

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Reorganization and Revision of)	WT Docket No. 94-148
Parts 1, 2, 21, and 94 of the Rules)	
To Establish a New Part 101 Governing)	
Terrestrial Microwave Fixed Radio Services)	
)	
Amendment of Part 21 of the Commission's)	
Rules for the Domestic Public Fixed Radio)	CC Docket No. 93-2
Services)	
)	
McCaw Cellular Communications, Inc.)	RM-7861
Petition for Rulemaking)	
)	
Amendment of Part 101 of the)	WT Docket No. 00-19
Commission's Rules to Streamline)	
Processing of Microwave Applications in)	
the Wireless Telecommunications Services)	
)	
Telecommunications Industry Association)	RM-9418
Petition for Rulemaking)	
)	

**COMMENTS OF THE
UNITED TELECOM COUNCIL**

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SUMMARY

Microwave facilities are licensed on a first-come-first served, site-by-site basis. Moreover, applications must be coordinated by a certified frequency coordinator prior to reaching the Commission. Hence, the current licensing regime makes it almost impossible for mutually exclusive applications to be filed with the Commission.

The current licensing regime reflects the fact that microwave facilities are used as the communications backbone for licensees, such as the utility and pipeline companies that are members of UTC. Microwave facilities are not used to cover wide geographical areas, but communicate over narrow paths with strict standards against deviation. Hence, licensing microwave services by geographic area would be contrary to the use of microwave facilities, and it neglects the Commission's obligation pursuant to Section 309(j)(6)(E) "to ...avoid mutual exclusivity in application and licensing proceedings."

Even if the Commission's auction authority was triggered by the receipt of mutually exclusive applications, utilities, pipelines and other critical infrastructure industries would be exempt from auctions as providing "public safety radio services." Moreover, the Commission must establish safeguards to protect public safety radio services above 2 GHz by ensuring that sufficient spectrum is made available to meet current and future needs.

Finally, UTC supports the proposal to eliminate Section 101.603(b)(1) which arbitrarily prohibits private operational fixed service ("POFS") licensees from carrying common carrier traffic on a non-common carrier basis. It also supports the proposal to make the 952.95-956.15 MHz and 956.55-959.75 MHz available for conditional authorization.

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Pursuant to Section 1.415 of the Federal Communications Commission's ("Commission") Rules, the United Telecom Council ("UTC") hereby submits its Comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceedings.¹ UTC opposes proposals to auction geographic service areas of Part 101

¹ In the Matter of Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services; Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services; McCaw Cellular Communications, Inc. Petition for Rule Making; Amendment of Part 101 of the Commission's Rules to Streamline Processing of Microwave Applications in the Wireless Telecommunications Services; Telecommunications Industry Association Petition for Rulemaking, WT Docket No. 94-148; CC Docket

spectrum. Moreover, utility companies that provide public safety radio services should not be required to obtain Part 101 spectrum through competitive bidding. UTC supports the Commission's proposal to permit the carriage of commercial traffic on private operational fixed service ("POFS") facilities, and urges the Commission to clarify that spectrum used for public safety radio services would also be permitted to carry commercial traffic on a non-common carrier basis. UTC also supports the Commission's proposal to make frequency bands 952.95-956.15 MHz and 956.55-959.75 MHz available for conditional authorization under Section 101.31(b).

I. Background

UTC is the information technology and telecommunications association for the nation's electric, gas, and water utilities, natural gas pipeline companies and other critical infrastructure industries. Approximately 1000 utilities and pipeline companies are members of UTC, ranging in size from large investor-owned utilities serving millions of customers to small rural electric cooperatives and water districts that serve only a few thousand customers each. All utilities and pipeline companies depend on reliable and secure communications systems to carry out their public service obligations, and many operate private microwave systems, both point-to-point and point-to-multipoint, to meet these critical communications requirements. UTC has been an active participant in this and other proceedings affecting microwave services, and is therefore pleased to have this opportunity to comment on the *Notice of Proposed Rulemaking*.

No. 93-2; RM-7861; WT Docket No. 00-19; RM-9418, Memorandum Opinion and Order and Notice of Proposed Rule Making, 15 FCC Rcd 3129 (rel. Feb. 14, 2000)(hereinafter "*Notice of Proposed Rulemaking*").

The Commission has proposed to “eliminate the rule prohibiting stations licensed as private systems from offering common carrier communications services.”² It has also proposed to make the 952.95-956.15 MHz and 956.55-959.75 MHz bands available for conditional authorization.³ It has also invited comment on a number of issues related to the impact of the 1997 Balanced Budget Act on Part 101. Specifically, it invited comment on various options for licensing microwave facilities above 2 GHz through competitive bidding. It also invited comment on a number of issues related to auctioning of spectrum above 2 GHz, including whether, “any of the services licensed under Part 101 come within the Balanced Budget Act’s definition of ‘public safety radio services’” that are exempt from auction.⁴ UTC confines its comments to addressing these three broad issues: spectrum auctions for microwave licensing above 2 GHz, common carrier traffic on POFS facilities, and conditional authority in the 952.95-956.15 MHz and 956.55-959.75 MHz bands.

II. Microwave Licenses for Spectrum Above 2 GHz Should Not be Assigned through Competitive Bidding.

The Commission proposal to license microwave services through competitive bidding operates from the false-premise that the Commission has the authority to do so. Section 309(j) only authorizes competitive bidding for mutually exclusive applications for initial licenses or construction permits.⁵ As the Commission acknowledges in the *Notice of Proposed Rule Making* “under the current licensing scheme, mutually exclusive

² *Notice of Proposed Rulemaking* at ¶¶35-38.

³ *Id.* at ¶44.

⁴ *Id.* at ¶81.

situations rarely if ever occur.”⁶ This is so because microwave services are currently licensed on a site-by-site basis and because applicants must obtain frequency coordination of proposed facilities prior to filing an application with the Commission. Hence, the current licensing scheme would not trigger the Commission’s authority to auction spectrum for microwave services.

Nonetheless, the Commission assumes that it may auction microwave spectrum over large geographic areas. Implicit in this assumption is that geographic service area licensing of microwave services will create mutual exclusivity, where none existed before. In this regard, the Commission oversteps its authority again by failing “to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.”⁷ As the Commission acknowledges in the *Notice of Proposed Rule Making*, “[m]icrowave is used as the *backbone* infrastructure” for private as well as commercial licensees, and is not designed to communicate in broad geographic service areas. Instead, microwave communicates in narrow point-to-point and point-to-multipoint paths. Hence, the proposal to license microwave services according to geographic areas is contrary to the nature in which the service is used, resurrecting the concern raised by Congress, “that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations” to avoid mutual exclusivity.⁸

⁵ 47 U.S.C. §309(j)(1).

⁶ *Notice of Proposed Rulemaking* at ¶75.

⁷ 47 U.S.C. §309(j)(6)(E).

⁸ *See* H.R. Conf. Rep. No. 105-217, 105th Cong. 1st Sess. at p. 572 (1997). *See also*, Letter from Senators John Breaux, Slade Gorton, Spencer Abraham and Thomas Daschle, and Representatives Billy Tauzin

III. The Commission Must Protect Public Safety Radio Service Providers

In the Commission’s proceeding implementing the Balanced Budget Act of 1997 (“BBA97”), UTC strongly objected to the use of competitive bidding for the assignment of licenses in existing spectrum allocations, particularly spectrum allocated for mobile and fixed services that utilities and pipeline companies use to support the safe and reliable delivery of critical services to the public.⁹ UTC reiterates its opposition to the use of competitive bidding in existing spectrum bands, which threatens to exacerbate the critical shortage of spectrum available for utilities, pipelines and other critical infrastructure industries by either freezing applications for new or modified facilities or relocating incumbents from reallocated spectrum.

A. Appropriate Scope of the Exemption for Public Safety Radio Services

The Commission invited comment on the “services licensed under Part 101 that come within the definition of ‘public safety radio services.’” It asked for an estimate of the current and future use of the spectrum by public safety radio services, and whether spectrum set-aside for public safety radio services should be consolidated with spectrum in the Public Safety Pool.¹⁰

Utilities, pipelines and other critical infrastructure industries that use microwave facilities in support of the safe and reliable delivery of critical services to the public qualify

and John Dingell to Chairman Kennard (Dec. 22, 1998) at 2 (noting that Congress “did not engage in an idle act” when it confirmed the FCC’s responsibility to avoid mutual exclusivity in licensing, and expressing concern that “the Commission was ignoring its obligations under Section 309(j)(6)(E)”).

⁹ *In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934*, WT Docket No. 99-87, Comments of UTC to the *Notice of Proposed Rulemaking* at 12-13 (filed Aug. 2, 1999). UTC incorporates by reference its comments submitted in the BBA97 proceeding to clarify and supplement its comments and reply comments submitted in the instant proceeding.

¹⁰ *Notice of Proposed Rulemaking* at ¶81.

as public safety radio services. The Balanced Budget Act of 1997 defined public safety radio services as,

Private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that --
(i) are used to protect the safety of life, health, or property; and
(ii) are not made commercially available to the public¹¹

The report language explained that “private internal radio services’ used by utilities, railroads [and] . . . pipelines” fall within the definition of “public safety radio services.”¹²

The Commission has acknowledged this point by proposing “to protect operations in several radio services (Railroad, Power, and Petroleum) where radio is used as a critical tool for responding to emergencies that could impact hundreds or even thousands of people.”¹³ Therefore, UTC submits that private internal communications of utilities, pipelines and other critical infrastructure industries are exempt from spectrum auctions.

B. Safeguards to Protect Public Safety Radio Services

The statutory exemption is part of Congress’s broader intent to protect public safety radio services. UTC does not believe that the BBA97 was intended to expand eligibility for traditional “public safety” spectrum, but to protect additional types of services that are closely related to these traditional public safety providers. Consequently,

¹¹ P.L. 105-33, Section 3002(a)(2) amending Section 309(j)(2) of the Communications Act.

¹² H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572.

¹³ *In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Services and Modify the Policies Governing Them*, PR Docket No. 92-235, *Second Report and Order*, 12 FCC Rcd. 14307, 14329 (footnote omitted). (hereinafter “*Second Report and Order*”); *See also* Letter from Chairman William Kennard to Senator Trent Lott responding to Senate Reauthorization Follow Up Questions for May 26, 1999 Hearing Record of the Senate Committee on Commerce, Science, and Transportation, at 5 (agreeing that “the exemption [for public safety radio services]. . . includes private internal radio services used by utilities, railroads, . . . [and] pipelines.”).

UTC is not seeking new utility or pipeline access to existing public safety spectrum allocations. In that regard, UTC does not endorse the proposal to consolidate public safety spectrum with spectrum set-aside for public safety radio services.¹⁴ Instead, UTC urges the Commission to consider establishing three (3) categories of service in all existing and future private bands:

- (1) Public Safety, including traditional emergency response agencies such as police and fire.
- (2) Public Service, including other “exempt” services such as utilities, pipelines and railroads.
- (3) Industrial/Business, including services that do not fall within the “public safety radio services” definition.

To that end, UTC has filed a Petition for Rulemaking, which was considered in the BBA97 proceeding, and which it incorporates by reference herein to be considered as part of this proceeding.¹⁵ UTC strongly urges the Commission to implement the auction exemption provisions of the BBA97 in accordance with the relief sought within the Petition for Rulemaking and comments submitted in the BBA97 proceeding.

In order to protect public safety radio services that utilities, pipelines and other critical infrastructure industries use, the Commission must establish safeguards to ensure that current public safety radio service spectrum is not reallocated and that sufficient spectrum is set-aside to satisfy future demand. In this regard, UTC reminds the Commission that many utility and pipeline microwave facilities have been recently

¹⁴ See *Notice of Proposed Rulemaking* at ¶ 81.

¹⁵ See UTC, The Telecommunications Association, American Petroleum Institute, and Association of American Railroads Petition for Rulemaking (filed Aug. 14, 1998). See also *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 Mhz*, WT Docket No. 99-87, *Notice of Proposed Rulemaking*, 14 FCC Rcd 5206, 5229 (1998); And see Comments of UTC at 26-29 (filed Aug. 2, 1999) and Reply Comments of

relocated to 6 GHz after the 1850-1990 MHz band was reallocated for PCS.¹⁶ It would be inequitable for the Commission to uproot utilities and pipeline licensees again by conducting auctions in the 6 GHz band. Moreover, foisting public safety radio services from current allocations or restricting them from future allocations compromises the integrity of communications of utilities, pipelines and other critical infrastructure industries that support the safe and reliable delivery of critical services to a substantial percentage of the public at large. Therefore, UTC recommends that prior to any auction, the Commission should, at a minimum, conduct assessments of other bands as well as the 6 GHz band to determine the impact upon public safety radio services, including those of utilities, pipelines and other critical infrastructure industries.

In the event that the Commission does auction microwave spectrum, it must protect public safety radio services more than simply “grandfathering” existing utility and pipeline systems.¹⁷ The BBA97, by providing that utility and pipeline communications systems would be exempt from auctions, clearly envisioned that additional licenses would be available for these services. Congress did not intend for the Commission to circumvent the provisions of the BBA97 by simply reclassifying all private bands “non-public safety radio service” spectrum. The plain meaning of the statute indicates that there would continue to be spectrum for all “exempt” services. In that regard, the Commission must

UTC at 15-17 (filed Sept. 30, 1999) and Joint Comments of the Critical Infrastructure Industries at 17-22 (filed Aug. 2, 1999) in WT Docket No. 99-87.

¹⁶ The 6 GHz band is also likely to become the preferred home for private microwave systems relocated from the 2110-2200 MHz band to make room for Mobile Satellite Service. *See Amendment of Section 2.106*, ET Docket No. 95-18, FCC 00-233, *Second Report and Order and Second Memorandum Opinion and Order*, (rel. July 3, 2000).

¹⁷ *See e.g. Notice of Proposed Rulemaking* at ¶77 (Option I).

ensure that public safety radio services are not relocated or required to share spectrum with other services.¹⁸

IV. The Commission Should Eliminate the Rule Prohibiting POFS Licensees' Carriage of Common Carrier Traffic.

In its comments and in a Petition for Reconsideration in this proceeding UTC has requested that the Commission eliminate the restriction in Section 101.603(b)(1) of the Rules that prohibits POFS licensees from carrying common carrying traffic.¹⁹ UTC continues to urge the Commission to eliminate this restriction which presents POFS licensees with the Hobbesian choice of either allowing reserve capacity to remain idle, or complying with onerous common carrier regulations.

The Telecommunications Act of 1996 clarifies that “a telecommunications carrier shall be treated as a common carrier under this Act *only to the extent that it is engaged in providing telecommunications services. . .*”²⁰ Recently, the FCC and the U.S. Court of Appeals for the D.C. Circuit affirmed that a private carrier service is not subject to common carrier regulation simply because it carries common carrier traffic.²¹ Nonetheless, Section 101.603(b)(1) of the Rules does precisely that by treating POFS licensees as common carriers when they carry common carrier traffic on a non-common carrier basis. Therefore, Section 101.603(b)(1) is inconsistent with fundamental regulatory principles by prohibiting POFS from carrying common carrier traffic on a non-

¹⁸ See e.g. *Notice of Proposed Rulemaking* at ¶ 77 (Options II and III).

¹⁹ Comments of UTC at 11-16 (filed Feb. 21, 1995); Petition for Reconsideration/Clarification of UTC at 2-8 (filed June 27, 1996).

²⁰ See Section 3(49) of the Communications Act of 1934, as amended by Section (3) of the Telecommunications Act of 1996 (emphasis added); See also 47 CFR §§51.5, 54.5.

²¹ *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 922, 925 (1999).

common carrier basis, and the Commission must eliminate it in order to promote efficient use of the spectrum.²²

V. The Frequency Bands 952.95-956.15 MHz and 956.55-959.75 MHz Should be Made Available for Conditional Authorization.

UTC supports the Commission's proposal to make the point-to-point channels in the 952.95-956.15 MHz and 956.55-959.75 MHz available for conditional authorization.²³

Utilities, pipeline companies and other critical infrastructure industries make significant use of these frequency bands for lower density communications. It would be extremely helpful if applicants for point-to-point channels in these bands were able to deploy and operate under conditional authority, just as they may in the higher microwave bands. Therefore, UTC urges the Commission to make the 952.95-956.15 MHz and 956.55-959.75 MHz available for conditional authorization.

²² Elimination of this restriction is also compelled by Section 10 of the Act because it effectively prohibits telecommunications carriers from providing service utilizing existing private microwave facilities.

²³ *Notice of Proposed Rulemaking* at ¶ 44.

CONCLUSION

The Commission is indeed faced with a “special challenge” to auction microwave spectrum above 2 GHz.²⁴ As daunting as the technical challenges may be, the regulatory authority necessary to conduct such auctions may be an even greater obstacle to overcome. As the Commission recognizes, “under the current licensing scheme, mutually exclusive situations rarely, if ever, occur.”²⁵ Without mutual exclusivity, the Commission may not auction spectrum. Nor may it create mutual exclusivity by arbitrarily licensing microwave spectrum in swaths of geographic areas, because the Commission is obligated to avoid mutual exclusivity in accordance with Section 309(j)(6)(E). Therefore, the Commission cannot and should not auction microwave spectrum.

Nonetheless, to the extent that microwave spectrum above 2 GHz is auctioned, the Commission must protect utilities, pipelines and other critical infrastructure licensees, as “public safety radio service” providers. These entities use private internal communications to support the safe and reliable delivery of critical services to the public, and the BBA97 Conference Report explains that they fall within the auction exemption. Moreover, the BBA97 manifests Congress’s overriding intent to protect the communications of these entities that closely relate to traditional agencies eligible for licensing in the Public Safety Pool. Consistent with Congress’s overriding intent, the Commission must implement safeguards to ensure that auctions do not compromise the integrity of public safety radio service communications.

²⁴ See *Notice of Proposed Rulemaking* at ¶ 75.

²⁵ *Id.*

UTC applauds the Commission for ensuring “that the spectrum is used for the purposes the public interest requires,”²⁶ and its proposal to eliminate Section 101.603(b)(1) would promote the public interest by freeing POFS licensees to make effective use of unused capacity on their microwave facilities. While many microwave facilities may not currently have capacity available to carry common carrier traffic, eliminating Section 101.603(b)(1) provides at least the opportunity for some licensees to use their reserve capacity to provide service to carriers whose only other option would be to construct duplicative and spectrally-inefficient systems.. Moreover, Section 101.603(b)(1) impermissibly regulates POFS as common carriers, even though they do not provide telecommunications service under the Communications Act. Therefore, the Commission should eliminate Section 101.603(b)(1).

Similarly, making the 952.95-956.15 MHz and 956.55-959.75 MHz available for conditional authorization would also promote efficient use of the spectrum by allowing licensees to operate during the pendency of their application for new or modified facilities. Thus, UTC urges the Commission to grant conditional authority on these bands.

²⁶ *Notice of Proposed Rulemaking* at ¶74.

WHEREFORE, THE PREMISES CONSIDERED, UTC urges the Commission to act in conformity with the views expressed herein, avoiding auctions of microwave services in accordance with Section 309(j)(6)(E); exempting utilities, pipelines and other critical infrastructure industries from auctions for microwave spectrum, as public safety radio services under Section 309(j)(1); permitting POFS licensees to carry common carrier traffic on a non-common carrier basis; and making the 952.95-956.15 MHz and 956.55-959.75 MHz available for conditional authorization.

Respectfully submitted,

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