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CHARLES M. MEEHAN
Attorney at Law

P.O. Box 101
113 Spring Avenue
Chestertown, MD 21620

Phone: 410-778-9380
Fax: 410-778-9545
mikemeehan@meehan-law.com
www.meehan-law.com

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December 15,2000

Ex Parte

VIA FEDERAL EXPRESS

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW,
Washington, DC, 20554

Re: WT Docket No. 00-230

Dear Ms. Salas:

Pursuant to Section 1,1206(a)(1) of the Commission's Rules. This is to advise that today the undersigned sent, on behalf of my law firm, the attached written *ExParte* presentation to Thomas Sugrue, Chief, Wireless Telecommunications Bureau and Dale Hatfield, Chief, Office of Engineering and Technology.

Should any questions arise concerning this matter, please contact the undersigned.

Respectfully submitted,

Charles M. Meehan

CC: Thomas Sugrue
Dale Hatfield

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From: Charles M. Meehan <mikemeehan@meehan-law.com>
To: Tom Sugrue <tsugrue@fcc.gov>; Dale Hatfield <dhatfiel@fcc.gov>
Date: Friday, December 15, 2000 11:24 AM
Subject: Impact on Utility Telecommunications of R&O WT Docket No. 99-87 and NPRMs WT Docket No. 00-230 and ET Docket No. 00-221

Dear Tom and Dale:

I thought you might find the attached Analysis Bulletin of interest. The thrust of this Bulletin is to present a realistic picture of why these proceedings mark a needed turning point in how utilities should secure the spectrum they use in the future, the steps the industry should be taking to succeed in this new licensing/allocation environment, and, how to take advantage of the revenue opportunities these proceedings present. I suspect the views expressed in the attached Bulletin, which reflect the position of the forward looking industry members, may be somewhat different from those of some of the other industry members. I thought the attached might be of value to you in dealing with industry representatives on these issues.

Should you have any questions or observations concerning the points in the attached Bulletin, please let me know.

This Bulletin was sent to business development executives in about fifty utilities that have requested they receive these Analysis Bulletins on a regular basis. Since this e-mail and the attached Bulletin deal with active proceedings, I am making appropriate *Ex Parte* filings with the Secretary's Office.

Mike Meehan

Charles M. Meehan
Attorney at Law
P O Box 101
Chestertown. MD 21620
410 778 9380

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December 11, 2000

ANALYSIS BULLETIN

This is another issue of our law firm's Analysis Bulletins, which you previously requested be sent to you. Should you no longer wish to receive these Analysis Bulletins. Please reply to this e-mail and type "Remove" in the subject box.

Up front, I apologize for the length of this Analysis Bulletin, but the issues involved are so important that they warrant in-depth discussion, not "news letter" treatment.

IMPACT ON FUTURE UTILITY TELECOMMUNICATIONS OPERATIONS AS A RESULT OF THE ACTION TAKEN IN WT DOCKET NO. 99-87 (97 BALANCED BUDGET ACT) AND THE PROPOSALS IN WT DOCKET NO. 00-230 (SECONDARY SPECTRUM MARKET) AND ET DOCKET NO. 00-221 (ADDITIONAL WIRELESS SPECTRUM)

OVERVIEW

In all of these proceedings there are three themes which could have a substantial impact on future utility radio telecommunications operations, in terms of how spectrum use rights are obtained and revenue producing opportunities. These themes are:

1. Business, Industrial and Land Transportation (BILT) licensees will pay for the spectrum they need. Not-with-standing the fact that the Federal Communications Commission (FCC) has found that the use of spectrum for certain critical utility operations is within the Public Safety Exemption (PSE) from auctions, utilities may still have to pay for the additional spectrum they want to license in the future, even from bands currently available for licensing. This is the result of the FCC limiting the availability of the PSE for existing "private" bands used by utilities, and making it clear that most future allocations may be subject to Band Manager type licensing, where the Band Manager secures the spectrum at auction and the leases portions of it to end users, like utilities.

2. Private system licensees will be able to generate revenue streams from certain of their radio system licenses by providing commercial service to the public and by leasing spectrum to third parties. This will become very important since if utilities have to pay for any new spectrum they need, management will be taking a hard look at whether expanding private, internal use systems can be economically

justified in light of the fact that commercial systems are increasingly meeting needs historically met only by internal use systems, as was recognized by the FCC in its Report and Order (R&O) in WT Docket No. 99-87. If the private, internal use systems can generate revenue streams, their upgrading or expansion might be economically justified.

3. It is clear that the FCC has a preference for Band Manager type licensing for spectrum allocated for private services. However, the FCC has not adopted it for existing private services, nor has it made any specific decision to do so in any future service. Rather, it will make that decision, case-by-case. The FCC believes that this type of licensing will increase the diversity of users of private spectrum, will facilitate apportionment of spectrum in a more dynamic fashion than existing procedures and will accelerate the trend toward more efficient use of private spectrum. If the FCC does require Band Manager licensing for future private allocations available to utilities, it might be less expensive for utilities to participate in the Band Manager auctions and become Band Managers, rather than leasing spectrum from a Band Manager.

PAYING FOR THE SPECTRUM YOU USE

The FCC's decisions in the R&O in WT Docket No. 99-87 with respect to private users paying for the spectrum they use could have a substantial impact on utility radio operations. These decisions will, I suggest, bring those utilities that still wish to operate their own systems to the realization that the best way to accomplish that goal might be to convert their internal use "cost centers" into "profit centers" that generate enough revenue to justify continuing to operate their own system. This would be done by providing service to the public or leasing spectrum to third parties.

The PSE Does Not Apply to Most of the Bands Currently Used by Utilities

In the R&O in WT Docket No. 99-87, the FCC has diluted the application of the PSE to utility radio telecommunications operations, to the point where it does not apply to most of the bands currently used by utilities.

First of all, the PSE is only used where there are mutually exclusive applications. Thus, it would not apply to the bands that are shared.

Next, the FCC holds that the PSE applies to blocks of spectrum, not to classes of users. If the majority of users in a band are qualified to obtain auction-exempt spectrum, the band will be designated as auction-exempt. If the majority of users in a band are not so qualified, the band is not auction-exempt.

While recognizing that the PSE applies to services designated for non-commercial use by entities such as utilities, the FCC goes on to stress that the PSE only applies to services in

which these public safety uses comprise the "dominant" use of the spectrum. Thus, services in which such uses are not dominant (and in which mutual exclusivity occurs) are not exempt from auctions, "even if some individual licensees in the service [utilities?] may choose to use the spectrum for public safety purposes as defined by the statute."

Using this analysis, the FCC goes on to hold that " the exemption does not apply to exclusively licensed spectrum in the 220, 800 and 900 MHz bands allocated to Industrial/Land Transportation, Business use, nor does it apply to exclusive private land mobile radio frequencies in the 470-512 MHz band, because the dominant use of these bands is not 'public safety' as defined by Section 309(j)(2)(A)." Instead, the FCC holds, the dominant use of these frequencies is by persons primarily engaged in a commercial activity, to support their day-to-day operations. The FCC then really "nails the lid on the coffin" by holding that "...the dominant use of these bands is not by entities with an infrastructure that they use primarily for the purpose of providing essential services to the public at large...."

Query: If the PSE does not apply to all of these bands currently used by utilities, to which bands used by utilities does it apply?

Future Allocations

As to future private allocations, all the FCC has to do to negate application of the PSE to the spectrum is to make sure that those who can use the band include a broad range of users that do not qualify for auction-exempt status. Also, the FCC could make the band available only to Band Managers through auctions as it has proposed with respect to the 1392-1395 and 1432-1435 MHz bands in the NPRM in ET Docket No. 00-221. Also, keep in mind that the FCC held in its R&O in WT Docket No.99-87, if users within the PSE want to participate in such auctions, they may not use the PSE, but are treated like any other applicant-bidder.

WHAT TO DO ABOUT THIS TURN OF EVENTS?

Seek Legal Redress

Based upon earlier precedents of the private user community's actions in such situations, one course of action would be to file Petitions for Reconsideration, lobby Congress and bring an appeal in the Courts. [Another name for these three proceedings is "The Lawyers Relief Act of 2000"]. As I have stressed in the past, actions set by precedent may be based on something less than average performance, and, for that reason, should not be blindly relied upon. In light of the record in WT Docket No. 99-87 on the application of the PSE issue and the reasoning in the FCC's R&O on its applicability, I would suggest that other options should at least be examined before a great deal of money and time is spent on this approach.

Seek an Allocation of Auction-Exempt Spectrum

Another course of action would be to concentrate on future allocations and seek an allocation of spectrum that would only be available for users which "are qualified to obtain auction-exempt spectrum."

However, in its R&O in WT Docket No. 99-87, the FCC rejected the proposal to create a separate "Public Service Pool" (e.g., utilities, pipelines and railroads) for the bands below 470 MHz and specifically rejected the argument that creation of such a Pool would effectuate Congressional intent to include these users in the PSE.

Query: Would not the same reasoning apply to a Petition to secure a new, separate allocations for entities that would have been included in the "Public Service Pool"?

In fact, after rejecting the creation of such a Pool, the FCC went on to state that its decision not to create such a Pool, "... does not preclude us from using other mechanisms (e.g., Band Managers or a change of licensing schemes) in these or other bands [new allocations?] ...."

Query: Does this mean that for future allocations for private services the FCC will rely on Band manager type licensing schemes?

In The NPRM in ET Docket No. 00-221 (Additional Wireless Spectrum) the FCC clearly favors allocating additional private spectrum using Band Managers. In that NPRM the FCC specifically states: "We believe that, to the extent possible we should ensure that the market determines the most appropriate use of this spectrum [1.4 GHz]. In this regard, we are not inclined to allocate spectrum for particular kinds of services unless there is a clear and compelling public interest in doing so. Parties making specific proposals should provide justification of those proposals in terms of maximizing the utility of these bands to new services." The FCC also asks for comment on ways that spectrum for specific services might be auctioned, including license areas and spectrum blocks.

While a auction-exempt allocation is probably inconsistent with the market determining the most appropriate use of the spectrum, well planned "reconnaissance missions" with the Staff at the Office of Engineering and Technology, the Wireless Telecommunications Bureau, key Commissioners Offices, and, when things settle down on the Hill, Congressional Staff, on the chances for success might be worthwhile. As to the 1.4 GHz band, keep in mind that incumbent Government users must be protected. For some of the military operations in this band, the protection would run for a number of years, if not indefinitely. For this reason, perhaps another band could be selected as the "target" for an auction-exempt allocation. I suspect, however, that irrespective of the band selected, the same "market" concerns that are being raised with respect to the 1.4 GHz band would be raised with respect to other bands and this will have to be addressed.

To be frank with you, I read the actions taken by the FCC in WT Docket No, 99-87 and its proposals in ET Docket No. 00-221, as saying that it is going to be difficult for organizations with the wherewithal that that our nation's utilities, pipelines and railroads have to secure new spectrum without paying for its use in some manner, other than auctions. If you are going to pay for the spectrum you use, it would probably be less expensive to get it yourself in an auction, rather than lease it from a Band Manager because his/her operating costs and profit are added to the cost the Band Manager pays at auction.

Since the decisions on the PSE in the R&O in WT Docket No. 99-87 dealt with the interpretation of Congressional intent, I find it hard to believe that the positions adopted were made by the FCC without any informal Congressional coordination and without receiving at least tacit approval.

Develop an Auction System Utilities Can Successfully Use and Take Advantage of the Revenue Opportunities These Proceedings Offer

As you know, I am a firm believer that bold action gives the best promise of success. Thus, perhaps the best course of action might be to cut further losses on the PSE applicability issue.

Until a "target" band can be selected for an auction-exempt allocation and a case developed to justify such an allocation, stop being paranoid about auctions and put time and money into designing an auction system you can use successfully for securing new spectrum (e.g., just open to BILT users, as I urged some years ago). This would facilitate securing spectrum as Band Managers. In the NPRM in WT Docket No. 00-230 (Secondary Spectrum Market), the FCC proposed that Band Managers can use a portion of their spectrum for internal uses. Thus, you could use that spectrum to meet internal needs, as well as generating revenue by leasing the spectrum to third parties.

Most importantly, turn your main efforts to taking advantage of the revenue opportunities these proceeding offer and generate some new revenue streams for your organization as it enters a competitive market in its core business. Based on my recent contacts with the Commissioners' Offices in the WT Docket No. 99-87 proceeding, I believe that the FCC's management would support such moves. **THINK 2001-NOT 1950!**

WHAT ARE THE REVENUE OPPORTUNITIES IN THESE PROCEEDINGS

Convert Your Analog 800 MHz Internal Use Systems Into Digital Commercial Systems, Provide Service To The Public, As Well As Meeting Your Internal Needs and Form Consortia of Interconnected Utility Networks To Provide This Service Over Multi-Utility Areas of Operation.

With the removal of the 800 MHz BILT commercial use restrictions by the R&O in WT Docket No. 99-87, these licensees can convert their internal use "cost centers" into "profit centers". These Rule changes will also allow 800 MHz BILT users to secure channels

from other BILT users and to trade or assign channels with other commercial operators, to help build out their commercial operations.

Interested utilities should also consider supporting the FCC's proposal in the Further Notice in WT Docket No. 99-87 to remove the commercial use restrictions on the 900 MHz BILT band.

Converting analog internal use 800 and 900 MHz BILT systems into digital hybrid commercial/internal systems, may be the only way utility management can justify operating its own system as it moves into a competitive market and it becomes more difficult to include the costs of such internal systems in a rate base.

Those utilities that have successfully entered the commercial market have found that these commercial ventures must be in an unregulated subsidiary of the utility, and managed by entrepreneurial personnel with commercial service experience. However, there is still a key support role for the technical management that operates the current internal use systems,

I strongly suggest that utilities with 800 MHz BILT systems that are interested in such ventures should also consider forming consortia of users that interconnect their networks and provide service over large areas, as well as developing "roaming" agreements. I am aware of several utility 800 MHz BILT users that are interested in such consortia.

Consider Becoming Band Managers or Lease Out Spectrum to Other Users

If the Band Manager proposals for the 1.4 GHz band found in the NPRM in ET Docket No. 00-221 are adopted, they may present revenue opportunities, assuming there can be viable Band Manager operations in light of the protection requirement for incumbent Government users. This proceeding might also present an opportunity to propose an auction system that has a universe in which utilities would have a fair chance of success.

If the secondary spectrum market proposals in WT Docket No. 00-230 are adopted, there may be opportunities for revenue by leasing out licensed spectrum to third parties. This may become important if utility management finds that special arrangements with state-of-the-art commercial providers can meet their internal needs. The revenue generated by leasing existing spectrum to third parties could help finance this commercial provider outsourcing effort.