

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

In the Matter of)	
)	
Service Rules for the 746-764 and)	WT Docket No. 99-168
776-794 MHz Bands, and Revisions)	
to Part 27 of the Commission's Rules)	
(Television Channels 60-60))	
)	
Reallocation and Service Rules for the)	GN Docket No. 01-74
698-746 MHz Spectrum Band)	
(Television Channels 52-59))	
)	
Auction of Licenses in the 747-762)	DA 02-260
and 777-792 MHz Bands Scheduled)	Report No. AUC 02-31-A
for June 19, 2002)	
)	
Auction of Licenses in the 698-746)	DA 02-563
MHz Band Scheduled for June 19, 2002)	Report No. AUC 02-44-B

To: The Commission

COUNCIL TREE COMMUNICATIONS, L.L.C.
OPPOSITION TO APPLICATION FOR REVIEW

Council Tree Communications, L.L.C. ("Council Tree"),¹ pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), and the Commission's April 26, 2002 Public Notice, DA 02-971, submits this Opposition to the captioned Application for Review filed by the Cellular Telecommunications & Internet Association ("CTIA") on April 24, 2002 ("Application for Review").

¹ Council Tree is an investment company organized to develop telecommunications industry partnerships for the benefit of minority-owned and women-owned investors, recognizing the opportunities for business success predicated on the meaningful diversification of telecommunications facilities ownership.

I. INTRODUCTION

In a letter to Chairman Powell delivered on April 3, 2002, CTIA asked the Commission to delay the start of the pending auctions for spectrum in the Upper and Lower 700 MHz bands (designated Auctions 31 and 44, respectively),² each of which is scheduled to begin on June 19, 2002. On April 10, 2002, Wireless Telecommunications Bureau Chief Thomas J. Sugrue denied the CTIA Letter Request, indicating that Auctions 31 and 44 would proceed as scheduled.³ In its Application for Review, CTIA asks the Commission to review the Wireless Bureau Letter and to delay the start of Auctions 31 and 44 beyond June 19, 2002. For the reasons set forth here, and for the reasons discussed in Council Tree's April 9, 2002 letter in opposition to the CTIA Letter Request,⁴ Council Tree urges the Commission to deny CTIA's Application for Review.

II. CTIA HAS CITED BAND CLEARING ISSUES TO URGE DELAY OF A 700 MHz AUCTION FOR NEARLY TWO YEARS

First, CTIA argues that the Commission should overturn the decision of the Wireless Bureau to proceed with Auctions 31 and 44 on the theory that the current prospects for clearing incumbent broadcasters from the Upper and Lower 700 MHz bands are uncertain. According to CTIA:

efficient spectrum management goals would be far better served if prospective bidders could obtain greater certainty and clarity regarding the realistic measures

² Letter from Thomas E. Wheeler, President/CEO, CTIA, to the Honorable Michael K. Powell, Chairman, Federal Communications Commission (filed April 3, 2002) ("CTIA Letter Request").

³ Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Thomas E. Wheeler, President/CEO, CTIA, DA 02-857 (rel. April 10, 2002) ("Wireless Bureau Letter").

⁴ Letter from Steve C. Hillard, President, Council Tree, to the Honorable Michael K. Powell, Chairman, Federal Communications Commission (filed April 9, 2002) ("Council Tree Letter").

that will be required to clear the band of incumbents prior to the auctions, and a better sense as to when those measures could be successfully implemented.⁵

CTIA also argues that “[u]nder the current conditions, interested parties will not be able to ‘evaluate the availability of equipment for the relevant services’ because manufacturers will not focus on developing equipment for this band until the timing of availability of the spectrum is clarified.”⁶ Based on this stated “uncertainty,” CTIA claims that the Commission should put aside the Upper and Lower 700 MHz band auctions until some unspecified time in the future.

Yet, CTIA has cited band clearing issues to urge delay of a 700 MHz auction for nearly two years. As noted in the Wireless Bureau Letter, CTIA wrote to then-Chairman Kennard in July, 2000 urging the Commission to delay the start of Auction 31,⁷ which at that time was scheduled to begin on September 6, 2000. Among other things, CTIA argued that potential bidders needed additional time to implement the negotiation process intended to clear incumbent broadcasters from the Upper 700 MHz band, explaining that “[n]ow that these issues have been clarified, the Commission should allow a sufficient period of time for negotiations to take place.”⁸ Indeed, according to CTIA, “[r]egardless of their outcome, providing additional time for negotiations will lend greater certainty to the auction, which will aid bidders in formulating their business models and bidding strategies.”⁹

⁵ Application for Review at 2.

⁶ Id. at 3.

⁷ See Letter from Letter from Brian Fontes, Senior Vice President Policy and Administration, CTIA, et al. to the Honorable William E. Kennard, Chairman, Federal Communications Commission (filed July 20, 2000).

⁸ Id. at 2.

⁹ Id.

Of course, CTIA's July, 2000 efforts to promote delay of Auction 31 have contributed to the provision of nearly two years of "additional time for negotiations," which CTIA made clear would "lend greater certainty to the auction" and would "aid bidders in formulating models and bidding strategies." Now, however, CTIA claims that "the fact that the timing of the availability of the spectrum for commercial use is not known and will not be known before the June auction date makes 'develop[ment] of business plans' and analysis of 'market conditions' virtually impossible."¹⁰ Having urged the Commission to delay the September, 2000 start of Auction 31 until June, 2001 to "aid bidders in formulating models and bidding strategies," CTIA's current argument that formulating models and bidding strategies for a June, 2002 auction will be "virtually impossible" is unpersuasive at best.

Moreover, as the Wireless Bureau explained in its letter to CTIA, since July, 2000 "the Commission has sought to alleviate those uncertainties within its control by affirming and further refining its voluntary clearing policies"¹¹ The Commission set forth 700 MHz band clearing procedures in at least four separate orders that have been issued since 2000, and the Wireless Telecommunications Bureau has established an expedited schedule to resolve outstanding petitions for reconsideration of the Lower 700 MHz band rules. Moreover, prospective bidders may evaluate the level of broadcast incumbency in the various markets and spectrum blocks for which licenses are to be offered in Auctions 31 and 44 and factor those levels into their bid strategies and amounts. Contrary to CTIA's latest claim, therefore, the "'develop[ment] of business plans' and analysis of 'market conditions'" is not "virtually impossible."

¹⁰ Application for Review at 3-4.

¹¹ Wireless Bureau Letter at 1-2 (footnote omitted).

Finally, notwithstanding CTIA's argument to the contrary, timely auction of Upper and Lower 700 MHz band licenses will *promote* technology and equipment development for this spectrum. So long as the availability of redeployed 700 MHz spectrum remains a fiction, there will be little incentive for vendors seriously to develop equipment for this spectrum, thus producing the very sort of 700 MHz spectrum valuation issues about which CTIA complains. The licenses in the Upper and Lower 700 MHz bands represent a substantial amount of spectrum that will permit the provision of much-needed new wireless and broadcast-like services. For this promise to be fulfilled, however, potential licensees and equipment manufacturers must prepare for the innovative deployment of this spectrum, which preparation cannot reasonably be done while the licenses are being withheld by the Commission. Auctioning rights to this critical spectrum will permit manufacturers to complete the development of necessary equipment with an actual market in which to test and sell their products. Contrary to CTIA's claims, therefore, rapid deployment of this spectrum in new ways will be advanced — not inhibited — by adherence to the statutory scheme.

III. THE POTENTIAL AVAILABILITY OF ADDITIONAL SPECTRUM FOR COMMERCIAL USE IN THE FUTURE SHOULD NOT HALT ALL SPECTRUM AUCTIONS TODAY

Second, CTIA argues that the Commission should overturn the decision of the Wireless Bureau to proceed with Auctions 31 and 44 on the theory that additional spectrum could be available for commercial use in the future through the Commission's advanced wireless services proceedings. According to CTIA:

the wireless industry has worked diligently with the Commission and NTIA to ensure that 120 MHz of harmonized spectrum is made available for advanced services. Significant work still remains to secure that spectrum, part of which currently is held by the Department of Defense. The uncertainty surrounding the availability and timing of the auction for advanced wireless services spectrum means that companies would not be able to assess their spectrum options

effectively before having to decide on a 700 MHz auction strategy if those auctions were held in June.¹²

On this basis, CTIA claims, “the FCC should not auction the 700 MHz bands until the broader proceeding on advanced wireless services spectrum is concluded, and that spectrum is auctioned.”¹³

Yet, the fact of ongoing proceedings to identify and develop additional spectrum bands for commercial use cannot reasonably serve as the basis for delaying the long-scheduled Upper 700 MHz band auction and the more-recently scheduled Lower 700 MHz band auction. Indeed, while CTIA estimates that “[s]ignificant work” remains to be done in an advanced wireless services rulemaking, the Commission is faced with a statutory directive to complete the auction of Lower 700 MHz band licenses by September. Potential Auction 31 and 44 bidders have organized business plans and secured financing in reliance on the current auction schedule, and the Commission should not upset those arrangements due to the continuing pendency of a separate proceeding that still requires “[s]ignificant work.”

Moreover, if it were true that the Commission should conduct no auction until companies could “assess their spectrum options” in the manner CTIA suggests, no auction could reliably be scheduled. It will almost always be true that alternative spectrum bands might be available for various uses in “the future” — particularly with the development of new wireless technologies — and those who favor delay of a particular auction event could rely on that claim at virtually any time to support their effort. The Commission, therefore, cannot establish the precedent that the fact of ongoing proceedings to identify and develop additional spectrum bands for

¹² Application for Review at 4-5.

¹³ Id. at 5 (emphasis added).

commercial use is a sufficient basis to delay already scheduled competitive bidding events.

There could be no dependable spectrum auction schedule if that were the case, which would not be in the public interest.

IV. IN THE ABSENCE OF A CHANGE IN LAW, THE COMMISSION MUST CONDUCT AUCTION 44 IN A MANNER CONSISTENT WITH THE EXISTING STATUTORY DEADLINE

Finally, CTIA argues that the Commission should overturn the decision of the Wireless Bureau to proceed with Auctions 31 and 44 on the theories that Congress might act to change the existing statutory deadlines or that the existing statutory deadlines may be interpreted away by the Commission. According to CTIA:

The Wireless Bureau [Letter] also states that the Congress has taken no action on the Administration's proposal to delay these auctions. While this might have been true when the letter was written, bipartisan legislation to delay the 700 MHz auctions has now been introduced in the U.S. House of Representatives with fifty-two (52) co-sponsors.¹⁴

According to CTIA, this legislation “represents a significant change in circumstances subsequent to the Wireless Bureau [Letter].”¹⁵ Apparently arguing in the alternative, CTIA also claims that the existing statutory deadlines for the 700 MHz auctions “are inconsistent with the requirements of Section 309(j)”¹⁶ Though CTIA does not identify the portion of Section 309(j) with which these deadlines are allegedly inconsistent, it appears that CTIA may be referring to Section 309(j)(3)(E)(ii) based on a reference earlier in its Application for Review.¹⁷ On this

¹⁴ Id. at 4.

¹⁵ Id. at 5.

¹⁶ Id. at 5-6.

¹⁷ See id. at 3-4.

basis, it seems, CTIA argues that “reasonable statutory interpretation” should “lead the Commission to postpone both of the 700 MHz auctions.”¹⁸

Contrary to the arguments of CTIA, however, the Commission must conduct Auction 44 in a manner consistent with the existing statutory deadline in the absence of a change in law. As a threshold matter, the fact that legislation has been introduced that would achieve CTIA’s desired goal does not change the governing law on the subject of the 700 MHz band auctions. Though some in Congress have long indicated an interest in postponing the start of these important auction events, no legislation has been enacted to modify the statutory mandate for Auction 44 in the nearly five years since it was instituted, suggesting that there has not been material interest in departing from the clearly established schedule. Moreover, while CTIA calls the Commission’s attention to legislation introduced in the United States House of Representatives that would authorize a delay of the 700 MHz band auctions, CTIA does not mention recent reports of legislation to the contrary that may be introduced in the United States Senate.¹⁹ At bottom, Congress directed the Commission to deposit all proceeds from Auction 44 in the United States Treasury by September 30, 2002. To avoid litigation-related delays that have plagued other competitive bidding events, the Commission must conduct Auction 44 in a manner consistent with that mandate unless and until there is a change in governing law.

Separately, it cannot reasonably be said that the existing statutory deadlines for the 700 MHz auctions “are inconsistent” with the requirements of Section 309(j)(3)(E)(ii) or that Section 309(j)(3)(E)(ii) should be applied to overcome the plain timing mandate. Section

¹⁸ Id. at 6.

¹⁹ See, e.g., Paul Kirby & Howard Buskirk, Proponents of Delaying 700 MHz Auctions Running into Opposition among Senators, Telecommunications Reports, Apr. 29, 2002, at 3.

309(j)(3)(E)(ii), which was added as part of the Balanced Budget Act of 1997, provides that the Commission shall:

ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed . . . (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.²⁰

Section 309(j)(14)(C)(ii), meanwhile, *was also added as part of the Balanced Budget Act of 1997*, and it directs that “[t]he Commission shall complete the assignment of [licenses reclaimed and reorganized under Section 309(j)(14)], and report to the Congress the total revenues from such competitive bidding, by September 30, 2002.”²¹ Similarly, Section 3007 of the Balanced Budget Act of 1997 makes clear that “[t]he Commission shall conduct the competitive bidding required under this title . . . in a manner that ensures that all proceeds of such bidding are deposited [in the United States Treasury] not later than September 30, 2002.”²²

In the very same statute, therefore, Congress enacted the *general* Commission obligation to provide parties time in advance of competitive bidding events to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services but the quite *specific* Commission duty to complete certain auctions by September 30, 2002. Indeed, Congress also established a 2006 deadline for the completion of the digital television transition

²⁰ 47 U.S.C. § 309(j)(3)(E). See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258-59 (“Balanced Budget Act of 1997”).

²¹ 47 U.S.C. § 309(j)(14)(C)(ii). See Balanced Budget Act of 1997, § 3003, 111 Stat. 251, 265-66.

²² Balanced Budget Act of 1997, § 3007, 111 Stat. 251, 269 (reproduced at 47 U.S.C. § 309(j) note 3).

that is at the root of CTIA's band clearing complaints,²³ suggesting that Congress knew well that new licenses in these spectrum bands could be subject to auction in advance of complete incumbent broadcaster relocation. It is a commonplace rule of statutory construction that a law should be read to avoid internal inconsistencies, and it would be an odd result indeed if the quite plain September 30, 2002 deadline set forth *twice* in the Balanced Budget Act of 1997 was cast aside under the banner of the far more general Section 309(j)(3)(E)(ii) provision in these circumstances. That cannot have been what Congress intended.

V. CONCLUSION

For these reasons, and for the reasons set forth in the Council Tree Letter, Council Tree urges the Commission to deny the CTIA Application for Review and to conduct Auctions 31 and 44 in a manner consistent with the existing statutory deadline.

Respectfully submitted,

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²³ See, e.g., 47 U.S.C. § 309(j)(14)(A); Balanced Budget Act of 1997, § 3003, 111 Stat. 251, 265.

CERTIFICATE OF SERVICE

I, Susan K. Cadwell, certify that true and correct copies of the foregoing Council Tree Communications, L.L.C. Opposition to Application for Review were delivered to the following parties by United States Mail, except as indicated, on May 3, 2002:

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