

**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
)	

REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE

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SUMMARY

The initial comments filed in response to the *Fourth Further Notice* demonstrate an overwhelming consensus among the parties on many of the key issues identified by the Commission with respect to access to and usage of the 700 MHz public safety spectrum. Most significantly, commenters agree that the Commission has ample legal authority under Section 337 of the Communications Act¹ to allow utilities and other critical infrastructure industry ("CII") entities to operate on the 700 MHz public safety broadband spectrum on a shared basis, and that the FCC's tentative conclusion to the contrary in its *Third Further Notice* is incorrect and contradicts sound public policy.² EEI strongly supports this view, as discussed in some detail in its initial comments.³

As indicated below, the plain language of Section 337 provides the Commission with a strong legal basis to craft rules in this proceeding which permit shared use of spectrum by utilities and other CII entities, provided that spectrum remains available for the provision of public safety services by those entities delineated in Section 337(f). This view is further supported by the legislative history in connection with the 1997 Balanced Budget Act, which demonstrated that Congress favored shared systems and anticipated that the Commission would promulgate rules that "facilitate if not promote" shared usage.

¹ 47 U.S.C. § 337.

² Service rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a National Broadband Interoperable Public Safety Network in the 700 MHz Band, *Third Notice of Proposed Rulemaking*, WT Docket No. 06-150; PS Docket No. 06-229, 23 FCC Rcd. 14301, 14404-07 ¶ 322-27 (rel. Sept. 25, 2010) ("*Third Further Notice*").

³ See Comments of the Edison Electric Institute, FCC Fourth Further Notice (filed April 11, 2011) ("Initial Comments").

Additionally, shared use of spectrum is consistent with the Commission's prior interpretations of Section 337 and related statutes, and furthers the goals of the Commission to promote spectrum efficiency and partnerships between entities with similar missions.

In view of the nearly-unanimous consensus among the parties to this proceeding, EEI encourages the Commission to move forward to develop a roadmap for next steps to craft rules which will promote efficient usage of the 700 MHz public safety network spectrum, consistent with the plain language of Section 337, Congressional intent and Commission precedent.

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REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE

The Edison Electric Institute ("EEI"),⁴ on behalf of its member electric utilities, hereby submits the following reply comments in the above-referenced proceeding in response to the Federal Communications Commission's ("FCC" or "Commission") request for comments on issues related to communications interoperability and nationwide interoperability among public safety broadband networks operating in the 700 MHz band.⁵

As set forth below, the Commission has sufficient legal authority to develop rules which permit shared use of spectrum by utilities and other CII entities, provided spectrum

⁴ EEI is an association of United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve almost 95 percent of all customers served by the shareholder-owned segment of the U.S. industry, about 70 percent of all electricity customers, and generate about 70 percent of the electricity delivered in the U.S.

⁵ 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, PS Docket No. 06-229; Amendment of Part 90 of the Commission's Rules, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, ¶135 FCC-11-6 (Released January 26, 2011) (*Fourth Further Notice*).

remains available for the provision of public safety services. This approach is supported by the plain language of Section 337 of the Communications Act, as well as legislative history underlying the 1997 Balanced Budget Act and FCC precedent. EEI believes that rules promoting shared use of spectrum will play a critical role in advancing important Commission goals, and urges the Commission to move forward to craft rules which will promote efficient use of the 700 MHz public safety network spectrum.

I. THE MAJORITY OF COMMENTERS AGREE ON KEY PRINCIPLES OF SPECTRUM USAGE, INCLUDING USE OF SPECTRUM BY PUBLIC UTILITIES AND OTHER CII ENTITIES ON A SHARED BASIS.

As the Commission proceeds to develop rules which implement Section 337, it should bear in mind the nearly-unanimous agreement among commenters to this proceeding that the FCC has ample legal authority to allow utilities and other CII entities to operate on the 700 MHz public safety spectrum on a shared basis. Commenters also collectively agreed that partnerships between public safety licensees and utilities as shared users should be controlled by the licensees. EEI strongly agrees with these sentiments, as well as with commenters' position that the FCC should not seek to adopt proscriptive rules regarding use of spectrum, and instead may safely rely on the licensees themselves to ensure that the spectrum remains used principally for public safety purposes. As well, EEI supports the premise advanced by a majority of commenters that the FCC should pursue a flexible approach to implementing Section 337, and allow individual parties to a partnership to negotiate between themselves rules governing shared access, prioritization of service, type of use, and use for more general utility purposes, subject to FCC oversight.

Commenters responding to the FCC's *Fourth Further Notice* also registered general agreement that partnerships between public and private entities are necessary to enable a cost-effective build-out of the public safety network. EEI noted as much in its initial comments and, as discussed below, continues to support this approach as the best way to promote spectrum efficiency and cost-effective development of the network.

Specifically, EEI agrees with the State of New Mexico that Section 337 and existing Commission rules and precedent provide the Commission with solid legal authority to allow CII users to operate on the public safety network pursuant to certain conditions, and that the Commission should allow public safety operators to enter into partnering agreements with utilities and other CII entities. As Seattle notes, shared use of the network conforms with the views previously expressed by Congress, provided spectrum remains available for public safety communications.

EEI agrees with the State of Minnesota that the Commission should work to broaden the definition of "eligible users" to include all government users, as well as government and non-government partners who share a common interest in the public good (e.g., utilities, transit authorities, municipalities, etc.). EEI supports this approach as a useful method to ensure utilities and other CII entities have access to spectrum to serve the public interest and to provide critical services relied upon by most, if not all, of this country's government agencies, military bases, public safety and emergency health care services, as well as business and residential users.

Indeed, the State of Minnesota is correct to note that partnerships with non-public safety or non-government entities are critical to the success of the public safety broadband network. EEI firmly believes that without such partnerships network funding

will present a significant hurdle, and will result in there being little if any incentive for public safety organizations to build out the public safety network, thereby forcing continued use of commercial service.

As discussed below, EEI supports the request of the Los Angeles Regional Interoperable System Authority and others for the Commission to re-examine its tentative conclusion in the *Third Further Notice*⁶ that utilities and other CII entities are not eligible users of public safety spectrum. Los Angeles correctly notes that this conclusion does not support the mission-critical functions of utilities and CII entities, and overlooks the important role utilities play in the immediate aftermath of catastrophic events as they work closely with public safety entities to respond to emergencies and engage in recovery efforts.

As Southern Company observes, development and deployment of shared public safety/public utility 700 MHz systems is in the public interest, and will provide a platform for communications supporting critical utility operations. EEI agrees with Southern's assessment that public safety entities and public utilities have a close interrelationship and similar communications needs, and that utilities can provide essential funding and support for the 700 MHz public safety broadband network. Further, EEI agrees with Cleco that partnering arrangements between utilities and state/local public safety entities represent the best approach for determining how best to proceed with spectrum sharing.

While nearly every commenting party was in agreement on these important issues, the State of Virginia and the San Francisco Bay Area Cities expressed varied

⁶ *Third Further Notice*, 23 FCC Red. 14301, 14404-07 ¶ 322-27.

opposition to shared use by utilities. Notably, however, the sentiment voiced by these two parties primarily was rooted in concerns about a perceived lack of available spectrum. It is nonetheless telling that the San Francisco Bay Area Cities indicated they are amenable to temporary use of spectrum by utilities in critical situations, such as when restoring interrupted utility service is critical to protecting public safety.

II. THE COMMISSION HAS SUFFICIENT AUTHORITY TO PERMIT SHARED USE OF PUBLIC SAFETY BROADBAND SPECTRUM BY UTILITIES AND OTHER CII ENTITIES.

The Commission in its *Fourth Further Notice* asked whether Section 337 of the Communications Act provides the FCC with sufficient authority to allow non-public safety entities to access the 700 MHz spectrum on a shared basis. As detailed below, the plain language of Section 337 provides the Commission with sufficient legal grounds to develop rules which permit shared use of spectrum by utilities and other CII entities, provided that spectrum remains available for the provision of public safety services by those entities delineated in Section 337(f). In addition, the legislative history underlying the 1997 Balanced Budget Act reveals that Congress favored shared systems and anticipated that the Commission would promulgate rules that “facilitate if not promote” shared usage. Such an approach is also consistent with FCC precedent and advances important Commission goals.⁷

⁷ In addition to these reply comments, EEI fully supports the similar positions articulated by Southern Company, SCANA, Harris Corporation, Alcatel-Lucent and the State of New Mexico in their initial comments in this proceeding.

A. Section 337 Does Not Prohibit Shared Use of Public Safety Spectrum by Utilities and Other CII Entities, and In Fact Contemplates Such Usage by Nongovernmental Entities for Their Communications.

Section 337 of the Communications Act ensures that the 700 MHz public safety network spectrum principally will be available for the provision of "public safety services," as defined in Section 337(f).⁸ A review of the plain language of this section unambiguously reveals that Section 337 *does not* prohibit access to or use of that spectrum for the provision of other services, nor does it prohibit shared use of spectrum. A majority of commenters to this proceeding correctly note as much.⁹ To the contrary, shared use of the spectrum for the provision of non-commercial, non-public safety services is permissible under Section 337, provided the "principal" use of the license is to provide public safety services, and such shared use does not inhibit access to the network for public safety services.¹⁰

The Commission, pursuant to Section 337(a), is required only to "allocate" spectrum for "public safety services," a direction which stops well short of offering any indication that spectrum allocation to public safety services is exclusive.¹¹ Nor does the language of this section explicitly or implicitly preclude access to public safety spectrum for other services, so long as the "principal" use of spectrum remains for the public safety service for which the spectrum initially was allocated. Section 337 contains no explicit

⁸ 47 U.S.C. § 337(f).

⁹ *See, e.g.* Comments of Southern Company Services, Inc. at 12; Comments of the State of New Mexico at 9; Comments of Harris Corporation at 32; Comments of Alcatel-Lucent at 24; Comments of SCANA Corporation at 4.

¹⁰ 47 U.S.C. § 337(f)(1)(A).

¹¹ 47 U.S.C. § 337(a).

restrictions as to licensing or usage eligibility of entities that may access this allocation on a shared basis, or the shared uses to be made of this spectrum.

To the contrary, in adopting Section 337, Congress provided only that allocation of 24 MHz of the 700 MHz spectrum shall be made “according to the terms and conditions *established by the Commission.*”¹² As detailed below, this language demonstrates Congress’ unequivocal intent to afford the Commission authority and discretion to act and to craft requirements for spectrum usage in a manner consistent with Congressional intent, provided that spectrum remains available for the provision of public safety services by those entities delineated in Section 337(f).

While 337(f)(1) defines “public safety services” for purposes of Section 337 to include services provided by state or local government entities, it specifically extends this definition to services provided by “nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services...”¹³ The definition of “public safety services,” then, unambiguously reveals that Section 337 specifically contemplates use of spectrum by “nongovernmental entities” for their communications, provided there is authorization from a governmental entity whose primary mission is the protection of life, health or property.

The statutory language of Section 337 also demonstrates it is well within the Commission’s authority to permit utilities and other CII entities to use the 700 MHz public safety spectrum on a shared basis to the extent the “principal” use of the spectrum

¹² 47 U.S.C. 337(a) (emphasis added).

¹³ 47 U.S.C. 337(f)(1)(B)(ii).

remains for public safety purposes.¹⁴ In fact, as discussed below, Congress, in passing the 1997 Balanced Budget Act, fully intended the Commission to promulgate rules that “facilitate if not promote”¹⁵ shared usage.

B. Legislative History Reveals Congress' Preference for Shared Systems and Demonstrates that Congress Anticipated the Commission Would Develop Rules that Facilitate if not Promote Shared Use.

In addition to the plain language of the statute, the legislative history of the 1997 Balanced Budget Act demonstrates that Congress favors shared systems and anticipated that the Commission would promulgate rules that “facilitate if not promote”¹⁶ shared usage. Congress also passed into law statutory language that provides the Commission with discretion to act in a manner consistent with Congressional intent when crafting rules for shared use of the 700 MHz public safety spectrum, provided that availability of spectrum for public safety services is retained. Thus, legislative history, supports the view that spectrum allocated by the Commission pursuant to Section 337 was not intended to be used exclusively for public safety services.

Indeed, Congress anticipated that the Commission would craft rules that promote development of shared systems between utilities and public safety entities. In fact, in the course of Congressional deliberation of the 1997 Budget Act, strong sentiment was expressed in favor of shared use. In particular, Senator Bryan in the floor debate offered his hope that “the FCC will promote the development of shared public safety/public service radio systems.”¹⁷ Senator Bryan went on to note that a shared radio network had

¹⁴ 47 U.S.C. § 337(f)(1)(A).

¹⁵ 143 Cong. Rec. S6325 (1997).

¹⁶ *Id.*

¹⁷ *Id.*

been developed in Nevada for use by public safety entities, as well as utilities and state and local government agencies.¹⁸ Senator McCain similarly registered support for such an approach, adding “I would also like to offer my support for the allocation of new spectrum for use by public safety and public service organizations, and *would urge the FCC to adopt rules that would facilitate, if not promote, the development of shared radio systems by such entities.*”¹⁹ Senator McCain’s words are particularly insightful as to Congress’ view towards shared use of systems and the important public safety role played by utilities. This colloquy should inform the Commission as it moves forward to craft rules implementing Section 337.

The unambiguous statutory language along with the stated objectives of Congress reveals it is well within the Commission’s authority to permit shared use of the public safety spectrum. Section 337 provides the Commission discretion to act in a manner consistent with Congressional intent – namely, to develop rules that “would facilitate, if not promote, the development of shared radio by [public safety and public service (e.g., utilities)] entities.”²⁰ EEI urges the Commission to pursue a course of action consistent with this understanding.

C. Section 337 Provides the Commission with Authority and Discretion to Permit Utilities and other CII Entities to Use Spectrum On A Shared Basis, Consistent with Congress’ Preference for Shared Use.

The discussion above makes apparent that it is well within the Commission’s authority to allow utilities and other CII entities to use the public safety network on a shared basis in a manner that ensures the 700 MHz spectrum is used principally for

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

²⁰ *Id.*

public safety services.²¹ The Commission also has discretion under Section 337 to craft rules governing spectrum access and usage that are consistent with Congress' preference for shared use of networks.

The plain language of Section 337(a) gives the Commission rulemaking authority and sufficient legal basis to permit shared use of public safety network spectrum by utilities as CII entities, including use of spectrum for non-critical communications, pursuant to individual agreements between these entities and public safety operators. EEI urges the Commission to pursue such an approach that will advance the Commission's goals of promoting spectrum efficiency and partnerships between entities with similar missions.

An overly narrow interpretation of Section 337 risks limiting development of beneficial partnerships between public safety entities and other governmental and quasi-governmental entities that have similar mission-critical communications needs and requirements. The Commission should avoid such an approach because limiting partnerships in this manner would frustrate the goals articulated by the Commission in its 700 MHz *Second Report and Order*, as well as in the National Broadband Plan, in which the FCC advocated for independent sources of funding and leveraging existing infrastructure.²² Allowing utilities and other CII entities to use the 700 MHz public

²¹ In addition, and as noted by other parties to this proceeding, Section 303(y) of the Communications Act also grants the Commission general authority to allow flexible use of spectrum allocations. 47 U.S.C. § 303(y).

²² See 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, 15427 n.822 (rel. Aug. 10, 2007) ("*Second Report and Order*") ("Providing the D Block licensee with the opportunity to offer commercial services on this spectrum, on a secondary basis, is 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."). *Id.* at 15437, ¶ 416. See also FCC, *Report to Congress, A National Broadband*

safety network spectrum on a shared basis to support their communications needs would offer a strong incentive for utilities to enter into partnerships with public safety entities for construction and operation of shared systems, and ultimately will make spectrum available for public safety services in many areas of the country. This in turn will reduce overall deployment costs and encourage spectral efficiencies that will ensure the 700 MHz band is put to the best and most effective possible use.

Further, as discussed above, an approach that limits access to or shared use of spectrum would frustrate the sentiment of Congress, as expressed in the legislative history in connection with the 1997 Balanced Budget Act. Congress registered favor for shared systems and, in passing the Act, anticipated that the Commission would promulgate rules that “facilitate if not promote” shared usage.²³ Promoting collaborative deployment efforts that use shared resources while still advancing the public interest should be encouraged by the Commission as it moves forward to develop rules with respect to access to and usage of the 700 MHz public safety spectrum. To this end, EEI urges the Commission to craft rules which allow public safety entities maximum flexibility to grant spectrum access to utilities and other CII entities, consistent with the plain language of Section 337 and Congressional intent, provided that the network remains available for the provision of public safety services.

Plan for Our Future at 328, n.7 (Mar. 16, 2009) (Providing CII users such as utilities with shared spectrum access “serves the added purpose of allowing the public safety licensee(s) to leverage infrastructures that utilities might currently have. Therefore, access to utilities’ towers and other structures may be part of any secondary usage program.”).

²³ 143 Cong. Rec. S6325 (1997).

D. The Commission’s Analysis and Implementation of Section 309(j)(2) (“Application for license”) Offers Useful Guidance and Supports Implementation of Section 307 in a Manner that Promotes Utility Access to Public Safety Spectrum on a Shared Basis.

The Commission’s prior analysis implementing Section 309(j)(2) of the Communications Act, which was adopted along with Section 337 as part of the Balanced Budget Act of 1997, serves as useful guidance for the Commission as it moves forward to craft rules implementing Section 337, and supports an approach which permits utilities and other CII entities access to the 700 MHz spectrum on a shared basis.

Section 309(j)(2) provides that the Commission’s authority to auction spectrum does not apply to licenses or construction permits issued by the Commission “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 (ii) are not made commercially available to the public.”²⁴ While the Conference Report accompanying the addition of Sections 309(j)(2) and 337 into the Communications Act indicates that the “public safety radio services” exemption described in Section 309(j)(2) is “much broader than the explicit definition for ‘public safety services’ contained in” Section 337(f)(1),²⁵ the Commission’s analysis and implementation of Section 309(j)(2) provides useful direction for the Commission’s review of Section 337.

²⁴ 47 U.S.C. § 309(j)(2).

²⁵ H.R. Rep. No. 105-217, 105th Cong., 1st Sess., at 572. Indeed, the Conference Report notes that the term “public safety radio services” in Section 309(j)(2) “includes ‘private internal radio services’ used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public.” *Id.*

The Commission, in adopting rules implementing Section 309(j)(2), concluded that because the statutory language provides that the exemption applies to “public safety radio *services*,” the auction exemption “should be evaluated in terms of its application to particular services rather than to particular classes or groups of licensees within a service.”²⁶ Thus, the Commission adopted an approach focused on the predominant use of the spectrum within a particular band rather than the identity or nature of the entities using that spectrum, or the specific uses of the network made by individual licensees. Importantly, the Commission concluded that the public safety exemption would apply only to services in which the public safety uses outlined in Section 309(j)(2) “comprise the *dominant* use of the spectrum.”²⁷ The Commission did not require that the spectrum be used *exclusively* for public safety uses. According to the Commission, because utilities “do not use their frequencies exclusively for safety-related purposes, Congress could not have intended that entities using exempt spectrum use that spectrum exclusively for such purposes.”²⁸ The Commission also noted that “it would be overly burdensome to require licensees to differentiate between, and use different frequencies for, pure public safety communications and business communications which may also serve a safety-related purpose.”²⁹

The Commission's Section 309(j)(2) analysis is instructive here and supports an allocation by the Commission of the 700 MHz network spectrum with an eye towards its

²⁶ *Implementation of Section 309(j)(2) and 337 of the Communications Act of 1934 as Amended*, WT Docket No. 99-87, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22709, 22741 ¶ 66 (2000) (“*First Report and Order*”).

²⁷ *First Report and Order*, 25 FCC Rcd at 22740 ¶ 64 (emphasis added).

²⁸ *Id.* at ¶ 85.

²⁹ *Id.*

use in the aggregate. Namely, the Commission may allocate the public safety network spectrum in such a way that, when viewed in the aggregate, it will have as its dominant use communications services "the principal purpose of which is to protect the safety of life, health, or property."³⁰ Indeed, Section 337 permits this approach to the extent it does not require every use or user of the spectrum to be limited to this function. Rather, Section 337 requires only that the principal or dominant purpose of the spectrum allocation be for services that "protect the safety of life, health, or property." Proceeding in this manner favors an approach that allows utilities and other CII entities to use the public safety spectrum on a shared basis, in a manner consistent with the plain language of Section 337 as well as Congress' intent to promote shared systems and its anticipation that the Commission would promulgate rules that "facilitate if not promote" shared usage.³¹

E. Shared Use of the Public Safety Broadband Spectrum is Permissible in Light of the Commission's Previous Interpretations of Section 337.

While the Commission in the *Fourth Further Notice* referenced tentative conclusions previously drawn by the FCC in its *Third Further Notice*,³² and registered some trepidation about permitting shared use of the 700 MHz public safety spectrum by utilities and other CII entities, it bears emphasizing that the *Third Further Notice* drew only tentative conclusions with respect to network access. In contrast, Commission precedent on the matter offers strong support in favor of developing rules which promote use of public safety spectrum by utilities and other CII entities on a shared basis,

³⁰ 47 U.S.C. § 337(f)(1)(A).

³¹ 143 Cong. Rec. S6325 (1997).

³² *Third Further Notice*, 23 FCC Rcd. 14301, 14404-07 ¶ 322-27.

provided adequate spectrum is available for the provision of public safety services. In particular, a flexible interpretation of Section 337(f) is consistent with prior Commission findings in the 700 MHz proceeding, as well as in the FCC's National Broadband Plan and in the 4.9 GHz Proceeding. Each of these is discussed in turn below.

1. 700 MHz Proceeding

While the Commission proposed a narrower interpretation of network access in the *Third Further Notice*, it favored a markedly broader view of access to the public safety band in its *Second Further Notice*, in which it noted that “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.”³³ The Commission’s interpretation of Section 337(f) in that proceeding supported providing public safety entities with a good deal of discretion to determine who should be afforded access to public safety spectrum.

While the Commission in its *Third Further Notice* appears to have given ground to its earlier findings interpreting Section 337(f) in a broader sense, its conclusions in the *Third Further Notice* were tentative, and never effectuated. In addition, the reasoning in the *Third Further Notice* did not address previous Commission determinations in the *Second Report and Order* that secondary use of spectrum by non-public safety entities is permissible under 337. EEI urges the FCC to look to its prior findings for guidance, and

³³ 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 Further Notice of Proposed Rulemaking*, WT Docket No. 06-150, PS Docket No. 06-229, 23 FCC Rcd. 8047, 8061 ¶ 30 (rel. May 14, 2008) (*Second Further Notice*).

to use this proceeding as the forum in which to forge an approach that is consistent with its views in the *Second Further Notice*.

The same holds true for the Commission's decision in the *700 MHz Waiver Order*, in which the FCC did not address shared usage of spectrum under Section 337. The conclusion reached by the Commission in that order denied Flow Mobile access to the public safety spectrum on the grounds that it was not a state/local government entity (nor was it authorized by a governmental entity), and was not seeking to access spectrum on a shared basis. However the Commission did not go so far as to address whether shared usage by non-public safety entities is permissible where authorized by a governmental entity whose primary purpose is the provision of public safety services.

For these reasons, the Commission's conclusions in its *Second Report and Order*, in which it properly determined that shared usage is expressly authorized by the plain language of Section 337, serves as the best and most appropriate foundation for the Commission as it moves forward.³⁴

Equally noteworthy is a significant change in recent years to the economic and regulatory landscape that formed the basis for the Commission's tentative conclusions in the *Third Further Notice*. Since that time the Commission has, through its National Broadband Plan, endeavored to find ways to more effectively rely on existing resources, including spectrum, to provide broadband access to customers and to support public safety. In addition, the recent economic climate at state and local levels has emphasized a need to pool resources to advance public safety and other efforts, including deployment of a public safety broadband network. As a result, the conclusions reached by the FCC

³⁴ See *Second Report and Order*, 22 FCC Rcd. at 15439.

prior to issuance of the *Third Further Notice* more appropriately reflect the economic constraints faced by public safety entities and non-governmental entities. Therefore, the best approach forward is one that builds on the Commission's earlier findings in the *Second Report and Order*, in which the Commission recognized the benefit of interpreting Section 337(f) in such a way as to afford public safety entities discretion to determine who should be given access to public safety spectrum.

2. National Broadband Plan

The Commission, in the National Broadband Plan, advocated affording public safety entities discretion to determine whether to provide non-public safety partners use of the public safety spectrum on a shared basis through leasing or similar mechanisms.³⁵ The Commission also expressed support for providing utilities access to public safety networks for mission-critical communications and acknowledged the importance of providing CII entities such as utilities access to this spectrum. Hence, the Commission recognized that the work performed by these entities is critical to supporting first responders and ultimately will benefit homeland security and public safety.³⁶

EEI calls to the Commission's attention the recommendations made in the National Broadband Plan regarding access to public safety network spectrum by utilities and other CII entities on a shared basis. The FCC should sustain this approach in the instant proceeding because it will benefit the build-out of the network by allowing utilities and public safety entities to reach agreements regarding investment in and usage of the 700 MHz spectrum. As discussed above, this reading is consistent with the plain

³⁵ FCC, *Report to Congress, A National Broadband Plan for Our Future* at 315.

³⁶ *Id.* at 269-71.

language of Section 337, as well as Congress' intent to promote shared systems and its anticipation that the Commission would promulgate rules that “facilitate if not promote” shared usage.³⁷

3. 4.9 GHz Proceeding

The Commission, in its 4.9 GHz band proceeding, saw the benefit of and ultimately adopted a flexible approach for access to public safety spectrum under the Communications Act.³⁸ In that proceeding, the Commission based its access rules on the definition of “public safety services” in Section 337(f) and recognized that access to the 4.9 GHz band should be “sufficiently flexible to provide a variety of entities to access [that] band, particularly if allowing such entities access would increase the effectiveness of public safety communications, foster interoperability and further ongoing and future homeland security initiatives.”³⁹ The Commission concluded that “permitting 4.9 GHz licensees to enter into sharing arrangements with entities not eligible for their own license is in the public interest.”⁴⁰

Notably, the Commission in its *4.9 GHz Third Report* expressed favor for a flexible approach to shared usage of spectrum, adding that it would not impose limitations on the types of specific entities that would be eligible to enter into sharing arrangements, and would “afford traditional public safety providers [...] flexibility to exercise their discretion regarding what entities in their jurisdiction operate in support of

³⁷ 143 Cong. Rec. S6325 (1997).

³⁸ In the Matter of the 4.9 GHz Band Transferred from Federal Government Use, Memorandum Opinion and Order and Third Report and Order, WT Docket No. 00-32, 18 FCC Rcd 9152, 9158-63 (rel. Apr. 23, 2010) (*4.9 GHz Third Report*).

³⁹ *Id.* at ¶ 15-25.

⁴⁰ *Id.* at ¶ 22.

public safety.”⁴¹ The Commission ultimately refrained from attempting to bear down on a distinction between "public safety" and "non-public safety" entities. The Commission recognized that a "bright line distinction" between these two groups would be difficult to draw and "might unduly inhibit the use of the subject spectrum that could benefit the public welfare." Importantly, the Commission also recognized that "traditional public safety licensees will be in the best position to determine whether certain sharing arrangements would benefit their public safety communications."⁴²

The Commission's acknowledgement in the 4.9 GHz proceeding of the benefits of a flexible approach to public safety partnerships should serve as a foundation for developing in this proceeding rules that continue to promote such partnerships and advance shared use of the 700 MHz public safety spectrum by utilities and other CII entities. Additionally, the Commission's prior findings and recommendations in the *Second Report and Order* and the *National Broadband Plan* offer strong support for rules implementing Section 337 that promote use of public safety spectrum by utilities and other CII entities on a shared basis, provided adequate spectrum is available for the provision of public safety services.

III. THE COMMISSION SHOULD MOVE FORWARD TO DEVELOP A ROADMAP FOR NEXT STEPS CONSISTENT WITH THESE COMMENTS AND WITH THE CONSENSUS POSITION OF COMMENTERS TO THIS PROCEEDING.

In light of the nearly-unanimous consensus among the parties to this proceeding⁴³ concerning key issues of spectrum access and usage, including utility and other CII

⁴¹ *Id.*

⁴² *4.9 GHz Third Report* at 9262-63, at ¶ 23.

⁴³ As noted above, the State of Virginia and the San Francisco Bay Area Cities are the sole outliers who registered opposition to shared use of spectrum by utilities. EEI notes, however, that this opposition was primarily rooted in concerns about the lack of available spectrum.

entities' use of spectrum on a shared basis, EEI urges the Commission to move forward to develop a roadmap for next steps to craft rules which will promote efficient use of the 700 MHz public safety network spectrum, consistent with the plain language of Section 337, Commission precedent, and the intent of Congress to promote shared systems.⁴⁴

As a first step, the Commission should reverse the tentative conclusion drawn in its *Third Further Notice* that utilities and other CII entities are not eligible users of public safety spectrum. Indeed, as discussed above, this tentative conclusion represents a marked departure from Commission precedent favoring a broader view of access to the public safety band. The Commission should also proceed to establish working sessions between utilities and public safety entities to allow these parties to reach consensus on any remaining issues and to develop a framework for partnerships and spectrum access going forward.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EEI respectfully requests that the Commission consider these reply comments and ensure that any Commission action taken regarding eligibility and access to use the 700 MHz public safety broadband spectrum is consistent with them.

Respectfully submitted,

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⁴⁴ See 143 Cong. Rec. S6325 (1997).

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