

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 Adopt Regulations for Automatic)
Vehicle Monitoring Systems)
)

PR Docket No. 93-61

To the Commission:

**COMTRAK OPPOSITION TO HENNEPIN COUNTY
PETITION FOR PARTIAL RECONSIDERATION**

Comtrak, by its attorneys and pursuant to Section 1.429(f) of the Rules of the Federal Communications Commission (FCC or Commission), respectfully submits this Opposition to the Petition of Hennepin County (Hennepin) for Partial Reconsideration of the Commission's Second Report and Order in the above-referenced docket.¹

Comtrak is an equipment manufacturer that has been involved in location technology as a supplier of sophisticated radio frequency location systems to the U.S. government and, more recently, to commercial ventures. Comtrak intends to provide multilateration location and monitoring services (LMS), either individually or through partnerships with other businesses, and will require access to LMS spectrum in order to meet this business objective. Comtrak has participated throughout the Commission's rulemaking process for LMS.²

Comtrak files this Opposition to respond to specific issues raised by Hennepin and to express its strong support for moving forward without delay with the Commission's planned auction of LMS spectrum.

¹ FCC 98-157, released July 14, 1998 (Second Report and Order).

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List A B C D E

I. The Commission Properly Determined That It Is Required By Law To License LMS Spectrum Through A System Of Competitive Bidding.

In 1995 the Commission decided to allocate LMS spectrum through competitive bidding.³ The Commission reached this decision based upon a variety of factors. These included: 1) the likelihood of filing of mutually exclusive applications; 2) an analysis of the principal use of LMS spectrum; 3) concerns for the development and deployment of new services to the public; 4) administrative and judicial delays; 5) efficient use of spectrum; and 6) concerns about recovering for the public a portion of the value of LMS spectrum.⁴ Now, three and a half years later, Hennepin comes forward to challenge the FCC's decision. Specifically, Hennepin claims that the competitive bidding authority established by Congress, subsequently modified by the Balanced Budget Act of 1997,⁵ compels the Commission to assign spectrum first to any Public Safety entities that want it. Apparently Hennepin believes that the Commission has the authority to auction only that spectrum that Public Safety entities do not want.⁶

A. Hennepin's Interpretation of § 309(j) is Revolutionary

As an initial matter, Comtrak notes that the interpretation of § 309(j) proposed by Hennepin would in fact constitute a revolutionary change in the nation's communication policy, subordinating commercial service to an extent never before envisioned. Railroads and pipeline operators could lay claim to any spectrum to be auctioned merely by asserting a public safety

² PR Docket No. 93-61.

³ Report and Order, FCC 95-41 PR Docket 93-61, ¶¶ 53-57 (Released February 6, 1995) (First Report and Order).

⁴ *Id.* ¶ 54.

⁵ Balanced Budget Act of 1997, P.L. 105-33, § 3002, 111 Stat. 251 (1997) (BBA).

⁶ Hennepin asserts: "To be consistent with the Conference Report [on the BBA] the exemption [from competitive bidding] must extend beyond specific spectrum allocations for public safety and encompass any license for spectrum that meets the criteria of § 309(j)(2)." Hennepin, p. 9.

use. There is no indication that Congress intended any such result.⁷ To the contrary, in the BBA Congress changed the Commission's use of competitive bidding from a permissive grant of authority to a Congressional mandate that the Commission use competitive bidding except in specifically enumerated instances.⁸ Contrary to Hennepin's assertions, the Commission, fully justified in choosing to apply competitive bidding to LMS spectrum three and a half years ago, is now *required* by Section 309(j), as amended, to do so.

Section 309(j)(2) sets forth three exceptions to the use of competitive bidding for mutually exclusive applications. The exceptions are: (1) public safety radio services; (2) certain licenses for digital television service; and (3) non-commercial educational broadcast stations and public broadcast stations (the Public Broadcasting exemption).⁹ In effect, Hennepin argues that the exemption from competitive bidding for public safety radio services allows any not-for-profit entity to exercise a right of refusal over any spectrum made available by the Commission, even if allocated for commercial purposes, merely by asserting that it wants the spectrum for public safety uses.

Finally, Hennepin's proposed interpretation of the Commission's competitive bidding authority would necessarily extend to railroads, utilities, the American Automobile Association and other entities described in the legislative history as "public safety radio services" with the same rights Hennepin seeks—the right to preempt all other licensees in access to spectrum allocated for commercial use. This could not have been Congress' intention in establishing the narrow, specific exemptions to competitive bidding authority contained in Section 309(j)(2).

⁷ Both railroads and pipelines are included within the expanded definition of public safety radio services in the legislative history of 47 U.S.C. § 309(j)(2). H. R. Conf. Rep. No. 105-217, 105 Cong. Sess. 217, 572 (1997).

⁸ 47 U.S.C. § 309(j)(2).

⁹ Id.

B. Hennepin's Interpretation of § 309(j) is Contrary to Congressional Intent.

Analysis of the BBA demonstrates that Hennepin's interpretation is inconsistent with Congressional intent. In the BBA, Congress directed the reallocation to public safety services of 24 MHz of spectrum between 746 and 806 MHz of spectrum currently used for television broadcast services.¹⁰ In the event there is immediate need for spectrum for public safety use that cannot be met due to the unavailability of spectrum between 746 and 806 MHz, Congress has directed that the Commission permit public safety licensing on unassigned frequencies outside those channels.¹¹ However, even under those circumstances, Congress requires that the Commission must first determine, among other things, that granting the application would be consistent with the public interest and that "the unassigned frequency was allocated for its present use not less than 2 years prior to the date upon which the application is granted."¹² Congress included this requirement to "ensure that the Commission is given ample time to assign licenses for recently allocated spectrum *before* that spectrum can be assigned to public safety services."¹³

If, as Hennepin maintains in its Petition, an entity were able to secure spectrum that was to be auctioned merely by asserting that it will be used for public safety purposes, the provisions of the Balanced Budget Act would be internally inconsistent. Hennepin's interpretation is therefore contrary to the Commission's principles of statutory construction.¹⁴

¹⁰ BBA § 3004, P.L. 105-33, § 3004, 111 Stat. 251 (1997).

¹¹ H. R. Conf. Rep. No. 105-217, 105 Cong. Sess. 217, 579-80 (1997); 47 U.S.C. § 337(c).

¹² 47 U.S.C. § 337(c).

¹³ H. R. Conf. Rep. No. 105-217, 105 Cong. Sess. 217, 580 (1997)(emphasis added).

¹⁴ See e.g., Pittencrieff Communications, Inc., Memorandum Opinion and Order, FCC 97-343, Released Oct. 2, 1997 ("various provisions of a statute should be read to give effect to each provision and so as not to create a conflict between the provisions.") (citations omitted).

C. *The Public Safety Radio Service Exemption Does Not Apply to Commercial Spectrum.*

Congress intended in the BBA to ensure that spectrum devoted to particular public safety services, rather than to individual licensees, would be exempt from auction. Examples of such services include the Power Radio Service,¹⁵ the Petroleum Radio Service,¹⁶ and the Railroad Radio Service.¹⁷ These instances, enumerated in the legislative history accompanying the BBA, suggest that Congress intended the exemption to apply to spectrum allocated for non-commercial services of a public safety nature, rather than any spectrum that an individual applicant happens to occupy or request. Unlike the examples cited by Congress, LMS has been allocated to a commercial service.¹⁸

In support of its Petition, Hennepin refers to the Commission's proceedings regarding implementation of Section 309(j) in the context of commercial and public broadcasting.¹⁹ In that proceeding, the Commission has under consideration the exemption from competitive bidding for noncommercial and public broadcast stations²⁰ that apply for stations on channels not reserved for public broadcasting. The Commission notes that the exemption "clearly precludes" the use of competitive bidding for licenses on reserved public broadcasting frequencies, but that competitive bidding may be permissible for nonreserved frequencies.²¹ The Commission's distinction between the type of spectrum (reserved or nonreserved) versus type of station (commercial or noncommercial/public) is significant because the public broadcast exemption in 309(j)(2) applies to the station, not the service in which it seeks to be licensed.

¹⁵ 47 C.F.R. § 90.63.

¹⁶ 47 C.F.R. § 90.65.

¹⁷ 47 C.F.R. § 90.91.

¹⁸ First Report and Order ¶ 56.

¹⁹ FCC 98-194, released August 18, 1998 (Commercial Broadcast Report and Order).

²⁰ Commercial Broadcast Report and Order ¶ 21.

Conversely, the exemption on which Hennepin relies applies to “public safety radio services,” and therefore to the spectrum allocated for that purpose, rather than the type of station *per se*. That is, the exemption applies to the spectrum, not the type of station. As the Commission noted, the impracticability of exempting public broadcasting stations from competitive bidding when they apply for commercial spectrum is so great, and the Congressional intent with regard to the public broadcast exemption sufficiently unclear, that the Commission has declined to apply the exemption without seeking further comment. This is the case notwithstanding the fact that the exemption is addressed specifically to the type of station to be constructed. In the case of the public safety exemption, the legislative history supports the conclusion that Congress sought only to prevent auction of spectrum that had been allocated for particular uses. Unlike the public broadcasting exemption, however, there is no indication that the type of station to be constructed would exempt the Commission from its statutory obligation to use competitive bidding.

Hennepin is therefore incorrect in concluding that “a license meeting the criteria of the exemption in Section 309(j)(2) cannot be subject to competitive bidding.”²² It is instead the allocation of spectrum to a service generally for licensing by those eligible to provide public safety radio services in that service that determines the applicability of the public safety exemption.

II. Competitive Bidding Is In The Public Interest.

Patchwork licensing is inconsistent with the development and deployment of advanced LMS technology. Hennepin proposes to license spectrum in Minneapolis for its own system, leaving other spectrum not chosen by similarly situated entities for the competitive bidding

²¹ Commercial Broadcast Report and Order ¶ 24.

²² Hennepin Opposition, p. 9 (emphasis added).

process. This proposal would be detrimental to the nationwide provision of LMS service. If urban markets are not available for commercial use, deployment of LMS in those less populated rural areas surrounding the urban markets becomes less economically feasible. Accordingly, allowing public safety licensees to take selected markets out of the competitive bidding process could be particularly harmful to rural communities, in violation of §309(j)(3)(A).²³

III. Exemption From The LMS Auction Is Unnecessary To Secure Hennepin's Asserted Public Safety Objectives

A. Additional Spectrum is Available for Public Safety LMS.

LMS operations below 512 MHz are authorized by Section 90.355 of the Commission's Rules.²⁴ Such operations are authorized on spectrum in the 25-50 MHz, 150-170 MHz, and 450-512 MHz bands, including spectrum reserved for public safety entities such as Hennepin. Consistent with the Commission's competitive bidding authority, such spectrum would be exempt from auction, unavailable to commercial entities such as Comtrak, and available to Hennepin for its public safety use. Accordingly, Hennepin need not participate in the LMS auction to secure LMS spectrum and the Commission need not change its rules to allow Hennepin to provide the innovative public safety services it envisions.

B. Commercial Service Could Meet Hennepin's Public Safety Needs.

Hennepin asserts that commercial service is not a reasonable alternative to the development of its own LMS system for reasons of both cost and control. Hennepin asserts that it would be forced to absorb the cost of a commercial LMS provider's spectrum acquisition expenses, thereby subsidizing a commercial entity and assuming a financial burden Congress did not intend to visit upon local governments. Hennepin's analysis fails to consider several factors that may make commercial service more attractive than developing, deploying and maintaining

²³ 47 U.S.C. § 309(j)(3)(A). See also 47 U.S.C. §151.

²⁴ 47 C.F.R. § 90.355.

Hennepin's own system. First, commercial operators will likely seek to provide LMS nationwide or across far greater territories than just Hennepin County. Such large scale operations would offer economies of scale in system deployment, operation, and maintenance that a local government could not hope to match. Moreover, it appears that the costs of spectrum acquisition for LMS may be a very small component of the total cost of the service, both because of the costs of LMS technology and because the encumbrances on the spectrum, and the limitations on the uses to which the spectrum can be put, limit the value of the spectrum for other users.²⁵ Accordingly, even assuming that spectrum acquisition costs were more than *de minimis*, the efficiencies resulting from a nationwide or large scale LMS system could render commercial LMS a dramatically less expensive alternative to a system established by a local government entity.

Similarly, Hennepin's arguments that it must hold an LMS license in order to ensure necessary levels of service reliability are speculative. The Commission has designed LMS auction rules to ensure that one licensee cannot take all of the LMS spectrum authorized for a particular EA. Accordingly, the Commission has configured the LMS auction in the way most likely to encourage competition – competition to meet the reliability needs of Hennepin as well as the needs of other entities within Hennepin's Economic Area.

V. CONCLUSION

The Commission's rulemaking in these proceedings has generated significant participation from the LMS industry, and has given the Commission an opportunity to assess development of the service consistent with the public interest. As a result, the Commission has developed rules to enable deployment of and competition in the Location and Monitoring

²⁵ See e.g., Comments of Comtrak, Comments of Teletrak, Inc., In the Matter of Location and Monitoring Service Spectrum Auction; Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues (Filed September 2, 1998).

Service. Hennepin's objections to these rules are unsupported by law. Moreover, if granted, Hennepin's Petition for Reconsideration could make unfeasible the wide-scale deployment of innovative technology. Such a result is contrary to the public interest and could ultimately deprive all users, commercial as well as governmental, of robust, competitive and competitively priced commercial Location and Monitoring Service. The Commission, therefore, should deny Hennepin County's Petition for Reconsideration and promptly affirm its decisions in the Second Report and Order.

WHEREFORE, THE PREMISES CONSIDERED, Comtrak respectfully requests that the Commission act upon the LMS Second Report and Order in this rulemaking in a manner consistent with the views expressed herein.

COMTRAK



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October 5, 1998

CERTIFICATE OF SERVICE

I, Jane Aguilard, do hereby certify that on this 5th day of October, 1998, I caused the foregoing Opposition of Comtrak to the "Petition for Partial Reconsideration for Hennepin County" to be served via hand delivery to the following:

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