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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Service Rules for the 746-764 and 776-794 MHz Bands, (Television Channels 60-69)	)	WT Docket No. 99-168
	)	
Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)	)	GN Docket No. 01-74
	)	
Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002	)	DA 02-260 Report No. AUC 02-31-A (Auction No. 31)
	)	
Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002	)	DA 02-563 Report No. AUC 02-44-B (Auction No. 44)
	)	
Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels	)	WT Docket No. 02-55

OPPOSITION OF PAXSON COMMUNICATIONS CORPORATION AND THE SPECTRUM CLEARING ALLIANCE

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TABLE OF CONTENTS

Page

SUMMARY ii

I. CTIA'S APPLICATION PROVIDES NO BASIS FOR DELAYING THE 700 MHz AUCTIONS. 4

A. CTIA's Application Is Procedurally Defective. 4

B. Section 309(j) of the Communications Act Forbids CTIA's Requested Relief. 5

C. CTIA's Claims of "Uncertainty" are Disingenuous and Insufficient to Override Congress's Clear Command. 8

1. The Commission Has Resolved the Uncertainty Surrounding the 700 MHz Auction. 9

2. Most "Uncertainty" that Currently Exists is CTIA's Own Invention. 12

3. Proposed Legislation and Alternative Usage Plans for the 700 MHz Band Cannot Justify Delay. 14

4. The Commission Cannot Eliminate All Uncertainty Prior to the Auction. 20

D. CTIA's Request is Distinguishable From Those Granted in the Past. 21

II. AUCTION DELAY WILL SIGNIFICANTLY DAMAGE THE PUBLIC INTEREST. 23

CONCLUSION 25

SUMMARY

There is no justification for delaying the 700 MHz auctions. CTIA's Application for Review presents the Commission with a simple choice: follow the law or ignore it in favor of speculative legislative and regulatory proposals created as part of a massive last-minute lobbying campaign by the large wireless services providers who are the only parties that stand to gain from delay.

CTIA's Application does not meet the barest minimum procedural requirements of the Commission's rules and it fails to specify any legal basis whatsoever for overturning the Wireless Bureau's decision not to delay the auctions. The Communications Act specifically requires that the 700 MHz spectrum be auctioned by September 30, 2002, and any delay beyond June 19, 2002 joepardizes compliance with the statutory deadline.

Substantively, CTIA's Application is not credible. CTIA trots out arguments about uncertainty surrounding the 700 MHz auctions that it first made over two years ago. Each of the "uncertainties" CTIA cites is either nonexistent or has been addressed by the Commission. The only uncertainty is why a wireless industry that has been begging the Commission for spectrum for years is requesting that it not be granted access to available spectrum.

If vindicated, the wireless industry's recalcitrance will have far-reaching adverse effects. The Commission's band-clearing policies will be ruined and the Spectrum Clearing Alliance dispersed. The roll-out of new commercial wireless services and, most importantly, much needed additional spectrum for public safety providers will be indefinitely delayed. The Commission's current 700 MHz band plans and band-clearing policies provide the only current, viable means of fulfilling these strong public interests, and to be successful they require the auctions to Commence on June 19, 2002.

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To: The Commission

OPPOSITION OF PAXSON COMMUNICATIONS CORPORATION AND THE SPECTRUM CLEARING ALLIANCE

Paxson Communications Corporation ("Paxson") and the Spectrum Clearing Alliance (the "Alliance"),[1] pursuant to Section 1.115(d) of the Commission's rules[2] and the expedited

[1] The Alliance was formed to promote and facilitate the timely clearing of the upper 700 MHz band in accordance with the voluntary band-clearing mechanisms developed by the Commission. In addition to Paxson, the Alliance includes a significant and increasing number of upper 700 MHz broadcasters operating throughout the United States, including Univision Communications ("Univision"). Paxson's 19 stations and Univision's 16 stations in the band comprise approximately 40% of the encumbered analog broadcast spectrum. As the auction date

pleading schedule adopted for this proceeding,[3] hereby submit this Opposition to the Cellular Telecommunications & Internet Association's ("CTIA") Application for Review of the Wireless Telecommunications Bureau's (the "Bureau") denial of CTIA's request that Auction Nos. 31 and 44 be postponed (the "Application").[4] CTIA's Application requests that the Commission delay the 700 MHz auctions despite a direct statutory command to hold the auctions and despite years of wireless industry pleas for additional spectrum. Bereft of both logic and candor, CTIA's Application must be denied. **There is no justification for delaying the 700 MHz auctions.**

CTIA's arguments for delay rely chiefly on the specter of "uncertainty," and the Application sets about the task of conjuring as much of it as possible. There is, however, very little about the 700 MHz spectrum or the long-awaited auctions that is uncertain. The Commission has spent the last five years setting service rules for the 700 MHz bands, developing rules and procedures for the 700 MHz auctions, and creating a regulatory regime that will allow broadcasters and wireless operators to clear the encumbered spectrum prior to the close of the DTV transition. Paxson and the Alliance have worked within the Commission's framework to implement these policies, which are now on the cusp of success. In the face of clear and unambiguous statutory directives and the Commission's extensive band clearing mechanisms, CTIA's reliance on proposed legislation as a predicate for delay openly flouts the law and

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approaches, the Alliance continues to add members at an accelerating pace, and is now in excess of 70% of the encumbered analog spectrum.

[2] 47 C.F.R. § 1.115(d).

[3] *See* Pleading Cycle Established for Oppositions to Application for Review of Wireless Telecommunications Bureau April 10, 2002 Letter, D.A. 02-857, Regarding Schedule for Auction Nos. 31 and 44, *Public Notice*, DA 02-971 (rel. Apr. 26, 2002).

[4] *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Thomas E. Wheeler, DA 02-857 (rel. Apr. 11, 2002) ("*Sugrue Letter*").

Commission precedent.[5] As Chairman Powell has made clear, if the auctions are to be delayed, "[t]he real answer does need to be a congressional act to overturn a congressional act."[6] Unless the House and Senate pass legislation that overrides the existing statutory deadline of September 30, 2002, and the president signs it into law, all before the end of September, the Commission lacks the legal basis to delay the auction.

CTIA would have Congress and the Commission believe that yet another auction delay is supported by nearly every interested party except Paxson and other incumbent broadcasters. Of course, that is not the case. Included among the more than 75 parties that favor commencing the auctions on June 19, 2002 are Congressmen, public safety providers, companies that plan to offer wireless communications services in rural areas, and companies involved in the expanding broadband internet access segment of the wireless communications industry. In assessing its statutory obligation, the Commission should ask why these parties apparently are not troubled by the litany of "uncertainties" employed by CTIA to try to delay the auction.

There is more at stake in this proceeding, however, than the near-term future of commercial wireless operations in the upper 700 MHz band. **Upper 700 MHz band-clearing will not occur if the Commission decides to delay the upper 700 MHz auction a sixth time.** If band-clearing does not occur, not only will consumers be deprived of the advanced wireless services that the wireless industry has been promising to provide for many years, but public safety operators will be deprived indefinitely of the 24 MHz of desperately needed spectrum Congress has allocated for their use. Indeed, given the statutes governing the end of the DTV

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[5] *See* n. 46, *infra.*

[6] Heather Forsgren Weaver, *House Bill Would Delay 700 MHz Auction*, RCR WIRELESS NEWS, April 22, 2002, at 3.

transition, the end of voluntary band-clearing undoubtedly will introduce real and substantial uncertainties regarding when any of the 700 MHz spectrum will become available for advanced wireless or public safety uses. With so much at stake, CTIA's manufactured "uncertainties" cannot justify violation of the express dictates of the Communications Act or of the Congressional mandate to deposit the auction proceeds by September 30, 2002.

I. CTIA'S APPLICATION PROVIDES NO BASIS FOR DELAYING THE 700 MHz AUCTIONS.

CTIA's Application is procedurally defective and provides no substantive basis for delaying the 700 MHz auctions. The Application ignores the procedural predicate required under the Commission's rules for review of the Bureau's decision. Instead, CTIA argues simply that the public interest demands a delay in the 700 MHz auctions because various "uncertainties" preclude the Commission from auctioning the 700 MHz at this time – the very same arguments considered and rejected in the *Sugrue Letter*.

A. CTIA's Application Is Procedurally Defective.

CTIA's Application is procedurally deficient in at least two respects. First, under the Commission's rules, an application for review must "specify with particularity" at least one of the following bases to justify reversal of an action taken pursuant to delegated authority:

(1) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy;

(2) The action involves a question of law or policy which has not previously been resolved by the Commission;

(3) The action involves application of a precedent or policy which should be overturned or revised;

(4) An erroneous finding as to an important or material question of fact; or

(5) Prejudicial procedural error. [7]

[7] *See* 47 C.F.R. § 1.115(b)(2)(i)-(v).

CTIA does not even mention, let alone "specify with particularity," any of these grounds. That defect alone is sufficient to dismiss the Application.[8]

Moreover, the Application relies, to a large extent, on a "change in circumstances" from those presented to the Bureau, *i.e.* the introduction in Congress of the Auction Reform Act of 2002 (the "Auction Bill").[9] CTIA, however, is barred from even raising the Auction Bill in its Application because it was not in existence at the time the Bureau considered CTIA's request for delay of the auctions. Section 1.115(c) of the Commission's rules **expressly forbids** consideration of facts contained in an application for review that were not presented to the Bureau.[10] The Commission has held that the proper means of introducing new facts to a Bureau proceeding is through a motion for reconsideration directed towards the Bureau, not through an application for review.[11] These procedural defects preclude consideration of CTIA's Application, and the Commission accordingly should dismiss it.

B. Section 309(j) of the Communications Act Forbids CTIA's Requested Relief.

The Commission's legal responsibility under Section 309(j) is explicit and unambiguous. In 1997, responding to the demands of the wireless industry to find new spectrum for public safety and advanced wireless services, **Congress directed the Commission to reallocate,**

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[8] *See* Application for A and B Block Broadband PCS Licenses, *Memorandum Opinion and Order*, 11 FCC Rcd 17062, ¶ 6 (1996) ; Chapman S. Root Charitable Trust, *Memorandum Opinion and Order*, 8 FCC Rcd 4223, ¶ 7 (1993).

[9] Application at 5.

[10] *See* 47 C.F.R. § 1.115(c).

[11] McGraw-Hill Broadcasting Company, Inc., *Memorandum Opinion and Order*, 2001 FCC LEXIS 6867, FCC 01-356, n.2 (rel. December 20, 2001) ("To the extent that [an applicant] relies upon facts relating to events which occurred after [the Division decision] these facts should have been directed to the Division in a petition for reconsideration") (application dismissed). Nor did CTIA request a waiver of this long-standing Commission rule. *See, e.g.*, Mercury PCS II, LLC, *Memorandum Opinion and Order*, 15 FCC Rcd 9654, n.52 (2000).

auction, and assign the licenses in the 700 MHz band by September 30, 2002.[12] These provisions were contained in the Balanced Budget Act of 1997, and were enacted due in no small part to a longstanding need by public safety officials for more channels of radio communication.[13] The Commission already has failed to meet the congressionally accelerated deadline of September 30, 2000 for depositing the proceeds of the Upper 700 MHz auction in the U.S. Treasury and this non-compliance with law must cease.[14] Failure to meet the September 30, 2002 deadline, then, will constitute a second and continuing violation of two controlling statutory provisions. **It is time that the Commission step up to its obligations under this statute and enforce the law.** As an instrument of Congress the Commission is required to enforce existing statutes, not positions contained in congressional letters, not arguments of lobbyists hired by the wireless industry, not mere suggestions of alternate spectrum uses and not even proposed legislation. The Commission should follow Commissioner Abernathy's "general rule of thumb" and "follow the statute set by Congress."[15]

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[12] Under Section 309(j)(14)(C) (2) of the Communications Act, the FCC is required to auction all spectrum reclaimed from broadcasters through reorganization of the broadcast bands by September 30, 2002. 47 U.S.C. § 309(j)(14)(C)(2) *see also* Pub. L. No. 105-33, 111 Stat. 251 § 3007 (uncodified; reproduced at 47 U.S.C. § 309(j) note 3) (requiring deposit of auction proceeds by September 30, 2002). In November 1999, however, Congress enacted a consolidated appropriations statute that accelerated the date by which the Upper 700 MHz auction proceeds were to be deposited in the U.S. Treasury to September 30, 2000. *See* Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, Sec. 213.

[13] *See* Remarks of Sen. John McCain, introducing bill to reallocate spectrum to public safety and advanced wireless services. 143 Cong. Rec. S945 (Feb. 4, 1997).

[14] *See* Cellular Telecommunications Industry Association, *et. al.'s* request for Delay of the Auctions of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31), 15 FCC Rcd 17406 (2000) ("*Auction Delay Memorandum*").

[15] *Abernathy Voices Concern About Statutory Limits of Auction Timing*, WASHINGTON TELECOM NEWSWIRE, April 19, 2002, at 1.

As the Bureau properly pointed out in its decision below, Congress too has been aware of the September 30, 2002 deadline but has not acted to change it.[16] Thus, the Commission is bound to follow the law as it presently exists. Given the current mandate of Section 309(j) of the Act, this conclusion is unassailable. It is axiomatic that the Commission's regulatory authority and its power to act *flows from* Congress's statutory directives and the Commission has no authority to alter or ignore those directives.[17] Consequently, the Commission is bound by the September 30, 2002 deadline. Unless and until the statutory auction dates are changed by Congress and signed into law by President Bush, the Commission lacks any legal basis to delay the auction and must comply with the statutory deadlines.

Given the clarity of the statutory commands, Chairman Powell's expression to Congress that he is concerned about the possibility of legal action should the auction be delayed is eminently responsible.[18] Commissioner Abernathy also succinctly summarized the situation when she stated that **"Today the Commission has a statutory mandate to move forward with the 700 MHz auction and that is a deadline that may well be challenged in court if we fail to hold the auction this year."**[19] Indeed, at least two parties that intend to participate in the auctions, the Rural Telecommunications Group and Council Tree Wireless, LLC, have explicitly

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[16] *Sugrue Letter* at 2.

[17] *See United States v. Storer Broadcasting*, 351 U.S. 192, 202-205 (Commission regulatory power is broad but restricted to acts "not inconsistent with the [Communications] Act" (citing 47 U.S.C. §§ 154(i), 303(r))).

[18] *Powell Indicates Discomfort With Delaying 700 MHz Auction Again*, COMMUNICATIONS DAILY, April 18, 2002, at 1.

[19] *Abernathy Echoes Concerns Over Statutory Limits on Auction Date*, COMMUNICATIONS DAILY, April 22, 2002, at 1.

threatened legal action, if the Commission delays the auction.[20] Moreover, Paxson and other members of the Alliance have spent over $3 million in participating in Commission proceedings, implementing the Commission's band-clearing policies, and preparing for the auction in reasonable reliance on the FCC's stated intentions and duty to meet the September 30, 2002 deadline. Paxson and the Alliance anticipate that aggrieved parties will seek to protect their legitimate interests if the Commission ignores its statutory obligations and grants CTIA's request.

C. CTIA's Claims of "Uncertainty" are Disingenuous and Insufficient to Override Congress's Clear Command.

CTIA argues that various uncertainties related to the 700 MHz spectrum justifies delay.[21] Specifically, CTIA argues that each of these elements of uncertainty preclude the Commission from satisfying its statutory obligation 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."[22] In fact, the Commission and other parties have spent the last several years addressing and resolving the very "uncertainties" that CTIA now claims would justify a sixth auction delay.

Contrary to CTIA's claims, a considerable number of parties in fact intend to participate in the auctions or want the auctions to proceed on schedule. Such parties include companies interested in providing wireless broadband services such as Intel and numerous local companies,

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[20] *See Ex Parte* Letter filed by Rural Telecommunications Group, WT Docket No. 99-168, GN Docket No. 01-74, April 22, 2002; *see also* Allyson Vaughan, *Small Carriers May Get Legal About 700 MHz Delay*, WIRELESS WEEK, April 25, 2002, available at http://www.wirelessweek.com/index.asp?layout=story&doc_id=83266&verticalID=33&vertical=Regulatory&industry=Spectrum+and+Licensing.

[21] Application at 2-3.

[22] 47 U.S.C. § 309(j)(3)(E)(ii).

such as Alaskan Native Wireless, who plan to offer new services in rural areas.[23] The fact that CTIA, dominated by the major wireless voice service providers, would seek to delay an auction that might provide spectrum to competitors casts doubt on CTIA's motives in filing the Application.

1. The Commission Has Resolved the Uncertainty Surrounding the 700 MHz Auction.

The Commission is well aware this is the *sixth* time the wireless industry has made these *same arguments*. The upper 700 MHz band auction originally was scheduled to commence May 10, 2000.[24] Just as CTIA is asking now, several wireless commenters requested additional time to develop business plans and bidding strategies, leading to an initial delay to June 7, 2000,[25] and then to September 6, 2000.[26] Then, in July, 2000, CTIA and others requested a nine-month delay based on uncertainties regarding the Commission's band-clearing policies and the Commission's package bidding procedures.[27] This request led to a delay of the upper 700 MHz auction until March 6, 2001.[28] On January 18, 2001, Verizon Wireless sought a further

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[23] *See Ex Parte* Letter describing Presentation of Spectrum Exchange and Intel Corporation, filed April 26, 2002; *see also* COMMUNICATIONS DAILY, April 30, 2002, at 5-6; Paige Albiniak, *700 MHz Auctions, Take 6*, Broadcasting and Cable, April 29, 2002 at 46.

[24] *See* Auction of Licenses in the 747-762 and 777-792 MHz ("700 MHz") Bands Scheduled for May 10, 2000; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, DA 00-43 (rel. Jan. 10, 2000).

[25] *See* Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until June 7, 2000, *Public Notice*, DA 00-573 (rel. Mar 17, 2000).

[26] *See* Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 6, 2000, *Public Notice*, DA 00-942 (rel. May 2, 2000).

[27] *Auction Delay Memorandum*, ¶ 4.

[28] *Id.* ¶ 1.

postponement of the upper 700 MHz auction.[29] The Bureau granted the request "to provide additional time for bidder preparation and planning and for reasons of auction administration," resetting the auction for September 12, 2001.[30] Finally, the Bureau delayed the upper 700 MHz auction due to Petitions for Reconsideration of the *Third Report and Order* in WT Docket No. 99-168,[31] and, six months ago, setting the current June 19, 2002 date after those petitions had been resolved.[32]

What is most striking about this ***sixth*** request for delay is that ***none*** of the previously cited uncertainties exist any longer. CTIA cannot expect the Commission to be persuaded that wireless operators need still more time (after two years) for evaluation of the auction procedures or formulation of business plans. The Commission has addressed uncertainties about its band-clearing regime through a thorough, multi-year rule making process,[33] eliminating the basis for

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[29] *See* Wireless Telecommunication Bureau Seeks Comment on Request for Postponement of Auction of Licenses in the 747-762 and 777-792 MHz Bands, *Public Notice*, DA 01-143 (rel. Jan. 18, 2001).

[30] *See* Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 12, 2001, *Public Notice*, DA 01-266 (rel. Jan. 31, 2001).

[31] *See* Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) is Postponed, *Public Notice*, DA 01-1546 (rel. July 11, 2001).

[32] *See* Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Scheduled for June 19, 2002, *Public Notice*, DA 01-2394 (rel. Oct. 15, 2001).

[33] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Order on Reconsideration of the Third Report and Order*, WT Docket No. 99-168, FCC 01-258 (rel. Sept. 17, 2001); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Third Report and Order*, 16 FCC Rcd 2709; Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000) ("*Upper 700 MHz MO&O*"); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476 (2000) ("*700 MHz First Report and Order*"); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, 12 FCC Rcd 22953 (1998); Reallocation of

the July 2000 delay.[34] In response, Paxson and the Alliance have eliminated concerns that broadcasters might not be willing to negotiate agreements to vacate their upper 700 MHz spectrum. Paxson, for example, has filed numerous regulatory requests that would lead to clearing incumbent operations from the upper 700 MHz band pursuant to extraordinary Commission effort to create band-clearing procedures – procedures that the wireless industry sought and supported.[35] and one such request already has been granted. Paxson understands that its other members soon will file similar requests. Contrary to CTIA's claims, then, there is substantial certainty regarding how and when band-clearing will take place.

Moreover, the Commission has auctioned encumbered bands in the past, including, for example, the 800 MHz SMR spectrum and Emerging Technologies Spectrum at 1850-1990 MHz, including the broadband PCS spectrum located at 1890-1910 MHz and 1970-1990 MHz.[36] In each of those cases, band-clearing strategies were developed and implemented, just as they have been in the 700 MHz proceedings. Thus, if CTIA is correct and the need to accomplish band-clearing is a sufficient uncertainty to establish grounds for a delay, the Commission could never hold an auction for encumbered spectrum. History shows that this is not the case.

There also are no uncertainties regarding the terms on which the 700 MHz spectrum will be available, or what auction bidders will need to do to acquire it. If such uncertainties truly

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Television Channels 60-69, the 746-806 MHz Band, *Notice of Proposed Rule Making*, 12 FCC Rcd 14141 (1997).

[34] At that time, CTIA requested an auction delay based on uncertainty surrounding voluntary band-clearing, an enterprise that CTIA apparently supported at that time. *Auction Delay Memorandum*, ¶ 5.

[35] *See* n.39, *infra*.

[36] The SMR auction was Auction No. 16 and the PCS auction was Auction No. 35.

existed, CTIA and its members could and would have aired them during the Commission's auction proceedings, which were conducted and completed in February and March of this year.[37] CTIA, however, elected not to participate, instead filing its request for delay merely three weeks after those proceedings terminated and approximately six months after the auction date was announced by the FCC. CTIA has never explained why it did not raise its delay request at the appropriate time, and none of the objections that CTIA raised in that request or its Application are based on circumstances that emerged during those three weeks.

2. Most "Uncertainty" that Currently Exists is CTIA's Own Invention.

Apparently recognizing the risk of relying solely on two-year old arguments to justify a sixth auction delay, CTIA has manufactured some new "uncertainties," which simply do not exist. For example, CTIA now apparently questions voluntary band-clearing, claiming that Paxson and the Alliance raise anti-trust concerns because 700 MHz broadcasters will act in concert to reach band-clearing agreements with wireless operators.[38] Of course, CTIA and other potential auction participants have had ample opportunity to address these supposed concerns with the Commission but have failed to do so until now.[39] In any case, these concerns are

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[37] *See* Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002, Further Modification of Package Bidding Procedures and Other Procedures for Auction No. 31, *Public Notice*, Report No. AUC-02-31-B (Auction No. 31), DA 02-659 (rel. Mar. 19, 2002); Auction of Licenses in the 698-746 MHz Bands Scheduled for June 19, 2002, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, Report No. AUC-02-44-B (Auction No. 44), DA 02-563 (rel. Mar. 20, 2002).

[38] Application at 3.

[39] Indeed, most wireless industry participants in the Commission's rulemaking proceedings addressing voluntary band-clearing have expressed support for it. *See, e.g.*, Comments of U.S. West, WT Docket No. 99-168, filed Jul. 19, 1999 at 9-10; Reply Comments of AT&T Corp., WT Docket No. 99-168, filed Aug. 13, 1999 at 7-8; Airtouch Communications, Inc. Reply in Support of Opposition to Petitions for Reconsideration, WT Docket No. 99-168, filed Mar. 17, 2001 at 2-3; BellSouth Reply Comments, WT Docket No. 99-168, filed Mar. 17, 2000 at 5-7; Reply of

unfounded. As CTIA and its members are well aware, the Alliance in fact provides numerous benefits and economic efficiencies. For example, the Alliance (1) facilitates bidding by wireless providers; (2) reduces transaction costs for bidders by making available one "clearing house," instead of separate negotiations with 144 stations with over eighty different owners; (3) provides flexibility for separate clearance dates and prices on a broadcast market basis, thereby permitting clearance of a license territory at different times or different amounts; (4) provides that offers will be made to all potential spectrum bidders on a non-discriminatory basis, and creates a natural market mechanism to provide information to potential bidders; and (5) contemplates clearing Channels 63, 64, 68, and 69 that need to be cleared for public safety use (which otherwise might not be cleared because public safety agencies are unable to pay for clearing incumbents). Moreover, as CTIA is no doubt aware, the Alliance has formally advised the United States Department of Justice of the specifics of its spectrum-clearing plan, and is working closely with DOJ to ensure that the activities of the Alliance are in full compliance with any relevant anti-trust laws.

Additionally, CTIA alleges that "uncertainty" is created because manufacturers "will not focus" on developing equipment that will function in the 700 MHz band.[40] CTIA's suggestion that manufacturers are unwilling to develop and produce 700 MHz equipment is simply implausible. Beyond the smoke and mirrors of CTIA's claims is the reality that manufacturers are more than happy to expand production to provide the necessary equipment once wireless operators have acquired the spectrum and created a market. CTIA has not identified any

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APCO to Oppositions to Petition for Reconsideration, WT Docket No. 99-168, filed Mar. 17, 2000 at 2-3.

[40] Application at 3-4.

particular problems that the 700 MHz bands would create for equipment manufacturers, and one major manufacturer already is engaged in the design and production of equipment for use in the 700 MHz guard bands.[41] The wireless industry and equipment manufacturers have had several years to identify any specific problems that equipment production for the 700 MHz bands might pose and have not done so. If no equipment manufacturer has even mentioned this supposed "uncertainty," does CTIA expect the Commission to believe it really exists?

3. *Proposed Legislation and Alternative Usage Plans for the 700 MHz Band Cannot Justify Delay.*

The remaining "uncertainties" that CTIA identifies also are insufficient to justify a delay. CTIA cites the introduction of the Auction Bill as a basis for uncertainty regarding the required statutory dates for the 700 MHz auctions.[42] Of course, there is no assurance that the Auction Bill will ever become law. For exactly the reasons present in this situation, **the Commission always has recognized that proposed legislation is no justification for deviating from existing statutory provisions.**[43] Chairman Powell expressed this view perfectly in his recent remarks to

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[41] *See* Motorola to Design and Manufacture Equipment for Access Spectrum 700 MHz Guard Band Spectrum, *Press Release*, October 18, 2001, available at http://www.motorola.com/LMPS/pressreleases/page1770.htm.

[42] Application at 4. As described above, the Commission should not consider CTIA's citation of the pending legislation, which was never presented to the Bureau as a justification for delay. *See* Part I(A), *supra*.

[43] *See, e.g.*, Review of the Pioneer's Preference Rules and Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055, 4060, n.53 (1994) (recognizing pending legislation related to Commission conclusion and stating "We recognize that this pending bill is not law and emphasize that our judgment on these issues is based on our own analysis and experience"); The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 FCC Rcd 17087, 17105, n.36 (1997) (pending or desired legislation insufficient to alter Commission's mandate to collect fines for violation of operator on duty and lottery broadcast requirements and stating "Unless Congress amends the Communications Act to deregulate the action in question, we will continue to issue forfeitures for this violation, as warranted in each case"); Implementation of Sections 3(n) and

Congress when he said **"a letter from Congress is not the same as a Congressional Act."**[44] Commissioner Abernathy echoed this sentiment with her trenchant question: **"[H]ow do you explain not following a statutory mandate?"**[45]

The wisdom of remaining unswayed by proposed legislation is borne out by the fact that, as of April 4, 2002, during the current congressional session only 2.5% of the 6,147 bills introduced have been passed into law.[46] Even the sponsors of the Auction Bill acknowledge that passage of the legislation is not certain. Congressman Tauzin's spokesman stated that "[i]f we pass a bill out of the House and by a clear majority it will send a clear message to the FCC to hold off . . . The Senate is uncharted territory, but we're confident we can get this bill out of the House."[47] Even Senators sympathetic to delay describe changing the law as requiring a "Herculean effort."[48]

Moreover, staff of the Senate Appropriations Committee have publicly indicated that Senator Ted Stevens of Alaska intends to introduce a bill that would reiterate Congress's

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332 of the Communications Act; Regulatory Treatment of Mobile Services Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, *Third Report And Order*, 9 FCC Rcd 7988, 8127 (1994) (pending legislation insufficient to justify reclassification of Part 90 CMRS licensees for the purposes of fee collection under Part 22 absent prior Congressional authorization).

[44] *Powell Indicates Discomfort with Delaying 700 MHz Auction Again*, COMMUNICATIONS DAILY, April 18, 2002, at 1.

[45] *Abernathy Echoes Concerns Over Statutory Limits of Auction Date*, COMMUNICATIONS DAILY, April 22, 2002, p. 1.

[46] *See* http://thomas.loc.gov/.

[47] David McGuire, *Congressional Showdown Over Airwave Auction Looms*, NEWSBYTES, April 29, 2002, available at http://www.newsbytes.com/news/02/176222.html.

mandate that the auctions commence on June 19, 2002.[49] Lisa Sutherland, Minority Deputy Staff Director of the Senate Appropriations Committee and a senior staff person to Senator Stevens, expressed Senator Stevens's intent: "**The legislation would make it clear that this auction needs to go forward as planned. That's it for delays. Five times is enough... We just think its unfair to have something in the law that they relied on and now the rug is being pulled out from under them.**"[50]

The Commission also has received letters from Congressmen urging the Commission to follow the law and not delay the auctions.[51] Congressman Steans and Bilirakis informed the Commission that they were "pleased with [the Commission's] focus on carrying out the intent of Congress to reallocate [the 700 MHz] spectrum for commercial and public safety services. In this regard, we strongly encourage you [to] avoid further delays and proceed with the auction timetable as it is currently scheduled."[52] Thus, while there is full agreement that existing statutes must govern, there is no consensus regarding whether any changes whatsoever should be made. Attempting to regulate as if a bill delaying the auctions were certain to be passed would turn the very notion of delegated power under which the Commission operates on its head.

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[48] Brownback, Burns See Spectrum Reform Bills Dying This Congress, COMMUNICATIONS DAILY, May 1, 2002, at p 2.

[49] *See* Paige Albiniak, *Stevens: No 700-Megahertz Delay*, TVINSITE: BROADCASTING AND CABLE, April 29, 2002, available at http://www.tvinsite.com/broadcastingcable/index.asp?layout=story&doc_id=83546&display=breakingNews; *Stevens Expected to Introduce Legislation to Push 700 MHz Auction*, RCR WIRELESS NEWS, April 26, 2002, available at www.rcrnews.com/cgi-bin/news.pl?newsId=3148.

[50] *FCC Airwaves Auction Faces Trouble*, Reuters, April 24, 2002, available at http://news.com.com/2100-1033-890593.html?tag=cd_mh.

[51] *See* March 7, 2002 Letter to Chairman Powell from Congressmen Cliff Stearns and Michael Bilirakis.

CTIA further relies upon the Bush Administration's proposed budget and a letter to Chairman Powell from Commerce Secretary Donald Evans.[53] The Administration's budget proposal offers even less support for delay than the Auction Bill, with the added fact that a similar provision was included in last year's budget proposal and failed to become law.[54] Moreover, although CTIA cites Secretary Evans' letter, it omits the Secretary's statement that "[t]he Administration still believes that a legislative postponement of the auction deadlines is preferable and will continue to work towards that end."[55] Congress, however, for nearly a year-and-a-half, has ignored postponement, and there simply is not enough time or votes to achieve it now. The Commission, on the other hand, has done everything within its power to produce an appropriate auction structure and to facilitate band-clearing. Paxson and the Alliance have been prepared to engage in good faith discussions with the wireless industry, but the wireless industry has not evidenced any desire to participate in negotiations. Thus, the timing of band-clearing now is within the wireless industry's control. Five auction delays and CTIA's Application for Review show that the wireless industry is avoiding participation. The only way the Commission can ensure that band-clearing will move forward is by holding the auction and giving its band-clearing policies a chance to function. Failing to hold the auctions guarantees there will be no band-clearing.

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[52] *See id.*

[53] *See* Application at 6-7 (citing Letter from Donald L. Evans, Secretary of Commerce, to Michael K. Powell, Chairman, Federal Communications Commission, April 17, 2002, available at http://www.ntia.doc.gov/ntiahome/fccfilings/2002/700auction_41702.htm (the "*Evans Letter*").

[54] *See* Conference Report on H. Con. Res. 83, Concurrent Resolution on the Budget for Fiscal Year 2002, 107th Cong., 1st Sess. (2001).

[55] *See Evans Letter.*

Secretary Evans's letter also floats the idea of a short delay in the auction to allow Congress to act on pending legislative proposals.[56] Many of the reasons cited by Paxson and the Alliance opposing an indefinite or lengthy delay apply with equal force to a brief delay, which Paxson and the Alliance likewise oppose. First, even a short delay jeopardizes Commission compliance with the September 30, 2002 statutory deadline and further compounds non-compliance with the September 30, 2000 deadline. As the Commission knows, the journey from short-form submission to deposit of funds in the treasury can be a long and uncertain one. While it is impossible to predict with certainty, it is reasonable to believe that the auction of the 700 MHz licenses will take approximately 3-6 weeks – and perhaps longer.[57] Once the auction is complete, the FCC must issue a public notice which establishes a period of time for winning bidders to make down payments and file long form ownership applications. The Commission must then process those payments and applications and issue a notice announcing that the applications are acceptable. The notice also will establish a deadline for including petitions to deny. Assuming no delays arise from petitions or other reasons, the period from the end of the auction to the time winning bidders must submit the balance of their payments could be 3 1/2 months or more. Accordingly, even if the Commission commences Auction 31 on June 19th as scheduled, there is no guarantee it will meet its statutory burden. Consequently, a delay of even a single day places the Commission in jeopardy of violating its statutory requirement.

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[56] *See Id.*

[57] Auction 31 will be the first time the Commission has employed "combinatorial" bidding which the Commission has been reluctant in the past to employ because of "numerous complications for both the Commission and bidders." *See* Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000; Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding, *Public Notice*, DA 00-1075, at 1-3 (rel. May 18, 2000); *see also 700 MHz First Report and Order*, ¶ 124.

Finally, CTIA argues that delay is necessary because the valuation and uses of the 700 MHz spectrum are uncertain.[58] This argument is similar to that made in recent auction delay requests filed by the Private Wireless Coalition ("PWC"),[59] the Coalition for Public Safety Interference Solutions,[60] and PGTV, Inc ("PGTV").[61] In the first place, the uses of the 700 MHz spectrum are set by statute. Alternative proposals that would require additional legislation are even more speculative than the proposed legislation to delay the auction.[62] As the Alliance argued in response to PWC and PGTV, it would be unreasonable to delay the auctions in anticipation of legislation that may never be introduced, let alone passed. This is particularly the case where delay would require the Commission to abandon its carefully wrought band-clearing policies in favor of uncertain plans for the 700 MHz band that violate the Congressionally directed reallocation of the 700 MHz bands.[63]

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[58] Application at 4-5.

[59] *See* Letter to Chairman Powell from the Private Wireless Coalition, April 16, 2002.

[60] See *Ex Parte* Letter and presentation of the Coalition for Constructive Public Safety Interference Solutions, April 26, 2002.

[61] *See* Letter to Chairman Powell from Henry Goldberg, April 15, 2002.

[62] Additionally, Commissioner Abernathy has wisely expressed the opinion that 800 MHz solutions that cause too much upheaval in current spectrum arrangements should be avoided, stating that she "would like to find as many of the answers as possible to 800 MHz (interference) in the 800 MHz band itself. *See* Heather Forsgren Weaver, *Abernathy Wants 800 MHz Interference Solved Within Band*, RCR WIRELESS NEWS, April 22, 2002, available at http://www.rcrnews.com/cgi-bin/search.pl.

[63] *Ex Parte* Letter from the Spectrum Clearing Alliance to Chairman Powell, WT Docket No. 99-168, GN Docket No. 01-74, WT Docket No. 02-55, filed April 22, 2002 (opposing delay request of the Private Wireless Coalition; *Ex Parte* Letter from the Spectrum Clearing Alliance to Chairman Powell, WT Docket No. 99-168, GN Docket No. 01-74, filed April 18, 2002 (opposition to delay request of PGTV, Inc.).

4. The Commission Cannot Eliminate All Uncertainty Prior to the Auction.

Indeed, the idea that vague proposals for alternative uses of the 700 MHz bands could provide a basis for delay symbolizes CTIA's various claims of "uncertainty." Just as with every spectrum allocation there will be a path not taken, there will never be perfect knowledge regarding the actual worth of spectrum prior to an auction. If potential licensees could delay auctions based solely on claims that there is some uncertainty involved in the process, the Commission would never hold an auction. CTIA's request in this case is remarkable, however, in that it comes from an organization that has repeatedly described the wireless industry as "spectrum-starved."[64] CTIA's acknowledgement of this incongruity[65] makes it no less revealing. Moreover, CTIA's conjuring of its parade of "uncertainties" invites questions regarding CTIA's true intentions with respect to this additional spectrum allocated to wireless use.

As the *Sugrue Letter* makes clear, all of CTIA's ostensible concerns about "uncertainties" have already been addressed by the Commission. The Commission instituted a $2.6 billion reserve price for the upper 700 MHz spectrum,[66] ensuring that taxpayers receive payment for no less than the spectrum's budgeted value.[67] If CTIA's "uncertainties" actually exist, then few parties will bid on the spectrum and the reserve price is unlikely to be met. Interestingly, however, CTIA does not claim that parties will not bid, that the reserve price will not be met, or that under such circumstances holding the auction would result in needless administrative waste.

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[64] *See, e.g.*, Ben Charny and Sam Ames, *No Room at the Mobile Inn?*, CNET: NEWS.COM, November 16, 2001, available at http://news.com.com/2100-1033-275991.html.

[65] *See* Letter Requesting Delay of Auctions 31 and 44 from Thomas E. Wheeler, President/CEO of CTIA, to the Hon. Michael K. Powell, Chairman of the Federal Communications Commission, filed April 3, 2002.

[66] *Sugrue Letter* at 2.

Indeed, if attendance at the pre-auction seminar is any indication of the likely level of participation in the auction, then participation will be robust. The seminar drew attendance from a broad range of telecommunications industry participants, including America Connect, Analysis Consulting Ltd., Columbia Capital, Covington & Burling, Dielectric, Kurtis & Associates, P.C., Legg Mason, Maxlot.Com, McDermott, Will & Emery, National Economic Research Associates, Nextel Communications, Paul, Hastings, Janofsky & Walker LLP, Qualcomm, Robertson Stephens, Site-Ac, Inc., Smithwick & Belendiuk, P.C., Spectrum Exchange Group, Telephone and Data Systems, Technology Resources, Inc., Verizon Wireless, and Vulcan.[68] Additionally, several other parties, including Rural Telecommunications Group, Rural 700 MHz Group (representing over 50 small and rural local exchange carriers), McBride Spectrum Partners, Council Tree Communications, Plains Cooperative Telephone Association, Sully Buttes Telephone Cooperative, Penasco Valley Telephone Cooperative, Santel Communications Cooperative, Golden West Telecommunications Cooperative, McCook Cooperative Telephone Co., James Valley Telecommunications, Interstate Telecommunications Cooperative, and Phillips County Telephone Co. have specifically asked the Commission not to delay the auctions.

D. CTIA's Request is Distinguishable From Those Granted in the Past.

The lack of uncertainty surrounding the 700 MHz auctions dooms CTIA's Application. Without an actual basis in the Commission's rules to justify review of the Bureau's decision, CTIA appears to have modeled its request for delay on the Commission's first decision to delay

[67] In this regard, the Commission has done all it can because it is forbidden from making its auction decisions based on the likely revenue generation of the auction. 47 C.F.R. § 309(j)(7).

[68] The seminar also was streamed over the Internet, so actual participation was likely much greater.

the upper 700 MHz auction past the initial September 30, 2000 auction deadline.[69] In that instance, the Commission found a statutory conflict because the uncertainty surrounding the auctions precluded the Commission from giving interested bidders sufficient time to adequately assess the auction prior to its statutorily required date.[70] At the time of the prior delays, the Commission had not finalized its 700 MHz service rules or developed its band-clearing policies, but now it has – many months ago. Thus, there is no statutory conflict, and no basis to delay the 700 MHz auctions.

Moreover, the statutory conflict in CTIA's earlier request was between Section 309(j)(3)(E)(ii) of the Communications Act and the supplemental appropriations bill that accelerated the auction date for the upper 700 MHz auctions.[71] CTIA's current request, however, would require the Commission to find different parts of the same subsection of the same statutory section – 309(j)(3)(E)(ii) and 309(j)(14)(C)(ii) – to be in conflict, a finding that would mock Congress's obvious intent that every interested party be put on notice that the 700 MHz auction process would be completed, and that the process be actually be completed by September 30, 2002. Even if there were a conflict between these two statutes, however, the conflict would be easily resolved by the canon of statutory construction that requires a specific statutory directive (*i.e.*, the September 30, 20002 date for completion) to control the general (*i.e.* that parties have sufficient time to plan for the auctions).[72] No party has any justification for

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[69] See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, *Public Notice*, FCC 00-282 (rel. July 31, 2000); *Auction DelayMemorandum*.

[70] *Auction Delay Memorandum*, ¶¶ 6-11.

[71] *Id.*, ¶ 8.

[72] *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("It is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned . . .").

claiming a lack of notice of this date, and, as Paxson has shown, any legitimate uncertainty as to the terms on which the auction will be held.

II. AUCTION DELAY WILL SIGNIFICANTLY DAMAGE THE PUBLIC INTEREST.

CTIA's Application not only fails to provide a sufficient justification for delay; it ignores entirely the multiple public interests that will be harmed. If it chooses delay, the Commission will, in effect, be abandoning years of band clearing efforts just when they are about to bear fruit. Chairman Powell has succinctly remarked upon the public interest stakes involved in band-clearing:

> **Allowing commercial broadcasters to profit from clearing the spectrum [may offend some] sensibilities, but the public will reap the benefits of higher auction revenues, the deployment of new services and critically needed public safety spectrum.**[73]

Nearly two years ago, the Alliance alerted the Commission that it was approaching the point beyond which band clearing would not be practical, and it has frequently urged the Commission not to continue postponing the auction if it wants Channels 59-69 cleared.[74] The Commission's five auction postponements have exhausted the margin of error.

A sixth auction postponement would wipe out the considerable band-clearing momentum, and will mean the end of the Alliance. Membership in the Alliance is reaching the critical mass necessary to conduct substantial band clearing, but organizing the 80 owners of the 144 incumbent stations in the upper 700 MHz band is no easy task. If there is another auction delay, no one – not even the Commission – will be able to resurrect the Alliance or anything like it. It is therefore crucial that the Commission not undermine its band clearing policies by

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[73] Letter from Chairman Powell to Washington Post, October 23, 2001.

delaying the 700 MHz auctions. Doing so will guarantee that the upper 700 MHz spectrum will remain unavailable to the public safety community and new wireless services for the foreseeable future.

The American people will bear the brunt of the Commission's abandonment of band-clearing in two ways. First, they will be deprived of the new commercial wireless services that the wireless industry has been so aggressively touting for several years now. The wireless industry spoke long and loud about the importance of such services and how the 700 MHz bands are ideally situated to support them. CTIA's Application, however, is silent about the wireless industry's failure to meet the customer expectations that they have so assiduously raised.

Moreover, several interested parties have indicated a desire to bring these new services to the rural areas that too often get left behind by the major telcos that dominate CTIA. Carri Bennet, General Counsel to the Rural Telecommunications Group commented "Having the auctions go forward is good for rural America and will ensure the rapid deployment of advanced services in rural portions of the country. Our members are preparing their applications and doing due diligence so we're ready to go, go, go.

More importantly, however, grant of CTIA's Application will deprive public safety entities of 24 MHz of desperately needed spectrum, impairing the functioning of critical services such as police, fire and ambulance. CTIA speaks of speculative future spectrum uses that might aid in homeland security,[75] but **the current allocation of 24 MHz to public safety operators is a concrete way to give immediate help to important servants of the public interest that are both spectrum starved and ready to use the spectrum**. Depriving the public of these

[74] Paxson Comments in response to the *Upper 700 MHz MO&O* (filed Aug. 20, 2000).

[75] Application at 5

important services cannot be justified by the wireless industry's preference against aggressively pursuing offering services in the 700 MHz bands at this time.

CONCLUSION

For the foregoing reasons, Paxson hereby requests that CTIA's Application be dismissed and that the Commission preserve its band-clearing agenda by ordering that the 700 MHz auctions commence as scheduled, June 19, 2002.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION AND THE SPECTRUM CLEARING ALLIANCE

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CERTIFICATE OF SERVICE

I, Sherene McDougall, hereby certify that on this 3rd day of May, 2002, I served copies of the foregoing Opposition to Application for Review, via first-class mail, postage prepaid, to the following:

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