

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Utilities Telecom Council and Winchester Cator, LLC)	
)	RM - 11429
Petition for Rulemaking to Establish Rules Governing Critical Infrastructure Industry Fixed Service Operations in the 14.0-14.5 GHz Band)	

APPLICATION FOR REVIEW

UTILITIES TELECOM COUNCIL

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SUMMARY

The Utilities Telecom Council and Winchester Cator, LLC (“UTC/ Winchester”) request review of the *Order* of the Commission’s Bureaus denying their Petition to establish rules to permit critical infrastructure industry (“CII”) fixed service operations in the 14.0-14.5 GHz band. UTC/Winchester request that their Petition be reinstated and be included in a further notice of proposed rulemaking that would allow consideration, side-by-side with the Qualcomm Petition, which seeks to use the same spectrum, for which the Commission is now seeking public comment.

UTC/Winchester demonstrate that the Bureaus’ summary dismissal of their Petition without reasoned explanation, most of all their failure to explain, much less justify, the disparate treatment of the UTC/Winchester Petition and the Qualcomm Petition, was arbitrary and capricious. Faced with comparable technical proposals to use the same spectrum, each accompanied by detailed technical analysis, reasoned decision-making required a serious and consistently applied analysis of the two Petitions. Mere conclusory statements, accepting one proposal with no greater analysis than the assertion that the Commission believes that a “threshold case” has been made, while rejecting the other proposal saying little more than the Bureaus “are not convinced,” do not satisfy this fundamental APA requirement.

Emblematic of the lack of serious consideration given to the UTC/Winchester Petition is the suggestion that emergency CII responder communications requirements can be met through utility access to pole attachments, as if they would be helpful when, after a hurricane or tornado, poles and power lines are down. Here, too, the disparate treatment of the showings of spectrum needs vis-à-vis the Qualcomm Petition is striking.

Thus, the Bureaus dismissed out of hand the extensive showings made by UTC/Winchester of the spectrum shortage crisis facing CII providers, stating that they were not persuaded that they could not go somewhere else to meet their requirements, though exactly where there is sufficient spectrum or how that spectrum might be employed or at what cost, the Bureaus do not say. Yet, not a week before, the Commission found a sufficient showing of need based on the assertion that more spectrum is needed for air-to-ground services so that “leisure travelers will have greater options to use broadband to communicate with friends and family members, use social media, and play games,” by lowering the cost of such activities.

Overall, the Bureaus’ *Order* reads as a contrived *post hoc* justification for a decision already made. After taking five years to address it, the Bureaus fail to come to grips meaningfully with the technical analysis or demonstration of need that was presented; they miscast the legal premises set forth for the assignment of the spectrum for public safety services without an auction; they suggest a wholly new, yet amorphous, standard that must be met for the preemptible use of public safety spectrum for commercial use; and then they reject the Petition for not meeting this never before announced nor Commission-vetted requirement.

Therefore, UTC/Winchester respectfully request that the Commission overturn the Bureaus’ *Order* and reinstate the Petition for consideration alongside the Qualcomm Petition as part of a further rulemaking for use of the 14.0-14.5 GHz band.

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GHz Band)	

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s Rules, the Utilities Telecom Council (“UTC”) and Winchester Cator, LLC (“Winchester”)(together, “UTC/Winchester”) request the Commission to review the *Order*¹ of its Bureaus in the above-captioned proceeding that denied UTC/Winchester’s Petition for Rulemaking² to establish rules that would permit critical infrastructure industry (“CII”) fixed service operations in the 14.0-14.5 GHz band. UTC/Winchester request that their Petition be reinstated and be made available for public comment to be considered in a further notice of proposed rulemaking that would allow

¹ In the Matter of Utilities Telecom Council and Winchester Cator, LLC, RM-11429, *Order*, DA 13-1093 (rel. May 15, 2013) (OET, WTB, and IB) (“*Order*”).

² In the Matter of Utilities Telecom Council and Winchester Cator, LLC, Petition for Rulemaking, RM-11429 (filed May 6, 2008) (“UTC/Winchester Petition”).

consideration, side-by-side with the Qualcomm Petition,³ to make use of the spectrum for which the Commission is now seeking public comment.⁴

INTRODUCTION AND OVERVIEW

The UTC/Winchester Petition presented an innovative way to use the 14.0-14.5 GHz band to provide CII crews with the communications support they need quickly to restore essential CII services in emergency situations, such as increasingly violent and widespread hurricanes and tornados as tragically occurred last fall with Hurricane Sandy or just weeks ago with tornados in Oklahoma and other parts of the Midwest, as well as to provide high capacity links that are necessary to the development of a nationwide electric smart grid and, on a fully preemptible basis, commercial backhaul services.

Although the UTC/Winchester Petition had been pending for five years without Commission action, it is given remarkably short shrift in the *Order*. The Bureaus' suggestion that somehow the emergency CII responders' needs could be met by utilities through "access to pole attachments"⁵ is emblematic of how little serious attention was given to the needs of CII emergency responders or the solution that was presented. Of course, when a hurricane hits, utility crews trying

³ In the Matter of Amendment of the Commission's Rules to Establish a Next-Generation Air-Ground Communications Service on a Secondary Licensed Basis in the 14.0 to 14.5 GHz Band, Petition for Rulemaking, RM-11640, (filed July 7, 2011) ("Qualcomm Petition").

⁴ In the Matter of Expanding Access to Broadband and Encouraging Innovation through Establishment of an Air-to-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0-14.5 GHz Band, RM-11640, *Notice of Proposed Rulemaking*, FCC 13-66 (rel. May 9, 2013) ("*Air-to-Ground NPRM*"). Because of the related nature of the *Air-to-Ground NPRM* to the instant Application for Review, UTC/Winchester are submitting a copy of the same into docket RM-11640.

⁵ *Order* at 6.

desperately to restore power cannot rely upon communications over pole attachments to tell whether power lines strewn across broad areas of devastation may be safely restored. Yet that is what the Bureaus suggest would be sufficient for their needs. Rather than seriously consider the UTC/Winchester Petition or permit the public to do so in a rulemaking proceeding, the *Order* reflects a decision essentially not to do either.

Ironically, less than a week before denying the UTC/Winchester Petition, the Commission issued the *Air-to-Ground NPRM*, allowing public consideration of a proposed alternative use for the same spectrum. Comparable technical proposals made by Qualcomm for the use of the same spectrum, found wanting by the Bureaus with respect to the UTC/Winchester Petition, were found worthy of full public consideration applying a wholly different standard of review relative to the Qualcomm Petition. There are, to be sure, differences between the two Petitions: UTC/Winchester seek spectrum to be used primarily for CII crews to be able to respond immediately to disaster situations in order to restore essential services and for other critical CII applications whereas Qualcomm wants to lower the cost of air-to-ground communications, among other stated reasons, so that “[l]eisure travelers will have greater options to use broadband to communicate with friends and family members, use social media, play games....”⁶ But nowhere in ether decision do the Bureaus or the

⁶ *Air-to-Ground NPRM* at ¶17 (emphasis added).

Commission explain why they found the Qualcomm proposed service more worthy of consideration under the FCC's statutory public interest standard.

UTC/Winchester urge the Commission not to let the Bureaus substitute their judgment for what is the best use of the 14.0-14.5 spectrum for that of the public. To the extent that there are differences in the alternatives that have been proposed, whether in terms of the services to be provided or the technical parameters of their operation, those distinctions should be vetted in a proceeding allowing public comment on each proposal.

QUESTIONS PRESENTED

1. Does the *Order* demonstrate that the Bureaus examined the data presented and offer a reasoned explanation for rejecting the UTC/Winchester Petition or for the disparate treatment of the UTC/Winchester Petition and the Qualcomm Petition?
2. Does the *Order* conflict with Commission precedent, most particularly the *Air-to-Ground NPRM*, including as to allowing public comment as to the feasibility of allowing expanded use of the 14.0-14.5 GHz band by new secondary services while protecting primary satellite operations in the band?
3. Is the *Order* premised on an erroneous determination that there is no need for additional spectrum to support CII emergency crews and other critical CII requirements?

4. Did the Bureaus misstate the legal premises of the UTC/Winchester Petition regarding the acknowledged requirement that the dominant use of the band is for public safety services, while at the same time imposing on UTC/Winchester a wholly new requirement, and then casting out their Petition for its failure to address such a requirement, to delineate how much spectrum might be subleased for commercial purposes on a fully preemptible basis?

I. THE BUREAUS' CURSORY REJECTION OF THE UTC/WINCHESTER PETITION WITHOUT REASONED EXPLANATION OR EVEN THE SLIGHTEST EXPLANATION OF THE REASONS FOR THE DIFFERENT TREATMENT OF THE QUALCOMM PETITION WAS ARBITRARY AND CAPRICIOUS.

Under the Administrative Procedure Act (the "APA"),⁷ when acting upon proposed rules, the Commission "must examine the relevant data and articulate a satisfactory explanation for its action."⁸ Further, when confronted with responsible alternatives to its chosen policy, the Commission is obligated to "give a reasoned explanation for its rejection of such alternatives."⁹ Finally, when an agency determines to change an existing regulatory regime it must do so on the basis of

⁷ 5 U.S.C. § 706(2)(A) (1994).

⁸ *AT&T Corp. v. FCC*, 236 F.3d 729, 734 (D.C. Cir. 2001) ("*AT&T*"), quoting *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) ("*State Farm*"), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962).

⁹ *American Radio Relay League v. FCC*, 524 F.3d 227, 242 (DC Cir. 2001) ("*American Radio Relay League*"), quoting *City of Brookings Mun. Tel. Co.*, 822 F.2d at 1169, quoting *Farmers Union Cent. Exch., Inc. v. Fed. Energy Regulatory Comm'n*, 734 F.2d 1486, 1511 (D.C. Cir. 1984).

“reasoned analysis.”¹⁰ The failure of the Bureaus to follow these fundamental precepts for administrative rulemaking was arbitrary and capricious and must not be allowed to stand by the Commission.

UTC/Winchester presented extensive technical showings, including thousands of simulations of projected transmissions and the potential effect on satellites throughout the geostationary arc.¹¹ The Bureaus either ignore or summarily dismiss the evidence presented without serious consideration or analysis. The technical reports attached to these documents demonstrate that proposed CII operations would not cause harmful interference to primary satellite operations in the band, the latter report making this showing even using the worst case assumptions asserted by satellite interests who filed comments in opposition to the UTC/Winchester Petition. Yet those analyses (as well as analyses as to how CII operations could avoid interference from satellite transmissions) are barely even mentioned in the *Order*, much less refuted. These technical reports provided numerous means to be employed to mitigate the potential of any such interference, including through creating a 5-degree geo-arc exclusion angle, limitations on the permissible power of FS stations, plus power control, antenna size, and gain requirements. Rather than offering an analysis of these interference mitigation

¹⁰ *AT&T* at 735, quoting *State Farm* at 42.

¹¹ See UTC/Winchester Petition, attached engineering report of RKF Engineering, LLC (“RKF Report”), Section 3, “Mitigating Interference to the FSS/MSS Services;” UTC Replies to Oppositions and Reply Comments, RM-11429 (filed Aug. 11, 2008) (“UTC/Winchester Reply”), Appendix A, “Technical Response to Comments”, RKF Engineering, LLC (“RKF Reply”), Section 2, “Uplink Interference.”

techniques, the *Order* states no more than that the Bureaus are “not convinced”¹² that harmful interference can be avoided. As the D.C. Circuit has made clear, such a “conclusory ... statement cannot substitute for a reasoned explanation”¹³ as to the basis for the Bureaus’ rejection of the technical analysis that has been submitted.

UTC/Winchester also pointed to the Commission’s extensive experience though the sharing of C-band between satellite and fixed microwave facilities as evidence that such operations can successfully co-exist in the same spectrum.¹⁴ In fact, the constraints on FS transmissions proposed by UTC/Winchester are more restrictive than those that currently apply in the C-band. Here, too, the *Order* is silent as to why it is that sharing of spectrum can be successful at C-band but is not even worthy of consideration in Ku-band.

As further discussed below, the lack of reasoned consideration of the UTC/Winchester Petition is reflected in the Bureaus’ failure to address in the *Order* the extensive showings as to CII spectrum requirements, the lack of available alternatives, the legal premises upon which spectrum can be assigned without auction where the dominant use of the spectrum would be for CII public safety use, and, most of all, in the failure ever once to address, either in the *Order* or in the *Air-to-Ground NPRM*, the basis for the different treatment of the UTC/Winchester and Qualcomm Petitions.

¹² *Order* at ¶10.

¹³ *American Radio Relay League* at 242.

¹⁴ RKF Reply at n.51.

Confronted with two such proposals, each accompanied by substantial and detailed technical analysis and showings of need, each facing much of the same challenge of operating without harmful interference to primary users of the band, indeed each facing much the same criticism from those users as to claims of potential interference, reasoned decision-making required a serious and consistently applied analysis of the two Petitions. Mere conclusory statements, accepting one proposal, upon no greater analysis than the conclusory statements that the Commission believes that Qualcomm has made a “threshold case”¹⁵ of need or that it provided “sufficient technical information to initiate a rulemaking proceeding”¹⁶, while rejecting the other, saying little more than that the Bureaus “are not convinced”¹⁷ that harmful interference would be avoided or that they “are not persuaded”¹⁸ that other bands would not be suitable for CII needs, does not satisfy this fundamental requirement of reasoned decision-making.

II. THE DISPARATE TREATMENT OF THE UTC/WINCHESTER AND QUALCOMM PETITIONS CANNOT BE JUSTIFIED.

There is no justification for denying the UTC/Winchester Petition based upon issues raised as to potential interference to primary users in the band when very many of the same issues are raised by the Qualcomm Petition which the Commission now proposes to implement. Further, the ease in which the Commission found that Qualcomm and its airline customers had made a “threshold case” for the need for

¹⁵ *Air-to-Ground NPRM* at ¶ 25.

¹⁶ *Id.*

¹⁷ *Order* at ¶10.

¹⁸ *Id.* at ¶12.

additional spectrum for leisure travelers cannot be squared with the Bureaus' dismissive treatment in the *Order* of the growing spectrum requirements essential for the maintenance, security, and restoration of CII infrastructure, particularly in times of public emergency.

(a) Avoiding Harmful Interference to Primary Users of the Band.

With regard to the issues of potential interference to primary users of the band, the conflicting treatment of the two Petitions is reflected, among other ways, as to the following matters:

(i) Operations Coordinated Through a Single Entity. Both UTC/Winchester and Qualcomm seek to have operations coordinated through a single licensee/manager function.¹⁹ That entity, and not licensees for individual stations, would be responsible for coordinating use of the band by individual operators, ensuring that non-interference protections are enforced and, as needed, coordinating with other operations in the band. Yet, it is only in the case of UTC/Winchester that the Commission, through its Bureaus, casts doubt as the efficacy of such a centralized coordination role.

(ii) Use of an Aggregate Interference Threshold. Both UTC/Winchester and Qualcomm proposed limiting interference to satellite operations in the band through maintaining new secondary operations below an aggregate interference

¹⁹ Qualcomm's proposal specifies two blocks of frequencies, but Qualcomm wants one entity to be able to license both blocks. In the *Air-to-Ground NPRM*, the Commission asks for comment as to whether it would be better to license just a single block of spectrum. *Air-to-Ground NPRM* at ¶¶ 57-61.

threshold. Yet, while this factor is cited in the *Order* as problematic for UTC/Winchester's proposal,²⁰ it was accepted by the Commission as a basis for going forward with the *Air-to-Ground NPRM*.²¹ The Bureaus note in the *Order*, but do not decide, a dispute between UTC/Winchester and satellite party commenters as to whether a 1 percent or 6 percent aggregate interference threshold should apply, but then incredibly fault UTC/Winchester for their *ex parte* statement that, to resolve the issue, it would be willing to accept the 1 percent threshold insisted on by the satellite parties, because UTC/Winchester did not provide further engineering justification as to how they would do so.²² By contrast, the Commission notes, without discussion, Qualcomm's acceptance of the 1 percent aggregate threshold standard for GSO satellites,²³ but is silent as to Qualcomm's proposal to apply a 6 percent threshold to NGSO satellites.²⁴

(iii) Interference Mitigation Techniques Protecting Satellite Uplinks. Each of the UTC/Winchester and Qualcomm Petitions presented similar interference mitigation techniques to protect against harmful interference to satellite operations in the band. The Bureaus provide a footnote reference in the *Order* to certain of the techniques proposed by UTC/Winchester, including off-pointing of fixed stations away from satellites, power control, and power limitations,²⁵ but offer no reason why

²⁰ *Order* at ¶ 6.

²¹ *Air-to-Ground NPRM* at ¶ 22.

²² *Order* at n.19.

²³ *Air-to-Ground NPRM* at ¶22.

²⁴ Qualcomm Petition, Appendix A at 42.

²⁵ *Order* at n.17.

they are “not convinced” these interference mitigation techniques will be sufficient. By contrast, with no more analysis than that, the Commission cites almost identical interference mitigation techniques proposed by Qualcomm²⁶ to support its conclusion that a sufficient showing of non-interference had been made to move to the NPRM stage.²⁷

(iv) Efficacy of Secondary Operation in the Band. Each of UTC/Winchester and Qualcomm petitions discussed the means, including frequency assignment and intelligent receiver design, as ways in which the services proposed could successfully operate without suffering harmful interference from satellite operations in the band.²⁸ In neither the *Order* nor the *Air-to-Ground NPRM* is any serious analysis offered as to the efficacy of these approaches, much less any comparison of the two. Rather, the Commission simply states Qualcomm’s assurance that it will be able to avoid such interference as evidence of the fact,²⁹ while the Bureaus reject out of hand UTC/Winchester’s analysis so as to conclude that CII operations would not be viable in the band.³⁰

²⁶ *Air-to-Ground NPRM* at ¶ 19.

²⁷ An issue is made in the *Order* of the asserted lack of a means to identify a potentially misaligned CII transmitter that theoretically might be causing interference, *Order* at ¶ 8. UTC notes that the centralized database to be maintained by the CII coordinator should be sufficient to allow the coordinator to identify the station in the same way that could be done in the current C-band environment. Should the Commission determine, however, that individual identifying signatures be added for FS transmitters in the band, such a requirement can be implemented with available technology.

²⁸ UTC’s extensive analysis is found in Section 4 of the RKF Report and Section 3 of the RKF Reply.

²⁹ *Air-to-Ground NPRM* at ¶ 19.

³⁰ *Order* at ¶12.

Similarly, the Bureaus are dismissive of UTC/Winchester's acceptance of the condition that CII operations would be secondary to primary users of the band,³¹ yet the Commission notes with favor Qualcomm's acceptance of secondary status for its proposed air-to-ground service.³² Allowing more intensive use of spectrum through secondary allocations is, of course, not uncommon, including in bands allocated for satellite operations. Of course, almost any service proponent would no doubt prefer a primary and exclusive band devoted to its operations. But especially as demand for bandwidth is ever increasing, the notion that a proposed secondary allocation should be deemed insufficient, when no primary allocation that would support the required use is offered or available, is really quite extraordinary.

(b) Disparate Treatment of Showings of Spectrum Need.

In addition to the disparate treatment of the UTC/Winchester and Qualcomm Petitions vis-à-vis issues of potential interference to or from primary satellite operations in the band, the treatment of the Petitions as to the showing required to demonstrate a need for spectrum sufficient for a rulemaking proceeding is striking. While specific elements relative to the need for additional spectrum to support communications services for CII crews responding to emergency events are discussed further below, what is noteworthy with respect to the Commission's analysis of the Qualcomm Petition is the different standard of scrutiny that is applied.

³¹ *Id.* at ¶10

³² *Air-to-Ground NPRM* at ¶ 20.

Thus, the Bureaus challenge UTC/Winchester's assertions and studies demonstrating need, scoff at concerns about costs associated with propagation loss at higher power levels required for use of higher frequencies, assert that the problems identified with using other already congested spectrum are just a matter of "choice," and go so far to suggest that there is no need for mobile broadband to support emergency workers in the field when one has access to fiber, rights of way, and pole attachments.³³ By contrast, when it comes to the Qualcomm Petition, the Commission starts by positing as a given that the demand for mobile broadband connectivity continues to grow³⁴ and concludes by essentially accepting, without analysis, the assertions of Qualcomm and its airline customers that more spectrum is needed as sufficient to make "a threshold case that we should consider Qualcomm's proposal."³⁵

While recognizing the existence of available alternatives for air-to-ground communications, the Commission finds that the public interest will be served by allocating additional spectrum in order to lower the cost of services, among other purposes, to support "social media and games" for "leisure travelers."³⁶ Such a light "threshold" showing requirement has no correlation to the rigors the Bureaus demanded for CII requirements, as further discussed below.

³³ *Order* at ¶¶ 11-13.

³⁴ *Air-to-Ground NPRM* at ¶ 16.

³⁵ *Id.* at ¶ 25.

³⁶ *Air-to-Ground NPRM* at ¶¶ 17, 25.

III. THE ORDER IS PREMISED ON THE ERRONEOUS FINDING THAT THERE IS NO NEED FOR ADDITIONAL SPECTRUM TO PROVIDE SUPPORT FOR CII EMERGENCY RESPONSE CREWS.

UTC/Winchester submitted into the record extensive evidence and studies demonstrating the growing need for spectrum to support CII crews responding to public emergencies and the growing need for spectrum to support critical electric smart grid requirements.³⁷ That record evidence was barely mentioned in the *Order*. Instead, the Bureaus identify in the *Order* several bands which they posit might be available for such purposes without ever saying how such bands might be employed, whether sufficient spectrum in those bands would be available, or whether frequencies in those bands could be employed by CII on a dynamic basis immediately to establish extensive temporary networks to support CII workers in times of large-scale emergency or to provide the spectrum necessary for a nationwide electric smart grid.³⁸

As for UTC/Winchester's extended analysis as to the limitations of these bands, little more is stated in the *Order* than that the Bureaus are not convinced that such bands could not be used for such purposes. The Bureaus suggest in the *Order* that concerns of the higher cost of operating links to support emergency communications at much higher frequencies is not a matter of public interest concern (unlike bringing down the costs for airline passengers to play games online).³⁹ The

³⁷ See UTC Petition, Section II, UTC *ex parte* submission of UTC White Paper: *The Utility Spectrum Crisis: A Critical Need to Enable Smart Grids* (Jan. 2009) (filed Jan. 20, 2009).

³⁸ *Order* at ¶¶ 11-12,

³⁹ *Id.* at ¶ 12.

Bureaus similarly dismiss the problems identified by UTC/Winchester's engineering showing of coordinating the dynamic implementation of emergency communications networks in congested C-band spectrum as just a matter of "choice" of systems' design.⁴⁰ What "choice" the Commission would suggest CII have to employ that spectrum to support their emergency response communications requirements is not stated nor can UTC/Winchester even speculate as to what "choice" is intended to mean.

The lack of serious consideration shown in the *Order* for CII requirements is nowhere more apparent than in the suggestion that their needs, including those of emergency crews' communications requirements, could be satisfied by the use of wired infrastructure, such as pole attachments.⁴¹ When a Hurricane Katrina or Sandy hits, there are miles and miles where no poles are left standing. Emergency CII workers in the field, just like police, fire, and other teams need broadband wireless broadband access to support the restoration of services. Downed wires, destroyed transformers, and other wired infrastructure are the problem, not the solution, in such emergencies.

Beyond the cursory dismissal of the CII emergency communications requirements, the underlying burden reflected in the *Order*, implying that before a rulemaking petition may be considered the petitioners must demonstrate that there is no other possible spectrum, employing no other possible system design, apparently

⁴⁰ *Id.*

⁴¹ *Id.* at ¶ 13.

regardless of cost, that might be employed cannot be squared with the Commission's treatment of the Qualcomm Petition or any other petition for rulemaking of which we are aware. Certainly, no precedent is cited in the *Order* to support the imposition of such an extraordinary burden as a pre-condition to the initiation of a notice and comment rulemaking proceeding.

IV. THE BUREAUS BOTH ERRONEOUSLY MISCAST THE LEGAL PREMISES OF THE UTC/WINCHESTER PETITION RELATIVE TO AUCTION-EXEMPT PUBLIC SAFETY SERVICES AND, AS TO THE POSSIBLE SUBLEASING OF PUBLIC SAFETY SPECTRUM ON A PREEMPTIBLE BASIS, THEY EXCEED THEIR AUTHORITY BY ESTABLISHING A WHOLLY-NEW GATING CRITERION.

The Bureaus erroneously miscast the UTC/Winchester Petition relative to the proposed use of the spectrum for services in which the public safety use would comprise the dominant use. The Bureaus acknowledge that the Commission could adopt service rules pursuant to which CII entities could be granted access to auction-exempt spectrum for their safety radio services.⁴² But then, quoting completely out of context one phrase of the UTC/Winchester Petition, the Bureaus conclude that this is not what the UTC/Winchester Petition proposed and that therefore its grant would violate Section 309(j)(2)(A) of the Communications Act.⁴³ In fact, as the Bureaus later grudgingly acknowledge, the UTC/Winchester Petition proposes that the dominant use of the spectrum would be for CII public safety services.⁴⁴

⁴² *Order* at n.14

⁴³ *Id.* at ¶ 5.

⁴⁴ *Id.*

With respect to the possibility that some spectrum might be leased on a preemptible basis – so that, for example, at times of emergency commercial services might be immediately preempted so as to allow the installation of temporary facilities necessary to support CII crews while still remaining under the noise floor that the rules would require – it is asserted in the *Order* that the UTC/Winchester Petition is defective because it failed to delineate how spectrum would be divided between commercial and public safety use. What exactly this means, what the Bureaus find lacking (*e.g.*, whether there would need to be specific percentages of use of the spectrum for public safety or preemptible commercial services at any given time or something else is required) is not stated. Where in the statute or the Commission’s rules or in prior case precedent there is a requirement for such delineation the Bureaus do not say. While it may be that in the course of a rulemaking proceeding, ultimately to be ruled upon by the Commission, such delineations might be developed and specified in the rules, there is neither basis nor authority at the Bureau level to throw out a petition for rulemaking based on some amorphous and unstated rule requirement novel to the Commission’s previously stated rules and policies.⁴⁵

⁴⁵ Section 0.241(a)(4) of the Commission’s rules, cited in the *Order* as authority for its action, precludes Bureau action as to “new or novel questions of fact, law, or policy which cannot be resolved under outstanding precedents or guidelines.”

V. CONCLUSION.

The Commission has had before it two technically comparable proposals for making more efficient use of the 14.0-14.5 GHz band, each with substantial engineering support, yet each proposing a very different public benefit for the proposed service. UTC/Winchester urge that rulings issued a week apart, offering no substantial analysis of either proposal nor comparison of the two, yet dismissing one proposal out of hand while moving forward with an NPRM as to the other, cannot be squared with the Commission's obligation under the APA to engage in reasoned decision-making nor more broadly with the public interest. Accordingly, UTC/Winchester respectfully request that the *Order* be reversed and that the

Commission issue a further notice of proposed rulemaking that would allow the UTC/Winchester Petition to be considered side-by-side with the Qualcomm Petition.

Respectfully submitted,

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Dated: June 14, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Review was sent by first class mail, postage prepaid, this 14th day of June, 2013, to each of the following:

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