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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

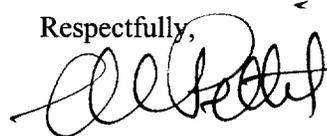
Re: Ex Parte Submission WT Docket No. 99-168

Dear Ms. Salas:

Yesterday, on behalf of Motorola, Inc., we notified the FCC of an *ex parte* presentation that analyzes legal and policy issues surrounding the establishment of private wireless band managers in the 746-806 MHz band. The analyses inadvertently failed to accompany the notification. We again submit this notification along with the attached analysis. Copies of this analysis will be served on multiple FCC officials as indicated on the attached service list. As such, this document should be associated in the docket file of WT Docket No. 99-168.

Please contact me regarding any questions concerning this matter.

Respectfully,



Robert L. Pettit
Counsel for Motorola, Inc.

Attachment

- | | | |
|-----|-----------------------|--------------------|
| Cc: | Mr. Ari Fitzgerald | Ms. Kathleen Ham |
| | Mr. Peter Tenhula | Ms. Amy Zosloff |
| | Mr. Bryan Tramont | Mr. Mark Bollinger |
| | Mr. Mark Schneider | Ms. Nancy Boocker |
| | Mr. Adam Krinsky | Mr. Gary Michaels |
| | Mr. James Schlichting | Ms. D'wana Terry |
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MOTOROLA, INC.

**MEETING THE NEEDS OF PRIVATE WIRELESS USERS
IN THE 746-806 MHz BAND**

WT Docket No. 99-168

Motorola, Inc. ("Motorola") is filing this *ex parte* submission in further support of its recommendation that 6 MHz of spectrum in the 746-806 MHz band be dedicated for private wireless services. As discussed in detail below, Motorola's suggested approach is fully consistent with Congress's intended usage of the spectrum in question and will serve the public interest by ensuring effective operation of public safety services licensed in the band. To facilitate efficient and expeditious licensing of the 6 MHz in question, Motorola endorses the Commission's suggestion that Band Managers be eligible to bid on and hold licenses for this spectrum. Should the Commission deem it necessary to expand the eligible pool of bidders within this 6 MHz allocation for any reason, Motorola suggests that it do so only within the narrow confines discussed herein; any further broadening of eligibility poses a potential threat to the effective operation of public safety services in the 746-806 MHz band and poses significant risks that private wireless users will not be served.

I. BACKGROUND AND OVERVIEW

The record in WT Docket No. 99-168, the on-going rule making establishing service rules for the 746-764 and 776-794 MHz bands ("the 746-806 MHz band"), contains recommendations from Motorola and other parties that some portion of the "commercial use" allocation be dedicated to private wireless services.¹ In support of this proposal, Motorola has explained that its suggested band plan, which calls for 1.5 MHz of spectrum at each edge of two 15 MHz blocks recommended for Commercial Mobile Radio Service ("CMRS") operations, would serve the dual purpose of: (1) creating a "buffer" to help ensure interference-free operation of public safety entities in the band; and (2) contributing a total of 6 MHz of spectrum to help address the severe spectrum shortage faced by the private wireless community. In these respects, Motorola's proposed band plan offers significant public interest benefits. Specifically,

¹ See, e.g., Motorola, Inc., *Ex Parte Notification*, WT Docket No. 99-168 (dated Sept. 15, 1999). See also The Industrial Telecommunications Ass'n, Inc. and Motorola, Inc., *Ex Parte Notification*, WT Docket No. 99-168 (filed Sept. 10, 1999); The Industrial Telecommunications Ass'n, Inc., and Motorola, Inc., *Ex Parte Notification*, WT Docket No. 99-168 (filed Oct. 7, 1999); Comments of the United Telecom Council ("UTC"), WT Docket No. 99-168, at 2 (filed July 20, 1999); Comments of MRFAC, WT Docket No. 99-168, at 4 (filed July 20, 1999); Comments of the Personal Communications Industry Ass'n ("PCIA"), WT Docket No. 99-168, at 3 (filed July 19, 1999).

Motorola's suggested approach recognizes the interference potential if traditional low antenna height, high frequency reuse systems operate adjacent to public safety services. Motorola's band plan offers a solution to this problem while concomitantly providing much needed spectrum for use by private wireless entities.²

Motorola is submitting this paper to augment various aspects of its proposal. In particular, this paper delineates the entities Motorola envisions as eligible to participate in the auction of licenses for the proposed 6 MHz "private" spectrum allocation. In addition, Motorola is taking this opportunity to document the Commission's legal authority to dedicate spectrum in this band to private wireless services. As detailed below, issuance of licenses to Band Managers, as recommended by Motorola, will qualify as "commercial use" within the plain meaning of the relevant statute, Section 337(a)(2) of the Communications Act of 1934, as amended, and thus, is wholly consistent with Congressional intent. Extension of eligibility to a limited group of private wireless entities, as described by Motorola *infra*, would also fall within the purview of Congress's "commercial use" designation and therefore, would be permissible if the Commission deemed it necessary. Finally, to the extent that the term "commercial use" as used in Section 337(a)(2) may be found ambiguous, Motorola's suggested interpretation is reasonable in light of Congress's and the Commission's statutory goals and will serve the public interest in several significant respects.

² On several occasions, the Commission has noted the spectrum shortage facing private wireless users. *See, e.g.,* Private Land Mobile Radio Services: *Background, Federal Communications Commission Wireless Telecommunications Bureau Staff Paper*, at 3, 22-31 (rel. Dec 18, 1996) (noting that over 1,000,000 licensed stations are authorized in the private land mobile services and over 12 million transmitters are in operation, and discussing the unique needs of private wireless users); *Spectrum Efficiency in the Private Land Mobile Radio Bands in use Prior to 1968*, 6 FCC Rcd 4126, 4127-29 (1991) (discussing the congestion in private land mobile radio bands below 800 MHz). *See also* Nextel Communications, Inc., *Request for Waiver of 47 C.F.R. §§ 90.617(c) and 90.619(b)*, DA 99-1404, at 13-14 (rel. July 21, 1999) (discussing FCC policies designed to "preserve PLMR frequencies" above 800 MHz for eligible users and noting concerns about "the diminished spectrum available to PLMRS eligibles for PMRS use").

II. ELIGIBILITY TO BID ON AND HOLD LICENSES FOR SPECTRUM IN THE PROPOSED PRIVATE ALLOCATION SHOULD BE LIMITED TO BAND MANAGERS AND, IF NECESSARY, PRIVATE WIRELESS ENTITIES

Motorola and other parties have consistently supported the Commission's suggestion that "Band Managers" be eligible to bid on spectrum in the recommended private allocation.³ In accordance with this concept, the Band Manager, which could be either an entity or an individual, would hold the license for the spectrum in question. As envisioned, the Band Manager would not provide communications services as such, nor would it construct or operate communications facilities in this band. Instead, the Band Manager would make its spectrum available to third-party private wireless end user eligibles through "contractual sublease" arrangements. The Band Manager would, however, be responsible for ensuring that the operations of each third-party end user comply with all applicable technical and operational rules. The third-party end users would be required, for example, to limit their operations to permissible "private" activities; these entities would not be allowed to engage in Commercial Mobile Radio Service ("CMRS") or other common carrier operations. The Band Manager concept offers an efficient means for ensuring that spectrum is made available in response to the unique needs of the private wireless community while allowing the Commission to use competitive bidding procedures for the relevant spectrum in accordance with the strict time frame mandated by recent legislation.⁴

In addition, if the Commission considers it necessary to broaden the group of eligible bidders, Motorola supports allowing entities eligible for licensing in the Industrial/Land Transportation Category⁵ and other private wireless eligibles engaged in commercial activities to

³ See *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, et al.*, FCC 99-52, at ¶¶ 88-95 (rel. March 25, 1999) (Notice of Proposed Rule Making). See also *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, FCC 99-97, at ¶ 15 (rel. June 3, 1999) (Notice of Proposed Rule Making) ("746-806 MHz Service Rule Notice").

⁴ On October 25, 1999, President Clinton signed into law a Defense Appropriations bill requiring the proceeds from the auction of the 36 MHz of non-public safety spectrum in the 746-806 MHz band to be deposited with the U.S. Treasury no later than September 30, 2000.

⁵ See 47 C.F.R. § 90.617(b) (the Industrial/Land Transportation Category consists of the Power, Petroleum, Forest Products, Film and Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab and Automobile Emergency). Each of these classifications, in turn, is defined in Section 90.7 of the Commission's rules.

bid on and hold licenses in the requested private allocation.⁶ These licensees would be able to use the spectrum for their own internal purposes and, in addition, would be permitted to share their system capacity on either a for-profit or cost-shared basis with other eligible users.⁷ Unlike the Band Manager, these licensees would be responsible for constructing and operating the communications facilities associated with their license. Third party eligibles “sharing” the technical facilities of these licensees would be required to meet the applicable eligibility requirements and use the facilities and underlying transmission services solely for permissible “private” uses. In these respects, the regulatory model envisioned by Motorola is virtually identical to that currently used for the 450 MHz business and industrial category of frequencies.⁸

Conceivably, a hybrid of these two eligible categories could exist and should be permitted if the Commission decides that it is necessary to permit entities other than Band Managers to hold licenses in the requested “private” allocation. For example, a private wireless eligible seeking spectrum for its own internal purposes may find that the amount of spectrum or

⁶ The Commission is still examining the scope of the exemption for “public safety radio services,” as defined in Section 309(j)(2), from the agency’s general auction authority. *See generally Implementation of Sections 309(j) of the Communications Act of 1934, as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, et al.*, FCC 99-52 (rel. March 25, 1999) (Notice of Proposed Rule Making). In Motorola’s view, a determination that private radio eligibles may bid for spectrum in the 746-806 MHz band is wholly separate from and should have no impact on the question of whether private radio entities fall within the “public safety radio service” exemption under Section 309(j)(2). Congress clearly articulated that, for purposes of these two statutes, it used a different standard for defining entities exempt from competitive bidding procedures from that used to define eligibility for future uses of recaptured broadcast spectrum at 746-806 MHz. Indeed, the Conference Report accompanying Congress’s 1997 amendments explicitly states: “The conferees note that the public safety radio services exemption described herein is much broader than the explicit definition for ‘public safety services’ contained in section 3004 of this title (adding new section 337(f)(1) to the Communications Act).” H.R. Conf. Rep. No. 105-217, at 572 (1997). Thus, a determination that most private radio entities do not fall within the definition of eligible public safety services for using the new 746-806 MHz allocation – and are thus eligible for the 746-806 MHz commercial use allocation – is wholly consistent with a determination that these same entities are encompassed by the exemption set forth in Section 309(j)(2).

⁷ In comments to the *Notice of Proposed Rule Making* in WT Docket No. 99-87, Motorola noted how shared private facilities can efficiently meet the private internal communications needs of multiple entities. While such private wireless systems should be supported within the proposed private wireless allocation in the 746-806 MHz band, Motorola strongly supports a clear FCC prohibition against shared systems that provide common carrier or CMRS service offerings within this 6 MHz of spectrum.

⁸ *See* 47 C.F.R. § 90.22 and 47 C.F.R. § 90.179.

geographic area of the available licenses exceeds its needs. Although a partial assignment of the license to another entity would normally be available, Motorola believes that a private license holder should also be permitted to bifurcate its license and offer Band Manager services on that portion of the license not needed for the licensee's own internal use. Ancillary Band Manager activities of this sort would be subject to all of the applicable regulatory rules and policies developed for directly-licensed Band Managers. In particular, the private wireless licensee would be responsible for ensuring that the operations of each third-party end user comply with all applicable technical and operational rules. Both third party eligibles "sharing" the technical facilities of the private licensee and third-party end users entering into a "sublease" arrangement under the Band Manager scenario would be required to meet applicable eligibility requirements and to use the facilities and underlying transmission services solely for permissible "private" uses.

Motorola submits that these eligibility limitations will ensure that the requested private allocation is made available to the greatest number of private radio end-users, thereby promoting the Commission's oft-stated goals for spectrum use efficiency. At the same time, Motorola's recommended limitations offer a way to satisfy the broadest possible range of private communications requirements in an effective and expeditious manner. In addition, the described eligibility limitations guarantee that the spectrum in question is used for the requested purpose, *i.e.*, private wireless communications and, as such, help protect public safety operations in the band from the potential for harmful interference.

III. THE COMMISSION HAS CLEAR LEGAL AUTHORITY TO ESTABLISH AN ALLOCATION IN THE 746-806 MHz BAND DEDICATED TO PRIVATE WIRELESS SERVICES

As mentioned, Motorola's proposed band plan recommends that 6 MHz of spectrum in the "commercial use" allocation in the 746-806 MHz band be made available for private wireless services. As indicated in prior *ex parte* filings, Motorola believes that the requested "private" allocation is fully consistent with Congress's directive that the spectrum in question be allocated for "commercial use."⁹ In the discussion that follows, Motorola demonstrates in detail that its interpretation of Section 337(a)(2) flows naturally when the statute is read in context. Motorola also addresses claims raised by FreeSpace Communications ("FreeSpace") in support of that company's position that Congress's "commercial use" designation precludes an allocation in this band for "private" services.¹⁰

⁹ See The Industrial Telecommunications Ass'n, Inc., and Motorola, Inc., *Ex Parte* Notification, WT Docket No. 99-168 (filed Oct. 7, 1999).

¹⁰ FreeSpace Communications, *Ex Parte* Presentation, WT Docket No. 99-168, at 7-8 (filed Oct. 13, 1999) ("*FreeSpace Ex Parte*").

Briefly by way of background, Section 337(a) of the Communications Act directs the Commission to allocate the spectrum between 746 and 806 MHz in two portions. The first portion, a 24 MHz allocation, is to be made available “for public safety services according to the terms and conditions established by the Commission, in consultation with the Secretary of Commerce and the Attorney General[.]”¹¹ The statute directs that the second portion of the band, *i.e.*, the remaining 36 MHz, be allocated “for commercial use to be assigned by competitive bidding pursuant to Section 309(j).”¹² Although the statute defines “public safety services” as used therein,¹³ neither it nor the underlying legislative history defines “commercial use.”¹⁴ Indeed, with one limited exception, the Communications Act of 1934, as amended, does not contain an explicit definition of “commercial use.”¹⁵

In accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁶ the initial inquiry in interpreting a statute is “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁷ In assessing whether the text is ambiguous, an interpreting body draws on a wide array of

¹¹ 47 U.S.C. § 337(a)(1).

¹² 47 U.S.C. § 337(a)(2).

¹³ Section 337(f) states that, “[f]or purposes of this section . . . [t]he term ‘public safety services’ means services – (A) the sole or principal purpose of which is to protect the safety of life, health, or property, (B) that are provided (i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.” 47 U.S.C. § 337(f)(1).

¹⁴ The House Report states that “[t]he FCC must allocate the remainder of the spectrum located in channels 60 through 69 for commercial use, and . . . assign these commercial licenses by means of competitive bidding.” H.R. Rep. No. 105-149, at 571 (1997). The Conference Agreement likewise indicates that “[n]ew Section 337(b) . . . directs the commission to commence assignment of the public safety licenses no later than September 30, 1998. In addition, the Commission must begin assignment of the commercial licenses by competitive bidding after January 1, 2001.” H.R. Conf. Rep. No. 105-217, at 597 (1997).

¹⁵ In the cable services context, Congress has defined “commercial use” as “the provision of video programming, whether or not for profit.” 47 U.S.C. § 612(b)(5). The definition, by its terms, is limited to the Section 612 provisions.

¹⁶ 467 U.S. 837 (1984).

¹⁷ *Id.* at 842-43.

“traditional tools.”¹⁸ *Chevron’s* “step 1,” as this inquiry is called, is not limited to an analysis of the particular statutory language.¹⁹ Rather, it encompasses consideration of the language, structure, and design of the statute as a whole.²⁰

The language of Section 337 itself makes clear the intent of Congress in using the phrase “commercial use.” Using the available tools of statutory construction, the meaning of “commercial use” in Section 337(a) is plain: spectrum dedicated to “commercial use” is simply spectrum not reserved for public safety purposes. In particular, as noted above, Section 337(a) directs the Commission to allocate spectrum in the relevant band for two distinct purposes: (1) public safety services, and (2) commercial use. These two classifications are the only distinction Congress made. As such, without a doubt, Congress used the phrase “commercial use” to define spectrum uses that are distinguished and different from “public safety services.” In other words, given the usage of the phrase contained in Section 337, “commercial use” must be deemed to involve all radio-based operations other than those that satisfy the definition of public safety services. Neither the statutory language nor the related legislative history supports a conclusion that Congress meant anything different from or more than this.²¹

¹⁸ *Id.* at 843 n.9.

¹⁹ These “traditional tools” include: (i) individual statutory texts, *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995); (ii) relevant statutory structures (*i.e.*, relationships between the provisions at issue and other provisions), *United Savings Assocs. v. Timbers of Inwood Forest Ass’n*, 484 U.S. 365, 371 (1988); (iii) legislative history, *Atherton v. FDIC*, 519 U.S. 213, 227-30 (1997); and (iv) policy consequences, *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990).

²⁰ *See, e.g.*, *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-25 (1987); *Chevron*, 467 U.S. at 845 (holding that the court will “reverse [an agency’s] interpretation of statutory law where ‘it appears from the statute or its legislative history’ that the interpretation is contrary to Congress’ intent”).

²¹ Should the Commission conclude that “commercial use” means usage for other than public safety purposes, as Motorola recommends, its construction may be upheld even if a court later finds that Section 337(a) is ambiguous. Under *Chevron*, where “the statute is silent or ambiguous with respect to the specific issue, the question for [a] court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. Thus, under *Chevron* “step 2,” a court “decide[s] not whether the [agency’s approach] represents the best interpretation of the statute, but whether it represents a reasonable one.” Construing “commercial use” in Section 337(a) to encompass private radio operations is not only eminently reasonable and fully consistent with the Act’s purpose of making telecommunications services available to all Americans within a deregulatory and competitive framework, but is also the interpretation most conducive to the public interest.

Notwithstanding the clarity of the “commercial use” concept in Section 337, FreeSpace argues that “commercial use” effectively prohibits any allocation for private operations in this band.²² Quite to the contrary, however, if Congress had wanted to limit the “commercial use” allocation to for-profit, subscription-type communications services, as FreeSpace appears to argue, Congress knew how to do so. Specifically, Congress could easily have limited eligibility for this allocation either to “Telecommunications Carriers”²³ or to “Commercial Mobile Service” providers,²⁴ two well-established classifications of “for-profit” communications service providers already defined in the Communications Act. In accordance with well-settled principles of statutory interpretation, the fact that Congress did not use either of these more specific terms indicates that it intended a different meaning.²⁵

Furthermore, in the subject proceeding, the Commission has already acted consistent with this broad interpretation of Congressional intent. Specifically, the Commission has determined that the 36 MHz allocation should be made available “to the broadest range of services.”²⁶ The Commission accordingly allocated the spectrum for fixed, mobile, and broadcasting use on a co-primary basis.²⁷ Significantly, although broadcasting is not normally considered a

²² *FreeSpace Ex Parte* at 7-9.

²³ 47 U.S.C. §§ 153(44), (46).

²⁴ 47 U.S.C. § 332(d)(1). Reliance on the definition of “Commercial Mobile Service” would exclude many potential uses of the spectrum apparently contemplated by Congress and effectuated by the Commission. For example, a concept of “commercial use” based on “commercial mobile service” would exclude fixed (unless incidental) usage as well as commercial broadcasting on these frequencies.

²⁵ *See Brown v. Gardner*, 115 S. Ct. 552, 556 (1994) (quoting *Russello v. United States*, 464 U.S. 16, 23 (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks omitted); *Railway Labor Executives’ Ass’n v. National Mediation Board*, 29 F.3d 655, 666 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1392 (1995) (“The fact that Congress omitted equivalent language . . . cannot be deemed unintentional or immaterial.”)).

²⁶ *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, 12 FCC Rcd 22953, 22962 (1998) (Report and Order) (“*Reallocation Report and Order*”).

²⁷ *Id.* Although the Commission’s inclusion of broadcast services among the potential offerings in this band demonstrates the agency’s objective to permit a wide range of permissible activities in the band, Motorola does not believe that broadcast service operations in this spectrum are technically compatible with meaningful mobile and fixed operations. Accordingly, Motorola has urged the Commission to exclude traditional broadcast services from the 746-806 MHz band. *See Comments of Motorola*, WT Docket No. 99-168, at 8-11 (filed July 19, 1999).

communications service offered on a “for-profit” basis, such as Commercial Mobile Radio Services, the Commission specifically concluded that Congress meant “to include commercial broadcasting in commercial services.”²⁸ In addition, the Commission has already concluded that “[p]rivate organizations or industry groups . . . will have the opportunity to seek the desired spectrum by participating in the auction.”²⁹ The Commission therefore clearly envisions a broad array of entities, including private users, as eligible for the spectrum in question.³⁰

In short, a fair reading of Section 337(a) under recognized principles of statutory interpretation leads to the conclusion that an allocation for private services in the “commercial use” portion of the 746-806 MHz band is wholly consonant with Congress’s intent. As outlined by Motorola and other parties, such an allocation will also serve the public interest in a variety of respects.

²⁸ *Id.*

²⁹ *Id.* at 22963. In other proceedings, the Commission has taken a fairly expansive view of “commercial use,” in effect treating the phrase as encompassing any non-Government use. See *Millimeter Wave Bands*, 13 FCC Rcd 16947,16972-74 (1998) (Order on Reconsideration and Notice of Proposed Rule Making).

³⁰ It is true that in the *Reallocation Report and Order*, the Commission “declin[ed] to allocate spectrum in the band exclusively to the private radio services” as requested by the Coalition of America’s Railroads (“CAR”). As characterized by the Commission, CAR “recommend[ed] that . . . [the Commission] allocate spectrum to private radio services, and assert[ed] that auctions are an inappropriate method for allocating and licensing spectrum in the private radio services.” *Reallocation Report and Order*, 12 FCC Rcd at 22961-62; see also *FreeSpace Ex Parte*, at 8-9. As noted above, in the *Reallocation Report and Order*, the Commission did, however, expressly state that a broad range of service providers – including private wireless eligibles – would be permitted to bid on the spectrum in question. In addition, in the instant proceeding, the Commission explicitly invited commenters to discuss “how innovative service rules for such a flexible use allocation might maximize the uses made of this spectrum” and in doing so, specifically invited comment on the licensing of private mobile and private fixed radio services within this band. *746-806 MHz Service Rule Notice*, ¶¶ 5-6, 15. Motorola’s recommended band plan is therefore well within the scope of the Notice. Moreover, in establishing service rules for the band, the Commission clearly has discretion to adopt a band plan that includes a private wireless “set aside” that promotes the broader goals of the proceeding, *i.e.*, that facilitates effective use of the spectrum by a broad range of entities.

IV. LICENSING OF THE ELIGIBLE ENTITIES IDENTIFIED BY MOTOROLA WOULD CONSTITUTE “COMMERCIAL USE” WITHIN THE MEANING OF SECTION 337(a)(2)

Based on the analysis and authorities outlined above, it is clear that issuance of licenses in the requested allocation to the eligible bidders described by Motorola would fully comport with Congress’s mandate that the spectrum in question be made available for “commercial use.” In particular, as discussed below, it is beyond cavil that the activities of Band Managers constitute “commercial use” because the services offered by these entities are for-profit, commercial enterprises. Given Congress’s choice of the broad term “commercial use” as opposed to other, more restrictive terminology employed elsewhere in the Communications Act, it also appears that private wireless eligibles could hold licenses for this spectrum in their own right because these entities are engaged in commercial activities and the frequencies in question will be used in support of commercial ventures.

At the outset, the activities of a Band Manager qualify as “commercial use” because the Band Manager will be performing a commercial, for-profit function on behalf of its third-party end-user constituents. In particular, the spectrum allocation and management activities performed by the Band Manager constitute a “commercial use” because these services will be provided for a fee, on a for-profit basis. Performance of these activities, which are an outgrowth of the Band Manager’s status as an FCC licensee, is in essence the “business” of the Band Manager. Specific for-profit, commercial functions of the Band Manager will include coordinating access to spectrum, performing engineering and data base management, and collecting fees and revenue from third-party end users.

Significantly, as the preceding section of this paper makes plain, it is irrelevant that the Band Manager will not be using the spectrum in question to provide for-profit “communications service” in the traditional sense. Congress did not limit eligibility for the “commercial use” allocation to traditional for-profit communications service providers such as Commercial Mobile Radio Service (“CMRS”) operators. Moreover, the Band Manager is in fact “using” its spectrum to provide commercial communications services because the Band Manager’s functions and revenues stem from its status as an FCC license holder. Motorola thus submits that under either theory, the Band Manager’s activities constitute a commercial enterprise and the Band Manager’s spectrum itself is used in support of that enterprise.

Issuance of licenses in the identified spectrum directly to private wireless entities would also be consistent with Congress’s “commercial use” designation. In particular, as discussed above, principles of statutory construction lead to the clear conclusion that Congress’s choice of the term “commercial use” intended to encompass a broad range of activities essentially including all “non-public safety” operations. This designation would therefore include the activities of private wireless eligibles. Moreover, it is significant that all of the identified users are engaged in commercial operations. As a result, any frequencies licensed to these operators would be used in support of commercial functions and thus, would be employed for “commercial use.” The offering of excess capacity on these systems on either a for-profit or a cost-shared

basis is a well-established private radio characteristic and in no way undermines the conclusion that the licensees in question satisfy the “commercial use” requirement of Section 337(a)(2). Finally, consistent with the foregoing paragraphs, if the private wireless licensee chooses to use a portion of its spectrum as a Band Manager, the spectrum would still be used for commercial purposes both from the standpoint of the licensee/Band Manager as well as from the perspective of third-party end users employing the spectrum in support of their greater commercial activities.

* * * * *

In summary, for the reasons set forth above, Motorola submits that its requested allocation of 6 MHz of spectrum in the 746-806 MHz band for “private” services is entirely consonant with Congressional intent and would serve the public interest. In particular, the perceived private uses of the spectrum are fully consistent with the express language of Section 337(a) and with the underlying purpose of the statute. Viewed in context of the Communications Act as a whole – and assisted by well-settled principles of statutory construction – Motorola submits that its interpretation of Section 337(a)(2) is the correct and only possible way to construe the statutory language. To the extent that the term “commercial use” as used in Section 337(a)(2) is nevertheless considered ambiguous, the Commission has broad discretion to interpret the statute in accordance with the principles outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Motorola submits that its recommended interpretation would be afforded great deference, if adopted by the Commission, because it is reasonable and promotes Congress’s and the Commission’s goals.