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BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 )

WT Docket No. 99-87

COMMENTS OF UNION ELECTRIC COMPANY d/b/a AMEREN UE AND  
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AMEREN CIPS

By:

Shirley S. Fujimoto  
Kirk S. Burgee  
McDermott, Will & Emery  
600 13th Street, N.W.  
Washington, D.C. 20005-3096  
202-756-8000

Attorneys for Union Electric  
Company d/b/a Ameren UE and  
Central Illinois Public Service  
Company d/b/a Ameren CIPS

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## **EXECUTIVE SUMMARY**

In its Notice of Proposed Rule Making in this proceeding, the Commission raises important issues concerning the fundamental scope of its auction authority under the Balanced Budget Act of 1997.

As a preliminary matter, Congress intended a measured and cautious approach to the implementation of mutually exclusive application procedures as a predicate to auctions in the private radio services. Such a step would not promote the public interest and therefore cannot be undertaken consistent with the terms of the Balanced Budget Act. Site-by-site, frequency-by-frequency licensing is the most efficient and appropriate licensing mechanism for the private radio services, and establishing a new format would harm, rather than advance the public interest. In light of the heightened emphasis placed on the FCC's obligation to avoid mutual exclusivity, the FCC must retain the status quo in the private services.

Furthermore, the Balanced Budget Act specifically forbids the Commission from auctioning spectrum used in connection with "public safety radio services." The plain language, as well as the legislative history, of the Balanced Budget Act make clear that Congress intended for the FCC to protect the spectrum interests of all "public safety radio services" licensees, including power utilities, and licensees engaged in non-profit, cost-shared operations. The intermingling of exempt and non-exempt licensees throughout the private radio spectrum will make it impossible to administer auctions while maintaining the viability of the "public safety radio services" as Congress intended.

Nor should the FCC open up the private radio spectrum to commercial providers, as requested by Nextel Communications. Private radio service spectrum is already insufficient to meet the needs of eligibles, including entities in the exempt public safety radio services. Permitting access by commercial entities would deplete the spectrum and improperly compromise the operations of those entities.

Union and CIPS also oppose the FCC's "Band Manager" concept, which would place in the hands of biased third parties the ability to dictate the terms of private radio users' spectrum use. The potential for abuse under such a framework is enormous and procedural safeguards could not sufficiently protect the interests of private users.

Finally, Union and CIPS strongly urge the FCC not to impose freezes or other interim measures on the private radio services in anticipation of auctions. The inconvenience and delay that freezes have brought in the General Category and SMR spectrum would be catastrophic in the private radio services. Utilities such as Union and CIPS must have continuing access to spectrum in order to refine or expand their existing systems. Without this ability on an ongoing basis, utility wireless systems and, consequently, their core operations could be compromised, with the potential for dramatic consequences on the public. No policy objectives could serve to countervail this possibility.

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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

**COMMENTS OF UNION ELECTRIC COMPANY AND  
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY**

Pursuant to § 1.415<sup>1</sup> of the rules of the Federal Communications Commission (“Commission” or “FCC”), Union Electric Company d/b/a Ameren UE (“Union”) and Central Illinois Public Service Company d/b/a Ameren CIPS (“CIPS”), by their attorneys, respectfully submit Comments in response to the Notice of Proposed Rulemaking in the above-mentioned proceeding.<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 1.415.

<sup>2</sup> *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, WT Docket No. 99-87, Notice of Proposed Rule Making (Released March 25, 1999) (the “NPRM”).*

## **INTRODUCTION**

The FCC has commenced a proceeding to implement Sections 309(j) and 337 of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997 (Balanced Budget Act).<sup>3</sup> As the FCC notes in the NPRM, the Balanced Budget Act revised the Commission's auction authority for wireless telecommunications services. As a private radio licensee, Union and CIPS are providing comment on the proposed changes to the FCC's rules and policies to implement the Commission's revised auction authority. Union and CIPS believe that the Balanced Budget Act's revision of the FCC's statutory auction authority limits which wireless services are potentially auctionable, particularly as it related to the FCC's duty to avoid mutual exclusivity and to respect the Balanced Budget Act's exemption from competitive bidding for all spectrum used by "public safety radio services."

## **BACKGROUND**

Union and CIPS, co-subsidiaries of St. Louis-based Ameren Corporation, provide energy services to 1.8 million customers in Missouri and Illinois. Union owns and operates nine power plants, including one nuclear facility at Fulton, Missouri. Union's facilities have a total gross generating capacity of 7,591 megawatts. In addition, Union provides natural gas to 67 Missouri communities and is the third largest distributor of natural gas in the state.

CIPS's territory includes approximately 7% of the population of Illinois and 35% of the state's surface area. In addition to residential customers, CIPS serves key businesses

in agriculture as well as a diversified industrial base, including firms in the petroleum, petrochemical, food processing, metal fabrication, and coal-mining industries. CIPS owns and operates five coal-fired power plants with a combined total generating capacity of 2,859 megawatts. CIPS also distributes natural gas (392 million therms in 1996), pursuant to which it operates 4,572 miles of transmission and distribution mains. CIPS also owns and operates four underground storage fields that can deliver about 123 million cubic feet of natural gas per day.

In order to conduct these critical activities in an effective and efficient fashion, while providing maximum customer and public safety, both Union and CIPS have licensed and implemented wireless telecommunications systems. Specifically, Union and CIPS collectively have licensed land mobile operations in the 37 MHz, 48 MHz, 150 MHz, 450 MHz, 800 and 900 MHz bands and microwave operations at 900 MHz, 2 GHz and 6 GHz. These systems serve as a lifeline between the utilities' headquarters and crews in the field. In light of the potential risks that are associated with high voltage electricity and pressurized natural gas, it is critical that inspection, maintenance and repair activities be coordinated on a real-time basis. The systems permit such coordination and, as such, the systems are vital to Union and CIPS's utility operations. Because of the importance of their wireless systems, Union and CIPS have a strong interest in the FCC's regulation of, and in their own continued access to radio spectrum.

## **DISCUSSION**

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<sup>3</sup> Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) (Balanced Budget Act).

**I. ESTABLISHING MUTUALLY EXCLUSIVE APPLICATION PROCEDURES IN THE PRIVATE RADIO SERVICES WOULD VIOLATE THE 1997 BALANCED BUDGET ACT**

**A. Congress has Heightened the FCC's Obligation to Avoid Mutual Exclusivity.**

The FCC's authority to issue licenses through the use of competitive bidding under Section 309(j) extends only to those circumstances in which mutually exclusive applications are received for an initial license or construction permit. The Omnibus Budget Reconciliation Act of 1993, which introduced the FCC's auction authority, expressly recognized that, notwithstanding the new auction framework, the FCC is under an ongoing obligation to avoid mutual exclusivity in application filings.<sup>4</sup> Specifically, the FCC must:

continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.<sup>5</sup>

In drafting the Balanced Budget Act of 1997, Congress made specific reference to this ongoing obligation in the opening clause establishing the FCC's new auction authority.<sup>6</sup> New Section 309(j)(1) conditions the FCC's auction authority upon acceptance of mutually exclusive applications "consistent with the obligations described in [Section 309(j)(6)(E)]." It is obviously significant that, in the very clause that sets forth the new auction authority, Congress has reemphasized the FCC's obligation to avoid the condition that triggers it.

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<sup>4</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L.No. 103 66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (Budget Act).

<sup>5</sup> 47 U.S.C. § 309(j)(6).

<sup>6</sup> Public L. No. 105-33, Title III, III Stat. 251 (1997) (Balanced Budget Act).

Union and CIPS submit that, by including the reference to the FCC’s Section 309(j)(6) obligation in Section 309(j)(1) as it did, Congress intended that the FCC take special care to ensure that it meets this obligation as a prerequisite to any other analysis of whether auctions are in the public interest. Indeed, the legislative history bears this conclusion out. As the FCC notes in the NPRM,<sup>7</sup> the House Conference Report to the Balanced Budget Act expresses the concern that, in implementing the new auction authority, the FCC might minimize its obligations under Section 309(j), and overlook the “tools that avoid mutual exclusivity.”<sup>8</sup> It seems clear that Congress’s reference to the FCC’s obligation to avoid mutual exclusivity in Section 309(j)(1) was intended as a cautionary device to avoid the excessive use of auctions as a licensing mechanism under the new format.

Consistent with Congress’s intent, as expressed through the drafting of 309(j) and in the legislative history, the FCC must overcome a significant burden in implementing auctions in a given service. That is, the FCC must determine that mutual exclusivity either cannot be avoided using the referenced “tools,” or that avoiding mutual exclusivity is not in the public interest. That burden is insurmountable in connection with the private radio services.

**B. The Public Interest Standard Applicable to the Obligation to Avoid Mutual Exclusivity is Broader than is Set Forth in Section 309(j)(3)(A-D).**

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<sup>7</sup> NPRM at ¶ 19.

<sup>8</sup> H.R. Conf. Rep. No. 105-217, 105th Congress, 1<sup>st</sup> Sess., at 572 (1997).

As noted in the NPRM, the FCC has previously determined that it must avoid mutual exclusivity under Section 309(j) when doing so would further the public interest goals set forth in Section 309(j)(3).<sup>9</sup> Union and CIPS agree that Sections 309(j) (3)(A-D) may set forth appropriate public interest objectives that the FCC should consider in determining whether to implement mutual exclusivity and thus auctions.<sup>10</sup> Union and CIPS believe, however, that it is important to emphasize that the FCC's obligation under Section 309(j)(6) extends to public interest goals that may not be specifically or directly enumerated in 309(j)(3)(A-D). This is evident from the language of the respective sections. Section 309(j)(6), which establishes the obligation to avoid mutual exclusivity, references "the public interest," without limiting or further defining its scope. Furthermore, the FCC's obligation under Section 309(j)(3) is set forth in the conjunctive form, providing that the FCC "shall include safeguards to protect the public interest...and

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<sup>9</sup> *NPRM* at ¶ 61.

<sup>10</sup> When identifying the class of licenses to be auctioned, the eligibility and other characteristics of such licenses and the methods used to implement an auction, the FCC must promote four enumerated objectives. These objectives, set forth in § 309(j)(3), are as follows:

- (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;
- (D) efficient and intensive use of the electromagnetic spectrum.

shall seek to promote [the objectives set forth in Section 309(j)(3)(A-D)] [emphasis supplied].

Union and CIPS submit that the FCC must avoid mutual exclusivity where doing so is in the public interest, though not necessarily as that term is defined in Section 309(j)(3). The public interest benefits yielded by the private radio services accrue indirectly, through enabling licensees to fulfill their core functions more safely, efficiently and effectively. Such benefits, while extraordinarily important, are less quantifiable or tangible than those the FCC has attempted to foster under the subscriber-based auction framework. In making determinations as to whether to avoid mutual exclusivity, the FCC must now employ a broad definition of “public interest” that takes into account the unique nature of the private radio services.

**C. The Public Interest would not be Served By Instituting Auctions in the Private Radio Services.**

As the FCC recognizes in the NPRM, the current licensing framework that governs private radio services “generally does not result in the filing of mutually exclusive applications because the frequencies are intensively shared, assigned on a first-come, first served basis, and /or subject to frequency coordination.”<sup>11</sup> Accordingly, the FCC would have to implement a new licensing scheme in these services in order to meet the threshold condition triggering the FCC’s authority to auction. Conversely, in order to “avoid” mutual exclusivity, the FCC need not do anything.

Based on the fundamental nature of the private radio services, the FCC cannot find that it is in the public interest to institute auctions in them. The FCC acknowledges as

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<sup>11</sup> *NPRM* at 13.

much in its conclusions concerning the Balanced Budget Act's "public safety radio service" exemption. As set forth above, the current licensing framework for the private radio services would have to be changed in order to establish mutual exclusivity. In inviting comment on the ramifications of the public safety radio services exemption, the FCC expressed its belief that "it would be imprudent and potentially disruptive to current public safety communications to overhaul the existing frequency assignment approach for public safety pool spectrum."<sup>12</sup> The FCC is correct in this conclusion, just as a new licensing scheme would be imprudent and disruptive to the private radio services generally. A change to a mutually exclusive application/auction format would, at a minimum, lead to crippling uncertainty and impaired access to spectrum in the private radio services.

In order to implement a mutually exclusive licensing scheme in the private radio services, the FCC must determine that disruption that would be imprudent to impose on the Public Safety Pool would be in the public interest to impose on the private radio services generally. Such a determination cannot be supported.

**D. Auctioning Private Radio Spectrum Would Not Further the Objectives Stated in Section 309(j)(3)(A)-D**

Section 309(j)(3)(A-D) sets forth four groups of objectives that the FCC must seek to promote as it identifies classes of licenses to be auctioned. In general, the first two of these groups relate to the development and deployment of new technologies and promotion of economic opportunity and competition, as well as the ready accessibility of innovative technologies. These objectives do not appear to have direct applicability to the private

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<sup>12</sup> *Id.* at 39.

services but, instead, are more suited to the auction of subscriber-based services. The third objective goes to the recovery of the value of spectrum made available for commercial use and, by its terms, does not apply to the private services at issue in this rulemaking.

The fourth factor, efficient and intensive use of the electromagnetic spectrum, will not be promoted by auctions in the private services. In auctioning the 800 MHz SMR services, the FCC established a mutually exclusive application scheme for the issuance of geographic area licenses. The FCC based this action upon its determination that site-by-site licensing hindered the ability of SMRs with wide-area, digital networks to respond to consumer demand and market conditions. These considerations do not apply to the private radio services.

In the NPRM, the FCC acknowledges the prevalence of site-by-site licensing in the private radio services by such users as railroads, petroleum pipelines and manufacturers.<sup>13</sup> Union and CIPS submit that, with few exceptions, site-by-site licensing is the only reasonable or appropriate means of licensing private radio services. This is so because, unlike subscriber-based services, which are rendered to the public at large across broad market areas, private radio users serve themselves over the territory in which they happen to conduct their core activities. Such territories can not be assumed to be coterminous with a specified market area. While it is reasonable to expect subscriber-based providers to conform their service areas to economic markets, it would not be economically efficient to require private users generally to adjust their areas of operations in order to do so.

Furthermore, licensing in the private radio services has largely been frequency-by-frequency, site-by-site because perfect frequency reuse is virtually never possible and

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<sup>13</sup> *Id.* at 13.

becomes less so as spectrum grows more congested. In Union and CIPS's experience, private user systems typically consist of a variety of discrete channels drawn from across the private pools. Based on both the geographic and spectral dispersion common to the private services, auctioning blocks of spectrum across market areas will either result in substantial spectrum in the hands of licensees that do not need it and/or will keep spectrum from licensees that do need it. In contrast to the auction of the SMR bands at 800 MHz and 900 MHz, this would not represent a net gain in spectral efficiency or further the public interest.

The practical effect of adopting geographic area licensing and auctions would be wasted resources and inefficient use of spectrum. For example, the FCC would be required to spend resources preparing for and auctioning spectrum. Auction participants would be made to bid on one or more licenses in order to secure authority to operate in the area that meets their actual needs. To the extent that the licensee does not intend to construct and operate a system in the entire area, it would have to partition its spectrum. The FCC would then have to expend resources reviewing the partitioning applications. Following this scenario, the licensee and FCC would go through an entire series of additional steps in order to get to the same result yielded by the existing licensing scheme -- licenses issued that cover the applicant's actual needs.

The inefficiency associated with auctions is exacerbated by the fact that, until such time as the licensee decides to partition, the spectrum is not being used. Any other entity that may have a need for some of the licensee's spectrum is left to pursue other options.

Finally, while the Commission may be able to justify expending resources to hold auctions for spectrum intended for commercial use, the argument that using auctions will

meet section 309(j)(3)'s revenue generation and unjust enrichment objectives is less compelling in the context of private radio services. This is true because private radio licensees are using spectrum in order to run their businesses and this spectrum is not a direct part of their product or service offerings. In the case of Union and CIPS, the public derives value by having power systems that operate safely and reliably. Requiring payment for spectrum used in this way could actually detract from this value because an extra cost is being imposed and this cost would probably cause some entities to forego using spectrum for similar purposes. This differs from commercial service providers that use spectrum as a critical part of the very product or service they are selling as communications entities. The spectrum is needed to generate business and, thus, revenue. It makes sense, therefore, that this subscriber-based spectrum is licensed via auction. The same cannot be said for private radio licensees.

Union and CIPS submit that Congress wisely reemphasized the obligation to avoid establishing mutual exclusivity in cases where it simply is not appropriate. The private radio services are qualitatively different from the subscriber-based services that the FCC has auctioned previously, and yield benefits that are not easily calculable. Union and CIPS submit that after careful evaluation of the pertinent factors, and giving due heed to Congress's apparent admonition concerning mutual exclusivity, the FCC can reach only one result; that is, that it should retain the status quo and not introduce mutually exclusive applications in the private radio services.

## **II. THE PUBLIC SAFETY RADIO SERVICES EXEMPTION**

The Balanced Budget Act of 1997 amended Section 309(j) of the Communications Act to require the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, with very specific exceptions.<sup>14</sup> Specifically, and as the Commission has observed, the Balanced Budget Act amendments subject the Commission's authority to use competitive bidding to three discrete exemptions.<sup>15</sup> Section 3002 of the Communications and Spectrum Allocation Provisions of the Balanced Budget Act Amendments amended Section 309(j) of the Communication Act to read in relevant part as follows:

(1) GENERAL AUTHORITY: If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license of 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) 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;

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<sup>14</sup> Balanced Budget Act, § 3001 *et seq.*, Pub. L. No. 105-33, Title III, 111 Stat. 251, \_\_\_\_ (1997).

<sup>15</sup>The Commission recently observed that the list of exemptions from its general auction authority set forth in Section 309(j)(2) is exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding. *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 16000 ¶ 199 (1998).

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licenses to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

47. U.S.C. § 309(j) (emphasis added).

The statutory scheme dictates that the Commission determines which services are potentially auctionable and which are not based on a two-fold inquiry.<sup>16</sup> First, the Commission should determine which private licensees Congress intended to include within the exemption from competitive bidding. Second, the Commission should define the scope of the exemption in light of the licensing scheme currently in place for exempt licensees and Congress's expressed intention to preserve access to public safety radio services spectrum.

**A. The Legislative History to the Balanced Budget Act of 1997 Makes Clear that Congress Intended to Include Power Utilities Within the Scope of the Public Safety Radio Services Exemption.**

In its *Notice*, the Commission asks whether it should designate certain radio services or classes of frequencies within certain services as “public safety radio services” for which licenses will be assigned without competitive bidding.<sup>17</sup> Because Congress did not define in the statute the class of licensees included within the “public safety radio services” exemption the Commission must look to the legislative history to discern Congress's intent, and interpret “public safety radio services” in a manner that is consistent with that intent.<sup>18</sup>

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<sup>16</sup> See *NPRM* ¶ 17.

<sup>17</sup> *Id.* ¶ 30.

<sup>18</sup> See *Hernstadt v. FCC*, 677 F.2d 893, 894 (D.C. Cir. 1980) (“When a statute's meaning is ambiguous, the paramount rule of statutory construction gives the statute that meaning

Section 309(j)(2) defines public safety radio services to include “private internal radio service used by ... non-government entities” to protect the safety of life, health or property and that are not made commercially available to the public. Rather than simply leave interpretation of this provision to the Commission’s discretion, in the House Conference Report accompanying the Balanced Budget Act amendments, Congress explicitly stated that “the public safety radio services exemption” is much broader than the definition for “public safety services” contained in new section 337(f)(1), and included specific types of private internal radio services that fall within the exemption.<sup>19</sup>

According to the House Conference Report, “the 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.”<sup>20</sup> Moreover, during the Senate floor debate addressing a similar provision in the Senate’s parallel version of the communications provisions of the Balanced Budget Act

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which fulfills the purpose and intent of the legislature.”).

<sup>19</sup> Section 337(f)(1) defines “public safety services” as services:

- (A) the sole or principal purpose of which is to protect the safety of life, health, or property;
- (B) that are provided—
  - (i) by State or local government entities; or
  - (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
- (C) that are not made commercially available to the public by the provider.

<sup>20</sup> House Conf. Rep. at , reprinted in U.S.C.C.A.N. at 192.

(hereinafter Senate floor debate), Senator Bryan noted that “[t]his legislation will expand the FCC’s authority to auction spectrum, but not at the expense of entities [such as utilities] that we have entrusted to protect the safety of life, health and property and to provide essential public services.”<sup>21</sup> As such, the legislative history conclusively shows that Congress intended to include utilities within the rubric of “public safety radio services.”

Congress’s specific exemption of utilities from the expanded auction authority imposed by the Balanced Budget Act amendments is not surprising considering the expert testimony that Congress had available during the drafting of the communications provisions of the Balanced Budget Act amendments. The Public Safety Wireless Advisory Committee (PSWAC) published its final report on September 11, 1996. *Final Report of the Public Safety Wireless Advisory Committee to the Federal Communications Commission* (visited June 1, 1999) <<http://pswac.ntia.doc.gov/pubsafe/fianl/htm>>, (hereinafter PSWAC Final Report). This report is referenced by witnesses in the

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<sup>21</sup> Congressional Record at S6325 (June 25, 1997). A parallel bill was introduced in the Senate by the Senate Committee on Budget, and debated on June 23, 24 and 25, 1997. 143 Cong. Rec. S6058 (daily ed. June 23, 1997); 143 Cong. Rec. S6015 (daily ed. June 24, 1997); 143 Cong. Rec. S6290 (daily ed. June 25, 1997). The Senate bill was amended during the floor debate to include the following additions to subsection (A), the parallel section to section (B) in the House bill:

(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, including Emergency Auto Service by non-profit organizations* that –

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

Subcommittee hearings from which the Communications provision of the Balanced Budget Act of 1997 (Budget Act) was born, and forms the background of information and expert recommendations available to Congress during drafting. *See, e.g., Oversight Hearing on Spectrum Management Policy Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Commerce Committee*, (statement of Reed E. Hundt, Chairman, FCC; statement of Michael Amorosa, Deputy Police Commissioner, Technology Development, New York City Police Department) (visited June 1, 1999) available at <<http://www.house.gov/commerce/telecom/hearings/021297/witness.htm>>.

Public safety and *public service entities* were the subject of focus for the PSWAC Subcommittee on Interoperability, which noted the vital nature of communications between and among both types of groups in the event of an emergency as well as in the day-to-day consistency of operations.<sup>22</sup> The Committee noted:

Public 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. These entities also play important roles in supporting first responders once an incident does occur. In all their operations, they have many of the same needs as Public Safety Agencies.

*Id.* (emphasis supplied).

Thus, the legislative history makes clear that utilities were intended to be included among the class of licensees encompassed by the statutory phrase “public safety radio services,” and should not be required to obtain their spectrum through competitive bidding.

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S. 947, 105<sup>th</sup> Cong. (1997) (emphasis added).

<sup>22</sup> PSWAC Final Report at 35.

**B. The Commission Should Exempt From Auction All Spectrum Occupied By Public Safety Radio Service Licensees.**

Once the Commission has determined, as it must, that power utilities fall within the statutory exemption, it must then determine how to apply the exemption given the current licensing in the private land mobile radio bands as well as Congress's express intention to preserve access to spectrum by "public safety radio service" licensees.

Under the Omnibus Budget Reconciliation Act of 1993, which added Section 309(j) to the Communications Act of 1934,<sup>23</sup> the FCC had express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses, provided that the "principal use" of such spectrum involved, or was reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation. By directing the Commission to identify the "principal use" of the spectrum, Congress recognized the existence of mixed-use spectrum.<sup>24</sup> Indeed, intercategory sharing in the 800 MHz band between private and commercial licensees made it extremely difficult to apply categorical treatment of licensees based on the application of competitive bidding principles to the 800 MHz spectrum pools.

Significantly, however, in the Balanced Budget Act of 1997, Congress read no such "principal use" restriction into its total prohibition against subjecting public safety radio services spectrum to competitive bidding. Accordingly, Union and CIPS believe that the Commission should apply this total prohibition on the auctioning of public safety radio

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<sup>23</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 312, 387 (1993) ("1993 Budget Act").

<sup>24</sup> See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2353 (1994) (*Second Report and Order*).

services spectrum by adopting a “contaminated band” analysis under which a pool would be exempt from competitive bidding if there is any use by one or more “public safety radio services” licensees.

Given the extensive intercategory sharing that has taken place in the Private Land Mobile Radio Service bands, and the intermingling of exempt and non-exempt licensees in the Industrial/Business and Industrial/Land Transportation pools in particular, there simply is no way to institute competitive bidding without serious disruption to public safety radio services licensees, contrary to the express will of Congress. Exempt entities are licensed throughout the entire private land mobile spectrum. Auctioning “on top of” these entities would effectively paralyze their operations, limiting licensees to their licensed parameters at the time of the auction or an associated freeze. While the FCC has previously taken action to auction over incumbents in other contexts, *e.g.*, the determination to auction the General Category, it has not done so where it had a statutory obligation to protect the incumbents’ services. Congress clearly intended that the FCC would protect and foster the public safety radio services. Union and CIPS submit that this intent will not be realized if those services are relegated to incumbent status in an auction context and thus unable to grow or modify their systems freely.

**C. The FCC Should Not Make Private Mobile Radio Service Spectrum Available for Licensing by Commercial Mobile Radio Service Providers**

In a recent Public Notice, the FCC has asked whether it should amend its licensing rules for the 800 MHz band to allow the incorporation of Private Mobile Radio Service

(PMRS) spectrum into Commercial Mobile Radio Service (CMRS) systems.<sup>25</sup> This inquiry arose out of a Request for Waiver filed earlier by Nextel Communications, Inc., in which Nextel sought this relief for itself.<sup>26</sup> Specifically, in connection with applications to take assignment of authorizations for Business Category channels, Nextel requested waiver of Section 90.617(c) of the FCC's rules, which prohibits the authorization of SMR systems in the Business Radio Category.<sup>27</sup> Nextel indicated that it sought waiver to meet the increasing demand for digital CMRS.<sup>28</sup> Union and CIPS strongly oppose the referenced rule change.

Section 309(j)(1) contains a very specifically crafted description of the services that Congress was seeking to protect when it created the "public safety radio services" exemption. By its terms, the exemption only reaches services that "are not made commercially available to the public."<sup>29</sup> This qualification would have been nonsensical had Congress intended that the FCC would permit commercial licensing of the spectrum held by exempt entities. Indeed, opening this spectrum to CMRS providers would lead to the very consequences which Congress was seeking to protect public safety radio services from: intense competition for, and lack of access to spectrum. Instead, Congress sought to establish a safe-harbor in which exempt licensees could establish and maintain wireless

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<sup>25</sup> *Wireless Telecommunications Bureau Incorporates Nextel Communications, Inc. Waiver Record into WT Docket No. 99-87; WT Docket No. 99-87; Public Notice*; Released: July 21, 1999.

<sup>26</sup> *Letter from Robert H. McNamara, Director Regulatory Technology and Compliance, Nextel Communications, Inc. to Federal Communications Commission* (various dates between July and October 1998) (Waiver Requests).

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

<sup>29</sup> 47 U.S.C. §309(j)(2)(ii).

systems without the uncertainty that comes from giving dissimilarly situated entities equal access to the same spectrum.

Extensive intercategory sharing and cross-eligibility by the exempt services would make it impossible to permit CMRS access to private radio spectrum without undermining Congress's objective of protecting the exempt services. The FCC has previously recognized the likelihood of "irreparable harm," in the form of spectrum depletion, that can result directly or indirectly from access by commercial providers to private spectrum.<sup>30</sup> In light of the pervasive presence of exempt entities throughout the private radio services, opening those services to CMRS providers would cause exempt entities to suffer the irreparable harm that the FCC has previously tried to avoid. As such, the FCC should not change its rules to permit CMRS providers to access PMRS spectrum.

**D. Congress Did Not Intend for the FCC to Impose Use Restrictions on Entities that Fall Within the Public Safety Radio Services Exemption**

In the NPRM, the FCC asks for comment on how to "ensure that the licensee's assigned frequencies continue to be utilized only for purposes that meet the requirements of the Balanced Budget Act's exemption from competitive bidding."<sup>31</sup> Union and CIPS submit that Congress did not intend that the exemption would be limited *only* to activities that directly promote the safety of life, health or property. To the contrary, Union and CIPS submit that the absence of a "principal use" provision in the language of Section

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<sup>30</sup> *In the Matter of Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands*; DA 95-1669; *Memorandum Opinion and Order* at ¶ 15; Adopted: July 26, 1995; Released: July 28, 1995.

<sup>31</sup> *NPRM* at 43.

309(j)(1) indicates that Congress intended that the exemption apply broadly to radio services, provided that they are used, at least in part, for the referenced activities. Had Congress intended to limit the exemption as the FCC suggests in the NPRM, it would have employed language such as “are used *exclusively* to protect the safety of life, health, or property...” or “*to the extent that* they are used to protect the safety of . . .” in the provision.<sup>32</sup>

This is the only practical interpretation of the statute, and will best promote Congress’s objectives. As the FCC is well aware, utilities, petroleum companies and other entities that clearly fall within the intended scope of the exemption use their wireless systems in a variety of ways. While the systems are vital in times of crisis, they are also integral aspects of day-to-day operations, allowing cost-effective and efficient buildout, inspection and maintenance of the infrastructure. Of course, these functions promote safety and, as such, can be said to fall within the exemption. Union and CIPS submit, however, that Congress did not intend for the FCC to make categorical or case specific determinations about companies’ uses of their systems.

Because utility wireless systems are designed to carry both emergency and “routine business” communications without differentiation, separating out communications as not falling within the exemption is impractical and would place at risk the integrity of the systems. Subjecting the two types of traffic to two different licensing schemes, (*e.g.*, geographic and site-by-site) would likely require exempt entities to develop parallel, duplicative systems, resulting in extraordinary cost and inefficiency. Congress could not

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<sup>32</sup> Compare 47 U.S.C. § 3(44): “A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . .”

have intended such an outcome when it established the exemption. Instead, Union and CIPS submit, Congress intended to exempt in their entirety the systems used by utilities, petroleum companies etc., recognizing that the traffic carried on those systems would not necessarily be completely or directly devoted to the protection of the safety of life, health or property.

Of course, Congress's intent would be undermined if licensees were able to avail themselves of the exemption by performing a nominal amount of exempt activity. Union and CIPS submit that this can be avoided through the application of eligibility provisions associated with the pre-consolidation Private Land Mobile Radio Services.<sup>33</sup> Old FCC Rule 90.63, for example, established eligibility in the Power Radio Service for those entities primarily engaged in certain activities that would appear to bring an entity within the scope of the Section 309(j) exemption.<sup>34</sup> Application of these criteria, and others associated with the old Part 90 Private Land Mobiles Radio Services, as a condition of eligibility for the "public safety radio services" could be used to ensure that Congress's objectives are met.

**E. Non-Profit, Cost Sharing Systems Involving Exempt Participants Fall Within the Public Safety Radio Services Exemption**

In the NPRM, the FCC asks for comment on whether non-profit, cost-shared systems fall within the "public safety radio services" exemption of Section 309(j)(2). Specifically, the FCC has inquired as to whether such systems can be treated as "private

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<sup>33</sup> See generally, 47 C.F.R. §§90.15-90.27 and 47 C.F.R. §§90.33-90.55 (1997). The FCC consolidated the Private Land Mobile Radio Services below 800 MHz into two pools in the Second Report and Order in PR Docket No. 92-235, adopted: February 20, 1997, released: March 12, 1997.

internal radio services,” as set forth in Section 309(j)(2), in light of the fact that the licensee receives funds from the sharing entity.<sup>35</sup> The FCC notes that “cost reimbursements ...could be viewed as compensation...” to the licensee.<sup>36</sup> Union and CIPS submit that there is no basis for treating exempt licensees engaged in cost-sharing operations any differently from other exempt entities.

The purpose of the public safety radio services exemption is to protect and foster certain wireless services that are “used to protect the safety of life, health or property.” The FCC has repeatedly recognized the importance of non-profit, cost-shared operations in making advanced wireless capabilities available to public safety entities.<sup>37</sup> Excluding such operations from the exemption would defeat the very objective that Congress was attempting to reach in creating it. In this regard, during the Senate floor debates discussed *supra*, Senators Bryan and McCain both expressed support for the facilitation of non-profit cost-shared systems involving public safety entities and “public service” utilities.<sup>38</sup> Specifically, Senator Bryan voiced support for shared systems such as one in Nevada involving sharing between Public Safety Category eligibles and utilities, noting that such systems are spectrally efficient, promote interoperability during emergencies, and provide access by smaller agencies.<sup>39</sup> Senator McCain urged the FCC to adopt rules that would

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<sup>34</sup> 47 C.F.R. §90.63 (1997), removed and revised, effective October 17, 1997.

<sup>35</sup> *Second Report and Order* at 33.

<sup>36</sup> *Id.*

<sup>37</sup> *See, e.g., In the Matter of Texas Utilities Services, Inc., Request for Waiver of Section 90.179 of the Commission’s Rules*, DA 97-1404, *Order*, 13 FCC Rcd 4258 (1997).

<sup>38</sup> *Congressional Record* at S6325 (June 25, 1997).

<sup>39</sup> *Id.*

“facilitate, if not promote, the development of shared radio systems by [‘public safety and public service organizations’]”.<sup>40</sup>

There is, Union and CIPS submit, no reason to regulate these systems differently because they involve the receipt of cost reimbursements. The fact that funds are distributed within these systems is merely an incident, rather than the purpose, of these systems and should have no bearing on their treatment.

Finally, the fact that the systems are shared does not make them any less “private” for purposes of the exemption. As indicated in the NPRM, the FCC has in other contexts treated service to a “significantly restricted class of eligible users” as being “available on a limited basis to insubstantial portions of the public.”<sup>41</sup> It is likewise appropriate in this proceeding for the FCC to determine that services are “not made commercially available to the public” when they involve shared operations among entities that are otherwise exempt. Such a determination would best serve Congress’s intention to protect the activities to which the exemption is directed.

### **III. THE FCC SHOULD NOT ADOPT THE BAND MANAGER PROPOSAL**

In the NPRM, the FCC proposes establishing a new class of licensee called a “Band Manager.”<sup>42</sup> As proposed, the Band Manager would be authorized to sublicense and

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<sup>40</sup> *Id.*

<sup>41</sup> NPRM at ¶ 51, citing the Second Report and Order in the CMRS Proceeding.

<sup>42</sup> *Id.* at 88.

oversee the administration of the spectrum it licensed.<sup>43</sup> The FCC envisions that the Band Manager would be permitted to charge for the use of spectrum.<sup>44</sup>

Union and CIPS are opposed to the Band Manager concept. In Union and CIPS'S view, the concept would constitute an impermissible ceding of the FCC's authority over radio spectrum, and has an extraordinary potential for inefficiencies and abuse. Union and CIPS urge the FCC to continue to administer the private radio services rather than to adopt this proposal.

Title III of the Communications Act generally, and Section 301 in particular contemplates control by the United States over all channels of radio transmission.<sup>45</sup> Further, while there are certain limited exceptions such as special temporary authority and shared use of radio stations, the Communications Act provides that the use of radio facilities will be pursuant to an FCC issued license.<sup>46</sup> Union and CIPS submit that selling off wholesale the oversight of entire radio services to third-parties tendering the highest bid would violate these longstanding statutory provisions and the policy objectives that implicitly underlie them. The overarching purpose of Title III is to ensure that a disinterested arm of the government with expertise in the associated issues administers the radio spectrum. The very idea of selling off the oversight of the private radio services is antithetical to this important policy and very likely constitutes a violation of the Communications Act.

Moreover, Union and CIPS are very concerned over the possible ramifications of being an incumbent in a band that is managed by an entity other than the FCC. Having

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<sup>43</sup> *Id.* at 89.

<sup>44</sup> *Id.* at 92.

<sup>45</sup> 47 U.S.C. § 301.

paid potentially significant sums of money for their licenses, Band Managers' interests would not necessarily lie in advancing the public interest so much as they would lie in recouping the investment or maximizing Band Manager revenue. As such, decisions about spectrum rights would be driven by improper motivations and incumbent licensees could be expected to suffer.

Nor is it reasonable to assume that procedural measures could provide adequate redress for incumbents. The FCC simply does not have the resources to ensure prompt resolution of the plethora of disputes that would inevitably arise as the result of the incentives built in to the Band Manager concept. In light of the significant time and cost of taking a dispute before the FCC, Band Managers would have an extraordinary and improper amount of leverage in their dealings with incumbents or potential incumbents.

#### **IV. THE FCC MUST ENSURE THAT PRIVATE RADIO SPECTRUM IS CONTINUOUSLY AVAILABLE FOR LICENSING**

In its notice of proposed rulemaking, the Commission notes that when it has adopted geographic licensing and auctions in the past, it has stopped accepting new license applications until it is ready to begin assigning licenses *via* the new licensing scheme.<sup>47</sup> To the extent that the FCC decides to auction any spectrum as a result of this proceeding, it is imperative that it does not temporarily suspend the acceptance of new license applications for private radio services.

As Union and CIPS have indicated throughout these comments, they use FCC spectrum to support internal business operations that provide critical services to the public.

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<sup>46</sup> *Id.*

<sup>47</sup> *NPRM* ¶ 96 (stating that application freezes deter speculative applications and protect the goals of the rulemaking).

For example, utilities' private land mobile systems support dispatch services that aid in service connection and restoration. These services also play an integral role in the SCADA systems that manage the electric grid. The various applications deployed using FCC spectrum ensure the smooth delivery and operation of power services throughout America. In the case of an emergency, these services are nothing short of critical. Consequently, private radio spectrum must be available for licensing at all times so that utilities, such as Union and CIPS, can always implement new spectrum-based applications that support their core business functions. Any application freeze would work against this important need and may place the FCC in the position of having adopted rules that endanger the public.

Even assuming that a short freeze would not hurt utilities – a position that is impossible to support – past precedent suggests that application freezes last much longer than the FCC has historically anticipated. For example, applications were frozen in anticipation of auctions for Location and Monitoring,<sup>48</sup> Interactive Video Data Services, Local Multipoint Distribution Services. In these and other cases, short freezes intended to allow the agency and the public time to formulate rules and raise capital turned into freezes lasting years. During this time, spectrum laid fallow and potential participants abandoned business plans. Because the FCC's ability to issue rules or initiate auctions is affected by intervening events such as staffing shortages, proceeding reprioritization, or petitions for reconsideration or court review, the best intentions to auction spectrum quickly are frequently waylaid. Because of the important applications supported by private land

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<sup>48</sup> The FCC stopped accepting LMS applications in 1995. The LMS auction was not held until February 1999.

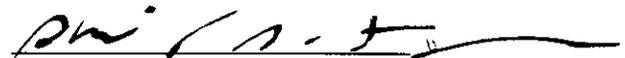
mobile and microwave spectrum, the risk of a protracted application freeze is too great to accept.

Finally, Union and CIPS believe that the FCC should not adopt interim construction requirements that differ from those currently applicable to private radio services. The current construction periods represent the perfect balance of being short enough to prevent speculation but long enough to allow all types of licensees to secure funding, order equipment and build new communications facilities. If the FCC shortens the existing construction window, it could make it more difficult for small businesses, municipal organizations and even entities like Union and CIPS to fulfill their construction obligations. Thus, the FCC should maintain the status quo.

### CONCLUSION

**WHEREFORE, THE PREMISES CONSIDERED,** Union and CIPS respectfully ask the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,



Shirley S. Fujimoto  
Kirk S. Burgee  
McDermott, Will & Emery  
600 13<sup>th</sup> Street, N.W.  
Washington, D.C. 20005

Attorneys for Union Electric  
Company d/b/a Ameren UE and  
Central Illinois Public Service  
Company d/b/a Ameren CIPS

Dated: August 2, 1999

## CERTIFICATE OF SERVICE

I, Christine S. Bisio, do hereby certify that on this 2<sup>nd</sup> day of August 1999, a copy of the foregoing "Comments of Union Electric Company d/b/a Ameren UE and Central Illinois Public Service Company d/b/a Ameren CIPS" was hand-delivered to each of the following:

Magalie R. Salas (Original and 4 Copies)  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, DC 20554

Ramona Melson  
Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

William E. Kennard, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-B201H  
Washington, D.C. 20554

Susan Ness, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-B115H  
Washington, D.C. 20554

Michael Powell, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-A204C  
Washington, D.C. 20554

Gloria Tristani, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-C302C  
Washington, D.C. 20554

Harold Furchtgott-Roth, Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-A302C  
Washington, D.C. 20554

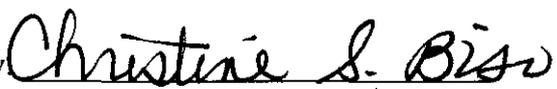
Thomas J. Sugrue  
Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
Room 3-C207  
Washington, D.C. 20554

Gary D. Michaels  
Auctions and Industry Analysis Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Kris Monteith  
Chief Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Robert S. Foosner \*\*  
Nextel Communications, Inc.  
2001 Edmund Halley Drive  
Reston, VA 20191

International Transcription Service  
445 12<sup>th</sup> Street, S.W.  
Room CY-B400  
Washington, D.C. 20554

By   
Christine S. Bisio

\*\* Via U.S. Mail