

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

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

RM-9332

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To: The Commission

**COMMENTS OF
SMALL BUSINESS IN TELECOMMUNICATIONS**

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SUMMARY

Small Business in Telecommunications respectfully urges the Commission to not auction the private radio channels for those reasons expressed herein, and SBT respectfully points out that the agency is not the public, that the public interest in effective spectrum management does not equate to the agency's desire to rid itself of "pesky" licensing duties, that the further privatizing of the radio spectrum is not necessarily a desirable goal, that further consolidation of the radio spectrum into fewer hands does not serve the ends of competition, and that the American public is entitled to the services of the agency itself – not the arbitrary language contained in a band manager's contract which evidences a lack of negotiating leverage on the part of the very persons who would make legitimate use of the radio spectrum. Accordingly, there exists no practical or reasonable basis for the auction of private spectrum and the Commission has provided no rational support for same.

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To: The Commission

**COMMENTS OF
SMALL BUSINESS IN TELECOMMUNICATIONS**

Small Business in Telecommunications (SBT) hereby comments to the Commission's proposals set forth in its Notice of Proposed Rule Making ("Notice") captioned above.

SBT Is An Interested Party

SBT represents hundreds of local operators, two-way shops, radio dealers, SMR operators, paging companies, community repeater operators and many other small, local businesses which rely on the Commission's equitable regulation of the spectrum to provide to each those channels necessary to offer commercial service and for design of systems on behalf of their extensive customer base. SBT estimates that the number of customers of commercial services provided by its membership is in the hundreds of thousands while its members also supply equipment to tens of thousands of private radio users. Accordingly, SBT is quite interested in the contents of the Notice

and the outcome of this proceeding, as the outcome may severely affect the methods by which each member performs business.

At the core of SBT's participation is the effort to preserve small business participation in the marketplace, including the reduction of barriers to market entrance and further reducing operators' costs in maintaining their ability to grow their systems. In the past, the Commission has taken a pro-consolidation of spectrum tact that has often reduced local operators' ability to expand systems' capacities via acquisition of additional channels. Freezes, auctions and extended implementation schedules for only the largest operators have severely limited the availability of channels required to continue the growth of local systems. SBT urges the Commission not to take such a course in this proceeding.

The Public Safety Issue

The Commission is correct in being concerned regarding its authority to auction spectrum which is employed to protect safety of life and property. Unfortunately, the answer sought in the Notice is not entirely clear since the Commission cannot directly apply the statutory language to its rules. The reasons for this are treated in the Notice.

As the Commission is aware, many Business and Industrial channels are, in fact, employed for the purpose of protection of safety of life and property. For example, Bethlehem Steel employs Industrial channels for operation of its many steel mills. The use of those channels is varied, including the coordination of personnel operating blast furnaces, which rely on that radio-aided

coordination in assuring that personnel are not put at severe risk. This use is obviously directed not only at plant operation, but safety of life. Such is the nature of private radio channel use.

At the core of the discussion is the question, is there a definable distinction between private radio use and public safety? The logical conclusion is, not at this time. There is no distinction which can be made when the present, actual use of the private radio spectrum is explored. A towing service may employ business channels for dispatch, but the core of its business is protecting the lives and property of its customers. A petroleum company produces energy related products, but its radios are employed for plant operations which are made safer for workers by the use of private radios. Or, a utility company is in the business of delivering electrical power, but a radio-aided person working on high power lines is at greater risk without the use of radio control and coordination. There is, therefore, no discernable distinction between private radio and public safety that can be supported once the agency takes into account the actual uses of the radios is the only logical litmus test for determining the issue.¹

Once this logical litmus test is applied to the statutory language, which would preclude the auction of spectrum employed for public safety purposes, it is apparent that the Commission's authority to auction private spectrum is highly limited. Congress made no distinction based on the

¹ "The Balanced Budget Act defines 'public safety radio services' to include private internal radio services used by ... non-government entities... [which] are not made commercially available to the public. The relevant legislative history states that 'public safety radio services' is much broader than the explicit definition ... contained in Section 337 of the Communications Act." Notice at paragraph 27.

Commission's historical separation by radio service, designating one group of channels as primarily "public safety" while reserving others as "industrial" channels. Therefore, Congress gives no clear green light to auction private channels. Indeed, the burden to demonstrate its authority is upon the Commission which must show that its use of auction authority (instead of the numerous other methods available under Section 309(j)) has been applied in a manner which will not violate the protections created by Congress regarding the use of radio spectrum for the protection of life and property. SBT avers that the Commission is not positioned to "mandate" how channels are presently used for the purpose of meeting this burden. Rather, the Commission is left only with the ability to recognize present use and apply its limited authority accordingly.

Therefore, the issue arises as to whether the Commission is, at present, prepared to resolve the mixed use of private channels (safety and business) by draconian designation based on traditional radio service designations. SBT believes that the Commission is not so positioned. At the very least, the marketplace will require considerable time and guidance to take the steps necessary to create this distinction in practice. SBT respectfully suggests that the Commission's statutory threshold might be met in the future by expanding the eligibility for use of public safety frequencies to include use by Business and Industrial eligibles which intend to employ spectrum primarily for public safety-type operations. By expanding eligibility and encouraging migration onto public safety channels, the Commission would protect sensitive uses of the radio spectrum by private users, provide a foundation for possible auction of private channels at a date following migration (assuming the remainder of Congress' requirements for use of auctions can be met) and fulfill any perceived

obligation which the agency deems to exist in accord with the Balanced Budget Acts of 1993 and 1997.

UTC and others have recommended the creation of an additional frequency pool to provide a safe haven from auctions for private users which employ land mobile operations devoted to the protection of life and/or property, but which users would not presently be deemed eligible for use of public safety spectrum. Assuming *arguendo* that any auction of private radio spectrum is appropriate (which it is not) the need to either create a separate pool or expand eligibility to use of public safety frequencies is entirely appropriate. Yet, SBT would only support creation of such a pool on the following bases: (i) as a necessary, preliminary step toward the Commission's achieving compliance with the Congressional limitations on use of auction authority to avoid employing competitive bidding procedures in licensing channels used for public safety uses; (ii) following a determination that the public interest, and not merely the agency's own efficiencies, might be served by auctioning private spectrum; (iii) that the pool would be available to all private radio users proposing use of spectrum for primarily safety related purposes; and (iv) that no alternative licensing methods which would avoid the creation of mutual exclusivity are reasonably available to the agency in lieu of auctions, including without limitation, the present licensing procedures.

SBT agrees that if such a pool were created, it must be solely to support non-commercial uses of the spectrum. It would be contrary to the underlying basis of the creation to allow persons to sell airtime for use of those channels. However, SBT again notes that the creation of such pool would

only be a result of what SBT deems to be a wholly unnecessary action by the Commission, to auction the private radio channels.

The Threshold Of Mutual Exclusivity

The spectrum at issue is "shared" spectrum that has long been free of the problems of mutual exclusivity. Unlike previous auctions, (e.g. SMR auctions, PCS auctions, etc.) authority to operate on the subject spectrum has been conditioned on the licensee's ability and willingness to share use of the spectrum with cochannel operators. Yet, the Commission is now considering auctioning that spectrum without revision of the underlying operational nature of that use. That is, the Commission has not created a means for obtaining exclusive use of that spectrum, a precursor to use of auction authority, yet it overleaps that threshold when it considers auctioning of those channels.²

As stated in numerous previous rule making proceedings, SBT avers that the intention of Congress in its creation of auction authority was to provide to the agency a valuable tool for the purpose of resolving mutual exclusivity.³ Yet, the Commission has continued to ignore the remedial nature of Congressional intent in creating auction authority and has, instead, created avenues for visiting mutual exclusivity on the licensing process for the specific purpose of employing auction

² Within its Notice at Paragraph 13, the Commission notes the unique configuration of private radio systems to serve the individual needs of its users. The Commission further notes that its traditional licensing methods do not create incidents of mutual exclusivity. Accordingly, mutual exclusivity would only be created via use of auction-based licensing.

³ "As noted above, the Balanced Budget Act of 1997 left unchanged the restriction that competitive bidding may only be used to resolve mutually exclusive applications." Notice at paragraph 19.

authority. The agency's motivations are abundantly clear, despite the oft-stated rhetoric. The agency is forwarding an agenda of administrative efficiency, giving such objective the highest priority – even higher than management of the radio spectrum in furtherance of the agency's duties.

One need only consider the simple question, "would mutual exclusivity exist without use of auction-based licensing?" to determine whether auction authority should, indeed, be employed. Stated another way, if (as appears quite clear in the legislative history) Congress intended that auctions be employed for the dual purpose of (i) resolving incidents of mutual exclusivity and (ii) returning value to the American public of the use of the radio spectrum, then the Commission's use of its authority, albeit limited, should be always remedial and secondarily for the purposes of raising revenues for the U.S. Treasury.

What then is the licensing problem in the form of mutual exclusivity which is to be remedied by the proposed use of auctions of the subject spectrum? The clear answer is that no problem of mutual exclusivity exists which must be remedied in the manner proposed. Only by the arbitrary creation of mutual exclusivity via the unbridled use of auctions would the Commission fabricate the statutory basis for its use of auctions in the licensing process for shared VHF and UHF private radio channels.

SBT urges the Commission to employ self-restraint in its march to auction wide-area systems on every conceivable channel in every EA throughout the Country. The intent of Congress in its creation and revision of the agency's authority does not evidence an intent by federal legislators to

fling open the door of the auction house, to sell wholesale the agency's licensing authority to commercial entities, and to add to the increasing consolidation of the lifespring of business growth for thousands of small, local operators.

The Notice at footnote 9 repeats the intent of Congress in its creation of Section 309(j)(6)(E), stating that "Congress intended the Commission to use tools that avoid mutual exclusivity 'when feasible and appropriate', *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 258-259 (1993) (emphasis added). The Commission has not shown that its application of auction authority in the future licensing of private radio channels would fulfill its obligation to avoid the creation of mutual exclusivity. Nor has the agency shown that forbearance in such use is neither feasible nor appropriate. Accordingly, the Commission has not shown in its Notice that use of auction authority is or would be within its limited authority granted by Congress.

Indeed, SBT argues that such use is neither feasible nor appropriate. Whereas in its previous uses of auction authority, the Commission justified its use by claiming efficiencies of licensing, support of emerging technologies, and the provision of greater operational flexibility to licensees, *See, e.g. First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995), no such claims can be made as justification for use of auctions to allocate private radio spectrum. The overlapping licensing of shared spectrum amidst a transition from traditional bandwidth to narrowing uses coupled with new trunked facilities and without a concurrent introduction of emerging technologies does not provide an equivalent backdrop of relevant factors which might be reemployed by the Commission to justify its actions. In sum, the

practical and licensing characteristics of the private radio channels is substantially different from what the Commission dealt with in employing its auction authority previously. Therefore, a new compelling justification would need to be created in support of any use of auction authority in the licensing of private radio spectrum.

SBT avers that no such justification exists and that no feasible use of auction authority can be shown to be a reasonable use of the authority granted by Congress. Indeed, the Notice itself queries the public about who might participate in any such auction and the purpose for which spectrum might be employed following an auction. That the agency itself is wholly unclear as to the uses and procedures which might result from any auction of private channels speaks volumes regarding whether such auctions could be made justifiable under the agency's limited authority.

The Application Of The Balanced Budget Act of 1993

Although SBT recognizes, like all others, the broad effect that this legislation had upon the regulation of radio spectrum, SBT must point out that the language relied upon by the Commission in its justification of previous auctions was sunsetted after one year. SBT urges the Commission to reread with greater specificity the language at Pub. L. No. 103-66, Title VI, Section 6002(a), 107 Stat. 312, 387 (1993), which stated that the Commission was to take those actions deemed necessary and feasible within one year of passage of that law. That year has long passed. In fact, one might reasonably argue that the recent budget surpluses enjoyed by the federal government have made moot the underlying reason for the creation of that law in the first instance. Yet, again commenters

are called to apply that law to the present and to determine whether application of the language therein is applicable to the agency's proposed actions.

The relevant portion of the Balanced Budget Act of 1993 was an attempt by Congress to direct the Commission to employ fundamental fairness as among similarly situated licensees, particularly those operators providing competing products or services, to remove arbitrary licensing techniques which unfairly penalized one type of operator compared to another. At the same time, Congress cautioned the agency that it was not bound to create a "one size fits all" mentality and its intent is clear within Section 309(j) in its recitation of numerous licensing methods to avoid the creation of mutual exclusivity. Therefore, a logical reading of the Balanced Budget Act of 1993 and the ensuing legislation codified within Section 309(j) would have the Commission employ equal licensing and operational parameters upon licensees when such leveling would create a necessary and feasible process resulting in a beneficial and efficient use of the radio spectrum.

Auction of private radio channels is, therefore, not warranted under a logical reading of the Balanced Budget Act of 1993 and Section 309(j). The licensees of private radio channels include airports, steel plants, distribution centers, utility companies, trucking companies, taxicab companies, and a host of small businesses seeking greater efficiencies in the use of radio. The typical private radio system employs fewer than fifty mobile units and operates over a highly limited geographic area, often no greater than a dozen acre plant. To attempt to equate these uses with those of large, regional systems employing wide blocks of channels to serve a varied and roaming public consumer is simply incorrect. To attempt to force a private user to participate in an auction to preserve future

use of spectrum for necessary growth is an imposition of administrative efficiency over economic and operational necessity. In sum, the use of auctions to license private radio spectrum is simply not within the intentions of Congress in the passage of the Balanced Budget Act of 1993. Instead, such use would have to be viewed as an attempt to employ an overbroad interpretation of that statute to equate and level two significantly different portions of the telecommunications marketplace in an effort to apply equal standards on two wholly dissimilar uses of the radio spectrum.

The Restriction Of Auction Authority To Initial Licenses

As problematic as this issue was in the auction of 800 MHz channels, this issue is even more difficult when one attempts to apply the intentions of Congress to the auction of private radio channels. In its defense of use of auction authority in licensing SMR channels, the Commission stated that auctions were justified for the purpose of creating a new, competitive service, which would be competitive with existing interconnected two-way services, such as cellular and PCS. Yet, nothing with the Notice suggests that the auction of private radio channels would be for any purpose related to augmenting an already competitive marketplace.

One is, therefore, left with the unanswered issue of whether the authorizations created by auction of private radio channels would result in the issuance of "initial licenses" as that term might be logically interpreted in accord with legislative history. This necessary duty to interpret the extent of the Commission's authority to employ auction authority only for the issuance of initial licenses is made more difficult when, as is evident in the Notice, the Commission has not articulated any new

service or use that might be made with auctioned spectrum. Instead, the Commission's suggestions do not include a revised plan for future use of the channels, but rather a process that extends existing use. If, then, no additional or new use is proposed by auction, are the licenses "initial" within the meaning of the statute? SBT urges the Commission to determine that mere extended uses of the private spectrum are not "initial licenses" as that term was intended to be interpreted by Congress.

SBT recognizes that the Commission has been provided some discretion by Congress for interpreting the language within Section 309(j) and for applying the agency's auction authority in a manner which comports with the intentions of the legislators.⁴ However, the Commission's authority is not without limits and is bound by a test of rationality in that application. To interpret the Commission's auction authority as sufficiently boundless to allow the agency to create "initial licenses" out of whole cloth for the singular purpose of promoting administrative efficiencies via auction of geographic-based licenses, stretches the limits of Congressional authority to the breaking point and eviscerates any intention that Congress had in limiting the use of auction authority as a remedy for mutual exclusivity, and which would not, otherwise, adversely affect the use of spectrum for public safety users. Instead of Congress' clear intentions demonstrated in statutory language which fully preserved alternative licensing methods, the agency would be ignoring all such alternative licensing methods in favor of a single method. The agency would be, in essence, declaring that auctions shall be used for all future licensing unless specifically precluded by Congress. This reading of Section 309 simply goes too far. This bias toward use of competitive

⁴ See, *Fresno Mobile Radio, Inc. et al. v FCC*, No. 97-1459 (D.C. Cir. 1999)

bidding procedures is not reflected in the Communications Act. Nor is the Commission's use of competitive bidding procedures to be assumed to be within the public interest.

The Commission, within its Notice, admits that this overly broad application of its authority would be in error. "Indeed, Section 309(j)(6)(E) made clear that the Commission was not relieved of its obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualification, service regulations and other means to avoid mutual exclusivity". Notice at paragraph 4. Therefore, when the public interest would be served, licensing procedures other than auction authority are to be employed to avoid mutual exclusivity. SBT states that the public interest would be served by employment of alternative licensing methods other than auction of the private radio channels.

Use of Auctions Will Not Serve The Public Interest

SBT recognizes the Commission's often difficult job in determining the best method of serving the public interest. However, in this instance the public interest appears quite clear. The public interest does not favor auction of private radio channels. To find otherwise is to make an unsupportable presumption that what is deemed good for the agency's operations is necessarily within the public interest.

Identifying the needs of the public must be viewed from a scope that focuses on the needs of consumers and workers throughout the whole of the American economy. It must be broader than a singular view toward administrative efficiency or consolidation of market efficiencies by a discreet

group of commercial operators. It must be seen as the net effect of all persons by changes in telecommunications regulation. When viewed in this appropriate context, the auction of private radio channels simply cannot withstand rational scrutiny.

At present, the radio landscape is thoroughly dotted with small, private operators of private systems. The Notice recognizes private operators' need for unique systems that are "highly customized . . . for the conduct of the licensee's underlying business." Notice at paragraph 31. A single plant in Tucson may employ a number of UHF channels for intra-plant operations, relying on the availability of additional channels for future growth. This plant would not, therefore, be well served if its expanding use of private radio spectrum were dependent on its participation in an auction to serve wide geographic areas. Nor would the plant be properly positioned to claim that it would meet construction guidelines which would require investment outside of its plant facilities. Therefore, to achieve even greater future efficiencies in plant operations via the use of radio devices, the plant would be forced to either overload its present channels or purchase commercial service.⁵

The purchasing of commercial service is simply not cost-efficient and will subject the plant to the operational characteristics of the commercial system. That is, commercial systems are not

⁵ The Commission's request for comments on the definition of "private internal radio services" is too restrictive in that it denies application of the definition if the mobile use would extend from real property owned or controlled by the licensee. Notice at paragraph 32. Although SBT would strongly urge that the definition be, at least, fully internal systems, i.e. in-plant operations, the overwhelming use of land mobile systems which are employed in a variety of manners, i.e. itinerant uses for construction projects, would suggest a broader definition that focuses on the use of the channel, rather than the specific location and ownership of property.

customized in design and application to meet the needs of individual users. Instead, commercial systems are designed to provide the most general application of signal and services. Accordingly, the plant would be required to pay airtime rates to a commercial provider which has not designed its systems to serve the individual needs of the plant operator. That this service would also not return the level of efficiencies to the plant that the plant originally enjoyed via the operation of its private system, designed specifically for the unique needs of the plant, is also certain. Therefore, the plant operator if forced would receive inferior service at greater cost.

The inefficiencies of dependency on commercial service by traditionally private operators will result in higher costs of operation, particularly in expanding plant operations. Those airtime charges will show up as increasing losses recorded on the bottom line, which must then be offset by either a reduction in employment or an increase in prices to consumer for the plant's products. Since the public interest would be best served via healthy employment and more competitive operations of plant facilities, the auction of private channels is directly contrary to the public interest.

SBT members also supply radios and systems to private radio users seeking to construct small systems (e.g. a base and five mobiles) to support limited operations that are authorized under the customer's license. A high percentage of many members' income is derived directly from this business. The likely outcome of the Commission's auctioning of private spectrum would chill the market for local operators who depend greatly on income from this activity. Some local operators would face financial ruin if this source of income were suddenly ended by regulatory fiat. This

practical, actual and unfortunate result of the Commission's auction of private radio spectrum must also be considered within this proceeding.

One must logically inquire, are alleged increases in administrative efficiency a sufficient justification for the ruination of local operators' businesses? Can the creation of streamlined methods of licensing be of greater importance than the economic viability of hundreds, likely thousands, of local businesses that rely on this income for their very survival? SBT avers strongly that the public interest is best served by maintaining the economic health of this vital industry segment and rejecting the proposal to auction private radio channels.

The Commission already removed much of local operators' growth potential via auction of 800 MHz channels, 900 MHz trunked channels, its intended auction of paging channels, and a host of other actions which, individually and in combination, have created barriers to market entry for entities designated under Section 309(j) and which have severely limited the future growth potential of local businesses. The effect of this disparate treatment has been offset in the Commission's continuing to make available private radio spectrum as a means of addressing the scarcity of spectrum for local operations. Local operators have responded to this remaining opportunity by exploiting the present and future potential of narrow band operations in sales of equipment to private licensees, construction of UHF trunked facilities, creation of shared used systems and community repeaters, and a number of other ventures which are designed to make maximum use of the traditionally private radio channels. The Commission could hope for no greater efficiency in the use of private radio channels and the delivery of services to the public than that which is being delivered

by zealous local operators. To chill this groundswell of activity which is making effective and intended use of the subject spectrum is not conducive to promotion of competition in the telecommunications marketplace or other directly affected areas of our nation's economy.

Licensing Methodologies

The Commission's proposals suggest that the auctioned spectrum would not be sold a channel at a time, based on mutually exclusive applications to use that channel in a given area. Instead, the agency is considering wholesale auctions to sell bands of channels to entities which the agency refers to as "band managers." This proposal is wholly unacceptable to SBT and its members for a number of reasons outlined below:

Underlying Intention Of Licensee Status: The Commission has long held that the underlying intent in acceptance of a license is to employ the license for the purpose of constructing and operating radio facilities. Yet, that intent is lost in the auction of channels to band managers for the purpose of managing the persons who would actually construct facilities under the terms of arms length contracts with the band manager. In essence, the Commission would be allowing persons to obtain at auction a license which does not carry the expectancy that the licensee, itself, would ever construct a single facility. Rather, the licensee would be merely a broker, selling the use of that license to serious operators who would invest in construction and operation of facilities. This form of sanctioned warehousing of spectrum runs contrary to the Commission's long-held policies against trafficking and warehousing of spectrum.

Competition For Use: Presently, the private radio channels are licensed on the basis of proposed use, need and a strict construction schedule. Yet, the Commission's proposed sale to a band manager would remove many of the in-place incentives for efficient use of the spectrum and would reduce the spectrum to a commodity, rather than a public resource. The Commission would sell the commodity wholesale to the band manager and the band manager would sell spectrum leases retail to local users. As a natural part of this licensing scheme, the band managers will have secondary auctions for spectrum that is desired by more than one operator. The ultimate effect of the licensing scheme will be a boon to band managers and an economic disaster for local users, particularly small users that lack the resources to pay high costs initially or pursuant to a secondary auction. In essence, control of the spectrum for the purposes of market entry or future growth would be limited to those entities with the deepest pockets or the best relationship with the band manager.⁶

Geographic Areas: At paragraph 62 of its Notice, the Commission seeks comments on the size of geographic areas to be auctioned. As further illustration of the unreasonableness of the Commission's proposed auction, the agency need consider the logical geographic size of plant operations and apply it to its request for comments. A large plant may extend over one square mile, while most are much smaller. So even applying the larger plant size, the optimum size for geographic licensing would be so small as to make geographic licensing impractical.

⁶ SBT notes that unlike the Commission, band managers will have no incentive to deal with small businesses. Rather, band managers will naturally seek to maximize the profit potential in their managing of the spectrum. Accordingly, the Commission's adoption of its band manager proposal will result in a violation of its duty to designated entities, to provide for participation and access to use of the radio spectrum to commence radio operations and to maintain a viable position in the marketplace.

This analysis by example is not without support in previous Commission action. Within its determination of the size to be employed for auction of paging channels, the Commission specifically looked at the typical uses and designs of existing paging systems. The agency applied an approach which relied on the present use of the spectrum to be auctioned. If an equal analysis were performed for auction of private radio channels, to reflect present use, the Commission would quickly discover that use of individual channels is most often limited to areas no greater than a single county, at most. Accordingly, SBT urges equal treatment in the agency's selection of geographic size of future licensing by auction of private radio channels.

The Actual Role Of Band Managers

If one properly looks at the intended functions and practices of band managers, there is only one logical conclusion: the Commission's proposal is not intended to sell spectrum or initial licenses as that term might be logically defined in accord with the Communications Act. What the Commission is proposing is sales of its licensing authority. The agency is attempting to sell the right to choose among applicants for the right to use the radio spectrum. All pretense aside, the Commission's use of band managers would, in effect, employ auctions for the purpose of privatizing the licensing process as it relates to the private radio channels. No other logical conclusion is possible.

Yet, the Communications Act makes it clear that all licensing authority resides exclusively within the Commission and nothing under Section 309(j) provides to the agency the right to sell at auction its exclusive duty to decide among applicants which may employ the radio spectrum. Given

the nature of the Commission's proposal, one may wonder whether the Commissioners' seats will be sold next so that private entities may be "licensed" to create rules. The Commission is urged to provide its legal justification for assigning by auction licensing authority to private entities and to provide its basis for proposing such a licensing method which is clearly contrary to its duties under the Communications Act. That this is the Commission's specific intent, to privatize the licensing function, is fully admitted in the Notice, see, paragraph 92. What the Commission has failed to demonstrate is any legal basis for this quantum leap over a half-century of law and precedent.

SBT and its members take no solace from the Commission's stated belief that competition among band managers will provide cost-effective avenues to future use of vital radio spectrum. The Commission has suggested no oversight into the possibility of profiteering by band managers to the exclusion of legitimate users which lack the resources to entice band managers to enter into negotiations. Nor has the Commission suggested how the agency will prevent consolidation of spectrum via large entities' potential purchase of band managers' authority throughout large regions, to create a monopoly clearing house of spectrum to which all licensees must go for service. The Commission has also failed to outline the nature or extent of and the terms which might be included in contracts with band managers, which terms will result in *de facto* rule making by band manager fiat. In sum, the Commission has unreasonably declared a reliance upon the good faith and competitive incentives among band managers, but has created no mechanism for assuring that its optimism is justified.

The agency's rush to rid itself of the administrative duties attendant to private radio licensing has blinded the agency to the needs of local operators and private radio licensees, whose dependence on accessibility to the radio spectrum is being fully threatened by the Commission's proposals. The Commission is tossing the baby out with the bath water and is drying the child's eyes with dollars gained in auction and saved in agency payroll. The Commission's cavalier approach to those essential needs of the class of regulatees that does not include the largest commercial carriers demonstrates an arrogance of purpose and design that belies any attempt to justify the proposals employing any public interest standard. In fact, the only standard being employed, again, is whether the Commission's actions will reduce its administrative burdens.

SBT respectfully points out that the agency is not the public, that the public interest in effective spectrum management does not equate to the agency's desire to rid itself of "pesky" licensing duties, that the further privatizing of the radio spectrum is not necessarily a desirable goal, that further consolidation of the radio spectrum into fewer hands does not serve the ends of competition, and that the American public is entitled to the services of the agency itself – not the arbitrary language contained in a band manager's contract which evidences a lack of negotiating leverage on the part of the very persons who would make legitimate use of the radio spectrum.

Auction Rules

SBT hesitates to comment on rules related to how an auction might be run to distribute bands of frequencies to wholesalers, although SBT can urge the Commission in the adoption of its auction rules to avoid, to the greatest extent possible, any unnecessary consolidation of the radio spectrum

for the sole purpose of spectrum warehousing. The following recommendations are, therefore, made:

(i) the "bands" to be auctioned should be no greater than five 12.5 kHz channels in size; (ii) the geographic area should be no greater than a county in size; (iii) the upfront payment should be no greater than five hundred dollars; (iv) the construction period should be no more than two years; (v) the auction should include a license-by-license stopping rule which would award the license to the highest bidder when no competing bid for that license is received for three rounds; (vi) small business entities should receive a 35% bidding credit; (vii) eligibility to participate in the auction should be limited to non-commercial business entities and small commercial entities with gross income of less than \$3 million per year, precluding large commercial carriers from participation to avoid additional concentration of spectrum in the limited hands of the largest entities; (viii) an additional bidding credit should be provided for entities which have not obtained spectrum via auction previously; and (ix) no frequency coordinating entity should be eligible to participate in the auction.

On reply, SBT may well suggest additional criteria for eligibility for participation in the auction to avoid the extreme harm that holding of such an auction would visit upon an unwilling private radio public. But in the first instance, the Commission should strictly limit participation to those persons who would most likely benefit via construction and operation upon the channels and not merely from brokering the use of the channels for profit. All steps should be taken to give the greatest advantage possible to private radio users and local operators. All avenues should be opened to invite and encourage participation by the smallest entities and new market entrants. And all auction rules necessary to avoid participation by speculators should be employed. In sum, if the

Commission is going to have a "going out of business sale" the rules should be adopted with such precision and care as to reduce, to the extent possible, the already horrendous harm that such an auction will have on the lives and businesses of millions of persons, customers, businesses, employees and designated entities which will be adversely affected by this dangerous change in licensing.

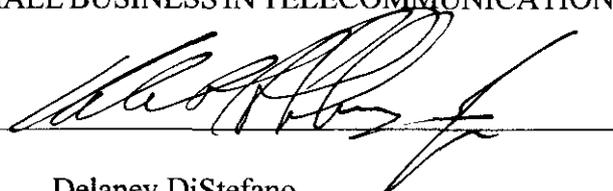
Conclusion

For the reasons stated above, SBT opposes the auction of private radio channels and urges the Commission in the strongest possible terms to reject its proposals to continue down this path which is fully contrary to the public interest and unsupported by law.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By



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