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June 25, 2012

VIA COURIER AND E-MAIL

David S. Turetsky, Chief
Public Safety and Homeland Security Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ruth Milkman, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**RE: 470-512 MHz Industrial/Business Spectrum
Public Notices: DA 12-643 and DA 12-892**

Dear Mr. Turetsky and Ms. Milkman:

The Enterprise Wireless Alliance (“EWA” or “Alliance”) is a national trade association representing business enterprises, wireless sales and service providers, communications providers, hardware and software system vendors, and technology manufacturers. A significant number of EWA members operate state-of-the-art analog or advanced digital voice and data wireless systems in the 470-512 MHz band (“T-Band”) either to satisfy internal management control, business efficiency, and productivity objectives or to provide access to these critical operational business requirements through private carrier systems. Many of the Alliance’s manufacturer members produce infrastructure, fixed and mobile devices, and associated software applications that are deployed on T-Band frequencies. T-Band is a critical segment of the very limited spectrum available for EWA’s members and is used to meet essential business enterprise communications needs in the most populated markets in the county. Therefore, the Alliance is deeply troubled by recent Federal Communications Commission (“FCC” or “Commission”) actions that seriously undermine the current use of this spectrum and threaten its long-term availability. For the reasons discussed herein, EWA requests that the Commission support the continued, unrestricted use of T-Band channels by Industrial/Business licensees.

On February 22, 2012, Congress enacted the Middle Class Tax Relief and Job Creation Act of 2012.¹ Title VI of that legislation is entitled “Public Safety Communications and

¹ Pub. L. No. 112-96, 126 Stat. 156 (2012) (“Spectrum Act”).

Electromagnetic Spectrum Auctions.” Subtitle A of Title VI is labeled “Reallocation of Public Safety Spectrum.” The first provision, Section 6101, directs the FCC to “reallocate the 700 MHz D block spectrum for use by public safety entities....”² That 10 MHz is to be added to the 10 MHz of 700 MHz broadband spectrum previously allocated for public safety use.³ The next provision, Section 6103, is entitled “470-512 MHz Public Safety Spectrum” and states the following:

- (a) In General-Not later than 9 years after the date of enactment of this title, the Commission shall-
- (1) reallocate the spectrum in the 470-512 MHz band (referred to in this section as the “T-Band spectrum”) currently used by public safety eligibles as identified in section 90.303 of title 47, Code of Federal Regulations; and
 - (2) begin a system of competitive bidding under section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)) to grant new initial licenses for the use of the spectrum described in paragraph (1).⁴

There is no legislative history accompanying the Spectrum Act. Nonetheless, the linkage between these two directives to the FCC is clear: (1) reallocate the D Block that had been scheduled for commercial auction to public safety; and (2) reallocate T-Band spectrum from public safety eligibles for a future commercial auction. By contrast, the Spectrum Act makes no reference to T-Band spectrum used by Industrial/Business licensees. It does not direct the FCC to reallocate any T-Band spectrum except that “currently used by public safety eligibles” or provide for the reallocation of alternative spectrum for use by Industrial/Business licensees.

Nonetheless, on April 26, 2012, the Commission announced what it described as a “limited suspension” of the acceptance and the processing of certain applications for Part 22 and Part 90 authorizations in the 470-512 MHz band (“T-Band”).⁵ This action effectively “freezes” T-Band spectrum for an indeterminate period, one that could last more than a decade. Critically, for Industrial/Business T-Band incumbents, the FCC’s action incorporates all T-Band frequencies and applies to Industrial/Business as well as public safety entities. The FCC will not accept any applications for new T-Band authorizations, for modifications that propose to extend the coverage of an existing system however incrementally, or for modifications that seek to add

² *Id.* § 6101.

³ 47 C.F.R. § 90.528.

⁴ Spectrum Act § 6103.

⁵ Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Suspend the Acceptance and Processing of Certain Part 22 and 90 Applications for 470-512 MHz (“T-Band”) Spectrum, *Public Notice*, DA 12-643 (rel. Apr. 26, 2012) (“Freeze PN”). In response to a written request from EWA and inquiries from others, the Commission released a clarification of the Freeze PN. Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau Clarify Suspension of the Acceptance and Processing of Certain Part 22 and 90 Applications for 470-512 MHz (“T-Band”) Spectrum, *Public Notice*, DA 12-892 (rel. June 7, 2012) (“Clarification PN”). The Clarification PN does resolve certain questions, in particular that the FCC will accept and process modification applications that do not “extend the station’s authorized interference contour in any direction.” Since T-Band systems are not licensed based on predicted contours, EWA assumes that the “authorized interference contour” is the 21 dBu interference contour in 90.187 (b)(iii) that is used in the 421-512 MHz trunking analysis and that the FCC intends to use it as the test for permissible conventional as well as trunked applications.

or even merely exchange T-Band frequencies on a one-for-one basis. Moreover, the FCC has applied the freeze to already coordinated applications that were pending with the FCC at the time the Freeze PN was released. Applications from parties that had paid the required frequency coordination and FCC filing fees and had met all FCC requirements are in regulatory limbo while the Commission considers how to implement the Spectrum Act. The FCC justified this band-wide freeze based on the need to maintain a “stable spectral landscape” while it undertakes its deliberations.⁶

EWA urges the Commission to revisit its reading of the Spectrum Act. By applying the freeze to T-Band spectrum currently used by Industrial/Business licensees, the Commission has clearly gone beyond the plain meaning of the statute. Title VI expressly addresses only public safety communications and its Subtitle A, “Reallocation of Public Safety Spectrum,” could not be clearer. Congress established a quid pro quo: specifically, it reallocated 10 MHz of commercial 700 MHz broadband spectrum for public safety use, but required public safety to relinquish its T-Band spectrum for other uses. Congress could have directed the FCC to reallocate all T-Band spectrum identified in FCC Rule Section 90.303, but instead specifically qualified the spectrum at issue as that “currently used by public safety eligibles.” By expanding its deliberations about how to implement the Spectrum Act to include spectrum used by other categories of T-Band licensees, the Commission is substituting its own judgment for that of Congress.

This more limited reading of the statutory directive is consistent not only with the nomenclature of its titles, but with the fact that the loss of public safety T-Band spectrum was counterbalanced by a nationwide 10 MHz allocation exclusively for public safety use and a provision directing the use of auction proceeds to finance the relocation of those T-Band systems.⁷ By contrast, Industrial/Business licensees have not received a new allocation for more than a quarter century.⁸ The legacy spectrum available for this critical wireless user community is fully assigned in the markets in which T-Band channels are allocated.⁹ Moreover, unlike T-Band, the vast majority of that spectrum is licensable only on a shared basis. It is effectively impossible to secure VHF or UHF band channel exclusivity in those heavily encumbered markets where exclusive control channels are needed for the migration from analog to more efficient and more useful digital technologies. It is not reasonable to assume that Congress

⁶ Freeze PN at 1.

⁷ Spectrum Act §6103(b). This is not to say that EWA endorses the reallocation of public safety T-Band spectrum for other uses. The Alliance recognizes that this band supports tens of thousands of public safety units that may not easily find a comparable spectrum home, even if the relocation costs are paid in part from auction proceeds.

⁸ See Amendment of Parts 2, 15, and 90 of the Commission’s Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, Gen. Docket No. 84-1233, *Report and Order*, 2 FCC Rcd 1825 (1986).

⁹ The only “new” spectrum that has and will become available in the 11 markets in which T-Band spectrum is allocated is the 800 MHz interleaved spectrum that is in the process of being relinquished by Sprint Nextel Corporation. However, eligibility for that vacated spectrum is limited to public safety entities for the first three years and to public safety and critical infrastructure industry entities for the following two years. See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order*, 19 FCC Rcd 14969 at 15052 ¶ 152 (2004).

intended to displace Industrial/Business T-Band systems without providing these economy boosting businesses with both alternative comparable spectrum and a relocation funding mechanism as it did for mission critical entities.

The Commission's action has placed EWA's members in an untenable position. Not only are their systems frozen at a critical point in the analog to digital technology transition process, but the freeze imposes a competitive handicap that already is impacting the Private Land Mobile Radio marketplace. This is true even for entities that are not seeking to expand their geographic footprint or channel capacity. Licensees of established private, internal T-Band systems still must decide whether to continue adding units to their fleets when there is no certainty about when the FCC will even propose, much less adopt, rules governing the future availability of this spectrum, what those rules will be, or whether licensees will be required to self-finance their relocation. Given this level of uncertainty, licensees will need to make hard choices in determining whether investing in additional equipment is economically justifiable.

The situation may be worse for the commercial operators providing communications service capabilities to Industrial/Business users. Competitors already are advising prospective and existing customers that they should avoid or abandon T-Band, because the FCC is going to reallocate this spectrum. They are able to point to the Freeze PN and the Clarification PN as evidence that this spectrum is slated for auction and also to warn that neither Congress nor the FCC has identified replacement spectrum for these T-Band operations or funding for their relocation. This is an untenable competitive situation that is not required by any fair reading of the Spectrum Act and not justified from a public policy perspective. The Commission's desire to stabilize the spectrum environment for the future, unidentified use of T-Band by unknown entities has actually served to destabilize what has been a vibrant spectral environment, an intensively used allocation that has provided critical communications capabilities for many thousands of Industrial/Business entities that promote local economies and create jobs.

Finally, the FCC's decision to freeze not only new but pending applications is contrary to normal Commission practice and cannot be justified on public policy grounds. The much more typical approach is to freeze the acceptance of newly filed applications, not the processing of applications already on file that are consistent with current Commission rules.¹⁰ The

¹⁰ See, e.g., Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *First Report and Order*, 11 FCC Rcd 16570 at ¶ 2 (1996)(FCC suspended acceptance of new paging applications as part of a proposal to convert from site-based to geographic licensing); Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988 at ¶¶ 107-8 (1994) (FCC suspended acceptance of 800 MHz SMR Pool applications in conjunction with a proposal to implement changes in service rules and channel blocks); Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational, and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 at ¶ 229 (2003)(FCC adopted a freeze on the acceptance of certain ITFS applications while it undertook a comprehensive review of the ITFS service); Freeze on the Filing of Certain TV and DTV Requests for Allotment of Service Area Changes, *Public Notice*, 19 FCC Rcd 14810 (2004) (FCC prohibited the acceptance of new applications and petitions requesting new channels or service areas while the FCC was developing a new DTV Table of Allotments).

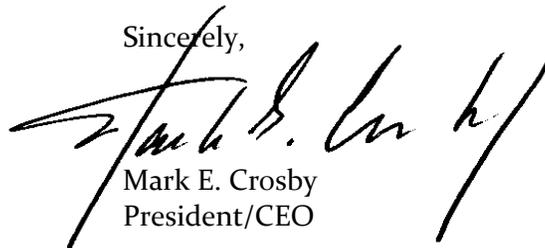
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Administrative Procedure Act¹¹ may not prohibit the FCC from suspending the processing of such applications, but there is no reason to do so in this instance. There has not been an influx of applications in anticipation of changes in the FCC rules. Unlike the 39 GHz proceeding, where the Commission pointed to a large number of applications that would be burdensome to process,¹² the Alliance would guess that there are no more than several dozen, perhaps fewer, pending T-Band applications that are affected by the freeze. Even in the 39 GHz proceeding, the FCC subsequently reversed itself and lifted the processing freeze on pending applications where mutual exclusivity issues had been resolved.¹³

It may be that Industrial/Business entities with pending T-Band applications will choose not to implement the systems proposed in their applications for the reasons described above, but the FCC should not deprive them of the opportunity to do so. Having completed the frequency coordination process, thereby confirming that the proposed systems were compliant with the FCC's technical requirements, these parties may have purchased equipment, signed tower leases, entered into customer contracts, or assumed other contractual obligations consistent with their applications. By refusing to process a modest number of applications for an unknown amount of time and before even proposing rule changes for T-Band, the Commission has imposed a further burden on Industrial/Business T-Band users, one that is not required by the Spectrum Act or needed in any meaningful way to "stabilize the existing spectrum landscape."¹⁴

For the reasons described herein, EWA urges the FCC to follow the express directives of the Spectrum Act. The Commission must plan for the reallocation of T-Band spectrum currently used by public safety entities, a task made easier by the relocation tools provided by Congress. It should not pursue initiatives that could result in the reallocation of T-Band spectrum currently used by Industrial/Business entities, an outcome that is not mandated by the Spectrum Act and that does not serve any identified public interest.

Sincerely,



Mark E. Crosby
President/CEO

cc: David Furth, Deputy Chief, Public Safety and Homeland Security Bureau (via e-mail)
Roger Noel, Chief, Mobility Division, Wireless Telecommunications Bureau (via e-mail)
Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau (via e-mail)

¹¹ 5 U.S.C. § 551 *et seq.*

¹² See Petition for Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Order*, 11 FCC Rcd 1156 (1995).

¹³ Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Memorandum Opinion and Order*, 12 FCC Rcd 2910 (1997).

¹⁴ Freeze PN at 1.