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

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229
	)	
Amendment of Part 90 of the Commission's Rules	)	WP Docket No. 07-100

COMMENTS OF THE STATE OF NEW MEXICO

Respectfully Submitted,

STATE OF NEW MEXICO

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Department of Information Technology

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SUMMARY

As an early builder of the New Mexico portion of the nationwide 700 MHz public safety broadband network and a BTOP grant recipient, the State of New Mexico is a major stakeholder in this proceeding. New Mexico urges the Commission to refrain from adopting unnecessary and premature technical rules and to allow maximum flexibility by public safety operators in the selection of use and users on the system, consistent with Congressional intent and existing law.

The Commission should avoid taking any but the most basic and necessary steps at this time, recognizing that the technical and operational lessons to be learned from early deployments will be critical to developing the nationwide public safety broadband network. As one of the most rural states in the nation, New Mexico believes that the Commission should give maximum latitude to rural jurisdictions to formulate technical, coverage, operational and funding solutions that will facilitate the rural buildout of the nationwide network.

Under Section 337 of the Communications Act and existing Commission rules and precedent the Commission has the legal authority to allow critical infrastructure users ("CII entities") to operate on the public safety network pursuant to certain conditions. In order to facilitate build out of the 700 MHz public safety network, the Commission should allow public safety operators to enter into partnering agreements with utilities and other CII entities under which a CII entity's communications of a *public safety* nature—i.e., communications to protect the safety of life, health or property—could be carried on a *limited priority* basis over the public safety 700 MHz network, with other general or non-public safety communications of the CII entity being carried on a *secondary* basis.

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The State of New Mexico provides these comments in response to the Commission's Fourth Further Notice of Proposed Rulemaking in the above-captioned proceeding ("*4th FNPRM*")[1]. In the *4th FNPRM*, the Commission seeks comment on an appropriate technical framework to facilitate the deployment and operation of a nationwide, interoperable public safety wireless broadband network.[2] New Mexico is an early builder of its portion of the network and therefore the rules and policies adopted in this proceeding are of great importance to the State of New Mexico. New Mexico appreciates the Commission's continuing efforts in this matter that is critical to the security and protection of the nation. As detailed below, New Mexico urges the Commission to refrain from adopting unnecessary and premature technical rules and to

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[1] Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Amendment of Part 90 of the Commission's Rules, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking,* 26 FCC Rcd 733 (2011) ("*4th FNPRM*")

[2] *Id.*

allow maximum flexibility by public safety operators in the selection of use and users on the system, consistent with Congressional intent and existing law.

1. Introduction.

The development and deployment of a 700 MHz nationwide interoperable public safety broadband network is of critical importance to the State of New Mexico. Accordingly, the State of New Mexico has undertaken responsibility for building and operating the New Mexico portion of the nationwide public safety broadband network. In May 2010, in response to a petition filed by the State of New Mexico, the Commission granted the State a waiver allowing New Mexico to build and operate an LTE broadband network utilizing the 700 MHz public safety broadband spectrum.[3] New Mexico is one of 20 jurisdictions to receive such a grant. Pursuant to the Commission's *Waiver Order*, the State of New Mexico entered into a lease agreement with the Public Safety Broadband Licensee (PSBL), the holder of the nationwide license, providing the State full authority to build and operate a broadband network in New Mexico.[4]

Concurrently with obtaining its waiver and lease, the State of New Mexico applied for and obtained a Broadband Technology Opportunities Program (BTOP) grant from the National Telecommunications and Information Administration (NTIA) to fund building of the network. The BTOP grant totals $38 million and the State is contributing an additional $17 million in cash and like-kind contributions for the network. Presently, the State is actively building the New Mexico portion of the nationwide public safety broadband network. As a waiver recipient, BTOP grantee, active member of the

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[3] Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks, *Order,* PS Docket No. 06-229 (Released May 12, 2010) ("*Waiver Order*").

[4] *Waiver Order*, Appendix B.

Operators Advisory Committee (OAC) to the PSBL, and early builder, the State of New Mexico is a major stakeholder in this proceeding.

2. The Commission should allow maximum flexibility to State and regional builders while ensuring an interoperability framework for the nationwide network.

In granting waivers to 20 early builders, the Commission struck a careful balance allowing waiver recipients to move forward with constructing their respective portions of the nationwide network, while "mitigat[ing] any possible concern regarding 'prejudgment'" of the larger rulemaking issues.[5] That balance has been working to allow early builders to commence deployment in a fashion that creates a forum for the public safety community to learn from these deployments while maintaining a course towards nationwide interoperability. As the Commission recognized in the *Waiver Order*, "These early deployments may also assist the Commission in understanding what additional issues may arise for public safety in connection with the larger goal of establishing a nationwide interoperable broadband network and serve better to inform all parties as we proceed with the related rulemaking proceedings."[6] The Commission observed further,

> We also recognize that as these early deployments move forward, the Commission will continue the rulemaking process, including additional considerations of rules governing technical interoperability among public safety networks and between public safety networks and commercial deployments, either through partnerships or in roaming relationships. *We expect these early waiver-based efforts to provide us with valuable insight into this process.*[7]

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[5] *Waiver Order* at ¶11.

[6] *Id.*

[7] *Id.* at ¶59 (emphasis added).

The goal of learning from the early deployments has begun to be realized. The early builders have formed an active and vibrant working group, the OAC, which meets weekly to discuss developing issues and to learn from each other's experiences as members begin their deployments. A smaller group of the seven BTOP grantees has also been formed as a subcommittee of the OAC, which meets weekly to discuss issues relevant to the BTOP deployments. The OAC and its members are in close concert with the PSBL leadership and they routinely discuss issues together.

The early deployments by waiver recipients remain very much in their infancy. There is much still to be learned from these test bed systems. We urge the Commission to allow this learning to continue before making any decisions that might hamstring development of the public safety network. There is little to no experience with actual day-to-day operation of these public safety deployments or how they will be used. Hardware and applications are still being developed. Issues such as sharing of equipment and network resources among neighboring jurisdictions have yet to be fully explored. In sum, there is much still to learn as these early deployments get up and running.

Accordingly, we urge the Commission to refrain from taking any but the most basic and necessary steps at this time, recognizing that the technical and operational lessons to be learned from early deployments will be critical to developing the future nationwide, interoperable public safety wireless broadband network. The Commission should take only such steps that ensure an efficient and flexible model for public safety that will allow maximum latitude for evolving systems.

The *4th FNPRM* includes a great amount of detail in nearly all aspects of network construction and operation. Such "hands on" regulation of the minutiae of network

operations is best left, at least for now, to the network operator(s) themselves—i.e., the OAC members together with the PSBL. Such extensive regulation by the Commission is not only unusual but is also premature as many of the items discussed in the *4th FNPRM* cannot be resolved until a large amount of further work is done. Moreover, some issues raised in the *4th FNPRM* range far beyond what is needed to ensure interoperability. Public safety itself is most appropriately suited to determine how to build out the nationwide network, and detailed, prescriptive regulations will chill creative and intelligent evolutionary developments as jurisdictional deployments are rolled out and operational learning occurs.

As the Commission previously recognized,

> By enacting the 1997 Budget Act, Congress sought to achieve two important goals. The first was to provide spectrum sufficient for public safety to meet current and projected communications requirements, including *innovative technical applications*. The second was to *provide the minimum technical framework necessary to standardize operations in this spectrum band....*"[8]

Accordingly, any rules adopted by the Commission should foster the Congressional intent of facilitating innovative technical applications while providing the *minimum* technical framework necessary to standardize operations on the network.

3. There should be a single nationwide network with maximum flexibility for local, regional, and State deployments.

New Mexico supports the concept of a single nationwide network rather than a network of networks approach as the appropriate vision for building out the public safety

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[8] *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, First Report and Order and Third Notice of Proposed Rulemaking, 14 FCC Rcd 152, 155 (1998)(emphasis added)(hereafter, "*First Report and Order*".

network. New Mexico views its deployment as being the New Mexico portion of the nationwide network, rather than as a standalone separate network. Within a nationwide framework there is ample room for local, state and regional variations in addressing differing operational, use and funding models among jurisdictions. A "one-size-fits-all" approach would hamper accommodating the range of differing needs that exists among jurisdictions and therefore such an approach must be rejected. The Commission should instead create rules that foster the "regional flexibility necessary to allow entities the opportunity to fashion approaches tailored to meet the individual needs of diverse regional communities."[9]

4. Rural jurisdictions face unique challenges and maximum flexibility should be allowed for rural jurisdictions to establish technical, coverage and funding models that will facilitate the rural buildout.

As one of the most rural states in the nation, New Mexico faces significant hurdles in addressing the critical public interest need for wireless broadband communications deployment. Given the economics of communications network deployment, new technologies and services generally become ubiquitous in urban areas far more rapidly—and with more competitive choices—than in rural areas. And yet in rural areas the need for mobile broadband communications critical to the safety of health life and property is every bit as important as it is in urban areas. The State of New Mexico concurs with the Commission's observation in the *4th FNPRM*, recognizing "that commercial providers often have economic incentives to concentrate their network deployments in high population areas but that public safety broadband users will require

[9] *Id.* at 156.

coverage availability even in highly rural areas."[10] Indeed, given the lack of available alternatives in rural areas compared to urban areas—while in most urban areas one is never more than a few steps from a broadband connection point, in rural areas it is not uncommon to be many miles from the nearest connection point or broadband hotspot—the need for rapid public safety mobile broadband deployment in rural areas cannot be overstated. Accordingly, the FCC should give maximum latitude to rural jurisdictions to formulate technical, coverage, operational and funding solutions that will facilitate the rural buildout of the nationwide network.

5. The Commission should allow maximum flexibility to jurisdictional operators to determine what users to allow on the network, and such flexibility is consistent with existing law.

The Commission seeks comment with regard to eligible users on the network, and specifically whether critical infrastructure entities such as utilities ("CII entities") can be eligible users on the network under § 337 of the Communications Act.[11] The Commission also expresses concern about whether it has legal authority to allow such shared use of the public safety broadband network.[12] As discussed below, there are strong policy considerations that support allowing shared use of the public safety network, and *there is no doubt that the Commission has the legal authority to allow such use under the existing statute, regulations and Commission precedent.*

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[10] *4th FNPRM* at ¶ 73.

[11] *4th FNPRM* at ¶¶ 134-140.

[12] *Id.* at ¶ 135.

a. Policy considerations support allowing shared use between CII entities and Public Safety on the Nationwide Public Safety Broadband Network.

The State of New Mexico previously filed extensive comments with the Commission that set forth the policy considerations supporting allowing public safety entities to partner with CII entities to build and use the network.[13] As explained in those comments, the Commission should adopt rules allowing public safety entities to enter into partnering agreements with CII entities under which a CII entity's communications of a *public safety* nature—i.e., communications to protect the safety of life, health or property—could be carried on a *limited priority* basis over the 700 MHz public safety broadband network, with other general or non-public safety communications of the CII entity being carried on a *secondary* basis. Such partnering agreements, or "MOU's" for shared usage should detail the parties' funding obligations, usage rights and priority of service under various circumstances and levels and types of emergencies, in accordance with the overarching goal of building a national public safety broadband network. Considerations supporting such sharing include:

- CII entities have requirements similar to Public Safety entities for secure, reliable, hardened, dedicated communications networks that will not fail during severe incidents, manmade or natural disasters, or times of emergency.
- Public Safety entities often work closely with CII entities in responding to incidents, and CII entities often play a critical role along with Public Safety first responders in protecting the safety of health, life and property.

[13] *Comments by the State of New Mexico on Petitions for Waive to Deploy 700 MHz Public Safety Broadband networks*, filed by the State of New Mexico in Docket 06-229 (October 15, 2010).

- CII entities can help to fund the buildout and maintenance of the public safety broadband network.

These policy considerations are addressed more fully in the State of New Mexico's October 15, 2010 comments submitted in Docket 06-229 and accordingly, rather than repeating those comments here, the State of New Mexico incorporates those comments herein by reference.

b. The Commission has Legal Authority to allow sharing with CII entities pursuant to authorization by public safety operators.

Congress has given the Commission very broad latitude under § 337 to establish rules to foster the development of a public safety broadband network. The statute states that, "the Commission shall allocate" 24 MHz of the 700 MHz band "for public safety services *according to the terms and conditions established by the Commission* in consultation with the Secretary of Commerce and the Attorney General."[14] As discussed below, this very broad rulemaking authority gives the Commission the legal basis for allowing secondary use by CII entities on the public safety spectrum pursuant to agreement with public safety operators even for non-critical communications.

In addition to the general delegation of broad rulemaking authority to the Commission under § 337 (a), the statute in § 337 (f) (1) also specifically contemplates use of the spectrum by "non-governmental entities" (NGO's) for critical communications of a public safety nature, based on authorization from a government entity whose primary mission is the protection of life, health or property. Thus, based on the plain meaning of the statute itself, public safety jurisdictions deploying and operating parts of the

[14] 47 USC § 337 (a) (1) (emphasis added).

nationwide network can allow use of the network for communications of a public safety nature by CII entities on a primary basis through partnering arrangements.

In 1998, the Commission issued the *First Report and Order*, to implement the Congressional mandate under § 337 and "to establish the terms and conditions that will govern use of the 24 megahertz of spectrum recently reallocated from broadcast to public safety services."[15] In adopting eligibility rules for the spectrum, the Commission implemented an inclusive interpretation of governmental entity eligibility, concluding "that state or local government entities are eligible for licensing in the 700 MHz band without further showing as to eligibility"—i.e., without any need to show that their primary mission is of a public safety nature.[16] The Commission concluded further that, "NGOs are also eligible for licensing in the 700 MHz band if approved by an appropriate state or local government entity"—i.e., a state or local governmental entity whose mission is the oversight of or provision of public safety services.[17]

Thus the Commission implemented the plain meaning of § 337 (f) (1) to include eligibility by NGOs for communications of a public safety nature pursuant to authorization from an eligible government entity. With regard to CII entities specifically, the Commission explained that "a commercial utility company, with appropriate governmental authorization, is eligible to hold licenses for spectrum in the 700 MHz band for use when it provides services to protect the safety of life, health or property that it

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[15] *First Report and Order*, at ¶ 3.

[16] *Id.* at ¶ 54.

[17] *Id.* at ¶¶ 55-56.

does not make commercially available to the public."[18] The eligibility rules adopted in the *First Report and Order* are set forth in § 90.523 of the Commission's rules.

In 2004, when the Commission adopted rules allowing the leasing of public safety spectrum, the Commission based its decision on who would be eligible to lease public safety spectrum on the eligibility rules adopted in the *First Report and Order*.[19] The Commission determined that parties eligible to lease public safety spectrum would include not only public safety entities, but also "entities providing communications in support of public safety operations."[20] In the *Leasing Order*, the Commission specifically declined to allow the leasing of public safety spectrum for communications of a purely commercial nature or communications other than in support of public safety.[21]

In 2007, in the *Second Report and Order*, the Commission amended its rules to allow a commercial D Block winner to use the public safety broadband spectrum for purely commercial communications on a secondary basis and subject to preemption, in exchange for the D Block winner's agreement to fund the buildout of a 700 MHz nationwide public safety network.[22] In explaining its decision, the Commission observed that allowing the D Block winner to use the public safety broadband spectrum for purely commercial purposes on a secondary preemptible basis would "not undermine the

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[18] *Id.* at ¶ 72.

[19] *Promoting Efficient Use of Spectrum through the Elimination of Barriers to the Development of Secondary Markets*, 19 FCC Rcd 17503, at ¶ 53 (2004) ("*Leasing Order*").

[20] 47 CFR § 1.9048.

[21] *Leasing Order*, at ¶¶ 53-56.

[22] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, Second Report and Order, 22 FCC Rcd 15289 (2007)("*Second Report and Order*").

'principle purpose' of the services provided in this band 'to protect the safety of life, health or property,' as required by Section 337."[23] The Commission noted that allowing such commercial use of the spectrum was justified as "an integral part of a viable framework for enabling the 700 MHz Public/Private partnership to finance the construction of a nationwide, interoperable public safety broadband network."[24]

The Commission emphasized, "We disagree with commenters who assert the Act prohibits us from permitting commercial operations on a secondary basis in the 700 MHz public safety spectrum to facilitate the build-out of a public safety network."[25] In response to commenters who suggested that § 337 (a) (1) should be construed as requiring that the public safety broadband spectrum "be used *exclusively* for public safety services," the Commission explained that, "the statutory provision, however, contains no such limiting language."[26] The Commission explained further:

> Moreover, Section 337 (a) (1) confers upon the Commission the authority to allocate 24 megahertz for public safety services 'according to the terms and conditions established by the Commission.' We construe this phrase as affording us broad discretion to impose conditions on the use of this spectrum to effectuate its optimal use by public safety, and the condition at issue here serves just such a purpose. Namely, the secondary preemptible commercial use condition will harness private sector resources to facilitate the construction of a nationwide interoperable public safety broadband network fur use in this spectrum....[27]

The Commission explained further, "In any event, even were we to construe Section 337 (a) (1) to require this 24 megahertz of spectrum to be devoted exclusively to

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[23] *Id.* at ¶ 414.

[24] *Id.* at ¶ 416.

[25] *Id.* at ¶ 419.

[26] *Id.*

[27] *Id.*

the provision of 'public safety services,' we would reach the same conclusion because the definition of 'public safety services' does not foreclose the secondary preemptible commercial use at issue here."[28] Instead, the Commission observed, "the statute flexibly defines 'public safety services' as services 'the sole or *principal* purpose of which is to protect the safety of life, health, or property."[29] The Commission determined:

> Authorizing secondary preemptible commercial operations does not impair or materially detract from that statutorily mandated "principal purpose." Indeed, it furthers that purpose, as note above, by making funds available for the construction of a nationwide broadband network that will greatly benefit public safety users.[30]

The Commission concluded, "Denying public safety the benefits of secondary use would thus work against the intent of Congress by denying public safety a means of efficiently and effectively making use of their spectrum."[31]

Thus, it is clear that the Commission has broad legal authority to allow public safety entities to enter agreements with CII entities that would provide for CII access to the spectrum as users of the public safety network in return for helping to fund the build-out of the network. If the Commission could allow such an arrangement with respect to a D Block winner for the purpose of fostering network build-out, it can certainly do so with respect to CII entities in furtherance of the same purpose. Non-public safety communications of the CII entity would be allowed only on a secondary, preemptible basis, with CII communications of a critical or "public safety" nature—i.e., communications for the safety of life, health or property—being allowed on a higher

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[28] *Id.* at ¶ 420

[29] *Id.*

[30] *Id.*

[31] *Id.* at ¶ 424.

priority basis pursuant to authorization from the public safety entity in accordance with §337(f).

Although the Commission proposed in the *Third Further Notice*[32] to amend its rules and prohibit the PSBL from selling service on the public safety spectrum to NGOs whose sole or principal purpose was something other than to protect the safety of life, health or property, that tentative conclusion does not undermine the Commission's authority to allow sharing with CII entities. First, the proposal in the *Third Further Notice* was only a tentative conclusion that was never adopted into law; accordingly it is not binding.[33] Second, although the Commission proposed that the PSBL would not be allowed to sell service to CII entities, the Commission noted that CII entities would still be able to buy service on the shared use network from a D Block winner with the result that CII communications could still be carried on the public safety spectrum on a secondary basis.[34] The Commission was attempting to make purchase of the D Block by potential bidders a more lucrative proposition by requiring CII entities to buy service on the spectrum from a D Block winner rather than from the PSBL, thereby helping to achieve the ultimate goal of build-out of the public safety network.

With the passing of plans for a D Block auction winner that would be required to fund the build-out of the nationwide public safety broadband network, there is no longer any reason to prohibit CII entities from obtaining service on the public safety spectrum

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[32] *Service rules for the 698-746, 747-762 and 777-792 MHz Bands, Implementing a Nationwide, Broadband, Interoperable, Public Safety Network in the 700 MHz Band*, Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 14301 at ¶¶ 325-326 (2008) ("*Third Further Notice*").

[33] *See MTS and WATS Market Structure*, 61 Rad. Reg. 2d 417, ¶ 17 (1986) ("the Notice was simply a proposal at the time, and therefore not binding").

[34] *Third Further Notice* at ¶ 326.

from public safety operators. Instead, there is strong precedent and justification for doing so as a means to obtain funding to help build-out the network to fulfill Congress' mandate. Accordingly, the Commission should allow maximum flexibility to local, state and regional public safety builders/operators to enter into usage agreements with CII entities that provide for funding of the network in exchange for access.

6. The Commission should allow maximum flexibility to jurisdictional operators to determine what uses to allow on the network.

The State of New Mexico supports allowing jurisdictional operators to determine what uses to allow on the network based on regional operational needs. In this regard, New Mexico notes that eight of the waiver recipients, including New Mexico, are already on record in support of allowing fixed uses on a primary basis on the network.[35] This position is consistent with Congressional intent, the carefully considered views of the Commission and with the regulatory flexibility allowed to commercial carriers.

In the allocation proceeding following the Budget Act, the Commission acknowledged, "*as required by the Budget Act* ... we are allocating 24 MHz of spectrum to the *fixed and mobile* services on a *primary* basis for public safety services."[36] The Commission later sought to implement the Congressional intent that all public safety communications needs, including requirements for fixed use services, be accommodated on a primary basis on the public safety 700 MHz spectrum.

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[35] See Petition For Reconsideration (filed in response to an Order of the Public Safety and Homeland Security Bureau restricting use of fixed services by waiver recipients to "ancillary" and "secondary" status), PS Docket No. 06-229 (January 10, 2011).

[36] Reallocation of Television Channels 60-69, the 746-806 MHz Band,[36] ET Docket No. 97-421, *Report and Order*, 12 FCC Rcd 22953 (1998) at ¶ 12 (emphasis added).

After carefully considering the issue of primary fixed use on the 700 MHz public safety broadband spectrum the Commission tentatively concluded, "the shared wireless broadband network must provide for fixed and mobile voice, video, and data capability."[37] In making this tentative conclusion the Commission considered various arguments surrounding fixed use, noting that while "[w]e appreciate the concern that certain [fixed] applications could have a significant impact on network design and costs ... we find that any effort to prohibit certain types of applications would be counterproductive to encouraging development and use" of the network. The Commission observed, "emerging networks and technologies are capable of accommodating a wide variety of services" and further emphasized, "[w]e expect operators and users of the shared network will make reasonable judgments as to the applications that will run on the network and will adapt to meet evolving requirements."[38] The Commission's tentative conclusion is consistent with the rights of commercial operators at 700 MHz to design their own systems with maximum flexibility for all uses, fixed as well as mobile.[39]

In sum, there is no legitimate technical reason to proscribe jurisdictional operators from deploying fixed uses on the network. The Commission should not substitute its judgment for that of the public safety operators of the network in determining what uses may be of critical importance and may warrant priority status.

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[37] *Third Further Notice* at ¶106.

[38] *Id.*

[39] See 47 CFR § 27.2 and 47 CFR § 27.5.

CONCLUSION

In view of the foregoing, the State of New Mexico requests that the Commission adopt rules and policies consistent with the views expressed herein.

Respectfully Submitted,

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