ARTER & HADDEN LLP
ATTORNEYS AT LAW
founded 1843

Cleveland
Columbus
Dallas
Dayton
Irvine
Los Angeles

1801 K Street, N.W., Suite 400K
Washington, D.C. 20006-1304
telephone 202.775.7100
facsimile 202.857.0172

San Diego
San Francisco
Washington, D.C.
Woodland Hills
Affiliate Office
Geneva, Switzerland

DOCKET FILE COPY ORIGINAL
ORIGINAL
RECEIVED
SEP 27 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Donell A. Hicks
Direct Dial: (202) 775-4463
E-mail: dhicks@arterhadden.com

September 27, 2001

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, SW
Washington, DC 20554

Re: Comments
PR Docket 92-257

Dear Ms. Salas:

On behalf of Electronic Tracking Systems, L.L.C. ("ETS"), transmitted herewith are two copies of its Comments and Reply Comments as filed in ET Docket 00-221 for incorporation into PR Docket 92-257. Furthermore, please incorporate the attached packet of letters filed in ET Docket 00-221. In addition, ETS is filing on this date Ex Parte comments in both proceedings relating to the aforementioned documents.

Please address any questions regarding ETS to William K. Keane of this firm at (202) 775-7123 or to the undersigned.

Very truly yours,

Donell A. Hicks

Enclosures

No. of Copies rec'd 0+1
List A B C D E

302655_1.DOC

FILE COPY

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

RECEIVED
MAR - 8 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Reallocation of the 216-220 MHz,	)	ET Docket 00-221
1390-1395 MHz, 1427-1429 MHz,	)	RM-9267
1429-1432 MHz, 1432-1435 MHz,	)	RM-9692
1670-1675 MHz and 2385-2390 MHz	)	RM-9797
Government Transfer Bands	)	RM-9854

To: The Commission

COMMENTS OF ELECTRONIC TRACKING SYSTEMS, L.L.C.

William K. Keane
Elizabeth A. Hammond
Donell A. Hicks

Arter & Hadden LLP
1801 K Street, NW, Suite 400K
Washington, DC 20006-1301
(202) 775-7100

Its Counsel

March 8, 2001

SUMMARY

Electronic Tracking Systems, L.L.C. ("ETS") hereby submits its comments in response to the questions posed by the Commission in connection with transfer of the Federal 216-200 MHz spectrum. ETS and its predecessors-in-interest have been producing state-of-the-art law enforcement tracking systems ("LETS") since 1972 for use by law enforcement agencies in the protection of banks and other high risk businesses. ETS's electronic tracking systems operate on low-power channels in the 216-217 MHz and 219 MHz bands.

Any new entry into 216-220 MHz by high-power licensees would be disastrous to the operations of the many secondary, low power users which occupy the band. The Commission has expressed its concern for protection of low power users in the instant rulemaking, stating that important public safety needs are being served. The Commission has also expressed a concern to safeguard adjacent television channel 13 from reception interference. Continued low power use of 216-220 MHz—and exclusion of new high power uses of the band—serves both of these Commission's goals.

The Commission is not required to auction 216-217 MHz. Section 309(j) specifically gives the Commission broad discretion to determine which services are suitable for auction, and which are not. Furthermore, the Budget Act itself nowhere requires that 216-220 MHz be auctioned, unlike subsection (c) of Section 3002 which specifically identifies spectrum by band to be auctioned.

Should the Commission read the statute as requiring an auction, the Commission would remain obligated to protect ETS' law enforcement operations by harmonizing conflicting provisions of the Budget Act. Section 3004 of the Budget Act obligates the Commission to enhance the spectrum available for public safety communications. To read Section 3002 as

requiring an auction of the 216-220 MHz band would effectively reduce the spectrum available for law enforcement, while another Section (3004) seeks to enhance it. The Commission, as the expert agency, has the duty to harmonize these conflicting provisions by holding, at least, that the statute does not require an auction of 216-217 MHz.

If an auction is required, LETS would be auction-exempt. Congress has specifically determined that the Commission's auction authority does not extend to "public safety radio services." LETS meets the definition of a public safety radio service and should be deemed exempt from any requirement to obtain spectrum through auction.

ETS supports primary status for secondary users in the 216-220 MHz as long as it does not adversely affect LETS' continued ability to be licensed by rule. In this fashion, low power operators would be protected from interference. The Commission has accorded primary status to other users licensed-by-rule basis, and should follow suit here.

For all the foregoing reasons, ETS submits that: (1) high-power operations (whether of the fixed or mobile variety) should be excluded from the 216-220 MHz band; (2) the Commission need not and should not auction 216-217 MHz; and (3) low power users should be granted primary status without changing the licensing rule under which they operate.

TABLE OF CONTENTS

I. Introduction 1

II. Background On ETS 2

III. The Valuable Services Provided By Low Power Users In 216-217 MHz Would Be Severely Impacted By New High Power Operations. 7

A. The Commission Has Previously Recognized the Interference Threat to 216-220 MHz Low Power and Adjacent Band Operations. 7

IV. The FCC Need Not Auction The 216-217 MHz Band. 9

A. The Commission Has Broad Discretion to Determine Whether and How to Conduct An Auction. 10

B. If the Budget Act Is Read to Contemplate A 216-217 MHz Auction, the Commission Would Still Be Obligated to Protect Law Enforcement. 11

V. LAW ENFORCEMENT TRACKING SPECTRUM IS AUCTION-EXEMPT. 13

VI. THE FCC SHOULD GRANT PRIMARY STATUS TO LPRS 15

VII. CONCLUSION 17

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

In the Matter of	)	
	)	
Reallocation of the 216-220 MHz,	)	ET Docket 00-221
1390-1395 MHz, 1427-1429 MHz,	)	RM-9267
1429-1432 MHz, 1432-1435 MHz,	)	RM-9692
1670-1675 MHz and 2385-2390 MHz	)	RM-9797
Government Transfer Bands	)	RM-9854

To: The Commission

COMMENTS OF ELECTRONIC TRACKING SYSTEMS, L.L.C.

Electronic Tracking Systems, L.L.C. ("ETS"), a wholly-owned subsidiary of Spectrum Management, L.L.C., by its counsel, hereby submits its comments in response to the *Notice of Proposed Rule Making* ("*Notice*") in the above-captioned proceeding. The *Notice* addresses a wide variety of issues related to the transfer of spectrum from the federal government to non-government users. ETS provides the following comments with respect to issues raised in connection with the 216-220 MHz band.

I. Introduction

In the referenced *Notice*, the Commission seeks input as to the feasibility and identification of any new services that might be accommodated in bands being transferred pursuant to the Omnibus Budget Reconciliation Act of 1993 ("OBRA-93") and the Balanced

Budget Act of 1997 ("BBA-97" or the "Budget Act").[1] For the 216-220 MHz band, the Commission requests comment on the following principal issues:

- whether entry into this band by high-power operations, such as paging services, should be allowed;[2]
- whether allowing only fixed services for new entry would ameliorate interference to incumbent licensees;[3]
- whether the Commission is required to auction all four megahertz, including 216-217 MHz;[4] and
- whether elevating secondary users to primary status would be a viable option for protecting existing licensees.[5]

ETS submits that any new entry into 216-220 MHz by high-power licensees (whether fixed or mobile) would be disastrous to the operations of the many secondary, low power users which occupy the band and, in particular 216 to 217 MHz law enforcement tracking systems ("LETS"). ETS further demonstrates that the Commission is not required to auction 216-217 MHz. Finally, ETS urges that the Commission elevate secondary users like LETS to primary status so long as no changes to the licensing procedures for these services are made.

II. Background On ETS

ETS and its predecessors-in-interest (including Pronet, Inc.) have been producing state-of-the-art electronic tracking systems since 1972 for use by law enforcement agencies in the

---

1 Pub. L. No. 103-66, 107 Stat. 312 (1993) and Pub. L. No. 105-33, 111 Stat. 251 (1997), respectively.

2 *Notice* at para. 17.

3 *Id.* at para. 16.

4 *Id.* at para. 15.

5 *Id.* at para. 16-17.

protection of banks and other high risk businesses (e.g. jewelers and high end retail merchants). These systems have made a dramatic contribution to the apprehension and conviction of criminals and to a reduction in crime rates. The systems have also proven invaluable in the rapid recovery of stolen money and property.

ETS' sub-miniature radio frequency (RF) transmitters are hidden in currency, jewelry and other valuable property. Once moved, these transmitters broadcast RF signals alerting law enforcement authorities to a theft and allowing them to track the property.[6] ETS has more than 29,000 transmitters operating in 135 cities in the United States. ETS works with numerous law enforcement agencies, including the Federal Bureau of Investigation and local police departments, in providing its service.

The ETS infrastructure utilizes numerous receivers located throughout a given service area, such as a municipality. A number of fixed receivers are located on top of buildings or other structures. These receivers are connected to law enforcement computer dispatch systems, which notify local law enforcement officials of a theft while it is in progress and allow for tracking of the ETS signal.

When a "theft" signal is received, law enforcement officials monitor movement of the stolen property and relay information to police officers with receivers located in their vehicles or helicopters, or who are using hand-held devices. Both the fixed and mobile receivers are capable of tracking criminals in vehicles, on foot, or within buildings. Portable hand-held receivers can even track a criminal to a specific location in a multi-room premises, including hotels or

---

[6] ETS's electronic tracking systems operate on low-power channels in the 216-217 MHz and 219 MHz bands. The frequencies utilized by ETS are optimum for its use: ETS's mobile receivers cannot track moving transmitters at frequencies below 200 MHz and the efficiency of ETS's transmitters deteriorates rapidly above 400 MHz.

apartment buildings. Generally, the time elapsed from a "theft" notification to apprehension of the criminal and recovery of the stolen goods is under twenty minutes.

Other important uses of ETS's electronic tracking system include the tracking of criminal suspects pursuant to court order by undercover law enforcement agents.

ETS's systems have made an invaluable contribution to law enforcement and public safety. In 1991, there were 9,388 bank robberies in the United States.[7] By 1999, the number of bank robberies had been reduced to 6,599.[8] LETS has played a central role in helping reduce the number of robberies in the cities where its system has been installed. According to data supplied by law enforcement agencies, robberies in these cities have been reduced 50-70 percent.[9] By contrast, cities that do not have LETS systems have experienced an increase in the number of robberies occurring yearly. For example, in the Dayton, Ohio metropolitan area robbery rates increased by 40 percent in the two years from 1997 to 1999, according to the affected police departments (which incidentally, are planning to install LETS).

Set forth below are some recent examples of ETS tracking system successes:

Seattle, WA

Three armed robbers forced customers and employees to the floor in a take-over bank robbery the day before Thanksgiving. Shots were fired into the branch ceiling. After taking money from the teller drawers, they forced two employees to open the vault and stole the available cash. Over $1,000,000 was taken in all.

---

[7] Census Bureau's Statistical Abstract of the United States (1999), Table No. 342, Crime and Crime Rates – by Type, www.census.gov/statab/freq/99s0342.text.

[8] Source: FBI's Bank Crime Statistics Report (1999).

[9] Bank robberies decreased by 74% in Baltimore after the installation of an ETS system; by 60% in Dallas; by more than 50% in Orange County, California; by 64% in Birmingham; and by more than 70% in Little Rock. (All statistics provided by the relevant law enforcement agencies.)

Hidden in the cash were ETS transmitters sending location signals to both the Seattle Police and the FBI. These two agencies' combined Task Force had requested tracking equipment from ETS to help apprehend the robbers (who had stolen over $1,500,000 in 19 bank robberies during the previous several years).

Immediately alerted by the ETS system, law enforcement took less than five minutes to start tracking the two vehicles used in the escape. After gun fights, two of the three robbers surrendered; the third committed suicide with his own gun. All stolen money was recovered and the two surviving robbers were sent to prison.

The senior FBI agent in the Seattle area later gave credit to ETS's equipment for its role in the capture.

Long Beach, CA

Three robbers entered a credit union branch waving assault rifles. One forced customers to the floor, another jumped the counter, roughed up two tellers and took the money from their drawers; a third robbed the vault. Working with banks in this area, law enforcement had previously arranged for ETS transmitters to be hidden in each teller's money drawer. A patrolling police officer from a neighboring city, Signal Hill, received an alarm on his ETS-provided vehicle tracking receiver and summoned additional help from Signal Hill and Long Beach. The suspects, who had not yet even reached their escape vehicle, took flight on foot. Police gave chase and arrested the three robbers and an accomplice, the driver. All $43,000 was recovered and the robbers are in prison.

Bessemer, AL

Three armed robbers forced customers and employees to the floor of a local bank. Taking the money from teller drawers, and simultaneously activating the hidden transmitter, the robbers fled into neighboring Birmingham. Police from three jurisdictions, all using LETS, closed in and captured the robbers in a matter of minutes. The $18,332 stolen was returned to the bank and the robbers are in prison.

Dallas, TX

Two robberies in one day:

At one bank, a robber forced two employees at gun point to open a safe at the drive-through section of the branch and hand over $84,314. After fleeing on foot to his home only two blocks away, police promptly tracked the thief to this location, surrounded the place and made the arrest. All stolen money was recovered and the robber is in prison.

Later that same day, two robbers entered a jewelry store armed with rifles, smashed the display cases and directed employees to place all jewelry and cash in the robbers' bags. Following advice from law enforcement, ETS had provided hidden transmitters for concealment in jewelry displays. Activated during this robbery, the transmitters' signal led police to the robbers' residence three miles away. Arrests were made, all $56,607 in stolen jewelry and cash were recovered, and the robbers are in prison.

San Juan, Puerto Rico

The FBI requested assistance from ETS in helping stop a wave of gangland style bank robberies and related murders. Three robbers took over a bank branch with assault rifles, jumped the counter and took the money in the teller's drawers. A shot was fired into a cash cart to emphasize the robbers' demands. A fourth accomplice waited outside with a get-a-way car. ETS transmitters, hidden in the stolen money, were tracked into the hills by police where the robbers were arrested and the money recovered. The robbers, all minors at the time, are in prison. The stolen funds, $29,832, were recovered.

As seen above, with LETS criminals are often caught "red-handed" with stolen property and, frequently, with their equipment and disguises still in their possession. Arrests like these result in higher conviction rates because of the compelling evidence available for use by prosecutors (indeed, arrests resulting from ETS's systems have produced a 100 percent conviction rate). This in turn leads to a significant reduction in the crime rate as more repeat offenders (such as serial bank robbers) are removed from the criminal pool.

In the year just concluded, ETS's electronic tracking systems were involved in the apprehension of 190 criminals.[10] ETS estimates that the apprehension of these individuals will prevent at least five times this number of robberies – or nearly 1,000 crimes – over the next few years. (This is based on police department and FBI estimates that the average number of robberies a criminal perpetrates before capture and conviction is eight to thirteen; and the estimation that each robber apprehended through the use of ETS technology would have committed at least five additional robberies before capture using traditional investigative techniques.)

[10] Source: ETS Robbery Report Database.

III. The Valuable Services Provided By Low Power Users In 216-217 MHz Would Be Severely Impacted By New High Power Operations.

A. The Commission Has Previously Recognized the Interference Threat to 216-220 MHz Low Power and Adjacent Band Operations.

The Commission must not allow new high power operations, such as paging, in the 216-220 MHz band. To do so would cause severe interference to the many secondary low power services already operating in the band. These users include law enforcement tracking systems such as ETS's, auditory assistance devices for the hearing-impaired, medical diagnostic and monitoring tools, and geophysical and other low power telemetry users of all types. Indeed, many of these licensees are operating in the 216-220 MHz band precisely because they could not operate in the 72-76 MHz band due to the presence of high-power operations.[11]

The Commission has expressed its concern for protection of low power users in the instant rule making. In particular, the *Notice* states: "[W]e are also concerned about the continued viability of the incumbent, non-Government services, particularly LPRS, in the 216-220 MHz band, which while not authorized on a primary basis, serve important public needs."[12] The Commission recognized that "auditory assistance devices, as well as the currency tracking devices authorized under LPRS, provide valuable services to the public."[13] Allowing high power operations at 216-217 MHz would be directly contrary to these earlier public interest determinations. Indeed, the Commission set aside exclusive frequencies in 216-217 MHz for the

---

[11] As one of the Commenters in the Low Power Radio Service ("LPRS") proceeding noted, "the 72-76 MHz band . . . is crowded with high power paging and land mobile systems that cause 'significant interference' to low power devices." *Amendment of the Commission's Rules Concerning Low Power Radio and Automated Maritime Telecommunications System Operations in the 216-217 MHz Band, Report and Order*, 11 FCC Rcd 18517, 18520 (1996) ("LPRS Order").

[12] *Notice* at para. 12.

[13] *Id.*

operation of electronic tracking systems, such as ETS's, based on its conviction that law enforcement entities need "to track extremely valuable goods ... without the threat of interference from other low power services."[14]

The Commission's abiding concern for the protection of public safety services, like law enforcement, is underscored by its decisions in the 700 MHz Guard Band proceeding.[15] There the Commission determined to "[adopt] a set of measures that together will provide the strong degree of protection to public safety we seek from Guard Band operations."[16] As part of these protections, the Commission determined not to allow use of cellular architectures in adjacent bands because such systems "by design, produce large numbers of base stations within a relatively small geographic area [,and] coordinating frequencies for each and every one of these base stations with the various public safety systems operating in the area . . . would be a complex, uncertain and resource-intensive task for both commercial and public safety users"[17] The Commission's determination to protect even normal-powered, public safety voice and data services from CMRS operations on adjacent channels lends strong support to ETS's observation that allowing any high powered service (such as paging) to operate co-channel with LETS would create serious interference to the latter – a result the Commission surely does not intend.[18]

---

[14] *LPRS Order* at 18532.

[15] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Second Report and Order*, 15 FCC Rcd 5299, para. 7 (2000).

[16] *Id.* at para. 14.

[17] *Id.* at para. 19. The Commission noted that this coordination task would be particularly difficult in residential areas where public safety officers need to communicate on portable radios. *Id.* at para. 20.

[18] The Commission asks whether it could allow high-power fixed services in the 216-217 MHz band. The location of fixed stations is of course more easily determined at any given point in time. However, LETS transmitters operate at no more than 100 mW, and the receivers are

Besides the need for a secure band for important purposes like law enforcement, the Commission was influenced to allocate the 216-217 MHz band for low power operations out of a recognition that this would minimize the risk of interference to adjacent television channel 13 reception. There is no high power service (other than the U.S. Navy's space surveillance system which operates at the upper end of the band on 216.88-217.08 MHz) operating on a primary basis in the band due to the potential for harmful interference to channel 13.[19] And in allocating LPRS to 216-217 MHz, the Commission determined that LPRS services "are unlikely to cause harmful interference to TV reception on adjacent frequencies . . . ."[20] Protection of adjacent channel broadcast service represents an additional reason -- if any be needed -- for not allowing higher power operations in 216-217 MHz.[21]

IV. The FCC Need Not Auction The 216-217 MHz Band.

The Commission has tentatively concluded that the auction of spectrum from 217-220 MHz (covering three of the four MHz at issue here) -- auctions which are already completed or

---

susceptible to desensitization when in proximity to other transmission sources. Thus, a police officer could easily lose track of a suspect due to interference from a transmitter, whether fixed or mobile.

[19] 216-220 MHz originally was allocated to the Automated Maritime Telecommunications Service ("AMTS"); however, "the 216-217 MHz band was found to be unusable by high power AMTS coast stations operating within 105 miles of TV channel 13 stations, which operate on the immediately adjacent 210-216 MHz band, due to the potential for harmful interference to TV reception." *LPRS Order*, 11 FCC Rcd at 18518.

[20] *Id.*, 11 FCC Rcd at 18517.

[21] Congress recently directed the Commission to modify its rules for the LPFM radio service so as to preserve minimum distance separations for third-adjacent channels (requirements the Commission had eliminated in creating the LPFM service). It did so in order to protect full service FM station reception from interference. *See The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001*, Pub. L. No. 106-553, 114 Stat. 2762 §632 (2000). This represents just the most recent illustration of Congressional concern for protection of broadcast reception.

planned -- substantially complies with any auction requirement it may have pursuant to the Budget Act.[22] ETS supports this reading of the auction legislation.

A. The Commission Has Broad Discretion to Determine Whether and How to Conduct An Auction.

Preliminarily, there is nothing in the Budget Act which restricts the Commission's broad discretion under Section 309(j) to determine which services are suitable for auction, and which are not. On the contrary, Section 3002(a) of the Budget Act prescribes that:

> If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

Id. codified at 47 U.S.C. Section 309(j)(1).

Section 309(j)(6)(E) in turn directs the Commission to use engineering solutions, negotiations and the like so as to avoid the mutual exclusivity which is a condition precedent to any spectrum auction under Section 309(j). Thus, the Commission retains broad discretion whether to conduct an auction.

Furthermore, the Budget Act itself nowhere requires that 216-220 MHz be auctioned. The controlling section providing for the 216-220 MHz transfer is merely captioned "Identification and Reallocation of Auctionable Frequencies." *Id.*, Section 3002 (e). This section does not mandate that 216-220 MHz be auctioned. By contrast, subsection (c) of Section 3002, which affirmatively directs the Commission to auction a separate 55 MHz (2110-2150 MHz and 15 MHz from the range 1990-2110 MHz), is captioned "Commission Obligation to Make Additional Spectrum Available by Auction." (emphasis added)

---

[22] *Notice* at para. 15.

Clearly, when Congress wanted to mandate an auction, it did so: The fact that it stopped short of directing an auction in the case of 216-220 MHz provides further support for the view that, while 216-220 MHz may be "auctionable," it need not necessarily be auctioned.[23]

B. If the Budget Act Is Read to Contemplate an Auction, the Commission Would Still Be Obligated to Protect Law Enforcement.

Even if the statute were read as requiring an auction of 216-220 MHz, that would still not resolve the issue in the case of law enforcement tracking. The Commission would remain obligated to protect ETS' law enforcement operations by harmonizing conflicting provisions of the Budget Act.

As noted previously, if Section 3002 were read to require an auction, it would threaten the continued viability of law enforcement tracking systems in 135 cities around the United States: Each of these systems operates on a secondary, non-interference basis; each one is vulnerable to interference from a primary user such as an auction winner. An auction would, in effect, evict law enforcement tracking from the band.[24]

---

[23] Legislative history to Section 3002(e) suggests that the spectrum reallocated pursuant to the Budget Act "is to be assigned using competitive bidding pursuant to section 309(j) of the Communications Act" (H. Conf. Rep. No. 105-217 at p. 575). However, it is an axiom of statutory construction that the terms of a clear statute control over legislative history, particularly in a case like this where the Commission's statutory discretion remains so broad. *See American Civil Liberties Union* vs. *FCC* 823 F.2d 1554, 1569 (D.C. Cir. 1987) ("committee reports, even authoritative committee reports, are not law"): *see also* H. Conf. Rep. No. 105-217 at p. 572 (stressing the conferees' intention that the Commission not interpret its "expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E) [to avoid auctions]").

[24] Nor is it practical for ETS and its law enforcement "partners" to bid for spectrum. Rather, this is a classic situation where, as the Commission has recognized, flexible use does not work. *See Spectrum Policy Statement*, FCC 99-354, released November 22, 1999, at para. 11 (flexible allocations "may interfere with important public interest goals ... such as public safety communications").

On the other hand, Section 3004 of the same Budget Act obligates the Commission to make spectrum available to public safety communications; directs the allocation of 24 additional MHz from the range 746-806 MHz for public safety services; and even requires that "upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement . . . to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity." *See also* Section 3002(c)(2)(C) (Commission directed to "consider the needs of existing public safety radio services" in conducting auction of the 55 MHz).[25]

In effect, then, one Section of the Budget Act would reduce the spectrum available for law enforcement, while Sections seek to enhance it.

It is fundamental that administrative agencies are expected to harmonize conflicting provisions of their organic statutes and, indeed, are entitled to considerable deference in the act thereof. *See Chevron U.S.A.* vs. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (particular weight given views of expert agencies when construing statutes to "reconcil[e] conflicting policies"); *see, e.g., Ameritech Corp.*, 14 FCC Rcd 14712, 14940 (1999) (Commission called upon to resolve statutory conflict "in a way that makes sense of the statute

---

[25] The Budget Act is hardly the first instance when Congress has spoken to the need for improved public safety communications. In 1993, Congress expressed concern for ensuring that public safety communications needs are met and directed the Commission to take action in that regard. The Commission and NTIA later created the Public Safety Wireless Advisory Committee ("PSWAC") to "evaluate the wireless communications needs of . . . Public Safety agencies . . . and recommend possible solutions." *Final Report of the Public Safety Wireless Advisory Committee to the Federal Communications Commission*, September 11, 1996, at 2. PSWAC concluded that "unless immediate measures are taken to alleviate spectrum shortfalls and promote interoperability, Public Safety agencies will not be able to adequately discharge their obligation to protect life and property in a safe, efficient and cost effective manner." *Id.* A key finding of PSWAC was that "the currently allocated Public Safety spectrum is insufficient to meet current voice and data needs . . .and will not meet future

as a whole"); *CPNI Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14480-81 (1999) (resolution of statutory conflict should best further the statutory design); *see also* 73 AM Jur 2d Statutes §255.

Thus, if there be a conflict here, it is incumbent upon the Commission as the expert agency to resolve it. That is, it is incumbent upon the Commission to read the Budget Act so as to honor the overarching legislative purpose of enhancing spectrum available for law enforcement purposes, by at least excluding 216-217 MHz from any auctions, rather than interpreting Section 3002 inflexibly as requiring an auction. Such is clearly a "permissible construction of the statute," *Chevron, supra*, at 843, in the light of Section 3004's public safety mandate and Section 3002(a)'s stress on the Commission's discretion to determine whether to hold an auction in the first place (*see* Section IV.A, *supra*).

V. LAW ENFORCEMENT TRACKING SPECTRUM IS AUCTION-EXEMPT.

If the Commission were still to resolve the statutory conflict in favor of a 216-217 MHz auction, law enforcement tracking spectrum would nonetheless be auction-exempt. Measures would then have to be taken to ensure that LETS – exclusive frequencies were protected.

Congress has specifically determined that the Commission's auction authority does not extend to "public safety radio services."[26] The Commission has construed the public safety

---

needs . . . ." *Id* at 19. It is against this background that Congress took the actions in the Budget Act referenced above.

[26] The competitive bidding authority ... shall not apply to licenses or construction permits ...
(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities ... that —
(i) are used to protect the safety of live, health or property; and
(ii) are not made commercially available to the public ....
Section 3002(a)(2) codified at Section 309(j)(2) of the Communications Act.

exemption as including traditional public safety agencies (like police and fire departments), as well as radio services in which "the dominant use of the spectrum" is for protecting the safety of life, health and property. *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*, *Report and Order and Further Notice of Proposed Rule Making*, FCC 00-403, para. 5 (rel. Nov. 20, 2000) (hereinafter, the "*Report and Order*"). In particular, "the exemption can apply only to spectrum that the Commission specifically allocates for the particular uses that Congress intended to benefit." *Id.* at para. 66.

> The Commission has further construed this exemption to mean "that radio service[s] not allocated for traditional public safety uses will be deemed to protect the safety of life, health or property within the meaning [of the exemption] if the dominant use of the service is by entities that (1) have an infrastructure that they use primarily for the purpose of providing essential public services to the public at large; and (2) need, as part of their regular mission, reliable and available communications in order to prevent or respond to a disaster or crisis affecting the public at large."[27]

LETS spectrum may be considered exempt inasmuch as it is set aside for traditional public safety services. As noted previously, the frequencies in question are dedicated by Commission for the sole purpose of "track[ing] extremely valuable goods or undercover agents without the threat of interference from other low power services."[28] Thus, LETS operations meet the first test.

---

[27] *Id.* at para. 77.

[28] *LPRS Order*, 11 FCC Rcd at 18532.

LETS also meets the alternative test. The dominant use (indeed, exclusive use) of LETS frequencies is for the reduction of crime and recovery or stolen property. LETS utilizes a city-wide "infrastructure" in tracking criminals and recovering property -- an "essential ... service to the public at large." *Id.* at para. 77.

Likewise, LETS requires a "reliable and available" ability to communicate. *Ibid.* Any interference to a tracking receiver significantly reduces the likelihood of apprehension of criminals and recovery of goods.

Accordingly, LETS meets the definition of a public safety radio service and should be deemed exempt from any requirement to obtain spectrum through auction.[29]

If, the Commission were to conclude that an auction of LETS frequencies is necessary, the agency should exercise its discretion to protect low power users in the additional respects described below.

VI. THE FCC SHOULD GRANT PRIMARY STATUS TO LPRS.

The Commission has inquired whether it should grant primary status to low power licensees. *Notice* at para. 18. ETS supports primary status so long as it does not adversely affect LETS' continued ability to be licensed by rule.

---

[29] The Commission has indicated that the exemption should be defined to include "radio services, rather than ... particular classes or groups of licensees within a service." *Report and Order, supra*, at para. 66. Law enforcement tracking is, to be sure, one type of use within the Low Power Radio Service which includes other classes of users. However, as discussed, the Commission has also determined that the exemption should apply "to spectrum that the Commission specifically allocates for the particular uses that Congress intended to benefit." *Id.* The Commission designated LETS spectrum for this purpose, and only this purpose. Accordingly, the 216-217 MHz exclusive law enforcement tracking frequencies are within the scope of the auction exemption.

Primary status would afford low power operators a degree of protection against interference. The Commission should exercise its broad discretion in auction design by affording this protection to law enforcement tracking communications.

Primary status must not disturb the licensing-by-rule approach which many low power users enjoy, however. *See* Rule 95.1001. As the Commission has previously concluded "the administrative and economic burdens associated with individually licensing stations in the LPRS greatly outweigh any derived benefits to the public and the Commission."[30] The licensing burden both the private-sector and the Commission would incur in maintaining such information would be enormous. Thus, the Commission wisely decided on licensing by rule for all LPRS operators.

Moreover, elevating LPRS to primary status need not entail individual licensing. In a number of other cases, the Commission has licensed a service by rule, but at the same time provided that service a primary allocation. These include the Citizens Band and Family Radio Services in Part 95; the Maritime Radio Service (for domestic operations) in Part 80; and the Aviation Radio Service in Part 87 (for domestic operations). Thus, primary status for low power users would be fully consistent with continued licensing by rule.

---

[30] *LPRS Order*, 11 FCC Rcd at 18528.

VII. CONCLUSION

For all the foregoing reasons, ETS submits that: (1) high-power operations (whether of the fixed or mobile variety) should be excluded from the 216-220 MHz band; (2) the Commission need not and should not auction 216-217 MHz; and (3) low power users should be granted primary status without changing the licensing rule under which they operate.

Respectfully submitted,

Electronic Tracking Systems, L.L.C.

By: Donell A. Hicks

William K. Keane
Elizabeth A. Hammond
Donell A. Hicks

Arter & Hadden LLP
1801 K Street, NW
Suite 400K
Washington, DC 20554
(202) 775-7100

Its Counsel

March 8, 2001

290352_1

STAMP & RETURN

FILE COPY

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

RECEIVED

APR 9 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Reallocation of the 216-220 MHz,	)	ET Docket 00-221
1390-1395 MHz, 1427-1429 MHz,	)	RM-9267
1429-1432 MHz, 1432-1435 MHz,	)	RM-9692
1670-1675 MHz and 2385-2390 MHz	)	RM-9797
Government Transfer Bands	)	RM-9854

To: The Commission

REPLY COMMENTS OF
ELECTRONIC TRACKING SYSTEMS, L.L.C.

Electronic Tracking Systems, L.L.C. ("ETS"), by its counsel, hereby replies to certain of the opening comments filed in the above-captioned proceeding.

Background

As ETS discussed in its opening Comments, re-allocation of the band 216-220 MHz would destroy its utility for a multitude of highly beneficial low power uses. These include, most notably, the law enforcement tracking systems provided by ETS in numerous cities around the United States -- systems which have made a material contribution to reduced robbery rates and improved public safety. Those uses also include auditory assistance devices which have greatly improved the lives of many disabled citizens, and seismic telemetry equipment used in the search for new domestic oil and gas reserves -- one of the Bush Administration's highest policy priorities.

ETS further demonstrated that the Commission need not auction the 216-217 MHz band; that even if an auction were required, ETS systems operate in that band on two discrete

frequencies dedicated exclusively for law enforcement purposes; that law enforcement tracking systems in this band should therefore be deemed auction-exempt as a public safety radio service; and, finally, that low power users should be granted primary status without the need for individual licensing (in the case of low power users like law enforcement tracking which are licensed by rule).

Based on the opening comments it is clear that the vast majority of commenters agree that the band should be preserved for low power uses. By contrast, there are only a handful of proposals seeking high power operations. These include, for example, filings by Mobex Communications, Inc. ("Mobex"), which would have the band allocated for base stations with powers as high as 1000 watts or more; and Trimble Navigation Limited ("Trimble") and Pacific Crest Corporation ("Pacific Crest"), which seek to have the band authorized for survey operations using "real-time kinematic" ("RTK") technology.[1] These systems would operate with base station powers up to 35 watts and a range of 30 miles. Pacific Crest at 3, 6-7; *but see* Trimble at 8 (suggesting that RTK power-height could be up to 500 watts ERP at a height of 670 meters (HAAT) for a coverage area with an 80 km radius).

Discussion

As explained in greater detail in the attached Technical Statement from Mr. David Wood, President, ETS, there is no way law enforcement tracking can co-exist with high power operations like these. Claims by Mobex, for example, of an intention to protect incumbent low power users, while perhaps sincere, are without foundation from an engineering standpoint.

[1] Mobex appears to contemplate expansion of automated maritime services, power levels for which are specified at Rule 80.215(h). Mobex's subsidiary, Regionet, had previously proposed paging services for this band. Rule 22.535 prescribes power as high as 1,400 watts for paging.

Indeed, high power proponents themselves appear to recognize the problem by suggesting in the alternative that low power users like law enforcement tracking be relegated to some other band.

Insofar as interference is concerned, Mr. Wood's statement explains in detail the effects that Mobex and/or Trimble equipment would have on law enforcement tracking equipment. That equipment would be de-sensed by high power emissions, particularly given the sensitivity of tracking receivers -142 dbm necessary to achieve practical tracking ranges of one to two miles. Even Mobex/RTK operation on nearby channels would be such as to preclude practical operation for law enforcement tracking. As Mr. Wood observes, the emission mask of an RTK transmitter would need to be 104 db below its 35 watt transmitted power in order to avoid interference even at a one mile range from the RTK transmitter.

The Commission has previously addressed the issue of potential interference to law enforcement tracking. Indeed, the agency determined to dedicate two frequencies exclusively for this purpose in order to minimize "the threat of interference from other low power services." *Report and Order* in WT Docket No. 95-56, 11 FCC Rcd 18517, 18532 (1996). For the same reasons, the Commission restricted maximum transmitter power for all low power users in the 216-217 MHz band to 100 mW ERP. The proposed Mobex/RTK high power operations present a "threat of interference" orders of magnitude greater than that contemplated in the *Report and Order*. Thus, such operations should continue to be precluded in this band.

Nor is relocation for low power incumbents, as some have proposed, a viable option.[2]

First. The high power proponents fail to identify just where the low power community might be relocated to. This is no trivial issue given the increasing difficulty that the Commission

[2] *See* Mobex at 7; *see also* Securicor Wireless Holdings, Inc. at 6.