BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	**RM-9322**
	)	
Establishment of Public Safety Radio Pool in the Private Mobile Frequencies Below 800 MHz	)	**RM-9405**
	)	
Petition for Rule Making of the American Mobile Telecommunications Association	)	**RM-9705**

PETITION FOR RECONSIDERATION FOR UNION ELECTRIC COMPANY AND CENTRAL ILLINOIS PUBLIC SERVICE COMPANY AND AMEREN ENERGY GENERATING COMPANY

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Dated: February 1, 2001

No. of Copies rec'd 0+11
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EXECUTIVE SUMMARY

Union Electric Company (Union), Central Illinois Public Service Company (CIPS), and Ameren Energy Generating Company (Ameren Energy), subsidiaries of St. Louis-based Ameren Corporation, (hereinafter collectively referred to as "Ameren") believe that the Federal Communications Commission (hereinafter Commission or FCC) has exceeded its statutory authority and violated the Administrative Procedure Act in this proceeding. Specifically, Ameren contends that the Commission lacks the authority under Section 309(j) of the Communications Act to conclude that spectrum allocated for use by utilities is subject to competitive bidding because the plain language of Section 309(j) prohibits the use of competitive bidding in connection with "public safety radio services", which includes services used by utilities. The Commission concluded however that the prohibition on competitive bidding applies only if the *dominant use* of the spectrum is by public safety radio service licensees. In doing so, the Commission imposed an additional condition that defeats the clear intent of Congress in adopting the public safety exemption. As such, the dominant use standard is unlawful.

The Commission also determined that it had the authority to use an auction technique, which it calls a "Band Manager," in the private radio services. Not only is the Band Manager simply an indirect way to impose auctions on entities which Congress directed should be auction exempt, but this concept also violates the Communications Act, which clearly states that radio spectrum is to be licensed by "Federal authority" and does not give the Commission the authority to delegate this responsibility.

Additionally, the Commission's decision that spectrum allocated for use by utilities is subject to competitive bidding violates the Administrative Procedure Act. The "dominant use"

test, upon which the Commission based its determination that Business and Industrial/Land Transportation spectrum in the 470-512 MHz, 800 MHz, and 900 MHz,[1] the primary frequency bands used by the auction exempt utilities may be auctioned, is arbitrary and capricious and not in accordance with the law for two reasons. First, procedurally, the Commission failed to adequately explain why it used the dominant use test and how it was applied. Second, in applying the dominant use test, the Commission fails to consider the clear intent of Congress in implementing the exemption for public safety radio services.

Furthermore, the Commission's decision that a Band Manager licensee may be implemented in the Prime Utility Bands was arbitrary and capricious because the Commission failed to consider adequately whether the public interest would be served by this decision.

[1] These frequency bands are hereinafter referred to as "Prime Utility Bands."

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PETITION FOR RECONSIDERATION FOR UNION ELECTRIC COMPANY AND CENTRAL ILLINOIS PUBLIC SERVICE COMPANY AND AMEREN ENERGY GENERATING COMPANY

Ameren, through its undersigned counsel and pursuant to Section 405 of the Communications Act[2] and Section 1.429 of the Federal Communications Commission's (hereinafter Commission or FCC) rules,[3] submits this Petition for Reconsideration of the Report and Order, FCC 00-403, released November 20, 2000, (hereinafter "Report and Order") in the above-captioned proceedings.[4]

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[2] 47 U.S.C. § 405.
[3] 47 C.F.R. § 1.429.
[4] In the Matter of 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,

As is set forth more fully below, the Commission's decision with regard to the scope of the Public Safety Radio Service exemption and the use of Band Managers should be reconsidered in a manner consistent with the views expressed herein.

I. INTRODUCTION

1. The FCC commenced this proceeding to implement Sections 309(j) and 337 of the Communications Act of 1934, as amended by the Balanced Budget Act of 1997 (1997 Balanced Budget Act).[5] On November 20, 2000, the FCC released a Report and Order implementing Sections 309(j) and 337, in which it stated that "public safety radio services," as defined in Section 309(j), were exempt from competitive bidding. The Commission also found, however, that *spectrum* allocated to licensees, such as utilities, that were intended to be covered by the exemption, could be subject to competitive bidding if public safety radio services do not "comprise the dominant use of the spectrum."[6] In addition, the FCC concluded that it could implement the Band Manager auction technique in the private radio services. Ameren is submitting this Petition for Reconsideration seeking reversal of the FCC's rules and policies implementing the FCC's revised auction authority. Specifically, Ameren believes that the 1997 Balanced Budget Act's revision of the FCC's statutory auction authority prohibits the FCC from subjecting the Prime Utility Bands[7] to competitive bidding and from implementing a new licensee category, Band Manager (to be chosen by auction) to manage the same spectrum utilities are currently using.

Petition for Rule Making of the American Mobile Telecommunications Association, WT Docket No. 99-87, RM-9332, RM 9405, RM-9705, Report and Order and Further Notice of Proposed Rulemaking, (Released November 20, 2000) ("Report and Order").

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

[6] Report and Order at ¶ 64.

2. Ameren is an interested party in this proceeding because the Commission's interpretation of the statute may subject Ameren 's licensed private radio spectrum to competitive bidding while Congress's clear intent was to exempt Ameren and other utilities from competitive bidding. Also the Commission determined that it had the authority to use an auction technique, which it calls a Band Manager. This technique will simply add a spectrum "landlord" in the Prime Utility Bands which the utilities currently occupy and thereby (1) charge fees for the utilities' use of the spectrum; and (2) avoid Congress's directive that utilities should not have to obtain their licenses at auction. Both of these decisions detrimentally affect Ameren as described more fully below.

3. The Commission has allocated land mobile spectrum to the private sector over several decades. As private land mobile bands have become saturated, the Commission has made new allocations. In this regard, the 220-222, 470-512, 800 and 900 MHz bands were allocated for power utility use as a consequence of overcrowding in the earlier allocated bands. It has also been the case that over the last several years, the Commission has determined that land mobile spectrum should be able to be accessed by various classes of users. Consequently, power utilities do not have sole access to any of the above-referenced bands, nor to their other two significant spectrum homes, the 150-170 and 450-470 MHz bands. The Commission has determined that broader access results in greater spectrum efficiency.[8] However, this policy means that it is impossible for power utilities to license their large land mobile systems in radio bands that are available *only* to other power utilities or other auction exempt entities.

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[7] This refers to spectrum at 470-512 MHz, 800 MHz and 900 MHz used extensively by utilities for internal communication systems.

[8] See In the Matter of Implementation of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile radio Services and Modify the Policies Governing Them and Examination of

4. Ameren seeks reconsideration of the Commission's Report and Order in the above captioned proceedings for the following reasons:

- The Commission's decision to subject the Prime Utility Bands to competitive bidding is inconsistent with Congress's clear intent in enacting the 1997 Balanced Budget Act and frustrates the purpose of the statute.
- The Commission's decision to use the "dominant use" test was arbitrary and capricious because the Commission failed to explain a rational basis for its use.
- The Commission's use of the dominant use test was arbitrary and capricious because the Commission failed to provide evidence that the Prime Utility Bands failed this test.
- The Communications Act prohibits the Commission from imposing auctions on auction exempt utilities indirectly via "Band Managers" licensed in the Prime Utility Bands.
- The Communications Act prohibits the Commission from implementing a Band Manager because radio channels are to be licensed by Federal authority and the Commission's duties in this regard cannot be delegated.
- The Commission's decision to implement a Band Manager was arbitrary and capricious because the Commission failed to determine adequately how the public interest will be served by this decision.

II. BACKGROUND

5. Union Electric Company (Union), Central Illinois Public Service Company (CIPS), and Ameren Energy Generating Company (Ameren Energy), subsidiaries of St. Louis-based Ameren Corporation, provide energy services to 1.8 million customers in Missouri and Illinois. Union owns and operates nine power plants, including one nuclear facility at Fulton, Missouri. Union's facilities have a total gross generating capacity of approximately 7,900 megawatts. In addition, Union provides natural gas to 90 Missouri communities and is the third largest distributor of natural gas in the state.

Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, PR

6. CIPS's territory includes approximately 7% of the population of Illinois and 35% of the state's surface area. In addition to residential customers, CIPS serves key businesses in agriculture as well as a diversified industrial base, including firms in the petroleum, petrochemical, food processing, metal fabrication, and coal-mining industries. CIPS also distributes natural gas to 169,000 customers in 267 Illinois communities pursuant to which it operates approximately 4,600 miles of transmission and distribution mains. CIPS also owns and operates four underground storage fields that can deliver about 123 million cubic feet of natural gas per day.

7. Ameren Energy is an unregulated producer of electrical energy under the Ameren umbrella that owns and operates five coal-fired power plants with a combined total generating capacity of approximately 2,900 megawatts.

8. In order to conduct these critical activities in an effective and efficient fashion, while providing maximum customer and public safety, Union, CIPS, and Ameren Energy have licensed and implemented wireless telecommunications systems. Specifically,they hold FCC authorizations for operations in the 37 MHz, 48 MHz, 150 MHz, 154 MHz, 450-470 MHz, 800 MHz bands, and 900 MHz bands. In addition, the companies hold extensive licenses in the private operational-fixed microwave radio service for Multiple Address System and point-to-point operations.

9. These systems serve as a lifeline between the utilities' headquarters and crews in the field. In light of the potential risks that are associated with high voltage electricity and pressurized natural gas, it is critical that inspection, maintenance and repair activities be coordinated on a real-time basis. The systems permit such coordination and, as such, the systems

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Docket No. 92-235, Second Report and Order, 12 FCC Rcd 14307, 14308 ¶ 1 (1997).

are vital to Union, CIPS, and Ameren Energy's utility operations. Because of the importance of their wireless systems, Union CIPS, and Ameren Energy have a strong interest in the FCC's regulation of, and in their own continued access to radio spectrum.

III. THE COMMISSION'S INTERPRETATION OF SECTION 309 IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND WITH THE INTENT OF THE 1997 BALANCED BUDGET ACT

A. Applicable Legal Standards

10. An agency construing its organic statute is subject to the two-step inquiry set forth by the Supreme Court in Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984). Under a Chevron analysis, the first step is to determine if Congress has directly spoken to the issue. If the intent of Congress is clear, an agency, like a reviewing court, must give effect to the unambiguously expressed will of Congress. Chevron at 842-43. Moreover, Chevron cautions that an agency should use traditional tools of statutory construction to determine Congress's intent and if "Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron at 843 n. 9. The first step, and primary interpretive tool, should be the language of the statute itself. ACLU v. Federal Communications Comm'n, 823 F. 2d 1554, 1568 (D.C. Cir. 1987) (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)).

11. If Congress has not directly spoken on the precise question at issue then step two of the Chevron test requires a determination of "whether the agency's answer is based on a permissible construction of the statute." Chevron at 843. A "permissible" construction is one that is "rational and consistent with the statute." NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987). A construction is not permissible if it frustrates the primary purpose of the statute. Becker v. FCC, 95 F.3d 75, 79-80 (D.C. Cir. 1996).

12. Finally, an agency must adequately articulate the reasons underlying its construction of a statute, so that a reviewing court can properly perform the analysis set forth in Chevron. See Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994); Leeco v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992) ("In the absence of any explanation justifying [the agency's position] as within the purposes of the act . . ., we are unable to sustain the Commission's decision as reasonably defensible.") (internal quotations omitted).

B. Congress Has Clearly Stated That Spectrum Allocated To Utilities Should Not Be Subject To Competitive Bidding

13. The 1997 Balanced Budget Act 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, except with regard to three discrete exemptions, two of which are not pertinent to this petition.[9] Specifically, the Balanced Budget Act amended Section 309(j)(1) of the Communication Act to read, in relevant part, as follows:

> (1) 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;

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

> (B) for initial licenses or construction permits for digital television given to existing terrestrial broadcast licensees to replace their analog television services licenses; or
>
> (C) for stations described in section 397(6) of this title.[10]

14. It is clear that Congress gave the Commission the authority to auction all radio licenses except under three discrete circumstances. One of the discrete circumstances in which the Commission is forbidden to auction licenses occurs when the Commission licenses public safety radio services. Congress's specific mandate, expressed in the plain language of section 309(j)(1), is that competitive bidding shall not be used to award licenses "for public safety radio services, including private internal radio services used by non-government entities and others to protect the safety of life, health or property." Indeed, Congress's intent in this regard is clear from the legislative history. The House Conference Report stated that "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."[11]

15. In accordance with step one of the Chevron standard, the meaning of Section 309(j) is evident from the plain language of the statute: applicants for licenses in the exempted services must not be required to go to auction to receive their licenses. In interpreting the public safety radio services exemption, the FCC uses the term "service" as it is used in the FCC rules; i.e., to denote a radio service consisting of a combination of operating and eligibility rules and associated spectrum.[12] The services that utilities use to protect the safety of life, health or

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[10] 47. U.S.C. § 309(j) (emphasis added).
[11] House Conf. Rep. at, reprinted in U.S.C.C.A.N. at 192. (emphasis added).
[12] Compare Report and Order at ¶¶ 64 - 66 with 47 C.F.R. § 90.351.

property are readily identifiable, and include the Prime Utility Bands. Under a plain language analysis, these are "services . . . used to protect the safety of life, health or property."

16. Although the Commission agrees that Congress intended to exempt entities that protect the safety of life, health or property, like utilities, from competitive bidding, the Commission invented a second hurdle that must be cleared for public safety radio services to be exempt from competitive bidding. Specifically, the Commission determined that the exemption applies only if the "dominant use" of the spectrum is by public safety radio services.[13] As a result of using the dominant use test, none of the Prime Utility Bands are exempt from auction. Only spectrum allocated to "traditional" public safety licensees is exempt from competitive bidding.[14]

17. It is clear from the legislative history, however, that Congress intended for the public safety radio services exemption to include more than traditional public safety licensees. The Commission even agrees that Congress intended for the public safety radio services exemption to "include a larger universe of users than traditional public safety."[15] In particular, the Commission agrees that Congress intended to protect entities that perform the activities that utilities perform.[16] The Commission's invention of the dominant use test, however, resulted in only traditional public safety entities being exempt from competitive bidding.[17]

18. The statute plainly states "services . . . that are *used* to protect the safety of life, health and property" are exempt. The Commission, however departs dramatically from this

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[13] Report and Order at ¶ 64.
[14] Compare Report and Order at ¶ 74 with Report and Order at ¶ 81. Traditional public safety licensees are those licensees that are eligible to hold authorizations in the Public Safety Pool. 47 C.F.R. § 90.20(a)(1).
[15] Report and Order at ¶ 75.
[16] See Report and Order at ¶¶ 75 - 78.
[17] Compare Report and Order at ¶ 74 with Report and Order at ¶ 81.

meaning by interpreting the statute to mean services that are *predominately* used to protect the safety of life, health and property are exempt. Once the dominant use test is applied, the exemption becomes meaningless; leaving out all public safety categories except those using spectrum allocated to traditional public safety licensees.[18]

19. The Commission states that "the statutory exemption for public safety services applies . . . to services designated for non-commercial use by entities such as utilities."[19] The Commission also found that the "legislative history of the Balanced Budget Act refers to particular 'users' as being exempt."[20] The Commission then concludes that the Prime Utility Bands, which are used by utilities, are not exempt from competitive bidding. It is irrational for the Commission to state that Congress intended to exempt services used by utilities and that the legislative history refers to 'users' as being exempt and still conclude that the Prime Utility Bands used by utilities are subject to auctions. The Commission's conclusion violates Congress's clear intent when Congress passed this legislation.

20. Furthermore, utilities are only permitted to use spectrum that the Commission allocates to them, such as the Prime Utility Bands. To the extent that the Prime Utility Bands fail the dominant use test, it is because of the Commission's own eligibility rules governing the allocation of spectrum. The Commission's regulations do not permit utilities to use spectrum where by operation of the eligibility rules, the dominant use of the spectrum is by public safety radio services. Therefore, it is impossible for utilities, which Congress clearly intended to be exempt from competitive bidding, to benefit from the exemption from competitive bidding because of the way in which the Commission allocated the spectrum. The Commission cannot

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[18] Id.
[19] Report and Order at ¶ 64.
[20] Report and Order at ¶ 66.

apply a statute in a way that does not harmonize with the statute's 'origins and purpose'". United States v. Vogler Ferilizer Co., 455 U.S. 16, 26 (1982) (quoting National Mufflers Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)).

21. Even though the Commission determined that utilities are within the mass of entities Congress intended to benefit from the exemption, virtually all of the spectrum used by utilities may be auctioned.[21] This finding makes the exemption meaningless which is clearly inconsistent with the plain language of the statute. In reaching this conclusion, the Commission exceeds the scope of its authority under Section 309(j) and thus fails under the first step of the Chevron analysis.

22. This interpretation of the exemption will admittedly benefit other licensees in the Prime Utility Bands that Congress did not intend to exempt from auction.[22] This is, however, an unavoidable consequence of otherwise carrying out Congress's intent and a factor that Congress was aware of in enacting the legislation. At the time of the legislation, Congress knew that public safety radio services include various users in addition to those users that Congress intended would be exempt from auctions. The alternative is to cast the exemption too narrowly, as the Commission has done, in an effort to avoid inclusion of additional entities. The Commission's zeal to use auctions as broadly as possible does not justify thwarting Congress's intent with regard to entities who should receive the benefit of the exemption.

C. The Commission's Interpretation Is Based On An Impermissible Reading Of The Statute

[21] Report and Order at ¶ 81.

[22] Ameren notes that the Commission's decision will have a similar effect: the Commission's eligibility rules allow governments to use the Public Safety spectrum to support official activities that do not include the protection of safety of life, health and property. 47 C.F.R. § 90.20(a)(1).

23. Even assuming that Congress's intent with regard to spectrum used by utilities is not plain under Section 309(j), the Commission's construction of that section is unreasonable and thus impermissible under step two of a Chevron analysis. As previously stated, the Commission concedes that the exemption established in Section 309(j) is intended to effect relief beyond simply exempting traditional public safety entities from auction, and that utilities perform the types of activities Congress intended to protect in enacting the exemption.[23] The net effect of the FCC's determination in the Report and Order, however, is to extend relief only to traditional public safety entities.[24] Utilities, whose operations the exemption was plainly intended to benefit, can have spectrum allocated to them that is used to protect the safety of life, health and property auctioned. Specifically, the Commission has ruled that the Prime Utility Bands can be auctioned.[25] Furthermore, utilities receive no new access to exempt spectrum, the Commission having determined that existing eligibility restrictions will continue to apply.[26] The Commission's determination therefore frustrates the primary purpose of the exemption: that auctions not be implemented "at the expense of entities...entrusted to protect the safety of life, health and property" as was clearly stated in the legislative history.[27]

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[23] Report and Order at ¶ 75.
[24] Compare Report and Order at ¶ 74 with Report and Order at ¶ 81.
[25] Report and Order at ¶ 81.
[26] Report and Order at ¶¶ 55, 70.
[27] 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.

24. As stated in the previous section, the logic of the Commission is contradictory. First, the Commission states that Congress intended to exempt services used by utilities and that the legislative history refers to 'users' as being exempt. After reaching this conclusion the Commission then finds that that the Prime Utility Bands used by utilities are subject to auctions. This interpretation clearly frustrates the purpose of the exemption and is an impermissible interpretation of the statute.

25. The flaw in the Commission's statutory interpretation is that the Commission determined that spectrum allocated to public safety radio service licensees can be subject to competitive bidding because the exemption applies only to bands in which public safety radio service licensees comprise the "dominant use" of the spectrum in that band. The Commission has introduced a new hurdle for public safety radio service licensees that Congress did not include in the statute. By imposing this additional hurdle, spectrum that would otherwise be exempt from competitive bidding is now subject to competitive bidding. The Commission has frustrated the clear intent of Congress of exempting public safety radio service licensees, including utilities, from competitive bidding by subjecting public safety radio service licensees to the dominant use test.

26. Additionally, the Commission's interpretation is unreasonable in that some public safety radio service licensees, like utilities and railroads, are subject to competitive bidding while other public safety radio service licensees, like police and fire, are exempt. Not all public safety

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(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).

radio service licensees are treated the same. The Commission's sole explanation is that in the Commission's view the exemption applies only to a service in which the "dominant use" of the band is by public safety radio service licensees. This distinction between classes of entities, both of whom Congress intended to cover by the exemption, is not supported in any way by the language of the statute and violates the clear intent of Congress.

D. The Commission Failed To Explain The Basis For The Dominant Use Test

27. The application of the dominant use test by the Commission also violates the second step of Chevron because the Commission never discussed its basis for using the dominant use test. Instead the Commission simply stated that they have used this approach in the Multiple Address System proceeding[28] and that they will use the same approach in these proceedings.[29] Reviewing the Multiple Address System proceeding which the Commission cites, one likewise does not find an explanation of why the agency used the dominant use test.[30] Because the Commission failed to explain why it is using the dominant use test, this rationale for denying auction exemption in the prime bands used by the very entities intended to be exempt cannot be sustained. See Leeco v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992)

E. The Commission's Decision To Implement The Band Manager Is Inconsistent With The Intent Of The 1997 Balanced Budget Act And The Communications Act

28. As stated above, under the second step in Chevron, an agency is only permitted to interpret a statute in a way that is rational and consistent with the intent of the statute. In the

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[28] In the Matter of Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, Report and Order 15 FCC Rcd 11956 (1999) (MAS Report and Order).
[29] Report and Order at ¶ 73.
[30] See MAS Report and Order at ¶ ¶ 20 - 25.

Report and Order, the Commission determined that the Communications Act provides the Commission with the authority to implement Band Managers as an appropriate vehicle for administering the private radio services.[31] As previously stated however, Congress specifically exempted licenses granted to public safety radio services from competitive bidding. By implementing a Band Manager, the Commission is trying to do indirectly what it cannot do directly. Although the Commission has not decided on the exact procedures on how it will implement a Band Manager,[32] it appears that the Commission intends to auction the right to be a Band Manager in the Prime Utility Bands and allow the Band Manager to charge licensees for the right to use the spectrum in these bands.[33] One reason for exempting utilities from competitive bidding was to allow utilities access to spectrum to perform critical public safety functions. By auctioning the Prime Utility Bands to a Band Manager, purportedly to encourage "spectrum efficiency," the Commission goes against Congress's wishes that utilities not be required to obtain licenses by auction. Congress has clearly expressed a policy of supporting the special needs of utilities in their attempts to meet legitimate telecommunications requirements: "In managing spectrum, the FCC . . . first should attempt to meet the requirements of those radio users which render important services to large groups of the American public, such as governmental entities and utilities, rather than the requirements of those users which would render benefits to relatively small groups."[34] Therefore, if the utilities are exempt from auctions, as previously discussed, the Commission cannot at the same time apply auctions in the Prime Utility Bands via a Band Manager without completely eviscerating the intent of the exemption in the first place.

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[31] Report and Order at ¶¶ 42 - 44.
[32] See Report and Order at ¶ 35.
[33] See Report and Order at ¶ 38.

29. Even if the Band Manager auction technique does not violate the prohibition against subjecting public safety radio services to competitive bidding, the Band Manager is still illegal because Section 301 of the Communications Act expressly and implicitly stands for the principle that radio channels are to be licensed "by Federal authority."[35] By in essence transferring the licensing function to a "private entity," the Band Manager, the FCC engages in an impermissible delegation of authority, violating this fundamental principle of the statute, and thus failing the second step of Chevron.

30. The Band Manager also frustrates another purpose of Title III; to promote the safety of life and property and to further the public interest in the grant of radio licenses.[36] These purposes are completely ignored if the Commission allows a Band Manager to decide who is allowed to use the spectrum. Unlike the FCC, the Band Manager will be concerned with maximizing its investment not with the public interest. The decision of the Commission to implement a Band Manager is not consistent with the fundamental purpose of Title III of the Communications Act.

IV. THE COMMISSION'S RULINGS ARE ARBITRARY AND CAPRICIOUS

A. Applicable Legal Standards

31. "Scrutiny of the facts does not end . . . with the determination that the . . . [Commission] has acted within the scope of . . . [its] statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, (1971) (citing 5 U.S.C. § 706(2)(A)). In determining whether

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[34] S. Rep. No. 191, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2237, 2250.
[35] 47 U.S.C. § 301.

agency action is arbitrary or capricious, a reviewing court will first consider whether the agency has considered the relevant factors involved and whether there has been a clear error of judgment. Id.

32. The agency must also articulate a "rational connection between the facts found and the choice made." City of Brookings Mu. Tel Co. v. Federal Communications Comm'n, 822 F. 2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). In reviewing that explanation, a court will consider whether the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Motor Vehicle Ass'n at 43. A reviewing court "will not supply the basis for the agency's action, but instead rel[ies] on the reasons advanced by the agency in support of the action." Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F. 3d 752, 758 (6th Cir. 1995) (citation omitted). In addition, the United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 48-49 (1983) (citing Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)). Agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct. FEC v. Rose, 806 F. 2d 1081, 1088 (D.C. Cir. 1986).

B. The Commission's Decision To Use The Dominant Use Test was Arbitrary and Capricious

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[36] 47 U.S.C. §§ 151, 309(a).

33. As previously stated, the FCC concluded that the spectrum allocated to public safety radio service licensees can be auctioned because the public safety radio services exemption applies only to bands in which public safety radio service licensees comprise the "dominant use" of the spectrum in that band. The Commission's determination that the Prime Utility Bands are subject to competitive bidding is premised upon this dominant use test.[37] This determination is arbitrary and capricious for two reasons. First, the Commission failed to adequately explain why and how it used the dominant use test. Second, the use of the dominant use test fails to consider the clear intent of Congress in implementing the exemption for public safety radio services.

34. As previously stated, the Commission adopted the dominant use test it previously employed in the Multiple Address System proceeding without explanation.[38] The mere fact that a test was previously used does not provide justification for using it in this circumstance. Furthermore, in the Multiple Address System proceeding, the Commission did not explain why it used the dominant use test or its statutory authority for doing so.[39] Because the Commission failed to explain why it is using the dominant use test, the decision of the Commission to use the dominant use test cannot be sustained. FEC v. Rose, 806 F. 2d 1081, 1088 (D.C. Cir. 1986).

35. Not only did the Commission fail to explain why it is using the dominant use test, the Commission also failed to state how it determined that the Prime Utility Bands failed to meet the dominant use test. The Commission stated that "the dominant use of these frequencies [the Prime Utility Bands] is by persons primarily engaged in the operation of a commercial activity,

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[37] Report and Order at ¶ 81.
[38] Report and Order at ¶ 73.
[39] See MAS Report and Order at ¶ ¶ 20 - 25.

to support day-to-day business operations."[40] The Commission asserted that the dominant use of the Prime Utility Bands is by licensees that are not public safety radio service licensees. After making this claim, the Commission failed to substantiate it with any documentation or offer of proof. Nor does the Commission cite any studies or comments that could lead the Commission to this conclusion.

36. The Commission also failed to adequately explain why some entities who Congress clearly intended to be exempt from competitive bidding like utilities and railroads are subject to competitive bidding while other entities like police and fire are exempt. This interpretation violates the clear intent of Congress because licensees who Congress clearly intended to exempt from competitive bidding are now subject to competitive bidding.

37. Evidence that Congress did not intend for the FCC to limit coverage of the public safety radio exemption can be found in the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), which added Section 309(j) to the Communications Act of 1934,[41] the Commission 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.[42] By directing the Commission to identify the "principal use" of the spectrum, Congress recognized the existence of mixed-use spectrum and expressly provided the FCC with criteria to determine it auctionability.[43]

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[40] Report and Order at ¶ 81.
[41] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 312, 387 (1993) ("1993 Budget Act").
[42] Id.
[43] 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).

38. Significantly, however, 1997 Balanced Budget Act, Congress included no such "principal use" restriction in its prohibition against subjecting public safety radio services spectrum to competitive bidding. Accordingly, services used, not *predominantly* used, "to protect the safety of life, health, or property" should be the criteria used to determine auctionability. The Commission should apply this total prohibition on the auctioning of public safety radio services spectrum.

39. In this regard, the Commission makes much of its contention that utilities do not have traditional public safety functions as their primary mission.[44] This emphasis is misplaced; the very existence of utility *wireless systems*, to which the public safety radio services exemption is directed, is owed to public safety considerations. Utilities maintain their own communications facilities because the heightened safety and reliability considerations make commercial service not a feasible alternative. Accordingly, whether or not utilities' primary mission is directed to public safety, the mission of a utility's wireless system *is* public safety and it is the systems to which Congress concerned itself in establishing the exemption. For all of the above reasons, by using the dominant use test, the Commission acted arbitrarily and capriciously.

C. The Commission's Determination That It Had The Authority To Implement A Band Manager is Arbitrary And Capricious

40. Title III of the Communications Act generally, and Section 301 in particular, states that it is the purpose of the Communications Act to maintain control of the United States over all radio channels and provide for the use of the channels "by persons for limited periods of time under *licenses granted by Federal authority*."[45] This Section of the Communications Act gives *only* the Federal government the power to license entities to use the radio channels. (The

[44] Report and Order at ¶ 76.

Federal government is prohibited from delegating this authority to anyone else.) In implementing the concept of a Band Manager in the private bands, the Commission has impermissibly delegated its licensing authority.

41. Furthermore, the decision to delegate licensing authority is also arbitrary and capricious because if a Band Manager is given the authority to, in effect, license other entities to use the spectrum, the Band Manager will not be guided by principles of "promoting safety of life and property through the use of wire and radio communication"[46] or consider "whether the public interest convenience and necessity will be served by the granting of such application,"[47] as the Commission is required to by the Communications Act.

42. Having presumably paid potentially significant sums of money for their licenses, a Band Manager's interests would not necessarily lie in advancing the public interest so much as they would lie in recouping the investment or maximizing the Band Manager's revenue. As such, decisions about spectrum rights would be driven by improper motivations and incumbent licensees could be expected to suffer. The Band Manager will be most concerned with the price that the Band Manager could charge. "[A]n agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest." Sierra Club v. Sigler, 695 F.2d 957, 962-3 n. 3 (5th Cir. 1983). In this case there is a clear conflict between the Band Manager's economic interest and the interests of the public that cannot be reconciled.

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[45] 47 U.S.C. § 301 (emphasis added).
[46] 47 U.S.C. § 151.
[47] 47 U.S.C. § 309(a).

43. The Commission stated in the Report and Order that the Band Manager will be subject to the Commission's oversight.[48] Unfortunately, it is unreasonable to assume that procedural measures could provide adequate redress for incumbents. The FCC simply does not have the resources to ensure prompt resolution of the plethora of disputes that would inevitably arise as the result of the incentives endemic in the Band Manager concept. Furthermore, if the FCC did have such resources, any utility or efficiency to be derived from the Band Manager mechanism would be lost in the expenditure of them. In light of the significant time and cost of taking a dispute before the FCC, Band Managers would have an extraordinary and improper amount of leverage in their dealings with incumbents or potential incumbents.

44. Furthermore, in deciding that it can license Band Managers, who in turn would decide which entities could use the spectrum they control, the Commission would have improperly delegated the decision to determine whether the "public interest, convenience and necessity will be served" as required.[49] When an agency is the representative of the public interest, "[t]his role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the [agency]." Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 620 (1965), cert. denied sub non. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941, (1966).

45. Also, the Commission's analogy that Band Managers are similar to the present frequency coordination process is incorrect. A frequency coordinator's task is largely a technical one, the Commission determines if granting the application is in the public interest.

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[48] Report and Order at ¶ 42.
[49] 47 U.S.C. § 309(a).

46. The Commission also failed to articulate a satisfactory explanation of how the public interest is served by this decision and how the Commission's procedural measures will provide adequate redress. In particular, the Commission has failed to adequately explain why economic interests will not drive the Band Manager first and foremost. Furthermore these issues were raised in Comments submitted to the Commission and were not addressed in the Report and Order.[50] Therefore, the determination that the Commission has the authority to implement the Band Manager is arbitrary and capricious, and the Commission should reconsider the rules set forth in the Report and Order. See Motor Vehicle Ass'n, 463 U.S. at 48-49.

[50] Comments of SCANA Corporation (WT Docket No. 99-87) at 27 (filed August 2, 1999), Comments of Union Electric Company d/b/a Ameren UE and Central Illinois Public Service Company d/b/a Ameren CIPS at 25-26 (filed August 2, 1999), Comments of Cinergy Corporation (WT Docket No. 99-87) at 25-26 (filed August 2, 1999), Comments of Entergy Services, Inc. (WT Docket No. 99-87) at 25 (filed August 2, 1999), and Comments of Commonwealth Edison Company (WT Docket No. 99-87) at 28 (filed August 2, 1999).

V. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Ameren urges the Commission to consider this Petition for Reconsideration of the Report and Order and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: February 1, 2001

CERTIFICATE OF SERVICE

I, Gloria Smith, do hereby certify that on this 1st day of February 2001, a copy of the foregoing "Petition for Reconsideration for Union Electric Company and Central Illinois Public Service Company and Ameren Energy Generating Company " was hand-delivered to each of the following:

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