

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Allocation of Spectrum Below) ET Docket No. 94-32
5 GHz Transferred from Federal)
Government Use)

To: The Commission

COMMENTS OF APCO

The Association of Public-Safety Communications Officials-International, Inc. ("APCO"), hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, FCC 94-272, released November 8, 1994.

APCO is the nation's oldest and largest public safety communications organization, with over 11,000 members involved in the management and operation of law enforcement, fire, emergency medical, disaster relief, highway maintenance, forestry-conservation, and other public safety communications facilities. APCO is the FCC's certified frequency coordinator for Part 90 Police, Local Government, and Public Safety Radio Services.

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I. THE COMMISSION'S SPECTRUM ALLOCATION AND COMPETITIVE BIDDING PROPOSALS ARE CONTRARY TO THE COMMUNICATIONS ACT

The NPRM proposes an allocation scheme for the first 50 MHz of spectrum (2390-2400 MHz, 2402-2417 MHz and 4660-4685 MHz) to be released by the Federal Government pursuant to Title VI of the Omnibus Budget Reconciliation Act of 1993.^{1/} However, rather than making a public interest determination regarding the highest and best use of the spectrum, the Commission proposes merely to allocate all 50 MHz for "Fixed" or "Mobile" service, and to auction off blocks of the spectrum to the highest bidders. This extraordinary proposal would violate a fundamental principle of the Communications Act and effectively prevent public safety entities from using any of the 50 MHz.

The Communications Act, as amended by Title VI of the Omnibus Budget Reconciliation Act of 1993, authorizes the FCC to use competitive bidding (i.e., auctions) to select among mutually exclusive applicants seeking channel assignments. 47 U.S.C. § 309(j). As the Commission acknowledges, its "authority under Section 309(j) to use competitive bidding is limited to awarding licenses and is not to be used for allocating spectrum." NPRM at ¶9, n.24. The amended Act makes clear that "Nothing ... in the use of competitive bidding shall (A) alter spectrum allocation criteria and procedures established by other provisions of [the Communications Act]." 47 U.S.C. § 309(j)(6)(A). Thus, the

^{1/} Pub.L.No. 103-66, 107 Stat. 312 (August 10, 1993).

Commission cannot substitute auctions for its statutory obligation to allocate spectrum in the public interest. Yet, that is precisely what is proposed in the NPRM.

Congress only determined in the 1993 legislation that auctions might be better than lotteries or comparative hearings in assigning scarce frequencies among mutually exclusive applicants. However, Congress did not believe that auctions should be used to allocate spectrum in the first instance, since the public interest would not always be served if spectrum use were determined by the highest bidder.

Of particular concern to Congress was that critical spectrum users such as state and local government public safety agencies and others should not be required to bid for spectrum needed for such core activities as protecting the safety of life and property. As a result, auctions were strictly limited to radio services where the "principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers...." 47 U.S.C. § 309(j)(2)(A).^{2/}

^{2/} The legislative history emphasizes that

there are limited cases in which competitive bidding would be appropriate and in the public interest. The limited grant of authority contained in this section is designed so that only those classes of licenses would be issued utilizing a system of competitive bidding.

H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 253 (May 25, 1993).

Congress also provided that the Commission's authority to issue licenses through competitive bidding would cease if

The Commission has failed to complete and submit to Congress, not later than 18 months after the date of enactment of this subsection, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees.

47 U.S.C. § 309(10)(B)(iv). The purpose of this provision was to ensure that the Commission would be cognizant of important public safety spectrum needs when making initial spectrum allocation decisions, and would not be led instead by the revenue potential of auctions.^{3/}

The Commission cannot evade these Congressional directives through auction of all of the 50 MHz at issue without regard to the potential use of the spectrum, so long as it is "Fixed or Mobile." No significant operational guidelines or restrictions are proposed. This extremely broad allocation could accommodate almost any telecommunications technology. While the Commission made a similarly broad allocation for "emerging technologies" in ET Docket 92-9 (regarding the 2 GHz bands)^{4/}, that was clearly

^{3/} The legislative history of the amended Act indicates that Congress "remains committed to protect public safety users from adverse effects of competitive bidding, and encourages the Commission to take into account the needs of public safety users in making allocation decisions." H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 254 (May 25, 1993).

^{4/} Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order, ET Docket 92-9, 7 FCC Rcd 6886 (1992).

a preliminary allocation to be followed by more specific allocations for particular technologies, such as Personal Communications Services ("PCS").

The problem with the Commission's proposed Fixed or Mobile allocation is not limited to its breadth. The real problem is the combination of an extraordinarily broad allocation with a proposal to use auctions to "assign" the spectrum among mutually exclusive applicants. The end result is allocation by auction, since almost any spectrum use will be permitted. The use of the spectrum will be determined by the highest bidders.

The Commission's only basis for a decision to use auctions for these frequencies is its premature and unsubstantiated prediction that "most of the services to be provided in this spectrum would likely meet the statutory criteria for auctions," NPRM at ¶9, i.e., that the "principal use of the spectrum" will be for subscription services. This is no more than a self-fulfilling prophesy. If the spectrum is "assigned" to the highest bidders through auctions, then it is virtually assured that the principal use of the spectrum will be for subscription based services, since that may be the only way for the winning bidders to recoup their initial investments. Entities planning to use the spectrum for revenue-raising subscription services (as opposed to using the spectrum for their own private internal operations) are likely to be the highest bidders in any spectrum auction.

The Commission cannot possibly make a determination that the spectrum is likely to be used for subscription services when the spectrum is not being allocated for any specific use. Is it not just as likely that there will be substantial non-subscription, private fixed and mobile use of the 50 MHz? How can the Commission know, or even predict, the principal use of the spectrum under these circumstances?

Such circular logic is precisely why Congress insisted that the Commission make a spectrum allocation decision first (without consideration of potential auction revenues^{5/}), and then determine whether the potential use meets the statutory criteria for using auctions. Otherwise, virtually all newly allocated spectrum will be provided on a subscription basis, leaving critical non-subscription services such as public safety without spectrum for their future communications needs. Therefore, APCO strongly opposes the Commission's spectrum allocation and competitive bidding proposals for the 2390-2400 MHz, 2402-2417 MHz and 4660-4685 MHz bands.

^{5/} See 47 U.S.C. § 309(j)(7)(A) ("In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.")

II. THE COMMISSION HAS OVERLOOKED THE SPECTRUM NEEDS OF PUBLIC SAFETY AND OTHER PRIVATE RADIO USERS.

The Commission's NPRM barely even addresses the critical spectrum needs of public safety and other private radio users who are part of the Coalition of Private Users of Emerging Multimedia Technologies ("COPE"). The Notice of Inquiry that led to the NPRM requested comment on a Petition for Rulemaking filed by COPE setting forth specific spectrum needs for privately licensed communications technologies of the future.^{6/} As described in the Petition, commercial service providers will not provide sufficient priority access, security, coverage, reliability, or service offerings to meet the specialized needs of public safety and certain other private users of radio spectrum.^{7/}

Public safety agencies need to have sufficient excess capacity and priority access to ensure that vital communications will not be disrupted in times of emergency. Their systems must also be designed to maintain the highest levels of reliability even during major storms, earthquakes and other disasters when their services are in greatest demand. Commercial systems lack sufficient economic incentive to meet those requirements.

^{6/} APCO is an active member of COPE and assisted in the preparation of the COPE Petition for Rulemaking.

^{7/} See COPE Petition at 15-21. A private user of the spectrum is both the licensee and the end user of a frequency assignment. Examples include law enforcement agencies, fire departments, disaster relief agencies, utilities, railroads, and major industrial entities.

Public safety agencies also need universal coverage throughout their relevant areas of jurisdiction. A sheriff's department cannot risk losing communication with a deputy who happens to be driving through a valley or behind a large building. Commercial services, in contrast, may well forgo building extra transmission sites to reach such remote areas. Nor will commercial services provide the extra interference protection that public safety agencies must build into their systems to prevent vital communications from being disrupted by co-channel or adjacent channel operations.

Finally, most of the highly specialized communications services required by public safety and other private users will have little or no appeal to the general public and, therefore, are unlikely to be offered by commercial providers. Private systems designed, owned, and operated by the users of those systems are, in many cases, the only alternative.^{8/}

On one hand, APCO is pleased that the Commission has pledged to "continue to consider COPE's request for spectrum." NPRM at ¶16. However, APCO is dismayed that the Commission's principal response to the COPE Petition is that "private users can receive service from commercial service providers and can compete in obtaining spectrum on the same basis as commercial providers." Id. Public safety needs and

^{8/} Public safety agencies do make use of commercial service whenever possible. For example, many agencies have installed cellular phones for administrative communications and telephone interconnect.

many of the other private spectrum uses described in the COPE Petition cannot, in most instances, be provided by commercial service providers. And it is folly to suggest that State and local government public safety agencies can simply "compete on the same basis as commercial providers" for spectrum. Is the Commission suggesting that a local police department enter the auctions and bid against the likes of AT&T, MCI, TCI, and the BOCs?^{9/}

Obviously, the radio spectrum needs of public safety entities must be met by some method other than requiring them to buy spectrum from a commercial provider or in an auction. Spectrum must be allocated specifically for public safety use. Otherwise, public safety operations throughout the country will be denied the communications tools they need to fight crime and respond to life threatening emergencies.

A number of specific public safety communications needs are described in the COPE Petition and in the materials filed by APCO and others concerning the pending Commission study of current and future public safety spectrum needs. Examples include broadband wireless communications networks to transmit criminal information such as fingerprints, mugshots, and other high resolution images to and from police officers in the field.^{10/}

^{9/} See Comments of APCO in response to Notice of Inquiry in ET Docket No. 94-32 (filed June 15, 1994), at 4.

^{10/} Pairing these frequencies with other frequencies to be released by the Federal Government in the near future may be helpful in facilitating more effective use of the spectrum.

Another immediate spectrum need is for frequencies to transmit live full motion video from helicopters and other aircraft flying above crime scenes, forest and building fires, civil disturbances, and other emergencies. Such video images would be invaluable in coordinating law enforcement, fire department, and other public safety agency responses to such incidents.^{11/} Unfortunately, there are no channels dedicated for such public safety operations. APCO believes that there is a potential that spectrum for airborne video surveillance and other public safety needs could be satisfied, in part, in the spectrum at issue in this proceeding.^{12/}

Unfortunately, if the Commission makes a premature decision to auction all of the 50 MHz, the spectrum will be forever lost to commercial entities. At minimum, the Commission should pause to examine whether subscription based commercial services are, in fact, the highest and best use of this spectrum. The Commission must also address the significant spectrum needs of public safety in this and other proceedings.

^{11/} The Los Angeles County Sheriff's Department is filing separate comments to describe this specific spectrum need.

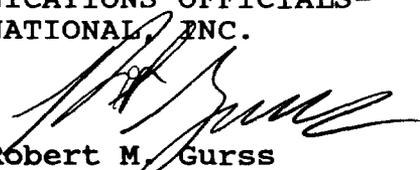
^{12/} For example, careful placement of airborne video operation receive sites in non-residential areas could facilitate use of frequencies otherwise encumbered by microwave oven and other ISM use.

CONCLUSION

Therefore, for the reasons discussed above, APCO urges the Commission not to adopt the spectrum allocation and competitive bidding proposals contained in the NPRM, and to take immediate steps to meet the spectrum needs of state and local government public safety agencies.

Respectfully submitted,

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December 19, 1994