

RECEIVED

AUG 4 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

**REPLY COMMENTS OF**  
**BADGER METER, INC.**

Badger Meter, Inc. ("Badger"), 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.<sup>1</sup>

Badger is one of the foremost marketers and manufacturers of meters for AMR systems and other products using flow measurement and control technology. Its products are employed in meter reading and other tasks involving the monitoring and control of liquids and gases within public and private systems. A substantial portion of its business is dedicated to manufacturing AMR equipment which it sells to public and private water utilities. It has offices throughout the country and over 950 employees.

<sup>1</sup> *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 046  
List ABCDE

**Badger Opposes the Efforts to Revise the Rules Relating to the  
Commission’s Auction Authority as it Relates to Part 101**

Badger 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’s<sup>2</sup> exemption from competitive bidding for all spectrum used by “public safety radio services.”<sup>3</sup>

***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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Section 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.

---

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

<sup>3</sup> NPRM at ¶ 80.

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

<sup>5</sup> 47 U.S.C. § 309(j)(6).

<sup>6</sup> Balanced Budget Act.

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.<sup>7</sup> Badger is primarily interested in the MAS spectrum in the 900 MHz band. It wishes to urge the Commission to maintain the existing licensing scheme for this spectrum as well, which also has a channel-by-channel and site-by-site licensing scheme. As the Commission noted, applicants are responsible for "coordinating interference issues prior to filing a license application."<sup>8</sup> Badger 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.

**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.<sup>9</sup> Specifically, and as the Commission has observed, the Balanced Budget Act amendments subject the Commission's

---

<sup>7</sup> NPRM at ¶ 75.

<sup>8</sup> NPRM at ¶ 75.

<sup>9</sup> Balanced Budget Act, § 3001 *et seq.*, Pub. L. No. 105-33, Title III, 111 Stat. 251, \_\_\_\_ (1997).

authority to use competitive bidding to three discrete exemptions.<sup>10</sup> 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.

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

---

<sup>10</sup> 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).

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 Broaden 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.<sup>11</sup>

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 exemption.<sup>12</sup>

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

---

<sup>11</sup> NPRM at ¶ 81.

<sup>12</sup> 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.

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.”<sup>13</sup> 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.”<sup>14</sup> As such, the legislative history conclusively shows that Congress intended to include utilities within the rubric of “public safety radio services.”

Congress specified a broad exemption 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 Committee to the Federal Communications Commission (visited June 1, 1999) <<http://pswac.ntia.doc.gov/pubsafe/fianl/htm>>, (hereinafter PSWAC Final Report). This report

---

<sup>13</sup> House Conf. Rep. at , reprinted in USCCAN at 192

<sup>14</sup> 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, 105<sup>th</sup> Cong. (1997) (emphasis added).

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 a broad scope of public service entities 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 which 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,<sup>15</sup> 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.<sup>16</sup>

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, Badger 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'

---

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

<sup>16</sup> 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*).

services. Congress clearly intended that the FCC would protect and foster the public safety radio services. Badger 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***

Badger 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, Badger 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.

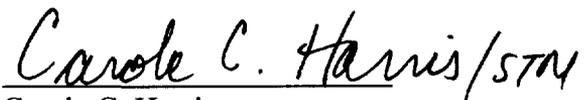
This is the only practical interpretation of the statute, and will best promote Congress’ objectives. As the FCC is well aware, utilities, petroleum companies and other entities that clearly fall within the intended scope of the exemption use their radio systems in a variety of ways. While the systems 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. Badger 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, Badger 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,** Badger respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,  
BADGER METER, 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

WDC99 298272-1.055136.0010

**CERTIFICATE OF SERVICE**

I, Jane Aguilard, 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

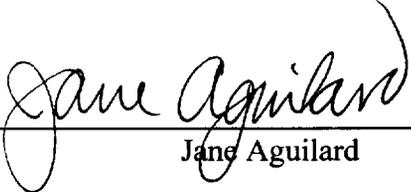
James (Andy) Butler, CPBE  
 SBE President  
 Booth, Freret, Imlay & Tepper  
 5101 Wisconsin Avenue, N.W., Suite 307  
 Washington, DC 20016

**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