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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	**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 CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

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Dated: February 1, 2001

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EXECUTIVE SUMMARY

Consolidated Edison Company of New York, Inc. ("Con Edison") believes that the Federal Communications Commission (the "Commission" or the "FCC") has exceeded its statutory authority and violated the Administrative Procedure Act in this proceeding. Specifically, Con Edison 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. 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] including private internal radio services used by . . . non-government entities" (a group which includes utilities). Moreover, it is clear from the legislative history that Congress intended for Section 309(j)'s prohibition against competitive bidding to apply to utilities. The Commission concluded, however, that the prohibition against competitive bidding applies only if the *dominant use* of the spectrum is by public safety radio service licensees. This conclusion is contrary to the language of the statute and runs afoul of the clear intent of Congress in adopting the public safety exemption. As such, the dominant use test adopted by the Commission 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 concept an indirect way to impose auctions on entities which Congress provided in Section 309(j) should be auction exempt, it also violates the requirement of Section 301 of the Communications Act that radio spectrum is to be licensed by "Federal authority." The delegation of this responsibility to a Band Manager, a private entity, is unlawful.

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 bands (the "Prime Utility Bands"), 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 failed to follow 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 and violates the Communications Act and the Administrative Procedure Act because the Commission failed to consider adequately whether the public interest would be served by this decision.

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PETITION FOR RECONSIDERATION FOR CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Con Edison, through its undersigned counsel and pursuant to Section 405 of the Communications Act[1] and Section 1.429 of the Federal Communications Commission's (hereinafter Commission or FCC) rules,[2] 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.[3]

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[1] 47 U.S.C. § 405.
[2] 47 C.F.R. § 1.429.
[3] 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, Petition for Rule Making of the American Mobile Telecommunications Association, WT Docket

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 (the "1997 Balanced Budget Act").[4] 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."[5] In addition, the FCC concluded that it could implement the Band Manager auction technique in the private radio services. Con Edison is submitting this Petition for Reconsideration seeking reversal of the FCC's rules and policies implementing the FCC's revised auction authority. Specifically, Con Edison 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[6] to competitive bidding and from implementing a new licensee category, a Band Manager (to be chosen by auction), to manage the same spectrum utilities are currently using.

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").

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

[5] Report and Order at ¶ 64.

2. Con Edison is an interested party in this proceeding because the Commission's interpretation of the statute may subject Con Edison's licensed private radio spectrum to competitive bidding while Congress's clear intent was to exempt Con Edison and other utilities from competitive bidding. Also by adding a Band Manager, which is a spectrum "landlord" in the Prime Utility Bands which the utilities currently occupy, the result will be to (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 Con Edison 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. Over the last several years, the Commission has determined that land mobile spectrum should be accessible 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.[7] 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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[6] As mentioned in the Executive Summary, the term "Prime Utility Bands" as used herein refers to spectrum at 470-512 MHz, 800 MHz and 900 MHz used extensively by utilities for internal communication systems.

[7] 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 Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, PR Docket No. 92-235, Second Report and Order, 12 FCC Rcd 14307, 14308 ¶ 1 (1997).

4. Con Edison 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 (1) the Commission failed to explain why it used the test and how the dominant use test was implemented and (2) by implementing the dominant use test, the Commission failed to follow Congress's intent with regard to Section 309(j).

- The Commission's use of the dominant use test was arbitrary and capricious because the Commission failed to provide any proof or documentation that the Prime Utility Bands failed this test.

- The Communications Act prohibits the Commission from imposing auctions on auction exempt utilities and therefore the Commission cannot indirectly impose auctions on utilities by licensing "Band Managers" in the Prime Utility Bands without completely eviscerating the intent of Section 309(j).

- 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 and violates the Administrative Procedure Act because the Commission failed to determine adequately how the public interest will be served by this decision and how the Commission's procedural measures will provide adequate redress.

II. BACKGROUND

5. Con Edison supplies electric service in all of New York City (except part of Queens) and in most of Westchester County; gas service in Manhattan, the Bronx and parts of Queens in New York City as wells as in parts of Westchester County, and steam service in Manhattan. Besides providing service to more than 4 million customers, Con Edison has the complex task of providing energy in one of the world's densest power grids under very challenging circumstances.

6. Con Edison primarily uses its radio communications systems to direct the daily activities of its work crews and to monitor and control distribution systems. Con Edison has frequencies licensed in the 150-174 MHz, 450-470 MHz, 470-512 MHz, and 800 MHz band. These mobile communications systems support Con Edison's utility operations. Con Edison also has 900 MHz Multiple Address System and private operational-fixed point-to-point microwave licenses.

7. Con Edison emphasizes that it, along with other power utilities, provides the core resource -- electricity -- that permits modern society to function. Absent electric power, other industrial and business operations simply cannot be performed. For the general population, utilities have the responsibility of providing electric power to hospitals and other critical facilities throughout their service territories, while simultaneously ensuring the safety of their crews working on distribution lines, where a misstep can be instantly fatal to utility employees and deprive large areas and populations of electric power. Power utilities and other critical infrastructure industries such as the petroleum pipeline and the railroad industry have demonstrably more crucial requirements for reliable, interference-free communications in order to serve the populations at large, as well as safeguard the lives of their employees. Con Edison's effectiveness in supporting the utility operations and its users is directly dependent upon the ability to maintain currently licensed spectrum and to access new spectrum in the future.

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

8. 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 matter. 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)).

9. If Congress has not directly spoken on the precise matter 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).

10. 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

11. The 1997 Balanced Budget Act amended Section 309(j) of the Communications Act to require the Commission to award mutually exclusive grants 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.[8] Specifically, the 1997 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;
> >
> > (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.[9]

12. 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

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[8] 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).

[9] 47. U.S.C. § 309(j) (emphasis added).

the Commission is forbidden to auction licenses involves licenses for 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."[10]

13. 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.[11] The services that utilities use to protect the safety of life, health or 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."

14. 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

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

applies only if the "dominant use" of the spectrum is by public safety radio services.[12] Under the Commission's application of the dominant use test it created, none of the Prime Utility Bands are exempt from auction. Rather, only spectrum allocated to "traditional" public safety licensees would be exempt from competitive bidding.[13]

15. 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."[14] In particular, the Commission agrees that Congress intended to protect entities that perform the activities that utilities perform.[15] The Commission's invention of the dominant use test, however, resulted in only traditional public safety entities' being exempt from competitive bidding.[16]

16. 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 provision by interpreting the statute to mean services that are *predominately* used to protect the safety of life, health and property are exempt. Once the Commission's dominant use test is applied, the Section 309(j) exemption becomes meaningless to all public safety categories except those using spectrum allocated to traditional public safety licensees.[17]

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[12] Report and Order at ¶ 64.
[13] 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).
[14] Report and Order at ¶ 75.
[15] See Report and Order at ¶¶ 75 - 78.
[16] Compare Report and Order at ¶ 74 with Report and Order at ¶ 81.
[17] Id.

17. The Commission states that "the statutory exemption for public safety services applies . . . to services designated for non-commercial use by entities such as utilities."[18] The Commission also found that the "legislative history of the Balanced Budget Act refers to particular 'users' as being exempt."[19] However, the Commission then concludes that the Prime Utility Bands used by utilities are not exempt from competitive bidding. It is illogical and inconsistent for the Commission to conclude that the Prime Utility Bands used by utilities are subject to auctions while acknowledging that Congress intended to exempt services used by utilities and that the legislative history refers to 'users' as being exempt.

18. 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 Commission's dominant use test, it is because of the Commission's own eligibility rules governing the allocation of spectrum. The Commission's eligibility rules do not permit utilities to use spectrum where the dominant use of it 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 Section 309(j) exemption as Congress intended because of the way in which the Commission allocates spectrum. Indeed, virtually all of the spectrum used by utilities may be auctioned. The Commission cannot apply a statute in a way that does not harmonize with the statute's 'origins and purpose'". United States v. Vogler Fertilizer Co., 455 U.S. 16, 26 (1982) (quoting National Mufflers Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)). In reaching its conclusions, the Commission exceeds the scope of its authority under Section 309(j) and fails to give effect to the expressed will of Congress in violation of the first step of the Chevron analysis.

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[18] Report and Order at ¶ 64.

19. While the correct construction of the Section 309(j) exemption will admittedly benefit other licensees in the Prime Utility Bands which Congress did not expressly state an intention to exempt from auction,[20] this is but an unavoidable consequence of otherwise carrying out Congress's expressed 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 stated would be exempt from auctions. The only alternative is to cast the exemption too narrowly, as the Commission has done, to avoid inclusion of additional entities. This is not permissible, where, as here, it would thwart Congress's expressed intent with regard to entities entitled to receive the benefit of the exemption. See United States v. Vogler Fertilizer Co., 455 U.S. 16, 26 (1982).

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

20. Even if Congress's intentions under Section 309(j) with regard to spectrum used by utilities were not clear, the Commission's construction of that section is an unreasonable one under the statute 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.[21] The net effect of the FCC's determination in the Report and Order, however, is to extend relief

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[19] Report and Order at ¶ 66.

[20] Con Edison 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).

[21] Report and Order at ¶ 75.

only to traditional public safety entities.[22] The spectrum utilized by utilities for purposes that was intended to be protected by the exemption is now subject to auction.[23] Furthermore, the Commission having determined that existing eligibility restrictions will continue to apply,[24] utilities will receive no new access to exempt spectrum. 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.[25]

21. 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.

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[22] Compare Report and Order at ¶ 74 with Report and Order at ¶ 81.
[23] Report and Order at ¶ 81.
[24] Report and Order at ¶¶ 55, 70.
[25] Congressional Record at S6325 (June 25, 1997). A parallel bill was introduced in the Senate by the Senate Committee on Budget, and debated on June 23, 24 and 25, 1997. 143 Cong. Rec. S6058 (daily ed. June 23, 1997); 143 Cong. Rec. S6015 (daily ed. June 24, 1997); 143 Cong. Rec. S6290 (daily ed. June 25, 1997). The Senate bill was amended during the floor debate to include the following additions to subsection (A), the parallel section to section (B) in the House bill:
(2) EXEMPTIONS – The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission.

(A) for public safety radio services, including private internal radio services used by *State and local governments and* non-Government entities, *including Emergency Auto Service by non-profit organizations* that –
(i) *are used* protect the safety of life, health, or property; and
(ii) are not made commercially available to the public;

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

22. 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.

23. Additionally, the Commission's interpretation is unreasonable in that some public safety radio service licensees, like utilities and railroads (i.e., the non-government entities included in the language of Section 309(j)(1)(A), are subject to competitive bidding while other public safety radio service licensees, such as police and fire fighters, are exempt. The Commission fails to treat all public safety radio service licensees the same despite the literal language of Section 309(j)(1)(A)) that references both "governments and non-government entities." The Commission's sole explanation is that, in its view, the exemption applies only to a service in which the "dominant use" of the band is by traditional public safety radio service licensees. This distinction between classes of entities, both of whom Congress intended to cover by and actually listed in the exemption, is not supportable.

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

24. 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 implementing the dominant use test. Instead the Commission simply stated that it had used this approach in the Multiple Address System proceeding[26] and that it would use the same approach in these proceedings.[27] The Multiple Address System proceeding which the Commission cites does not contain an explanation of why the Commission implemented the dominant use test.[28] Because the Commission failed to explain why it is implementing the dominant use test, the resulting denial of the auction exemption to 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

25. 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 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.[29] 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

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[26] 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).
[27] Report and Order at ¶ 73.
[28] See MAS Report and Order at ¶ ¶ 20 - 25.
[29] Report and Order at ¶¶ 42 - 44.

directly. Although the Commission has not decided on the exact procedures by which it will implement a Band Manager,[30] 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.[31] 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."[32] Therefore, if the utilities are exempt from auctions, as previously discussed, the Commission cannot at the same time require auctions in the Prime Utility Bands, via a Band Manager system, without completely eviscerating the intent of the exemption.

26. Even if the Band Manager auction technique did 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."[33] By in essence transferring the licensing function to a private entity, the Band Manager, the FCC engages in an

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[30] See Report and Order at ¶ 35.
[31] See Report and Order at ¶ 38.
[32] S. Rep. No. 191, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 2237, 2250.

impermissible delegation of authority, violating this fundamental principle of the statute, and thus failing the second step of Chevron.

27. 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.[34] 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 rather than with protecting 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

28. "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 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.

29. 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

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[33] 47 U.S.C. § 301.
[34] 47 U.S.C. §§ 151, 309(a).

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

30. 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.[35] This determination is arbitrary and capricious for two reasons. First, the Commission failed to

[35] Report and Order at ¶ 81.

adequately explain why and how it implemented the dominant use test. Second, the implementation of the dominant use test fails to consider the clear intent of Congress in implementing the exemption for public safety radio services.

31. As previously stated, the Commission adopted the dominant use test it previously employed in the Multiple Address System proceeding without explanation.[36] The mere fact that a test was previously used does not provide justification for its use. 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.[37] 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).

32. 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, to support day-to-day business operations"[38]and asserted that the dominant use of the Prime Utility Bands is by licensees that are not public safety radio service licensees. However, the Commission failed to substantiate these claims with any proof or documentation. 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.

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

33. 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 (the "1993 Budget Act"), which added Section 309(j) to the Communications Act of 1934.[39] The Commission was granted 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.[40] 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 its auctionability.[41]

34. Significantly, however, the 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, rather than *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 to the auctioning of public safety radio services spectrum.

35. In this proceeding, the Commission emphasizes that utilities do not have traditional public safety functions as their primary mission.[42] This emphasis is misplaced; the very existence of utility *wireless systems*, to which the public safety radio services exemption is directed, owes to public safety considerations. Utilities maintain their own communications facilities because the heightened safety and reliability considerations do not make commercial

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[39] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 312, 387 (1993) ("1993 Budget Act").
[40] Id.
[41] 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).

service 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

36. 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*."[43] This Section of the Communications Act gives *only* the Federal government the power to license entities to use the radio channels. (The 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.

37. The decision to delegate licensing authority is arbitrary and capricious because if a Band Manager is given the authority, in effect, to 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"[44] or consider "whether the public interest convenience and necessity will be served by the granting of such application,"[45] as is required of the Commission under the Communications Act.

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[42] Report and Order at ¶ 76.
[43] 47 U.S.C. § 301 (emphasis added).
[44] 47 U.S.C. § 151.
[45] 47 U.S.C. § 309(a).

38. 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 – a conflict that cannot be reconciled.

39. The Commission stated in the Report and Order that the Band Manager will be subject to the Commission's oversight.[46] 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 efficiency to be derived from the Band Manager mechanism would be lost in the expenditure of such resources. 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.

40. 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

[46] Report and Order at ¶ 42.

necessity will be served" as required.[47] 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).

41. 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, while the Commission reserves to itself the determination of whether granting the application would be in the public interest.

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.[48] 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.

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[47] 47 U.S.C. § 309(a).

[48] 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, Con Edison 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

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 Consolidated Edison Company of New York, Inc." was hand-delivered to each of the following:

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