BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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In the Matter of	)	
	)	
Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them	)	
	)	PR Docket 92-235
and	)	
	)	
Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services	)	

To: The Commission

COMMENTS OF APCO
IN RESPONSE TO
FURTHER NOTICE OF PROPOSED RULEMAKING

The Association of Public-Safety Communications Officials-International, Inc. ("APCO") hereby submits the following Comments in response to the Further Notice of Proposed Rulemaking adopted as part of the Commission's Report and Order, FCC 95-255 (released June 23, 1995), in the above-captioned proceeding.

APCO is the nation's oldest and largest public safety communications organization, with over 12,000 worldwide members involved in the management and operation of police, fire, emergency medical, forestry-conservation, highway maintenance, disaster relief, and other public safety communications facilities. APCO is the FCC-certified frequency coordinator for the Part 90 Police Radio Service

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and Local Government Radio Service, and for all Part 90 Public Safety Pool channels.

The Commission has proposed several mechanisms, including exclusive licensing, user fees, and competitive bidding, to create more efficient spectrum utilization in the radio frequencies subject to the refarming proceeding. Perhaps these mechanisms would be useful in some circumstances for radio services used by commercial entities. However, public safety radio frequencies are already assigned whenever possible on a "quasi-exclusive" basis to prevent destructive interference to critical safety operations. Furthermore, there are compelling constitutional and public policy reasons not to impose fees or auctions on state and local government users. Therefore, these are neither appropriate nor necessary mechanisms to improve efficient use of public safety frequencies.

I. EXCLUSIVITY

The Commission has recognized in several instances in this and other proceedings that public safety may require different rules than other land mobile users. APCO believes this is particularly true in the matter of exclusivity. It is not that exclusivity is of no value to public safety. To the contrary, it is an absolute necessity to avoid interference to public safety communications. However, any rules creating "exclusive" channels must recognize the special needs of public safety users and that exclusivity

has a different and more important role for public safety services.

Exclusivity is absolutely necessary for those services that protect the safety of life and property. By "exclusivity," it is not intended that spectrum cannot be shared, but rather that it must be shared in a fashion which ensures a clear channel, with no destructive interference in vital situations. The serious result from a lost transmission when a unit is responding to a life or death situation, or when an officer's life is in danger needs no explanation. Therefore, APCO and other public safety frequency coordinators have consistently attempted to recommend channels in a manner which would prevent destructive interference between users. Unfortunately, the shortage of frequencies makes it impossible always to provide for this critical need. The result is often the inability to find usable channels, and requires a constant effort by APCO to assist in identifying and eliminating destructive interference on existing assignments.

Realistically, providing some form of exclusivity while meeting the need of as many public safety users as possible cannot be accomplished without setting criteria for channel loading. However, each public safety service, and each political entity, has different loading requirements. Using a fixed number of mobile units per channel is not the total answer. In the frequencies covered by this proceeding, the Commission has historically limited the number of channels

available to a licensee to one for some services and two for others, unless specific justification for additional channels was provided. Unfortunately, the Commission has never been in a position to enforce this rule. With limited staff, and in the absence of clear and specific criteria, there is no practical way for the Commission to judge "Justification." Consequently, both frequency coordinators and the Commission have been forced to consider every request, even though no justification was provided. This must be changed.

APCO offers to work with the coordinators for the other public safety services to attempt to develop criteria which would best satisfy the number of channels that any applicant could justify. This would include type of service, channel loading, population and area served, as well as effective system design. While developing such criteria will be a monumental task, it must be accomplished if there is to be any hope of meeting public safety needs. This will be far more effective than exclusivity rules based on arbitrary loading or channel efficiency guidelines that may have no relationship to the actual needs of the public safety agencies in the area.

Finally, the spectrum efficiency goals of the Commission's exclusivity plan can also be accomplished by allowing public safety frequency coordinators the abilitly to restrict system coverage areas to the licensee's area of jurisdiction. That will allow for greater channel reuse

and, when combined with a rational loading criteria, will greatly improve overall spectrum efficiency in the public safety radio services.

The Commission must address the exclusivity issue by providing specific rules for public safety. The vast difference in requirements between spectrum for use for commercial purposes and for protection of life and property must be recognized and rules for the use of the spectrum be designed in a manner best suited to each.

II. USER FEES

The Commission's Further Notice proposes that private land mobile licensees pay "market based user fees" for the right to use radio frequencies. Under the Commission's proposal, "public safety users" would be exempt from such user fees. However, the Commission also seeks comments as to whether it should impose "reduced or nominal fees" on public safety entities. APCO strongly opposes this alternative.

The Commission notes the "[p]ublic safety users have traditionally merited special treatment because they are charged with the protection of human life and property." Indeed, no FCC-regulated use of the spectrum is more important than public safety. That is reason enough not to impose additional costs such as user fees on cash-strapped public safety agencies. Even more fundamental, however, is the impropriety of the federal government charging state and

local governments fees to use a public resource to perform governmental functions of any type.

There is a long-established constitutional concept of "comity" between the state and federal government, by which "neither [the state or federal government] may tax the governmental means and instrumentalities of the other." Brush v. Commissioner of I.R.S, 300 U.S. 352, 364 (1937). Therefore, imposing spectrum user fees on state and local governments (which are tantamount to a tax on the use of the spectrum) would be both bad public policy and a violation of a core principle of our federal system of government.

The proper distinction for purposes of a user fee exemption is not whether a spectrum user is a public safety agency or not, but, rather, whether the user is a state or local government.[1/] This is also a far easier distinction to administer, and is consistent with current provisions excluding state and local governments from regulatory and application fee requirements.

III. COMPETITIVE BIDDING

The Commission also proposes the use of competitive bidding for the assignment of land mobile frequencies. The Commission recognizes in the Further Notice, however, that it would be inappropriate to require state and local governments to compete in those auctions. Lacking adequate

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[1/] Of course, other non-government entities may also merit exemptions from user fees for other public policy reasons.

funds, and without any intent to use spectrum for revenue producing enterprises, state and local governments will never be the highest bidders in spectrum auctions. They would then be without the radio spectrum they need to protect the safety of life and property. This is one instance, therefore, where the "marketplace" is not the most appropriate mechanism for allocating and managing the radio spectrum.

IV. NEW CHANNELS

Finally, the Commission seeks comments as to how to allocate "new" channels created as a result of users converting to narrower band equipment. APCO believes that these new channels should be allocated for public safety use whenever possible, especially in or near metropolitan areas. No radio service is more important than public safety, and no service is less tolerant of spectrum shortages than public safety. While commercial interests may have legitimate desires more channels to promote their businesses, public safety agencies need more channels to ensure that police, fire, and other public safety personnel have adequate communications capability to protect the safety of life and property.

CONCLUSION

For the reasons stated above, APCO strongly supports the Commission's proposal to exclude state and local government entities from user fees and auctions. APCO also urges that any exclusivity rules adopted by the Commission take into consideration the special needs of public safety users.

Respectfully submitted,

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