Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Competitive Bidding Rules	)	WT Docket No. 01-32
To License Certain Rural Service Areas	)	
	)	RM-8897

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC ("Cingular") hereby replies to the joint comments of Miller Communications, Inc. ("Miller") and Ranger Cellular ("Ranger")[1] submitted in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.[2] Miller and Ranger argue that the Commission is required by statute to limit the class of participants in the proposed auction of cellular Rural Service Areas ("RSAs") to those entities who filed applications for the RSAs prior to July 1997. In the alternative, Miller and Ranger assert various equitable grounds upon which similarly to restrict auction eligibility. As discussed more fully below, these arguments are without merit. To the contrary, the public interest will best be served by opening eligibility to all interested parties, including Miller and Ranger.

Miller and Ranger principally rely on 47 U.S.C. § 309(l), which was added by the Balanced Budget Act of 1997,[3] to support their theory that participation in the RSA auction must be restricted to the existing pool of applicants. That section states:

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[1] *See* Joint Comments of Ranger Cellular and Miller Communications, Inc., WT Docket No. 01-32 (Mar. 19, 2001) ("Joint Comments").

[2] *Implementation of Competitive Bidding Rules to License Certain Rural Service Areas,* FCC 01-36 (rel. Feb. 12, 2001), *summarized*, 66 Fed. Reg. 14104 (rel. Mar. 9, 2001) ("*NPRM*").

[3] Pub. L. No. 105-33, Sec. 3002(a)(3), 111 Stat. 251, 260 (1997).

> With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall —
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> (1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit; [and]
>
> (2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding . . . .

Miller and Ranger argue that this section is applicable because the term "commercial radio" means "commercial mobile radio services" ("CMRS") and therefore includes cellular service.[4] In other words, they assert that the terms "commercial radio" and "television stations" should be viewed as distinct, unrelated terms. This argument is inconsistent with the plain meaning of the statute, however, which clearly applies only to broadcast station applications when viewed in context.

Matters of statutory interpretation are governed by the two-part test established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny. The first step of *Chevron* asks whether the plain meaning of the statute is clear when viewed in context, based upon an "examination of the statute's text, legislative history, and structure."[5] If the meaning is clear, that is the end of the matter.[6] In context, the statute here clearly applies only to applications for "radio or television stations" that are "commercial." The use of the adjective "commercial" was meant to exclude

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[4] *See* Joint Comments at 4-5.

[5] *GTE Service Corporation v. FCC*, 205 F.3d 416, 420 (D.C. Cir. 2000) (quoting *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997)); *see Chevron*, 467 U.S. at 843 n.9; *Southern California Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995); *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990).

[6] *See Chevron*, 467 U.S. at 843 n.9; *Bell Atlantic Telephone Companies*, 131 F.3d at 1047; *Hammontree v. NLRB*, 894 F.2d 438, 441 (D.C. Cir. 1990).

noncommercial educational (*e.g.*, public) radio and television applications from the scope of Section 309(l), because Congress expressly excluded such applications from the Commission's general auction authority in Section 309(j).[7] Miller and Ranger's reading of Section 309(l) would apply the modifier "commercial" to radio stations, but not to television stations, thus rendering the exclusion in 309(j) partially inoperative.[8] This is clearly not the case, because the Commission's auction authority for television station applications is expressly limited to those that are commercial.[9] In other words, in order for Sections 309(j) and 309(l) to be read consistently, the use of the word "commercial" must be viewed as an adjective describing both radio and television station applications, rather than viewing "commercial radio" and "television stations" as two separate and distinct categories of applications.

Moreover, there is absolutely no indication in the statute or its history that Congress intended to include within the scope of Section 309(l) commercial *mobile* radio services like cellular. Given the fact that other sections of the Communications Act contain express references to "commercial mobile services," Congress' failure to use such a description in Section 309(l) is dispositive.[10] In fact, the legislative history

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[7] *See* 47 U.S.C. §§ 309(j)(2)(C), 47 U.S.C. § 397(6) (providing that competitive bidding authority shall not apply to applications for "television or radio broadcast station[s]" that are "noncommercial educational" or "public").

[8] It is an elementary canon of statutory construction that a statute should be interpreted so as not to render one part inoperative. *See, e.g., Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).

[9] *See supra* note 7 and accompanying text.

[10] *See, e.g.*, 47 U.S.C. §§ 253(e), 274(i)(2)(B), 332(c)(1), 332(d)(1); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

makes clear the section is limited to the traditional notion of commercial broadcast radio and television applications:

> The conferees adopted a provision that repeals the Commission's lottery authority for all applications other than for licenses for non-commercial educational and public broadcast stations . . . .
>
> The conferees adopted a new provision with respect to the applicability of competitive bidding to pending comparative licensing cases. *New section 309(l) of the Communications Act requires the Commission to use competitive bidding to resolve any mutually exclusive applications for radio or television broadcast licenses* that were filed with the Commission prior to July 1, 1997.[11]

The legislative history also provides examples of the applications for radio or television broadcast licenses intended to be covered by Section 309(l), including "applications for secondary broadcast services such as low power television, television translators, and television booster stations."[12]

Even assuming, *arguendo*, that the statute is ambiguous, deference must still be given to the agency's interpretation of the statute as long as it is reasonable.[13] In dismissing the applications of Ranger and Miller, the Commission has previously explained that Section 309(l) is limited to broadcast applications and that its use in the commercial mobile (*e.g.*, cellular) context is inapposite.[14] This interpretation is clearly

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[11] *See* H.R. Conf. Rep. No. 105-217, at 573 (1997) (emphasis added), 1997 U.S.C.C.A.N. 194.

[12] *Id.*

[13] *Chevron*, 467 U.S. at 843; *see, e.g.*, *Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997).

[14] *See Certain Cellular RSA Applications, Order*, DA 01-544, at ¶ 6 n.14 (rel. Mar. 2, 2001), citing *Implementation of Section 309(j) — Broadcast Competitive Bidding, First Report and Order*, 13 F.C.C.R. 15920 (1998) (subsequent history omitted); *see also id.*, 13 F.C.C.R. at 15922 ("Section 309(l) . . . governs the resolution of pending comparative broadcast licensing cases."); *Notice of Proposed Rulemaking*, 12 F.C.C.R. 22363, 22367 (1997) ("[N]ew Section 309(l) expressly deals with the resolution of pending comparative broadcast initial licensing cases.")

reasonable given the context and history of the statute discussed above, as well as the Commission's consistent treatment of "commercial radio" as a broadcast term of art that does not encompass mobile radio applications.[15]

As a fall-back position, Ranger and Miller argue that the pool of applicants should be restricted to participants in the original applicant pool because, *e.g.*, those applications have been pending for many years and the pool is small, and opening up the pool will lead to litigation and serve no purpose other than to impermissibly increase auction revenues.[16] At bottom, these arguments are essentially seeking a right to exclude a potential class of competitors and prevent the licenses from being put to the highest and best use. In the *Bachow Communications, Inc. v. FCC* case cited by Miller and Ranger, the D.C. Circuit held that an applicant filing prior to a cut-off date does not have a vested right to exclude untimely competitors, and that it is within the Commission's discretion to decide not to process mutually exclusive applications pending under an obsolete license allocation system so that others who were cut-off may reapply in a new system.[17] This is exactly the case here, as the Commission has observed:

> Our competitive bidding program seeks to award each license to the applicant who values it most highly, as determined by the marketplace,

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[15] *See, e.g.*, 47 C.F.R. §§ 73.3526(e)(14), 73.3555(c)(2). The Commission's regulatory fee decisions also distinguish "commercial mobile radio services," which fall under the commercial wireless fee category, from "commercial radio," which falls under the mass media fee category. "Commercial radio" stations are defined therein to "include licensed Commercial AM . . . and FM . . . Radio Stations operating under Part 73 of the Commission's Rules." *See Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, 15 F.C.C.R. 14478, 14542-44 (2000).

[16] *See* Joint Comments at 6-15.

[17] 237 F.3d 683, 688 (D.C. Cir. 2001). Miller and Ranger's attempts to rely on Section 309(l) cited in footnote 5 of that decision are misplaced, *see id*. at 688 n.5, because *Bachow* involved applicants for broadcast licenses in the 39 GHz band and, as discussed above, Section 309(l) is inapplicable to the commercial mobile radio applications at issue here.

> and who is therefore most likely to offer valued service to the public. Excluding potential applicants that were not previously lottery applicants would be inconsistent with that goal. We also note that nearly twelve years have passed since the closing of the original RSA filing window, so that a number of commenters who have expressed interest in participating in RSA auctions did not have the opportunity to file applications, while some applicants that did file lottery applications may no longer exist. Finally, to the extent that former lottery applicants continue to have an interest in applying for these markets, open eligibility allows them to do so.[18]

Given the holding in the *Bachow* case, the Commission is clearly well within its discretion to establish open eligibility to participate in the RSA auction. As expressed in its comments, Cingular agrees that the public interest will be served by permitting open eligibility in this proceeding.[19]

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[18] *See NPRM* at ¶ 8.

[19] *See* Comments of Cingular Wireless LLC, WT Docket No. 01-32, at 2 (Mar. 19, 2001).

CONCLUSION

For the reasons set forth above, the Commission should reject the proposal of Ranger and Miller to limit the class of eligible applicants in this proceeding. The Commission should adopt its proposal to allow all interested parties, including Miller and Ranger, to participate in the proposed RSA auction consistent with the public interest.

Respectfully submitted,

CINGULAR WIRELESS LLC

By: /S/ J. R. Carbonell

J. R. Carbonell
Carol L. Tacker
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-6030

Its Attorneys

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