

DOCKET FILE COPY ORIGINAL

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

In the Matter of)
)
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. 00-19

RM-9418

RECEIVED

AUG 4 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF
CONSOLIDATED EDISON OF NEW YORK, INC.

Consolidated Edison of New York, Inc. ("Con Edison"), through its undersigned counsel and pursuant to section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or the "Commission"), 47 C.F.R. § 1.415, respectfully submits its Reply Comments in response to the Notice of Proposed Rulemaking in the above captioned proceeding.¹

Con Edison is a public utility which provides electric, natural gas, and steam service to all of New York City (except a relatively small area in Queens County) and most of Westchester County. Commensurate with providing service to one of the most densely populated areas in the country, it has approximately 3.03 million electric customers, 1.04 million natural gas customers, and 1,898 steam customers. As of 1998, Con Edison's service area spanned 660 square miles and included 89,699 underground cable miles, 35,349 overhead wire miles, 4,210 miles of gas mains, and 105 miles of steam mains and services. Additionally, Con Edison is affiliated with

¹ *In the Matter of Amendment of Part 101 of the Commission's Rules to Streamline Processing of Microwave Applications in the Wireless Telecommunications Services*, Wt Docket No. 00-19, Notice of Proposed Rulemaking (released February 14, 2000) (the "NPRM").

No. of Copies rec'd 0+6
List ABCDE

Orange and Rockland Utilities, Inc. ("O&R"), an electric and gas utility that serves nearly 274,000 electric customers and 117,000 natural gas customers. It covers 96 communities across 1,350 square miles in southeastern New York State, northern New Jersey, and northeastern Pennsylvania.

Con Edison Opposes the Efforts to Revise the Rules Relating to the Commission's Auction Authority as it Relates to Part 101

Con Edison believes that the current licensing scheme for the fixed microwave facilities should remain. Auctioning private microwave spectrum is contrary to the FCC's duty to avoid mutual exclusivity and is contrary to the Balanced Budget Act's² exemption from competitive bidding for all spectrum used by "public safety radio services."³

1. Establishing Mutually Exclusive Application Procedures in Private Microwave Services Would Violate the 1997 Balanced Budget Act

The FCC's authority to issue licenses through the use of competitive bidding under Section 309(j) extends only to those circumstances in which mutually exclusive applications are received for an initial license or construction permit. The Omnibus Budget Reconciliation Act of 1993, which introduced the FCC's auction authority, expressly recognized that, notwithstanding the new auction framework, the FCC is under an ongoing obligation to avoid mutual exclusivity in application filings.⁴ Specifically, the FCC must:

continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.⁵

In drafting the Balanced Budget Act of 1997, Congress made specific reference to this ongoing obligation in the opening clause establishing the FCC's new auction authority.⁶ Section

² Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) (Balanced Budget Act).

³ NPRM at ¶ 80.

⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L.No. 103 66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) Budget Act.

⁵ 47 U.S.C. § 309(j)(6).

⁶ Balanced Budget Act.

309(j)(1) conditions the FCC's auction authority upon acceptance of mutually exclusive applications "consistent with the obligations described in [Section 309(j)(6)(E)]." It is obviously significant that, in the very clause that sets forth the new auction authority, Congress has reemphasized the FCC's obligation to avoid the condition that triggers it.

Consistent with Congress' intent, as expressed through the drafting of 309(j) and in the legislative history, the FCC must overcome a significant burden in implementing auctions in a given service. That is, the FCC must determine that mutual exclusivity either cannot be avoided using the referenced "tools," or that avoiding mutual exclusivity is not in the public interest. That burden is insurmountable in connection with private microwave spectrum.

2. *The Public Interest would not be Served By Instituting Auctions of Private Microwave Spectrum*

The Commission noted in the NPRM that the current licensing framework for the microwave spectrum above 2 GHz rarely results in mutually exclusive situations.⁷ The current licensing scheme for this spectrum involves channel by channel and site-by-site licensing for the microwave technology. As the Commission noted, applicants are responsible for "coordinating interference issues prior to filing a license application."⁸ Con Edison believes that the Commission will have to implement a new licensing scheme for these microwave services in order to meet the threshold condition that would trigger the FCC's authority to auction. The existing licensing scheme, in place for decades, has worked well and there is no reason to significantly alter this process.

⁷ NPRM at ¶ 75.

⁸ NPRM at ¶ 75.

3. **Public Radio Service Exemption**

The Balanced Budget Act of 1997 amended Section 309(j) of the Communications Act to require the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, with very specific exceptions.⁹ Specifically, and as the Commission has observed, the Balanced Budget Act amendments subject the Commission's authority to use competitive bidding to three discrete exemptions.¹⁰ Section 3002 of the Communications and Spectrum Allocation Provisions of the Balanced Budget Act Amendments amended Section 309(j) of the Communication Act in to read relevant part as follows:

(1) GENERAL AUTHORITY: If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license of construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) EXEMPTIONS—The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—

(A) for public safety radio services, including 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 public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licenses to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

⁹ Balanced Budget Act, § 3001 *et seq.*, Pub. L. No. 105-33, Title III, 111 Stat. 251, ___ (1997).

¹⁰ The Commission recently observed that the list of exemptions from its general auction authority set forth in Section 309(j)(2) is exhaustive, rather than merely illustrative, of the types of licenses or permits that may not be awarded through a system of competitive bidding. *Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, *First Report and Order*, 13 FCC Rcd 15920, 16000 ¶ 199 (1998).

47. U.S.C. § 309(j) (emphasis added).

The statutory scheme dictates that the Commission determines which services are potentially auctionable and which are not based on a two-fold inquiry. First, the Commission should determine which private licensees Congress intended to include within the exemption from competitive bidding. Second, the Commission should define the scope of the exemption in light of the licensing scheme currently in place for exempt licensees and Congress' expressed intention to preserve access to public safety radio services spectrum.

4. *The Legislative History to the Balanced Budget Act of 1997 Makes Clear that Congress Intended to Include Power Utilities Within the Scope of the Public Safety Radio Services Exemption*

In its NPRM, the Commission asks whether it should designate certain Part 101 services or classes of frequencies within certain services as “public safety radio services” for which licenses will be assigned without competitive bidding.¹¹

Section 309(j)(2) defines public safety radio services to include “private internal radio service used by ... non-government entities” to protect the safety of life, health or property and are not made commercially available to the public. Rather than simply leave the interpretation of this provision to the Commission’s discretion, in the House Conference Report accompanying the Balanced Budget Act amendments, Congress explicitly stated that “the public safety radio services exemption” is much broader than the definition for “public safety services” contained in new section 337(f)(1), and included specific types of private internal radio services that fall within the exemption¹²

¹¹ NPRM at ¶ 81.

¹² Section 337(f)(1) defines “public safety services” as 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.

According to the House Conference Report, “the exemption from competitive bidding authority for ‘public safety radio services’ includes ‘private internal radio services’ used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public.”¹³ Moreover, during the Senate floor debate addressing a similar provision in the Senate’s parallel version of the communications provisions of the Balanced Budget Act (hereinafter Senate floor debate), Senator Bryan noted that “[t]his legislation will expand the FCC’s authority to auction spectrum, but not at the expense of entities [such as utilities] that we have entrusted to protect the safety of life, health and property and to provide essential public services.”¹⁴ As such, the legislative history conclusively shows that Congress intended to include utilities within the rubric of “public safety radio services.”

Congress specific exemption of utilities from the expanded auction authority imposed by the Balanced Budget Act amendments is not surprising considering the expert testimony that Congress had available during the drafting of the communications provisions of the Balanced Budget Act amendments. The Public Safety Wireless Advisory Committee (PSWAC) published its final report on September 11, 1996. Final Report of the Public Safety Wireless Advisory

¹³ House Conf. Rep. at , reprinted in USCCAN at 192

¹⁴ Congressional Record at S6325 (June 25, 1997). A parallel bill was introduced in the Senate by the Senate Committee on Budget, and debated on June 23, 24 and 25, 1997. 143 Cong. Rec. S6058 (daily ed. June 23, 1997); 143 Cong. Rec. S6015 (daily ed. June 24, 1997); 143 Cong. Rec. S6290 (daily ed. June 25, 1997). The Senate bill was amended during the floor debate to include the following additions to subsection (A), the parallel section to section (B) in the House bill:

(2) EXEMPTIONS – The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission

(A) for public safety radio services, including private internal radio services used by *State and local governments and non-Government entities, including Emergency Auto Service by non-profit organizations* that –

(i) *are used* protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

S. 947, 105th Cong. (1997) (emphasis added).

Committee to the Federal Communications Commission (visited June 1, 1999) <<http://pswac.ntia.doc.gov/pubsafe/fianl/htm>>, (hereinafter PSWAC Final Report). This report is referenced by witnesses in the Subcommittee hearings from which the Communications provision of the Balanced Budget Act of 1997 (Budget Act) was born, and forms the background of information and expert recommendations available to Congress during drafting. See, e.g., Oversight Hearing on Spectrum Management Policy Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Commerce Committee, (statement of Reed E. Hundt, Chairman, FCC; statement of Michael Amorosa, Deputy Police Commissioner, Technology Development, New York City Police Department) (visited June 1, 1999) available at <<http://www.house.gov/commerce/telecom/hearings/021297/witness.htm>>.

Public safety and public service entities were the subject of focus for the PSWAC Subcommittee on Interoperability, which noted the vital nature of communications between and among both types of groups in the event of an emergency as well as in the day-to-day consistency of operations. PSWAC Final Report at 35. The Committee noted:

Public service providers, such as transportation companies and utilities rely extensively on radio communications in their day-to-day operations which involve safeguarding safety and preventing accidents from occurring. These entities also play important roles in supporting first responders once an incident does occur. In all their operations, they have many of the same needs as Public Safety Agencies.

Id. (emphasis added).

Thus, the legislative history makes clear that utilities were intended to be included among the class of licensees encompassed by the statutory phrase “public safety radio services,” and should not be required to obtain their spectrum through competitive bidding.

5. *The Commission Should Exempt From Auction All Spectrum Occupied By Public Safety Radio Service Licensees*

Once the Commission has determined, as it must, that power utilities fall within the statutory exemption, it must then determine how to apply the exemption given the current

licensing in the POFS bands as well as Congress' express intention to preserve access to spectrum by "public safety radio service" licensees.

Under the Omnibus Budget Reconciliation Act of 1993 ("the 1993 Budget Act"), which added Section 309(j) to the Communications Act of 1934,¹⁵ the FCC had express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses, provided that the "principal use" of such spectrum involved, or was reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation. By directing the Commission to identify the "principal use" of the spectrum, Congress recognized the existence of mixed-use spectrum.¹⁶

Significantly, however, in the Balanced Budget Act of 1997, Congress read no such "principal use" restriction into its total prohibition against subjecting public safety radio services spectrum to competitive bidding. Accordingly, Con Edison believes that the Commission should apply this total prohibition on the auctioning of public safety radio services spectrum by adopting a "contaminated band" analysis under which a pool would be exempt from competitive bidding if there is any use, no matter how minimal, by one or more "public safety radio services" licensees.

Due to the nature of the POFS license structure there simply is no way to institute competitive bidding without serious disruption to public safety radio services licensees which is contrary to the express will of Congress. Exempt entities are licensed throughout the entire POFS spectrum. Auctioning over top of these entities would effectively paralyze their operations. While the FCC has previously taken action to auction over incumbents in other contexts, it has not done so where it had a statutory obligation to protect the incumbents' services. Congress clearly intended that the FCC would protect and foster the public safety

¹⁵ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 312, 387 (1993) ("1993 Budget Act").

¹⁶ *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2353 (1994)(*Second Report and Order*).

radio services. Con Edison submits that this intent will not be realized if those services are relegated to incumbent status in an auction context and thus unable to grow or modify their systems freely.

6. *Congress Did Not Intend for the FCC to Impose Use Restrictions on Entities that Fall Within the Public Safety Radio Services Exemption*

Con Edison submits that Congress did not intend that the exemption would be limited only to activities that directly promote the safety of life, health or property. To the contrary, Con Edison submits that the absence of a “principal use” provision in the language of Section 309(j)(1) indicates that Congress intended that the exemption apply broadly to radio services, provided that they are used, at least in part, for the referenced activities. Had Congress intended to limit the exemption as the FCC suggests, it would have employed language such as “are used exclusively to protect the safety of life, health, or property...” in the provision.

This is the only practical interpretation of the statute, and will best promote Congress’ objectives. As the FCC is well aware, utilities, petroleum companies and other entities that clearly fall within the intended scope of the exemption use their radio systems in a variety of ways. While the systems are vital in times of crisis, they are also integral aspects of day-to-day operations, allowing cost-effective and efficient buildout, inspection and maintenance of the infrastructure. Of course, these functions promote safety and, as such, can be said to fall within the exemption. Con Edison submits, however, that Congress did not intend for the FCC to make categorical or case specific determinations about companies’ uses of their systems.

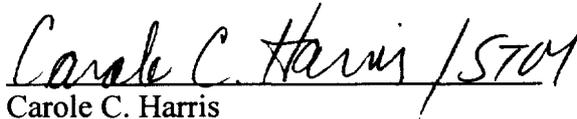
Because utility radio systems are designed to carry both emergency and “routine business” communications without differentiation, separating out communications as not falling within the exemption is impractical and would place at risk the integrity of the systems. Subjecting the two types of traffic to two different licensing schemes, (e.g., geographic and site-by-site) would likely require exempt entities to develop parallel, duplicative systems, resulting in extraordinary cost and inefficiency. Congress could not have intended such an outcome when it established the exemption. Instead, Con Edison submits, Congress intended to exempt in their

entirety the systems used by utilities, petroleum companies etc., recognizing that the traffic carried on those systems would not necessarily be completely or directly devoted to the protection of the safety of life, health or property.

WHEREFORE, THE PREMISES CONSIDERED, Con Edison respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,

CONSOLIDATED EDISION OF NEW YORK, INC.



Carole C. Harris
Sondra T. Mendelson*
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8281

Its Attorneys

** Admitted in Maryland only*

August 4, 2000

CERTIFICATE OF SERVICE

I, Jane Aguilar, Legal Secretary with the law firm of McDermott, Will & Emery, hereby certify that on August 4, 2000, copies of the foregoing Reply to Comments were served as indicated on the following:

By Hand:

Magalie Roman Salas, Secretary
(Original plus six copies)
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Chairman William E. Kennard
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Harold W. Furchtgott-Roth
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Michael K. Powell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Judy Boley
Office of the Managing Director
Federal Communications Commission
445 Twelfth Street, S.W., Room 1-C804
Washington, DC 20554

By First Class Mail:

Virginia Huth
OMB Desk Officer
10236 New Executive Office Building
725 Seventh Street, N.W.
Washington, DC 20503

Telecommunications Industry Association
2500 Wilson Boulevard, Suite 300
Arlington, VA 22201-3834

Peter Tannenwald, Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W., Suite 200
Washington, DC 20036-3101

Jeffrey Krauss, Consultant
620 Hungerford Drive, Suite 27
Rockville, MD 20850

David Ackerman, President
Giganet Wireless Systems, Inc.
777 Corporate Drive
Mahway, NJ 07430

Bryan Hawkins, Manager
Wireless Communications Division
Technology Services Department
City of Long Beach, California

Wayne V. Black
Keller & Heckman, LLP
1001 G Street, N.W., Suite 500 West
Washington, DC 20001

By First Class Mail:

Barry Lambergman
 Director, International Regulatory Affairs
 1350 Eye Street, N.W., Suite 400
 Washington, DC 20005-3305

George Cummings
 Spectrum Principal Staff Engineer
 8075 S. River Parkway H-154
 Tempe, AZ 85284

Phillip L. Vereer
 Willkie Farr & Gallagher
 Three Lafayette Centre
 1155 21st Street, N.W.
 Washington, DC 20036-3384

Joseph M. Sandri, Jr.
 Winstar Communications, Inc.
 1615 L Street, N.W., Suite 1260
 Washington, DC 20036

Christopher R. Hardy, Vice President
 COMSEARCH
 2002 Edmund Halley Drive
 Reston, VA 20191

Annette Allen, President
 California Public-Safety Radio Association
 6641 Crowley Avenue
 Venture, CA 93003

Lawrence R. Krevor
 Senior Director, Government Affairs
 Nextel Communications, Inc.
 2001 Edmund Halley Drive
 Reston, VA 20191

Jeffrey L. Sheldon
 United Telecom
 1140 Connecticut Avenue, N.W., Suite 1140
 Washington, DC 20036

Robert M. Guss, Esq.
 Wilkes, Artis, Hedrick & Lane, Chartered
 1666 K Street, N.W., Suite 100
 Washington, DC 20006

Edwin N. Lavergne
 Shook Hardy & Bacon, LLP
 600 14th Street, N.W.
 Washington, DC 20005-2004

David H. Pawlik
 Skadden Arps Slate Meagher & Flom, LLP
 1440 New York Avenue, N.W.
 Washington, DC 20005-2111

Edgard Class III
 Shook, Hardy & Bacon, LLP
 600 14th Street, N.W., Suite 800
 Washington, DC 20005

Michael Fitch, Chair
 The Satellite Industry Association
 225 Reinekers Lane, Suite 600
 Alexandria, VA 22314

Robert J. Miller
 Gardere & Wynne, LLP
 1601 Elm Street, Suite 3000
 Dallas, TX 75201

Alfred M. Mamlet
 Steptoe & Johnson, LLP
 1330 Connecticut Avenue, N.W.
 Washington, DC 20036

James (Andy) Butler, CPBE
 SBE President
 Booth, Freret, Imlay & Tepper
 5101 Wisconsin Avenue, N.W., Suite 307
 Washington, DC 20016

By First Class Mail:

Gary M. Epstein
Latham & Watkins
1001 Pennsylvania Avenue, N.W., Suite 1300
Washington, DC 20004-2505

J.E. Boatwright
Information Technology Officer
County of Riverside
7195 Alessandro Boulevard
Riverside, CA 92506

Russell H. Fox
Gardner, Carton & Douglas
1301 K Street, N.W., Suite 900 East Tower
Washington, DC 20005


Jane Aguilar