

March 2, 2007

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: WT Docket Nos. 96-86 and 06-169
Written Ex Parte

Dear Ms. Dortch:

The availability of the 700 MHz spectrum will offer a one-time opportunity to address the undisputed need for Public Safety mobile broadband spectrum. However, in order to address this need, the Commission must implement the Broadband Optimization Plan (“BOP”), which involves, *inter alia*, allocating a portion of the Upper 700 MHz B Block to public safety use. The B Block is part of the 36 MHz of spectrum that the Commission allocated to commercial use to be assigned by competitive bidding pursuant to section 337.¹ The analysis set forth below demonstrates that the Commission possesses the requisite authority to reconfigure the 700 MHz band, reallocate the B Block, and implement the BOP. Indeed, the reading of section 337 described herein is the only reading of the statute that gives effect to both section 337’s spectrum allocation and the FCC’s fundamental obligation to protect the safety of life and property.

I. Enabling Public Safety Broadband

Section 1 of the Communications Act of 1934, as amended, directs the Commission to manage the spectrum in a manner that promotes the safety of life and property.² In the twenty-first century, as the Commission has previously stated, a critical part of implementing that directive is enabling public safety wireless broadband capability.³ The record in response to the *Eighth NPRM* overwhelmingly supports the

¹ See 47 U.S.C. § 337(a).

² 47 U.S.C. § 151.

³ *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, Ninth Notice of Proposed Rulemaking, 21 FCC Rcd 14837, ¶ 12 (2006) (“*Ninth NPRM*”); see also *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, Eighth Notice of Proposed Rulemaking, 21 FCC Rcd 3668, ¶ 4 (2006) (“*Eighth NPRM*”).

conclusion that broadband is essential to public safety.⁴ Indeed, the Commission concluded only a few months ago that it must promote public safety broadband, proposing a comprehensive plan to promote “the rapid deployment of a nationwide, interoperable, broadband public safety network, and thereby improve emergency responsiveness.”⁵

The Broadband Optimization Plan is the only plan in the record that enables fully useable nationwide broadband for Public Safety. The comprehensive record contains much support for the BOP, and reveals the inherent and insupportable flaws of the other plans for broadband that have been advanced. The plans described in the *Eighth NPRM* sandwich broadband between narrowband allocations, a configuration that effectively would prevent public safety from having both robust broadband and narrowband operations. The 6+6 plan advocated by Alcatel-Lucent would severely hamper, if not foreclose, the use of state-wide, interoperable, mission-critical voice networks for a significant period of time in Canada border states and would make deploying broadband networks there far more difficult – a sorry outcome for the fourteen states that border Canada.⁶ The BOP, by contrast, has the full support of many public safety entities – because it enables full broadband, nationwide, and permits state-wide interoperable narrowband deployments, while significantly reducing the potential for interference to narrowband operations.

In the *Eighth NPRM*, the Commission sought comment on alternatives to provide Public Safety with broadband capabilities.⁷ Comments submitted in that docket and in related dockets demonstrate that, at best, the band plans described in the *Eighth NPRM* (with broadband sandwiched between two public safety narrowband segments) would provide inadequate broadband systems for Public Safety due to: (1) their compromised performance levels borne of extreme measures necessary to prevent interference from public safety broadband operations into adjacent public safety narrowband operations; and (2) the failure to permit deployment of commercial-like systems for Public Safety and, hence, the lost opportunity for commercial partners and economies of scale in network deployment.⁸

⁴ See, e.g., WT Docket No. 96-86, Comments of the National Public Safety Telecommunications Council (June 5, 2006); Comments of Region 24 700 MHz Regional Planning Committee (June 6, 2006); Comments of Motorola, Inc. (June 6, 2006); Comments of Lucent Technologies, Inc. (June 6, 2006).

⁵ *Ninth NPRM* ¶ 3.

⁶ This would be true of any plan that consolidates Public Safety’s entire narrowband allocation into TV channels 64/69.

⁷ See *Eighth NPRM* ¶¶ 14-29.

⁸ See, e.g., Comments of Access Spectrum, LLC and Pegasus Communications Corporation, PS Docket No. 06-229 and WT Docket No. 96-86 (Feb. 26, 2007).

Alcatel-Lucent has proposed a 6+6 plan that would consolidate the public safety narrowband spectrum, but would not allocate additional spectrum to public safety.⁹ This plan has not been vetted technically, and does not solve the Canadian border issue, leaving the fourteen states in the border regions vulnerable to having no interoperability for their state-wide, mission-critical voice systems until Canada agrees to vacate the remaining television broadcast channels. There are no current plans to vacate Channels 64 and 69 in Canada. If past experience is any guide, it seems likely that the Canadian broadcasters will continue to operate in those channels for some period of time, at least 5 years, and perhaps 10 years or longer. In the meantime, New York State, along with the other border states, would be stymied in efforts to have operable narrowband and interoperable narrowband in the border regions.¹⁰ Working out this issue was a significant focus of, and accomplishment of, the work of the Technical Working Group since several major public safety organizations made clear in their prior filings with the FCC that satisfactory resolution of the border region issue was a *sine qua non* of their support for the BOP.¹¹ Further, the failure to add the additional 3 MHz of spectrum to the public safety allocation would significantly hamper – and could eliminate – certain states’ ability to deploy broadband networks since Canada has primary rights to up to 70 percent of the 24 MHz of spectrum currently allocated to Public Safety. The BOP includes 3 MHz of additional broadband spectrum that is vital for states in this situation. For these reasons, among others, NPSTC supports the BOP and opposes the 6+6 plan.¹²

The one plan that most public safety entities support (because it is the only plan that enables broadband nationwide without compromising narrowband operations) is the

⁹ See, e.g., Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael McMenamin, Global Government & Public Affairs, Alcatel-Lucent, WT Docket Nos. 96-86 and 06-169 (Jan. 26, 2007). However, the 6+6 plan does not offer the technical or economic benefits of the BOP, has not been adequately reviewed, and lacks support in the record. See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael Gottdenker and Ruth Milkman on behalf of Access Spectrum, LLC and Marshall Pagon and Kathleen Wallman on behalf of Pegasus Communications Corporation, WT Docket Nos. 96-86 and 06-169 (Feb. 14, 2007) (“Access/Pegasus Feb. 14 Letter”).

¹⁰ See Access/Pegasus Feb. 14 Letter at 3-4; Attachment to Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Ruth Milkman on behalf of Access Spectrum, LLC (Feb. 23, 2007).

¹¹ See *supra* note 15.

¹² Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Vincent R. Stile, Chair, National Public Safety Telecommunications Council, WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229, at 3 and n.1 (Feb. 23, 2007).

BOP.¹³ The BOP would optimize broadband system performance and maximize opportunities for Public Safety to deploy commercial-like systems, resulting in economic benefits that make the construction and operation of broadband networks affordable to Public Safety. The BOP would: (1) consolidate the public safety narrowband spectrum at the top of the public safety band; (2) allocate an additional 3 MHz of spectrum nationwide to the public safety community; (3) enable Public Safety to manage its own guard bands; and (4) place public safety broadband operations directly adjacent to commercial broadband operations, thereby promoting public-private partnerships. It has become apparent that Public Safety will not achieve robust high capacity performance broadband capabilities unless these features are implemented. The BOP also resolves the Canadian border, equipment reprogramming, and spectrum planning database issues,¹⁴ the resolution of which was a necessary precondition to the support for consolidation of the narrowband channels by the Association of Public-Safety Officials – International, the International Association of Chiefs of Police, the International Association of Fire Chiefs, the Major Cities Chiefs Association, the Major Counties Sheriffs Association and the National Sheriffs Association.¹⁵

The BOP enjoys overwhelming support from the public safety community.¹⁶ It also has undergone a thorough technical review resulting in the conclusion that there are

¹³ See Comments of Access Spectrum, L.L.C., Columbia Capital III, LLC, Intel Corporation, and Pegasus Communications Corporation, WT Docket No. 96-86 (June 6, 2006); Comments of Access Spectrum, LLC, Columbia Capital III, LLC, Pegasus Communications Corporation and Telcom Ventures, LLC, WT Docket No. 06-150 (Sept. 29, 2006); Comments of Access Spectrum, LLC and Pegasus Communications Corporation, WT Docket Nos. 96-86 and 06-169 (Oct. 23, 2006) (“Access/Pegasus Oct. 23 Comments”); Reply Comments of Access Spectrum, LLC and Pegasus Communications Corporation, WT Docket Nos. 96-86 and 06-169 (Nov. 13, 2006).

¹⁴ See Report of the 700 MHz Technical Working Group, transmitted via letter from Ruth Milkman, Counsel for Access Spectrum, LLC and Kathleen Wallman, Adviser to Pegasus Communications Corp., WT Docket Nos. 06-169 and 96-86 (Oct. 23, 2006) (“First TWG Report”). Access Spectrum and Pegasus solved the reprogramming and spectrum planning database (CAPRAD) issues by committing to fund the expenses related to converting existing 700 MHz narrowband systems and updating CAPRAD, contingent on the adoption of the BOP. See Access/Pegasus Oct. 23 Comments at 16-17.

¹⁵ See Letter to Ms. Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission from Wanda McCarley on behalf of the Association of Public-Safety Communications Officials - International, Harlin McEwen on behalf of the International Association of Chiefs of Police, the Major Cities Chiefs Association, the Major Counties Sheriffs Association and the National Sheriffs Association, and Alan Caldwell on behalf of the International Association of Fire Chiefs, WT Docket No. 96-86 (July 31, 2006).

¹⁶ The public safety entities supporting the Broadband Optimization Plan include: the National Public Safety Telecommunications Coalition (the members of which are the

no technical issues remaining that would prevent it from being adopted.¹⁷ The BOP offers the only viable and technically feasible plan that has been presented to the Commission that would provide robust broadband nationwide capabilities to Public Safety on an affordable basis.

II. The Commission's Authority to Augment Public Safety Spectrum

As discussed above, in order to implement the BOP, a portion of the B Block would be transferred to the public safety allocation.¹⁸ The Communications Act gives the Commission the authority to take this step in order to enable public safety broadband and thereby promote safety of life and property.

Access Spectrum and Pegasus already have explained that the Commission fulfilled the requirements of Section 337 with respect to the Upper 700 MHz A and B Blocks.¹⁹ In particular, the Commission has: (1) reallocated 36 MHz of the Upper 700 MHz band, including the 6 MHz of the A and B Blocks, to make this spectrum available

American Association of State Highway Transportation Officials, American Radio Relay League, American Red Cross, Association of Public-Safety Communications Officials-International, Association of Fish & Wildlife Agencies, Forestry Conservation Communications Association, International Association of Chiefs of Police, International Association of Emergency Managers, International Association of Fire Chiefs, International Municipal Signal Association, National Association of State Emergency Medical Services Officials, National Association of State Foresters, National Association of State Telecommunications Directors), Major Cities Chiefs Association, Major County Sheriffs Association, the National Sheriffs Association, the New York State Office for Technology, and the following 700 MHz Regional Planning Committees: Region 4 (Arkansas), Region 5 (Southern California), Region 7 (Colorado), Region 8 (Metropolitan New York City Area), Region 9 (Florida), Region 10 (Georgia), Region 11 (Hawaii), Region 13 (Illinois except Southern Lake Michigan counties), Region 14 (Indiana except Southern Lake Michigan counties), Region 17 (Kentucky), Region 22 (Minnesota), Region 24 (Missouri), Region 26 (Nebraska), Region 30 (New York - Albany area), Region 32 (North Dakota), Region 33 (Ohio), Region 35 (Oregon), Region 39 (Tennessee), Region 45 (Wisconsin except Southern Lake Michigan counties), Region 54 (Chicago – Southern Lake Michigan counties) and Region 55 (New York – Buffalo).

¹⁷ See Second Report of the 700 MHz Technical Working Group, transmitted via letter from Ruth Milkman, Counsel for Access Spectrum, LLC and Kathleen Wallman, Adviser to Pegasus Communications Corporation, WT Docket Nos. 06-169 and 96-86 (Jan. 26, 2007).

¹⁸ See BOP, *supra* note 13.

¹⁹ See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Ruth Milkman, counsel to Access Spectrum, LLC and Kathleen Wallman, Adviser to Pegasus Communications Corporation, WT Docket Nos. 96-86, 06-150 and 06-169 (Dec. 12, 2006).

for commercial use;²⁰ and (2) completed an auction of the A and B Block spectrum.²¹ Indeed, some of the A and B Block spectrum has been used for commercial purposes since it was auctioned, although it has never been used intensively. However, the course of events suggests that there are better uses for the A and B Block spectrum.

The A and B Blocks were configured, allocated to commercial use, and auctioned with the expectation that they would be used for narrowband operations. Since the time of the guard band auctions, however, wireless broadband applications have multiplied, and Public Safety's need for broadband capabilities has emerged. Unfortunately, there has been a shortage of suitable spectrum available for that use, and no spectrum is currently available for public safety mobile broadband operations. At the same time, commercial narrowband capabilities have been fully developed in other bands, and the band manager concept has not proven to be a successful experiment. In light of the growing availability of wireless broadband applications, the intense Public Safety demand for broadband spectrum, and the pending availability of 700 MHz spectrum, it is entirely appropriate for – indeed incumbent upon – the Commission to consider mechanisms available to meet Public Safety's demand for broadband spectrum, including a reconfiguration of the 700 MHz band that encompasses the A and B Blocks.²²

In light of the history of the B Block, including the fact that it has already been auctioned, and the overwhelming need for public safety broadband spectrum, Section 337 should be read to give the Commission the authority to manage the 6 MHz that has already been auctioned in a manner that best achieves the statutory goals. The interpretation advocated by Access Spectrum and Pegasus recognizes that after the Commission discharges section 337's specific instructions, the agency continues to possess the authority over the 700 MHz band conferred on it by the other provisions of the Communications Act.²³ This reading of section 337 is consistent with the canon of statutory interpretation that “where possible, provisions of a statute should be read so as not to create a conflict.”²⁴ Because a portion of the presently-commercial B Block (part

²⁰ See *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, Report and Order, 12 FCC Rcd 22953, ¶ 17 (1998).

²¹ “700 MHz Guard Bands Auction Closes; Winning Bidders Announced,” Public Notice, 15 FCC Rcd 18026 (Sept. 25, 2000) (DA 00-2154).

²² See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) (“[I]t is clear that Congress meant to confer ‘broad authority’ on the Commission . . . so as ‘to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.’”) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)).

²³ See, e.g., 47 U.S.C. §§ 303(a)-(c) (granting the FCC authority to classify radio stations, prescribe the nature of services to be rendered by each class of station, and assign bands of frequencies to various classes of stations); see also 47 U.S.C. § 151.

²⁴ *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986) (citation omitted); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)

of the 36 MHz already auctioned) must be reallocated to public safety use to provide Public Safety with effective and affordable wireless broadband capabilities, this reading of section 337 gives effect to Congress' intentions with respect to both section 337 and, *inter alia*, the prime statutory directive to manage the spectrum in a manner that promotes the safety of life and property. Indeed, this interpretation of section 337 is consistent with the Commission's position in the *800 MHz Rebanding Order* that the B Block could be allocated to public safety use²⁵ and its statements about section 337 in other contexts.²⁶ Courts have been particularly deferential to the Commission with respect to management of spectrum to promote public safety,²⁷ given the statutory emphasis on the need to serve the public interest by advancing safety of life and property.

("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into a harmonious whole.'") (citations omitted).

²⁵ See *Improving Public Safety Communications in the 800 MHz Band; 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; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 209 (2004) (the Commission recognizing the possibility of redesignating the B Block to public safety use but deferring a final decision on the matter).

²⁶ See *Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) from Commercial Use; Assignment of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) to the Public Safety Broadband Trust for Deployment of a Shared Public Safety/Commercial Next Generation Wireless Network*, Order, 21 FCC Rcd 13123, ¶ 2 (2006) (stating that sections 337(a) and 309(j)(15)(C)(v) require the Commission to auction 30 MHz of spectrum, which excludes the B Block from the auction requirement); see also *Ninth NPRM* ¶ 46 (discussing ways to permit secondary commercial operations in the 700 MHz spectrum allocated to public safety use).

²⁷ See, e.g., *Keller Communications Inc. v. FCC*, 130 F.3d 1073, 1077 (D.C. Cir. 1997) ("Whether particular channels provide adequate public safety communications is precisely the type of technical issue on which we defer to the Commission's expertise.") citing *MCI Cellular Tel. Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984); see also, *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 444-445 (D.C. Cir. 1991); *Teledesic LLC v. FCC*, 275 F.3d at 84; see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-595 (1981) (emphasizing the FCC's broad discretion in determining how best to achieve the goal of securing the maximum benefits of radio to the people of the United States).

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In conclusion, as explained herein, there is no statutory bar to implementing the BOP and the public interest factors strongly counsel in favor of its adoption. Therefore, the Commission should exercise its authority to adopt the BOP and take all necessary steps to implement it promptly.

Sincerely,

/s/ Ruth Milkman

Ruth Milkman
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
(202) 777-7700
Counsel to Access Spectrum, LLC

/s/ Kathleen Wallman

Kathleen Wallman
Wallman Consulting, LLC
9332 Ramey Lane
Great Falls, VA 22066
(202) 641-5387
*Adviser to Pegasus Communications
Corporation*

cc: Matthew Berry
John Branscome
Fred Campbell
Jeff Cohen
Samuel Feder
Angela Giancarlo
Aaron Goldberger

Bruce Gottlieb
David Horowitz
Joel Kaufman
Cathleen Massey
Barry Ohlson
Dana Shaffer