

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**Joint Reply Comments of the Industrial Telecommunications Association, Inc.,
the Council of Independent Communications Suppliers, The Taxicab & Livery
Communications Council, and the Telephone Maintenance Frequency Advisory
Committee**

On March 25, 1999, the Commission released a *Notice of Proposed Rule Making* proposing to implement the Balanced Budget Act of 1997.¹ On August 2, 1999, the Industrial Telecommunications Association, Inc. (ITA), the Council of Independent Communications Suppliers (CICS), the Taxicab & Livery Communications Council (TLCC), and the Telephone Maintenance Frequency Advisory Committee (TELFAC) (collectively, "Joint Commenters") and over 100 other interested parties filed comments. Now, the Joint Commenters submit these "Reply Comments" in order to further clarify their views to the Commission.

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

I. Background

In this proceeding, the Commission proposes to implement Sections 309(j) and 337 of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997 (BBA).² The BBA expanded the Commission's auction authority for the wireless telecommunications services and the Commission sought comment on how best to modify its rules and policies in order to implement this expanded authority. The Commission also sought comment on the scope of the BBA's exemption from competitive bidding for "public safety radio services" and which services are potentially auctionable.

II. Reply Comments

A. Section 309(j)(6)(E) obligations.

As part of this proceeding, the Commission sought comment on how it should weigh its Section 309(j)(6)(E) obligations against the public interest factors of Section 309(j)(3). Nextel Communications, Inc. (Nextel) argues that "the 1997 Budget Act requires the Commission to assign *all* non-public safety licenses . . . via competitive bidding."³ Simply stated, this is an incorrect interpretation of the BBA. Congress had the opportunity to specifically direct the Commission to assign all non-public safety licenses via competitive bidding; it did not do so. Rather, Congress provided the Commission with auctions as a tool to *resolve* mutual exclusivity – not to *create* it. To use Nextel's own words, "the Commission's interpretative obligations begin with the

² See The Balanced Budget Act of 1997, Pub. L. No. 105-33, Title III, Stat. 251 (1997) (BBA).

³ See Comments of Nextel Communications, Inc. at 3 and 8 ("Pursuant to Section 309(j), as amended by the Budget Act, applications for all spectrum licenses are subject to competitive bidding unless they are for public safety services.").

statute itself.”⁴ As elucidated by virtually all of the commenters to this proceeding, Congress made the statutory analysis simple by instructing the Commission that compliance with its Section 309(j)(6)(E) obligations are a condition precedent for the use of competitive bidding.

As amended by the BBA, Section 309(j)(1) now states that:

*If consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding . . .*⁵

As the Joint Commenters (and the vast majority of the commenters to this proceeding) pointed out – Congress’ intent is very clear. The Commission has expanded auction authority – *but only so long as* the proposed action is consistent with the provisions of Section 309(j)(6)(E). Section 309(j)(6)(E) provides that the Commission must “continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity.”⁶ In sum, before using competitive bidding as a licensing mechanism, the Commission *must* first consider ways to avoid mutual exclusivity.⁷

Virtually all of the commenters, including the Joint Commenters, urged the Commission not to artificially “create” mutual exclusivity in order to justify auctioning

⁴ Comments of Nextel Communications, Inc. at 8, n.24.

⁵ See 47 U.S.C. § 309(j)(1) (emphasis added).

⁶ 47 U.S.C. § 309(j)(6)(E)

⁷ See Comments of Association of American Railroads (AAR) at 8 (“the Commission’s first obligation under Section 309(j)(1) is to use all appropriate methods to avoid mutual exclusivity”); Comments of MRFAC, Inc. at 7 (“it is the Commission’s obligation to avoid creating mutual exclusivity where none need exist . . .”); Comments of the Small Business in Telecommunications (SBT) at 8 (“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.”) ; see also Comments of Motorola, Inc. at 4-8; Comments of the Personal Communications Industry Association (PCIA) at 5; and Comments of the Private Internal Radio Service Coalition (PIRS Coalition) at 7-9.

private wireless spectrum.⁸ Boeing, in its comments, beautifully summarized this industry's position when it stated that "[t]he Commission should . . . not attempt to manipulate its private wireless licensing processes in a manner that fabricates the increased occurrence of mutual exclusivity as a pretext to pursue auctions."⁹

B. Mutual exclusivity does not exist in private wireless spectrum.

The Commission currently has in place an ideal licensing mechanism to avoid mutual exclusivity in the private wireless bands. As noted by many commenters, the private wireless community has successfully avoided mutual exclusivity for over a decade through the use of frequency advisory committees.¹⁰ Under the current licensing procedures, private wireless licensees, when licensed on a site-by-site basis and properly coordinated, do not generate mutually exclusive applications. Rather, the frequency advisory committees "coordinate around" existing licensees. If multiple applications for the same frequencies were received by a frequency advisory committee, the first application received is the first application processed. The result – no mutual exclusivity. The Joint Commenters reiterate that, since there is no mutual

⁸ Comments of Amtech at 6-7; Comments of AAR at 7; Comments of Blooston, Mordkofsky, Jackson & Dickens at 5-10; Comments of Forest Industries Telecommunications at 3-4; Comments of Kenwood Communication Corp. (Kenwood) at 2-3; Comments of MRFAC, Inc. at 6-7; Comments of Motorola, Inc. at 7; Comments of the PCIA at 4; Comments of the PIRS Coalition at 3-8; Comments of the U.S. Small Business Administration at 2-3; Comments of SBT at 6-9; Comments of the United Telecom Council (UTC) at 5-8; Comments of USMSS, Inc. at 2-4.

⁹ See Comments of The Boeing Company (Boeing) at 5.

¹⁰ See Comments of the American Automobile Association at 6 ("the existing system has worked well for private radio licensees generally, enabling widespread and efficient use of shared channels by many different users without interference."); Comments of Kenwood at 3 ("The use of private sector coordinators . . . is nonetheless overall quite good as a means of avoiding mutual exclusivity."); Comments of PCIA at 2-3 ("The Part 90 land mobile services . . . have successfully avoided having mutually exclusive applications for decades.")

exclusivity in the private wireless bands, there is absolutely no need to consider auctions as a licensing mechanism for private wireless spectrum.¹¹

C. Band Managers.

The Commission sought comment on whether or not it should create a new class of licensee – the band manager – who would bid at auction, and if it won the licenses, provide the spectrum for use by the private wireless industry. The Commission has raised the specter of “band managers” in several proceedings thus far. Each time, the Commission seeks comment on how the concept of a band manager fits within the confines of the Commission’s spectrum management responsibilities. As expected, this concept has proven somewhat controversial within the private wireless industry. Several commenters objected to band manager concept arguing that it would be an abdication of the Commission’s spectrum management responsibilities and urging the Commission to abandon this approach.¹² Others argued that a “so-called” band manager, at best, could be a frequency advisory committee with some new or additional responsibilities for administering the spectrum.¹³

Existing Spectrum. As explained in our comments, the Joint Commenters vehemently object to any attempt on the part of the Commission to “create” a new class of licensee – the band manager – in order to “force” auctions as a licensing mechanism

¹¹ While we do not believe that the private wireless industry is subject to auctions under Section 309(j)(1) since mutual exclusivity does not exist in the private wireless bands, we reiterate that it is the Joint Commenter’s position that *all* private wireless entities are nonetheless auction exempt pursuant to Section 309(j)(2). See Joint Comments of the Industrial Telecommunications Association, Inc., the Council of Independent Communications Suppliers, the Taxicab & Livery Communications Council, and the Telephone Maintenance Frequency Advisory Committee at 7-10.

¹² See Comments of Boeing at 11; Comments of Kenwood at 6; Comments of PIRS Coalition at 18.

¹³ See Comments of MRFAC, Inc. at 12 (“MRFAC does not oppose allowing frequency coordinators to act as clearinghouses in facilitating the partitioning and disaggregation of spectrum.”); Comments of UTC at 41-42 (“the authorized frequency coordinators could cooperate to sublicense the spectrum, resolve interference complaints . . . and promote spectrum efficiency.”).

upon the private wireless industry. We believe that the current licensing procedures and processes in place for existing spectrum – *i.e.*, the use of the frequency advisory committees – have worked extremely well for the past decade. We see no reason to modify these processes at this juncture nor do we believe that any proposed modification would be consistent with the statutory directives contained within the BBA. We do, however, agree with those commenters that suggested that the Commission might relieve itself of some administrative functions by providing the frequency advisory committees with new or additional responsibilities. These new or additional responsibilities could include collecting regulatory fees, reviewing applications, ensuring data accuracy, completing coordinations, verifying construction, and issuing call signs/licenses.

New Spectrum. Likewise, if the Commission were to allocate new spectrum for private wireless use, the Joint Commenters would urge the Commission to assign such an allocation through the traditional processes and using the existing private wireless licensing mechanisms – *i.e.*, via frequency advisory committees, not competitive bidding. We do recognize that spectrum has value and understand that some payment for this new allocation may be necessary. Thus, the Joint Commenters concur with those commenters who suggest that the Commission develop a payment mechanism, such as efficiency-based spectrum lease fees, to be associated with the assignment of new spectrum for the private wireless industry.¹⁴ We acknowledge that the Commission currently lacks Congressional authority to develop and assess a payment mechanism

¹⁴ See Comments of Boeing at 8 (“efficiency based lease fees could reward efficient use of private spectrum with lower fees and discourage inefficient use . . .”); Comments of MRFAC, Inc. at 11 (“MRFAC

for use of any new spectrum. We do, however, pledge to work with the Commission to gain Congressional approval for this approach; an approach that is supported by the Congressional Budget Office.¹⁵

The 746-806 MHz band. In an ideal world, the Joint Commenters would urge the Commission to assign spectrum in the 746-806 MHz band via the “traditional” licensing processes as well. Unfortunately, it appears that the Commission has little discretion with respect to the licensing mechanism to be used for assigning a spectrum allocation in this band. Congress has placed constraints on the type of use and directed the Commission to allocate this 36 MHz of spectrum via “competitive bidding.” This effectively eliminates any chance for assignment via the “traditional” licensing mechanisms.

While the Joint Commenters firmly believe that the private wireless industry would benefit from an allocation in the 746-806 MHz band, we feel compelled to concede that competitive bidding may be the licensing mechanism the Commission is forced to use in this *particular* band. Nevertheless, we reiterate our position that we would be adamantly opposed to any attempt to use competitive bidding as a licensing mechanism in existing private wireless bands or for new private wireless spectrum located in any band other than the 746-806 MHz band.

If the Commission does, in fact, determine that competitive bidding is the licensing mechanism that must be used in the 746-806 MHz band, the Joint

supports user fees as a means of encouraging spectrum efficiency and discouraging spectrum inefficiency.”); see *also* Comments of Ford Communications, Inc. at 3.

¹⁵ In its November 1998 report, the Congressional Budget Office stated that the imposition of a fee for use of the spectrum would reduce congestion in the affected bands, force more efficient use of the spectrum, and provide a method of compensation for use of spectrum that is not auctioned. See CBO Memorandum, “Two Approaches for Increasing Spectrum Fees,” at pp. 36-37, rel. Nov. 1998.

Commenters strongly urge the Commission to use a “band manager” to distribute spectrum for private wireless use. While we understand the private wireless industry’s hesitation to embrace this concept, we believe that this industry – working with the Commission – can modify the band manager concept to meet the particular needs of the private wireless industry. To that end, the Joint Commenters are committed to working with the Commission in seeking ways to secure an allocation of “new” spectrum for private wireless use in the 746-806 MHz band.

III. Conclusion

The Joint Commenters believe that the record in this proceeding *clearly* supports the premise that auctions are not an appropriate licensing tool for the private wireless industry. Moreover, it is the Joint Commenters belief that the Commission would be better served by focusing on adhering to the Congressional mandate that it avoid mutual exclusivity. As the Land Mobile Communications Council aptly stated, “[r]ather than focusing on competitive bidding and how best to overlay this licensing mechanism on the private land mobile frequencies . . . the Commission should devote its attention to avoiding mutually exclusive applications in the first place.”¹⁶

While we see no alternative to competitive bidding as an assignment methodology for the 746-806 MHz band, the Joint Commenters would be adamantly opposed to any attempt to use competitive bidding as a licensing mechanism in existing private wireless bands or for new private wireless spectrum located in any band other than the 746-806 MHz band. With respect to the 746-806 MHz band, the Joint Commenters strongly urge the Commission to carefully craft the service rules for 746-

¹⁶ Comments of the Land Mobile Communications Council at 12.

806 MHz band to provide for an allocation of spectrum for use by the private wireless industry through the auspices of a band manager.

Respectfully Submitted,

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Certificate of Service

I, Laura L. Smith, do hereby certify that on the 30th day of September 1999, I forwarded to the parties listed below a copy of the foregoing Reply Comments of the Industrial Telecommunications Association, Inc., the Council of Independent Communications Suppliers, the Taxicab & Livery Communications Council, and the Telephone Maintenance Frequency Advisory Committee by first-class mail, postage pre-paid:

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