

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

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 800 and 900 MHz Industrial/ Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	ET Docket No. 95-18
)	

To: The Commission

**PETITION FOR RECONSIDERATION OF
ENERGY CORPORATION AND ENERGENCY SERVICES, INC.**

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EXECUTIVE SUMMARY

Entergy, a multi-state electric utility licensed in the 800 MHz band, supports the FCC's efforts to resolve the interference caused by Nextel's operations. While Entergy hopes that the new interference abatement rules and band reconfiguration will minimize interference and disruption for all incumbent licensees, Critical Infrastructure Industry (CII) entities, such as Entergy, require interference protection and a smooth transition during the 800 MHz band reconfiguration to protect the safe and efficient delivery of electricity to the public.

To achieve these results, the FCC should promptly reconsider and clarify various aspects of the *Report and Order*. In particular, the FCC should clarify that the new interference abatement rules will apply to interference caused by ESMR and cellular licensees, while the existing harmful interference standard will continue to apply to interference caused by non-cellular licensees. The FCC should also permit CII licensees to relocate out of the Expansion Band at Nextel's expense, avoid involuntary relocation into the Expansion Band, and invoke "safety valve" interference protection. CII licensees merit the same degree of interference protection as Public Safety licensees because they operate similar systems for similar purposes.

In addition, the FCC should (1) clarify the logistics of the Public Safety set aside by (i) creating a designator to identify reserved spectrum in the licensing database and (ii) requiring Public Safety licensees to license Public Safety or SMR Pool spectrum before requesting Business or Industrial/Land Transportation Pool spectrum; (2) reconcile the conflicting time periods for the administrative review process associated with disputes between Nextel and incumbent licensees; (3) codify provisions in the *Report and Order* regarding non-binding arbitration and the appeals process; (4) clarify the definition of "Critical Infrastructure Industry;" and (5) correct the reference to "harmful interference" in the new interference abatement rules.

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**PETITION FOR RECONSIDERATION OF
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Pursuant to Section 1.429 of the FCC's rules,¹ Entergy Corporation and Entergy Services, Inc. (collectively, "Entergy") petition the Federal Communications Commission ("FCC") for reconsideration and clarification of the *Report and Order, Fifth Report and Order, Fourth*

¹ 47 C.F.R. § 1.429 (2003).

Memorandum Opinion and Order, and Order in the 800 MHz Public Safety Interference proceeding ("*Report and Order*").²

In the *Report and Order*, the FCC adopted interference abatement rules and a band reconfiguration plan to resolve the interference caused by Nextel's operations. Although Entergy supports the FCC's attempts to reduce interference for all incumbent licensees, it cautions that the FCC needs to clarify the applicability of the new interference abatement rules, grant the same degree of interference protection to Public Safety and Critical Infrastructure Industry licensees, clarify the logistics of the Public Safety set aside, and reconcile the inconsistencies in the dispute resolution process. The FCC also should clarify the definition of "Critical Infrastructure Industry" and correct the reference to "harmful interference" in the new interference abatement rules.

I. BACKGROUND

Entergy operates an extensive 800 MHz private land mobile radio system to support its safe and efficient delivery of electric service to the public. Because of the importance of this communications system to its Critical Infrastructure Industry ("CII") activities, Entergy has taken an active interest in this proceeding from its inception. In numerous comments and *ex parte* presentations, Entergy has asked the FCC to prevent Nextel's operations from causing harmful interference to CII licensees and to avoid any disruption of CII radio systems during and after any reconfiguration of the 800 MHz band. While Entergy hopes that the *Report and Order* will

² In re Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels; WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) [hereinafter *Report and Order*].

lead to the accomplishment of those goals, this will not occur unless the FCC promptly reconsiders and clarifies various aspects of the *Report and Order*.

II. THE NEW INTERFERENCE ABATEMENT RULES SHOULD APPLY ONLY TO LICENSEES OPERATING CELLULAR SYSTEMS

The FCC should clarify the *Report and Order* and the amended rules to note that the new unacceptable interference standard will not apply to non-cellular licensees or the non-cellular sites of licensees employing cellular architecture pursuant to a waiver. In the *Report and Order*, the FCC prohibited licensees from causing "unacceptable interference" to non-cellular licensees in the 800 MHz band.³ While the FCC repeatedly stated that the new unacceptable interference standard will apply to interference caused by ESMR and Part 22 cellular telephone providers,⁴ the amended rules suggested that this standard may cover other types of licensees as well.

Section 90.672(a) of the amended rules states that "unacceptable interference to non-cellular licensees in the 800 MHz band will be deemed to occur" when the non-cellular licensee meets certain conditions regarding signal strength and receiver performance.⁵ This rule defines the applicability of the heightened unacceptable interference standard by the type of licensee receiving interference, rather than the type of licensee causing the interference. Based on the language of this rule, the standard would apply not only to ESMR and Part 22 cellular telephone providers, but also to non-cellular licensees and the non-cellular sites of licensees operating only a few cellular sites pursuant to a waiver.

³ *Id.* at 14976-14977 ¶ 10, 15024-15034 ¶ 92-114.

⁴ *Id.* at 15024-15045 ¶ 92-141.

⁵ Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,849 (Nov. 22, 2004) (to be codified at 47 C.F.R. § 90.672(a)).

Although the heading of section 90.672 states that it covers "unacceptable interference to non-cellular 800 MHz licensees *from ESMR or Part 22 Cellular Radio Telephone systems*,"⁶ the wording of a heading will not necessary limit the scope of a statute (or, by extension, a rule).⁷ The controlling authority of a heading is even less certain when, as here, the language of the underlying *Report and Order* illustrates that the rule applies more broadly than stated in the heading. In the *Report and Order*, the FCC asserted that the "definition of '800 MHz cellular system' should not be interpreted to allow cellular-configuration systems that do not come within the cellular definition to cause unacceptable interference or to relieve them from the cost and other responsibility for promptly abating unacceptable interference"⁸ Thus, even though the heading would appear to limit the applicability of the "unacceptable interference" standard, the FCC appears to have intended the standard to apply to licensees other than ESMR or cellular licensees.

The FCC should clarify the *Report and Order* and the amended rules to note that the new unacceptable interference standard will apply only to licensees employing cellular architecture. The existing "harmful interference" standard should continue to apply to all other licensees, especially because the FCC adopted the new unacceptable interference standard specifically to combat interference caused by incompatible cellular systems.⁹ In other words, the FCC should use the "harmful interference" standard to evaluate interference claims against non-cellular

⁶ *Id.* (emphasis added).

⁷ Norman J. Singer, *Statutes and Statutory Construction* §§ 21.4, 47.14 (West Group 2000).

⁸ *Report and Order*, 19 FCC Rcd at 15061 ¶ 174.

⁹ *Id.* at 14972 ¶ 2 ("The interference problem in the 800 MHz band is caused by a fundamentally incompatible mix of two types of communications systems: cellular-architecture multi-cell systems – used by ESMR and cellular telephone licensees – and high-site non-cellular systems – used by public safety, private wireless, and some SMR licensees").

licensees. The FCC should also clarify that the "unacceptable interference" standard will not apply to licensees that operate only a few "cellular" sites pursuant to a waiver or, at most, will apply only to the cellular sites of such licensees and not to every site in the system.

III. THE FCC SHOULD ACCORD THE SAME DEGREE OF INTERFERENCE PROTECTION TO PUBLIC SAFETY AND CII LICENSEES

A. CII Licensees Should Not Have to Operate in the Expansion Band

The FCC should amend the rules to allow CII licensees to relocate out of the Expansion Band at Nextel's expense and to avoid forced relocation into the Expansion Band.¹⁰ In the *Report and Order*, the FCC recognized that the Expansion Band is more appropriate for licensees that "employ 'campus-type' or other interference-resistant type systems."¹¹ Because the Expansion Band poses an increased likelihood of interference to mission-critical operations, the FCC concluded that it was "prudent to allow all public safety licensees the option to relocate from this portion of the band."¹² The FCC further concluded that "no public safety licensee will be forced to relocate to this portion of the band."¹³

By contrast, the FCC declined to grant the same degree of interference protection to CII licensees. The FCC reasoned that, "under most circumstances, the Expansion Band offers

¹⁰ The Expansion Band encompasses the 815-816/860-861 MHz portion of the band, or the 812.5-813.5/857.5-858.5 MHz portion of the band in the Southeast. *Id.* at 15053 ¶ 154, 15058 ¶ 166. Entergy notes that Southern LINC has requested that there be no Expansion Band within 70 miles of Atlanta, Georgia, due to a lack of sufficient replacement channels in that area. Comments of Southern LINC, In re Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55 (Dec. 2, 2004). Entergy takes no position on Southern LINC's specific request with respect to Atlanta.

¹¹ *Report and Order*, 19 FCC Rcd at 15053 ¶ 154. The Private Wireless Coalition defined "campus-type" systems as having an "operating area with a five mile radius or less." Comments of the Private Wireless Coalition, WT Docket No. 02-55, 20 (May 6, 2002).

¹² *Report and Order*, 19 FCC Rcd at 15053 ¶ 154.

¹³ *Id.*

B/ILT, CII and non-cellular SMR licensees equivalent capacity and quality of service," apparently assuming that these licensees employ campus-type or other interference-resistant type systems.¹⁴ Based on this flawed presumption, the FCC refused to allow CII licensees to relocate out of the Expansion Band and may even force them to relocate out of the 851-854 MHz band into the Expansion Band.

CII licensees should receive the same relocation rights as Public Safety licensees with respect to the Expansion Band because they also do not generally operate campus-type or interference-resistant type systems and rely on interference-free communications where missed or garbled transmissions could lead to loss of life or property, as well as disruption in the delivery of essential energy services to the American public. While some Business and I/LT licensees might confine their operations to a limited geographic area,¹⁵ many CII licensees must cover extended operating areas as they protect and maintain the integrity of their electric and gas systems.

For example, Entergy Corporation is one of the largest electric utility holding companies in the country. Entergy Corporation's subsidiaries include Entergy Services, Inc. and five electric utility operating companies that in the aggregate own and operate an integrated electric utility system serving approximately 3 million customers and covering 130,000 square miles in Louisiana, Arkansas, Texas, and Mississippi. To facilitate its internal communications and to monitor its power generation and distribution system, Entergy operates an extensive and complex private land mobile radio system in the 800 MHz band. This system consists of 170 base sites and 8,000 mobile units with 240 talk groups and supports vital utility services,

¹⁴ *Id.* at 15051 ¶ 151 n.406.

¹⁵ Reply Comments of Consensus Parties, WT Docket No. 02-55, 24-25 (Feb. 25, 2003).

including dispatch service for construction, transmission, and engineering personnel in the field. Thus, Entergy's widespread and sophisticated system should not be subjected to the same Expansion Band presumptions as a campus-type radio system that has only a five-mile radius.

The FCC should also not presume that CII licensees operate other types of interference-resistant system. The record in this proceeding appears to contain no evidence that such interference-resistant systems are in widespread use by CII licensees. Several utilities have also complained of harmful interference caused by Nextel and Nextel Partners.¹⁶

If the FCC refuses to change its flawed presumption that CII licensees employ campus-type or interference-resistant type systems, the FCC should at least allow CII licensees to rebut this presumption.¹⁷ The FCC should establish standards that would permit CII licensees to relocate at Nextel's expense by demonstrating that Expansion Band spectrum would not provide equivalent capacity or quality of service.

B. Critical Infrastructure Industry Licensees Should Have the Right to Invoke "Safety Valve" Interference Protection

The FCC should apply the "safety valve" interference protection mechanism to Critical Infrastructure Industry licensees. In the *Report and Order*, the FCC offered Public Safety licensees a "safety valve" for use when the continued presence of interference constitutes a "clear and imminent danger to life or property."¹⁸ Under this safety valve, the FCC will require the

¹⁶ E.g., Comments of Cinergy Services, Inc. and Consumers Energy Company, WT Docket No. 02-55, 8-9 (Dec. 2, 2004); In re Nextel WIP License Corp. Palehua Ridge, Hawaii, File No. EB-02-HL-078, *Notice of Apparent Liability for Forfeiture* (Sept. 30, 2002) (reporting that an FCC representative found that Nextel Partners caused "severe wide-band continuous interference" to a utility licensee's operations).

¹⁷ Even the Consensus Parties acknowledged that non-Public Safety licensees should have the opportunity to relocate out of the 2 MHz block that is adjacent to the ESMR band. Reply Comments of Consensus Parties, WT Docket No. 02-55, 23 n.47 (Feb. 25, 2003).

¹⁸ *Report and Order*, 19 FCC Rcd at 15044 ¶ 140.

interference source to discontinue operation immediately, pending the identification and application of corrective measures.¹⁹ The FCC must review and approve any requests for safety valve treatment.²⁰

Although the FCC emphasized that this relief applies only to Public Safety licensees,²¹ its reasoning also applies to CII licensees. The FCC has elsewhere concluded that CII licensees and Public Safety licensees are similar. For example, the FCC noted that "the very nature of the services provided by . . . [CII entities] involves potential hazard to life and property,"²² which is the exact reason used to justify the safety valve for Public Safety licensees. The FCC further stated that "CII entities often work hand-in-hand with Public Safety officials at the scene of an incident" and that "reliable CII radio communications have long proven essential in speeding recovery from natural or man-made disasters."²³ Based on the similarities between Public Safety and CII licensees, the FCC should amend section 90.674(c)(3) to add the words "or CII" after every occurrence of the term "public safety."

IV. THE FCC SHOULD CLARIFY THE LOGISTICS OF THE PUBLIC SAFETY SET ASIDE

The FCC should provide additional details regarding the implementation of the Public Safety set aside. In the *Report and Order*, the FCC granted Public Safety entities exclusive access for three years to the spectrum vacated by: (1) Nextel in the interleaved portion of the 800 MHz band; (2) licensees voluntarily relocating to the Guard Band; and (3) licensees

¹⁹ *Id.*

²⁰ *Id.* at 15044-15045 ¶ 140.

²¹ *Id.* at 15044 ¶ 140.

²² *Id.* at 14974 ¶ 4 n.11.

²³ *Id.*

relocating from channels 121-150 of the General Category band.²⁴ The FCC also established the commencement date of the set aside as January 21, 2005.²⁵

Although the FCC adopted general rules for this set aside, it has not otherwise addressed the logistics of this licensing scheme. The FCC should create a designator in the licensing database to enable entities to identify spectrum that will be reserved for Public Safety applicants.²⁶ The FCC should also clarify that Public Safety licensees must first license any remaining Public Safety or SMR Pool spectrum before requesting B/ILT Pool spectrum. This clarification will preserve as much B/ILT Pool spectrum for CII and other B/ILT users as possible.

V. THE FCC SHOULD RECONCILE THE INCONSISTENCIES IN THE DISPUTE RESOLUTION PROCEDURES

The FCC should clarify the dispute resolution procedures in the *800 MHz Report and Order* and the amended rules to ensure that they adequately protect incumbent licensees. Specifically, the FCC should reconcile the conflicting time periods for the administrative review process associated with disputes between Nextel and incumbent licensees and codify provisions in the *Report and Order* regarding non-binding arbitration and the appeals process.

The *Report and Order* and amended rules specified four different timetables for measuring the length of the Transition Administrator's review of disputed issues. The *Report*

²⁴ *Id.* at 15052 ¶ 152, 15052-15053 ¶ 153, 15054-15055 ¶ 158; *see* Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,843, 67,845, 67,846 (Nov. 22, 2004) (to be codified at 47 C.F.R. §§ 90.615(a), 90.617(g)-(h)).

²⁵ *Report and Order*, 19 FCC Rcd at 15052 ¶ 152, 15052-15053 ¶ 153, 15054-15055 ¶ 158; *see* Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,823, 67,843, 67,845, 67,846 (Nov. 22, 2004) (to be codified at 47 C.F.R. §§ 90.615(a), 90.617(g)-(h)).

²⁶ *See* Comments of Shulman Rogers, WT Docket No. 02-55, 14-15 (Nov. 8, 2004); Comments of Arizona Public Service Co., WT Docket No. 02-55, 3 (Nov. 24, 2004).

and Order initially indicated that the Transition Administrator will resolve any dispute "within thirty days after [it] has received a submission by one party and a response from the other party."²⁷ But the FCC subsequently asserted that the Transition Administrator must forward any disputed issues to the Wireless Bureau "thirty days after the end of the mandatory negotiation period."²⁸ Section 90.677(d) of the amended rules introduces a third and fourth timetable, noting that the Transition Administrator must resolve any disputed issues "within thirty working days" and must forward any unresolved issues to the Wireless Bureau "within thirty days after the end of the mandatory negotiation period."²⁹

In addition, the FCC did not allot any time for non-binding arbitration in these timetables. In the *Report and Order*, the FCC stated that any party "may seek expedited non-binding arbitration which must be completed within thirty days of the Transition Administrator's, or other mediator's recommended decision or advice."³⁰ The FCC further noted that any unresolved issues may be referred to the Chief of the Public Safety and Critical Infrastructure Division within ten days of the recommended decision or advice.³¹ This thirty- or forty-day arbitration

²⁷ *Report and Order*, 19 FCC Rcd at 15071 ¶ 194. This first timetable necessarily lasts longer than thirty days because it incorporates the time to prepare a response to the initial submission.

²⁸ *Id.* at 15076 ¶ 201. The second timetable limits the review period to thirty days, without providing any time for a submission or response.

²⁹ Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,852 (Nov. 22, 2004) (to be codified at 47 C.F.R. § 90.677). The third timetable counts "working" days, which could extend the Transition Administrator's review period up to almost one and one-half months depending on the number of weekends and holidays. Although the fourth timetable resembles the second timetable because both mention the thirty-day mandatory negotiation period, the fourth timetable requires a referral to the Wireless Bureau *within* this thirty-day period.

³⁰ *Report and Order*, 19 FCC Rcd at 15071-15072 ¶ 194.

³¹ *Id.* at 15072 ¶ 194.

period appears to be impossible to reconcile with the various timetables for the Transition Administrator's review process, all of which require referral of the unresolved issues to the Wireless Bureau within one to one and one-half months after the end of the mandatory negotiation period. Under the timetables in the *Report and Order* and amended rules, parties could pursue mediation by the Transition Administrator and still preserve recourse to non-binding arbitration only if they surrender a significant portion of their mandatory negotiation period.

The FCC also neglected to include any right to non-binding arbitration in the amended rules. While the FCC stated that "any party . . . may seek expedited non-binding arbitration" and "[t]he parties will share the cost of this arbitration,"³² these rights are not addressed in the amended rules.

Finally, even though the FCC adopted intricate procedures in the *Report and Order* regarding the review of disputed issues by the Wireless Bureau and the full Commission, the amended rules fail to codify these procedures. Section 90.677(d) of the amended rules states that "the Transition Administrator shall forward the record to the Chief of the Public Safety and Critical Infrastructure Division, together with advice on how the matter(s) may be resolved. The Chief of the Public Safety and Critical Infrastructure Division is hereby delegated the authority to rule on disputed issues."³³

This amended rule neglects to codify the portions of the *Report and Order* that (1) direct the Wireless Bureau either to resolve the issue *de novo* or designate it for an evidentiary hearing before an Administrative Law Judge, (2) allow either party to petition the full Commission for *de*

³² *Id.* at 15071 ¶ 194.

³³ Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,852 (Nov. 22, 2004) (to be codified at 47 C.F.R. § 90.677(d)).

novus review of a Wireless Bureau decision within 10 days of the effective date of that decision, or (3) require the FCC to set the matter for hearing before an Administrative Law Judge.³⁴

Thus, Entergy recommends that the FCC clarify the dispute resolution procedures by specifying a single timetable for measuring the length of the Transition Administrator's review of disputed issues. The FCC should amend section 90.677(d) to require the Transition Administrator to complete its review "within thirty days after the Transition Administrator has received a submission by one party and a response from the other party." The FCC should also adopt a new rule section on dispute resolution to memorialize the language from paragraph 194 of the *Report and Order* regarding non-binding arbitration and the appeals process.

VI. SEVERAL ASPECTS OF THE AMENDED RULES REQUIRE CLARIFICATION

A. The FCC Should Clarify the Definition of "Critical Infrastructure Industry"

The FCC should amend the definition of "Critical Infrastructure Industry" to capture the precise meaning of this term. While the FCC appropriately recognized that the statutory definition of "public safety radio services" includes CII entities,³⁵ it imprecisely defined "Critical Infrastructure Industry" in section 90.7 of the amended rules. Section 90.7, as amended by the *Report and Order*, states that "Critical Infrastructure Industry" refers to "[p]rivate internal radio services" operated by utilities and others, even though other provisions of the rules imply that CII are entities, not radio services.³⁶ To correct this error, the FCC should replace the clause "Private internal radio services operated by State, local governments and non-government

³⁴ Compare *id. with Report and Order*, 19 FCC Rcd at 15072 ¶ 194.

³⁵ *Report and Order*, 19 FCC Rcd at 14973 ¶ 4 n.11.

³⁶ Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,837 (Nov. 22, 2004) (to be codified at 47 C.F.R. § 90.7) (emphasis added).

entities" with "States, local governments, and non-government *entities* that operate private internal radio services"

B. The FCC Should Correct an Inadvertent Reference to "Harmful Interference" in the New "Unacceptable Interference" Rules

The FCC should revise the new interference abatement rules to correct an inadvertent reference to the "harmful interference" standard. In the *Report and Order*, the FCC adopted a new "unacceptable interference" standard to address interference caused by cellular licensees to non-cellular licensees in the 800 MHz band.³⁷ Although the FCC established procedures for non-cellular licensees to complain about unacceptable interference,³⁸ the term "harmful interference" was mistakenly used in section 90.674(a) of the amended rules.³⁹ The FCC undoubtedly meant to use the term "unacceptable interference" in this rule because of the overwhelming focus of the *Report and Order* on the new standard. In addition, section 90.674(a) itself notes that "harmful interference" is described in section 90.672, which actually defines "unacceptable interference."⁴⁰ Thus, the FCC should amend section 90.674(a) to replace the word "harmful" with the word "unacceptable."

³⁷ *Report and Order*, 19 FCC Rcd at 14976-14977 ¶ 10, 15039-15045 ¶ 124-141.

³⁸ *Id.* at 15041-15045 ¶ 132-141.

³⁹ Private Land Mobile Services; 800 MHz Public Safety Interference Proceeding, 69 Fed. Reg. 67,823, 67,850 (Nov. 22, 2004) (to be codified at 47 C.F.R. § 90.674(a)) (emphasis added).

⁴⁰ *Id.* at 67,849, 67,850 (to be codified at 47 C.F.R. §§ 90.672(a), 90.674(a)).

WHEREFORE, THE PREMISES CONSIDERED, Entergy Corporation and Entergy Services, Inc. respectfully request that the FCC grant this Petition for Reconsideration and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,



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