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EX PARTE OR LATE FILED

Bell Atlantic

December 17, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 – 12th Street, SW
Room: TW-A325
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: WT Docket No. 99-168
"Service Rules for the 746-764 and 776-794 MHz Bands"

Dear Ms. Salas:

On December 16, 1999, John Scott of Crowell & Moring and the undersigned met with Adam Krinsky of Commissioner Tristani's office to discuss service rules for the 746-764 and 776-794 MHz bands. Bell Atlantic believes that the Commission should adopt rules to facilitate the use of these bands for commercial mobile radio services. Our meeting focused on the proposal made by the Industrial Telecommunications Association and Motorola to set-aside 6 MHz of spectrum for private mobile radio services. Bell Atlantic believes that this proposal is in direct conflict with Congress' mandate to auction this spectrum for "commercial uses". Bell Atlantic opposes any private auction, and urges the Commission to auction all 36 MHz so that it is available for commercial mobile services. A paper summarizing our position is attached.

We also discussed CTIA's December 15, 1999 letter to Chairman Kennard. While Bell Atlantic has recommended that two 18 MHz licenses be auctioned, we can support CTIA's position that three commercial licenses be awarded in each geographic market. We agree with CTIA that bidders should be permitted to aggregate two, but not all three, of the commercial licenses. This would allow operators like Bell Atlantic to acquire the 18-20 MHz of spectrum that we believe is necessary to accommodate wideband data services.

Please include a copy of this ex parte presentation in the record for the above captioned proceeding. If you have any questions, you may call me on (202) 336-7873.

Don Brittingham

Attachment

cc: A. Krinsky

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ADOPTION OF THE ITA-MOTOROLA BAND-SHARING PROPOSAL WOULD VIOLATE THE COMMUNICATIONS ACT

The Industrial Telecommunications Association and Motorola have proposed that the Commission set aside six MHz out of the 36 MHz "commercial" segments of the 746-806 MHz allocation to license "band managers," who would in turn make this part of the spectrum available to companies for private, internal use. This proposal is contrary to the Communications Act because the spectrum would be used for private, not commercial, operation. The Commission must auction the entire 36 MHz segment, as Congress directed, for commercial wireless services that will serve and benefit the public.

In Section 3004 of the 1997 Budget Act, now codified as Section 337(a) of the Communications Act, Congress directed the Commission to allocate 36 MHz of the 746-806 MHz band only for ***"commercial use,"*** and required that this spectrum be licensed through competitive bidding. 47 U.S.C. § 337(a). There can be no dispute that auctioning and licensing this spectrum directly to companies for their internal use would not comply with the Budget Act. As ITA has stated, its members intend to use the spectrum "solely to meet their internal wireless communications needs." ITA *Ex Parte* Letter, dated Dec. 9, 1999.

The band manager proposal attempts to evade this clear limit by advancing the concept of a band manager who would instead receive the license. Because the band manager will then lease the right to use the spectrum to private entities at a profit, ITA and Motorola argue this constitutes "commercial use."

The proposal should be rejected at the outset because it would undermine Congress's objective – to ensure that all of the 36 MHz is used for the benefit of the public because of the clear need for more publicly available wireless service. The end result, if this proposal is accepted, would be precisely what Congress did not allow for this spectrum – private rather than public use.

The proposal also conflicts with the precise language Congress chose in the Budget Act: "commercial use." Although the Act does not define this phrase, the Conference Report makes clear that when Congress used the term "commercial," it did not mean private operations. For example, in allocating an additional 20 MHz "currently reserved for government use for reallocation to commercial uses," the Report states, "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." *H. Conf. Rep. No. 105-217,* at 575 (1997). This

language would have made no sense if use meant anything other than the provision of communications – and that is not what the band manager would do.

The term "commercial" also has a well-understood meaning in the Communications Act and in Commission policy. For example, the definition of a "commercial" mobile service ("CMRS") in Section 332 treats it as a service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of the eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). "Private" service and "commercial" service are distinct. Courts have repeatedly held that Congress is presumed to know its prior use of terminology in a statute when amending that statute.

In implementing Section 332 and in other proceedings, the Commission has drawn a bright line between licensing spectrum for commercial as opposed to private use. The ITA/Motorola proposal, when measured against that precedent, cannot be found to be "commercial use" without undermining Section 337 and settled Commission policy.

1. No commercial "use" of spectrum. The first problem with the particular band manager proposal presented by ITA and Motorola for the 700 MHz block is that the party that would be granted the spectrum by the FCC, the band manager, would not be "using" the spectrum at all. "Use" implies providing some telecommunications service, not simply managing the band. The band manager would be no different from the Commission in that it would be "managing" the reassignment of spectrum. It would not "use" the spectrum anymore than the commission or a frequency coordinator does so. That is not "use."

2. No "for profit" use. As ITA and Motorola recognize, a "commercial" use must be a "for profit" use. But the proposal is not commercial use of the spectrum because the band manager does not profit from any use of the spectrum. The band manager provides no "radio service," and would be licensed but would have no licensed service or facilities. Rather, the band manager would profit from leasing spectrum to companies for their own private, internal facilities and uses. The band manager would no more use the spectrum "for profit" than does the FCC itself. This would be inconsistent with the "for-profit" requirement because, as the Commission has stated, "for profit" services "exclude services where the licensee does not seek to receive compensation from *operation* of a mobile radio system." Implementation of Sections 3(n) and 332 of the Communication Act, 9 FCC Rcd 1411, 1428 ¶ 44 (1994) (emphasis supplied).

3. No subscriber-based service. The band manager proposal would not be "commercial use" because it is not subscriber based, as is the case with previously authorized "commercial" uses of spectrum. The Commission has referred to a "commercial" operation as providing a telecommunications service to subscribers. See, e.g., Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 9 FCC Rcd 2348, 2352-53 (1994); Amendment of the Commission's Rules Regarding Multiple Address Systems, 14 FCC Rcd 10744, 10755-56 (1999) (describing applications for "subscriber-based" services as "services of a commercial nature"). Private services, in contrast, "do not involve the payment of compensation to the licensee by subscribers," but rather, are for internal uses." Competitive Bidding, 9 FCC Rcd at 2352.

4. Not publicly available service. As the NPRM in this proceeding recognized (at ¶ 51), a commercial service, unlike a private service, is generally made available to the public without restriction. The "band manager" service would, however, be restricted to a limited number of agreements for private use of the spectrum, and would not be freely available to the public. Again there is nothing about the band manager's role that is consistent with the Commission's policies for determining commercial use of spectrum. In fact, the legislative history of Section 337 refers to the licensees of the spectrum designated for commercial use as "commercial licensees." *H.Conf. Rep. No. 105-217,* at 579.

5. Inefficient use of spectrum. The proposal would result in a clearly inefficient use of spectrum at a time when there is a critical need for additional spectrum to meet the fast-growing public demand for access to wireless communications. The Commission has licensed private wireless services on a site-by-site basis, allowing the applicant's internal need for spectrum to dictate the amount and service area of spectrum authorized. Licensing band managers on a site-by-site basis makes no sense. But if they are granted 700 MHz spectrum to serve a geographic area, this would be equally inefficient because band managers themselves have no particular need for the service area. The band manager would contract with private users on a site-by-site basis for spectrum to meet internal needs, which of course will not be tailored to a predefined EA, MTA or other license area. Because it makes no sense to have a "build-out" requirement for a band manager, spectrum usage would be disjointed and inefficient. Proper spectrum policy requires licensing the spectrum to a commercial licensee who has a "build-out" incentive to use the spectrum throughout the licensed service area.

6. Improper use of auction authority. In its comments in this docket, ITA acknowledged that auctions were particularly ill-suited to private mobile radio use because of the way private users deploy their systems. Congress, however, explicitly declared that this spectrum must be auctioned. The

inconsistency between how ITA views the spectrum as being deployed and Congress' direction that auctions must be used underscores the point that none of this band can be earmarked for private use either directly or through the artifice of a band manager.

7. Departure from well-established licensee control policies. The concept of distinguishing the band manager, as licensee, from the party actually operating on the 700 MHz frequencies, raises serious and difficult issues of where control lies, issues that would force the Commission to depart from longstanding rules and policies governing a licensee's obligations. The Commission has always required that the actual licensee of the spectrum retain full control of how the spectrum is used and operated. It has recognized that it the party actually using the spectrum must be subject to its full jurisdiction.

Here, however, there would be an unprecedented division between licensee and spectrum user because the "licensee" would not use any spectrum at all. The proposal does not grapple with this serious problem. How will the Commission verify that the licensee/band manager is in control of how the spectrum is used, initially and in the long term? Who does the Commission look to in cases of radio interference? Who does the Commission look to for compliance with other licensing requirements? If the band manager is the licensee, it will be responsible – yet as a practical matter, since it will not be operating any system on the spectrum, how will it know that all FCC rules are followed? Accepting the proposal would undercut settled policy on the critical importance of licensee control.

In sum, imposing a for-profit spectrum manager as an intermediary between the Commission and private radio operators does not change the basic fact -- under the ITA/Motorola proposal, the spectrum will be used by private entities, not the public. Given this fact, the proposal is in unavoidable conflict with Congress's mandate that this spectrum be licensed for commercial use for the benefit of the public.