Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended	)	WT Docket No. 99-87
	)	
Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies	)	
	)	
Establishment of Public Service Radio Poll in the Private Mobile Frequencies Below 800 MHz	)	RM-9332

<u>Comments of the Land Mobile Communications Council</u>

The Land Mobile Communications Council (LMCC), in response to the *Notice of Proposed Rule Making* released March 25, 1999,[1] hereby respectfully submits these Comments.

I. Introduction and Background

1. The LMCC is a non-profit association of organizations representing virtually all users of land mobile radio systems, providers of land mobile services, and manufacturers of land mobile radio equipment. The LMCC acts with the consensus, and on behalf, of the vast majority of public safety, business, industrial, private, commercial, and land transportation radio users on several frequency bands regulated by the Federal

[1] *See* In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 As Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, *Notice Of Proposed Rule Making*, WT Docket No. 99-87, FCC 99-52 (rel. March 25, 1999) (*NPRM*).

Communications Commission (Commission). Membership includes the following organizations:

- Aeronautical Radio, Inc. (ARINC)
- American Association of State Highway and Transportation Officials (AASHTO)
- American Automobile Association (AAA)
- American Mobile Telecommunications Association, Inc. (AMTA)
- American Petroleum Institute (API)
- American Trucking Associations, Inc. (ATA)
- Association of American Railroads (AAR)
- Association of Public Safety Communications Officials-International, Inc. (APCO)
- Central Station Alarm Association (CSAA)
- Forest Industries Telecommunications (FIT)
- Forestry-Conservation Communications Association (FCCA)
- Industrial Telecommunications Association, Inc. (ITA)
- Intelligent Transportation Society of America, Inc. (ITSA)
- International Association of Fire Chiefs (IAFC)
- International Association of Fish and Wildlife Agencies (IAFWA)
- International Municipal Signal Association (IMSA)
- International Taxicab and Livery Association (ITLA)
- Manufacturers Radio Frequency Advisory Committee (MRFAC)
- National Association of State Foresters (NASF)
- Personal Communications Industry Association (PCIA)
- Telecommunications Industry Association (TIA)
- United Telecom Council (UTC)

2. On March 25, 1999, the Commission released the above-mentioned *Notice of Proposed Rule Making* implementing Sections 309(j) and 337 of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997.[2] As part of this proceeding, the Commission sought comment on the changes to its rules and policies to implement its expanded auction authority. These Comments are the product of a collaborative effort among the member associations of the LMCC whose constituents are the many distinct entities that employ private wireless systems for the protection of life and property, and for the management and efficiency of their businesses.

II. Scope of Auction Authority

A. Existing Spectrum

3. The Budget Act revised the Commission's auction authority in two important ways. First, Congress expanded the Commission's auction authority for mutually exclusive applications. However, in doing so, Congress exempted certain services from auctions. Second, Congress *obligated* the Commission to explore the use of engineering solutions, negotiation, threshold qualifications, service regulations or "other means" to *avoid* mutual exclusivity.

4. It is now incumbent upon the Commission to determine how to implement the Budget Act. The Commission's *NPRM* discusses the question of auction exempt services in detail. However, the LMCC believes that the Commission devotes scant attention to discussing how to avoid mutually exclusive applications in the first place.

5. The Part 90 land mobile services, with the exception of the 800/900 MHz SMR pools, have successfully avoided having mutually exclusive applications for decades. Through the use of the frequency coordination system, licensing internal use systems on a site-by-site basis, and limiting eligibility, the Part 90 land mobile services are the shining example of what Congress has now mandated by statute. By enabling users to obtain licenses for their actual operating areas, and permitting radio dealers to group small users together into common systems, the Part 90 land mobile services have become the most populous radio service, and the most successful. Although license issues do occasionally arise, the Part 90 land mobile services represent on a per-license basis the most efficient, effective and least costly burden of all of the services regulated by the Commission.

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[2] *See* Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) (Budget Act).

6. It is vital that the Commission continue its decades-long, successful licensing mechanism for these services. In the Budget Act, Congress specifically recognized the value of this licensing system. While, minor changes can and should be made to the licensing system to modernize the issuance of licenses and reduce the Commission's burden, the mechanism itself is sound.[3]

7. First-come/first-served application processing, coupled with a frequency coordination system, has worked well over the decades because it recognizes that different business, industrial, and public safety users utilize land mobile radio in different ways. Unlike a commercial carrier system, which must have wide-coverage to appeal to the widest variety of possible users, a private radio system is licensed for the actual service area which is needed by the user with the type of technology which best serves that user's communications and financial needs. Whether the system is a campus system, a ribbon configuration or a data dispatch system, business, industrial, and public safety users can be "coordinated around" other systems, share the same frequency, or be placed on channels compatible with other users. Thus, private radio spectrum has become both the most populous as well as the most versatile spectrum licensed by the Commission.

8. Retention of the present licensing and coordination system is most important for existing land mobile spectrum. Implementation of any drastic changes in licensing methodology for already allocated spectrum would have a devastating impact on existing users. The changes brought by the Commission's "refarming" proceeding[4] are only now beginning to be implemented. Licensees are now beginning to purchase advanced

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[3] The American Mobile Telecommunications Association, Inc. (AMTA) opposes this portion of the LMCC's comments. AMTA's position is detailed fully in its individual comments in the instant proceeding.

technology and narrowband radio systems. While it may be appropriate to continue to refine the refarming rules,[5] it would wreak havoc on the land mobile industry to scrap a ten year effort to modernize the 150 MHz and 450 MHz licensing bands, which is only now taking hold, and replace it with a new licensing scheme.

B. New Spectrum

9. With regard to new spectrum, the LMCC recognizes that the Budget Act did not alter the Commission's public interest obligation as reflected in Section 309(j)(3). In paragraph 60 of the *NPRM* the Commission states that the Commission's obligation in Section 309(j)(3) is to "... determine whether a licensing scheme is in the public interest." The LMCC maintains, however, that Section 309(j)(3) does *not* relate to public interest determinations of "licensing schemes." Rather, the section is explicitly titled "Design of Systems of Competitive Bidding," and the section states that the Commission should promote certain public interest objectives in specifying classes of licenses to be issued via competitive bidding. Thus, it is the LMCC's analysis that the Commission must *first* seek to avoid mutual exclusivity, as required by Section 309(j)(6)(E), *then* decide whether applications are auctionable if mutual exclusivity cannot be avoided, and *then* design an auction methodology which meets the public interest objectives. This analysis is consistent with the beginning of the first sentence of Section 309(j)(1), which provides that the section applies *if* mutually exclusive applications are accepted.

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[4] *See* Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, PR Docket 92-235.

[5] See Section III of these Comments for a discussion of mandatory migration.

10. It is clear that the Commission must first seek to avoid mutual exclusivity, and it is clear that the Commission utilizes an effective method for accomplishing this result with respect to currently allocated land mobile spectrum. Thus, no major changes in this area should be attempted. With regard to new spectrum allocated for land mobile, there is the "potential" for mutually exclusive applications. However, utilization of the existing licensing methodology can minimize, if not totally eliminate, the prospect of mutual exclusivity. The LMCC believes that the existing frequency coordination system can be effective for new allocations of spectrum. Frequency advisory committees, working in conjunction with applicants, can ensure that mutually exclusive applications do not arrive at the Commission.

11. Even if mutually exclusive applications were to arrive at the Commission, it would appear that the Budget Act amendments would exclude many, if not all, Part 90 land mobile eligible services from auction eligibility.

C. Auction Exemption

12. Section 309(j)(2)(A) exempts from auction private internal radio services used by non-governmental entities that are used to protect the safety of life, health or property. As recognized by the Commission, the legislative history of the Budget Act states that this exemption is broader than the public safety eligibility criteria.[6] The Commission has requested comment on what services beyond those traditionally associated with the "Public Safety Radio Services" should be included within this classification. However, the Commission is far too restrictive in its thinking, mentioning only emergency road services, state and local governments and fixed systems within the ambit of non-auctionability.

[6] *NPRM* at ¶ 27.

Contrary to the Commission's belief, the LMCC does not believe that the list of non-auctionable services here is exhaustive. Further, the Commission's suggested insertion of "principally used" to protect the safety of life, health or property is not supported by the statute.

13. The actual language exempting spectrum used by non-governmental entities for protection of life, health or property and are not made commercially available to the public covers a wide variety of Part 90 licensees. Spectrum used by utilities, industrial plants, transportation industries, manufacturing facilities and many more are clearly covered by this definition. Private land mobile spectrum, used as an integral part of improving business efficiency, is also an integral part of ensuring the safety of workers, customers and property. The functions of business efficiency and business protection cannot be separated, and the Commission should not attempt a tortured redefinition of "permissible communication" which was eliminated years ago.[7]

14. Private land mobile systems are not "commercially available to the public." As the Commission is aware, these systems are not consumer-oriented systems, but rather are used by businesses to further their activities and protect workers and property. If the Commission were to consider making spectrum available in a format which is conducive to mixed business and consumer uses, one could consider what spectrum should be subject to auction. However, the focus in the instant proceeding are frequencies governed

[7] See Amendment of the Rules to Eliminate Permissible Communications Restrictions in the Private Land Mobile Radio Service, *Report and Order*, PR Docket 84-109, FCC 85-27, released January 31, 1985, 50 Fed. Reg. 6179 (February 14, 1985).

by Part 90 of the Commission's rules, which still include eligibility requirements for spectrum use.[8]

15. The safety implications of a utility's work cannot be differentiated from the safety implications of a plant communications system that must prevent or clean-up chemical spills. The public safety benefits of a volunteer fire department's radio system are indeed identical to the public safety benefits of the ground radio communications used by airlines.

16. Similarly, multiple-licensed and non-profit cooperative systems should be exempt. The only significant difference between these systems and single user internal systems is that a series of users, independently eligible for licensing, have banded together to create a spectrally efficient system. Rather than penalizing users for sharing spectrum in a variety of formats, the Commission should encourage such use.

17. On this basis, the LMCC urges the Commission to: (1) maintain its current licensing scheme for the currently allocated Part 90 frequencies; (2) implement a similar licensing scheme for new spectrum allocated for Part 90 eligibles; and (3) charge the frequency advisory committees with the duty of ensuring that mutually exclusive applications are avoided.

III. Mandatory Migration

A. Background.

18. In its initial refarming decision, the Commission decided to implement re-channelization of the land mobile bands in question through type acceptance alone.[9] The Commission determined that "a natural inducement exists for all users, especially those

[8] 47 C.F.R. §§ 90.20, 90.33.

located in congested areas, to migrate to narrowband equipment as it becomes available."[10]

19. The Commission anticipated coupling the flexibility of the type-acceptance mode of transition with market-based incentives. However, there were a variety of concerns and objections raised by the Part 90 community. Moreover, the proposals themselves have been eclipsed by subsequent legislative and regulatory changes. The Commission itself recognized this in its *Third Memorandum Opinion and Order* in the refarming proceeding stating that "some of the issues addressed in the First R&O and FNPRM are no longer germane to this proceeding's spectrum conservation goals and portions of the record are stale."[11] The Commission terminated the further notice portion of the refarming proceeding and incorporated the still-relevant portions of that record into the instant proceeding.

B. LMCC Position.

20. The LMCC has long urged the Commission to take more definite action, in the form of mandatory migration to narrowband technology or the equivalent, to promote efficiency in private land mobile bands.[12] Although made up of associations representing widely varying user groups, the LMCC came to a consensus almost four years ago that some kind of procedures for the narrowband transition were necessary to achieve the

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[9] *See* 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 and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Report and Order and Further Notice of Proposed Rule Making*, PR Docket No. 92-235, 10 FCC Rcd 10076 (1995) (*Refarming Report and Order*).

[10] *See Refarming Report and Order* at ¶ 35.

[11] *See* 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 and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Third Memorandum Opinion and Order*, PR Docket 92-235, FCC 99-138, rel. July 1, 1999, at ¶ 26.

[12] *See* Comments of the Land Mobile Communications Council, PR Docket No. 92-235, filed Nov. 20, 1995 (LMCC Comments).

spectrum efficiency goals of both the Commission and the private land mobile community in the refarming proceeding.[13]

21. In its Comments regarding the *Refarming Report and Order*, the LMCC recommended that licensees be provided a transition period to apply to convert to narrowband technology, and that they be offered an incentive for conversion.[14] The LMCC's proposal would have (i) required licensees to declare the use of narrowband technology by a date certain, and (ii) conferred secondary status on all licensees authorized to use 25 or 30 kHz channels if they did not convert to 12.5 kHz channelization or equivalent spectrum efficiency.[15]

22. While there have been significant technological advances in the four years since the *Refarming Report and Order*, there is little indication that the type-acceptance process alone – without some kind of conversion process – will accomplish the necessary transition to narrowband technologies. Thus far, licensees on shared frequencies have exhibited limited desire to transition to more spectrally efficient technologies when the additional capacity created will not directly benefit them but will, instead, benefit co-channel licensees.

23. Despite the many advances in technology, there is always the concern that manufacturers will hesitate to invest in the new technologies necessary to facilitate the transition to narrowband use without some anticipation of an adequate level of sales and system deployments. Due to the rugged quality of existing equipment, many systems are far exceeding the ten-year mark of continued operation. Licensees using these systems have little incentive to invest in new, spectrally efficient equipment. While the LMCC is

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[13] LMCC Comments at ¶ 24.
[14] LMCC Comments at ¶ 24.
[15] *Id.* at ¶ 25.

appreciative of the Commission's initial deference to the life expectancy of existing equipment, it cannot expect the manufacturing community to continue to serve the private land mobile community indefinitely under these conditions. For example, while some members of the land mobile manufacturing community have developed and made available more spectrally efficient equipment, others have had difficulty in developing a successful business strategy. The LMCC is concerned that, absent clarification regarding the processes for migration to narrowband technologies, other manufacturers may soon face similar difficulties.

24. Thus, the LMCC urges the Commission to open a dialogue with the private wireless industry to discuss the processes by which existing licensees in the private mobile bands below 470 MHz may be encouraged move to more spectrally efficient technologies.[16] While the various members of the LMCC have differing views as to the best method for reaching this goal, the LMCC does encourage the Commission to carefully review the needs of the different segments of the private wireless industry and begin examining the migration process. We understand that there are unique national operational and spectrum needs associated with certain industry segments, such as the railroad and taxicab industries, but note that the private wireless industry recognizes the need to ultimately migrate to more spectrally efficient technologies.[17] To that end, the LMCC pledges to work with the Commission to give careful consideration to this issue to achieve as seamless a migration as possible to narrowband technologies and we encourage the Commission to begin this dialogue as expeditiously as possible.

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[16] The rules governing the 470-512 MHz band permit exclusive use of these channels with adequate loading. Once licensees have obtained the exclusive use of their authorized channels, they no

IV. Conclusion

25. Rather than focusing on competitive bidding and how best to overlay this licensing mechanism on the private land mobile frequencies, the LMCC believes that the Commission should devote its attention to avoiding mutually exclusive applications in the first place. Moreover, the statute and the legislative history clearly establish that most, if not all, of the land mobile radio community is be subject to competitive bidding. As elucidated herein, the LMCC urges the Commission to maintain its current licensing scheme for already allocated Part 90 frequencies and to implement a similar licensing scheme for any new spectrum allocated for Part 90 eligibles. Finally, the LMCC strongly urges to the Commission to begin a dialogue with the land mobile industry to discuss the processes by which existing licensees in the private mobile bands below 470 MHz may be encouraged move to more spectrally efficient technologies.

Respectfully Submitted,

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_/s/ Paul B. Najarian_____
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Date: August 2, 1999

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longer have a disincentive to employ more efficient technologies when they become available. Therefore, the LMCC does not include the 470-512 MHz band in its recommendations.

[17] American Trucking Associations, Inc. (ATA) opposes this portion of the LMCC's comments.

CERTIFICATE OF SERVICE

I, Laura L. Smith, do hereby certify that on the 2nd day of August 1999, I forwarded to the parties listed below a copy of the foregoing Comments of the Land Mobile Communications Council by first-class mail, postage pre-paid:

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** Via Hand Delivery*