

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

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

**OPPOSITION OF UTC**

Pursuant to Section 1.429(f) of the Federal Communications Commission's ("Commission") Rules, the United Telecom Council ("UTC"), hereby submits its opposition in response to a Petition for Reconsideration of the Commission's *Report and Order* in the above-referenced docket.<sup>1</sup> UTC opposes expanding Section 337(c) to allow public safety service applicants to access unassigned frequencies when enough public safety frequencies are available in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.

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

**I. The Unavailability of Public Safety Frequencies Must Remain A Necessary Precondition for an Entity Seeking Public Safety Services to Access Unassigned Spectrum Pursuant to Section 337(c).**

The Association of Public Safety Communications Officials International (“APCO”) seeks reconsideration of the Commission’s decision that a Section 337 applicant must demonstrate that “there [is] no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.”<sup>2</sup> APCO asserts that the Commission must consider a request pursuant to Section 337(c) if no public safety spectrum is available that would satisfy the requested public safety use.<sup>3</sup>

UTC believes that the Commission has reached an appropriate conclusion concerning the scope of Section 337(c). Section 337(c)(1)(A) expressly requires that “no other spectrum allocated to the public safety services be immediately available to satisfy the requested public safety service use.”<sup>4</sup> The fact that other public safety spectrum may be more expensive or may provide less than optimal propagation does not make it “unavailable” for purposes of Section 337(c).<sup>5</sup> “Nor does the legislative history, which states only that ‘spectrum must not be immediately available on a frequency already allocated to public safety services,’ suggest a narrow

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<sup>2</sup> Petition for Partial Reconsideration of APCO to the *Report and Order*, at 3-6 , filed Feb. 2, 2001, *quoting*, *Report and Order*, at ¶132.

<sup>3</sup> *Id.*

<sup>4</sup> 47 U.S.C. §337(c)(1)(A).

<sup>5</sup> *See* New Hampshire Department of Transportation, *Memorandum Opinion and Order*, 14 FCC Rcd 19,439 ¶4, 19,442 ¶8 (WTB 1999)(“*New Hampshire*”).

scope for this requirement.”<sup>6</sup> Moreover, there is nothing novel here; the Commission has consistently applied this standard in response to individual requests for waivers pursuant to Section 337(c).<sup>7</sup> Therefore, the Commission has appropriately and consistently recognized only a narrow right to unassigned spectrum for entities seeking spectrum for public safety services.

To paraphrase APCO, public safety spectrum is not “immediately available” if it does not “satisfy the requested public safety use.” There is no basis in Section 337(c) or the legislative history for such an expansive reading. If Congress had intended to grant public safety applicants carte blanche to select unassigned spectrum whenever the exact frequency they wanted was unavailable, it would have done so expressly. Instead, Congress added a laundry list of conditions that limit the scope of the right of access to spectrum under Section 337(c).<sup>8</sup> Moreover, Congress did not entitle public safety service applicants to unassigned spectrum whenever interoperable spectrum was unavailable in public safety allocations. Instead, Congress merely cautioned against the use of unassigned spectrum that would retard interoperability.<sup>9</sup> Therefore, Section 337(c)

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<sup>6</sup> See County of Burlington, New Jersey, *Order on Reconsideration*, 15 FCC Rcd. 16569, ¶7 (WTB 2000)(“*Burlington*”), citing H.R. Rep. No. 111, 103rd Cong., 1st Sess. at 579-80 (1993).

<sup>7</sup> See *New Hampshire* and *Burlington*, *supra.* at n.7-8.

<sup>8</sup> Not only must no other spectrum be immediately available, but the requested use must be technically feasible without causing harmful interference; it must be consistent with other public safety services in the same geographic area; the assigned spectrum must not have been allocated within 2 years prior to the date of the request; and the public interest must be served by the grant of the application. See e.g. 47 U.S.C §337(c)(1)(A)-(E).

<sup>9</sup> See H.R. Conf. Rep. No. 105-217, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 580 (1997)(requiring that “the use of the unassigned frequency must be consistent with other public safety services in that geographic area, in order to ensure that interoperability of public safety services is not retarded by the allocation of that frequency for such use.”).

does not support an expansive right of access to unassigned spectrum by public safety service applicants, and the Commission should not alter its conclusion in the *Report and Order*.

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

Respectfully submitted,

**UTC**

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ss  
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Dated: March 8, 2001

**CERTIFICATE OF SERVICE**

I Brett Kilbourne certify that a copy of the foregoing Opposition of UTC was served on the party below via first class mail, postage prepaid this 8th day of March, 2001.

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