

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of the Commission's Rules)
Regarding Multiple Address Systems)

WT Docket No. 97-81
SECRETARY OF THE COMMISSION

To: The Commission

Emergency Request for Limited Exception to Application Freeze

CII Petitioners

United Telecom Council (UTC)

Jeffrey L. Sheldon
Thomas Goode
1140 Connecticut Ave., NW
Suite 1140
Washington, D.C. 20036

Association of American Railroads

Thomas J. Keller
Verner, Liipfert, Bernhard,
McPherson and Hand, Chtd.
901 15th Street, N.W., Suite 700
Washington, D.C. 20005
Its Attorney

American Petroleum Institute

Wayne V. Black
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Its Attorney

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Summary

The FCC should lift its freeze on the filing of multiple address system (MAS) applications by auction-exempt critical infrastructure industry (CII) entities for the 928/952/956 MHz MAS bands. Maintaining this freeze until the FCC determines whether to introduce spectrum auctions into these bands would serve no valid purpose, as CII entities, which are substantial and significant users of the band, are exempt from spectrum auctions. Furthermore, the FCC would be flouting its statutory obligation to avoid mutual exclusivity if it were to assign licenses in these bands through competitive bidding. By eliminating access to spectrum used by CII for important internal applications, the freeze may also adversely affect public safety.

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The United Telecom Council, the American Petroleum Institute and the Association of American Railroads (jointly referred to as CII Petitioners), hereby submit this *Emergency Request for Limited Exception to Application Freeze (Emergency Request)* in response to the Federal Communications Commission's (FCC) *Further Notice of Proposed Rule Making and Order (FNPRM & Order)*, released July 1, 1999, in the above-referenced proceeding. In the *FNPRM & Order*, the FCC seeks further comment on issues relating to the future licensing of Multiple Address Systems (MAS) and extends its previously adopted licensing freeze for MAS to include spectrum used primarily by the CII Petitioners. The CII Petitioners urge the FCC to provide an exception to the licensing freeze for utility, petroleum and railroad applications in the 928/952/956 MHz MAS bands.

I. Introduction and Background

The CII Petitioners represent the telecommunications interests of the nation's electric, gas, and water utilities, pipelines, petroleum companies and railroads, and include the following organizations:

The United Telecom Council (UTC), formerly Utilities Telecommunications Council. UTC is the national representative on communications matters for the nation's electric, gas, water and steam utilities, and natural gas pipelines. UTC's approximately 1,000 members range in size from large combination electric-gas-water utilities that serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only a few thousand customers each. UTC's members provide electric, gas and water service to the majority of US households and businesses and operate in all fifty (50) states and the District of Columbia.

The American Petroleum Institute (API). API is a national trade association representing approximately 350 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as a spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and Federal proposals affecting telecommunications facilities used in the petroleum and natural gas industries.

The Association of American Railroads (AAR). AAR is a voluntary, non-profit organization composed of Class I and other railroad companies operating in the United States, Canada and Mexico. These railroad companies generate 97 percent of the total operating revenues of all railroads in the United States. The AAR represents its member railroads in connection with Federal regulatory matters of common concern to the industry as a whole, including matters pertaining to the regulation of communications. In addition, AAR functions as a frequency coordinator with respect to the operation of land mobile and other radio-based services. The railroads use land mobile radio frequencies for critical safety and operational functions to support nationwide railroad operations, to control train movements and to monitor safety-related conditions of track and equipment throughout the railroad system.

UTC, API and AAR have been active participants in this proceeding to urge the FCC to provide adequate MAS spectrum for use by CII. On October 30, 1998, UTC, API and AAR filed Joint Supplemental Comments on the FCC's *Notice of Proposed Rulemaking (NPRM)* in this matter. Those comments explain the important uses of MAS by CII, the need to safeguard access to existing MAS spectrum and the need to allocate new spectrum for CII MAS uses. The Joint Supplemental Comments also provide an analysis of how the FCC could best license MAS spectrum to take into account the spectrum provisions of the Balanced Budget Act of 1997 (BBA).¹ The Joint Petitioners reiterate their support for the resolution of MAS issues based on the clear statutory language of the BBA and urge the FCC to lift the freeze on the acceptance of applications by CII for MAS in the 928/952/956 MHz bands.

II. FCC Must Lift the Licensing Freeze for CII Industries

In the *FNPRM & Order*, the FCC seeks further comment on the future licensing of 900 MHz MAS to assess the impact of the BBA on the FCC's pending MAS proposals. The *FNPRM & Order* offers "interested parties, particularly the predominant users of MAS spectrum, a further opportunity to comment."² While the CII Petitioners do not dispute the need to consider the impact of the BBA on the FCC's MAS licensing rules, they strongly disagree that the licensing of all MAS bands to all parties must be suspended pending the outcome of this proceeding. The expansion of the freeze implemented in the *NPRM* serves no valid purpose and will adversely affect public safety. Therefore, the CII Petitioners urge the

¹ The Balanced Budget Act of 1997, P.L. No. 105-33 (enacted August 5, 1997).

² *FNPRM & Order* at ¶28.

FCC to permit utilities, pipelines, petroleum companies and railroads to continue to apply for licensing in the 928/952/956 MHz bands during the pendency of this proceeding.

A. The Freeze on CII Licensing in the 928/952/956 Band Serves No Purpose

In the *FNPRM & Order*, the FCC expanded the freeze on MAS licensing to include all applications for the 932/941, 928/959 and 928/952/956 MHz bands. Unlike the previous FCC freeze, the current freeze does not just affect applications for commercial MAS systems, but all applications regardless of the type of service proposed. According to the FCC, the expanded freeze is needed due to the “uncertainty regarding whether to employ geographic area licensing and auctions for these bands.”³ The CII Petitioners urge the FCC to recognize this freeze is unnecessary for the 928/952/956 MHz bands as the FCC does not have statutory authority to auction MAS licenses for CII. CII applications for MAS are exempt because: (1) a substantial and significant use of the band is made by exempt “public safety radio services;” and (2) MAS applications have generally not been mutually exclusive

In 1997, substantial changes to the FCC’s spectrum auctioning authority were made by the passage of the BBA. The BBA’s spectrum provisions balanced the need to identify new sources of Federal revenue with the need to ensure that spectrum used to safeguard life, health or property was safeguarded. The BBA therefore specifically exempted from the FCC’s spectrum auctioning authority “public safety radio services.”

³ Id.

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 organization, that--
- (i) are used to protect the safety of life, health, or property; and
 - (ii) are not made commercially available to the public....⁴

This provision reflects Congress's view that, because such licenses are used by utilities, pipelines, petroleum companies and railroads (i.e., CII) and others to protect the safety of life, health and property, the public interest would best be served by ensuring that such public safety radio services are undisturbed by any auction activity. In the Conference Committee report that accompanied the BBA, Congress explained:

[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. The conferees note that the public safety radio services exemption described herein is much broader than the explicit definition for 'public safety services' contained in section 3004 of this title (adding new section 337(f)(1) to the Communications Act).⁵

By carving this exemption from the FCC's auction authority, Congress plainly expressed its intent to include both the licenses as well as entities that used such licenses and/or their private networks to protect the safety of life, health and property. The plain meaning of the language -- particularly in view of the following facts -- support this premise:

(a) CII depend on internal radio systems in order to provide services that protect life, health

⁴ BBA at Title III, §3002, adding a new Section 337(f)(1) to Title III of the Communications Act of 1934.

and property; (b) CII rely on the use of their internal radio communications systems to support the nation's infrastructure; and (c) these radio services are not made commercially available to the public.

As the UTC, API and AAR explained in their Joint Supplemental Comments to the *NPRM*, the language of the exemption and the accompanying rationale reflect a well-established regulatory recognition that public safety licenses and services should receive additional protections.⁶ Congress has established an express exception for public safety radio service licenses and, by reference, the use of such spectrum by CII, in order to protect spectrum and licenses used to safeguard life, health and property. Moreover, and in doing so, Congress determined it necessary to offer guidance on the scope of the definition to be employed in determining the broad protection to be accorded under this provision, and stated "the exemption described herein [Section 3002] is much broader than the explicit definition for 'public safety services' contained in section 3004 of this title [which added] a new section 337(f) to the Communications Act."⁷

⁵ See H.R. Rep. No. 105-217, at 572 (1997) ("House Report") (emphasis added).

⁶ See Final Report, Public Safety Wireless Advisory Committee at 33, (September 11, 1996) ("[P]ublic service providers, such as transportation companies and utilities rely extensively on radio communications in their day-to-day operations, which involve safeguarding safety and preventing accidents from occurring."); Second Report and Order (SR&O), PR Docket No. 92-235, 12 FCC Rcd 14307, 14309 (1997) ("[S]ome types of radio users employ radio not just for day-to-day business needs but also to respond to emergencies that could be extremely dangerous to the general public. Oftentimes these communications systems are employed to meet Federal regulations... In this regard, there is broad support in the comments to protect operations in several radio services (Railroad, Power, and Petroleum) where radio is used as a critical tool for responding to emergencies that could impact hundreds or even thousands of people."); Critical Foundations, The Report of the President's Commission on Critical Infrastructure Protection (October, 1997) ("In addition to being a key component of the other infrastructures, the energy infrastructure is critical to our economy... [n]ew information systems for electronic commerce, for data interchange and for improving operational efficiencies are now essential business elements of the energy infrastructure.")

⁷ House Report at p. 572.

Based on the statutory language of the BBA, as well as the guidance provided by Congress in the accompanying report language, the FCC cannot require CII entities to participate in auctions for MAS spectrum. These entities, as well as the spectrum used by them for private internal systems, are exempt from auctions as “public safety radio services.”

The FCC is also prevented from introducing auctions in these bands by another statutory provision. The FCC is limited by the Communications Act in its use of competitive bidding to those instances in which mutually exclusive applications are received for filing.⁸ Congress emphasized the obligation of the FCC to avoid mutual exclusivity (and hence auctions) in the BBA. The FCC’s spectrum auctioning authority was amended by the BBA to include the condition that auctions could be used if and only if mutual exclusivity existed consistent with the FCC’s established obligation to avoid mutual exclusivity under Section 309(j)(6)(E). This section reads:

Nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.⁹

In December of 1998, Congress reminded the FCC of this statutory obligation to avoid mutual exclusivity and of its reasons for confirming this obligation in the BBA. In a letter to Chairman Kennard, six (6) congressional leaders noted that Congress “did not engage in an

⁸ 47 U.S.C. §309(j)(1).

⁹ 47 U.S.C. §309(j)(6)(E).

idle act” when it confirmed the FCC’s responsibility to avoid mutual exclusivity in licensing.¹⁰ Instead, Congress was “concerned that the Commission was ignoring its obligations under Section 309(j)(6)(E).”¹¹

There can be no clearer instance in which the FCC’s obligation to avoid mutual exclusivity must apply than with regard to the 928/952/956 MHz MAS bands. Applications for these MAS systems have not generally been mutually exclusive. Instead, the applications for these systems involve unique operating parameters, are filed on a site-by-site basis and are subject to prior coordination. Therefore, under Sections 309(j)(1) and 309(j)(6)(E) of the Communications Act, the FCC should continue to license services, particularly those services that are exempt from auctions, on a site-by-site basis and avoid mutual exclusivity.

Since the FCC suspended acceptance of commercial applications for the 928/952/956 MHz MAS bands in February 1997, CII entities have been the primary applicants for new systems in these bands.¹² Accordingly, it is CII entities who will suffer (and have already

¹⁰ Letter to Chairman Kennard from Senators John Breaux, Slade Gorton, Spencer Abraham and Thomas Daschle, and Representatives Billy Tauzin and John Dingell. (December 22, 1998) at p. 2.

¹¹ Id.

¹² Based on data compiled by Micronet, the CII Petitioners estimate that in 1997 CII applications constituted 63.3% percent of the total applications for new or modified MAS facilities. Government public safety applications constituted 5.4% of the total number of applications for this year. The proportion of auction-exempt applications was, therefore, 68.7% of the total number of MAS applications. The percentage of auction-exempt MAS applications has continued to grow since 1997, with CII applications far exceeding the number of applications filed by all other types of services. Based on applications identified by service-specific codes, the CII Petitioners estimate that 61.8% of all applications were filed by CII entities. When considering all auction-exempt applications, this number rises to 71.4% of the total number of applications. Similarly, in 1999, the percentage of applications by CII was 63.4% based on a review of applications identified with service-specific codes. Factoring in government public safety applications, the proportion of auction-exempt applications was 75.9% of the total number of applications.

begun to suffer) the greatest consequences of the new freeze. This is clearly not what Congress intended when it enacted the BBA.

Based on the clear and unambiguous statutory authority and precedent, the licensing of the 928/952/956 MHz bands by CII must not be subject to auctions. Freezing the acceptance of these “exempt” services until the FCC makes a formal determination will serve only to hamper the deployment of critical systems. As explained more fully in Section IIB below, these systems are used for a variety of important internal applications by CII.

B. The Freeze of CII Licensing in the 928/952/956 Bands Will Adversely Impact Public Safety

The licensing of 900 MHz MAS has been at issue for almost a decade, when the FCC first decided in 1989 to allocate spectrum for MAS in the 932/941 MHz. Since that time, the FCC has struggled with issues relating to the licensing of this spectrum, issues that resulted first in the delay in the licensing of new MAS spectrum, then in the suspension of commercial systems in existing MAS spectrum and finally in the suspension of private non-commercial licensing in existing spectrum. During the last ten years, CII licensees have continued to demonstrate that MAS systems serve critical internal needs and that continued and expanded access to spectrum for these services is in the public interest.

The CII use MAS systems to satisfy a variety of important internal communications needs. As the Joint Supplemental Comments filed by UTC, AAR and API note, and as the Comments and Reply Comments in this docket demonstrate, the predominant use of MAS is

for supervisory control and data acquisition (SCADA) and telemetry operations by utilities, pipelines and petroleum companies.¹³ The record in this docket also demonstrates that, while many applications have been filed by other entities to provide subscriber-based services using MAS channels, there is little actual MAS use by these private carrier applicants. Adaptive Broadband (formerly Microwave Data Systems), a major supplier of MAS equipment, estimates that 90% of the newly licensed systems that have actually been constructed are licensed to private users, and that by far, the majority of equipment orders it has filled are from private users to meet internal communications requirements.

A number of commenters to the *NPRM*, including the Joint Commenters, have explained the important uses of MAS among the CII. Electric utilities, for example, operate SCADA systems on MAS channels to remotely monitor and control electrical distribution substations, line switches and capacitor banks, to track and report power consumption, and for other real-time monitoring and control over widely-scattered utility system components. Utilities also use MAS for automatic meter reading (AMR), having invested more than US\$ 800 million to deploy more than 14 million MAS receivers. MAS facilities are deployed in oil and natural gas production fields and along pipelines to monitor and control a variety of operating parameters so as to satisfy safety and environmental objectives and to maintain optimal levels of production. Drinking water utilities rely on SCADA systems which utilize the MAS bands to prevent the loss of system integrity, such as loss of water pressure from

¹³ See Joint Supplemental Comments at p. 2.; Comments of East Bay Municipal Utility District at p. 8; Delmarva Power and Light, p. 2; Southern California Edison at p. 2; Puget Sound Energy at p. 3; American Water Works Association at p. 10; American Petroleum Institute at p. 6; Washington Suburban Sanitary Commission at p. 6; Comsearch at p. 2; and Black & Associates at pp. 3-5.

pump failure, therefore jeopardizing fire flow needs; management of “aging” infrastructure to prevent system surges; preventing water service failures to health facilities and industrial users; and disruption of power supplies.

The railroad industry makes also extensive use of MAS facilities for real-time switching and signalling functions throughout the nationwide rail network. Train movements on the nation’s rail network are controlled remotely across long distances using a combination of fixed point-to-point microwave links for the long haul “backbone” circuits, combined with localized “drops” along the railroad right-of-way. These “drops” from the backbone microwave circuits consist of mobile radio links for voice communications between the centralized dispatcher and the train crews in the locomotives, and MAS links for carrying the telemetry communications which control the visual signal displays along the right-of-way and operate track switching equipment along the right-of-way to allow trains to move to sidings, change directions at intersections, etc.

There is a continued and urgent need for access to the MAS frequencies by the utility, pipeline and railroad industry as these industries upgrade their communications capabilities to provide better reliability. For example, in some portions of the rail network, telemetry communications for switching and signaling have been transmitted by railroad-owned wireline infrastructure strung on poles along the railroad right-of-way. The railroad industry has routinely been replacing this wireline infrastructure (which is difficult and expensive to maintain) with radio-based technology using MAS frequencies. The Union Pacific Railroad

is currently in the midst of an extensive project of upgrading large portions of its switching and signaling system by replacing outmoded "pole-line" systems with MAS stations. In addition, MAS frequencies are used for all new installations where new track systems are being built to serve new and expanded customer locations and service areas.

All of this critical upgrading and replacement activity will be brought to a halt if the Commission continues to impose the freeze on MAS licensing announced on July 1, 1999. Many MAS installations, particularly those installed along railroad and pipeline rights-of-way, typically are in rural and outlying areas, where there is no other demand for utilization of these frequencies on or near the right-of-way. As a result, there has not been (nor is there expected to be) any mutual exclusivity with respect to demand for these frequencies in these areas.

The freeze on new applications will affect the ability of CII applicants to meet their public safety obligations. While many existing MAS channels at 928/952/956 MHz are congested in parts of the country, the freeze on all spectrum will foreclose the deployment of MAS systems anywhere.¹⁴ Moreover, there are no commercially available substitutes for MAS spectrum. As explained above, MAS are used for critical internal operations. No commercial service providers offer these types of services, nor are they likely to do so anytime in the foreseeable future. Moreover, the CII have important operational concerns, including a need for high degrees of reliability and security, as well as unique operating

territories, that generally cannot be satisfied by commercial providers. Accordingly, the FCC's new MAS freeze could seriously impede the ability of the CII to satisfy important public safety objectives.

Conclusion

It simply makes no sense for the FCC to place a freeze on the filing of MAS applications by auction-exempt CII entities for the 928/952/956 MHz MAS bands while it considers whether to impose geographic licensing and auctions on these bands. As the Joint Petitioners have demonstrated above, CII entities are the principal users of these bands and rely heavily on this spectrum to provide important "public safety radio services." Moreover, regardless of the nature of the users of these bands, the FCC would be flouting its statutory obligation to avoid mutually exclusivity if it were to assign licenses in these bands through competitive bidding. In sum, the new freeze serves no legitimate purpose (particularly with respect to CII entities) and may even have adverse consequences on public safety.

¹⁴ Because of this congestion, the CII have urged the FCC to allocate the 928/952/956 MHz MAS channels and at least 20 channel pairs in the 932/941 MHz band to CIIs, defined as entities eligible under the former Power, Petroleum and Railroad Radio Services under Part 90 of the FCC's Rules. Joint Supplemental Comments at p.4.

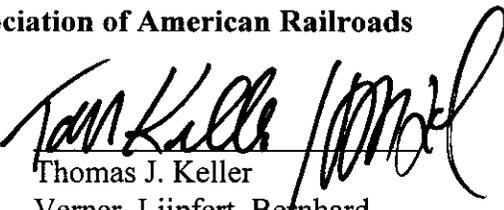
WHEREFORE, THE PREMISES CONSIDERED, the Joint Petitioners respectfully request the FCC to promptly grant this *Emergency Request for Limited Exception to the Licensing Freeze*.

Respectfully submitted,

United Telecom Council (UTC)

By: 
Jeffrey L. Sheldon
Thomas Goode
1140 Connecticut Ave., NW
Suite 1140
Washington, D.C. 20036

Association of American Railroads

By: 
Thomas J. Keller
Verner, Liipfert, Bernhard,
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Chtd.
901 15th Street, N.W., Suite 700
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By: 
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Suite 500 West
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