

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

**REPLY COMMENTS OF  
SMALL BUSINESS IN TELECOMMUNICATIONS**

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## SUMMARY

SBT hereby joins with the industry consensus in rejection of the Commission's proposals to employ competitive bidding authority for future licensing of the private radio spectrum. SBT opposes the creation of a third pool of channels which would be designated as auction exempt and, instead, avers that any and all use of competitive bidding authority is contrary to the agency's statutory authority; contrary to the actual use of private radio channels by millions of existing users; contrary to the Commission's obligations under the Regulatory Flexibility Act; and contrary to its obligations to keep to itself all duties related to the licensing and administration of the radio spectrum in accord with the Communications Act of 1934, as amended. Finally, SBT opposes any creation of that entity described as a "band manager" under the Commission's proposals as contrary to law and public policy.

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**REPLY COMMENTS OF  
SMALL BUSINESS IN TELECOMMUNICATIONS**

Small Business in Telecommunications (SBT) is a non-profit association of hundreds of independent businesses, whose members span the use of private radio for operation of private carrier systems, community repeaters, SMR, paging, and a host of other services. Its local shop owners provide radios for customers' design and operation of private internal radio systems and to provide shared radio service which is customized for the purpose of serving the unique needs of business and industrial radio users. As a commenter in this proceeding and other related proceedings, SBT offers its assistance to the Commission to consider the needs of small business and its owners and employees which depend on the agency to provide continued opportunities to compete in the telecommunications marketplace. SBT welcomes this further opportunity to reply to those comments submitted within the proceeding and compliments each entity and organization which filed comments in this proceeding for the purpose of assuring that the Commission is provided a clear view of the industry's position on these issues. Accordingly, SBT offers the following:

There is no doubt that the comments illustrate fully the lack of support of the Commission's proposed auction of private radio spectrum below and above 800 MHz. The comments stated repeatedly that each affected class of licensees would choose to not participate in auctions of spectrum due to the proposed methodology being either patently unworkable, contrary to the public interest, or simply not in the best interest of each commenting group of persons or industrial segment's use of the private radio spectrum. The extremely few supporters of auction which filed comments have simply not made their case.

In fact, were the agency to review carefully the comments received, the agency would find that the proposals contained within the NPRM are fully bereft of support from the industry. Only one commenting party supported the proposals as offered by the Commission, while over eighty commenting parties representing thousands of Commission licensees, opposed the proposals.<sup>1</sup> Simply stated, the industry consensus is clearly that the Commission should reject its proposals in favor of the present licensing methodologies.

### **A Clear Consensus Exists To Reject The Proposals**

That the industry is joined in the shared belief that the Commission's proposals are inappropriate for the licensing of private radio spectrum is without doubt. Although variations of rejection exists among commenting parties, only one party, Nextel, supported the Commission's proposal to auction private radio channels. Even those parties which support the creation of a third

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<sup>1</sup> Or opposed any use of auctions to license channels employed by that commenting party's industrial segment.

pool of frequencies which would be exempted as a “public safety services pool” have articulated their approach in terms which fully reject the Commission’s proposals, certainly in so much as the proposal might apply to any spectrum of interest to those commenting parties. In essence, each commenting party, save one, has stated that auctioning of private radio channels is an inappropriate licensing method.<sup>2</sup>

Certainly, the industry agrees that private internal systems should be exempted from auction, *e.g.* MRFAC states that such exemption should include all traditional industrial radio services such as Manufacturers, Forest Products, etc. MRFAC comments at 6, which make up the bulk of the channels proposed to be auctioned.<sup>3</sup> And commenting parties universally agree that all private internal radio systems are employed, in some capacity, to protect the safety of life and property.<sup>4</sup> As

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<sup>2</sup> MRFAC has attempted to distinguish between “true” private radio licensees and others for the application of some definition in determining which channels might be subject to auction and which may not. MRFAC comments at 3. Although SBT recognizes the valid attempt by MRFAC in asserting this distinction, it is unlikely that such a division could be made for the purposes of creating a licensing mechanism which would pass any test of arbitrariness. SBT joins with USMSS when it states, “[p]rivate carriers and community repeaters are easily distinguishable from commercial providers...Private carriers offer dispatch-type communications only for private internal users, while [commercial carriers] offer services to the public at large.” USMSS comments at 9.

<sup>3</sup> *See, also*, “[t]he proposed auction will result in the dramatic loss of spectrum for private internal use, which will adversely affect the private radio community, consumers, and the public in general.” Blooston, Mordkofsky, Jackson & Dickens (BMJ&D) comments at Summary; and, “Implementation of any drastic changes in licensing methodology for already allocated spectrum would have a devastating impact on existing users.” PCIA comments at 4.

<sup>4</sup> *See*, PCIA comments which note the safety uses of private radio systems by taxicab companies, computer chip manufacturers, pizza delivery services, etc. and the effect on licensees’ compliance with OSHA regulations. *Id.* at 6-18.

for what services are to be included in the definition of “private internal systems”, SBT agrees with the joint comments of ITA, CICS, TELFAC, and TLCC (Joint Commenters), which state:

The Joint Commenters emphasize that the Commission must include in its definition of “private internal radio services” private carriers and community repeaters – as well as, of course, private internal users. Private carriers and community repeaters promote a high level of spectrum efficiency by customizing a communications system to meet the individual needs of the private internal user, if that user does not wish to construct and operate their own internal system. . . . The availability of this system enables potential users to develop customized communication applications that otherwise would not be available and enhances employee safety, operational efficiency, and productivity while enabling the private internal user to avoid the expense of having to construct and operate its own communications system.

Joint Commenters comments at 10-11.

Additionally, SBT joins with The Private Internal Radio Service Coalition (PIRSC) in noting that the needs and development of small business concerns, like most private carriers and community repeater operators and their customers, would be adversely impacted by small business’ requirement to adhere to agency-mandated auction schedules, or the vague promise of arms-length negotiations with a somewhat undefined band manager. *See*, PIRSC comments at 9. The specific and unique needs of small business in its efforts to grow and maintain competitiveness in the field of communications or the provision of telecommunications equipment to local businesses requires greater flexibility and availability of private spectrum than would be provided under the Commission’s proposals if adopted.

SBT further agrees and supports the comments of the United States Small Business Administration (SBA) in its assessment of the NPRM.

The NPRM does not consider the effects of the proposed rules on small business, which may be seriously impacted by a decision to license private internal communications licenses by competitive bidding, nor does it discuss alternatives designed to minimize this impact. For these reasons, the NPRM and regulatory flexibility analysis do not satisfy the requirements of the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act (collectively "RFA"). (*citations omitted*).

SBA comments at 1-2. As correctly noted within SBA's comments, the Commission is under an obligation to seek alternatives which would lessen adverse impacts upon small business arising out of the enactment of rules. SBT can discern no method whereby the Commission can fulfill this obligation and also adopt its proposals, particularly in view of the numerous alternative licensing methods available under Title 47 which would not result in additional injury to small business.

SBT is also concerned about the effect on small two-way and paging operators which depend on the availability of shared spectrum for the growth of local operations. The proposals within the NPRM challenge this continued use of private radio spectrum. Yet, the NPRM lacks any motivating factor for bringing forth these proposals other than references to the Balanced Budget Act of 1997. Such references are insufficient as a justification for threatening the livelihood and future of thousands of small businesses across America. As stated by the North Texas Communications Council (NTCC) in its comments:

Through the use of a first-come, first-serve processing procedure, a frequency coordination system, licensing systems on a site-by-site basis, and limiting eligibility, the Part 90 land mobile services are the shining example of what Congress has now mandated by statute. By enabling users to obtain licenses for their actual operating areas, and permitting radio dealers to group small users together into common systems, the Part 90 land mobile service have become the most populous radio service, and the most successful.

NTCC comments at 3.<sup>5</sup> In sum, therefore, the present licensing system is not broken and is not requiring repair by adoption of the Commission's proposals. To the contrary, the present licensing methodologies are working well to provide services to small and local businesses throughout the Country in an efficient manner.

These sentiments are fully echoed and articulated in the comments of the Land Mobile Communications Council (LMCC) which observed, "[r]ather than focusing on competitive bidding and how best to overlay this licensing mechanism on the private land mobile frequencies, the LMCC believes that the Commission should devote its attention to avoiding mutually exclusive applications in the first place." LMCC comments at 12. SBT joins with LMCC and its host of represented organizations in requesting that the Commission expend its scarce resources in the more advisable goal of avoidance of those problems which might give rise to effecting remedies like competitive bidding procedures.

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<sup>5</sup> See, also, comments of Thomas C. Smith; Kay Communications, Inc.; On Site Communications; Barbara Wilson; Rees Communications; and Henry Radio, Inc.

Indeed, the USMSS, Inc., representing hundreds of independent Motorola service shops across the Country, has joined in the chorus of commenters which suggest redirecting the agency's efforts toward avoidance of mutual exclusivity prior to implementing any precipitous use of competitive bidding. "Before using competitive bidding as a licensing mechanism, the Commission must first consider ways to avoid mutual exclusivity." USMSS comments at 3. SBT agrees. SBT further supports USMSS' assessment that the bands below 470 MHz are so encumbered as to make geographic licensing overly cumbersome and without any resulting benefit in spectrum administration. USMSS comments at 10 (in response to Commission inquiry at paragraph 67 of the NPRM). And, SBT strongly agrees with USMSS in its objection to any frequency migration plan contemplated by the Commission for the purpose of accommodating geographic licensing. Such upheaval is contrary to the operation of existing businesses which would be adversely affected, and which businesses represent hundreds of thousands of licensees operating tens of millions of radio units. Instead, SBT urges the Commission to expeditiously find additional spectrum for private land mobile use to remedy the expected and predicted shortfall in available private spectrum, to accommodate the growth of U.S. industry.

It is clear, therefore, that all of the aforementioned commenting parties oppose the Commission's proposals to employ competitive bidding for allocation of private radio spectrum.<sup>6</sup> It is clear that the consensus opinion is that the Commission is not obligated under the Communications Act of 1934, as amended, to employ auction authority for such purposes. It is

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<sup>6</sup> *See, also*, comments of Motorola, Inc.; Cinergy Corporation; Trimble Navigation Limited; and Forest Industries Telecommunications which join in opposing the Commission's proposals.

beyond doubt that each of the cited commenting parties urges the Commission to continue to seek methods for avoiding mutual exclusivity and, thereby, eliminate the need or justification for any use of competitive bidding. SBT joins this overwhelming consensus in respectfully requesting rejection of the Commission's proposals to employ competitive bidding for allocation of private radio spectrum.

In an effort to be complete and even handed, however, SBT does point to the lone supporter of the Commission's proposals, Nextel Communications, Inc. and replies to those comments.

#### Reply To Supporting Comments

##### **Nextel Communications, Inc.**

Nextel stated that the present licensing processes for private spectrum has resulted in a "corporate welfare program" for the largest industrial entities.<sup>7</sup> Such reasoning offered by one of the largest recipients of allegedly "free" spectrum appears to be a case of selective amnesia. Nextel received much of its inventory of spectrum by and through the filing of applications that were unsupported by engineering, proper fees, or coordination.<sup>8</sup> Even in the era of "free" SMR spectrum which was obtained by the filing of an application to the Commission, Nextel found a way to receive grants which were less than "free." For Nextel to now chide others would be more understandable if the agency had taken the required steps to provide a remedy for Nextel's previous application

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<sup>7</sup> Nextel comments at summary.

<sup>8</sup> *See*, Application For Review to WTB's denial of Request For Special Relief filed by Brown and Schwaninger, FCC File No. CWD-27-24..

irregularities, yet, the Commission has not reached this issue. Nextel's further claim that only cellular radio providers have not been subjected to auction<sup>9</sup> conveniently forgets the primary source of Nextel's channels, the present licensing methods for private spectrum which were applied until recently to SMR channels.

Nextel equates industrial behemoths' use of the radio spectrum with those of small, local businesses. Somehow, Nextel equates the economic resources of a local towing company with that of Ford Motor Company.<sup>10</sup> SBT avers that such equations are simply without merit and should be discarded in this discussion as fully beyond the boundaries of reality. Nor do such discussions assist the agency in meeting its statutory obligations to avoid mistreatment of small business in accord with the dictates of the Regulatory Flexibility Act.<sup>11</sup> Nextel would have the agency ignore its obligations and, instead, enact rules which would be devastating for small business by lumping local concerns with multi-national corporations. The agency cannot feign myopia in its consideration of alternative regulatory vehicles to promote cost effective alternatives to forced commercial carriage.<sup>12</sup>

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<sup>9</sup> Nextel comments at footnote 19.

<sup>10</sup> Indeed, Ford Communications, Inc. commented within this proceeding and opposed the Commission's proposals as contrary to good spectrum management and as a threat to Ford's private internal systems.

<sup>11</sup> *See*, comments of U.S. Small Business Administration.

<sup>12</sup> Nextel's claim that there is some inherent evil in the use of community repeaters by local businesses with limited resources is bizarre. Nextel comments at footnote 9. First, it ignores the thousands upon thousands of licenses issued for single operator repeater facilities upon which small local businesses rely; and second, it discounts the cost-efficient use of spectrum by shared users, which the Commission has found to be beneficial to the public interest.

But even if the agency were to focus solely on the use of the radio spectrum by the largest private industrial concerns, the Commission would discover that such uses are beneficial to the economic well being of the whole of the Country. The public interest is served by the cost-effective manufacture and delivery of goods to the public. In-plant operations provide for efficient communications within industrial settings, fully customized for that private user's needs and which do not carry the monthly charge associated with commercial carriage. To state cavalierly, as Nextel does, that such operations result in an inefficient use of the radio spectrum,<sup>13</sup> reduces the Commission's vision to that of little more than a technician, examining transmitter throughput to the exclusion of the economic reality of the entire effect on industrial efficiency created by the present licensing methods. Spectrum is most efficiently employed when uses supported are creating an efficient end result, *i.e.* lower costs and higher efficiency in the safe delivery of goods and services. To fully discount this positive result from current licensing methods is to promote allegedly efficient transmitter uses to the detriment of all other economic realities. A public interest analysis requires something more than a narrow appreciation of alleged administrative efficiencies for the agency and transmitter efficiencies.

Nor should the Commission be impressed by Nextel's references to the Balanced Budget Act of 1997 ("1997 Act") and its obligations thereunder. What Nextel has conveniently failed to address is the violations of that same Act raised in Petitions For Reconsideration to the 800 MHz Auction,

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<sup>13</sup> In *Fresno Mobile Radio et al. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999) the Court rejected Nextel's contention that an entity which receives authority via auction has a greater incentive to construct radio facilities. This basis for use of competitive bidding, having been fully rejected by the Court, is deemed decided contrary to Nextel's tired assertions within its comments.

by which Nextel obtained over 90% of the EA licenses granted. Nextel's failure to reconcile its varying opinion regarding application of the 1997 Act fully demonstrates Nextel's self-serving agenda – that the agency may ignore the dictates of the 1997 Act as long as such violations result in a benefit to Nextel. No where in Nextel's comments does it request that the Commission apply the statutory directives of the 1997 Act to the earlier proceeding via a ruling upon the long-pending petitions for reconsideration.

However, to avoid invective and to assure that the debate regarding the merits of the Commission's proposals are seriously considered, the Commission must consider the actual language of the 1997 Act which suggests that competitive bidding, among other alternatives, might be employed for the purpose of resolving incidents of mutual exclusivity. Yet, mutual exclusivity does not exist in the licensing of shared spectrum. Such circumstances would only occur if an auction procedure is employed in conjunction with the creation of exclusivity rights for private radio operators.

The NPRM is strangely vague as to the rights of incumbent operators in the area of exclusive use. What are the rights of existing operators to be prior to and following an auction? The entire NPRM appears to be predicated on the existence of exclusivity in incumbents' use or the creation of such exclusivity by some unidentified means. Accordingly, a determination of existing licensees rights, including a methodology for obtaining exclusive use of spectrum, would be necessary prior to the Commission's employment of competitive bidding procedures for future licensing of private spectrum. This preliminary step would be required to give rise to the basis for use of competitive

bidding procedures. For without addressing first and fully the manner by which incumbent operators would achieve exclusivity, the Commission risks undermining the legal basis upon which any use of competitive bidding must be based. Absent this effort, the Commission is left with a mixed bag of faux exclusivity for auction “winners” allocated atop shared spectrum -- which is shared with other incumbents but not the auction “winner”? Neither the Commission nor Nextel have solved this conundrum and SBT seriously doubts that any solution will be forthcoming in this proceeding. Accordingly, the Commission has failed to address primary issues in its NPRM and Nextel’s claim that the 1997 Act gives rise to the agency’s use of auctions is simply without merit.

SBT will not engage in the same quotations of members of the Commission which Nextel has employed liberally to support its position. Nextel’s use of out-of-context quotations suggests that the Commission’s members, contrary to the spirit of the Administrative Procedures Act, have pre-judged this matter and are not interested in the comments submitted by the consensus of well-meaning participants which oppose the Commission’s proposals.

SBT opposes the Commission’s grant of Nextel’s requested waiver or, in this context, modification of rules to allow for an elimination of eligibility criteria for use of 800 MHz channels.<sup>14</sup> Such a change in the agency’s rules at this juncture is, at first, premature given the association with

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<sup>14</sup> SBT’s opposition is predicated on the Commission’s apparent effort to determine whether EA licensees require the requested relief to engage in relocation of incumbent 800 MHz licensees, *see, also*, Chadmoore Wireless Group, Inc. comments. SBT would be willing to support flexible rules which would provide equal relief to all licensees to employ intercategory sharing and other methods which would not create unintended benefits to an exclusive class of EA licensees and which would not eviscerate the licensing status which characterized the 800 MHz auction.

the 800 MHz relocation process which is subject to pending challenges in the form of petitions for reconsideration. Absent the agency's ruling on those petitions, there exists no basis for providing relief to Nextel which may be fully mooted by the outcome of those petitions. Secondly, the requested amendment would provide to Nextel an advantage which was not fully articulated prior to the holding of the auction. Had all potential bidders been made aware of this source of "trading stock" channels, the outcome of the 800 MHz auction and the identity of the participants would have been altered. SBT avers that many of its members did not participate in that auction specifically for the reason that those members did not possess lower 800 MHz channels for relocation of incumbent users and, upon reflection of the agency's rules, did not foresee any available use of I/LT channels for such purpose. For the agency to change the rules so soon after the conclusion of the auction and prior to the conclusion of the relocation period would smack of preferential treatment to a single operator which volunteered to be treated under the existing rules via its participation in that auction.

## **AMTA**

AMTA's comments are difficult to characterize as either supportive or not of the Commission's proposals articulated within the NPRM. What is clear is that AMTA supports use of competitive bidding procedures for the purpose of clearing some portion of the UHF spectrum to be employed for geographic licensing and forcing relocation of existing private radio users onto other spectrum for operation of wholly internal systems. Whether AMTA's proposal comports with or opposes the Commission's proposals in whole, in part, or at all is not fully clear. Yet, SBT opposes

AMTA's proposals as potentially an even greater upheaval of the existing use of the radio spectrum than that proposed within the Commission's NPRM.

Again, like Nextel, AMTA leans on visions of spectrally efficient uses by geographic licensees as compared to the present use of the spectrum by private entities. Again, like Nextel, AMTA proposes an alleged solution to a problem which simply does not exist or which, if found to exist, will eventually disappear over time due to constant advances in emerging technology and reduction in the availability of older equipment. AMTA's efforts to force technology via auction and relocation is, therefore, rejected as creating regulatory obsolescence to speed the way to its singular vision in reinventing the private radio spectrum.

Not included in AMTA's comments is any assistance in the controversy regarding the use of private radio spectrum for public safety uses which do not employ public safety designated channels in accord with the agency's reforming effort to divide the private spectrum into two distinct pools, industrial and public safety. AMTA admits that its members provide services for vital public safety uses, but does not appear to be bothered by any effort to auction spectrum which is employed for these purposes, contrary to the admonitions of Congress. SBT is not so inclined toward avoidance of this subject. Instead, SBT hereby states that there is no way to separate non-safety uses from safety uses in the employment of industrial radio spectrum.

Indeed, an arbitrary approach to this problem is contraproductive to meaningful discussion. When radios are employed in a plant setting, those devices serve a dual purpose: operational

efficiency and safety. Manufacturers and distribution entities necessarily employ radios for both purposes. For example, when Bethlehem Steel Corporation employs its radios to coordinate the use of blast furnaces, heavy rolling stock machinery, operation of shipping terminals, etc., the company is obviously employing the radios for both purposes. It would be naive to not credit the company with seeking to increase the efficient output of its enterprise via the use of private radio systems. It would also be incorrect to fail to note the safety to lives and property supported by the use of those same radios. Certainly blast furnace workers employing a private internal system would agree that the radios serve both purposes equally.

Therefore, the Commission's efforts to resolve via the licensing process this dual-purpose use of millions of radios is a hopeless effort. Instead, the Commission should simply admit the reality of the use of private radio systems and find that private spectrum is not subject to auction due to this dual use. To do otherwise would be to apply an arbitrary and capricious designation on the actual use of radio devices based on the channel upon which the device might operate, rather than how the radios are presently used. That AMTA does not choose to address this central issue demonstrates its plan's inability to address all of the practical and legal consequences involved.

As stated *supra*, a threshold consideration in the use of competitive bidding authority is the fact that the relevant spectrum is presently shared, thereby avoiding mutual exclusivity. AMTA recognizes that this condition exists and that the shared nature of the spectrum is only altered by

selective application of a single rule.<sup>15</sup> Yet, AMTA's comments do not address the effect that shared use has upon the Commission's proposals and whether this fact undermines the need or justification for use of competitive bidding.

SBT does agree, however, with one underlying facet of AMTA's comments. AMTA supports the growth of private carrier systems, as does SBT. SBT supports methods for earned exclusivity and promoting the natural growth of trunking technology throughout the marketplace which might be employed by either private carrier systems or internal systems to gain greater spectrum efficiencies in use and delivery of services to local business. What SBT does not support is the employment of competitive bidding, relocation and geographic licensing for the purpose of enforcing immediately this evolution. The means does not justify the ends.

SBT strongly opposes AMTA's support of the "band manager" concept. AMTA states that the band manager is analogous to the existing private carrier or SMR operator.<sup>16</sup> This is simply incorrect and underscores AMTA's naive approach to this issue. Whereas a private carrier or SMR operator is required to meet rigid construction requirements to make operational systems to serve the public, the band manager is not so disposed. Instead, the band manager will simply acquire spectrum and then decide who might construct and operate upon the channels. The band manager is required to construct nothing and serve no one excepting the U.S. Treasury in the payment of

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<sup>15</sup> AMTA comments at footnote 12 recognizes Section 90.187 as a method of earned exclusivity of a type.

<sup>16</sup> AMTA comments at para. 15.

auction receipts. The band manager is a broker, at best. It owns and risks nothing that is required to serve the public interest, convenience and necessity. It is subject only to the whims of its own desires in selling use of the channels to the highest bidder. It is, in essence, a licensing subagent of the Commission, with the ability to adopt rules and regulations for use of “its” spectrum. Therefore, it becomes a mini-FCC within the parameters of its fiefdom. SBT, therefore, strongly disagrees with AMTA’s analogy, and with the creation of a quasi-governmental licensing agent under the banner of administrative efficiency and consistent spectrum allocation, and because the creation of these entities will adversely affect the ability of small business to grow due its inability to compete with larger entities in attracting the band manager’s cooperation in small entities’ future use of the radio spectrum.

Instead, SBT joins with PCIA and MRFAC and others<sup>17</sup> in opposition to the use of band managers for which the agency has failed to identify specific duties and obligations in the distribution or partitioning of spectrum or, for that matter, the use of spectrum to provide services to the public. Such vague privatization of the Commission’s duties is without justification and is subject to horrendous abuses by any entity fulfilling such role. If the Commission is seeking greater privatization of its administrative duties in the licensing of private radio spectrum, the Commission may initiate a rule making proceeding specifically for that purpose, *e.g.* to expand the duties of

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<sup>17</sup> PCIA comments at 29-30. SBT further agrees with MRFAC in its statement that the creation of band managers, “represents an abdication of the Commission’s proper role in administering the public’s resource.” MRFAC comments at 11. *See, further*, Ray’s Radio Shop comments at 6-7; Western Communications, Inc. comments at 5.

frequency coordinators.<sup>18</sup> However, SBT does not believe that this issue should be taken up in the context of this proceeding since the discussion would necessarily be skewed by suggestions that a band manager is to be identified with the agency's auction proposals. Nor is SBT in support of the alternative band manager approaches articulated in USMSS's comments at 14 (Option 1 or Option 2) as suggested by ITA in Docket 99-158. Both options suggested by USMSS and ITA result in an unnecessary abdication of the Commission's duties and both options provide too much consolidation of control over future uses of the spectrum within a private entity.

#### Reply To NIMBY Comments

A number of the commenting parties appeared to be supportive of the Commission's use of competitive bidding methods, so long as the Commission did not auction spectrum of particular interest to the commenting party. These "Not In My Backyard or NIMBY" commenters are, perhaps, the most vexing. Attempting to straddle the fence in addressing the core issues presented within the NPRM, these commenting parties have provided little in basic guidance except a public pronouncement of each's self-interest in avoiding auctions, which comments are recognized below:

In contrast, one may note the comments of the Boeing Company, which first address the inappropriateness of competitive bidding methods for private radio spectrum, then address Boeing's specific needs and the interests of the Commission in devising a licensing methodology that may serve all parties equitably, not just Boeing. Similarly, Commonwealth Edison Company has stated generally that the Commission is not obligated to employ and should not employ auctions for the

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<sup>18</sup> See, comments of USMSS and PCIA.

allocation of private radio spectrum, regardless of any exemption to which ConEd might be entitled. Also, SCANA Corporation has commented in direct opposition to the Commission's proposals, despite its apparent qualification for exemption for much of its private radio usage, which opposition is echoed *en toto* within the comments of Entergy Services, Inc. and Union Electric Company. SBT lauds these commenters which have chosen to deal first with the overall use of the private radio spectrum, then have addressed their individual concerns in opposition to the Commission's proposals.<sup>19</sup>

Below 800 MHz:

IAFC/IMSA states that its members are public safety entities which wish to be protected from the Commission's use of competitive bidding procedures while being provided access to additional spectrum under application of 47 U.S.C. §337.

The American Automobile Association recommends creation of a separate pool of channels which would be exempt from competitive bidding, to be employed by "Public Safety Radio Services" for which channels AAA members would be eligible. Supporting the efforts of Auto Emergency, Railroad, Power and Petroleum eligibles, AAA asks that the agency create a safe backyard for these groups.<sup>20</sup>

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<sup>19</sup> *See, also*, comments of Wisconsin Public Service Corporation

<sup>20</sup> AAA states, "conceivably the Commission could auction portions of the Industrial/Business Pool...", comments at 7. AAA does not explain the basis for this general statement under the present state of the law, but does include its finding that any such effort by

ARINC argues in its comments that the Commission should not auction frequencies granted to it under Part 87 of the Commission's Rules, which comment appears to be outside the scope of this rule making. Secondly, ARINC states that Aviation Terminal Use channels authorized under Part 90 should also be exempt from auction; shared 800 and 900 MHz systems employed by aeronautical cooperatives should not be made a part of future auctions; and if the Commission creates a private pool for safety users, ARINC's channels should be included.

Central Station Alarm Association states that the Commission lacks authority from Congress to auction those 460 MHz channels allocated for CSEPA uses and that if the Commission creates a separate safety pool, its ten channels should be included in any auction exempt status the Commission might be offering.

Citizens Water Resources claims that water distribution should be included in any public safety pool to be created by the Commission, although CWR is somewhat vague as to what spectrum it requires for its vital purposes.

Hewlett-Packard Company seeks to protect from auction all 12.5 kHz channels employed for medical telemetry equipment, citing the safety of life promoted by operation of such devices.

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the Commission would not be possible for "any Public Safety Radio Services licensees," *Id.* which AAA would define, inexplicably, by an outdated reference to Radio Services.

The New York State Technology Enterprise Corporation “supports the Commission’s proposals to exempt both the 700 MHz band and the Public Safety Radio Pool” from allocation by competitive bidding. NYSTEC comments at 2. Further, if the Commission engages in auctions, NYSTEC wishes for public safety entities to be able to evoke 47 U.S.C. §337(c) to claim for their future use that spectrum. *Id* at 3.<sup>21</sup>

Above 800 MHz:

Radscan, Inc. seeks inclusion into any separate frequency pool to be created by the Commission its multiple address system (MAS) channels.

CellNet Data Systems, Inc. seeks to exempt its use (and future use) of multiple address channels under any theory the agency might choose; while Mark IV comments seek to exclude LMS channels employed for non-multilateral uses from the auction block, citing its contribution to ITS systems and the safety in vehicular operators’ use of the Nation’s highways.<sup>22</sup>

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<sup>21</sup> A review of the comments submitted by NYSTEC presents an interesting additional conundrum for the Commission. If the Commission employs auctions for allegedly unused spectrum, public safety commenters claim that the designation of that spectrum would be tantamount to a finding that the spectrum is unused and, therefore, subject to claim for public safety uses under Section 337(c) upon request. This situation would place the agency in the position of announcing an auction which would first be conditioned on claims by public safety entities for all channels to be auctioned in whatever location is deemed required by public safety entities based on presumably site-based applications. The end result would, then, be that the agency would not be producing geographic licensing to band managers, but rather effecting a redesignation of spectrum from one private radio pool to another on a case-by-case basis. *See, also*, APCO comments.

<sup>22</sup> *See, also*, comments of Amtech Systems Division of Intermecc Technologies Corp.

Mark IV's comments are echoed in the comments submitted by the United States Department of Transportation, which states that the Commission should avoid any auction of spectrum employed for deployment of Intelligent Traffic Systems (ITS) which assist in the decrease of air pollution, while providing safer use of the Country's highway systems.<sup>23</sup>

### **The CII Comments:**

Contained within the record are the numerous comments filed by entities supporting the efforts of the *ad hoc* group entitled the Critical Infrastructure Industries (CII), which is made up of UTC, API and AAR, which collectively claim to represent "the electric, water and gas utilities, natural gas pipelines, petroleum companies and railroads," CII comments at iii. CII and its supporters<sup>24</sup> claim that Congress has specifically exempted from auction any future licensing of frequencies employed in support of these critical industries. This coalition of radio users claim that

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<sup>23</sup> See, also, comments of The Peace Bridge; Wisconsin Department of Transportation; New Jersey Highway Authority; South Jersey Transportation Authority; Transportation Operations Coordinating Committee; New York State Thruway Authority; West Virginia Parkways; Maryland Transportation Authority; and MTA Bridges and Tunnels, all requesting exemption in the commenting parties future use of the 902-928 MHz band for ETTM systems.

<sup>24</sup> Additional supporters of the CII agenda which filed comments include Arizona Public Service Co.; Consumers Energy; Western Resources; Kansas City, Missouri Water Services Dept.; Clay Electric Co-op; Alliant Energy; San Francisco Public Utilities Commission; City of Lincoln Water System; Baltimore Gas and Electric Company; Minnesota Power, Inc.; The City of Sacramento, Department of Utilities; American Water Works Association; City of Calhoun, Georgia; American Electric Power Corporation; National Association of Water Companies; United Water New Jersey; North Marin Water District; Anchorage Water & Wastewater Utility; San Juan Water District; Columbus Water Works; United Water Idaho; East Bay Municipal Utility District; Central and South West Corp.; and Wisconsin Public Service Corp. What the Commission should additionally note is that *none* of these comments recommended auction of spectrum employed by other private radio users, except as in contrast to auction of spectrum to those entities represented by commenters. The industry consensus is, therefore, clearly opposed to use of competitive bidding for licensing of private radio spectrum.

the services provided by their represented members are so vital to the public interest in the provision of public service and safety that Congress intended that the Commission exempt from auction any use of competitive bidding for channels that should be specifically reserved to provide the American public with those goods and services offered by CII's members.

Insofar as CII opposes use of competitive bidding for future licensing of private spectrum, SBT strongly agrees. Insofar as the agency should raise the goods and services provided by CII members above those provided by other private radio operators, SBT disagrees.<sup>25</sup> SBT does not argue that the services provided by a utility or petroleum company are not vitally important. However, not included among those entities which would be protected from use of auctions are pharmaceutical manufacture and distribution companies, providers of food and transporters of agricultural products, hospital administrative services, colleges and universities, operators of roads and turnpikes,<sup>26</sup> and a myriad of other vital services which provide a host of necessary goods and services to the public to assure the quality and the safety of life.

As a further illustration of the uselessness of arguments which attempt to compete for protection from auction, SBT notes that the CII comments speak to the dangers inherent in working around oil and gas in the production and transportation of same. SBT avers that those workers' dangers are real and deserving of protection. Yet, so are the lives of persons working high steel

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<sup>25</sup> *See, also*, PCIA comments at 18-19, which argue against the creation of the pool as an inefficient use of spectrum which would not fully protect the "pool" licensees.

<sup>26</sup> *See*, comments of International Bridge, Tunnel and Turnpike Association

construction jobs, blast furnace operations, loading of barges and ships, and millions of other jobs which involve dangers that are reduced by coordination via the use of private radio.<sup>27</sup> Congress may have illustrated its intended exemption by specifically including railroads, utilities and pipelines,<sup>28</sup> but there is no suggestion that the classes of entities included by example within the conference report was intended to be exhaustive.<sup>29</sup>

SBT does not believe that the CII members would object to the Commission simply rejecting its proposals and maintaining the present licensing procedures. In fact, SBT is certain that any outcome which included an exemption for CII members' future use of private radio spectrum would be deemed acceptable by CII and its supporters. What SBT's comments herein are intended to demonstrate is that SBT supports CII's and supporting requests that Power, Railroad and Petroleum channels be exempt from auction. SBT supports all requests for exemptions, since SBT believes that the Commission's proposals are woefully flawed when applied to any and all uses of the private radio spectrum.

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<sup>27</sup> “*all* private wireless communications protect [sic] the safety of life, health and property of the public – and, as such, should be auction exempt.” USMSS comments at 5, and “*all* private wireless use of radio systems is directly related to the protection of the public.” ITA, CICS, TLCC, TELFAC joint comments at 9.

<sup>28</sup> *See*, House and Senate conf. rep. 97 BBA.

<sup>29</sup> “The actual language exempting spectrum used by non-governmental entities for protection of life, health or property and not made commercially available to the public covers a wide variety of Part 90 licensees. The list of non-auctionable services is therefore not exhaustive [sic].” PCIA comments at 6. *See, also*, comments of Intek Global Corp. at 3, “although Congress titled its exemption ‘public safety radio services,’ it intended the exemption to apply broadly to both public safety and private wireless services.” *Id.*

SBT does not support a “three pool approach” as suggested within the CII comments.<sup>30</sup> SBT supports the present two pool approach, with both pools being exempted from auction – the public safety pool because the FCC lacks all statutory authority and the Business/Industrial Pool because the FCC lacks sufficient statutory authority.<sup>31</sup>

SBT does not support any licensing mechanism which arises moreover from effective lobbying of Congress for inclusion of protective language within a conference report,<sup>32</sup> rather than licensing processes which recognize the benefit to the Country and its citizens from all private providers of goods and services. SBT does not support any commenter’s position which claims that the lives and output of its workers are at greater risk or are more valuable than other persons. The lives of all workers are important. The safety of all persons who rely on radio communications in the performance of their duties is vitally important. To classify workers eligible for the agency’s protection based on industry segments is arbitrary, capricious and, frankly, at odds with equal protection under law. SBT respectfully requests that the agency provide equal protection to all workers in all industries without regarding to whether that worker labors along a petroleum pipeline or in a mine or in a factory or on a farm. In fact, SBT will include in the list of dangerous

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<sup>30</sup> SBT’s objection to the creation of a third pool is shared by nearly all non-CII commenters, *e.g.* USMSS comments at 7-8.

<sup>31</sup> Supporters of a “three pool” approach consistently claim that their use of private channels must be included in the third, exempted pool. This dash from the Commission’s proposals reminds one of the old joke which punch line is, “I don’t have to be faster than the bear. I just have to be faster than you.”

<sup>32</sup> SBT compliments those entities which have caused Congress to recognize its responsibility to private radio operators insofar as those entities recognize that the result should be shared by all private entities.

professions, local radio shop operators which climb towers to install antenna equipment and, therefore, SBT asks that the Commission recognize the lives and safety of its members in its future actions. SBT believes that the safety of the property and equipment and lives of its members is fully worthy of the agency's consideration in this proceeding.<sup>33</sup>

The above comment illustrates the specious nature of the dialogue arising from the NPRM which suggests that individual market segments must explain how the lives of its workers might be entitled to exemption based those workers' contribution to the vital infrastructure of the Country. That this issue has been presented for comment is incredible in creating a potential basis for arbitrary selection. That certain commenting parties have fallen into this rhetorical abyss is frightening.

In sum, SBT opposes all uses of competitive bidding for licensing of existing private radio spectrum employing overlay authority to be distributed among band managers for doling out via for-profit arrangements. SBT chooses to recognize the contributions to the Nation's infrastructure of all businesses and avers that each is necessary and vital to the welfare of the American economy and the public interest. And SBT strongly avers that all workers in all professions are entitled to protection in the future use of private radio to promote the safety of life and property in each enterprise; and that the interest of workers' safety should not be arbitrarily decided by the creation of a pool of protected persons, outside of which workers are somehow deemed expendable, even if only by implication.

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<sup>33</sup> *See, also*, the description of those uses of radios articulated by Lubrizol Corporation in its comments.

## **Competitive Bidding May Only Be Employed**

### **For Issuance Of A License Or Construction Permit**

As SBT stated in its original comments, the Commission's proposed use of competitive bidding as among entities which would be "band managers" (as that term is loosely defined in the NPRM) is highly problematic, both in legal theory and practical application. In attempting to define what rights would be attendant to being awarded the title of band manager pursuant to auction, SBT has further explored the Commission's statutory authority to consider employing these newly-created entities.

Section 309 (j) of the Communications Act of 1934 grants the Commission the authority to engage in competitive bidding procedures where, "mutually exclusive applications are accepted for any *initial license or construction permit...*" 47 U.S.C. §309(j)(1) (Emphasis added). The terms *initial license* and *construction permit* presuppose the construction and operation of a radio station or device which would be employed for the purpose of transmitting and receiving messages via radio. Yet, the Commission's proposals for those actions to be taken by a band manager do not include any obligation that the band manager construct or operate even a single radio facility.

Under 47 U.S.C. §151, the Commission is charged with the duty to "to make available . . . radio communication service with adequate facilities . . ." (emphasis added) yet, the Commission's proposals guarantees neither communications service nor facilities from the band manager. Under 47 U.S.C. §153(42) a station license is defined as an authorization, "for the use or operation of apparatus for transmission of energy, or communications, or signals by radio by whatever name the

instrument may be designated by the Commission.” Again, the statutory language states that the issuance of authorization shall be for the specific intent of operating apparatus. Yet, the Commission’s description of the band manager’s duties do not include the operation of apparatus by the band manager and do not guarantee or require that communications services be produced by the operation of any radio station. Under 47 U.S.C. §153(12), the definition of construction permit includes authorization for the construction or installation of apparatus. And, finally, 47 U.S.C. §153(24) states that a “licensee” is the holder of a radio station license. In each instance, therefore, the Act states that a license and the holding of a license presupposes the holder’s construction and operation of apparatus to perform communications services. No such presumption underlies a band manager’s authority.

This exploration of the exact nature of a band manager’s authority is significant in determining both the agency’s authority to employ competitive bidding procedures and the duties which might be attendant to being a band manager. If, as it appears under the specific language of Title 47, the band manager would not receive a “license” or a “construction permit” as those terms are defined under the Act, then the agency does not have authority to engage in competitive bidding methods for distribution of this new kind of authority.

The above discussion, thus, begs the question as to the nature of that authority which is then proposed to be auctioned. SBT avers that the authority which the Commission proposes to sell is, in fact, licensing authority. Under the Commission’s proposals, the band manager would have all actual and apparent authority to choose among “applicants” for the future use of the bands auctioned

and later controlled by the band manager. Applicants' use of the bands would then be subject to the Commission's rules *and* those terms dictated by the band manager pursuant to private contracts, which terms could discriminate among applicants. Accordingly, band managers would not only be imbued with licensing authority via success in a Commission auction, but also would received *de facto* authority to engage in the creation of "rules" which would take the form of private contract terms.<sup>34</sup> These rules would not be subject to due process protections or the dictates of the Administrative Procedures Act, but rather would be determined by the band manager's understandable desire to maximize the profit-making potential of its coordination of the spectrum under its control.

SBT distinguishes among that authority arising out of partitioning and disaggregation rights provided to some wide-area licensees; and those rights attendant to performing as a band manager. The rights arising out of acceptance of a "radio license" which requires the licensee to construct and operate apparatus for the purpose of providing communications services, either alone or in concert with third parties, is likely within the Commission's authority. For those previously auctioned/licensed uses, the Commission has carefully defined the obligation to provide services on the spectrum auctioned, including the setting forth of specific timetables to assure construction of radio facilities as a condition subsequent to continued licensing. That such timetables might be met via private contractual relationships which include partition or disaggregation does not necessarily

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<sup>34</sup> It is without doubt that the contract terms would need to comport with the agency's rules, as well. However, it takes little or no imagination for one to contemplate *de facto* rules which would not violate the specific language of the agency's rules, but which would include many new and potentially discriminatory terms.

remove the basic nature of the authorization as a “radio license” as that term is defined under the Act, and are regulated in conformity with the Commission’s traditional approach regarding assignments of authority. But no such requirements would exist and no such construction/operation rules are proposed within the NPRM for band managers. Absent these specific requirements associated with accepting that authority proposed for band managers, SBT avers that no “station license” or “construction permit” would be granted to a band manager and, therefore, the Commission is without statutory authority to create such an entity.

SBT cannot find any authority granted by Congress to the agency which would allow the Commission to delegate or sell its licensing and rule making authority. To the contrary, the Act gives the agency exclusive jurisdiction over such matters and would preclude any delegation, much less sale, of the agency’s obligation to perform these vital regulatory functions. This is true because only the agency is able and bound to provide necessary protections under due process of law in a non-discriminatory manner to those persons who would construct and operate apparatus for the provision of communications services. A band manager would not be so bound and would not be positioned to provide such necessary Constitutional protections.<sup>35</sup>

The Act further states that the rules permitting the use of competitive bidding shall not, “be construed to convey any rights ... that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection” 47 U.S.C. 309(j)(6)(D). This language

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<sup>35</sup>See, MRFAC comments at 11; Ray’s Radio Shop comments at 6-7; and Western Communications, Inc. comments at 5.

precludes the Commission's use of competitive bidding for the purpose of issuing authorizations that do not accompany the same requirements as the licenses previously issued in that service. As the Commission is fully aware, private radio licenses carry with them an obligation to construct and operate a radio station in accord with the technical parameters of the license. Band managers would receive authority to withhold from all others the use of radio spectrum and the right to engage in such protective activity without the concurrent obligation to construct and operate facilities. Accordingly, SBT respectfully suggests that the authority which would be granted to band managers is contrary to the limitation on the Commission's authority contained at 47 U.S.C. §309(j)(6)(D).

Finally, Section 309(j) is replete with references to the Commission's duty to employ competitive bidding authority to serve the public interest. The Commission has long held that the warehousing of radio spectrum is not in the public interest. The public interest lies in the provision of radio service, not the ability to preclude or discriminate among others in providing that service. Absent any construction or operation requirement, the authority the Commission seeks to auction will allow a successful bidder to cause valuable portions of the radio spectrum to lie fallow. Since the Commission has not proposed or articulated how the public might be served, and certainly has not assured that the public would be served, in the issuance of authority to band managers, SBT is unable to find that necessary statutory authority which would allow the Commission to employ competitive bidding authority for the purpose of creating band managers.

## Competitive Bidding Authority

As among those commenting parties which dealt with the Commission's authority to employ competitive bidding, following the enactment of the 1997 Act, without regard to those exemptions claimed by numerous parties, only two commenters stated that the agency did have such authority.<sup>36</sup> The remaining commenters, representing over 30 commenting parties which represented via associations and consortia, thousands of radio operators, stated that the Commission did not possess such authority.

SBT agrees with those commenters which found that the Commission is obligated to first employ other methods for resolving mutual exclusivity, which methods are articulated under 47 U.S.C. §309(j)(6)(E), prior to employing its authority under Section 309(j) for the use of competitive bidding. This threshold requirement has been identified by the many commenters as being essential to the agency's proposed use of competitive bidding.<sup>37</sup> For example, Motorola stated in its comments, "[Motorola] believes that the totality of the FCC's spectrum management responsibilities compels it to continue relying on engineering techniques, entry criteria, and service rule provisions." Motorola comments at 3. NTCC stated, "the Commission must first seek to avoid mutual exclusivity, as required by Section 309(j)(6)(E), then decide whether applications are auctionable if mutual exclusivity cannot be avoided, and then design an auction methodology." NTCC comments

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<sup>36</sup> See, comments of Nextel and AMTA.

<sup>37</sup> See, *e.g.* comments of PCIA, Joint Commenters, MRFAC, FIT, Cinergy Corporation, Boeing Corporation, Ray's Radio Shop, NTCC, Motorola, and USMSS.

at 4. Each of the dissenting comments arguing against use of competitive bidding stated a similar concern, that the auction of private spectrum in the manner proposed “will artificially create mutual exclusivity when it does not normally exist,” BMJ&D comments at 5, despite the fact that the Commission has the “resources and ability to make sure that no mutually exclusive applications are accepted by the Commission.” Western Communications comments at 2. And many of the objecting commenters pointed to the Conference Report to the 1997 Act, which report expressed concern that the agency would interpret too broadly its auction authority in a manner which would ignore its obligations under Section 309(j)(6)(E), *See, e.g.* PIRSC comments at 7 and BMJ&D at 6.<sup>38</sup> Also telling is the issue raised by Cinergy Corporation in its comments. “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. *Id.* at 4.

Perhaps the best summation for the myriad of dissenting comments on this issue was expressed in the comments submitted by the Boeing Company which states simply, “[t]he Commission should not attempt to manipulate its private wireless licensing process in a manner that fabricates the increased occurrence of mutual exclusivity simply as a pretext to pursue auctions.” *Id.* at 4. SBT most strongly agrees.

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<sup>38</sup> BMJ&D correctly point out the relevance of *DIRECTV v FCC*, 110 F.3d 816 (D.C. Cir. 1997), in which the court held that despite the possible existence of licensing methodologies which the agency might deem outmoded, the agency, nonetheless was still bound by those obligations under Section 309(j)(6)(E), to discern alternative methods to avoid mutual exclusivity among applications in creating new licensing procedures. *Id.* at 828.

SBT agrees with those commenters which have noted that the Commission's use of auctions to create mutual exclusivity is illegal bootstrapping which has been wholly discouraged by Congress. SBT agrees with those numerous commenters which have noted that the agency's authority to employ auctions is intended as a remedy for mutual exclusivity and that use of bidding authority should not form the administrative difficulties for which the remedy was designed. And SBT joins with the vast majority of commenters in stating without doubt, the agency simply lacks the statutory authority to employ competitive bidding processes for the licensing of private radio spectrum among all applicants and licensees.

### **Conclusion**

The Commission must see that there is an overwhelming consensus against use of competitive bidding for licensing of private radio spectrum; against use of band managers as the authorized agents of this proposed change in licensing methods; and against the catastrophic changes that adoption of the Commission's proposals would visit upon a successful, thriving industrial community. SBT agrees with those commenters who have pointed up the extreme injury to small business which would be a result of adoption of the Commission's proposals and reiterates the Commission's obligations to seek alternatives to avoid the creation of such injury which is required under the Regulatory Flexibility Act. Finally, SBT respectfully urges the Commission to heed the collective voices of the consensus and reject its proposals.

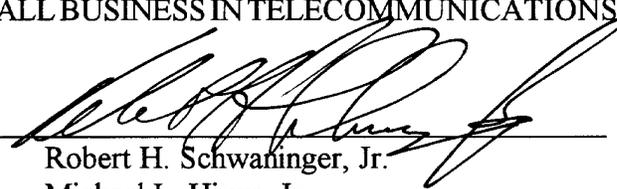
In conclusion, SBT lauds those commenting parties which have opposed the use of competitive bidding processes for licensing of private radio channels. Each dissenting commenter

has demonstrated a fidelity to the integrity of the Commission's processes and the admonitions of Congress in reaching their opinion. But, also, each dissenting commenter noted that adoption of the Commission's proposals would be devastating to the future of small business, industry, and the American public. To those commenters, SBT expresses its thanks and congratulations for having demonstrated courage which exceeded self-interest alone and looked to preserving the safety of lives and property for all in the orderly use of private radio spectrum.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By



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