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May 20, 2002

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MAY 20 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

Dear Ms. Dortch:

On May 17, Michael Hays, Jason Rademacher and the undersigned attended a meeting with Paul Rogovin and Susan Steiman of the General Counsel's Office to discuss the Commission's legal obligation to proceed with Auctions No. 31 and 44 as currently scheduled. The substance of our discussion is reflected in the attached documents that were provided to Mr. Rogovin and Ms. Steiman.

An original and one copy of this letter are provided for inclusion in the above referenced dockets. Please contact me if you have any questions or require additional information.

Sincerely,



Kenneth D. Salomon

Enclosures

cc(w/encl.): Thomas Sugrue, Chief Wireless Telecommunications Bureau
Bryan Tramont
Peter A. Tenhula
Paul Margie
Samuel Feder
Margaret W. Wiener
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**RESPONSE TO MAY 6, 2002 EX PARTE PRESENTATION
REGARDING EFFECT OF CONSOLIDATED APPROPRIATIONS ACT**

INTRODUCTION

The May 6, 2002 ex parte submission by Mary Jo Manning (“Ex Parte”) takes the meritless position that the effect of Consolidated Appropriations Act of 2000 (“CAA”) was to leave no date for the upper 700 MHz auction (“Upper 700 MHz Auction”). As established below, this erroneous interpretation violates pertinent canons of statutory construction, including the doctrine disfavoring implied interpretations (a principle which the Ex Parte failed to mention). In addition, such a construction imputes a totally irrational result: it necessarily suggests that Congress (having determined to accelerate the Upper 700 MHz Auction from September 30, 2002 to September 30, 2000) nonetheless intended by virtue of the same statute that once the year 2000 deadline passed, all deadlines ceased to exist. That argument is absurd.

DISCUSSION

A. The CAA Is Consistent With And Did Not Impliedly Repeal The September 30, 2002 Deadlines Contained In 47 U.S.C. § 309(j)(14)(C)(ii) And The 47 U.S.C. § 309 Deadline Note Provision.

Any contention that CAA § 213 has somehow repealed the September 30, 2002 deadlines contained in 47 U.S.C. § 309(j)(14)(C)(ii) and the statutory note to 47 U.S.C. § 309(j) entitled “Deadline for Collection” (hereinafter “§ 309(j) Deadline Provision”) is meritless. Those sections can and should be read in harmony because they are reconcilable and synergistic. Section 213 set an accelerated deadline for auction of the Upper 700 MHz band in furtherance of a congressional goal to reclaim that spectrum as quickly as possible for reallocation of the spectrum. Section 309(j)(14)(C)(ii) and the Section 309(j) Deadline Provision, by contrast, set a more general and encompassing congressional deadline by which the auction of the Upper and Lower 700 MHz band had to be conducted and the proceeds distributed for all “reclaimed” spectrum¹ by September 30, 2002. Congress established the Sections 309(j)(14)(C)(ii) and 309(j) Deadline Provision date of September 30, 2002 to further the overall congressional scheme for facilitating the transition to digital television by 2006.

Thus, Section 309(j)(14)(C)(ii), the Section 309(j) Deadline Provision, and CAA § 213 are consistent with each other and reconcilable because, among other things, they establish deadlines that were intended to achieve different yet complementary purposes. In fact,

¹ The term “reclaimed,” as the FCC has always recognized, means reallocated for post-transition, non-broadcast use. Both the Upper and Lower 700 MHz spectrum bands have been reallocated to new services, and thus each falls within this category of reclaimed spectrum. The term “reclaimed” in this context obviously does mean that the current broadcaster has actually returned its license to use the spectrum because the statute requires that the spectrum auctions be completed by September 30, 2002, while it mandates that broadcasters cannot be required to return their licenses to the Commission until at least December 31, 2006.

compliance with the CAA § 213 January 1, 2000 deadline would have facilitated compliance with the overall September 30, 2002 deadline.

Furthermore, the September 30, 2000 deadline in Section 213 does not imperil the continued viability of the September 30, 2002 deadline set by Section 309(j)(14)(C)(ii) and the Section 309(j) Deadline Provision because statutory provisions may not be repealed by implication. This principle is “one of the fundamental ground rules under which laws are framed.” United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985) (“It is a venerable rule, frequently reaffirmed by the Supreme Court, that ‘repeals by implication are not favored and will not be found unless an intent to repeal is ‘clear and manifest.’”) (citation omitted). See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 189 (1978) (citing “cardinal rule that repeals by implication are not favored”); Morton v. Mancari, 417 U.S. 535, 549 (1974) (same); Posadas v. Nat’l City Bank, 296 U.S. 497, 503 (1936) (same).

Congress did not reference, let alone repeal, Section 309(j)(14)(C)(ii) of the Communications Act or the Section 309(j) Deadline Provision when it enacted CAA § 213. In accordance with bedrock statutory principles, this congressional silence cannot be construed as an implicit repeal of the September 30, 2002 deadline.

Two additional statutory interpretation principles relating to implied repeals further demonstrate the spurious nature of the implied repeal argument. First, implied repeal is even more inappropriate here because Congress did explicitly repeal another provision when it enacted Section 213. The existence of a specific repealer is “evidence that further repeals (by implication) are not intended by the legislature.” 1A Norman J. Singer, Statutes & Statutory Construction § 23:11, at 493-94 (6th ed. 2002).²

When Congress enacted Section 213 and accelerated the deadline for auctioning the Upper 700 MHz to September 30, 2000, it explicitly repealed Section 337(b)(2) of the Communications Act, which required the FCC to “commence competitive bidding for the commercial licenses . . . after January 1, 2001.” The express repeal of Section 337(b)(2) indicates that Congress was well aware of related statutory provisions and able to repeal obsolete or conflicting provisions, and that it specifically chose not to repeal or alter the pre-existing deadline for completing the auction of the entire 700 MHz band by September 30, 2002.

² See also Buffum v. Chase Nat’l Bank of City of N.Y., 192 F.2d 58, 61 (7th Cir. 1951) (rejecting plaintiff’s argument that venue provision 28 U.S.C. § 1391 superceded earlier enacted venue provision 12 U.S.C. § 94 because “Congress repealed only all laws specified in the revision . . . [and] [i]t attached a schedule of the laws which it intended to repeal. . . . Section 94 was not amongst the list of repealed laws.”); Bowrin v. INS, 194 F.3d 483, 489 (4th Cir. 1999) (rejecting the plaintiff’s argument that the legislative enactment of Section 401(e) of the Anti-Terrorism and Effective Death Penalty Act removed all avenues for aliens to pursue any kind of habeas review in district court merely because it repealed specific habeas jurisdiction under Section 106(a)(10) of the Immigration and Nationality Act).

Second, the “presumption against implied repeal is especially strong when repeal is claimed to be the implied consequence of a provision in an appropriations act.” 1A Norman J. Singer, Statutes & Statutory Construction § 23:18, at 523. See Tennessee Valley Auth. v. Hill, 437 U.S. at 190 (stating emphatically that policy against repeal by implication, “applies with even greater force when the claimed repeal rests solely on an Appropriations Act”); Comm. for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 785 (D.C. Cir. 1971) (recognizing that “it is well settled that repeal by implication is disfavored, and the doctrine applies with full vigor when . . . the subsequent legislation is an appropriations measure . . .”). Here, the CAA was an appropriations act. Thus, the presumption against implied repeal is especially strong.

B. The Presumption That Appropriations Acts Apply Only To The Fiscal Year In Question Is Inapplicable to CAA § 213 And, Even If Applicable, Further Establishes The Binding Nature Of The September 30, 2002 Deadline.

As established above, the pertinent canons of statutory construction establish that the CAA did not impliedly repeal 47 U.S.C. § 309(j)(14)(C)(ii) or the 47 U.S.C. § 309(j) Deadline Provision. Despite the clarity of this principle, the Ex Parte contends that the September 30, 2000 auction date mandated in CAA § 213 “expired” on September 30, 2000. This contention is meritless for at least two reasons.

First, if a provision in an appropriations act bears no relation to the object of the appropriation, this indicates a congressional intent to make the provision permanent. See General Accounting Office, Principles of Federal Appropriations Law, Vol. 1, 2-29. Here, Section 213 is not the object of any appropriation for the simple reason that it is not an appropriation, that is, it is not a transitory budget allocation funded by Congress for a discrete period of time. To the contrary, Congress’s intent to make this provision permanent is clear because Section 213 is a necessary part of a coherent, multi-year strategy designed to work in concert with other statutory provisions to achieve spectrum clearing.

Second, the argument that Section 213 expired necessarily assumes that Congress cannot alter existing substantive law or create new, permanent law through an appropriations act. That is clearly not the case; it is well within Congress’s discretion to make a permanent change to substantive law through an appropriations act. See United States v. Dickerson, 310 U.S. 554, 555 (1940) (holding that Congress can amend substantive law through an amendment to an appropriations bill); City of Los Angeles v. Adams, 556 F.2d 40, 48-49 (D.C. Cir. 1977) (stating that “[w]here Congress chooses to [amend general laws] . . . [courts] are bound to follow Congress’s last word on the matter even in an appropriations law”). There are numerous examples where Congress has included permanent legislation as part of an appropriations act.³ Here, Congress set an unequivocal deadline designed to accelerate the date by which licenses in

³ For example, the Satellite Home Viewer Improvement Act of 1999, adopted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Appendix I, was passed by Congress as Section 1000(a)(9) of the Consolidated Appropriations Act, 2000, Pub. Law 106-113, 113 STAT. 1501.

the 700 MHz band were to be auctioned and reassigned and the fact that this was done through an appropriations act makes it no less mandatory.

Finally, if, contrary to these well-recognized principles, CAA § 213 were found to expire on September 30, 2000, such expiration merely provides added support for the principle, as independently established above, that CAA § 213 cannot impliedly repeal 47 U.S.C. § 309(j)(14)(C)(ii) or the 47 U.S.C. § 309(j) Deadline Provision. The expiration of CAA § 213 would eliminate any possible theoretical conflict between the September 30, 2000 date mandated in CAA § 213 and the September 30, 2002 date mandated by 47 U.S.C. § 309(j)(14)(C)(ii) and the 47 U.S.C. § 309(j) Deadline Provision.

CONCLUSION

There is no merit to the contention that CAA § 213 impliedly repealed 47 U.S.C. § 309(j)(14)(C)(ii) or the 47 U.S.C. § 309(j) Deadline Provision. There is no conflict between these sections, and the pertinent principles of statutory construction establish that implied repeal is forbidden under the circumstances here. Moreover, CAA § 213 did not expire on September 30, 2002, and even if it did, such expiration merely reinforces the mandatory impending September 30, 2002 auction date.



CONGRESS ROUTINELY INCLUDES AUTHORIZATION LEGISLATION IN APPROPRIATION ACTS

Congress routinely uses appropriation acts as vehicles for the passage of authorization measures. These authorization measures do not terminate at the end of the fiscal year of the appropriation act vehicle. Here are a few examples of authorization measures that were included in recent appropriations acts:

1. Satellite Home Viewer Improvement Act of 1999, adopted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, Appendix I, Section 1000(a)(9) of the Consolidated Appropriations Act, 2000, Pub. Law 106-113, 113 STAT. 1501
2. Commodity Futures Modernization Act of 2000, Appendix E, Consolidated Appropriations Act, 2001, Pub. Law 106-554, Appendix E, 114 STAT. 2763A.
3. Government Paperwork Elimination Act, Title XVII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. Law 105-277, 112 STAT. 2681.
4. Drug Demand Reduction Act, Division D of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. Law 105-277, 112 STAT. 2681.
5. Foreign Affairs Reform and Restructuring Act of 1998, Division G of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. Law 105-277, 112 STAT. 2681.
6. Chemical Weapons Convention Implementation Act of 1998, Division I of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. Law 105-277, 112 STAT. 2681.

May 20, 2002