

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of Sections 309(j) and
337 of the Communications Act of 1934
as Amended
WT Docket No. 99-87

SECOND MEMORANDUM OPINION AND ORDER

Adopted: April 24, 2003

Released: April 28, 2003

By the Commission:

1. Introduction. This Second Memorandum Opinion and Order addresses a petition for reconsideration, filed by the Central Station Alarm Association (CSAA), regarding the scope of the public safety radio services exemption in Section 309(j) of the Communications Act of 1934, as amended (Communications Act). For the reasons set forth below, we deny CSAA's petition.

2. Background. The Balanced Budget Act of 1997 ("Balanced Budget Act") amended Section 309(j)(1) of the Communications Act to require the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, except as provided in Section 309(j)(2). Sections 309(j)(1) and 309(j)(2) now state,

(1) General Authority.--If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions.--The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

- (A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--
(i) are used to protect the safety of life, health, or property; and
(ii) are not made commercially available to the public;

1 Central Station Alarm Association Petition for Reconsideration (filed May 20, 2002) (CSAA Petition).

2 Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997) ("Balanced Budget Act"). For a fuller description of the Balanced Budget Act and the history of this proceeding, see Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of the American Mobile Telecommunications Association, Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 99-87, RM-9332, RM-9405, RM-9705, 15 FCC Rcd 22709, 22713-17 ¶¶ 10-17 (2000) (R&O).

- (B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or
- (C) for stations described in section 397(6)³ of this title.⁴

The Conference Report for Section 3002(a) of the Balanced Budget Act states that the exemption for public safety radio services includes private internal radio services used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services.⁵

3. In the *Report and Order and Further Notice of Proposed Rule Making (R&O)* in this proceeding, the Commission adopted rules and policies to implement the Balanced Budget Act provisions regarding Sections 309(j) and 337 of the Communications Act.⁶ The Commission determined that Congress intended for the public safety radio services auction exemption to include a larger universe of services than traditional public safety services, and that the services, the dominant use of which is by the entities of the type identified in the Conference Report (*i.e.*, utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments) were to be included within the exemption as well.⁷ Hence, the Commission concluded that a radio service not allocated for traditional public safety uses will be deemed to be used to protect the safety of life, health or property within the meaning of Section 309(j)(2)(A)(i) if the dominant use of the service is by entities that (1) have an infrastructure that they use primarily for the purpose of providing essential public services to the public at large; and (2) need, as part of their regular mission, reliable and available communications in order to prevent or respond to a disaster or crisis affecting the public at large.⁸

4. CSAA asked the Commission to clarify the intent of the term “public at large,” and the criterion that reliable and available communications are needed to respond to a disaster or crisis affecting the public at large.⁹ In the *Memorandum Opinion & Order (MO&O)* in this proceeding, the Commission rejected CSAA’s proposed interpretation of the “protection of life, health, or property” standard.¹⁰ CSAA suggested that alarm monitoring companies should be deemed to serve the public at large because they make their services available to any member of the public who wishes to subscribe.¹¹ The Commission concluded that this interpretation was overbroad.¹² Rather, as used in the *R&O*, the Commission stated that the term “public at large” refers to the recipients of “essential public services.”¹³ The Commission explained that the requirement that the entity have an infrastructure it uses primarily for the purpose of providing essential public services to the public at large was intended to limit the scope of the exception to

³ 47 U.S.C. § 397(6). Section 397(6) defines the terms "noncommercial educational broadcast station" and "public broadcast station."

⁴ 47 U.S.C. § 309(j)(1), (2) (as amended by Balanced Budget Act, § 3002) (footnote added).

⁵ See H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997).

⁶ See *R&O*, 15 FCC Rcd at 22717-71 ¶¶ 18-136.

⁷ See *id.* at 22746 ¶ 75.

⁸ *Id.* at 22746-47 ¶¶ 76-78.

⁹ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Memorandum Opinion and Order*, WT Docket No. 99087, 17 FCC Rcd 7553, 7569-70 ¶ 40 (2002).

¹⁰ *Id.*

¹¹ *Id.* at 7570 ¶ 41.

¹² *Id.*

¹³ *Id.*

radio services used by entities that provide essential public services to a large portion of the population, as do utilities.¹⁴ The Commission reiterated that, as stated in the *R&O*, one of the characteristics of a service that protects the safety of life, health, or property is that the public at large depends on this service, which affects their daily lives and where accidents or service interruptions may have dangerous consequences to a significant number of people.¹⁵ The Commission concluded that alarm and/or alarm monitoring services do not concern a large part of the population to the extent that the wider community would be detrimentally affected by a disruption in the service.¹⁶ It added that this approach to determining whether a particular use protects the safety of life, health or property ensures that only those services that Congress clearly intended to exempt from auction are exempt, and is consistent with Congress's amendment to Section 309(j)(1) to expand the definition of auctionable services.¹⁷

5. On May 20, 2002, CSAA filed a petition for reconsideration of the *MO&O*. Specifically, CSAA requests reconsideration of the Commission's use of the term "public at large" in its interpretation of Section 309(j)(2).¹⁸

6. *Discussion.* CSAA argues that we should interpret the term "public at large" to include entities that make their services available to the public, regardless of how much of the public actually subscribes to the service.¹⁹ In support of this contention, it notes that the Commission has so used the term in other contexts.²⁰ CSAA argues that in this respect alarm and/or alarm monitoring services are indistinguishable from private ambulance services – which Congress included in the auction exemption – because they also are used only by a portion of the public, and their activity relates to health and safety.²¹ Further, CSAA argues that Congress intended the Commission to focus on whether the primary purpose of the communications is safety-related in applying the exemption, and not on how widely available the safety-related communications are.²²

7. We remain unpersuaded by CSAA's arguments. We note, as a general matter, that the Commission's use of the term "public at large" came in the context of interpreting Section 309(j). Consequently, the fact that the term has been used more broadly elsewhere is not germane to what Congress intended to be the scope of the auction exemption for public safety radio services. As the Commission explained in the *R&O* and the *MO&O*, it developed the two-part test for determining what services fall within the exemption in order to best implement the legislative intent. The Commission's test is designed to identify entities similar in nature to those listed in the Conference Report. The services provided by CSAA's members are of a different character, because they do not involve using infrastructure to provide essential services. In addition, we note that alarm and/or alarm monitoring services are

¹⁴ *Id.*

¹⁵ *Id.* (citing *R&O*, 15 FCC Rcd at 22747 ¶ 77).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ CSAA Petition at 1.

¹⁹ *Id.* at 4.

²⁰ *Id.* (citing Space Station System Licensee, Inc., *Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271, 2289 n.127 (2002) (stating that commercial mobile radio services are "any mobile radio communication service that affords interconnection with the public switched network and is provided for profit to the public at large")); *see also, e.g.*, Review of Part 15 and other Parts of the Commission's Rules, *Order*, ET Docket No. 01-278, 17 FCC Rcd 17003, 17009 ¶ 13 (2002) (referring to the "public at large who wish to use an ATM machine or complete a credit card transaction at a retail outlet").

²¹ CSAA Petition at 4-5.

²² *Id.* at 5.

distinguishable from private ambulance services in that the private ambulance services have long been eligible for Public Safety Pool frequencies,²³ for which CSAA concedes that its members are not and should not be eligible.²⁴

8. CSAA also states that the Commission, in adopting the “protection of life, health, or property” standard that does not include alarm monitoring, is unreasonably restrictive, and unnecessarily hamstring the growth and evolution of the alarm industry and hampers its ability to serve its customers.²⁵ We disagree. Regardless of our position as to what constitutes serving the public at large, alarm monitoring companies will continue to be able to offer their services to any member of the public that wishes to subscribe. Consequently, we do not believe that our decision regarding the scope of the auction exemption either fetters the alarm industry’s growth and evolution or hampers its ability to serve its customers. Rather, it merely reiterates our reasoning that CSAA, its members and other alarm monitoring companies are not among the entities within the scope of the public safety radio services auction exemption.

9. Accordingly, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.429 of the Commission’s Rules, 47 C.F.R. §§ 1.429 and 1.425, IT IS ORDERED that the Petition for Reconsideration filed by Central Station Alarm Association on May 20, 2002, IS DENIED.

FEDERAL COMMUNICATION COMMISSION

Marlene H. Dortch
Secretary

²³ See 47 C.F.R. § 90.20(a)(2)(iii)(C).

²⁴ See CSAA Petition at 6.

²⁵ *Id.* at 5-6.