

**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 UTILITIES TELECOM COUNCIL

Utilities Telecom Council

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SUMMARY

The Commission should adopt a more inclusive interpretation of Section 337(f) of the Communications Act of 1934, as amended that would include utility and critical infrastructure industry communications as public safety services. This interpretation would be consistent with the plain language of the statute, as well as Congressional intent and FCC precedent. By contrast, the FCC's narrow interpretation of Section 337(f) that is based on the entities, rather than the communications services that they provide, is unreasonable because it reads the word "services" out of the statute, and renders other provisions meaningless.

Utilities and other critical infrastructure industries rely on private internal communications networks to ensure the safe, reliable and efficient delivery of essential services to the public at large. As such, the sole or principal purpose of their communications is to protect the safety of life, health and property. Utilities are government entities (in the case of municipal utilities) or they are non-governmental entities (in the case of cooperative and investor-owned utilities) that are authorized by a government entity whose primary mission is public safety services. Finally, utilities and other CII do not generally make their communications commercially available to the public. Thus, the communications of utilities and other critical infrastructure industries satisfy the three-part test for public safety services under Section 337(f).

The FCC should promote partnerships between public safety and utilities and critical infrastructure industries, because this would promote the deployment of 700 MHz public safety/public service shared systems, consistent with Congress's intent when it passed the 1997 Balanced Budget Act amendments, including Sections 309(j) and Section 337(f). Utilities and public safety are compatible users of the spectrum, and utilities and critical infrastructure

industries can share the spectrum without diluting capacity for public safety. Moreover, the FCC should allow public safety and utilities to negotiate the terms and conditions for sharing the spectrum, rather than imposing priority access requirements. Finally, the FCC should at least allow public safety to lease spectrum to utilities and other critical infrastructure industries, even if it finds that they are not eligible as providers of public safety services under Section 337(f).

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COMMENTS OF THE UTILITIES TELECOM COUNCIL

The Utilities Telecom Council (UTC) hereby files these comments in response to the FCC's *Fourth Further Notice of Proposed Rulemaking* in the above-referenced proceeding.¹

UTC submits that the communications of utilities and critical infrastructure industries (CII) are public safety services, consistent with the three-part statutory definition in Section 337(f) of the Communications Act of 1934, as amended.² The sole or principal purpose of their communications services is to protect the safety of life, health or property. Utilities are either governmental or non-governmental entities that are authorized by governmental entities whose primary mission is to provide such services. Finally, the communications services provided by

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, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, WT Docket No. 06-150; PS Docket No. 06-229, 26 FCC Rcd. 733 (2011)(hereinafter *Fourth Further Notice*). UTC's comments also briefly address the FCC's Public Notice inviting comment on the request for declaratory ruling by the City of Charlotte in this proceeding. *See* Public Safety and Homeland Security Bureau Seeks Comment on Petition for Declaratory Ruling Asking to Clarify the Scope of Section 337 Regarding Use by State or Local Government Entities of the 700 MHz Public Safety Broadband Spectrum, *Public Notice*, PS Docket No. 06-229, 2011 WL 1044284.

² 47 U.S.C. §337(f).

utilities and CII are not made commercially available to the public. As such, the Commission need not impose any restrictions upon the use of the spectrum or the network by utilities and CII, as contemplated in the *Fourth Further Notice*.

The Commission should not adopt a narrow interpretation of Section 337(f) that would exclude utilities and other CII. This would frustrate national public policy goals to promote the deployment of public safety broadband networks, as well as interoperability with first responders such as utilities and other CII. It would also interfere with local and regional public safety organizations' interests in partnering with utilities and CII on a case by case basis. These partnerships reflect the importance of coordination between utilities and CII with public safety during emergency response scenarios. Moreover, a narrow interpretation is inconsistent with the FCC's own precedent.

The Commission may adopt an inclusive interpretation of Section 337(f) without diluting the availability of spectrum for public safety services. Utilities and public safety have successfully partnered to deploy statewide systems in Colorado, Illinois, Nebraska, Nevada, Ohio, Pennsylvania and South Carolina, and they have been able to compatibly share spectrum in the 800 MHz band and in the bands below 512 MHz. There is no reason to believe that utilities and CII could not compatibly share spectrum with public safety in the 700 MHz band as well. As the Commission has recognized in its National Broadband Plan, utilities and public safety have similar communications needs and design their networks to be highly reliable and resilient. Moreover, utilities and CII would be interested primarily in rural areas, where there should be ample spectrum available for sharing. In any event, utilities and CII should be allowed to negotiate the terms and conditions of access with public safety entities in a manner that satisfies Section 337(f).

Similarly, the Commission may allow utilities and CII access to the spectrum without dictating the terms and conditions, including primary access. The Commission should allow utilities and CII to negotiate the terms and conditions of their sharing arrangements with public safety entities. It may decide to review those sharing arrangements on a case-by-case basis; but it should not impose burdensome affirmative reporting requirements. This would drain resources that could be devoted for investment in the network. Moreover, it would potentially discourage the parties from partnering with each other, if it would necessarily lead to onerous reporting requirements. Moreover, there is nothing in the statute that requires the FCC to dictate the terms and conditions of access; Section 337(f) only provides that the sole or principal purpose be for public safety services. It doesn't require that the sole or primary purpose be for public safety services.

With regard to other specific technical requirements for interoperability, UTC believes that the Commission should also generally refrain from overly prescriptive requirements. The parties should be able to determine how best to meet their communications needs. It would be counterproductive to impose arbitrary requirements that may drive up costs without any or, alternatively, insufficient corresponding benefits.

In any event, the FCC should permit public safety licensees to lease spectrum to utilities and CII. Such leasing would be consistent with the public safety/private partnership that the FCC planned between the 700 MHz commercial D-Block licensee and the 700 MHz public safety broadband licensee (PSBL). The Commission determined that the public safety/private partnership between the PSBL and the 700 MHz D-Block licensee did not violate Section 337(f), and the Commission could also apply this rationale in the present context in order to allow leased access to the 700 MHz public safety broadband spectrum by utilities and CII.

I. INTRODUCTION

UTC is the trade association for the communications and information technology interests of the nation's electric, gas and water utilities, pipeline companies and other CII. Since its formation in 1948, UTC has advocated for policies to promote and protect the private internal communications systems that its members own, manage and operate to support the safe, reliable and efficient delivery of essential services to the public at large. These private internal communications systems include wireline and wireless networks that provide voice and data for fixed and mobile applications. Due to the critical nature of the infrastructure delivery systems and the safety of personnel and the public that these communications systems support, utilities and CII design, build, operate and maintain these communications systems to extremely high standards for reliability, security and resiliency. Any failure of their communications can have catastrophic results, jeopardizing worker safety and the safety of the public at large. As such, the sole or principal purpose of utility and CII communications is to protect the safety of life, health or property.

While utilities and other CII use communications for routine maintenance, utility crew dispatch, and remote system monitoring and control functions, they are also used for emergency response and restoration from natural and manmade disasters and other emergencies. These networks typically enable communications among a utility's own workers, but they also facilitate communications between utilities responding to mutual aid scenarios in which utilities from other parts of the country will assist with restoration in affected areas.³ These communications

³ For example, the Federal Energy Management Administration (FEMA) recognizes the need for mutual aid agreements for preparedness as part of the National Incident Management System (NIMS) <http://www.fema.gov/emergency/nims/Preparedness.shtm>.

also involve coordination with public safety entities, such as police, fire and rescue. Although they are not public safety entities *per se*, utilities and other CII play a recognized public safety role during emergency response, and they need interoperable communications during these emergencies.⁴

Unfortunately, utilities and other CII lack widespread interoperable communications with public safety and with other utilities during mutual aid efforts.⁵ Moreover, they are under increasing demand for communications to support new or enhanced applications, such as certain smart grid applications. While demand has increased, utilities' supply of existing spectrum suffers from increasing congestion and interference from a growing number of radio users, many of which are incompatible with utility and CII operations. Moreover, while utilities and CII have lost spectrum to reallocation, there has been no new spectrum allocated for utilities and CII on a dedicated basis.

Thus, utilities and CII are in the midst of their own spectrum crisis and are keenly interested in sharing spectrum with public safety.⁶ As the Commission explained in its National

⁴ See e.g. Testimony of William Carrow, President of The Association of Public Safety Communications Officials International before the House Homeland Security Committee (Mar. 30, 2011) as reported at <http://www.utcinsight.org/content/apco-gives-shout-out-utilities-times-more-first-responder-we-are> (stating that "[t]hey [utilities] become at many times more 'first responder' than we are. If you don't have electricity and you don't have the wherewithal to get the job done, we have to rely on them.") See also "The Federal Response to Hurricane Katrina: Lessons Learned" at <http://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/chapter5.html> (criticizing FEMA for diverting generators to hospitals when these generators were needed to restore the flow of oil to the entire mid-Atlantic United States, and stating that "[w]hile lifesaving efforts are always the first priority, there was no overall awareness of the competing important needs of the two requests.")

⁵ See e.g. National Task Force on Interoperability, "Why Can't We Talk" (Feb. 2003) at http://www.safecomprogram.gov/NR/rdonlyres/322B4367-265C-45FB-8EEA-BD0FEBDA95A8/0/Why_cant_we_talk_NTFI_Guide.pdf (criticizing the lack of interoperability among first responders and describing interoperability as "the ability of public safety service and support providers—law enforcement, firefighters, EMS, emergency management, the public utilities, transportation, and others—to communicate with staff from other responding agencies, to exchange voice and/or data communications on demand and in real time.")

⁶ See The Utilities Telecom Council, "The Utility Spectrum Crisis: A Critical Need to Enable Smart Grids" (Jan. 2009) at <http://www.utc.org/utc/utility-spectrum-crisis-critical-need-enable-smart-grids>.

Broadband Plan, utilities and public safety have similar communications needs and are compatible users of the spectrum.⁷ They could share spectrum with each other, and in fact there are many examples of utilities and CII that do share spectrum with public safety.⁸ The 700 MHz public safety broadband spectrum represents an ideal opportunity to expand upon successful spectrum sharing arrangements in other bands, as utilities and public safety struggle to meet their increasing communications needs.

Therefore, UTC and its members have a direct and important interest in this proceeding and are pleased to offer these comments. These comments are primarily focused on the eligibility of utilities and CII to access the 700 MHz public safety broadband spectrum, which was raised in the FCC's *Fourth Further Notice of Proposed Rulemaking*. While other technical issues raised in the *Fourth Further Notice* are important generally, the issue of the eligibility of utilities and other CII to access the spectrum is of primary importance. Without access to the spectrum, the other technical issues are moot.

II. UTILITY AND CII COMMUNICATIONS ARE PUBLIC SAFETY SERVICES IN ACCORDANCE WITH SECTION 337(F).

A. Overview

Based on Section 337(f) of the Communications Act, the Commission has established a three-pronged test to determine eligibility for 700 MHz public safety spectrum: (1) purpose of

⁷ National Broadband Plan, p. 270 at <http://www.broadband.gov/plan/12-energy-and-the-environment/#r12-4> (stating that “[t]he wide-area network requirements of utilities are very similar to those of public safety agencies. Both require near universal coverage and a resilient and redundant network, especially during emergencies.”)

⁸ *Id.* at 271 (citing SouthernLINC and the Nevada Shared Radio System as examples of public safety/public service shared networks).

use; (2) identity of licensee; and (3) compliance with the noncommercial *proviso*.⁹ UTC submits that under this test, utilities and CII communications are eligible because the sole or principal purpose of their communications is to protect life, health or property; they are either government entities or they are non-governmental organizations that have obtained authorization from a governmental organization whose primary mission is such services; and they do not make these communications services commercially available to the public.

In addition to the plain language of Section 337(f), Congressional intent also supports including utility and CII communications as public safety services. When Congress passed the Balanced Budget Act of 1997 (BBA97), not only did it add Section 337(f), but it also added Section 309(j) to the Communications Act of 1934, which established a class of “public safety radio services” that are auction-exempt. The definition of public safety radio services is strikingly similar to the definition in Section 337(f), and provides that public safety radio services are services that are used to protect life, health and property and which are not made commercially available to the public.¹⁰ The legislative history of the BBA97 clarified that the term “public safety radio services” includes utilities and other CII.¹¹

⁹ This test is codified in the Commission’s Rules at 47 C.F.R. §90.523. Note that this rule also applies to other public safety spectrum besides the 700 MHz spectrum. *See* 4.9 GHz Spectrum, *Memorandum Opinion and Order and Third Report and Order*, WT Docket No. 00-32, 18 FCC Rcd. 9152, 9159 at ¶17 (2003).

¹⁰ The relevant language of Section 309(j) regarding the auction exemption for public safety radio services is as follows:

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission –

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that -

(i) are used to protect the safety of life, health, or property; and

FCC precedent also supports including utility and CII communications as public safety services. When the FCC implemented the BBA97 provisions, it concluded that utilities and CII do provide “public safety radio services”, because they operate extensive communications networks that are needed to provide essential services to the public at large.¹² Based on their role as providers of public safety radio services, the FCC has distinguished utilities and other CII and granted them a preference over other private wireless users in the context of 800 MHz rebanding.¹³ Similarly, the FCC has also distinguished utilities and other CII from other private wireless users in the context of frequency coordination, because of their impact on public safety as well.¹⁴

(ii) are not made commercially available to the public;

¹¹ See H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1997) (stating that “the exemption from competitive bidding authority for ‘public safety radio services’ includes ‘private internal radio services’ used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments.”).

¹² Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Notice of Proposed Rule Making*, WT Docket No. 99-87, 15 FCC Rcd. 22709, 22747 at ¶78 (2000)(stating that “we conclude that a radio service not allocated for traditional public safety uses will be deemed to protect the safety of life, health or property within the meaning of Section 309(j)(2)(A)(i) 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.”)

¹³ See e.g. 47 C.F.R. §90.7 (defining “critical infrastructure industry (CII)” as state, local government and non-government entities, including utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not for-profit organizations that offer emergency road services, providing private internal radio services provided these private internal radio services are used to protect safety of life, health, or property; and are not made commercially available to the public.) CII licensees in the 800 MHz band have preferential access to available frequencies that are cleared during rebanding, in accordance with 47 C.F.R. §90.615 of the Commission’s Rules.

¹⁴Under Section 90.35 of the Commission’s Rules, frequencies formerly allocated to the Power, Petroleum and Railroad Service Pools must be coordinated by the certified coordinator for the respective radio service pool, unless written consent from that coordinator is obtained. See 47 C.F.R. §90.35(b)(2)(ii). See also Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Notice of Proposed Rule Making*, WT Docket No. 99-87, 15 FCC Rcd. 22709, 22747 at ¶76 (explaining that the public service role of utilities served as the basis for the Commission’s decision to establish special frequency coordination requirements to protect spectrum formerly used exclusively by the power, petroleum, and railroad industries “because, in these industries, radio is used as a critical tool for responding to emergencies that could impact hundreds or thousands of people.”)

Although the FCC has tentatively concluded that utilities and other CII do not provide public safety services, it reached this tentative conclusion by adopting a narrow interpretation of Section 337(f) based upon the entities using the spectrum, rather than the communications services that they provide.¹⁵ The FCC should return to a “more inclusive” interpretation of Section 337(f) that recognizes that the “statute does not require licensees to have the sole or principal purpose of providing public safety services,” but instead “mandates that this spectrum must be used for *services* whose sole or principal purpose is to protect the safety of life, health or property.”¹⁶ Under this more inclusive interpretation, utilities and CII communications could be considered public safety services, because “the nature of their day-to-day operations provides little or no margin for error and in emergencies they can take on an almost quasi-public safety function.”¹⁷

On a related issue, the City of Charlotte has requested a declaratory ruling “confirming that the City and other entities with broadband waivers are permitted to allow shared use of their 700 MHz broadband spectrum by governmental personnel including, but not limited to, those engaged directly in police, fire and medical emergency activities.”¹⁸ UTC agrees with the City’s assessment that sharing is a “growing trend” that should be permitted by the FCC, because it avoids duplicative networks and provides emergency and non-emergency responders access to

¹⁵ Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Third Further Notice of Proposed Rulemaking*, 23 FCC Rcd 14301, 14405-06 ¶¶ 323-326 (2008) (*Third Further Notice*); see also State of Illinois, *Order*, 23 FCC Rcd 437 (PSHSB 2008) (rejecting argument that provider of electric and gas utility service was eligible to hold license for or use 700 MHz public safety spectrum)

¹⁶ *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, First Report and Order, WT Docket No. 96-86, 14 FCC Rcd. 152, 181 ¶¶ 34 (1998) (emphasis in original)(hereinafter *First Report and Order*).

¹⁷ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services,” PR Docket No. 92-235, *Second Report and Order*, 12 FCC Rcd 14307,14329 at ¶41 (1997).

¹⁸ City of Charlotte Request for Declaratory Ruling, PS Docket No. 06-229 at ii-iii (filed March 7, 2011).

the advanced capabilities available only with broadband technology.¹⁹ More to the issue here, the City of Charlotte confirmed the Commission’s assessment that there is a “strong desire of many in the public safety community to include secondary users such as utilities, public works and others on their networks as a mechanism to coordinate common activities and respond jointly to emergencies, as well as a method to spread costs and capitalize on infrastructure sharing opportunities.”²⁰ UTC believes that the Commission should interpret Section 337(f) so as to enable such sharing of the spectrum by government entities.²¹

If the FCC insists on interpreting Section 337(f) narrowly according to the types of entities rather than the sole or principal purpose of the communications services for which the spectrum is used, the FCC should still find that utilities and CII are eligible because they are “first responders” in emergency response activities. There are numerous official government references that recognize the important role that utilities and CII play as first responders in emergency response activities. These include various Homeland Security Presidential Directives, eligibility under the Telecommunications Service Priority (TSP) program, as well as other federal, state and local provisions regarding emergency response planning (as more fully described below).

¹⁹ *Id.* at 10.

²⁰ *Id.* at 11, quoting the FCC’s *Fourth Further Notice* at ¶ 135 and adding that “the safety of the City’s citizens would be greatly enhanced if private security personnel” at Duke Energy’s nuclear generating facilities “were permitted to access the broadband network Charlotte will deploy.”

²¹ UTC believes that the Commission may permit spectrum sharing by government entities, as requested by Charlotte, without relying on an interpretation of Section 337(f) that is based solely on the entities rather than the services that are provided. It is only necessary that the sole or principal purpose of the spectrum be for public safety services.

B. The sole or principal purpose of utility and other CII communications is to protect life, health and property.

In the *Fourth Further Notice*, the Commission stated that it is reexamining Section 337(f)(1)(A) “in light of the strong interest in permitting [secondary use of the spectrum], and it asked whether the “sole or principal” purpose requirement could be met if the Commission were to adopt a limit on the amount of secondary usage permitted, such that the principal purpose of the network or networks remains for public safety purposes.²² Furthermore, the FCC asked a series of related questions regarding how it could measure limits on secondary usage, including whether it should be addressed on a nationwide basis, or on some smaller subdivision; and whether secondary usage should be required to have some quasi-public safety focus, or some other public safety nexus to qualify. Similarly, the FCC asked whether secondary usage traffic should be afforded a lower priority; whether there should be an exception for those communications that qualify for public safety services treatment; and whether it should require such prioritization, or limit communications by secondary users to those that protect the safety of life, health or property. Finally, the FCC asked how secondary usage limits could be enforced; and whether there are other methods that could be employed to ensure “principal” use remains for public safety services.²³

In response, UTC believes that no limits are necessary nor should they be imposed by the FCC on the communications of utilities and other CII, because the sole or principal purpose of these communications is to protect life, safety and health, consistent with Section 337(f)(1)(A). Utilities and other CII rely on private internal communications networks to support the safe,

²² *Fourth Further Notice*, 26 FCC Rcd. at 770, ¶136. The FCC noted that it had previously noted that such an interpretation would appear inconsistent with the spirit of the statute. *Id.*, citing *Third Further Notice* at 14403 ¶¶ 317-18.

²³ *Id.*

reliable and efficient delivery of essential services to the public at large. These communications networks provide voice and data for a variety of mission critical applications, including emergency response, line protection and wide area situational awareness. For example, in the aftermath of storms and other natural disasters, utilities and CII use land mobile radios and microwave sites to communicate with and between field crews during restoration efforts. Often during such emergencies, this requires communications with public safety agencies that are also responding.²⁴ The public safety purpose of these communications networks cannot be overstated. They represent the difference between life and death for utility and other CII workers, informing them whether and when power lines are energized or de-energized.²⁵ They also are used for remote monitoring and control of critical infrastructure networks, and the failure of these communications can be catastrophic to public safety.²⁶

That is why utilities and other CII design, build, operate and maintain their communications networks to high standards for reliability and resiliency. For example, some tele-protection systems are designed for 99.999% reliability and low latency levels of 20 ms or less, because they need to respond to faults on the grid in split seconds to isolate the fault and

²⁴ See e.g. National Association of State Chief Information Officers, “We Need to Talk: Governance Models to Advance Communications Interoperability” at 2 (stating that “[i]nteroperability must also be addressed as part of a coordinated, multi-jurisdictional response plan that involves law enforcement, firefighters, emergency medical services (EMS), emergency management, public utilities, transportation, and public health.”) <http://www.nascio.org/publications/documents/NASCIO-InteropGovResearchBrief.pdf>. And see http://www.osha.gov/OshDoc/data_General_Facts/downed_electrical_wires.pdf. However, utilities and other critical infrastructure industries generally lack any truly interoperable communications with public safety.

²⁵ For example, power lines may need to be turned on and off during the course of maintenance and restoration efforts. Situations, such as “alive on backfeed” may exist which can threaten to result in electrocution if line workers are not made aware of this condition. In addition, this condition may result in extensive damage to electric lines if undetected and uncorrected.

²⁶ For example, due to a failure of its supervisory control and data acquisition (SCADA) systems, a utility in Bellingham, Washington accidentally released thousands of gallons of heating oil into an estuary due to a failure in the SCADA system. The fuel caught fire, killing two boys and 18-year old man that were nearby, and scorching a 1.5 mile stretch of streambank. See <http://www.ens-newswire.com/ens/may2002/2002-05-31-06.html>. For more information about this and other SCADA accidents, visit <http://www3.nts.gov/publicctn/2005/ss0502.pdf>.

prevent it from causing a cascading outage. A failure of these transfer-trip systems can burn up power lines, resulting in fires and extended periods of outages – all of which threaten public safety.²⁷ Similarly, the high standard of resiliency of utility and other CII communications networks was demonstrated in the aftermath of Hurricane Katrina in 2005. While commercial systems were down for days if not weeks after the storm, utility and other CII communications networks largely withstood the beating and were the only communications available in many of the affected areas of the storm.²⁸

Utility communications proved so important to public safety during Hurricane Katrina that years later the Southern Governors' Association (SGA) passed a resolution – which it filed in this FCC docket – that 1) recognizes utilities and CII as part of the public safety community; 2) recommends that the FCC should provide access to the national public safety network for utilities and other CII, including priority access during emergencies; and 3) recommends that the

²⁷ For example, during the summer of 2003, ConEd experienced numerous outages and underground fires due to overheating of its electrical cable, which was due in part to the failure of fuses at the network protectors on the secondary electrical distribution system. See “Initial Report on the Power Outages in Northwest Queens in July 2006,” (Aug. 2, 2006) at <http://coned.com/messages/Mayors%20Report.pdf>. See also “Long Island City Network, July 17-25, 2006: Incident Investigation Committee Report,” (Feb. 17, 2006) at <http://www.coned.com/messages/LICReport/Analysis.pdf>.

²⁸ See e.g. Utility communications networks proved their survivability in the aftermath of Hurricane Katrina and other Gulf Coast hurricanes during 2005. While commercial systems were out for a week or more after the hurricane, SouthernLINC Wireless (a subsidiary of Southern Company) reported that 98% of its cell sites were back in operation within three days. It also reported that SouthernLINC wireless “contributed greatly to public safety and restoration of public services,” including electric service in the affected states. See generally Letter from Jeffrey L. Sheldon, Counsel to Southern Company, to Nick Sinai, Energy and Environment Director at FCC, FCC Docket No. 09-51 (filed Feb. 5, 2010). See also Final Report of the Commission’s Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (“Katrina Panel Final Report”) at <http://www.fcc.gov/pshs/docs/advisory/hkip/karrp.pdf> (stating that “Mississippi Power relied on its only viable form of communication – its internal system Southern Linc Wireless. This system was designed with considerable redundancy and proved reliable despite suffering catastrophic damage. Within three days, the system was functioning at nearly 100 percent.”) And see “Hurricanes of 2005: Performance of Gulf Coast Critical Infrastructure Communications Networks,” United Telecom Council, November 2005 at http://www.utc.org/fileshare/files/34/Research/white_papers/2005_-_UTC_-_HURRICANES_OF_2005_PERFORMANCE_OF_GULF_COAST_CIC_NE.

FCC and federal, state and local public safety agencies review and eliminate regulations that discourage the development of shared systems between utilities and public safety that promote interoperable public safety communications.²⁹ Specifically the SGA resolution stated in relevant part that:

Whereas the Southern Governors' Association recognizes the public safety community as including local, state, and federal police, fire, and emergency medical services personnel, as well as representatives of other CII including transportation, health care, and utilities;

Be it Resolved:

The Southern Governors' Association endorses the following principles and courses of action:

A nationally interoperable public safety communications network should meet all of the following requirements and characteristics" [including]:

- Provide nationwide roaming and interoperability for local, state, and federal public safety agencies (police, fire, and EMS) and other emergency services such as transportation, health care, and utilities; and
- Cover 99% of the population in each state-regardless of the population density, as well as most of the critical infrastructure, and support urban, suburban, and rural communities;

The Federal Communications Commission should [among other things]:

- Provide priority designation for utilities and others in the public safety community on existing spectrum below 1 GHz in times of emergency.
- Review regulations that discourage utilities from building shared systems to support public safety communications.

The federal, state and local public safety community should [among other things]:

- Review regulations that discourage utilities from building shared systems to support public safety communications and recommend any actions that may be required to eliminate those regulations that discourage the development of shared systems by utilities that promote interoperable public safety

²⁹ Letter to Michael Chertoff , Secretary, U.S. Dept. of Homeland Security, Kevin J. Martin, Chairman, Federal Communications Commission and John M.R. Kneuer, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration from Haley Barbour, Gov. State of Mississippi and Chairman of the Southern Governors' Association and Joe Manchin, III, Gov. State of West Virginia and Vice Chairman of the Southern Governors' Association (May 15, 2007) as filed in PS Docket No. 06-229 (May 18, 2007).

communications.³⁰

In 2002, NTIA conducted a study of the current and future communications needs of the energy, water and railroad industries³¹ and it stated that:

In its investigation into the use of spectrum by these industries, NTIA recognizes the vital roles the railroad, water, and energy industries play in the Nation's critical infrastructure. The events of September 11, 2001, have underlined the importance of these industries and the role they play not only in our daily lives, but in times of disaster response and recovery. When the World Trade Center collapsed, utilities needed to be shut off or restored. It was important for sufficient water pressure to be continuously available for firefighting, and when the airlines were grounded, people and commerce relied more on the railroad industry for transportation.³²

The NTIA report examined in detail the respective communications networks of each of these CII and it ultimately observed that they use communications to support a variety of mission critical applications that ensure safe operations. Specifically, it found that:

- Energy, water, and railroad services utilize portions of the radio spectrum from 20 MHz to 25 GHz for a variety of services. For example, wireless telecommunications are frequently used by energy producers, suppliers, and distributors to provide two-way voice communications; to monitor power transmission lines and oil or natural gas pipeline functions; and to send commands to various remote control switches. These companies rely on wireless communications to coordinate the daily activities of various work crews and to obtain meter data automatically from consumers. The railroad industry relies heavily on wireless technologies to conduct inspections of approximately 230,000 miles of track. Wireless technologies are also crucial in managing a soon-to-be implemented Positive Train Control (PTC) system, a U.S. and Canada coordinated system that controls train movement, train separation, and route alignment. Water utilities depend on wireless telecommunications technologies while engaged in activities such as flood control, wastewater management, the processing of drinking water, and farmland irrigation.³³

³⁰ *Id.* (emphasis added).

³¹ National Telecommunications and Information Administration, "Current and Future Spectrum Use by the Energy, Water and Railroad Industries," NTIA Spectrum Publication 01-49 (Jan. 2002) at <http://www.ntia.doc.gov/osmhome/reports/sp0149/sp0149.pdf>.

³² *Id.* at xxi.

³³ *Id.* at 7-1.

Similarly, the FCC itself recognized the public safety nature of utility and CII communications. It stated that:

A breakdown in the electric utility's infrastructure or fixed physical facilities (*e.g.*, a live wire) creates a dangerous condition for members of the public. Additionally, a dependable communications system is necessary for an electric utility to respond to an interruption in service that may hinder the delivery of vital services (*e.g.*, without power, a home may lack heat in the winter or air conditioning in the summer). Similarly, a metropolitan transit system meets both parts of the standard. A metropolitan transit system has an infrastructure or fixed physical facilities (*e.g.*, railroad tracks) where a breakdown in the system (*e.g.*, derailment) creates a dangerous condition that would adversely affect the public at large. Moreover, a reliable communications system is essential for a metropolitan transit system to enable quick response to any disruption in service as an interruption can create a dangerous condition and would impede the delivery of vital transportation services to the public.³⁴

Finally, it should be noted that the language of Section 337(f) refers to the “sole or principal” purpose of the communications network.³⁵ The term “principal” can take on both a quantitative and qualitative meaning.³⁶ In a quantitative sense, it could mean that most of the communications are for public safety services. In a qualitative sense, it could mean that the most important communications are for public safety services. UTC believes that it can be interpreted

³⁴ Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 99-87, 15 FCC Rcd. 22709, 22747 (2000). *See also* Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services,” PR Docket No. 92-235, *Second Report and Order*, 12 FCC Rcd 14307,14329 (1997)(providing special protections for frequencies that were formerly allocated to the Power, Petroleum and Railroad Service Pools in the PLMR bands below 512 MHz in recognition that utilities and other CII providers “employ radio ... to respond to emergencies that could be extremely dangerous to the general public,” and that “[a]ny failure in their ability to communicate by radio could have severe consequences on the public welfare.”) *See also* Industrial Telecommunications Association, *Order*, RM-10687, 19 FCC Rcd. 21664 (2004)(dismissing ITA’s request to coordinate the frequencies formerly allocated to the Power, Petroleum and Radio Service Pools, because “the rationale for exclusive frequency coordination is stronger now with the heightened concern for security and reliability of critical infrastructure systems and in the wake of the events of September 11, 2001” and “the Commission's position established in the *Refarming Second R&O* regarding the coordination of these quasi-public safety frequencies still holds today.”)

³⁵ 47 U.S.C. §337(f)(1)(emphasis added).

³⁶*See* <http://ardictionary.com/Principal/11825>. The term “principal” is defined as “Highest in rank, authority, character, importance, or degree; most considerable or important; chief; main; as, the principal officers of a Government; the principal men of a state; the principal productions of a country; the principal arguments in a case.”

by the FCC so that utilities and other CII are eligible if they use the spectrum mostly for public safety services. Alternatively, UTC believes that it can be interpreted by the FCC so that utilities and other CII are eligible if the most important communications on the network are public safety services. Under either test, utilities and other CII would be eligible because most (if not all) of the communications are for public safety services, and their most important communications are for public safety services. In any event, it is clear from the disjunctive language – “sole or principal purpose” -- that the spectrum doesn’t need to be solely used for public safety services.³⁷

For all of these reasons, it is clear that the sole or principal purpose of utility and CII communications is to protect the safety of life, health or property. These communications services are dedicated to supporting the safe, reliable and efficient delivery of essential electric, gas and water services to the public at large and to protecting the safety of field crews during routine maintenance and emergency restoration. In addition, without the essential services that utilities and other CII provide, police, fire and rescue could not do their jobs, or at the very least, their operations would be seriously compromised.³⁸ Thus, utility and CII communications satisfy the first part of the three-part test for public safety services.

³⁷ See “pursuant to the statutory definition, a service can still be considered a ‘public safety service’ even if its purpose is not solely for protecting the safety of life, health or property, so long as this remains its ‘principal’ purpose....”

³⁸ It almost goes without saying that police, fire and rescue depend on light, water and gas to do their jobs. But, there are government documents which speak to this issue. See *e.g.* Environmental Protection Agency (EPA), “Water and Emergency Services: A Critical Community Interdependency” at <http://water.epa.gov/infrastructure/watersecurity/communities/upload/waterandemergencyservicesinterdependenciesdec2010.pdf>.

C. Utilities and other CII are either governmental entities or are non-governmental entities that are authorized by a governmental entity whose primary mission is the provision of such services.

In the *Fourth Further Notice*, the FCC recognized that secondary use of the spectrum “would likely be undertaken pursuant to subsection 337(f)(1)(B)(ii) which allows such services to be provided by ‘nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services.’” In this context, the FCC asked how it should ensure that such consent is obtained; whether it should require that new authority be obtained by the PSBL; and/or whether it should adopt mechanisms for a state or local network or prospective secondary user to obtain evidence of such consent. Moreover, it asked whether a single agency in a particular geography should be responsible for managing such authorizations; and whether there are other means to satisfy this statutory element.³⁹

In response and as more fully described below, UTC submits that utilities and other CII are eligible entities under subsection 337(f)(1)(B), because they are either governmental entities or they are non-governmental entities that are authorized by a government entity whose primary mission is public safety. To the extent that utilities and CII are eligible entities through the authorization from a government entity whose primary mission is public safety in accordance with subsection 337(f)(1)(B)(ii), the FCC should allow such secondary use in accordance with its existing rules regarding sharing frequencies under Section 90.179 of the Commission’s Rules.⁴⁰ Specifically, the FCC should permit such sharing on a non-profit cost-shared basis, and should

³⁹ *Fourth Further Notice*, 26 FCC Rcd. at 770, ¶137.

⁴⁰ 47 C.F.R. §90.179.

require the parties to retain the terms and conditions for the sharing arrangement for review by the Commission on a case-by-case basis.⁴¹

There is no need to impose an affirmative filing requirement or to require that sharing arrangements be submitted to the PSBL, because state agencies that authorize secondary use of the spectrum have sufficient incentives to ensure that the spectrum is being used on a secondary basis for public safety services. If the FCC believes that it is necessary to oversee these sharing arrangements, it should only do so on a case-by-case review basis. Imposing onerous filing requirements and/or conditions on the approval of a license will discourage public safety from partnering with utilities and CII and will consume resources that could be invested in public safety broadband networks, thereby ultimately delaying or preventing deployment as a practical matter.

1. Industry overview and eligibility under Section 337(f).

There are generally four types of utilities: investor-owned utilities, cooperatively organized utilities, publicly-owned utilities, and Federal utilities.⁴² There are approximately 210 investor-owned utilities, 2,009 publicly-owned electric utilities, 883 consumer-owned rural electric cooperatives, and 9 Federal electric utilities.

For purposes of Section 337(f) and as more fully described below, publicly-owned utilities and Federal utilities are clearly governmental entities, and are eligible entities to use the

⁴¹ Indeed, in the FCC's First Report and Order in this proceeding, the Commission decided to extend its existing sharing rules under section 90.179 of the *Commission's Rules* to apply to state and local entities that share 700 MHz public safety spectrum with NGOs. See *First Report and Order*, 14 FCC Rcd. at 187, ¶70.

⁴² See generally, U.S. Energy Information Administration, "Electric Power Industry Overview 2007" at <http://www.eia.doe.gov/cneaf/electricity/page/prim2/toc2.html>. *Ibid.*

700 MHz public safety spectrum.⁴³ However, investor-owned utilities and cooperative utilities are non-governmental organizations that would need authorization from a governmental entity whose primary mission is public safety.⁴⁴ It should be underscored that publicly-owned utilities are currently eligible entities for licensing of FCC Part 90 public safety frequencies generally, and they should be eligible entities to hold licenses in the 700 MHz public safety spectrum. The FCC rules also provide for licensing of Federal entities, such as Federal utilities, on FCC Part 90 frequencies generally and on 700 MHz public safety spectrum specifically.⁴⁵ Similarly, it should be emphasized that investor-owned utilities and cooperatives have successfully partnered with traditional public safety on shared systems in other spectrum bands, and should be permitted to do so in the 700 MHz band.

a. Investor-owned utilities

As their name suggests, investor-owned utilities are private for-profit entities that are shareholder-owned, and they tend to be the largest – some of whom are combination electric, gas and water utilities that serve millions of customers across multi-state service territories. They operate in all States except Nebraska, where electric utilities consist primarily of municipal systems and public power districts. They represent 6 percent of the total number of electric utilities and approximately 38 percent of utility installed capacity, 42 percent of generation, 66 percent of sales, and 67 percent of revenue in the United States. Investor-owned utilities serve about 100 million ultimate consumers, about 71 percent of the total in the country.

⁴³ 47 U.S.C. § 337(f)(1)(B)(i).

⁴⁴ 47 U.S.C. § 337(f)(1)(B)(ii).

⁴⁵ See e.g. 47 C.F.R. § 90.179(g)(providing that Federal government entities may share public safety frequencies on a non-profit cost-shared basis). See also Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, WT Docket No. 06-150, 22 FCC Rcd 15289, 15427, n.822 (2007)(*Second Report and Order*); and see 47 C.F.R. § 2.103(b))(permitting Federal users to access 700 MHz public safety spectrum).

Investor-owned electric utilities are granted service monopolies in certain geographic areas and are obliged to serve all consumers. As franchised monopolies, these utilities are regulated and required to charge reasonable prices, to charge comparable prices to similar classifications of consumers, and to give consumers access to services under similar conditions.

Most investor-owned electric utilities are operating companies that provide basic services for the generation, transmission, and distribution of electricity. The majority of investor-owned utilities perform all three functions. Many investor-owned utilities that operate in regulated retail markets continue to operate on a vertically integrated basis (e.g., provide generation, transmission and delivery service at a bundled price to retail customers).

b. Cooperatively-organized utilities

Cooperative electric utilities are owned by the consumers they serve (i.e., their members). Distribution cooperatives provide retail electric service to their members. Generation and transmission cooperatives provide wholesale power and transmission service to their member distribution cooperatives. There are 912 cooperatives operating in 47 States; none operate in Connecticut, Massachusetts, Rhode Island, or the District of Columbia. Cooperative electric utilities represent about 27 percent of U.S. electric utilities, serve 42 million consumers or approximately 12% of the nation's population, account for 10 percent of total industry kilowatt-hour sales and revenue, and generate nearly 5 percent of the power necessary to serve their consumer-members. These electric utilities generally operate in rural areas and in total have service territories that cover 75% of the nation's land mass. Cooperative service territories generally reflect areas that historically were viewed as unprofitable to service by investor-owned utilities because of the relative low number of customers per line-mile.

Cooperatives are incorporated under State laws and are governed by the organization's board of directors elected by the members. Cooperatives operate on a not-for-profit basis.

c. Publicly-owned utilities

Publicly-owned utilities are nonprofit government entities that are organized at either the local or State level. There are 2,009 publicly-owned electric utilities in the United States. They represent about 61 percent of the number of electric utilities, supply approximately 9 percent of generating capability, 8 percent of generation, and account for about 15 percent of retail sales and 13 percent of revenue. They obtain their financing from the sale of general obligation bonds and from revenue bonds secured by proceeds from the sale of electricity. Publicly-owned electric utilities include:

- municipals,
- public utility districts and public power districts,
- State authorities,
- irrigation districts, and
- joint municipal action agencies.

Municipal utilities were established to provide service to their communities and nearby consumers at cost. Municipal utilities typically return a portion of their net income to consumers in the form of a general funds transfer. Retail rates may be lower than neighboring investor-owned utilities because they are not subject to State and Federal income tax. Municipal utilities, as well as other publicly owned utilities, are able to issue low cost, tax exempt debt to finance construction. Most municipal utilities simply distribute power, although some large ones produce and transmit electricity as well. Public power districts and public utility districts are concentrated in Nebraska, Washington, Oregon, and California.

Voters in a public utility district elect commissioners or directors to govern the district independent of any municipal government. State authorities, like the New York Power Authority (NYPA) or the South Carolina Public Service Authority (Santee Cooper), are agencies of their respective State governments. NYPA is primarily a wholesale power supplier to municipal and cooperative utilities, but also provides direct service to certain eligible industrial customers. Santee Cooper, in South Carolina, provides both retail and wholesale electric service. The Salt River Agricultural and Improvement District, in Arizona, is a dual purpose agency that provides both retail electric service and water supply services. Irrigation districts are primarily located in the western United States. They were organized by local citizens initially to manage water resources for agricultural purposes. Because electricity is integral to this function, many also provide retail electric service. Some States have created joint municipal action agencies for the purpose of constructing power plants and purchasing wholesale power for resale to municipal distribution utilities participating in the organization. Some of these entities include the Massachusetts Municipal Wholesale Electric Company, the Indiana Municipal Power Agency and the Municipal Electric Authority of Georgia.

d. Federal utilities

The 9 Federal electric utilities in the United States are part of several agencies in the U.S. Government:

- the Army Corps of Engineers;
- the Bureau of Indian Affairs and the Bureau of Reclamation in the Department of the Interior,
- the International Boundary and Water Commission in the Department of State,
- the Power Marketing Administrations in the Department of Energy (Bonneville, Southeastern, Southwestern, and Western), and
- the Tennessee Valley Authority (TVA).

Three Federal agencies operate generating facilities:

- TVA, the largest Federal producer;
- the U.S. Army Corps of Engineers; and
- the U.S. Bureau of Reclamation.

The TVA markets its own power. Generation owned by the U.S. Army Corps of Engineers (except for the North Central Division, for example, Saint Mary's Falls at Sault Ste. Marie, Michigan) and the U.S. Bureau of Reclamation is marketed by the Federal power marketing administrations: Bonneville, Southeastern, Southwestern, and Western. The four power marketing administrations also purchase energy for resale from other electric utilities in the United States and Canada. Federal electric utilities represent less than 1 percent of all electric utilities, provide approximately 7 percent of all generating capability and 4 percent of generation, and account for about 1 percent of total sales to ultimate consumers and less than 1 percent of the associated revenue. Federal electric utility generation is primarily sold at wholesale to municipal and cooperative electric utilities and to other nonprofit preference consumers, as required by Federal law. Federal power is sold not for profit, but to recover the costs of operations and repay the Treasury for funds borrowed to construct generation and transmission facilities. While the Federal utilities are not subject to rate regulation, they must submit their rates to the FERC for purposes of demonstrating that they are at a level sufficient to repay debt owed to the Federal government. Federal electric utilities operate approximately 200 power plants. Most of the Federal power plants are hydroelectric projects designed for flood control, irrigation purposes and pursuant to statutory obligations to supply wholesale power to publicly-owned utilities and electric cooperatives.

D. Utilities and other CII use their communications networks for private internal communications that are not made commercially available to the public.

In the *Fourth Further Notice*, the FCC considered the non-commercial proviso of Section 337(f)(1)(C), and asked whether fees charged to secondary users would violate this provision; and whether it would make a difference if the fee was made through in-kind contributions such as access to infrastructure. Furthermore, the FCC asked if any revenue generated by such access is limited in terms of how it can be spent, such that it must be put back into the public safety broadband network, would it satisfy the non-commercial proviso in Section 337(f)(1)(C); whether such limits would be a good idea in any event; and how such limits could be structured and enforced.⁴⁶

In response, UTC submits that utilities and critical infrastructure communications are not made commercially available to the public, consistent with Section 337(f)(1)(C). Instead, utility and CII communications are private internal, not commercial. While some utility and other CII PLMR networks may be connected to the PSTN and some broadband networks may connect AMI devices at the customer premises, these do not mean that they are made commercially available to the public. Nor do any fees that apply to secondary usage of the network render the underlying services as commercial. Such fees are commonplace in a shared network in order to allocate the costs between the various users of the network. Apart from assuring that the fees are cost-based and allow for in-kind contributions, the FCC should not impose any limits on them. Instead, the fees should only be subject to review on a case-by-case basis, if at all. The FCC should not impose onerous restrictions and reporting requirements on fees, which would

⁴⁶ *Fourth Further Notice*, 26 FCC Rcd. at 770-771, ¶138.

consume resources that could be invested in the network and which would discourage public safety from sharing the network with other users.

1. Utilities generally do not use their private internal networks to support commercial services.

As explained in Part II.B above, utilities and CII rely on private internal communications to support the safe, reliable and efficient delivery of essential electric, gas and water services to the public at large. By definition, private internal communications are inherently non-commercial and are not made available to the public.⁴⁷ Moreover, utility and CII networks are dedicated for private internal communications to ensure reliability and security.⁴⁸ While some PLMR systems are interconnected with the PSTN in accordance with 47 C.F.R. §90.477, the communications that are carried over the PSTN are strictly business communications by employees of the company. They are not interconnected with the PSTN for commercial services to the general public. Similarly, while some private internal communications support AMI and other applications at the customer premises, they are not rendered commercially available to the public within the meaning of Section 337(f)(C). Utilities use these communications for customer billing purposes, and any fees that apply are typically limited to cost-recovery. They are not offered as a stand-alone commercial offering to the public for profit.⁴⁹

⁴⁷ See 47 U.S.C. §101.1305 (defining a “private internal service” as a service where entities utilize frequencies purely for internal business purposes or public safety communications and not on a for-hire or for-profit basis.)

⁴⁸ As the networks support mission critical applications, they are usually stand-alone networks that are isolated from the PSTN. This promotes reliability by ensuring that capacity is available during emergencies, and it also ensures security by limiting potential cyber threats and other vulnerabilities from outside intrusion.

⁴⁹ Compare Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, WT Docket No. 06-150, 22 FCC Rcd 15289, 15489 at ¶¶ 419-433 (2007). In the 700 MHz D-Block *Second Report and Order*, the FCC reasoned that the PSBL could lease capacity to the 700 MHz commercial D-Block licensee without violating Section 337(f)(1)(C) because the offering was effectively a private carriage arrangement, which would promote the deployment of 700 MHz public safety broadband networks.

The FCC should not impose limits on fees for access to the public safety broadband network. As noted above, the FCC could simply follow the existing rules for sharing frequencies, which provide for non-profit cost-sharing.⁵⁰ These rules have served utilities and public safety well in partnerships for statewide shared networks in the past, and they should also serve well in the context of 700 MHz public safety broadband networks.⁵¹ Moreover, utilities and public safety should be able to negotiate the terms and conditions for sharing the network.⁵² To the extent that the FCC reviews the terms and conditions for access, it should be only on a case-by-case basis. Utilities and public safety entities should not be required upfront to file the sharing agreements with their application, and Commission grant of the license should not be conditioned on approval of the terms and conditions of the sharing agreement. Such an upfront requirement would create regulatory uncertainty that would discourage such partnerships, thereby undermining investment in shared systems and ultimately deployment of 700 MHz public safety broadband networks. Most of all, there is nothing in the language of the noncommercial proviso that would necessarily require the FCC to impose limits on the fees for access to the network; fees in themselves do not violate the non-commercial proviso in Section 337(f)(1)(C), only making the services commercially available to the public is a violation.

⁵⁰ 47 C.F.R. §90.179.

⁵¹ For example, the state of Illinois and Ameren share the costs of a statewide 800 MHz shared network, and they are continuing to add new eligible entities to the network, which in turn helps pay for the cost of the network. *See e.g.* State of Illinois, *Order*, 23 FCC Rcd 437 (PSHSB 2008).

⁵² Public safety and utilities have mutual incentives to work together to arrive at reasonable terms and conditions for access to the network.

III. THE FCC MUST INTERPRET SECTION 337(F) IN TERMS OF THE SERVICES, NOT THE ENTITIES THAT ARE PROVIDING THEM, AND SECTION 337(F) DOES NOT REQUIRE PREEMPTIBLE PRIORITY ACCESS BY PUBLIC SAFETY.

As noted above, the Commission must interpret Section 337(f) in terms of the communications services, not the entities that are providing them. This isn't just because it's good policy (which it is), it's because as a legal matter it is a reasonable interpretation of the plain language of the statute and because it is consistent with Congressional intent and Commission precedent. Conversely, interpreting Section 337(f) narrowly to exclude entities that are non-traditional public safety is unreasonable. It ignores the plain language and the context of the statute, rendering the term "services" meaningless, or at least, nonsensical and making whole subsections excess baggage.

In addition, UTC submits that there are changed circumstances with regard to the public interest issues that led the FCC to tentatively conclude that utilities and CII should not have access to the 700 MHz public safety spectrum. Specifically, the Commission's concerns that utilities and CII would "significantly dilute the band's available capacity" have not borne out, if they were ever valid to begin with.⁵³ Moreover, the Commission's underlying assumption that utilities and other CII could lease spectrum from the 700 MHz commercial D-Block licensee hasn't come to pass, nor is it likely to occur if the D-block is reallocated to public safety as has been proposed.⁵⁴

⁵³ *Third Further Notice*, 23 FCC Rcd. at 14406, ¶¶326.

⁵⁴ *Id.* (stating that "in any event, we observe that CII entities may access the shared broadband network on a commercial basis as customers of the D Block licensee(s).") *See also* S.28. "Public Safety Spectrum and Wireless Innovations Act"; *and see* HR. 607, "Broadband for First Responders Act of 2011" (both of which would reallocate

Now, traditional public safety entities have filed comments on the record supporting utility and other CII access to the 700 MHz public safety broadband spectrum.⁵⁵ This reflects the reality that public safety wants to partner with utilities and other CII in order to deploy 700 MHz public safety broadband networks. This is driven by the fact that public safety has real near term communications needs, and utilities and other CII have resources to contribute to the deployment of a 700 MHz public safety broadband network. Meanwhile, utilities and CII also have real near term communications needs and see the 700 MHz public safety spectrum as one of the few potential ways of meeting those needs. The FCC’s narrow interpretation of Section 337(f) stands in the way of these partnerships and should be eliminated or substantially revised.

The Commission could craft a test based on its implementation of the term “public safety radio services” that would still narrow the scope of the term “public safety services” so as to preserve the available capacity for public safety while also enabling utilities and other CII to partner with public safety. Specifically, the Commission could satisfy the “sole or principal” purpose language in the statute so as to include communications services, the sole or principal purpose of which is to support (1) an infrastructure that is used primarily for the purpose of providing essential public services to the public at large; and that is (2) needed to provide reliable and available communications in order to prevent or respond to a disaster or crisis affecting the public at large. In addition to advancing its policy goals of promoting the deployment of 700 MHz public safety broadband networks, such a test would also be a reasonable reading of the statute and would be consistent with Congressional intent, as well as Commission precedent, as more fully described below.

the spectrum that is currently allocated for the commercial 700 MHz D-Block for public safety services).

⁵⁵ See e.g. Comments by the Nevada Department of Transportation, the State of Maryland, the State of Pennsylvania and the State of New Mexico in PS Docket No. 06-229 (filed Oct. 18, 2011).

Finally, the Commission should not impose a requirement that utilities and other CII provide priority access to other public safety service providers on the network. Instead, the Commission should leave the terms and conditions of access to the network, including priority access, to the parties. This would not violate the “sole or principal” purpose language in the statute, because this language does not require priority access. Even if it could be interpreted to require priority access, the Commission should not decide whether the communications of utilities and other CII are subject to primary preemptible access by other public safety services on the network. First, LTE technology is extremely flexible with regard to providing multiple levels of priority access, which makes a preemptible priority access scenario extremely remote. Second, the Commission should not engage in the potentially arbitrary and dangerous practice of picking and choosing the priority access levels between different types of public safety services on the network. Third, mandating priority access for public safety entities would discourage utilities and CII from entering into partnerships with public safety to share the 700 MHz broadband network, thereby delaying or preventing the deployment of these networks in areas where utilities and CII could contribute needed resources.

A. The FCC’s interpretation that utilities and CII are ineligible to hold licenses in the 700 MHz Public Safety spectrum is contrary to the plain language of the statute and inconsistent with fundamental canons of statutory construction.

Any interpretation of a statute must begin with the plain language. As noted above, Section 337(f)(1)(A) provides that “the term ‘public safety services’ means services, the sole or principal purpose of which is protect the safety of life, health or property.”⁵⁶ Section 337(f)(1)(B) provides that these services must be provided by (i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary

⁵⁶ 47 U.S.C. §337(f)(1)(A)(emphasis added).

mission is the provision of such services.” Section 337(f)(1)(C) provides that these services must “not [be] made commercially available to the public by the provider.”

The Commission’s interpretation reads the word “services” out of the statute, and in the process renders entire subsections meaningless and nonsensical within the context of the statute as a whole. Instead of defining public safety services in terms of the communications services that are provided, the Commission relies entirely on the types of entities to determine eligibility. Thus, if the sole or principal purpose of a utility or other CII entity is not to protect the safety of life, health or property, then it is ineligible to access the 700 MHz public safety spectrum. Under this interpretation, it doesn’t matter that the sole or principal purpose of utility and other CII communications is to protect life, health or property – they are ineligible by virtue of their status as entities. Thus by ignoring the term “services” -- which is repeatedly used in Section 337(f)(1)(A) -- the Commission’s interpretation violates the first fundamental canon of statutory interpretation that agencies must give meaning to every term in the statute.

While the FCC is entitled to *Chevron*⁵⁷ deference to its interpretation of an ambiguous term, no such deference applies where the interpretation ignores the terms of the statute and in the process renders whole subsections meaningless and nonsensical. That is what the FCC’s interpretation does to subsections 337(f)(1)(B) and (C). For if, as the FCC contends, the term “services” was synonymous and interchangeable with the word “entities” or “entity”, it would render Section 337(f)(1)(B) meaningless. Section 337(f)(1)(B) describes the types of entities that provide public safety services. Why then would Congress have included this subsection, if (as the FCC contends) “public safety services” meant the same thing or could only be provided by public safety “entities”? As it is under the FCC’s interpretation, the term “public safety

⁵⁷ *Chevron v. NRDC*, 467 U.S. 837 (1984).

services” refers only to those services, such as police, fire and rescue services that are provided by public safety entities – and not to communications services by other entities. This interpretation is effectively circular, and virtually nullifies the language in Section 337(f)(1)(B)(ii), which provides that “non-governmental organizations” are also eligible entities to provide public safety services, if they are “authorized by a government entity whose primary mission is the provision of such services.”⁵⁸ Finally, the Commission’s interpretation makes Section 337(f)(1)(C) nonsensical because if (as the FCC contends) the term “services” refers to police, fire and rescue services rather than communications services, the non-commercial proviso in Section 337(f)(1)(C) would literally prohibit making police, fire and rescue services commercially available to the public. Therefore, the Commission’s interpretation is unreasonable and not entitled to *Chevron* deference.

B. A more inclusive interpretation of Section 337(f) that includes utilities and CII communications is true to the plain language of the statute and is consistent with Congressional intent and FCC precedent.

Instead of focusing exclusively on the types of entities, the FCC should adopt a more inclusive interpretation of Section 337(f) that gives proper meaning to the term “services” as communication services. This would recognize that utility and CII communications are public safety services, because 1) the sole or principal purpose of these communications is to protect the safety of life, health or property; 2) they are either provided by government entities (in the case of municipal utilities and other public utilities, as well as Federal utilities) or they are provided by nongovernmental organizations (in the case of investor-owned utilities and cooperative utilities) that are authorized by a government entity whose primary mission is the protection of life, health and property (*e.g.* a public safety agency); and 3) these communications services are

⁵⁸ 47 U.S.C. §337(f)(1)(B)(ii).

not made commercially available to the public. As described above, this would remain true to the plain language of the statute so that the public safety communications services described in Section 337(f)(1)(A) would be provided by entities described in Section 337(f)(1)(B) – including nongovernmental organizations -- and these communications services would not be made commercially available to the public, as prohibited under Section 337(f)(1)(C). Thus, this reading would put the provisions of Section 337(f) in harmony with each other, unlike the FCC’s current interpretation, which puts them in conflict.

By including utilities and other CII, this reading would be consistent with Congressional intent. By way of background, at the same time that it established Section 337(f) as part of the 1997 Balanced Budget Act amendments to the Communications Act, Congress also provided for a class of “public safety radio services” under Section 309(j) -- including electric, gas and water utilities and other CII -- that it exempted from having to acquire spectrum at auction.⁵⁹ The terms of the two provisions (Section 337(f) and Section 309(j)) are remarkably similar, and taken together indicate that Congress intended to allocate auction-exempt spectrum – including the 700 MHz public safety spectrum -- for these classes of services. To be sure, Congress clarified that the scope of the term “public safety radio services” was broader than the term “public safety services”, and only “public safety services” were allocated the 24 MHz of spectrum in the 700 MHz band.⁶⁰ But, that does not necessarily mean that Congress intended to exclude utilities and CII from being included as eligible providers of public safety services.⁶¹ Moreover, the

⁵⁹ 47 U.S.C. §309(j).

⁶⁰ *See e.g. See* H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. at 572 (1997) (“The conferees note that the public safety radio services exemption described herein is much broader than the explicit definition for “public safety services”) *See also* 47 U.S.C. §337(a)(allocating 24 MHz in the 700 MHz band for “public safety services”).

⁶¹ In fact, it could be concluded that Congress did intend to include utilities and other CII when it provided in Section 337(f)(1)(B)(ii) that that nongovernmental entities are eligible to access the 700 MHz public safety spectrum.

legislative history of the Balanced Budget Act of 1997 indicates that Congress intended to promote the development of shared public safety/public service systems.⁶² Thus, the FCC is free to include utilities and CII as eligible for access to 700 MHz public safety services spectrum, and doing so would be consistent with Congress’s intent to provide auction-exempt spectrum to promote the deployment of shared public safety/public service systems.

A more inclusive interpretation of Section 337(f) would be consistent with FCC precedent, as well. By way of background, when the Commission originally implemented Section 337(f), it adopted a “more inclusive interpretation” and recognized that the “statute does not require licensees to have the sole or principal purpose of providing public safety services,” but instead “mandates that this spectrum must be used for *services* whose sole or principal purpose is to protect the safety of life, health or property.”⁶³ “Thus, [the FCC] conclude[d], based on the definition in the 1997 Budget Act for ‘public safety services’, that NGOs are eligible for licensing in the 700 MHz band when expressly authorized by a state or local governmental entity whose mission is the oversight of or provision of such services,” and it required that “NGO applicants must submit a written statement by the state or local governmental entity that is authorizing the NGO to use 700 MHz band spectrum, and the authorizing state or local governmental entity's authorization must certify that its mission includes oversight of or

⁶² See *Congressional Record*, p. S6325 (June 25, 1997) (colloquy between Sen. Bryan and Sen. McCain during the Balanced Budget Act 1997 debate, showing that Congress did support shared systems to reduce costs and accelerate deployment.)

Sen. Bryan: I rise in support of the proposal to ensure that sufficient radio spectrum is made available for public safety and maintenance of the Nation's critical infrastructure, such as pipeline, railroad, and electric, gas and water utility services... I hope the FCC will promote the development of shared public safety/public service radio systems...

Sen. McCain: I would also like to offer my support for the allocation of new spectrum for use by public safety and public services organizations and would urge the FCC to adopt rules that would facilitate, if not promote, the development of shared radio systems by such entities.

⁶³ *First Report and Order*, 14 FCC Rcd. 152, 181 at ¶¶ 34 (1998).

responsibility for providing public safety services.”⁶⁴ The FCC recognized that “governmental authorities effectively have veto power over NGO applications for the 700 MHz band because NGOs need appropriate governmental authorization in order to be deemed eligible to receive a license,” thereby providing sufficient safeguards over the secondary use of the spectrum. Moreover, the Commission explicitly rejected arguments “that commercial entities are ineligible in all events because their principal purpose is not the protection of the safety of life, health, or property.” Instead, it clarified that “entities are not disqualified, *per se*, by their commercial status,” adding 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 does not make commercially available to the public.”⁶⁵

IV. THE FCC SHOULD FIND UTILITIES AND CII ELIGIBLE, EVEN IF THE FCC INTERPRETS SECTION 337(F) NARROWLY IN TERMS OF THE TYPES OF ENTITIES THAT USE THE SPECTRUM, PARTICULARLY GIVEN THEIR CRITICAL ROLE IN EMERGENCIES.

Even if the FCC continues to adopt a narrow interpretation of Section 337(f) it may still permit utilities and CII to access the spectrum as “first responders”. There are a variety of official government references to the important public safety role that utilities and CII serve during the immediate hours and days after the onset of an emergency. Specifically, utilities and CII are included as “first responders” under Homeland Security Presidential Directive 8; they are included as “critical infrastructure” under Homeland Security Presidential Directive 7; and they are eligible for the Telecommunications Service Priority (TSP) program as part of the National

⁶⁴ *Id.* at ¶56.

⁶⁵ *Id.* at 188, ¶72.

Communication System (NCS) and they maintain emergency response plans in support of the National Response Framework (NRF) and the National Incident Management System (NIMS).

Utilities and other CII fall within the definition of “first responders” under Homeland Security Presidential Directive 8 (HSPD-8), which includes:

“individuals who in the early stages of an incident are responsible for the protection and preservation of life, property, evidence, and the environment, including emergency response providers as defined in section 2 of the Homeland Security Act of 2002 (6 U.S.C. 101), as well as emergency management, public health, clinical care, public works, and other skilled support personnel (such as equipment operators) that provide immediate support services during prevention, response, and recovery operations.”⁶⁶

Utilities and other CII are also part of “critical infrastructure” that is protected under Homeland Security Presidential Directive (HSPD-7) and the USA Patriot Act of 2001, which includes:

“systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

Utilities and other CII are also eligible for the Telecommunications Service Priority (TSP) as part of the National Communications System (NCS). There are four broad categories of national security/emergency preparedness (NS/EP) providers that are eligible under the TSP, and electric, gas and water utilities and other CII are eligible under the category of entities supporting “Public Welfare & Maintenance of the National Economic Posture.”⁶⁷ In addition,

⁶⁶ See Homeland Security Presidential Directive / HSPD-8 at <http://www.fas.org/irp/offdocs/nspd/hspd-8.html>.

⁶⁷ TSP service user organizations may be in the Federal, State, local, or tribal government, critical infrastructure sectors in industry, non-profit organizations that perform critical National Security and Emergency Preparedness (NS/EP) functions, or foreign governments. Typical TSP service users are responsible for the command and control functions critical to management of and response to NS/EP situations, particularly during the first 24 to 72 hours following an event.

they also maintain emergency response plans, consistent with the National Response Framework (NRF) Emergency Support Functions (ESF) Annexes pertaining to protocols on Public Works and Engineering,⁶⁸ Energy,⁶⁹ Oil and Hazardous Materials Response,⁷⁰ and Transportation.⁷¹ Many of these emergency response plans are required by state law.⁷² The EPA has its own emergency response plan requirements for water utilities.⁷³ Thus, these examples reflect the larger reality that utilities have a public safety mission that is recognized by various government agencies at various levels of government.

V. EVEN IF THE FCC CONCLUDES THAT UTILITIES AND CII DO NOT PROVIDE PUBLIC SAFETY SERVICES, IT SHOULD PERMIT UTILITIES AND OTHER CII TO LEASE THE 700 MHZ SPECTRUM.

Utilities and other critical infrastructure should be permitted to lease the 700 MHz spectrum from a public safety licensee, even if they are not eligible to be licensed themselves. This would be analogous to the Commission’s plan to allow the 700 MHz commercial D-Block licensee to access the 700 MHz public safety spectrum as part of a public safety/private partnership.⁷⁴ First, the FCC concluded that a shared access arrangement under a public safety/private partnership would be permissible under Section 337(f) because the PSBL would not be offering services “to the public”; instead it would only be offering access to the network

⁶⁸ ESF#3

⁶⁹ ESF-12

⁷⁰ ESF-10

⁷¹ ESF-1

⁷² See e.g. [Kansas](#), [New York](#), [Texas](#),

⁷³ Large Water System Emergency Response Plan Outline: Guidance to Assist Community Water Systems in Complying with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 at <http://www.epa.gov/safewater/watersecurity/pubs/erp-long-outline.pdf>.

⁷⁴ Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Second Report and Order*, 22 FCC Rcd 15289, 15438-15442 ¶¶ 414-425.

to the D-Block licensee on a wholesale basis.⁷⁵ Second, the FCC alternatively found that sharing with carriers could be permitted consistent with Section 251, because it is not a “common carrier” service being offered to the public or to such classes of users as to be effectively available to the public.⁷⁶ Third, the Commission determined that allowing the PSBL to share spectrum on a secondary basis would be consistent with Congressional intent, because it would facilitate construction of the network while in no way impairing public safety use of the spectrum.⁷⁷ It is important to note in this regard that the FCC expressly allowed the parties to negotiate the terms and conditions under which public safety licensees would have preemptible priority access to the network during an “emergency”.⁷⁸

The FCC’s rationale allowing the commercial D-Block licensee to share the 700 MHz public safety spectrum applies with equal, if not more force in the case of allowing utilities and CII to lease spectrum from 700 MHz public safety licensees. Under 337(f), utilities’ access to the spectrum would not be available “to the public”. Instead it would be offered to utilities and CII on a wholesale basis – and further, it would only be used for private internal communications rather than commercial services. Alternatively, such leasing would not constitute a “common carrier” offering under Section 251, because it would only be made available to utilities and CII on rates, terms and conditions that are developed through individualized negotiations. Finally, utility and other CII use of the spectrum could contribute to the construction of the network without impairing public safety use of the spectrum.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at ¶426 (“In determining what constitutes an emergency, we agree with Frontline that the definition of an “emergency” for this purpose should be left to negotiation between the parties.”)

VI. THE FCC SHOULD NOT REQUIRE PRIORITY ACCESS FOR PUBLIC SAFETY ENTITIES, BUT RATHER LEAVE THE TERMS OF PRIORITY TO THE PARTIES INVOLVED.

As explained above, the Commission should not impose a priority access requirement for public safety entities. Instead, the Commission should leave the terms and conditions of access to the network, including priority access, to negotiation between the parties. This would not violate the “sole or principal” purpose language in the statute, because this language does not require priority access. Even if it could be interpreted to require priority access, the Commission should not decide whether the communications of utilities and other CII are subject to primary preemptible access by other public safety services on the network. First, LTE technology is extremely flexible with regard to providing multiple levels of priority access, which makes a preemptible priority access scenario extremely remote. Second, the Commission should not engage in the potentially arbitrary and dangerous practice of picking and choosing the priority access levels between different types of public safety services on the network. Third, mandating priority access for public safety entities would discourage utilities and CII from entering into partnerships with public safety to share the 700 MHz broadband network, thereby delaying or preventing the deployment of these networks in areas where utilities and CII could contribute needed resources.

CONCLUSION

WHEREFORE, the premises considered, UTC urges the Commission to adopt an inclusive interpretation of Section 337(f) and provide access to 700 MHz public safety broadband spectrum by utilities and other CII. Alternatively, the Commission must allow utilities and CII to be able to lease 700 MHz public safety broadband spectrum. Finally, the Commission should not dictate the terms and conditions for access to the spectrum, including priority access and fees; instead it should let the parties negotiate these terms, and the FCC should review them, if at all, on a case-by-case basis.

Respectfully submitted,

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