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February 5, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445- 12th Street, Southwest
Room TW-B204F
Washington, DC 20554

Re: WT Docket No. 99-87, et al.

Dear Ms. Salas:

On behalf of East Bay Municipal Utility District, I enclose an original and four copies of its Initial Comments for filing in the above-captioned proceeding, along with an additional copy (file) to be time-stamped and returned to this office. In addition, courtesy copies are being delivered to Leora Hochstein (Auctions and Industry Analysis Division) and Scott Stone, Public Safety and Private Wireless Division).

Kindly contact the undersigned if questions arise regarding this transmittal.

Sincerely yours,

Curtis T. White

Enclosures

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A B C D E

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Section 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 Service Radio Pool in Private Mobile Frequencies Below 800 MHz	)	RM-9405
	)	
Petition for Rule Making of The American Mobile Telecommunications Association	)	RM-9705

INITIAL COMMENTS

EAST BAY MUNICIPAL UTILITY DISTRICT

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Its Attorneys

Before the
Federal Communications Commission
Washington, DC 20554

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COMMENTS OF EAST BAY MUNICIPAL UTILITY DISTRICT

East Bay Municipal Utility District (interchangeably "EBMUD" and "District"), by its attorneys and purusant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, hereby offers its Initial Comments in the above-captioned Rule Making, *Report and Order and Further Notice of Proposed Rule Making* (FCC 00-403), released November 20, 2000 ("Notice").

1. Introduction

East Bay Municipal Utility District is a publicly owned and operated utility created under the Municipal Utility District Act of 1921. Its overarching statutory obligation is the provision of potable water service for its more than 1.5 million customers in its 325 square mile service area.[1]

Governed by its publicly elected Board of Directors, the District's operations include water conservation and water reclamation programs, water distribution, wastewater treatment, a long range water supply management program which includes, among others, underground storage capacity for water during wet years for substitute use in dry years, and the development, management and protection of more than 55,000 acres of watershed land.

In discharging its statutory obligations, EBMUD relies heavily on its microwave network and multiple access system (MAS) facilities to maximize efficiency and achieve operational goals. The network currently includes fourteen MAS Master stations which interface with, interrogate and respond to numerous remote facilities throughout its service area. Equally important and beyond the day-to-day functions, EBMUD also relies on its microwave network to provide reliable and essential communications connectivity during times of disaster such as fires, earthquakes, and windstorms.

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[1] The EBMUD service area encompasses the incorporated communities of Alameda, Albany, Berkeley, Danville, El Cerrito, Emeryville, part of Hayward, Hercules, Lafayette, Moraga, Oakland, Orinda, Piedmont, Pinole, part of Pleasant Hill, Richmond, San Leandro, San Pablo, San Ramon and Part of Walnut Creed; unincorporated communities include Alamo, Ashland, Blackhawk, Castro Valley, Cherryland, Crockett, Diablo, El Sobrante, Fairview, Kensington, North Richmond, Oleum, rode, San Lorenzo and Selby.

A party participant in numerous recent FCC proceedings involving rules and regulations governing MAS spectrum, EBMUD respectfully offers its comments in the instant matter.

1. The Congressional Directive To Auction Spectrum Must Not Create Hardships For Critical Infrastructure Industry Operators

The *Notice* chronicles the history of the auction authority conferred upon the Commission by the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"),[2] under which the agency was authorized -- though not required -- to use competitive bidding to choose among mutually exclusive applications for initial licenses or construction permits (CPs).[3] Further, this general authority was permitted only for subscriber-based services where mutually exclusive applications had been filed seeking licenses or CPs.[4] Through a series of Rule Makings, the Commission subsequently established its rules and procedures that now govern Competitive Bidding for auctionable licenses[5]

This general auction authority was significantly revised by the Balanced Budget Act of 1997 ("1997 Budget Act"), which now requires the Commission to award mutually exclusive applications for initial licenses and CPs under its competitive bidding procedures

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[2] Pub. L. No. 103-66, Title VI, § 6002(a). 107 Stat. 312.387 (1993).

[3] 47 U.S.C. § 309(j)(1).

[4] 47 U.S.C. § 309(j)(6)(E).

[5] E.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order,* 9 FCC Rcd 2348 (1994); Implementation of Section 309(j) of the Communications Act, *Second Memorandum Opinion and Order,* 9 FCC Rcd 7245 (1994).

except where exempt. In pertinent part, the 1997 Budget Act declares that the Commission's auction authority does not extend to licenses and permits issued:

> (A) for public safety radio services, including private internal radio services used by Sate and local governments and non-government entities and including emergency road services provided by not-for-profit organizations....[6]

Because the Statute left open the question whether EBMUD – and other Critical Infrastructure Operators -- would enjoy spectrum exemption under the then traditional meaning of "public safety" licensees, it filed joint and separate comments which, *inter alia,* supported the proposition that Congress intended the definition of "public safety radio services" to include entities using spectrum to protect life, health and property and, as such, a broader definition of "public safety" was required.

EBMUD commends the Commission for appropriately discerning Congressional intent and recognizing that the logical reading of the Statute requires the "public safety" exemption to include entities that meet the two pronged test, namely: (i) they have infrastructure that serves the public and provides a vital service to today's society; and (ii) such service providers require a reliable communications system in order to prevent or respond to disasters affecting their service(s) to the public.[7]

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[6] 47 U.S.C. § 309)(j))1),(2).

[7] *Notice* at ¶¶ 80 - 85.

In making its determination, however, the Commission raises additional issues which EBMUD would urge it to address. Specifically, the *Notice* points out that exemption applies only to spectrum where public safety uses comprise the "dominant" use of the spectrum. And further, spectrum in which such uses are not dominant (and in which mutual exclusivity occurs) are not statutorily exempt from auctions, even if some individual licensees may choose to use the spectrum for public safety purposes as defined by the Statute.

This determination raises the possibility -- whether remote or not -- that spectrum presently qualifying as exempt may, in the future, fail to meet the less than "dominant use" test and, as a result, may subsequently be determined auctionable. In the event this occurs and spectrum in that bandwidth is subjected to auction, it will likely occasion significant relocation on the part of some Commission licensees. For especially publicly governed entities, this could prove particularly troublesome and cause undue hardship given extended budgeting requirements and processes. This possibility assumes even greater relevance for EBMUD since it is currently in the early stages of a long-planned $4.5 million upgrade of its microwave network, a process which is likely to locate some of its facilities in spectrum not currently classified as exempt.[8]

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[8] In earlier filings with the Commission, EBMUD provided data showing it was operating at or near peak capacity on its existing network, and that loading would likely be heightened once the District completed an overhaul of its OPerations NETwork (OP/NET) system. (The OP/NET system provides mission critical as well as historical data to the District in a number of areas, including Seismic (vibration) studies, turbidity studies, reservoir and system outages and calibration models for forecasting emergency conditions.)

Because spectrum relocation issues have previously arisen in some auction proceedings,[9] EBMUD urges the Commission to, minimally, consider the following:

(a) Establish advance notice guidelines and procedures in the event spectrum is to be reclassified (from exempt to auctionable) under the "dominant" use theory;

(b) Develop procedures which promote the orderly relocation of facilities; and

(c) Establish guidelines for determining fair and just compensation.

2. The Commission Must Proceed Cautiously In Considering The Band Manager Licensing Approach For Private Radio Services

In its *Notice*, the Commission discusses the concept of using "Band Managers" in private radio services. The Band Manager is a new class of Commission licensee that is to make spectrum available for use by others through private, written contracts.[10] It is the Commission's determination that this market-based mechanism can create incentives for promoting a more efficient use of spectrum.[11]

The FCC notes it recently implemented its first form of Band Manager licensing in the 700 MHz licensing (where commercial services are authorized), and has requested comment on whether Band Manager licensing would be appropriate in other spectrum (3650-3700 MHz and the 4.9 GHz bands, all contingent upon a proper public interest showing).

The Commission further notes that while it does not currently propose the adoption of a generic Band Manager licensing approach for private radio services, its intention is to

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[9] Most notably, the reassignment and spectrum auction for Channels 60 - 67.

[10] *Notice* at ¶ 34.

[11] *Id* at ¶ 38.

set forth a framework for future determinations in service specific proceedings.[12] While acknowledging that use of Band Managers in spectrum restricted to private services may raise issues different from those in the 700 MHz docket, it states it nonetheless believes that Band Manager licensing is a viable mechanism for the private services area, and sets out threshold determinations in that regard, viz:

> (i) Band Managers are not likely to increase the cost of private spectrum users since such licensing is an appropriate and cost-efficient response to an underlying problem of scarcity;[13]
>
> (ii) Such licensing will not result in a concentration of private spectrum but, rather, will likely promote greater flexibility and diversity of use;[14] and
>
> (iii) Band Manager licensing is not violative of its statutory obligations, nor does it violate any provision of the Communications Act.[15]

As part of its framework for future deliberations in service specific licensing, the Commission states it will assess a number of factors in determining whether the Band Manager approach may be appropriate, including:

> (a) Should Band Managers have special qualifications?
>
> (b) If qualifications are required, should there be eligibility guidelines established similar to those used historically for awarding licenses in the affected private radio services band?
>
> (c) Should spectrum be licensed exclusively to Band Managers?

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[12] *Id* at ¶ 35.

[13] *Id* at ¶ 38.

[14] *Id* at ¶¶ 39 - 40.

[15] *Id* at ¶¶ 41 - 40.

(d) If Band Managers are determined appropriate, should they be limited to serving solely as a spectrum broker, or should they also be permitted to use as well as lease spectrum?

(e) If Band Managers are permitted spectrum use, should rules be implemented to ensure that the manager continues to perform core management functions?

(f) Should spectrum holdings be limited and, if so, should affiliates be included in such calculations?

(g) Should rules be developed (on a service specific basis) which govern the type(s) of entities eligible to lease licenses in the affected service area?

(h) Where determinations are made that Band Manager licensing is appropriate, what should be considered to afford users broad flexibility and access to spectrum?

(i) What additional determinations should be considered to maximize efficient use of spectrum and yield greater benefits than site-by-site or other traditional licensing techniques?

EBMUD acknowledges that the Commission does not presently seek to implement generic rules for Band Manager licensing in all private radio services. Rather, having made some threshold determinations, this proceeding allows it to posit certain factors it may consider as a framework for future determinations in service specific proceedings. It is during those subsequent proceedings, and once issues are fully ripe for debate, that parties will appropriately have an opportunity to offer issue specific responses.

Notwithstanding the forward looking activity, EBMUD believes it important to provide the Commission with a general statement of matters it considers fundamental to the FCC licensing process, particularly as it relates to the MAS band, namely:

(i) First and foremost, the Commission must not create hardships for licensees engaged in the provision of services in the protection of life, health and property;

(ii) Rule modifications and new licensing approaches should be guided by efforts to promote greater flexibility while easing regulatory burdens and costs;

(ii) With regard to site-by-site modification, the present system for acknowledging system conflict (or potential interference) is generally resolved through the Commission's requirement of (a) acknowledging the existence of risk of interference, and (b) expressly setting out a willingness to accept the risk. Any Band Manager proposal should offer a superior and more efficient means of resolving system conflict, and increasing or otherwise maximizing the efficient use of spectrum; and

(iv) Any modifications to the existing licensing scheme must be fully consistent with the public interest standard.

3. Conclusion

WHEREFORE, the premises considered, EBMUD requests the Commission appropriately consider and/or adopt its foregoing comments and recommendations.

Respectfully submitted,

EAST BAY MUNICIPAL UTILITY DISTRICT

By: _____

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February 5, 2001