> Oppositions to the reconsideration and clarification requests<sup>7</sup> were filed by the Association of Public-Safety Communications Officials-International, Inc. (APCO).<sup>8</sup> ITA and CIU responded to APCO's oppositions with reply pleadings.<sup>9</sup> For the reasons provided below, the Bureau's action is affirmed and the requests made by UTC, CIU and ITA are denied.

## II. BACKGROUND

2. The Order stated that there has been a substantial increase in 800 MHz Specialized Mobile Radio (SMR)<sup>10</sup> applications on the 150 General Category channels and, on an inter-category basis, on the 800 MHz Business and I/LT categories.<sup>11</sup> Because of the pressure placed on the latter two service categories by the SMR applications, there has been a significant increase in the number of Business and I/LT eligibles filing applications, on an inter-category basis, for 800 MHz Public Safety frequencies.<sup>12</sup> In response to these developments, the Commission has initiated a rule making proceeding in which it is considering whether to limit the availability of inter-category sharing channels to SMR licensees, and whether other Part 90 services should be restricted from future eligibility for licenses on SMR

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<sup>6</sup> Request for Clarification filed by ITA (ITA Request) on April 13, 1995.

<sup>7</sup> A few letters were received in support of ITA's clarification request. See e.g., Letter from George Balaban, President, Desert Cab Company, Inc., Las Vegas, Nevada, to Reed E. Hundt, Chairman, Federal Communications Commission (May 9, 1995) (Balaban Letter).

<sup>8</sup> Opposition to UTC's Petition for Reconsideration and ITA's Request for Clarification filed by APCO (APCO Response) on April 20, 1995; and Opposition to CIU's Petition for Reconsideration filed by APCO on May 15, 1995 (APCO Response II).

<sup>9</sup> Reply to Opposition to Request for Clarification filed by ITA (ITA Reply) on May 4, 1995, and Reply to Opposition to Petition for Reconsideration filed by CIU (CIU Reply) on May 25, 1995.

<sup>10</sup> Because the last sentence of note 11 of the Order incorrectly implied that no PMRS licenses are subject to competitive bidding procedures, the Order is corrected by deleting the sentence. Although certain private radio channels, such as Public Safety channels, are excluded from competitive bidding (Second Report and Order, 9 FCC Rcd 2348, para. 25 (1994)), PMRS licensees who receive compensation from subscribers, such as those in the Interactive Video and Data Service, are potentially subject to auction (Fourth Report and Order, 9 FCC Rcd 2330 (1994)). In any case, the error in note 11 of the Order does not affect our decision to deny reconsideration or clarification of the Order.

<sup>11</sup> Order at 4.

<sup>12</sup> Id.

Category channels.<sup>13</sup> To avoid compromising the resolution of these issues, as well as addressing the concerns of the Public Safety community that adequate spectrum remains available to meet their communications needs, the Order imposed a freeze on the acceptance of applications for inter-category sharing of frequencies allocated to the Public Safety, I/LT and Business services.<sup>14</sup>

### III. THE PLEADINGS

#### Petitions for Reconsideration and Clarification

3. UTC Petition for Reconsideration. UTC takes issue with the Bureau's determination that the freeze is procedural in nature. Petitioner argues that a substantive change was imposed which, under the Administrative Procedure Act (APA), requires that the public be provided notice of the proposed action and an opportunity to comment on that proposal.<sup>15</sup> UTC argues that compliance with the APA's notice and comment provisions would not undercut the purposes of the freeze.<sup>16</sup> UTC further asserts that the freeze goes beyond what is required to preserve the status quo pending resolution of the issues in PR Docket No. 93-144,<sup>17</sup> and will exacerbate the problems faced by the Pool channel applicants.<sup>18</sup> If utilities are no longer able to access out-of-category channels, UTC contends that development of their radio systems will be halted and frequency re-use plans will be negated.<sup>19</sup> It therefore suggests that we modify the Order to limit the freeze to requests by SMR applicants to access Pool channels.<sup>20</sup> Such action, UTC submits, would permit I/LT, Business and Public Safety services to continue to meet their critical, internal communications needs while alleviating to some extent APCO's concerns.<sup>21</sup>

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<sup>13</sup> See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act, PR Docket No. 93-144 and PP Docket No. 93-253, Further Notice of Proposed Rule Making, FCC 94-271, 59 Fed. Reg. 60111, paras. 51-54 (November 22, 1994).

<sup>14</sup> Order at 5.

<sup>15</sup> UTC Petition at 3.

<sup>16</sup> Id.

<sup>17</sup> UTC Petition at 5.

<sup>18</sup> UTC Petition at 3-4.

<sup>19</sup> UTC Petition at 6.

<sup>20</sup> UTC Petition at 7.

<sup>21</sup> UTC Petition at 7-8.

4. CIU Petition for Reconsideration. CIU requests that the freeze Order be vacated<sup>22</sup> because it fails to address the fundamental reason for the scarcity of available frequencies in the Public Safety, I/LT and Business Services and, thus, does not remedy the underlying problem.<sup>23</sup> Further, CIU contends that the freeze will irreparably harm those entities with bona fide needs for access to Public Safety frequencies.<sup>24</sup> Specifically, CIU alleges that Nextel Communications, Inc. (Nextel), dominates the 800 MHz spectrum -- this includes SMR, General Category, Business and I/LT channels.<sup>25</sup> Rather than imposing a freeze on inter-category sharing, CIU contends that the Commission should investigate the concentration of the vast majority of 800 MHz spectrum in one entity's hands.<sup>26</sup> Further, Petitioner argues that the freeze is unnecessary because the spectrum allocation issues under Commission consideration in PR Docket No. 93-144 concern the demarcation between channels available for SMR versus non-SMR use rather than inter-category sharing affecting I/LT, Business and Public Safety channels.<sup>27</sup>

5. In arguing that the Public Safety community would not be harmed if the freeze were lifted, CIU maintains that neither APCO nor the Bureau has been able to establish that future Public Safety needs are jeopardized by continuing inter-category sharing.<sup>28</sup> Citing the Commission's findings in its Report and Plan of the Federal Communications Commission Meeting State and Local Government Public Safety Agency Spectrum Needs Through The Year 2010,<sup>29</sup> CIU submits that more information is needed before the Commission can determine whether Public Safety entities are facing critical spectrum shortages and whether additional spectrum allocations are necessary.<sup>30</sup> Moreover, CIU asserts that I/LT and Business entities have current, critical needs for channels in the 800 MHz spectrum and will suffer irreparable harm if these needs are not met by lifting the freeze.<sup>31</sup>

6. ITA Request for Clarification. ITA submits that, absent clarification or change in the broad parameters of the Order,

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<sup>22</sup> CIU Petition at iii.

<sup>23</sup> CIU Petition at 2.

<sup>24</sup> Id.

<sup>25</sup> CIU Petition at 10.

<sup>26</sup> Id.

<sup>27</sup> CIU Petition at 11.

<sup>28</sup> CIU Petition at 12.

<sup>29</sup> FCC 95-55 (February 9, 1995).

<sup>30</sup> CIU Petition at 13.

<sup>31</sup> CIU Petition at 14.

irreparable harm will be imposed on affected I/LT, Business and Public Safety applicants.<sup>32</sup> To ensure the efficient use of the 800 MHz spectrum through the inter-category sharing rules, ITA suggests that I/LT entities be permitted some access to the Public Safety channels.<sup>33</sup> Specifically, ITA recommends that requests by non-Public Safety applicants to gain access to Public Safety category channels could be limited to the minimum number of frequency pairs necessary to accommodate the internal communication needs of the applicants<sup>34</sup> and, in any event, should not exceed ten frequency pairs.<sup>35</sup>

7. In those cases where an I/LT eligible seeks the use of 800 MHz frequency pairs, ITA proposes the following procedural sequence: (i) ITA coordination of any I/LT category channels available to meet the applicant's needs, (ii) if I/LT channels are unavailable to meet the applicant's needs, inter-category sharing of Business category channels would be sought,<sup>36</sup> and (iii) as a last resort, ITA would pursue inter-category sharing of Public Safety category channels.<sup>37</sup> ITA further argues that the effects of the freeze will be permanent rather than temporary in nature because Public Safety applicants may be inclined, in some cases, to generate in-category applications to garner as many of the remaining Public Safety category channels as possible.<sup>38</sup> Finally, ITA asserts that over time the number of 800 MHz frequencies that ITA could consider when coordinating applications has been dramatically reduced and, if industrial and land transportation applicants are now precluded from using 70 Public Safety category channels, they will suffer undue hardship and expense.<sup>39</sup>

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<sup>32</sup> ITA Request at 2.

<sup>33</sup> ITA Request at 3.

<sup>34</sup> Such applicants would be required to provide an affidavit attesting that the radio facilities applied for would be used solely for internal communications and not for providing a commercial communications service. ITA Request at 6.

<sup>35</sup> Id.

<sup>36</sup> If both I/LT and Business category channels are not capable of meeting the applicant's requirements, ITA suggests accommodating the applicant by use of General Category channels if that option remains available after the completion of on-going proceedings in PR Docket No. 93-144. ITA Request at 7.

<sup>37</sup> Id. The Desert Cab Company supports ITA's alternative approach as better serving the needs of the Public Safety applicants, as well as I/LT and Business entities, than does the freeze. See Balaban Letter at 1.

<sup>38</sup> ITA Request at 8-9.

<sup>39</sup> ITA Request at 8-9.

## Oppositions to Reconsideration and Clarification Requests

8. Opposition to UTC's Reconsideration and ITA's Clarification Requests. APCO opposes both the reconsideration and clarification requests by UTC and ITA, respectively. Contrary to UTC's assertions, APCO contends that modifying the freeze to permit inter-category sharing of Pool channels by non-SMR applicants would not significantly alleviate the problems faced by Public Safety entities.<sup>40</sup> APCO submits that most of the applications for inter-category sharing of Public Safety category channels have been filed by entities claiming to be Business or I/LT eligibles, but seeking licenses for every available channel within a wide area - - entities APCO terms "SMRs in Business/LT clothing."<sup>41</sup> APCO also argues that limiting the freeze to SMRs will not stop the flood of legitimate non-Public Safety applications for inter-category sharing in the Public Safety category.<sup>42</sup> While APCO sympathizes with legitimate Business and I/LT applicants, it nevertheless argues that the Commission must give top priority to addressing the current and future spectrum needs of Public Safety agencies.<sup>43</sup>

9. APCO also finds fault with ITA's suggested modification to the freeze asserting that it falls far short of addressing the core problems which led to the freeze on inter-category sharing.<sup>44</sup> APCO submits that limiting applications to ten or fewer channels does not prevent entities from filing multiple applications under different names and corporate identities.<sup>45</sup> Requiring applicants to certify their intentions also is insufficient, asserts APCO, because current signature and certification requirements have not prevented speculators from filing thousands of applications with little or no regard to the Commission's regulations.<sup>46</sup> APCO further contends that, even if rules could be fashioned to exempt legitimate applications for fewer than ten channels, modifying the freeze would still deprive Public Safety agencies of critical radio frequencies.<sup>47</sup>

10. Opposition to CIU's Petition for Reconsideration. In response to CIU's petition, APCO states that, regardless of the cause of the sudden demand for inter-category sharing in the 800 MHz band,

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<sup>40</sup> APCO Response at 3.

<sup>41</sup> APCO Response at 3. APCO notes that in one such case, the wide area comprised four states. Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> APCO Response at 4.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

the undeniable consequence has been the rapid depletion of scarce Public Safety radio frequencies.<sup>48</sup> Furthermore, APCO indicates that it has, in fact, been unable to meet recent Public Safety agency requests for channels in many parts of the country including, but not limited to, Michigan, Ohio, Missouri, Minnesota, North Carolina and Florida.<sup>49</sup> Not only are additional Public Safety Pool channels needed to provide inter-operability between police, fire and other emergency response agencies, argues APCO, but additional channels are needed to alleviate congestion and accommodate growing demand for capacity due to population growth and increased criminal behavior.<sup>50</sup>

### Reply Pleadings

11. Reply to Opposition to Clarification Request. ITA maintains that the current situation in the 800 MHz band is merely the result of the normal operations of the inter-category sharing rules.<sup>51</sup> Further, ITA argues that these rules were envisioned by the Commission as a temporary measure and, therefore, APCO's members have enjoyed a priority claim to the Public Safety Category channels for a much longer period than originally intended.<sup>52</sup> ITA also asserts that to permit Public Safety entities to reserve spectrum for some future, as-yet-undetermined, needs is bad public policy.<sup>53</sup> While recognizing the importance of providing adequate communications service to Public Safety agencies, ITA submits that non-Public Safety organizations also have pressing and socially significant land mobile communications needs.<sup>54</sup> Moreover, ITA argues that the bulk of the I/LT requests for use of Public Safety channels are not sought for major urban areas.<sup>55</sup>

12. Reply to Opposition to Petition for Reconsideration. CIU contends that it has not been proven that the freeze will resolve the critical shortages of 800 MHz spectrum that PMRS systems are experiencing or that lifting the freeze would have an immediate, irreparable impact on members of the Public Safety community.<sup>56</sup> The

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<sup>48</sup> APCO Response II at 2.

<sup>49</sup> APCO Response II at 2-3. APCO submits that the Public Safety Pool channels are also depleted in large portions of, if not, throughout, Maryland, Virginia, Texas, California, Nevada, New Jersey, New York, Pennsylvania and Illinois. APCO Response II at note 1.

<sup>50</sup> Id.

<sup>51</sup> ITA Reply at 3.

<sup>52</sup> Id.

<sup>53</sup> ITA Reply at 5 and 10.

<sup>54</sup> ITA Reply at 7.

<sup>55</sup> ITA Reply at 7-8.

<sup>56</sup> CIU Reply at 2.

petitioner asserts that, although inter-category sharing of PMRS frequencies is an indispensable element in the Commission's overall program for ensuring efficient use of limited spectrum, APCO unilaterally seeks to opt out of the inter-category system.<sup>57</sup> CIU notes, however, that reliable land mobile radio communications are essential to a reliable electric service which, in turn, is essential to a reliable Public Safety service.<sup>58</sup> The Commission's mandate, asserts CIU, is to promote the efficient use of the spectrum for the benefit of the entire public -- not just the Public Safety community.<sup>59</sup>

#### IV. DISCUSSION

13. Procedural Issues. After carefully reviewing the Petitions for Reconsideration and Clarification, as well as the pleadings filed in response to these Petitions, we affirm our decision imposing a freeze on new applications for inter-category sharing of PMRS frequencies allocated to the Public Safety, I/LT and Business Services in the 806-821/851-866 MHz band. Contrary to UTC's contention, freezes such as the one imposed by the Order have long been considered procedural in nature.<sup>60</sup> They are used by the Commission as an administrative tool to process efficiently license applications and avoid irreparable harm to license applicants until resolution of an issue raised in a rule making proceeding, among other things.<sup>61</sup> Further, if a freeze were not imposed until after notice and an opportunity for comment were provided, the availability of Public Safety frequencies could be significantly diminished before the Commission could resolve the relevant spectrum allocation issues. Clearly, use of the notice and comment provisions of the Administrative Procedure Act would undercut the effectiveness of the freeze and, therefore, not serve the public interest.<sup>62</sup>

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<sup>57</sup> CIU Reply at 4.

<sup>58</sup> CIU Reply at 5.

<sup>59</sup> CIU Reply at 5-6.

<sup>60</sup> See Neighborhood TV Co., Inc. v. FCC, 742 F. 2d 629 (D.C. Cir. 1984), Buckeye Cablevision, Inc. v. United States, 438 F. 2d 948 (6th Cir. 1971), Wentronics, Inc. v. FCC, 331 F. 2d 782 (D.C. Cir. 1964), Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963), Mesa Microwave, Inc. v. FCC, 262 F. 2d 723 (D.C. Cir. 1958).

<sup>61</sup> See Order, In the Matter of Acceptance of 220-222 MHz Private Land Mobile Applications, DA 91-647, 6 FCC Rcd 3333 (1991); Freeze on The Filing of MDS/MMDS Applications, Public Notice No. 22702, April 15, 1992; and Order, In the Matter of Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands allotted to the Specialized Mobile Radio Pool, FCC 93-279, 58 Fed. Reg. 31345 (1993).

<sup>62</sup> See 5 U.S.C. § 553(b)(3)(B), where it is provided that notice is not required when the agency finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

14. Substantive Issues. We conclude that neither UTC's or ITA's suggested modifications are adequate to preserve the status quo until resolution of the spectrum allocation issues raised in PR Docket No. 93-144 and by the Public Safety community. Limiting the freeze to SMRs, as suggested by UTC, is an incomplete remedy for the current situation. Even UTC acknowledges that under its proposal many I/LT applicants will still need to access Public Safety channels because of previous encroachment by SMRs in the I/LT pool.<sup>63</sup> Therefore, contrary to UTC's argument, the freeze is not over-inclusive. Rather, the freeze is a temporary action taken to address the substantial increase in SMR applications on an inter-category basis for 800 MHz Business and I/LT frequencies.

15. Although ITA's proposal to permit applications for ten or fewer Public Safety channels on an inter-category sharing basis solely for internal communications is a narrower proposal than UTC's suggestion, it too is inadequate to maintain the status quo. Under ITA's suggestion, Public Safety frequencies would still remain available for out-of-category use and, therefore, would have the effect of limiting the current availability of Public Safety category channels to the Public Safety community. We believe that such action would harm the public interest. Contrary to CIU's assertions, the record indicates that there is a substantial risk that, but for the freeze, communications needs of Public Safety would not be met. Lifting the freeze, as CIU suggests,<sup>64</sup> would be likely to cause irreparable harm to Public Safety communications. As CIU notes, more information is necessary to determine whether Public Safety entities are facing critical spectrum shortages. It is our intention to preserve the channels currently available to Public Safety so that, upon determination of these needs, the Commission will not be hampered in providing solutions to spectrum shortages.

16. CIU's suggestion that the Commission initiate an investigation into the causes of the increased demand in inter-category sharing, does not adequately address the scarcity of Public Safety frequencies. While an understanding of the reasons for the sudden demand in inter-category sharing in the 800 MHz band may -- to some degree -- prevent further depletion of Public Safety channels, current problems cannot be addressed merely by identifying their cause. Contrary to CIU's contention,<sup>65</sup> the freeze Order was not intended to resolve all the critical 800 MHz spectrum shortages. Its purpose was only to maintain some equilibrium in spectrum assignments until the Commission addresses the significant allocation issues.

17. Even if ITA were correct that the bulk of inter-category sharing applications were for non-urban areas, Public Safety channels are needed in all areas, rural as well as urban. Scarcity is not just a problem for metropolitan areas. Further, CIU is mistaken in its

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<sup>63</sup> UTC Petition at 7-8.

<sup>64</sup> CIU Reply at 2.

<sup>65</sup> CIU Reply at 2.

view that the spectrum allocation issues before the Commission only concern the demarcation between channels available for SMR and non-SMR use. In the general context of PR Docket No. 93-144, and the Commission's further inquiry into the spectrum needs of Public Safety entities, the Commission is considering questions relating to, among others, inter-category sharing. Moreover, the freeze imposed by the Order is not a final resolution of the matter. Rather, it is an action adopted for a limited time in order to prevent compromising the resolution of significant spectrum allocation issues. Rather than causing any irreparable harm to Business or I/LT eligibles, they remain able -- as do Public Safety entities -- to address their spectrum needs through in-category frequencies. In this respect, all eligibles in these services are treated on an equal basis.

#### V. CONCLUSION

18. As noted by APCO, many public safety agencies throughout the country are now initiating the migration to 800 MHz to alleviate congestion, improve spectrum efficiency through trunking, and create multi-agency communications systems.<sup>66</sup> Others have already made the move to 800 MHz and are looking for channels for necessary expansion of operations, especially in rapidly growing areas in which Public Safety Pool channels may be the only frequencies still available.<sup>67</sup> Lifting or modifying the freeze could negatively impact the continued use of these frequencies for critical emergency communications before the Commission has completed its spectrum allocation deliberations and resolved the many disparate concerns of the Public Safety, Business, I/LT and SMR communities. For the foregoing reasons, the Bureau affirms the Order suspending the acceptance of applications for inter-category sharing of the 800 MHz PMRS frequencies allocated to the Public Safety, Industrial/Land Transportation and Business Radio Services.

#### VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by UTC, the Telecommunications Association, the Petition for Reconsideration filed by Central and South West Corporation, Indianapolis Power and Light Company and Union Electric Company, and the Request for Clarification filed by the Industrial Telecommunications Association ARE DENIED.

20. IT IS FURTHER ORDERED that, as described above, the last sentence of Footnote 11 in the freeze Order (DA 95-741) is deleted.

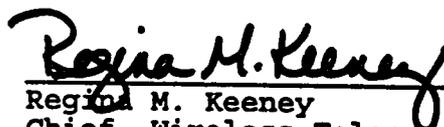
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<sup>66</sup> APCO Response at 5.

<sup>67</sup> Id.

21. For further information, contact Freda Lippert Thyden,  
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FEDERAL COMMUNICATIONS COMMISSION



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