

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Amendment of Part 90 of the Commission’s) WP Docket No. 07-100
Rules)
)

PETITION FOR RECONSIDERATION OF APCO INTERNATIONAL

Pursuant to Section 1.429 of the Commission’s rules,¹ the Association of Public-Safety Communications Officials-International, Inc. (APCO)² seeks reconsideration of the Sixth Report and Order (“Order”) in the above-captioned proceeding.³ The Order introduces an ill-conceived approach to spectrum sharing that lacks a basis in the record. Moreover, the Commission’s radical shift to the 4.9 GHz rules ignores public safety’s needs and reasonable alternatives – which, unlike the Order’s approach, were part of prior proposals on the record – that would promote public safety and increase use of the band. Therefore, APCO requests that the Commission vacate the Order and Seventh Further Notice of Proposed Rulemaking, and instead direct the Public Safety and Homeland Security Bureau to work with public safety entities to construct a more effective path forward.

¹ 47 C.F.R. § 1.429.

² Founded in 1935, APCO is the nation’s oldest and largest organization of public safety communications professionals. APCO is a non-profit association with over 35,000 members, primarily consisting of state and local government employees who manage and operate public safety communications systems – including 9-1-1 Emergency Communications Centers (ECCs), emergency operations centers, radio networks, and information technology – for law enforcement, fire, emergency medical, and other public safety agencies.

³ Amendment of Part 90 of the Commission’s Rules, WP Docket No. 07-100, *Sixth Report and Order and Seventh Further Notice of Proposed Rulemaking*, FCC 20-137 (rel. Oct. 2, 2020) (“Order”).

I. The Order Is Arbitrary and Capricious Because It Lacks a Basis in the Record and Fails to Promote Public Safety

The Commission violated Section 553 of the Administrative Procedures Act (APA) by failing to sufficiently communicate the adopted rule changes in the Sixth FNPRM.⁴ Under the APA the Commission is required to provide adequate notice and meaningful opportunity for comment by the public on “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁵ Here, the Commission not only failed to provide adequate notice and an opportunity for comment, it completely deviated from the terms and substance proposed in the Sixth FNPRM. The decisions to restrict eligibility to states based on Bureau-level determinations of 9-1-1 fee diversion and cede spectrum management authority to state governments are not logical outgrowths of the proceeding. These aspects of the Order by themselves render it arbitrary and capricious,⁶ and the Order suffers from additional failures of arbitrarily revising the rules in a way that hinders rather than promotes public safety use of the band.

a. Excluding States That Divert 9-1-1 Fees Has No Basis in the Record

The Order bars states that have diverted 9-1-1 fees from leasing 4.9 GHz.⁷ This provision is not a logical outgrowth of the record. In fact, fee diversion was not even included in the draft Order publicized within weeks of the final Order’s adoption. As Commissioner Starks noted, “this proceeding has never sought comment on that issue or anything like it, and there is no way

⁴ 5 USC § 553(b).

⁵ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

⁶ *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 533 (D.C. Cir. 1982)) (“[A] final rule is not a logical outgrowth of a proposed rule ‘when the changes are so major that the original notice did not adequately frame the subjects for discussion.’”).

⁷ Order at para. 23-24.

commenting parties and the governments, public safety organizations and citizens that will be adversely impacted would have reasonably known to comment on the idea.”⁸

In addition to lacking a basis in the record, tying 9-1-1 fee diversion to eligibility for 4.9 GHz is arbitrary and capricious because there is no rational link between the diversion of 9-1-1 fees and the purpose of the 4.9 GHz band. Further, relying on the list of states identified by the Public Safety and Homeland Security Bureau as diverting 9-1-1 fees in the Commission’s annual reports on 9-1-1 fee diversion will introduce additional arbitrariness to the eligibility in 4.9 GHz. In addition to the impracticalities of using the annual reports for 4.9 GHz eligibility decisions, as explored in the Seventh FNPRM,⁹ the determinations of what constitutes fee diversion can themselves be somewhat arbitrary. As APCO explained in a separate proceeding dealing with 9-1-1 fee diversion, complexities with the collection of data and determinations of what constitutes diversion create a partial disconnect between these reports and the underlying policy goals.¹⁰

b. The Commission’s Decision to Cede Spectrum Authority to State Governments is Not a Logical Outgrowth of Proposals in the Record.

The Sixth FNPRM sought to establish new licensing and service rules that would spur investment and usage of the band “while furthering public safety use of the band.”¹¹ In pursuit of this stated objective, the Commission sought comment on proposals such as allowing public safety licensees to lease spectrum capacity to critical infrastructure industries (CII) or other

⁸ Amendment of Part 90 of the Commission’s Rules, WP Docket No. 07-100, *Dissenting Statement of Commissioner Starks* (Sep. 30, 2020).

⁹ See Amendment of Part 90 of the Commission’s Rules, WP Docket No. 07-100, *Seventh Further Notice of Proposed Rulemaking*, FCC 20-137 at paras. 68-70 (rel. Oct. 2, 2020) (“Seventh FNPRM”).

¹⁰ See Comments of APCO International, PS Docket No. 20-291, Notice of Inquiry, *In the Matter of 9-1-1 Fee Diversion*, FCC 20-134 (rel. Oct. 2, 2020) (explaining that controversy over permissible fee expenditures can be a distraction from the ultimate goal which is ensuring that 9-1-1 has the funding it needs, regardless of whether the funding comes from fees on phone bills, state general funds, or other sources).

¹¹ Amendment of Part 90 of the Commission’s Rules, WP Docket No. 07-100, *Sixth Further Notice of Proposed Rulemaking*, FCC 18-33 at para. 75 (rel. Mar. 23, 2018) (“Sixth FNPRM”).

entities.¹² At no point did the Commission propose ceding licensing authority to states, creating a framework in which otherwise eligible public safety entities' access will be contingent on a state's wherewithal and willingness to lease them spectrum. In addition to being bad policy from a public safety perspective, the new approach essentially permits states to lease spectrum to the highest bidder, which in effect creates state-by-state private auctions that will lack the economies of scale and consistency of a single, national-level approach.

The Order itself provides further evidence that the state-based licensing approach was not a logical outgrowth of the record. In explaining the decision not to mandate priority access for public safety entities and entities with sharing agreements with public safety entities, the Commission states that it received no comments addressing this issue in the context of the adopted leasing regime.¹³ This is because no commenters had notice of or were able to anticipate the adopted leasing regime.

c. The Rules Do Not Support the Stated Goal to Promote Public Safety Use of the Band.

i. The Order Threatens Public Safety Use of the Band

Prior to the Order, the Commission's stated goal was to "ensure that public safety continues to have priority" in the 4.9 GHz band and to open the band for sharing while protecting incumbents from interference.¹⁴ Departing from this goal, the Order places "no restriction on the type of entity to which a state can lease or the type of services that the lessee can provide."¹⁵ State governments will thus be able to forego public safety use of the band in favor of increased revenue under the pretext of "balanc[ing] the needs of public safety and the benefits that can

¹² *Id.* at para. 75.

¹³ Order at para. 46.

¹⁴ Sixth FNPRM at para.3.

¹⁵ *Id.*

come from non-public safety use.”¹⁶ The Commission clearly has no intention to ensure public safety use of the band is protected. States are able to choose whether they want to require priority access for public safety “without unnecessary Commission involvement”¹⁷ and might soon be allowed to deny public safety access or prioritize non-public safety operations.¹⁸ As Commissioner Rosenworcel noted, the Order “clear[s] the way to kick first responders off this spectrum” and “threatens to do long-term damage to public safety communications.”¹⁹

Contrary to the Commission’s claim, the Order does in fact modify the rights of incumbent public safety licensees.²⁰ Creating a system wherein one state entity controls all 4.9 GHz spectrum licenses in the state fundamentally changes the usage of the band by incumbents. Prior to the Order public safety entities enjoyed exclusive, independent control of the band. Now they are subjugated to the will of a state lessor that has the authority to lease the band for commercial use that presents an entirely different spectrum environment. Changing the spectrum environment could render the band unfit for supporting existing public safety use. Further, while the 4.9 GHz band freeze order and Order are ambiguous about public safety licensees’ right to share spectrum with non-eligible entities pursuant to Section 90.1203(b), the Seventh FNPRM implies that this right is also no longer available to licensees.²¹

ii. The Order Relies on Faulty Assumptions

The Order lacks a basis for assuming that the state-based leasing regime is “the fastest and most efficient way to drive interest and investment in the band.”²² Because the eligible users

¹⁶ Order at para. 3.

¹⁷ *Id.*

¹⁸ Seventh FNPRM at para. 56.

¹⁹ Amendment of Part 90 of the Commission’s Rules, WP Docket No. 07-100, *Dissenting Statement of Commissioner Rosenworcel* (Sep. 30, 2020) (“Rosenworcel Statement”).

²⁰ *See contra* Order at para. 34.

²¹ Seventh FNPRM at para. 62 (explaining that a non-public safety entity (even one seeking to support public safety) will need to enter into a leasing agreement with a state lessor, or in the alternative, a state band manager).

²² Order at para. 19.

and prioritization rules may differ in every state, there is little reason to expect cohesive, widespread investment. As Commissioner Rosenworcel noted, “[t]his approach will only fragment these airwaves on a state-by-state basis.”²³ Without a cohesive or predictable spectrum landscape, it will be difficult for public safety entities, CII, and wireless service providers to plan or invest in the band.

Similarly, the purported advantages of “international harmonization” of the band provided in the Order – pointing to China and Hong Kong licensing of 4.9 GHz for 5G – are based on assumptions that contradict Commission policy.²⁴ As Commissioner Starks noted, “while 4.9 GHz may be ‘mid-band’ spectrum, it’s far from a prime candidate for 5G in the United States. Indeed, the countries that are most actively using the 4.9 GHz band for 5G are Russia and China, and the major telecom equipment manufacturer of 4.9 GHz equipment is Huawei.” Given the Commission’s recent efforts to remove Chinese-manufactured telecommunications equipment, the benefits of international harmonization as the Order envisions are questionable.²⁵

d. The Order Arbitrarily Rejects Proposals that Would Increase Public Safety Use of the Band.

For more than a decade, the public safety community has asked the Commission for reasonable changes to the 4.9 GHz rules that would help public safety make more effective, reliable, and increased use of the band. Public safety organizations have convened task forces and special committees, and participated in multiple rounds of public comment with the Commission. While the Sixth FNPRM included several proposals that were put forward by

²³ Rosenworcel Statement.

²⁴ See Order at para. 16, n 46.

²⁵ See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs, WC Docket No. 18-89, *Second Report and Order*, FCC 20-176 (rel. Dec. 11, 2020).

public safety to increase utilization of the band, the Order fails to justify the abrupt change of direction. For example, the Order abandons proposals for increased flexibility for Regional Planning Committees in facilitating use of the band and long-requested frequency coordination requirements, faulting commenters for failing to describe the benefits of these proposals in the context of a leasing framework.²⁶ Yet, commenters could not have known to discuss those proposals in the context of the Commission's out-of-the-blue proposal for a state leasing framework.

The Commission also failed to properly address comments on technical rule changes proposed in the Sixth FNPRM that were intended to facilitate sharing of the band. The Commission simply states that it “find[s] that these rule changes would not sufficiently increase use of the 4.9 GHz band.”²⁷ The Commission provides no rationale for why these proposals were rejected in lieu of the adopted leasing regime.

II. The Commission Should Vacate the Order and Develop an Approach that Will Promote Public Safety Use of the Band.

Instead of proceeding with an approach that contains no support and no basis in the record, the Commission should vacate the Order and direct the Public Safety and Homeland Security Bureau to work with public safety entities to pursue the changes they have recommended. As is evident from the record, public safety entities are generally not opposed to sharing the band with non-public safety users.²⁸ Indeed, APCO and others have recognized the potential benefits of sharing the band, provided that adequate safeguards are in place to protect public safety users.²⁹ The Commission must go back to the drawing board and develop an

²⁶ Order at para. 43.

²⁷ *Id.* at para. 45.

²⁸ Sixth FNPRM at para. 14.

²⁹ Order at para. 41.

approach that will promote, rather than undermine, public safety entities' use of the 4.9 GHz band.

Respectfully submitted,

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