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October 27, 1999

By Hand

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W. – Third Floor
Washington, D.C. 20554

Re: Written *Ex Parte* Communication
Service Rules for the 746-764 and 776-794 MHz Bands,
And Revisions to Part 27 of the Commission's Rules
WT Docket No. 99-168

Dear Mr. Sugrue:

This written *ex parte* communication is submitted on behalf of FreeSpace Communications (FreeSpace) for consideration in connection with the above-referenced rulemaking proceeding. In this proceeding, the Federal Communications Commission (FCC) is considering a number of proposals regarding service rules for commercial radio licenses in the 746-764 MHz and 776-794 MHz bands.[1] In one such proposal, Motorola, Inc. and other parties representing the private radio industry have urged the FCC to establish a protection band to protect public safety communications in adjacent spectrum bands and to limit the permissible uses of this protection band to private radio services.

The Commission should reject the Motorola proposal. Although the creation of a protection band to protect public safety communications is consistent with the FCC's statutory mandate, limiting the use of such a protection band to private radio is contrary to the directive in section 337(a) of the Communications Act, as amended, that this spectrum be allocated "for *commercial* use to be assigned by competitive bidding."[2] The Commission should instead adopt FreeSpace's proposal to create a protection band adjacent to public safety spectrum in which licensees could offer any commercial service provided they comply with power spectral density limits. FreeSpace's proposal is

[1] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Notice of Proposed Rulemaking*, WT Docket No. 99-168, FCC 99-97 (released June 3, 1999) (*NPRM*).

[2] 47 U.S.C. § 337(a) (emphasis added).

consistent with section 337 and will provide full interference protection to public safety communications.

## I. Background

Pursuant to Section 337 of the Act,[3] the Commission has reallocated 24 MHz in the 764-776 MHz and 794-806 MHz bands to public safety services. It has also reallocated 36 MHz in the 746-764 MHz and 776-794 MHz bands for commercial use as required by the Act. In the pending *NPRM*, the Commission is considering proposals regarding the licensing rules for these commercial uses.

In devising rules for the commercial services that will operate in the 746-764 and 776-794 MHz bands, the Commission is required by the Act to "establish rules insuring that public safety services licensees [in the 746-806 MHz band] shall not be subject to harmful interference from television broadcast licensees."[4] In addition, the legislative history of these provisions states that the Commission should "ensure that public safety service licensees continue to operate free of interference from any new commercial licensees."[5] A number of public safety parties have emphasized the vital need to carry out the statutory mandate to protect public safety communications from interference, and have suggested the creation of protection band to do so.[6]

Two parties have submitted specific protection band proposals to protect public safety communications in adjacent spectrum bands. FreeSpace has proposed that the Commission establish 2 MHz protection bands adjacent to public safety spectrum in the 700 MHz band (*i.e.*, protection bands at 762-764 MHz, 776-778 MHz, and 792-794 MHz). Under the FreeSpace proposal, licensees in these protection bands would be required to comply with power spectral density limits to protect public safety communications, but would be free to offer any type of commercial services.[7]

Motorola and other parties representing the private radio industry have proposed that the FCC establish 1.5 MHz protection bands adjacent to the public safety spectrum (*i.e.*, protection bands at 762.5-764 MHz, 776-777.5 MHz, and 792.5-794 MHz). Under the Motorola proposal, a band manager would bid in the auction of these channels, and their use would be limited to private radio services.

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[3] *Id.*

[4] *Id. at* § 337(d)(4).

[5] Balanced Budget Act of 1997, Conference Report to Accompany H.R. 2015, 105th Cong., 1st Sess., Report 105-217, at 580 (July 30, 1997).

[6] Comments of Association of Public-Safety Communications Officials-International at 3. *See also* Letter from Kathleen M. H. Wallman, Chair, National Coordination Committee, to Chairman Kennard, WT Docket No. 99-168 (Aug. 25, 1999).

[7] *See* Letter of Ruth Milkman, Lawler, Metzger & Milkman, to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, at 2-6 (filed Oct. 13, 1999 in WT Docket No. 99-168).

## II. Limiting the Protection bands to Private Radio Uses Is Contrary to Section 337 of the Communications Act.

Congress has explicitly precluded an exclusive set aside for private radio operations in the 746-764 and 776-794 MHz bands. Section 337(a) of the Act expressly directs that these bands be allocated "for commercial use to be assigned by competitive bidding pursuant to section 309(j)." [8] That provision further refers to the licenses assigned through this auction process as "commercial licenses."[9]

Section 337's use of the term "commercial" is significant. In the context of wireless services, both Congress and the Commission have long used the term "commercial" services or uses to distinguish such services from "private" or "noncommercial" services, such as private land mobile. Section 332(d) of the Act, for example, defines "commercial mobile service" and "private mobile service" as mutually exclusive categories.[10] The Commission has incorporated this distinction in its rules.[11] Similarly, in implementing previous auction legislation, the Commission distinguished between "private" radio services, such as private land mobile, and services that "involve commercial use of the spectrum."[12] In drawing a distinction between these two categories, Congress and the Commission have generally defined commercial uses, such as cellular and personal communications services, as radio services offered to the public for hire.[13] In contrast, private radio services, such as private land mobile, "are those that are used by government or business entities to meet their own internal communications needs or by individuals for personal communications, rather than to provide communications services to others."[14] Even Motorola has acknowledged the distinction between commercial and private services.[15]

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[8] 47 U.S.C. § 337(a)(2) ("Not later than January 1, 1998, the Commission shall allocate the electromagnetic spectrum between 746 megahertz and 806 megahertz, inclusive, as follows: ... 36 megahertz of that spectrum for commercial use to be assigned by competitive bidding pursuant to section 309(j).").

[9] *Id.* at § 337(b)(2) ("The Commission shall ... commence competitive bidding for the commercial licenses created pursuant to subsection (a) after January 1, 2001.").

[10] *Id.* at § 332(d)(1) & (3).

[11] 47 C.F.R. §§ 20.7, 20.8.

[12] *Implementation of Section 309(j) and 337 of the Communications Act of 1934 as Amended*, 14 FCC Rcd 5206, ¶¶ 8-10 (1999) (*Balanced Budget Act Notice*) (describing FCC's implementation of 1993 auction legislation). *See also Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-22 MHz Band by the Private Land Mobile Radio Service*, 12 FCC Rcd 10943, ¶¶ (1997) (describing licensing plan that distinguished between "commercial" and "noncommercial" uses).

[13] *Private Land Mobile Radio Services: Background*, FCC Staff Paper, at E2-E5 (Dec. 18, 1996) (describing legal distinctions between commercial and noncommercial systems).

[14] *Balanced Budget Act Notice*, 14 FCC Rcd 5206, at ¶ 10.

[15] Letter of Steve B. Sharkey of Motorola, Inc. to Magalie Roman Salas, FCC Secretary, Oct. 18, 1999 ("Under Motorola's plan, the majority of the 36 MHz would be available for *commercial services*. A

Motorola's proposal for an exclusive set aside for private radio is consequently inconsistent with Section 337(a)'s requirement that the 746-764 and 776-794 MHz bands be allocated for "commercial use." This is confirmed by the legislative history of the Balanced Budget Act of 1997. The Balanced Budget Act enacted section 337 of the Communications Act, which, as described above, requires the FCC to reallocate 24 MHz of spectrum in the 746-806 MHz band to public safety services and 36 MHz of spectrum in this band for commercial use.[16] It also enacted a number of other spectrum provisions, including a requirement that the Secretary of Commerce identify spectrum reserved for federal government use for reallocation for commercial uses to be assigned by the FCC through competitive bidding.[17] In debating these provisions as part of the 1997 budget reconciliation process, Congress considered a bill introduced by Senator Breaux that would have required the FCC to allocate 12 MHz of spectrum between 150 MHz and 1000 MHz to private radio uses.[18] Congress, however, declined to include this measure in the spectrum reallocation provisions that became a part of the Balanced Budget Act.[19] It instead chose to require the FCC to allocate 24 MHz to public safety services and 36 MHz for "commercial use," and also, in section 3002(e), to require the auction of 20 MHz of additional spectrum to be reallocated from federal government use.[20]

The Conference Report to this legislation noted this decision, and in doing so drew a distinction between commercial uses and private radio uses. In particular, the Conference Report states:

> The conference agreement combines the provisions of the House bill and Senate amendment to require the Secretary of Commerce to identify 20 MHz of spectrum currently reserved for government use for reallocation to *commercial uses*. The reallocated spectrum is to be assigned using competitive bidding pursuant to section 309(j) of the Communications Act. . . . The conferees considered expanding the total reconciliation under section 3002(e) to allow for additional allocations for *private wireless users*, but were unable to do so within the context of the

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portion of the spectrum would, however, be made available, through auction, to *private services*.") (emphasis added).

[16] Pub. L. No. 105-33, 111 Stat. 251, § 3004 (1997) (*codified at* 47 U.S.C. § 337(a)).

[17] Pub. L. No. 105-33, 111 Stat. 251, § 3002(e) (1997) (*codified at* 47 U.S.C. § 113).

[18] *See* S. 741, The Private Wireless Spectrum Availability Act, 43 Cong. Rec. S4479, S4485 (May 14, 1997) (1997 WestLaw 250203) (copy attached in Appendix A); "It's Back to the Drawing Board on the McCain Bill," *Washington Telecom News*, vol. 5, issue 22, June 2, 1997 (1997 WestLaw 7938727) (copy attached in Appendix A). S. 741 would have required private radio users to pay spectrum lease fees rather than bid at an auction for the 12 MHz of spectrum.

[19] *See* "Private Wireless Provisions Fail to Make it Into Budget," *Land Mobile News*, vol. 51, issue 26, June 27, 1997 (1997 WestLaw 8474384) (copy attached in Appendix A).

[20] *See, supra*, notes 17 and 18.

> Reconciliation process. Nevertheless, the conferees expect the Commission and the NTIA to consider the need to allocate additional spectrum for shared or exclusive use by private wireless services in a timely manner.[21]

Congress consequently viewed "commercial uses" and "private wireless" uses as two separate services. It provided additional spectrum to be auctioned off for commercial uses by requiring the FCC, under section 337(a), to allocate the 746-764 and 776-794 MHz bands for commercial use, and by requiring the Secretary of Commerce to reallocate 20 MHz from federal government use. It specifically declined to allocate a portion of these spectrum bands for private radio uses as part of this legislation, although it encouraged NTIA and the FCC to consider allocating other spectrum bands to private radio as part of their general statutory discretion in managing the electromagnetic spectrum.

Motorola makes a passing effort to shoehorn private radio into the statutory "commercial use" category. It asserts that "[t]hough services requiring electromagnetic spectrum are not the primary businesses for the end users of PMRS spectrum, they unquestionably use the spectrum in support of commerce. Arguably the activities of the PMRS user community have a critical impact on the US economy."[22] But this argument ignores the long-established distinction between commercial and private uses that Congress has embraced and would render section 337(a)'s use of the term "commercial use" meaningless.[23] Virtually any service could be considered a "commercial use" under Motorola's elastic definition.

Nor can Motorola avoid the meaning of "commercial use" by the fact that its proposed set-aside for private radio would use a band manager. Although private radio parties would much prefer a direct spectrum set-aside without having to bid at an auction, most (but not all) recognize that section 337(a) requires that licenses for spectrum in the 746-764 and 776-794 MHz bands be assigned through the competitive bidding process. The Motorola proposal would consequently have a band manager bid for spectrum in these bands. But this does nothing to address the other requirement in section 337(a): that these bands be allocated for commercial use. To the contrary, Motorola makes clear that the role of the band manager is simply to perform frequency coordination duties and to distribute spectrum rights solely to private radio users.[24] According to the Industrial Telecommunications Association ("ITA"), the band manager would not offer services to

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[21] H. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. 575-76 (1997) (*reprinted in* 1997 U.S. Code Cong. & Admin. News 176, 196) (copy attached in Appendix B).

[22] Motorola Comments at 13.

[23] *See also* Reply Comments of SBC Communications, Inc. at 3.

[24] Motorola Reply Comments at 10.

the public and "would not qualify as a traditional commercial mobile radio service provider."[25]

In other words, the spectrum that the band manager would oversee would *not* be employed for "commercial use." Unfortunately for the private radio parties, this is precisely what the statute requires. Injecting the band manager concept into the analysis does not change this fact.

Not only would a private radio set aside be contrary to section 337(a)'s requirement that this spectrum be allocated for "commercial use," it would also represent a rather transparent attempt to limit artificially the number of potential auction bidders in order to benefit a particular group of communications users. This would significantly reduce the revenues raised in an auction of this spectrum. To be sure, the Commission should not adopt licensing rules simply to maximize auction revenues.[26] Moreover, the Commission has the authority to establish a protection band, power limits, and other technical rules to prevent interference to public safety communications in the 764-776 MHz and 794-806 MHz bands. Indeed, as noted above, the Act requires the Commission to protect public safety operations from interference.

At the same time, however, the Commission should not establish rules for the purpose of lowering the amount a party will have to bid to obtain a license to use the radio spectrum. This appears to be the principal objective of the Motorola proposal. The Motorola plan for an exclusive set aside for private radio cannot be justified as necessary to protect public safety communications; commercial users, such as FreeSpace, can operate in these protection bands at power levels low enough to provide full protection to public safety. Rather, the Motorola proposal appears to be rooted in a concern that private radio users will not be able to compete in spectrum auctions against commercial service providers.[27] Motorola's solution is to limit the permissible uses of the protection band to private radio services, thus eliminating commercial service providers as potential bidders for this spectrum.

Such an exclusive set aside for private radio services would significantly reduce the revenues raised by these auctions without a public interest justification, and turn the statutory requirement that this spectrum be assigned by auction into an empty gesture. It would also increase the risk that the auction revenues will fall short of the $2.6 billion in revenue that Congress, as part of its budget planning, has projected will be raised in the auction of the spectrum in the 746-764 and 776-794 MHz bands.

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[25] ITA Comments at 9.

[26] 47 U.S.C. § 309(j)(7).

[27] Motorola Comments at 13 (questioning the "ability of traditional PMRS operators to compete in spectrum auctions against CMRS carriers"); Motorola Reply Comments at 10 ("[T]he only way that the band manager will be able to purchase the necessary aggregate spectrum is if specific segments of this band are allocated specifically for PMRS use.").

In sum, the Commission should reject Motorola's proposal to set aside a portion of these bands for exclusive private radio use. Such an exclusive set aside is contrary to section 337(a)'s requirement that this spectrum be allocated for "commercial use." It would also be contrary to congressional intent in that it would lower auction revenues for no legitimate public policy reason.

The Motorola proposal represents the private radio industry's third attempt to win an exclusive set aside of a portion of the spectrum reallocated under the Balanced Budget Act of 1997. As described above, it failed in its effort to persuade Congress to include a private radio set aside in this legislation. It failed again in asking the Commission, in its 1998 proceeding reallocating the 746-764 MHz and 776-794 MHz bands, to allocate spectrum in these bands exclusively to private radio services notwithstanding Congress's decision on this issue.[28] The Commission should reject this third attempt as well.

Respectfully submitted,

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Charles W. Logan

Counsel to FreeSpace Communications

Attachments

cc:
Christopher Wright
James D. Schlichting
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Nancy Boocker

[28] *Reallocation of Television Channels 60-69, the 746-806 Band*, 12 FCC Rcd 22953, ¶ 20 (1998).

# APPENDIX A

Citation Search Result Rank 13 of 39 Databa
143 Cong.Rec. S4479-07 CR
1997 WL 250203 (Cong.Rec.)
**(Cite as: 143 Cong. Rec. S4479-07)**

Congressional Record --- Senate
Proceedings and Debates of the 105th Congress, First Session
Wednesday, May 14, 1997

***S4479** STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mrs. HUTCHISON:

S. 738. A bill to reform the statutes relating to Amtrak, to authorize appropriations for Amtrak, and for other purposes; to the Committee on Commerce, Science, and Transportation.

AMTRAK REFORM AND ACCOUNTABILITY ACT OF 1997

Mrs. HUTCHISON.

Mr. President, I think it is very important in this country that we have a national rail passenger system. Rail is a viable alternative transportation. We now have a bus system that is feeding into Amtrak stations so people can come from small communities on the bus, into the Amtrak station, and go anywhere in the country as long as we keep our national system. You can go from Marshall, TX, to Chicago, IL, or to San Antonio and then to Los Angeles or all the way to Florida. It is really an exciting opportunity.

However, Mr. President, the national rail passenger service that we have now is really just an experiment. It really does not work very well, through no fault of the people who run it. Tom Downs is actually doing a terrific job. But we in Congress have put so many constraints and mandates on him that he cannot possibly compete to survive.

So, in fact, it is time to get the railroad back on track. It is time to get ***S4480** this railroad right. We can do it if Congress will correct some of the problems that we have put on this rail passenger train and let them compete. We have told them, "Run a good railroad," but we have tied one arm behind their back. So now it is time to let them compete, with the help of the bill I am introducing, most of which passed out of the Commerce Committee last year.

I am chairman of the Surface Transportation Subcommittee. It is in my purview to reauthorize Amtrak, and I want to reauthorize it and reform it so that it can compete and, hopefully, by the year 2002, there will not have to be operational subsidies from the taxpayers of America. But there is no question this will fail unless we have these reforms that will allow Amtrak to operate more like a business.

So, what are we trying to do? We are trying to have a system that is up and going without operational subsidies by the year 2002. Many of my friends say, " I do not know why we should help Amtrak. Why should we have taxpayer subsidies of Amtrak when all the other transportation modes do not need taxpayer subsidies?" Every transportation mode has taxpayer subsidies. Part of the reason we have

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important part of its mission.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 740

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. WAIVER OF PENALTY ON SMALL BUSINESSES FAILING TO MAKE ELECTRONIC FUND TRANSFERS OF TAXES.

No penalty shall be imposed under the Internal Revenue Code of 1986 solely by reason of a failure by a person to use the electronic fund transfer system established under section 6302(h) of such Code if-

(1) such person is a member of a class of taxpayers first required to use such system on or after July 1, 1997, and

(2) such failure occurs during the 1-year period beginning on July 1, 1997.

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By Mr. BREAUX:

S. 741. A bill to amend the Communications Act of 1934 to enable the Federal Communications Commission to enhance its spectrum management program capabilities through the collection of lease fees for new spectrum for radio services that are statutorily excluded from competitive bidding, and to enhance law enforcement and public safety radio communications; to the Committee on Commerce, Science, and Transportation.

THE PRIVATE WIRELESS SPECTRUM AVAILABILITY ACT

Mr. BREAUX.

Mr. President, I introduce the Private Wireless Spectrum Availability Act of 1997. This legislation will help the more than 300,000 U.S. companies, both large and small, that have invested $25 billion in internally owned and operated wireless communications systems. It will provide these companies with critically needed spectrum and will do so through an equitable lease fee system.

The private wireless communications community includes industrial, land transportation, business, educational, and philanthropic organizations that own and operate communications systems for their internal use. The top 10 U.S. industrial companies have more than 6,000 private wireless licenses. Private wireless systems also serve America's small businesses in the utility, contracting, taxi, and livery industries.

These internal-use communications facilities greatly enhance public safety and

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the quality of American life. They also support global competitiveness for American firms. For example, private wireless systems support: the efficient production of goods and services; the safe transportation of passengers and products by land and air; the exploration, production, and distribution of energy; agricultural enhancement and production; the maintenance and development of America's infrastructure; ***S4486** and compliance with various local, State, and Federal operational government statutes.

Current regulatory policy inadequately recognizes the public interest benefits that private wireless licensees provide to the American public. Consequently, allocations of spectrum to these private wireless users has been deficient. Private wireless entities received spectrum in 1974 and 1986 when the FCC allocated channels in the 800 megahertz and 900 megahertz bands. Over time, however, the FCC has significantly reduced the number of channels available to industrial and business entities in those allocations. Private wireless entities now have access to only 299 channels, or 32 percent of the channels of the original allocation.

Spectrum auctions have done a great job of speeding up the licensing of interpersonal communications services and have generated significant revenues for the U.S. Treasury. They have also unfortunately skewed the spectrum allocation process toward subscriber-based services and away from critical radio services such as private wireless which are exempted from auctions. Nearly 200 megahertz of spectrum has been allocated for the provision of commercial telecommunications services, virtually all of which has been assigned by the FCC through competitive bidding.

Competitive bidding is not the proper assignment methodology for private wireless telecommunications users. Private wireless operations are site- specific systems which vary in size based on that user's particular needs, and are seldom mutually exclusive from other private wireless applicants. Auctions, which depend on mutually exclusive applications and use market areas based on population, simply cannot be designed for private wireless systems.

This legislation mandates that the FCC allocate no less than 12 megahertz of new spectrum for private wireless use as a measure to maintain our industrial and business competitiveness in the global arena, as well as to protect the welfare of the employees in the American workplace. Research indicates that private wireless companies are willing to pay a reasonable fee in return for use of spectrum. They recognize that their access to spectrum increases with their willingness to pay fair value for the use of this national asset.

My bill grants the FCC legislative authority to charge efficiency-based spectrum lease fees in this new spectrum allocation. These lease fees should encourage the efficient use of spectrum by the private wireless industry, generate recurring annual revenues as compensation for the use of spectrum, and retain spectrum ownership by the public. Furthermore, the fees should be easy for private frequency advisory committees to calculate and collect.

Mr. President, I am mindful that some peripheral concerns expressed by small businesses that service private wireless users are not addressed in this bill. I assure these companies that I will work with them through the legislative process

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to address these issues. I urge my colleagues to join me in supporting this bill and ask unanimous consent that the full text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 741

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Wireless Spectrum Availability Act".

SEC. 2. DEFINITIONS.

As used in this Act-

(1) COMMISSION.-The term "Commission" means the Federal Communications Commission.

(2) PUBLIC SAFETY.-The term "public safety" means fire, police, or emergency medical service including critical care medical telemetry, and such other services related to public safety as the Commission may include within the definition of public safety for purposes of this Act.

(3) PRIVATE WIRELESS.-The term "private wireless" encompasses all land mobile telecommunications systems operated by or through industrial, business, transportation, educational, philanthropic or ecclesiastical organizations where these systems, the operation of which may be shared, are for the licensees' internal use, rather than subscriber-based Commercial Mobile Radio Services (CMRS) systems.

(4) SPECTRUM LEASE FEE.-The term "spectrum lease fee" means a periodic payment for the use of a given amount of electromagnetic spectrum in a given area in consideration of which the user is granted a license for such use.

SEC. 3. FINDINGS.

The Congress finds that:

(1) Private wireless communications systems enhance the competitiveness of American industry and business in international commerce, promote the development of national infrastructure, improve the delivery of products and services to consumers in the United States and abroad, and contribute to the economic and social welfare of citizens of the United States.

(2) The highly specialized telecommunications requirements of licensees in the private wireless services would be served, and a more favorable climate would be created for the allocation of additional electromagnetic spectrum for those services if an alternative license administration methodology, in addition to the

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existing competitive bidding process, were made available to the Commission.

SEC. 4. SPECTRUM LEASING FEES.

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end thereof the following:

"SEC. 12. SPECTRUM LEASE FEE PROGRAM.

"(a) SPECTRUM LEASE FEES.-

"(1) IN GENERAL.-Within 6 months after the date of enactment of the Private Wireless Spectrum Availability Act, the Commission shall by rule-

"(A) implement a system of spectrum lease fees applicable to newly allocated frequency bands, as described in section 5 of the Private Wireless Spectrum Availability Act, assigned to systems (other than public safety systems (as defined in section 2(2) of the Private Wireless Spectrum Availability Act)) in private wireless service;

"(B) provide appropriate incentives for licensees to confine their radio communication to the area of operation actually required for that communications; and

"(C) permit private land mobile frequency advisory committees certified by the Commission to assist in the computation, assessment, collection, and processing of amounts received under the system of spectrum lease fees.

"(2) FORMULA.-The Commission shall include as a part of the rulemaking carried out under paragraph (1)-

"(A) a formula to be used by private wireless licensees and certified frequency advisory committees to compute spectrum lease fees; and

"(B) an explanation of the technical factors included in the spectrum lease fee formula, including the relative weight given to each factor.

"(b) FEE BASIS.-

"(1) INITIAL FEES.-Fees assessed under the spectrum lease fee system established under subsection (a) shall be based on the approximate value of the assigned frequencies to the licensees. In assessing the value of the assigned frequencies to licensees under this subsection, the Commission shall take into account all relevant factors, including the amount of assigned bandwidth, the coverage area of a system, the geographic location of the system, and the degree of frequency sharing with other licensees in the same area. These factors shall be incorporated in the formula described in subsection (a)(2).

"(2) ADJUSTMENT OF FEES.-The Commission may adjust the formula developed under subsection (a)(2) whenever it determines that adjustment is necessary in order to calculate the lease fees more accurately or fairly.

"(3) FEE CAP.-The spectrum lease fees shall be set so that, over a 10-year license term, the amount of revenues generated will not exceed the revenues generated from the auction of comparable spectrum. For purposes of this paragraph, the 'comparable spectrum' shall mean spectrum located within 500 megahertz of that spectrum licensed in a concluded auction for mobile radio

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communication licenses.

"(c) APPLICATION TO PRIVATE WIRELESS SYSTEMS.-After the Commission has implemented the spectrum leasing fee system under subsection (a) and provided licensees access to new spectrum as defined in section 5(c)(2) of the Private Wireless Spectrum Availability Act, it shall assess the fees established for that system against all licensees authorized in any new frequency bands allocated for private wireless use.".

SEC. 5. SPECTRUM LEASE FEE PROGRAM INITIATION.

(a) IN GENERAL.-The Commission shall allocate for use in the spectrum lease fee program under section 12 of the Communications Act of 1934 (47 U.S.C. 162) not less than 12 megahertz of electromagnetic spectrum, previously unallocated to private wireless, located between 150 megahertz and 1000 megahertz on a nationwide basis.

(b) EXISTING INCUMBENTS.-In allocating electromagnetic spectrum under subsection (a), the Commission shall ensure that existing incumbencies do not inhibit effective access to use of newly allocated spectrum to the detriment of the spectrum lease fee program.

(c) TIMEFRAME.-

(1) ALLOCATION.-The Commission shall allocate electromagnetic spectrum under subsection (a) within 6 months after the date of enactment of this Act.

(2) ACCESS.-The Commission shall take such reasonable action as may be necessary to ensure that initial access to electromagnetic spectrum allocated under subsection (a) commences not later than 12 ***S4487** months after the date of enactment of this Act.

SEC. 6. DELEGATION OF AUTHORITY.

Section 5 of the Communications Act of 1934 (47 U.S.C. 155) is amended by adding at the end thereof the following:

"(f) DELEGATION TO CERTIFIED FREQUENCY ADVISORY COMMITTEES.-

"(1) IN GENERAL.-The Commission may, by published rule or order, utilize the services of certified private land mobile frequency advisory committees to assist in the computation, assessment, collection, and processing of funds generated through the spectrum lease fee program under section 12 of this Act. Except as provided in paragraph (3), a decision or order made or taken pursuant to such delegation shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as decisions or orders of the Commission.

"(2) PROCESSING AND DEPOSITING OF FEES.-A frequency advisory committee shall deposit any spectrum lease fees collected by it under Commission authority with a banking agent designated by the Commission in the same manner as it deposits application filing fees collected under section 8 of this Act.

"(3) REVIEW OF ACTIONS.-A decision or order under paragraph (1) is subject to review in the same manner, and to the same extent, as decisions or orders under subsection (c)(1) are subject to review under paragraphs (4) through (7) of

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subsection (c).

SEC. 7. PROHIBITION OF USE OF COMPETITIVE BIDDING.

Section 309(j)(6) of the Communications Act of 1934 (47 U.S.C. 309(j)(6)) is amended-

(1) by striking "or" at the end of subparagraph (G);

(2) by striking the period at the end of subparagraph (H) and inserting a semicolon and "or"; and

(3) by adding at the end thereof the following:

"(I) preclude the Commission from considering the public interest benefits of private wireless communications systems (as defined in section 2(3) of the Spectrum Efficiency Reform Act of 1977) and making allocations in circumstances in which-

"(i) the pre-defined geographic market areas required for competitive bidding processes are incompatible with the needs of radio services for site- specific system deployment;

"(ii) the unique operating characteristics and requirements of Federal agency spectrum users demand, as a prerequisite for sharing of Federal spectrum, that nongovernment access to the spectrum be restricted to radio systems that are non subscriber-based;

"(iii) licensee concern for operational safety, security, and productivity are of paramount importance and, as a consequence, there is no incentive, interest, or intent to use the assigned frequency for producing subscriber- based revenue; or

"(iv) the Commission, in its discretion, deems competitive bidding processes to be incompatible with the public interest, convenience, and necessity.".

SEC. 8. USE OF PROCEEDS FROM SPECTRUM LEASE FEES.

(a) ESTABLISHMENT OF ACCOUNT.-There is hereby established on the books of the Treasury an account for the spectrum license fees generated by the spectrum license fee system established under section 12 of the Communications Act of 1934 (47 U.S.C. 162). Except as provided in subsections (b) and (c), all proceeds from spectrum lease fees shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code, and credited to the account established by this subsection.

(b) ADMINISTRATIVE EXPENSES.-Out of amounts received from spectrum lease payments a fair and reasonable amount, as determined by the Commission, may be retained by a certified frequency advisory committee acting under section 5(f) of the Communications Act of 1934 (47 U.S.C. 155(f)) to cover costs incurred by it in administering the spectrum lease fee program.

SEC. 9. LEASING NOT TO AFFECT COMMISSION'S DUTY TO ALLOCATE.

The implementation of spectrum lease fees as a license administration

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mechanism is not a substitute for effective spectrum allocation procedures. The Commission shall continue to allocate spectrum to various services on the basis of fulfilling the needs of these services, and shall not use fees or auctions as an allocation mechanism.<>

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By Ms. SNOWE (for herself, Mr. REID, Mr. WARNER, Ms. MIKULSKI, Mr. CHAFEE, Mr. DURBIN, Ms. COLLINS, Mrs. MURRAY, and Mr. JEFFORDS):

S. 743. A bill to require equitable coverage of prescription contraceptive drugs and devices, and contraceptive services under health plans; to the Committee on Finance.

THE EQUITY IN PRESCRIPTION INSURANCE AND CONTRACEPTIVE COVERAGE ACT

Ms. SNOWE.

Mr. President, nowhere is the middle ground in American politics harder to find than in the debate over abortion. It is clear that the apparent inability of pro-choice and pro-life members to find common ground is one of the most divisive issues we face today. In debate after debate, it often appears that there is no middle ground. Well, I am extremely pleased that my colleague from Nevada, Senator REID, is joining me today to introduce legislation that will prove this statement untrue.

Too often, pro-choice leaders do too little to convey that they are not pro-abortion. Likewise, abortion opponents too often fail to work constructively toward reducing the need for abortion. The failure of pro-choice and pro-life members to stake out common ground weakens our Nation immeasurably.

Today that's going to change. The cosponsors of this bill come from different parties, and have very different views on abortion. Our voting records are clear: I am firmly pro-choice; Senators REID is firmly pro-life. Yet, despite these fundamental differences, we agree that something can and must be done to reduce the rates of unintended pregnancy and abortion in this country. That is why we are joining forces and introducing bipartisan, landmark legislation to make contraceptives more affordable for Americans. And I am pleased that a number of my colleagues, including Senators WARNER, MIKULSKI, CHAFEE, DURBIN, COLLINS, MURRAY, and JEFFORDS are joining us as original cosponsors.

The need is clear. This year, there will be 3.6 million unintended pregnancies-over 56 percent of all pregnancies in America-and half will end in abortion. These are staggering statistics. But what's even more staggering is that it doesn't have to be this way. If prescription contraceptives were covered like other prescription drugs, a lot more Americans could afford to use safe, effective means to prevent unintended pregnancies.

The fact is, under many of today's health insurance plans, a woman can afford a prescription to alleviate allergy symptoms but not a prescription to prevent an unintended and life-altering pregnancy. It is simply not right that while the vast majority of insurers cover prescription drugs, half of large group plans

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Washington Telecom News
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Monday, June 2, 1997

Vol. 5, Issue: 22

# It's Back To The Drawing Board On The McCain Bill

Private radio users are getting a second chance to convince Senate Commerce Committee Chairman John McCain (R-Ariz.) that they deserve at least 12 MHz of fresh spectrum in return for spectrum lease fees.

Sharpe Smith, director of communications for the Industrial Telecommunications Association (ITA), said that a draft of a bill sponsored by McCain and largely unfavorable to private radio users was, in Smith's words, "dead." He added: "It's being completely reworked and revitalized and will have some completely new things."

It appears that McCain's staff wants to make the bill consistent with the current budget resolution being debated in the Senate. In addition, before rewriting the bill, McCain's staff plans to meet with the staff of fellow Commerce Committee member John Breaux (D-La.) to try to reconcile their differences on spectrum policy.

Breaux recently introduced a bill that embodies ideas that ITA has pushed on the Hill for more than two years. Among them: The FCC should allocate at least 12 MHz of fresh spectrum to private radio users in return for spectrum lease fees.

In contrast, the April 8 draft of the McCain bill would have effectively left private radio users out of an allocation of 120 MHz for commercial use. It also would have established spectrum lease fees as an alternative to auctions for assigning existing allocations. While it favors lease fees for new spectrum, ITA opposes them for already allocated spectrum. Angry ITA President Mark Crosby likened the proposal to hitting the private radio industry "on the back of the head."

While the McCain and Breaux camps try to iron out differences, both have another challenge: convincing Senate Budget Committee members to include their ideas in this year's budget resolution.

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The budget resolution being debated would require 36 MHz of spectrum from UHF channels 60-69 to be auctioned--consistent with the McCain proposal, inconsistent with the Breaux bill. (ITA is fighting to get the budget resolution language changed to include spectrum lease fees.)

However, the budget resolution also would earmark the estimated $24.3 billion raised in spectrum auctions through 2002 to the U.S. Treasury; that clashes with the McCain proposal, which earmarks up to $750 million in auction revenues to pay for public safety systems. Under an amendment proposed by McCain and Sen. Ernest Hollings (D-S.C.), the government would spend less to cover any auction revenue shortfall.

...McCain Not Convinced

We were unable to reach McCain for comment, but sources said that he has not proven sympathetic to private radio concerns. "Senator McCain doesn't appear to be open to [new] allocations for private wireless users with an allocation mechanism that will work for use," said Launita Hernandez, manager of wireless communications for Seattle-based Airborne Express and the chairperson of ALERTS, an ITA-led alliance promoting spectrum lease fees. "My impression is that he believes that an auction is the only viable mechanism to bring in revenue."

Private radio users argue that they can't compete effectively in auctions against commercial services providers that are basing their bids on a business plan that includes ongoing subscriber revenues. Hernandez said the industry "recognizes that the government needs to be reimbursed"--the reason it is promoting lease fees as an alternative to auctions. Because private radio users would pay for the spectrum, "I think it's a reasonable request," she noted. Hernandez also questioned whether McCain believes that companies even need private radio--"something Breaux understands."

Mark Ashby, a legislative counsel for Breaux, agreed that Breaux and McCain have differences on the subject of private radio. That helps explain why Breaux introduced his own spectrum management bill rather than throw his support behind the chairman's.

"We don't think you necessarily have to auction everything," Ashby said. "You may get more money by auctioning the 12 MHz we're talking about," but it better serves the public interest to let private radio users have it in return for lease fees.

Crosby said that while ITA will continue to lobby McCain, his support is not necessary for the Breaux bill to become law. He

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pointed out that there are 19 members of the Senate Commerce Committee. "You don't need to bat 1.000," he said. "You just need to bat .501."

...Lease Fees Have Momentum

That both McCain and Breaux included spectrum lease fees as an assignment method in their legislation suggests the idea has come of age.

Hernandez pointed out that the recent auction of spectrum for Wireless Communication Services, which brought in $13.6 million--far less money than expected--has made lease fees more appealing to legislators. With lease fees, Congress will be guaranteed an ongoing revenue stream that, under the Breaux bill, could be as high as the revenue expected in an auction of comparable spectrum.

"I think [Congress] realizes that you can't keep...assigning value to clumps of spectrum without giving thought to engineering issues," said Hernandez. "You have to consider not just the projected revenue, but the practical [side] and the engineering side of assigning radio spectrum for it to make sense."

Although ITA has pushed lease fees for more than two years, Ashby said "the whole lease fee concept is still pretty new." One goal of the Breaux bill, he said, is to bring the issue "up to a higher level for discussion."

...Breaux Bill Favorable

The private radio industry got just what it wanted in the Breaux bill, no surprise since its writing was a joint effort between ITA and Breaux staff.

In a separate statement issued May 14, Sen. Breaux said the legislation would help more than 300,000 U.S. companies that have invested $25 billion in wireless communications systems. "It will provide these companies with critically needed spectrum and will do so through an equitable lease fee system," he wrote.

Breaux said that current spectrum policy "inadequately recognizes" the benefits of private wireless systems, leading to "deficient" allocations of spectrum. Of the original 1974 and 1986 private radio allocations at 800 MHz and 900 MHz, only 299 channels, or 32 percent of the original allocation, still is available to private wireless carriers, he wrote.

In particular, Breaux pointed to auctions as one culprit

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depriving private wireless service adequate attention. While he praised them for speeding up licensing and generating revenue, auctions "have also unfortunately skewed the spectrum allocation process toward subscriber-based services and away from critical radio services such as private wireless, which are exempted from auctions." The senator called auctions a poor tool for assigning private wireless spectrum because "private wireless operations are site-specific systems which vary in size based on that user's particular needs, and are seldom mutually exclusive from other private wireless applicants."

Breaux also praised lease fees, which should "encourage the efficient use of spectrum by the private wireless industry, generate recurring annual revenues as compensation for the use of spectrum, and retain spectrum ownership by the public. Furthermore, the fees should be easy for [frequency coordinators] to calculate and collect."

In a written statement, ITA's Crosby said, "We appreciate this recognition that private wireless licensees use spectrum to greatly enhance the American public's quality and safety of life and to support competition through productivity contributions."

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Friday, June 27, 1997

Vol. 51, Issue: 26

PRIVATE WIRELESS PROVISIONS FAIL TO MAKE IT INTO BUDGET

The House and Senate handed bad news to the private radio industry this week by failing to provide for an allocation of 12 MHz to private radio in return for spectrum lease fees (LMRN, May 23). Both bills mandate the allocation of 24 MHz from TV channels 60-69 for public safety, and the remaining 36 MHz for commercial use (to be assigned by auction). However, the original proposal to earmark auction revenue to pay for public safety systems is gone. The public safety community also is concerned that the proposed open-ended transition period to digital TV will prevent them from using the 24 MHz in certain cities, such as Los Angeles. The FCC is expected to propose reallocating channels 60-69 at its July 9 open meeting.

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# APPENDIX B

1997 U.S. Code Congressional and Administrative News

# BALANCED BUDGET ACT OF 1997

*PUBLIC LAW 105–33, see page 111 Stat. 251*

DATES OF CONSIDERATION AND PASSAGE

*House: June 25, July 30, 1997*

*Senate: June 25, July 30, 31, 1997*

**Cong. Record Vol. 143 (1997)**

**House Report (Budget Committee)**
**No. 105–149, June 24, 1997**
**[To accompany H.R. 2015]**

**House Conference Report**
**No. 105–217, July 30, 1997**
**[To accompany H.R. 2015]**

*No Senate Report was submitted with this legislation. The House bill was passed in lieu of the Senate bill (S. 947). The House Conference Report is set out below.*

## HOUSE CONFERENCE REPORT NO. 105–217

[page 1]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2015), to provide for reconciliation pursuant to section 104(a) of the concurrent resolution on the budget for fiscal year 1998, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * * * *

[page 555]

For consideration of the House bill, and the Senate amendment, and modifications committed to conference:

JOHN R. KASICH,
DAVID L. HOBSON,
RICHARD K. ARMEY,
TOM DELAY,
J. DENNIS HASTERT,
JOHN M. SPRATT, JR.,
DAVID E. BONIOR,
VIC FAZIO.

As additional conferees from the Committee on Agriculture, for consideration of title I of the House bill, and title I of the Senate amendment, and modifications committed to conference:

ROBERT SMITH,
BOB GOODLATTE,

The conference agreement also adds new sections 113(h) and 113(i) of the NTIA Organization Act. Section 113(h) requires Federal entities to make every effort to relocate their licensed use to other frequencies reserved for government use. Section 113(i) defines "Federal entity." The conferees note that the United States Postal Service qualifies as a federal entity under this definition.

Section 3002(e)—Identification and reallocation of auctionable frequencies

The conference agreement combines the provisions of the House bill and Senate amendment to require the Secretary of Commerce to identify 20 MHz of spectrum currently reserved for government use for reallocation to commercial uses. The reallocated spectrum is to be assigned using competitive bidding pursuant to section 309(j) of the Communications Act. The Commission is required to submit and implement a plan, in a timely fashion, for the reallocation and assignment of the 20 MHz identified in this section. Finally, this section amends sections 113 and 115 of the NTIA Organization Act in several places so that the identification and reallocation are accomplished through a second reallocation report under that Act.

The conferees considered expanding the total reallocation under section 3002(e) to allow for additional allocations for private wireless users, but were unable to do so within the context of the Reconciliation process. Nevertheless, the conferees expect the Commission and the NTIA to consider the need to allocate additional

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spectrum for shared or exclusive use by private wireless services in a timely manner.

Section 3003. Auction of recaptured broadcast television spectrum

HOUSE BILL

Section 3302 of the House bill adds a new section 309(j)(14) to the Communications Act of 1934 to require the Commission to reclaim the 6 MHz broadcasters now use for analog transmission by no later than December 31, 2006. The House bill also required Commission to grant extensions to broadcasters in those markets where more than five percent of the households continue to rely exclusively on an over-the-air, analog broadcast signal.

Section 3302 of the House bill directs the Commission to assign by means of competitive bidding the 78 MHz that is reclaimed from incumbent broadcast licensees. The Commission would be required to complete assignment of licenses for new uses of the reclaimed spectrum by September 30, 2002. To the extent that the Commission reallocates the reclaimed spectrum for services that include digital television service, section 3302 precludes the Commission from disqualifying a potential bidder due to the Commission's duopoly or newspaper cross-ownership rules.

SENATE AMENDMENT

Section 3002 of the Senate amendment adds a new section 309(j)(15) to the Communications Act of 1934 to require the Commission to reclaim the 6 MHz broadcasters now use for analog