

Commission to attempt to avoid mutual exclusivity, and the special status that Congress has afforded to CII services.

The Commission may award licenses by competitive bidding only to resolve mutually exclusive applications, and the Commission has an obligation to avoid mutual exclusivity by using other means first.³ The approach proposed in the FNPRM is inconsistent with that obligation.

It is the suggestion in the FNPRM of changing to geographic licensing that makes mutual exclusivity in the 900 MHz band — and hence the use of competitive bidding to award licenses — a possibility. Under the coordinated site-by-site licensing regime that has long prevailed, mutual exclusivity is a rarity.⁴ The Commission should not create the “threshold condition triggering the FCC’s authority to auction” by implementing a new licensing scheme when, “in order to avoid mutual exclusivity, the FCC need not do anything.”⁵ Congress directed the FCC to avoid mutual exclusivity, not to create it.⁶

Instituting auctions in the 900 MHz MAS band would run counter to what Congress intended for a second reason. Congress decided in the Balanced Budget Act of 1997 to exempt utilities from competitive bidding because of “the critical infrastructure responsibilities of utilities as well as their public safety functions.”⁷ Utilities and other “CII entities represent the overwhelming majority of licensees in the [900] MHz band.”⁸

If the Commission fulfills its obligation to provide and preserve spectrum for CII purposes, the 900 MHz MAS band will continue to be used predominantly for the private communications of utilities, pipelines, railroads, and other CII entities.⁹ Given these circumstances, the band should be exempt from the Commission’s competitive

³ See, e.g., Comments of UTC at 6 (citing 47 U.S.C. § 309(j)(6)(E)).

⁴ See Comments of UTC at 5.

⁵ Comments of Georgia Power Co. *et al.* at 8.

⁶ See Comments of CellNetData Systems at 8.

⁷ Letter from Hon. Rod Grams *et al* to Chairman William Kennard (Sept. 24, 1999); see also, e.g., Comments of PSC of Colorado at 3; Comments of Corn Belt Power Cooperative at 2.

⁸ Comments of UTC at 7.

⁹ In the case of AMR services, it is not uncommon for utilities to outsource their day-to-day AMR operations to third parties. This practice is increasing as the utility industry undergoes deregulation. Such outsourcing does not change the nature of the service provided, and should have no impact on MAS eligibility in the 900 MHz band.

bidding authority, and the Commission need not be concerned with preserving spectrum for future auctions.

II. The Extension Of The Application Processing Freeze At 900 MHz Is Having An Immediate And Harmful Effect On The CII Industries And The Public.

The parties to this proceeding have emphasized that the extension of the application processing freeze to CII applicants in the 900 MHz MAS band is having a substantial and deleterious effect on the CII industries and on the public at large. “[I]n the utility industry, reliability is fundamental” and the MAS freeze has undermined the reliability of its RF-based automatic meter reading (“AMR”) systems.¹⁰ Because, “[f]or most utilities, there is no practical alternative to using MAS frequencies for [AMR] equipment,”¹¹ CII operations have been compromised and the “quality of consumer service has declined.”¹²

Even if the Commission were to act today and rescind the expansion of the freeze, its impact on AMR acquisitions would be felt for some time to come because of long lead times for purchases. Accordingly, time is of the essence. Utility buying cycles generally encompass an evaluation period, a pilot program, and a business case and submission for an allocation in the budget for the following year. Sales that are lost in one budget cycle cannot go through the submission process until the next budget cycle, meaning that it could be two years from now before AMR sales that are lost during the expanded freeze are submitted, approved, and implemented. Some sales, moreover, may never be recaptured as utilities make alternative plans.

The extension of the MAS processing freeze to applications by CII entities has put the health and safety of the public at risk. The “normal and safe functioning” of CII services is dependent upon the ability of the industry to “consistently monitor, maintain, and repair their facilities and, of course, to immediately pinpoint the source of emergencies such as power outages.... In light of the critical activities carried out by [the CII industries, whose customers] include hospitals, police, and fire departments,

¹⁰ Comments of PSC of Colorado at 4-5.

¹¹ Letter from Hon. Rod Grams *et al* to Chairman William Kennard (Sept. 24, 1999).

¹² Comments of UTC at 3; *see also, e.g.*, Comments of East Bay Municipal Utility District at 7-8; Comments of Public Service Company of New Mexico; Comments of Pacific Gas & Electric at 2-3.

not being able to employ MAS facilities could have disastrous effects.”¹³

There is no meaningful support in the record for expanding the freeze, and the negative public health and safety consequences potentially are grave. The Commission, therefore, should lift the MAS freeze to the extent that it applies to applications to use the 900 MHz MAS band for services provided by or for the benefit of utilities and other CII entities.

CONCLUSION

For the reasons set forth above and in Itron’s initial comments, the Commission should: (1) continue to license MAS stations in the 900 MHz band on a site-by-site, frequency coordinated basis, thereby obviating the need for auctions; and (2) rescind its action expanding the freeze in the 928/952/956 MHz bands.

Respectfully submitted,

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¹³ Comments of Georgia Power Co. *et al.* at 3; see also Comments of Blue Ridge Electrical Cooperative at 1 (when local law enforcement requests that power be turned off in an area, for example when an accident has occurred, power could be shut off immediately using a SCADA system long before any lineman could reach the scene).