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May 8, 2002

Mary Jo Manning
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Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation in WT Docket No. 99-168 & IN Docket No. 01-74 (Auctions 31 & 44).

Dear Ms. Dortch:

On Monday, May 6, 2002, electronic copies of a memo concerning the effect of the Consolidated Appropriations Act, 2000 were provided to Mr. Brian Tramont, Office of Commissioner Abernathy, Mr. Sam Feder, Office of Commissioner Martin and Mr. Paul Margie, Office of Commissioner Copps.

An original and one copy of this memo are being provided for inclusion in the docket. If you have any questions or need any additional information, please let me know.

Sincerely,

Mary Jo Manning

Attachment

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EFFECT OF CONSOLIDATED APPROPRIATIONS ACT, 2000 ON 700 MHZ AUCTION DATES

Relevant Statutory Provisions:

The Consolidated Appropriations Act, 2000 ("CAA") changed the statutory provisions concerning the 2002 auction date for the Upper 700 MHz Band, as contained in the Communications Act, as follows:

1. CAA permanently removed the competitive bidding process for the Upper Band.

The competitive bidding deadline for the Upper Band was contained in section 337 (b)(2) of the '34 Act, and section 337 in its entirety was added to the '34 Act by the 1997 Balanced Budget Act ("BBA '97"). Section 337(a) directed the assignment by competitive bidding of 36 MHz between 746 and 806 MHz for commercial use, and the Commission has fulfilled this directive. Section 337(b)(2) required that the competitive bidding process commence after January 1, 2001, while Section 3007 (of BBA '97 and not encoded into permanent law) specified this process was to be completed by September 30, 2002.

Section 213 (a)(1) of CAA deleted section 337(b)(2). The intent of this deletion as found in CAA Section 213(a)(2) was to repeal the competitive bidding process concerning the Upper Band. Specifically, section 213(a)(2) provided that the "... FCC shall initiate [on enactment of CAA] the competitive bidding process previously required under Section 337(b)(2) of the Communications Act of 1934 (as repealed by the amendment made by paragraph (1)."

2. CAA replaced this repealed process with an FY 2000 auction deadline, which expired at the end of that fiscal year.

CCA did not replace the section 337(b)(2) competitive bidding process with a deadline that amended the underlying statute. Instead, Section 213(a)(2) and (3) contain provisions calling for an auction of the Upper Band that "ensure[s] that all proceeds of such bidding are deposited ... not later than September 30, 2000." Ensuing paragraphs specified the applicability (or inapplicability) of specific provisions of underlying statutes to the 2000 auction, but none of these statutory provisions were permanently modified; nor did the CAA, directly or through legislative history, otherwise reflect an intention that the deadline extend beyond the end of the fiscal year.

Discussion:

"Well-settled principles" of statutory construction impose a "very strong presumption" that an appropriations act "applies only for the fiscal year in which it was passed." (See Brandon Calloway v. District of Columbia, 216 F.3d 1, 9 (DC Cir. 2000); Building and Construction Trades Department, AFL-CIO v. Martin, 961 F. 2d 269, 273 (DC Cir. 1992)). To overcome this presumption, Congress must "unambiguously express" its intent to effect a substantive change in the law.

It is "unambiguous" that Congress intended to remove the competitive bidding process set forth in Section 337(b)(2), including its relationship to the 2002 auction deadline. First, Congress deleted this provision from permanent law. Further, Congress specifically provided in CAA Section 213(a)(2) that it intended to "repeal" the "competitive bidding process previously required" by that section. This permanent repeal included the Section 3007 date, as it was an

integral part of the "competitive bidding process" that was repealed by Section 213 of the later act, CAA. If CAA had not intended to remove the 2002 date, but rather, for example, to keep it as a fall back, then the 2000 date could not have served its purpose as a budget offset.

Having permanently changed Section 337's process and timing, CAA did not insert language in the underlying statute concerning an FY 2000 schedule. Rather, the provision relating to the 2000 date merely was included in the general provisions of the appropriations legislation (see CAA section 213 (a)(3)).

The purpose of the 2000 auction provision was exclusively to meet budget considerations, to establish the necessary "revenue offset" so the bill could meet the budget estimate targets required for FY 2000 appropriations measures. As the then Chairman of the Senate Budget Committee told then FCC Chairman Kennard in a May 5, 2000 letter, "the purpose [of the 2000 date] was to provide an 'offset' so that the fiscal year 2000 appropriations would not exceed the spending limits established in law." Senator Domenici also stated that Congress' "motivation [in setting the 2000 date] was purely budgetary." Once the measure passed, the budget resolution obligations were fulfilled. It was not necessary at any point that the estimated revenues from the auction actually be received, and Congress certainly expressed no intention that the auction should proceed after the end of that fiscal year. In fact, had it allowed for that possibility, the provision could not have served its intended budget purpose.

Since it is evident that Congress could have amended the underlying statute when it set 2000 date (but chose not to do so), and since the motivation for the CAA provision was purely to meet fiscal year 2000 budgetary considerations (a motivation that ended with the fiscal year), there was no "unambiguous" Congressional intent supporting the conclusion that the change was permanent. Rather, there is every reason to conclude the 2000 date was not intended to survive the fiscal year. Hence, the directive expired on September 30, 2000.

Conclusion:

For the reasons stated, the permanent removal of the Upper Band bidding process from Section 337(b) coupled with the FY 2000-only duration of the replacement date left the Commission with no operative statutory deadline as of October 1, 2000. There has been no subsequent legislation to replace that date with another or to reinstate the 2002 date. Hence, the Commission is able to set the auction date whenever it concludes, pursuant to section 309(j)(3), that the spectrum will be put to its highest and best use. *

* With regard to the Lower Band, section 309 (j)(14)(C) does not appear to require an auction of all analog television licenses. It only requires a report to the Congress on revenues received from the auction of "reclaimed" licenses, which seems to contemplate licenses which had been returned to the Commission (voluntarily) by broadcasters before the end of 2002. (Further discussion is found in memo "Postponement of 700 MHz Auctions".)