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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the matter of	)	
	)	
Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31)	)	WT Docket No. 99-168
	)	
Auction of Licenses in the 698-746 MHz Band (Auction No. 44)	)	GN Docket No. 01-74
	)	
Cellular Telecommunications & Internet Association	)	
	)	
Paxson Communications Corporation and the Spectrum Clearing Alliance	)	
	)	
Applications for Review of Wireless Telecommunications Bureau Letter, April 10, 2002, DA 02-857	)	

ORDER

Adopted: May 23, 2002 **Released: May 24, 2002**

By the Commission: Chairman Powell and Commissioner Copps issuing separate statements; Commissioner Martin dissenting and issuing a statement.

1. The Cellular Telecommunications & Internet Association ("CTIA") has filed an Application for Review asking that we reverse a Wireless Telecommunications Bureau ("Bureau") letter[1] that denied CTIA's April 3, 2002 request[2] for an indefinite delay of Auction Nos. 31 and 44. Since the date of CTIA's original request, numerous parties have made various filings supporting and opposing a delay in one or both auctions, as well as formally supporting or opposing CTIA's Application. On May 13, 2002, Paxson Communications Corporation and the Spectrum Clearing Alliance also filed a joint Application for Review of the Bureau Letter, seeking a Commission ruling that current statutes require the Commission to proceed with current auction schedules.[3]

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[1] Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Thomas E. Wheeler, President/CEO, Cellular Telecommunications & Internet Association, April 10, 2002, DA 02-857 (rel. April 11, 2002) ("Bureau Letter").

[2] Letter from Thomas E. Wheeler, Cellular Telecommunications & Internet Association, to The Honorable Michael K. Powell, Chairman, Federal Communications Commission, April 3, 2002 ("CTIA Request").

[3] To expedite resolution of these issues, the Bureau announced a May 3, 2002 deadline for filings regarding CTIA's Application. Pleading Cycle Established For Oppositions to Applications For Review Of Wireless Telecommunications Bureau April 10, 2002 Letter, D.A. 02-857, Regarding Schedule For Auction Nos. 31 and 44, Public Notice, D.A. 02-971 (rel. April 26, 2002). All parties filing papers by May 3, 2002 regarding the scheduling of Auction Nos. 31 and 44 are listed in Appendix A. By this Order, in addition to addressing the two Applications for Review, we resolve any outstanding requests by such parties regarding the scheduling of Auction Nos. 31 and 44.

2. We have reviewed the Bureau Letter, CTIA's Application, the Application jointly filed by Paxson Communications Corporation and the Spectrum Clearing Alliance, and related filings. We conclude that the Bureau acted correctly and find no grounds in either Application[4] or related filings sufficient to reverse the Bureau Letter.

3. Accordingly, IT IS ORDERED, that the Application for Review filed by the Cellular Telecommunications & Internet Association IS DENIED and the Application for Review filed jointly by Paxson Communications Corporation and the Spectrum Clearing Alliance IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

[4] Paxson Communications Corporation and the Spectrum Clearing Alliance were not aggrieved by the Bureau's denial of an indefinite delay and, therefore, cannot file an Application for Review of the Bureau's action. *See* 47 C.F.R. § 1.115(a).

Appendix A
Parties Addressing Issues Raised By CTIA's Application

Allcom Communications

American Mobile Telecommunications Association, Inc.

Association of Public-Safety Communications Officials, International, Inc.

Bergen County Police Department, County of Bergen, New Jersey

Cellular Telecommunications & Internet Association

Cingular

Coalition for Constructive Public Safety Interference Solutions (Cingular, AT&T Wireless, Nokia, Alltel Corporation, Southern LINC, FIRSTCellular)

Cook Inlet Region, Inc.

Council Tree Communications

Dickey Rural Networks

Dobson Communications Corporation

Eastern Slope Rural Telephone Association, Inc.

Ericsson

Golden West Telecommunications Cooperative, Inc.

Interstate Telecommunication Cooperative Inc.

James Valley Telecommunications

McCook Cooperative Telephone Company

Motorola

National Emergency Number Association

National Telecommunications Cooperative Association

Nextel Communications

Norwell Television

Paxson Communications Corporation

Paxson Communications Corporation and the Spectrum Clearing Alliance (joint filing)

Penasco Valley Telephone Cooperative, Inc.

PGTV, Inc.

Philips County Telephone Co.

Plains Cooperative Telephone Association, Inc.

Private Wireless Coalition (Aeronautical Radio, Inc.; American Association of Railroads; Forest Industries Telecommunications; Industrial Telecommunications Association, Inc.; MRFAC, Inc.; National Association of Manufacturers; Small Business in Telecommunications; United Telecom Council)

Rural Telecommunications Group

Santel Communications Cooperative, Inc.

Small Business in Telecommunications

Spectrum Exchange Group

Spectrum Clearing Alliance

Splitrock Telecom Cooperative, Inc.

Sully Buttes Telephone Cooperative, Inc.

Telecommunications Industry Association

United States Department of Commerce, Secretary Donald L. Evans

Upper 700 MHz Broadcasters (Paul F. Crouch; Four Season Peoria, LLC; MidState Television, Inc.; Christian French; Shopathome TV Network; H. Jack Mizfell; Univision Communications; Tri-State Christian TV; Radiant Life Ministries, Inc.; Bill Smith/Caroline Powley; Brevard Community College; Brian E. Cobb; Christian TV Corp; Harold Camping; Bob Ball/Jane Ball/Ginni Fox)

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

In the Matters of Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31); Auction of Licenses in the 698-746 MHz Band (Auction No. 44); Cellular Telecommunications & Internet Association Application for Review (WT Docket No. 99-168, GN Docket No. 01-74).

I do not support an open-ended, indefinite delay of our 700 MHz auctions scheduled for June 19, 2002, as advocated in the application for review filed by the Cellular Telecommunications & Internet Association (CTIA) and others, but I do believe that there are compelling reasons to invoke a short delay, until January 14, 2003, of the Upper 700 MHz band auction. I do not find any compelling reasons to delay the Lower 700 MHz band auction.

I am well aware that there has been a late-inning legislative drive by the industry to change the law and remove the dates that have been leading us to conduct these auctions at this time. If Congress passes into law such changes, the Commission will immediately and faithfully comply. While I respectfully take cognizance of these Congressional efforts, I cannot in good conscience sway from what I believe to be the right result based primarily on the *prospect* of legislative change -- particularly where Congress has already spoken definitively as to our responsibilities. By our actions today, we are *not* trying to out-race Congressional efforts to change the law. The Commission has waited until the last possible moment to issue this decision. It must announce the applications that have been accepted *today*, and will begin accepting funds next week, if no action by the Commission is taken. In other words, non-action would keep both auctions moving forward and it would be even more difficult to reverse or delay. We are making an affirmative policy judgment on when to conduct these auctions under the current circumstances, while striking a balance that is respectful of both past and potential Congressional action.

INDEFINITE DELAY

The application for review filed by the incumbent wireless industry seeks an indefinite delay of two auctions that the Commission had previously determined should take place at this time. In reaching those timing decisions, we considered all the issues and concerns that are presented now at this very late hour, just on the eve of the start of the auctions. The salient point is that there is nothing new presented in this appeal that was not fully considered by this Commission in adopting the service rules and setting the dates for these auctions. Therefore, I support denying the CTIA application for review's request for an indefinite delay.

The application for review raises essentially two arguments for indefinite delay. First, it asserts that broadcasters will not vacate until the completion of the digital television transition, and thus, the uncertainty of when that spectrum will be cleared frustrates its effective use. As an initial matter, auctioning encumbered spectrum is not at all unprecedented. For example, the Commission auctioned broadband PCS while encumbered by fixed microwave users and even adjusted the relocation rules after the first PCS auction. It has also auctioned the "white-space" surrounding incumbent licensees in the MDS, paging, and SMR services.[5] Second, Congress, when it directed the Commission to auction these

[5] *See, e.g.,* Lower and Upper Paging Bands Auction Scheduled for June 26, 2001, DA 01-850, *Public Notice,* 16 FCC Rcd 7675 (2001) at 6-7 (citing interference protections post-auction new licensees will owe incumbent licensees); Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 GHz (39 GHz) Band, DA 00-112, *Public Notice,* 15 FCC Rcd 850 (2000) at 9 (same); Auction of 800 MHz Specialized Mobile Radio Service Licenses, DA 97-1672, *Public Notice,* 13 FCC Rcd 1875 (1997) at 3-4 (same); *see, also,* Amendment of Parts 21 and 74 of the Commission's Rules with regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order,* FCC 95-230,

(continued....)

bands by certain dates, was aware that the spectrum was encumbered by broadcasters and would remain so for a significant period of time after the auction. Third, the supposed uselessness of these bands is belied by the number of applications the Commission has received, indicating significant interest in bidding despite the problems of incumbency. Thus, it is not clear to me why we should delay indefinitely the auction of this spectrum because of incumbency, as the parties urge. Additionally, it is hard legally to credit claims that Congress' objectives will be frustrated by this problem of incumbency, given that Congress set the dates with full knowledge that the spectrum was encumbered (having itself set in motion the DTV transition), and would remain so long after the dates it set for licensing the spectrum and depositing the auction proceeds.

More importantly, however, the problem of broadcast incumbency is one for which there is no short path to resolution. The transition to digital television could take well over a decade. One might argue that a modest delay is warranted, if there were a credible and imminent possibility that the bands at issue would be unburdened, but the proponents of delay do not offer one, and I see none. I am hesitant to keep spectrum off the market indefinitely, awaiting some as-of-yet unidentified solution that would greatly accelerate the transition. Jawboning, voluntary agreements and hope can only get us so far.

The only present possibility for clearing these bands is by way of the band-clearing mechanism established by the Commission in the Upper 700 MHz band that might induce broadcasters to leave the spectrum. Ironically, substantial delay would actually frustrate the possibility for band clearing in the upper band. Those broadcasters that occupy these bands will necessarily have to invest further in building out their digital stations and the possibility of relinquishing their extra 6 MHz licenses becomes much less attractive. Thus, substantial delay could create more uncertainty as to when and how the band might be cleared.

Additionally, some proponents of delay argue that even more spectrum in the Upper 700 MHz band could be made available for public safety users. Such suggestions, however, are quite speculative – though the Commission is deeply committed to improving spectrum availability and access for public safety users. For one, the problem of incumbency exists for any user of the bands. Public safety entities should be no more enthused about being moved to this spectrum than are the commercial providers that urge they be put there. In any event, there are no specific proposals that are developed that have any prospect of being realized any time soon.

I also hear some maintain that the problems associated with effective use of these bands may lead to a busted auction in which few participate and bids are low. It is important to emphasize (yet again) that good spectrum policy should not be driven by trying to garner the most dollars for the Treasury. It is such thinking, ironically, that led to the statutory auction dates that are now the subject of criticism and debate.

I would also note that requests for postponement are inconsistent with the incumbent wireless industry's consistent demands for additional spectrum. The parties seem to contend that these bands are not the spectrum they are really interested in (at least for now), so we should keep it on the government's shelf (or in the hands of analog broadcasters) until they are ready to bid on it. Withholding spectrum from auction indefinitely creates barriers to entry for new providers and may artificially shelter incumbents from competition – not a result that is in the public's interest.

The fact that a significant number of companies have applied to bid for these licenses should give pause in accepting too quickly the claims that the spectrum should not come into the market. A number

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(...continued from previous page)
10 FCC Rcd 9589 at ¶¶ 56-58 (rule making adopting interference protections for existing licensees with respect to new MDS licenses to be auctioned).

of major carriers and manufacturers now would prefer that these licenses not find their way into the market, but this should not overshadow other potential users who are anxious and willing to acquire this spectrum.[6] This Commission very recently took conscious steps to make a substantial amount of this band available for smaller and rural entities by limiting the geographic regions to RSAs and MSAs in the Lower 700 MHz band. We also made a combination of paired and unpaired bands available for new and innovative technologies to prove themselves in the market. This spectrum is allocated for flexible use and one cannot discount innovative, and potentially competitive services that might be built on the foundation that these licenses provide. We should never side with one segment of an industry over another, and I fear that accepting an indefinite delay would do just that.

Perhaps most importantly, appeals for the Commission to indefinitely put off the auction are further blunted by the fact that Congress has passed a statute – and signed into law by the President – that directs this agency to auction this spectrum by specific dates and for specific purposes. I recognize fully that the law affords some flexibility to miss statutory deadlines (we have done so several times with the Upper 700 MHz band), but those instances are rightfully narrow, and not a basis for indefinite disregard. A law passed by two houses of the U.S. Congress and signed by the President expresses the will of the people. Unelected members of an administrative agency, as Congress regularly reminds us, are duty bound to follow the law, no matter what our preferences might be otherwise. It should be above question that we should be conservative when being urged to push the envelope of the law, lest it contravene the will of Congress.

As I noted above, there have been aggressive attempts to change the law and remove (or modify) the current dates. But it is hazardous for an agency to take actions that contravene the law based only on the fact that there are efforts afoot to change that law. It is difficult and ill-advised to try and give odds on the chance of a given bill becoming law and to implement its terms before it does so. There have been several legislative proposals to alter the auction dates over the last several years (the same reasons were urged then as well), yet those efforts failed. Again, if Congress passes into law such changes, at any time, the Commission will immediately and faithfully implement its directives. In fact, I would encourage Congress to grant this agency the flexibility and discretion it needs for scheduling *all* auctions, not just these.

UPPER 700 MHZ AUCTION DELAY

With all that said about an indefinite delay, I have reluctantly concluded that the best course is for the Commission to temporarily delay the auction of the Upper 700 MHz band until January 14, 2003. While we cannot be sure of the ultimate outcome, the potentially imminent prospect that Congress may wish to change its policy gives me pause. While this legislative activity alone would not be enough, a number of technical questions and must carry issues remain outstanding that could affect the prospects for clearing the Upper 700 MHz band for new commercial and public safety users and they should be resolved.

[6] I note with interest that on July 20, 2000, a number of large industry players asked the Commission to delay the Upper 700 MHz auction (then scheduled for September 6, 2000) until June 2001. *See* Letter to William E. Kennard, Chairman, from the Cellular Telecommunications Industry Association, AT&T Wireless Services, Inc., BellSouth Corp., Ericsson, Inc., Motorola, Inc., Nextel Communications, Inc., Qwest Wireless, LLC, SBC Communications, Inc., Verizon Wireless, and VoiceStream Wireless. These players noted that "[b]ecause of its location in the electromagnetic spectrum and its excellent propagation characteristics, the 30 MHz of spectrum to be auctioned in the 700 MHz band is ideally suited for the next generation mobile and high-speed broadband services. These services will intensify competition for all communications services and yield tremendous benefit to the public." *Id.* at 1. In light of pending rulemaking proceedings involving the band clearing process, they urged the Commission to "work with Congress as necessary to permit a postponement of the [Upper] 700 MHz auction until June 2001." *Id.* at 3-4.

It bears repeating that, with this temporary delay, we are *not* imposing a deadline on Congress. Instead, we are making an affirmative policy judgment to move the auction to a date of our choosing. The Commission and its auctions staff have been planning for a long time to conduct these auctions (pursuant to Congressional direction) in a fair and efficient manner. Congress set out both the timing of such auctions and the purposes to which the spectrum should be put. There is a substantial effort underway in Congress to possibly change aspects of that policy. However, the fact that legislation has passed the House and that there are serious efforts to pass legislation quickly raises concerns in my mind about the destabilizing effect on the auction. Proceeding under this additional cloud of uncertainty could affect financing decisions and bidding behavior, thereby compromising the integrity of the auction. But I also note that just because the Commission delayed this particular auction before, it cannot stand for the proposition that it can delay whenever and for as long as it wishes. That would make a mockery of the laws enacted by Congress and set a troubling precedent for an administrative agency.

LOWER 700 MHZ AUCTION ON SCHEDULE

With regard to the Lower 700 MHz band, I am pleased that two of my colleagues have supported the effort to keep on schedule with that auction. There is a clear Congressional directive that requires the Commission to put money in the Treasury by the end of September for this spectrum to be reclaimed from analog broadcasters. Time remains for the Commission to comply with the current statutory date, and it should endeavor to do so absent compelling circumstances or other serious outstanding issues. Such circumstances or issues, to my mind, have not been presented by the proponents of delay. Moreover, there are unique public interest benefits to putting this spectrum in the market that tip in favor of proceeding. For example, the Commission has created licensing rules that will provide unique opportunities for rural and small interests to obtain licenses -- one of the public interest objectives of Section 309(j) of the Communications Act. Additionally, the application filings show substantial interest in this particular auction.

Of course, many of the arguments for temporarily delaying the Upper 700 MHz band auction could be said of the lower band as well. However, I believe important distinctions do exist. In addition to the unique positive public interest benefits identified above, one significant distinction is the fact that the specific legislative dates for the Upper 700 MHz band have long passed. That auction was previously delayed past the dates established in the year 2000 Consolidated Appropriations Act, based on the belief that conflicts in separate and distinct legislative goals necessitated additional time. We could have easily chosen to schedule the auction a few months from now instead of the dates we did select. In my view, we have come close to resolving those original concerns, but I believe we have greater latitude to set that auction date, within a very short realm of reasonableness. Additionally, in the Upper 700 MHz band, we have established a mechanism that affords an opportunity to clear the band of incumbent broadcasters to make way for new public safety and commercial services, but some technical issues are outstanding. We declined, however, to establish a similar band clearing mechanism for TV Channels 52-58 in the lower band and thus no such basis exists for further delay.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

RE: Auction of Licenses in the 747-762 and 777-792 MHz Bands and Auction of Licenses in the 698-746 MHz Band.

After a great deal of deliberation, I agree with today's decision to proceed as scheduled with the auction of licenses in the 698-746 band and temporarily to postpone the auction of licenses in the 747-762 and 777-792 MHz bands.

The statutory directives related to auction dates for the 700 MHz band are ambiguous. I have spent many hours trying to parse their meaning and intent. Reasonable arguments can be made for proceeding forthwith or delaying the auctions. Just about any conclusion in this matter involves some interpretive stretch on the part of the Commission.

Legitimate, but inconsistent, interpretations of section 309(j)(14)(C)(ii) of the Communications Act of 1934 and section 3007 of the Balanced Budget Act of 1997 provide no clear statutory language on which to determine Congressional intent. Legislative history related to these provisions is, unfortunately, also inconsistent. Given these conflicting possible interpretations, I am forced to attempt to meet our responsibilities in the best way possible.

I believe that moving forward with the lower 700 MHz band will both advance the goal of deploying rural wireless services and will move us towards resolution of assignment questions for this band, which Congress appears to value. I believe that our action today on the lower 700 MHz band has a sounder basis in statute and legislative history than would a delay of the entire band. A temporary postponement of at least part of the 700 MHz band, while controversial, seems in order given the apparent intent of Congress to legislate on this matter in the near-term future. The House of Representatives has already passed legislation, and reports of possible Senate action should give the Commission pause in moving ahead in the face of these Congressional concerns. Today's delay will allow Congress time to consider pending legislation related to auctions.

It should be noted that the Commission is forced to act now because the auction clock is running and a decision could not have been made subsequent to this that would have accommodated completing an auction this fall.

For these reasons, I support today's decision on this matter.

DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: *Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31), Auction of Licenses in the 698-746 MHz Band (Auction No. 44)*, Order, WT Docket No. 99-168, GN Docket No. 01-74

I respectfully dissent from the Commission's decision not to grant CTIA's petition to delay the auctions for the entire 700 MHz band. I believe the public interest would best be served by delaying the 700 MHz auctions to allow the Commission time to develop a more comprehensive approach to these spectrum issues.

The Commission has previously concluded that it has the authority to delay the 700 MHz auctions, so long as a delay would further our "statutory mandate to design our auction rules and procedures so as to manage the radio spectrum effectively and efficiently in the public interest." *Cellular Telecommunications Industry Ass'n et al's Request for Delay of the Auctions in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31)*, Memorandum Opinion, 15 FCC Rcd 17,406 ¶ 6 (2000) (Commission deciding to delay the auction for the upper 700 MHz band). Today's Order does not alter this conclusion, and, in a companion item released today, the Commission once again postpones the upper 700 MHz auction, this time for another seven months.

I believe the public interest would best be served by delaying the 700 MHz auctions indefinitely. The Commission is currently involved in a number of other proceedings involving complex spectrum management issues, such as our proceeding to identify additional spectrum for advanced wireless services and our proceeding to improve public safety communications in the 800 MHz band. In my opinion, we should consider these issues in a more comprehensive manner before proceeding with the 700 MHz auctions. A delay would also allow the Commission to shed light on the considerable uncertainty concerning when the spectrum in this band will actually become available to public safety and commercial users. The pathway to the transition to digital television – which would allow the spectrum in the 700 MHz band to become available – is unclear at best. While the Commission has allowed voluntary mechanisms for relocating incumbent broadcasters, we do not know whether and when such measures will bear fruit. And there remain outstanding issues here at the Commission, such as the pending short-spacing applications by some stations in the upper 700 MHz band, that will impact the transition. Members of Congress, the administration, and the public safety community have called for a delay of the 700 MHz auction for many of these same reasons.

I support the Commission's decision, in the companion item, to postpone the upper 700 MHz band auction but would have preferred to delay auctions for the entire 700 MHz band. I agree with one of the Commission's goals in that item – "to provide additional time for Congress to consider legislation" addressing these spectrum issues. I am troubled, however, by the implication that we are placing a deadline by which Congress must act. As I indicated above, the Commission has already determined that it has the authority to delay this auction. Particularly in such circumstances, the Commission should not impose artificial deadlines on congressional action. I thus would have preferred merely to announce that the auctions would be delayed at this time. Accordingly, in light of all of these considerations, I disagree with the Commission's decision to deny CTIA's petition requesting a delay.