Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 309(j) and	)	
337 of the Communications Act of 1934	)	
as Amended	)	**WT Docket No. 99-87**
	)	
Promotion of Spectrum Efficient	)	
Technologies on Certain Part 90	)	
Frequencies	)	
	)	
Establishment of Public Service Radio	)	
Pool in the Private Mobile Frequencies	)	
Below 800 MHz	)	

PETITION FOR CLARIFICATION AND RECONSIDERATION

OF THE UNITED TELECOM COUNCIL

Pursuant to Section 1.415 of the Federal Communications Commission's ("Commission") Rules, the United Telecom Council ("UTC", "the Council"), hereby submits the following petition for clarification and reconsideration of the Commission's *Report and Order* in the above-referenced docket.[1]

[1] Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 99-87, FCC 00-403, released November 20, 2000 ("*Report and Order" or "Further Notice").*

I. Introduction

UTC applauds the FCC's decisions in key areas of the *Report and Order*. Specifically, UTC approves the Commission's decision to honor Congressional intent by including utilities, pipelines and other critical infrastructure entities within the expanded definition of "public safety radio services" (PSRS). However, UTC has wide-ranging questions concerning the implementation of the new definition.

UTC supports the Commission's decision to forego auctions in current private land mobile spectrum at the present time.[2] The Council praises the FCC's determination that current shared frequency bands will not be subjected to the agony, and in some cases, administrative impossibility of geographic overlays and auctions. As the Commission described in the *Report and Order*, licensing methods in these bands do not give rise to mutual exclusivity; moreover, they are heavily congested and are relied upon for critical communications by tens of millions of end users. Beyond the shared bands below 470 MHz, UTC believes that auctions in any existing private land mobile bands are not only practically infeasible, but the negative impact of auctions upon public safety radio services in those bands would contravene the intent of Section 309(j)(2) to preserve and promote PSRS by utilities, pipeline companies and railroads, among others.

UTC recognizes that the Commission has limited its decision to establishing a "general framework" for exercising its expanded auction authority with regard to private

wireless.[3] However, there are important issues still to be addressed. For example, will there be future allocations for PSRS? Such allocations should be available for all users of PSRS. Similarly, in what, if any, way will utilities, pipelines, metropolitan transit systems and railroads have access to existing allocations of PSRS spectrum? Moreover, will the Commission limit the impact upon PSRS eligibles that might result from any licensing changes in existing or future allocations? In that regard, UTC reminds the Commission that it must seek to avoid changes to PLMR licensing that would result in mutual exclusivity. The Council is encouraged that the Commission has pledged to give significant consideration to the effectiveness of existing licensing schemes before converting to auctions. Clarification of these issues is necessary to provide certainty to PSRS users, and to implement effectively Congress's intent to meet the spectrum needs of PSRS users.

II. Discussion

A. Public Safety Radio Services Must Have Access to Auction-exempt Spectrum.

UTC applauds the Commission's determination that utilities, pipelines, metropolitan transit systems and railroads are users of public safety radio services. As the Commission acceded, Congress intended to allow these types of entities to use auction-exempt spectrum, because these entities operate extensive infrastructure systems that they use primarily for the purpose of providing essential public services to

[2] *Report and Order* at ¶96.

the population at large. Reliable communications are necessary for them, as part of their regular mission, to prevent or respond to a disaster or crisis affecting the public at large.[4] Therefore, declaring that PSRS includes utilities, pipeline companies, metropolitan transit systems and railroads is an important first step towards accomplishing the intent of Congress.

It is not enough to declare these entities as the type of users of auction-exempt spectrum. In order to accomplish the intent of Congress, those users must have access to auction-exempt spectrum in existing, as well as future allocations. In a variety of Commission proceedings, UTC and the Critical Infrastructure Communications Coalition (of which UTC is a member) have documented the critical shortage of spectrum that is available for utilities, pipelines and railroads to support their core business operations.[5] Moreover, existing allocations of spectrum are increasingly congested and subject to interference, thereby impairing the quality and reliability of PSRS operations.[6] Therefore, existing spectrum allocations must be preserved for these types of PSRS due to the spectrum shortage that currently exists, and new

---

[3] *Report and Order*, at ¶2.
[4] *Id.* at ¶77.

[5] Amendment of the Commission's Rules Regarding Multiple Address Systems, *Notice of Proposed Rulemaking*, WT Docket 97-81, Comments of UTC at 2-3 (filed Sept. 17, 1999); UTC, The Telecommunications Association, American Petroleum Institute, and Association of American Railroads Petition for Rulemaking (RM-9405)(filed August 14, 1998); Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Practices Governing Them, *Letter of UTC* (filed January 28, 1997).

sources of spectrum must be supplied immediately for PSRS to protect the safety of life, health and property into the future.

In its comments on the *Notice of Proposed Rulemaking*, UTC stated that it did not believe that the BBA97 was intended to expand the eligibility for traditional public safety spectrum, and UTC did not seek access to public safety spectrum.[7] Yet, the *Report and Order* does not identify auction-exempt spectrum to which utilities, pipelines and railroads will have access. The only auction-exempt spectrum that the Commission identified is already allocated for traditional public safety entities.[8] Moreover, the Commission has declined the request by the CII to establish a Public Service pool that would be allocated on a non-auction basis for public safety radio services other than those provided by traditional public safety entities.[9] As such, it is unclear how the Commission intends to promote and preserve PSRS provided by those entities newly included in the PSRS definition.

As with any other public safety service, utilities, pipelines and other critical infrastructure entities will need to expand and update their wireless systems over time. Additional, small spectrum allocations will be needed to maintain safe operations. At

---

[6] *See* Emergency Request for Limited Licensing Freeze of Certain Private Land Mobile Frequencies Below 512 of UTC and American Petroleum Institute, at 4-6 (filed June 26, 1998).
[7] Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, Comments of United Telecom Council (filed Aug. 2, 1999).

[8] *Report and Order*, at ¶74.

[9] *Id.* at ¶102-103.

the same time, these entities are highly regulated: they must obtain state approval, generally difficult to achieve, for capital outlays such as that needed simply for construction of new private wireless facilities. This process does not permit utilities, gas or water companies to commit the often huge resources needed to be successful in FCC auctions, even if such monies were available or justifiable for a non-commercial, private, internal system. Moreover, many utilities are municipally owned; these entities are usually statutorily prohibited from activities such as engaging in spectrum auctions. Therefore, UTC seeks clarification of the extent to which all eligibles within the PSRS -- particularly those provided by utilities, pipelines and railroads -- are eligible for the auction-exempt spectrum that the Commission has identified in the *Report and Order*.

The Council expects the Commission to include all entities within the new PSRS definition in any eligibility rules for future PSRS allocations. That Congress intended its broader public safety definition to apply to such allocations is clear. UTC does seek clarification as to how newly designated PSRS entities will be incorporated into the licensing of future allocations of spectrum for PSRS.

UTC can envision options for various frequency bands, to be discussed with the Wireless Telecommunications Bureau and the Commission in general. For example, the FCC may consider lowering regulatory barriers to encourage shared communications systems between traditional public safety agencies and electric, gas or water utilities.[10] Several examples exist of such systems, as these entities are inter-

[10] *See* In the Matter of 1998 Biennial Regulatory Review--47 C.F.R. Part 90 - Private Land Mobile Radio Services; Replacement of Part 90 by Part 88 to Revise the Private Land Mobile

dependent in cases of emergency: Police and fire departments often call on utilities immediately to cut power or gas service to an area in which they are operating. Such an option will not eliminate the need for additional spectrum for the newly designated public safety services; however, UTC looks forward to working with the Commission in interpreting its members' auction exemption to ensure continued safety of the nation's critical infrastructure.

B. The Commission Should Continue to Adopt Licensing Methods that Avoid Mutual Exclusivity in PLMR Bands.

The Commission prudently has refrained from introducing auctions in existing PLMR spectrum. UTC supports the Commission's conclusion that the absence of mutual exclusivity and congestion in the shared spectrum below 470 MHz precludes the adoption of auction in those bands. In addition, UTC agrees with the decision to avoid mutual exclusivity (and hence auctions) in the 470-512 MHz band and in the 220, 800 and 900 MHz Industrial/Land Transportation and Business Categories.[11] UTC also welcomes the Commission's offer to explore informal solutions to resolving mutually exclusive applications in the rare cases that they should occur under the current licensing regime in these bands.[12]

Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, *Report and Order*, WT Docket No. 98-182,15 FCC Rcd 16673, ¶¶20-21 (2000).

[11] UTC does not agree with the Commission's underlying conclusion that these bands are not auction-exempt because the predominant use of the band is not by public safety radio services.

[12] *Id.* at ¶91.

Although the Commission has reserved the option to revisit the licensing schemes in these bands in future service specific proceedings, UTC urges the Commission to continue its moratorium on auctions in existing PLMR spectrum. Auctions in the PLMR spectrum would be particularly inappropriate due to the continued presence of PSRS systems operated by utilities, pipelines and other critical infrastructure entities in those bands. As noted *supra*, the Commission has not identified auction-exempt spectrum for these types of PSRS. It would be inconsistent with the purpose of Section 309(j)(2) if PSRS in these bands were forced to pay, either directly through auction or indirectly through commercial providers or band managers, as the only means of acquiring the spectrum needed to maintain the safety of critical infrastructure.[13] Therefore, the Commission should continue to retain current licensing methods that avoid mutual exclusivity in order to preserve auction-exempt spectrum for public safety radio services, at least until the Commission identifies additional spectrum for public safety radio services.

---

[13] *See* Comments of UTC to the *Notice of Proposed Rulemaking* in WT Docket No. 99-87 at 41 (requiring public safety radio services to pay band managers for spectrum would circumvent the purpose of the auction-exemption).

C. The FCC Should Reconsider Its Conclusion Concerning the Weight of Its Obligation to Avoid Mutual Exclusivity.

UTC continues to emphasize that the Commission is obligated strongly by Section 309(j)(6) to avoid mutual exclusivity.[14] Section 309(j)(1) expressly conditions the Commission's auction authority upon the requirement in Section 309(j)(6) that the Commission avoid mutual exclusivity through engineering solutions and other means. This condition is unqualified by Section 309(j)(3), which grants the Commission the discretion to adopt licensing methodologies that are in the public interest, irrespective of its obligation to avoid mutual exclusivity.[15] Therefore, the Commission must continue to retain licensing regimes that avoid mutual exclusivity consistent with Section 309(j)(6).[16]

UTC encourages the Commission to continue to honor its obligation under Section 309(j)(6) with respect to future allocations. UTC disagrees with the Commission's conclusion that its spectrum auction authority is not conditioned upon meeting its obligation under Section 309(j)(6)(E) to avoid mutual exclusivity.[17] Even if Section 309(j)(1) could permit such an interpretation, the Commission must give

---

[14] *See* Comments of UTC to the *Notice of Proposed Rulemaking*, WT Docket No. 99-87 at 44.

[15] *See* 47 U.S.C. § 309(j)(1) ("If, *consistent with the obligations described in paragraph (6)(E),* mutually exclusive applications are accepted for any initial license or 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")(emphasis added).

[16] *Report and Order*, at ¶3.

[17] *Report and Order*, at ¶21.

meaning to Section 309(j)(6) and not minimize its obligation thereunder by "overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity."[18] In this regard, UTC agrees with the Commission that it should give significant consideration to the effectiveness of existing licensing mechanisms that avoid mutual exclusivity and should weigh the potential costs of changing such mechanisms against the potential benefits.[19]

---

[18] H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997).

[19] *Report and Order* at ¶27.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in the Petition.

Respectfully submitted,

UTC

_____

Jill M. Lyon
Brett Kilbourne

UNITED TELECOM COUNCIL
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

(202) 872-0030

Dated: February 1, 2001