

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 90 of the)	
Commission's Rules to Facilitate Future)	PR Docket No. 93-144
Development of SMR Systems in the 800)	RM-8117, RM-8030, RM-8029
MHz Frequency Band)	
)	
Implementation of Sections 3(n) and 332)	GN Docket No. 93-252
of the Communications Act -- Regulatory)	
Treatment of Mobile Services)	
)	
Implementation of Section 309(j) of the)	
Communications Act -- Competitive)	PP Docket No. 93-253
Bidding)	

TO: The Commission

COMMENTS OF UTC
ON
PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, UTC hereby submits its comments on various petitions for reconsideration that have been submitted in connection with the Second Report and Order, FCC 97-223, released July 10, 1997, in the above-captioned matter on future licensing of specialized mobile radio (SMR) systems in the 800 MHz band.¹ As explained more fully herein, UTC supports reconsideration of some of the

¹ Public Notice of the petitions for reconsideration was given at 62 Fed.Reg. 49,986 (September 24, 1997). Although UTC is addressing its Comments specifically to petitions that were filed on the Second Report and Order, the issues in this matter are inextricably intertwined with those addressed in the Memorandum Opinion and Order on Reconsideration, FCC 97-224 (MO&O), also released on July 10, 1997, in the above-captioned

fundamental conclusions adopted in this proceeding regarding continuing access of non-SMR licensees to 800 MHz spectrum. As the national representative on communications matters for the nation's electric, gas and water utilities and natural gas pipelines, UTC fully participated in earlier phases of this proceeding and has a strong continuing interest in these issues.

UTC agrees with the Automobile Club of Southern California (ACSC) and the Industrial Telecommunications Association (ITA) that the Commission must reconsider its decision to impose geographic licensing and competitive bidding on non-SMR systems licensed in the 800 MHz band. As noted by ACSC, the decision to impose geographic licensing on both SMR and non-SMR applicants for General Category channels, as well as its decision to license these channels in 50-channel blocks, ignores the strong mandate in Section 309(j)(6)(E) that the FCC has an "obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."

Furthermore, in recently amending Section 309(j)(1), Congress made explicit that fulfilling the "obligations described in paragraph (6)(E)" is a condition precedent to the exercise of the Commission's authority to use competitive bidding:

"(1) GENERAL AUTHORITY-- If, consistent with the obligations described in paragraph (6)(E) , mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection."²

proceeding. UTC therefore requests the Commission to take these comments into consideration in connection with its separate review of the MO&O.

² Balanced Budget Act of 1997, P.L. No. 105-33 (signed August 5, 1997), §3002

Congress further emphasized its concern that the Commission not interpret its recently expanded auctioning authority in a manner that “minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.”³

The restructuring of the 800 MHz band to provide for wide area licensing over large channel blocks increases the potential for mutually exclusive applications, and is at odds with the very clear statutory mandate that auctions only be used where, despite the FCC’s best efforts, the FCC must select from among competing applicants. In the Second Report and Order, the FCC expressed its view that Section 309(j)(6)(E) only requires it to take measures to minimize the filing of mutually exclusive applications where the FCC finds this to be “in the public interest.” To the contrary, Section 309(j)(6)(E) and Section 309(j)(1) provide that it is presumptively “in the public interest” for the FCC to take any steps possible to avoid the filing of mutually exclusive applications.

Even aside from the threshold question of whether the Commission ignored alternatives to auctions for the 800 MHz band, the allocation and licensing rules adopted in this docket must be reconsidered in light of other recent changes in the Commission’s auctioning authority. As part of the Balanced Budget Act of 1997, Congress eliminated the “principal use” requirement, which restricted the FCC to auctioning licenses only for spectrum principally used to provide subscriber-based services. In addition, however,

³ H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. (July 30, 1997).

Congress specifically exempted from the FCC's auction authority licenses for "public safety radio services" in new section 309(j)(2):

"(2) EXEMPTIONS-

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission --

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

- (i) are used to protect the safety of life, health, or property; and
- (ii) are not made commercially available to the public; . . ."

The accompanying Conference Report illustrated the scope of this exemption:

"[T]he exemption from competitive bidding authority for 'public safety radio services' includes 'private internal radio services' used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public."⁴

In light of these statutory changes, it is absolutely clear that the FCC is required to exempt from auctions and otherwise accommodate "public safety" licensees.⁵ Even a cursory review of the FCC's licensing records would indicate that a substantial number of entities meeting the statutory definition of "public safety radio services" are licensed to operate private, internal 800 MHz radio systems in the bands proposed to be auctioned in this proceeding. Utilities, pipelines, local government agencies, and others use frequencies in the 800 MHz band, including the bands targeted for auctioning in this proceeding, to protect the

⁴ Id.

⁵ The Balanced Budget Act of 1997 adopted a similar definition of "public safety service" in connection with a special allocation of spectrum in the 746-806 MHz range, but both the language of that definition and accompanying legislative history indicate that the class of entities encompassed by the auction exemption is broader.

safety of life, health and property. However, rather than trying to accommodate these licensees and prospective applicants, the Commission has simply provided that “non-SMRs” -- including “public safety” licensees -- must compete at auction to remain eligible for General Category channels.⁶ While this policy would have been subject to reconsideration even under the former wording of Section 309(j), it is certainly not defensible under the recent amendments to that section.

It is no longer sufficient for the Commission to look at whether a band will likely be used principally for subscriber-based services when determining its auctionability. Rather, the Commission must now assess whether its actions would compel “public safety radio service” licensees to compete in auctions. To the extent the FCC has correctly determined that the public interest would be served by allowing public safety radio licensees to continue to have access to General Category channels, it may not adopt a blanket requirement that these entities must now compete in auction.⁷

CONCLUSION

The rules, as adopted in this proceeding, will actually increase the likelihood of mutually exclusive applications in contravention of Section 309(j)(6)(E) and 309(j)(1). Moreover, the rules will require utilities, pipelines, and other public safety radio services to compete in auctions for the continued right to license systems on General Category channels in contravention of Section 309(j)(2).

⁶ MO&O, paras. 101-102.

⁷ It is equally inappropriate for the Commission to expect public safety radio service licensees to form bidding consortia, joint ventures and the like just to secure geographic area licenses. Cf. MO&O, para. 102.

WHEREFORE, THE PREMISES CONSIDERED, UTC urges the Commission to reconsider its allocation and licensing policies for the 800 MHz band to bring them into compliance with its limited statutory authority, and to ensure that utilities, pipelines and other public safety radio services continue to have access to General Category channels on a non-auctioned basis.

Respectfully submitted,

UTC

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CERTIFICATE OF SERVICE

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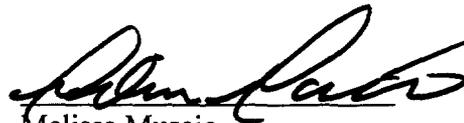
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