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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
ORIGINAL

In the Matter of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act)	
Competitive Bidding)	
)	
)	

COMMENTS OF THE AMERICAN AUTOMOBILE ASSOCIATION, INC.

The American Automobile Association, Inc. (AAA), by its attorneys, and pursuant to Rule Section 1.415(a), offers these Comments in response to the Commission's Notice of Proposed Rule Making (NPRM), Mimeo No. FCC 93-455, that was released on October 12, 1993, in the captioned proceeding.

I. Interest of AAA

AAA is a not-for-profit organization, with over thirty million members, that is dedicated to promoting the safety and comfort of the American driving public. AAA is widely known for its efficient and reliable emergency road service, which its member clubs provide throughout the populated areas of the Continental United States and Canada. AAA member clubs provide road service approximately 22 million times each year.

AAA uses radio to dispatch emergency vehicles to assist local police in clearing accident scenes, and assist motorists whose cars have broken down, or have suffered other mishaps. AAA often responds to calls from elderly persons with medical conditions; to mothers with small children locked in cars; to individuals stranded in

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inclement weather, or in high crime areas; and to calls by police to clear an accident scene at a dangerous intersection. Time is of the essence in these calls. AAA must have immediate access to radio frequencies to promptly dispatch emergency vehicles. AAA access to exclusive-use frequencies promotes the safety of life and property. It also promotes the public interest by relieving traffic congestion.

Additionally, AAA's call volume spikes (immediately expands to three times ordinary volume) during severe weather conditions. Severe weather conditions, such as thunderstorms, tornados, freezes, and floods occur at all seasons of the year. AAA has no control over when it must respond to sudden spikes in call volume. AAA's ability to handle such spikes in call volume would be severely degraded by forced sharing of frequencies, or reduced access to new frequencies.

The AAA also serves as coordinator for the Automobile Emergency Radio Service frequencies.

The AAA is not "engaged in reselling the use of the public airwaves for a fee,"¹ but rather accesses the spectrum solely to provide private-use dispatch service to its fleet of towing contractors and response units.

¹ H.R. Rep. 111, 103d Cong. 1st Sess. 253 (1993) (hereinafter, "H.R. Rep. No. 103-111").

II. **The AAA Is Neutral As To Proposed Auction Procedures, Where AAA Is Not Subjected to Competitive Bidding Requirements. AAA Urges Clarification of Private Use Definition.**

The NPRM seeks clarification of proposed eligibility criteria for the competitive bidding requirements of the Omnibus Budget Reconciliation Act of 1993 (Budget Act). The NPRM proposes to limit competitive bidding to those frequencies for which mutually exclusive applications have been filed. (NPRM at paras. 21, 22). The NPRM also proposes that renewal and modification applications would be excluded from competitive bidding requirements. Id. Finally, the NPRM proposes that competitive bidding be limited to licensees that receive compensation from subscribers for the communications service, noting that "private services" are those that do not have paying subscribers. (NPRM at paras. 23, 24). Also proposed are possible methods of differentiating between Private Land Mobile Radio Service (PLMRS) licensees that have paying subscribers, and those that do not. (NPRM at paras. 23-33).

Since AAA should not be subjected to auctions, it is neutral as to these proposals. However, AAA urges clarification that any PLMRS licensee will be exempted from competitive bidding requirements where the licensee is not receiving compensation from subscribers for enabling subscribers to receive or transmit signals over frequencies

on which the licensee is licensed to operate. In short, AAA urges clarification that any licensee will be exempted from competitive bidding requirements where the licensee does not meet the test articulated in Section 309(j)(2) of the Communications Act, 47 U.S.C. § 309(j)(2) (1993).

A. Authority to impose competitive bidding is contingent upon principal use by the licensee, not the service.

The NPRM notes House of Representatives Committee language instructing the Commission "to review existing services to determine whether they meet the test set forth in section 309(j)(2)." (H.R. Rep. No. 103-111 at 254, cited by NPRM at para. 31). The NPRM seems to imply that all licensees classified in "mixed-use" services could be subjected to competitive bidding, depending upon the "principal use" of the entire radio service. (NPRM at paras. 31-33). However, the Communications Act grants authority to engage in competitive bidding contingent upon the "principal use" by the licensee, not by the service into which the licensee is classified. 47 U.S.C. § 309(j)(2). The Committee Report's general and somewhat vague instruction that the Commission should review existing services for "auctionability" should not be misconstrued to expand the Communications Act's grant of limited authority to hold auctions based upon the individual licensee's principal use.

Congress gave the Commission "a limited grant of authority" to engage in competitive bidding, for "limited cases in which competitive bidding would be appropriate and in the public interest." H.R. Rep. No. 103-111 at 253. Committee findings indicate which "limited cases" would be appropriate for competitive bidding: "[I]f licensees are engaged in reselling the use of the public airwaves to subscribers for a fee, the licensee should have to pay reasonable compensation to the public for those resources; . . ." Id (emphasis added). Congressional intent was to receive compensation from licensees (not services) engaged in reselling use of frequencies.

Similarly, the Communications Act (which as a statute constitutes the most authoritative representation of congressional intent) makes competitive bidding authority contingent upon uses where

the licensee receiving compensation from subscribers in return for which the licensee (i) enables those subscribers to receive signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or (ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate; . . . 47 U.S.C § 309(j)(2) (1993) (emphasis added).

Any imposition of competitive bidding on a licensee not qualifying under the above quoted language would be an ultra vires act, regardless of the service into which the licensee was classified.

Not only did Congress limit its grant of authority to cases where the licensee receives compensation from subscribers, but it also affirmatively expressed an intent that grant of licenses for private use must not be subject to competitive bidding:

It is the Committee's intention that enactment of this section will not affect the Commission's current procedures for granting licenses for private use. H.R. Rep. No. 103-111 at 254.

Therefore, congressional intent is very clear: If a PLMRS licensee does not provide radio service directly to subscribers for pay, the licensee will be exempted from competitive bidding requirements.

The AAA member clubs are licensees that do not provide radio service directly to subscribers for pay. As such, they must be exempted from competitive bidding requirements, regardless of the classification chosen.

B. The principal use of the Automobile Emergency Radio Service is private, thereby making AERS licensees ineligible for competitive bidding.

The Committee Report stated that the Commission "is expected to review existing services" in determining whether they meet the test set forth in Section 309(j)(2) of the Communications Act. H.R. Rep. No. 103-111 at 254 (emphasis added). The AAA clubs are primarily members of the existing Automobile Emergency Radio Service (AERS), but also hold Business Radio Service licenses where spectrum availability or equipment design considerations dictate that Business Radio Service channels are needed. The principal spectrum

use by AERS licensees is internal dispatch. Indeed, there would appear to be no AERS licensees receiving compensation from subscribers under the definition of Section 309(j)(2) of the Communications Act. Therefore, the principal (and, apparently, only) use by AERS licensees would make these licensees ineligible for competitive bidding.

Similarly, the principal (and, probably, only) use by the Land Transportation Radio Services governed by Subpart E of the Commission's Rules is internal dispatch, thereby disqualifying Land Transportation licensees from competitive bidding. AAA notes that the refarming docket (PR Dkt No. 92-235, Re-write of Part 90 of the Commission's Rules) may result in reclassification of AAA and other internal users to larger pools or categories. Even these larger pools would appear to be primarily non-commercial, internal use, thereby making them ineligible for competitive bidding. AAA requests the Commission to clarify that member automobile clubs requesting Business Radio Service licenses for internal use, or requesting "General Category Pool" channels (pursuant to the Commission proposal in PR Docket No. 92-235), will not be subjected to competitive bidding requirements.

These classifications are consistent with the NPRM, which noted that the statute excludes "virtually all of those services which were 'private services' in the sense that they did not involve the payment of compensation to the

licensee by subscribers." NPRM at para. 26. The NPRM seeks comment on this interpretation. Id. The AAA is neutral on this interpretation, subject to the above noted limitation that the Commission lacks authority to impose competitive bidding on any licensee not qualifying under the test set out in Section 309(j)(2) of the Communications Act.

C. **In accordance with the test articulated by the Communications Act, the NPRM correctly proposes to exclude General Category, and interservice sharing channels, and properly notes the impracticability of imposing competitive bidding on any service with even the slightest commercial use.**

The NPRM correctly notes that police departments and local governments, as well as private entities (such as AAA) using their licenses for strictly internal purposes should not be required to bid against providers of Specialized Mobile Radio Service (SMRS). (NPRM at para. 33). Therefore, the AAA supports the proposed exclusion of General Category and interservice sharing channels from competitive bidding requirements to the extent that licensees not qualifying under the test of Section 309(j)(2) of the Communications Act will not be subjected to competitive bidding. See NPRM at n.15. In accordance with the test of Section 309(j)(2) of the Communications Act, the AAA also supports the observation at para. 33 of the NPRM that these strictly internal use entities should not have to bid against SMRS for spectrum on "contaminated" channels. However, it does not follow that only public safety entities should be exempted from competitive bidding, as suggested at

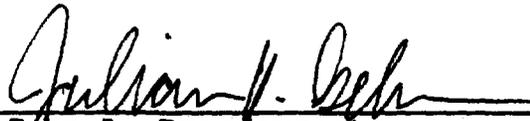
para. 33 of the NPRM. As noted above, the Commission lacks authority to impose competitive bidding on entities not qualifying under the test of Section 309(j)(2) of the Communications Act.

Also, as detailed by AAA comments in the reforming docket, private entities such as AAA provide safety related services complementing those provided by police and fire departments. Congress indicated its intent that public safety users be protected from competitive bidding. H.R. Rep. No.103-111 at 254.

WHEREFORE, it is respectfully requested that (1) AAA member clubs be exempted from competitive bidding in all their licensing applications, and (2) any licensee not meeting the test of Section 309(j)(2) of the Communications Act, 47 U.S.C. § 309(j)(2), be exempted from competitive bidding requirements.

Respectfully submitted,

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