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

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| **In the Matter of** | **)** | |
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| Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures | **)** | WT Docket No. 05-211 |
| | **)** | |
| Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006 | **)** | AU Docket No. 06-30 |
| | **)** | |

# CTIA – THE WIRELESS ASSOCIATION® OPPOSITION TO MOTION FOR EXPEDITED STAY PENDING RECONSIDERATION OR JUDICIAL REVIEW


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**OPPOSITION TO MOTION FOR EXPEDITED STAY PENDING RECONSIDERATION OR JUDICIAL REVIEW**

CTIA – The Wireless Association® ("CTIA") opposes the Minority Media and Telecommunications Council's ("MMTC"), Council Tree Communications, Inc.'s ("Council Tree"), and Bethel Native Corporation's ("BNC") (collectively "Joint Petitioners") Motion for Expedited Stay Pending Reconsideration or Judicial Review ("Motion") of Auction 66.[1]

## I. INTRODUCTION AND SUMMARY

Auction 66, as repeatedly recognized by the FCC and multiple commenters, is essential to the timely deployment of advanced wireless services. The Commission recently amended the Designated Entity ("DE") rules in an effort to improve the legitimacy of the DE process and to reduce the risk of fraud and abuse. In seeking to disrupt the auction schedule and the purposes of

[1] Motion for Expedited Stay Pending Reconsideration or Judicial Review, Minority Media and Telecommunications Council, Council Tree Communications, Inc., and Bethel Native Corporation, WT Docket No. 05-211, AU Docket No. 06-30 (filed May 5, 2006) ("Motion").

the new DE rules, the Joint Petitioners fail to satisfy each of the four prongs necessary to issue a stay.[2]

*First*, Joint Petitioners contend that they would eventually succeed in challenging the new DE rules because those rules are unsound, were made with insufficient notice, unsettle investor expectations, and introduce regulatory uncertainty into the process. However, the Commission provided adequate notification to all parties that the new rules would apply to Auction 66. As such, the Commission was well within its administrative expertise to structure the rules for upcoming auctions and Joint Petitioners are not likely to succeed on the merits.

*Second*, Joint Petitioners contend that numerous potential DE participants would be irreparably harmed because they would have difficulty responding to the new rules and securing investor support in time for the auction. The purported showing of irreparable harm does not allege anything more than remote and contingent economic effects that could still be remedied in time for the auction – something that does not satisfy the second prong of the stay test.

*Third*, contrary to the views of numerous outside parties, Joint Petitioners suggest that no outside party will be harmed by a stay. This argument ignores the interests of every other party that benefits from a DE program that in the FCC's view will be less subject to fraud and abuse. It also disregards the interests of those who structured *their* expectations based on the upcoming auction schedule.

*Finally*, Joint Petitioners contend that the public interest would be served by not

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[2] *See, e.g.*, *In the Matter of Request for Extension Of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, Memorandum Opinion and Order, 14 FCC Rcd 6080, 6084 ¶ 8 (1999) ("Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.") (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

introducing new rules at this time. However, as the Joint Petitioners themselves noted in their comments in this proceeding, the public interest is served by limiting the risk of fraud and abuse in the DE program. The new DE rules do not exclude any eligible party from Auction 66 and do not deny any party DE credits. Rather, the new DE rules merely preclude practices that the FCC has concluded could potentially harm the public interest. As Joint Petitioners have failed to satisfy *any* of the prongs of the stay analysis, the Commission should reject Joint Petitioners' Motion.

## II. BACKGROUND

The FCC's DE rules are designed to protect against fraud and abuse in the issuance of DE benefits in auctions. To ensure that these rules continue to protect the auction process, the FCC sought comment on whether it should adopt any revisions to its unjust enrichment rules in the *Further Notice* in this proceeding.[3] In conjunction with this goal, several commenters submitted pleadings indicating that the FCC's unjust enrichment rules do not adequately protect against such fraud and abuse.[4] Accordingly, in the *Second Report and Order*, the FCC modified these rules in order to "increase [its] ability to ensure that the recipients of designated entity benefits

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[3] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753, ¶ 20 (2006) ("*FNPRM*"). All comments and submissions submitted in response to this *FNPRM* are short cited herein. *See also id*. at ¶ 15 (stating that the *FNPRM* was initiated "to address any concerns that our designated entity program may be subject to potential abuse").

[4] *See* Ex Parte of the U.S. Department of Justice at 4 (indicating that the FCC rightly solicited comment on how to strengthen its rules because bidders have engaged in fraudulent activity in the past and referencing enforcement action that it has taken against bidders who had previously fraudulently participated in FCC auctions); Comments of STX at 2 (supporting "stricter unjust enrichment rules so that the U.S. Treasury may be made whole in the event that a designated entity turns out to have been merely a front organized to secure bidding credits for a large incumbent wireless service provider"); Comments of MMTC at 15 (suggesting that the FCC adjust its reimbursement obligations to require 100 percent of the value of the bidding credit and expand the unjust enrichment standard to encompass the entire license term and not just the first five years).

are limited to those entities and for those purposes Congress intended."[5] More specifically, the FCC amended its unjust enrichment rules by extending the unjust enrichment period to ten years.[6] In doing so, the FCC indicated that such a modification will provide a deterrent to speculation and participation in the licensing process by those who do not intend to offer service to the public.[7]

In the *Further Notice*, the FCC indicated that any revisions to its DE rules would apply to the upcoming Auction 66.[8] At the time, the Joint Petitioners supported this stance. For example, Council Tree stated that "[Auction 66] is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources . . . and this opportunity *should not be delayed*,"[9] despite its support of the FCC's modifications to the DE rules and its acknowledgement that these DE rules should apply to Auction 66.[10] By issuing the *Second*

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[5] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 06-52, ¶ 1 (Apr. 25, 2006) ("*Second Report and Order*").

[6] *Id.* at ¶ 36.

[7] *Id.*

[8] *FNPRM* at ¶ 1 ("We intend to complete this proceeding in time so that any modifications to our rules resulting from this proceeding will apply to the upcoming auction of licenses for Advanced Wireless Services ("AWS"), which currently is scheduled to begin June 29, 2006").

[9] Council Tree Comments at 38-39. *See id*. at 61 ("[T]he auction of AWS-1 licenses is a critical opportunity for smaller carriers . . . and that opportunity should not be delayed.").

[10] Council Tree Comments at 61-62 (stating that (1) the FCC should apply *any changes* adopted in this proceeding "to AWS licenses currently scheduled to be offered in an auction beginning June 29, 2006"; (2) the FCC "should ensure that its new rule is known (*or at least knowable*) to potential applicants in advance of the short-term filing deadline"; and (3) "[i]f the Commission is concerned about the effective date of the rule once it has been announced, the Commission may invoke its authority to direct that the new rule shall become effective upon publication in the Federal Register, without the normal thirty-day delay").

*Report and Order* when it did, the Commission afforded potential bidders more notice than the amount Council Tree requested. Now, after the Commission announced the DE rules through a process in which Council Tree actively participated, the Joint Petitioners, including Council Tree, have adopted a new position that directly conflicts with its previous stance, arguing that providing "just *two weeks* [notice] before the current Auction 66 short-form application deadline" is inadequate because it disrupts existing business models, and as a result Auction 66 must be stayed.[11]

CTIA strongly opposes any request to stay the beginning of Auction 66. As the Commission has indicated in many contexts, proceeding with Auction 66 in a timely manner is essential to the deployment of advanced wireless services.[12] Indeed, many of the individual FCC Commissioners have indicated their commitment to ensuring that Auction 66 proceeds on time.[13] Similarly, many entities, including many of CTIA's members, have indicated that they need additional spectrum *now* so they may deploy advanced services.[14] For example, in its Reply

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[11] Motion at 21 (emphasis in original).

[12] *See, e.g.*, Auction of Advanced Wireless Services Licenses Scheduled For June 29, 2006, Public Notice, FCC 06-47, ¶ 54 (rel. Apr. 12, 2006) ("It is in the public interest to make AWS spectrum available as soon as it is both reasonable and consistent with CSEA").

[13] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, FCC 06-8, Separate Statement of Commissioner Michael J. Copps (rel. Feb. 3, 2006) ("I am committed to sticking to our schedule for the AWS auction . . . [w]e need not delay this auction- which holds great promise for bringing new wireless services to American consumers"); *Id.*, Separate Statement of Commissioner Jonathan S. Adelstein (rel. Feb. 3, 2006) ("I have repeatedly stated my commitment to try to avoid unnecessary delays to the AWS auction").

[14] *See, e.g.*, Comments of United States Cellular Corp, AU Docket No. 06-3, at 4 (filed Feb. 14, 2006) ("U.S. Cellular strongly supports the prompt auction of the AWS-1 licenses commencing on June 29, 2006 as scheduled . . . [because it is in] the public interest [to have] additional commercial spectrum for broadband services demands"); Comments of Alltel, AU Docket No. 06-3, at 1 (filed Feb. 14, 2006) ("Alltel supports the Commission's efforts to ensure that Auction No. 66 begins on schedule").

Comments, T-Mobile argued that the Commission must "do everything within its power to prevent this proceeding from derailing the most important spectrum auction since the mid-1990s."[15] Accordingly, Auction 66 must proceed on time so as to ensure a timely deployment of advanced wireless services to the public.

## III. THE JOINT PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS FOR A STAY

The Joint Petitioners have failed to satisfy any of the four requirements for a party to obtain an injunction or stay, including showing a substantial likelihood of prevailing on the merits, that they will suffer irreparable harm, that third parties will not be adversely affected by the issuance of a stay or injunction, and that the public interest favors granting a stay.[16] The burden lies on the Joint Petitioners to satisfy each of these prongs "by a clear showing."[17] As the Joint Petitioners have not come close to satisfying this standard, the Commission must reject their motion.

### A. The Joint Petitioners Have Not Shown a Substantial Likelihood of Successfully Challenging the New DE Rules.

In order to succeed under the "likelihood of success" prong, a movant must do more than offer the possibility or even rough probability of success. It is not enough that the aggrieved

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[15] Reply Comments of T-Mobile AU Docket No. 06-3, at 1-3 (filed Mar. 3, 2006) (noting that "Auction 66 represents a vital opportunity for new entrants and existing carriers to obtain the spectrum they need to succeed in the highly competitive wireless marketplace").

[16] *See, e.g., Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925.

[17] *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004); *see also In the Matter of Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands*, Order Denying Stay, 1985 FCC LEXIS 4062, 6 ¶ 5 (1985) ("As the movant, AT&T necessarily must bear the burden of proof for a grant of its petition.").

party's arguments may have some merit and the Commission could have reached a different result. Rather, "even when a court may believe that a party would eventually prevail on the merits, it requires more, *i.e.*, 'that the record before us is of such order of probability as to mandate the stay.'"[18] The Joint Petitioners offer three primary arguments: (1) the new DE rules were announced without proper notice and, as a consequence, violate Section 309(j)(3)(E) of the Communications Act;[19] (2) the rules are arbitrary and capricious and violate the Administrative Procedure Act;[20] and (3) the new rules will unsettle investor expectations and will introduce uncertainty into the auction.[21] As discussed in greater detail, each of the Joint Petitioners' arguments fails even to reach any likelihood of success. At bottom, the Joint Petitioners seek to overturn evenly-applied rules to prevent fraud by using points that were made or should have been made in comments before the Commission. The Joint Petitioners do not offer any indication that Congress "has directly spoken to the precise question[s] at issue"[22] or that it has spoken in a manner contrary to the decision of the Commission. Similarly, they have not shown how the Commission's amendments to the DE auction rules for upcoming auctions amount to an impermissible construction of the relevant statutes.[23]

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[18] *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Order, 21 FCC Rcd 678, ¶ 11 (2006) (quoting *N. Atl. Westbound Freight Ass'n v. Fed. Mar. Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968)).

[19] *See* Motion at 6; 47 U.S.C. § 309(j)(3)(E) (requiring an adequate period of time following the announcement of rules "to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services").

[20] *See* Motion at 11; 5 U.S.C. § 706(2)(A).

[21] Motion at 8-9.

[22] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984).

[23] *Id.* at 843.

*First*, the Joint Petitioners argue that the Commission inappropriately and unexpectedly issued rules that went beyond the language of the *FNPRM* and, as a consequence, did not provide adequate notice to the interested parties.[24] This assertion belies the plain language of the *FNPRM* regarding the DE rules: "In this Further Notice of Proposed Rule Making[,] we consider whether we should modify our general competitive bidding rules . . . governing benefits reserved for designated entities[.]"[25] Further, the Commission specifically asked for comment about how to treat "spectrum leasing arrangements"[26] and whether it should change its unjust enrichment provisions. The Commission sought comment on whether to change the unjust enrichment rules for DEs, stating "We seek comment on whether . . . we should adopt revisions to our unjust enrichment rules such as those proposed by Council Tree, or in some other manner."[27] It also asked "over what portion of the license term should such unjust enrichment provisions apply."[28] Such language necessarily gave notice to all parties that the Commission could examine any element of the DE rules. The amendments to the rules challenged by the Joint Petitioners represent a logical outgrowth from the language in the *FNPRM*, and thus, with regard to the amendments addressed by the Joint Petitioners, "a reasonable person would be put on notice of the final rule."[29]

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[24] *See, e.g.,* Motion at 14 (asserting that the Commission "failed to give adequate notice and the opportunity to be heard before it adopted the new unjust enrichment rules").

[25] *FNPRM* at ¶ 1.

[26] *FNPRM* at ¶ 16.

[27] *FNPRM* at ¶ 20.

[28] *FNPRM* at ¶ 20.

[29] *See, e.g., In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 33 n.69 (2005).

*Second*, the Joint Petitioners broadly assert that the Commission has amended the unjust enrichment rules in an "unsound or unreasonable" manner.[30] Again, such an argument essentially revisits the arguments already made and rejected by the Commission.[31] Those same arguments challenge a policy matter well within the Commission's expertise and are subject to judicial deference.[32] Importantly, the Joint Petitioners do not show how the Commission's action would go beyond or contradict the plainly-expressed intent of Congress. In an effort to show the purportedly unreasonable nature of the Commission's decision, the Joint Petitioners mischaracterize the comments submitted by STX and MMTC by stating that neither suggested altering the unjust enrichment standard.[33] However, MMTC expressly requested that the "Commission consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years."[34]

*Third*, the Joint Petitioners contend that the timing of the rule change dramatically unsettles investor expectations and introduces significant uncertainty into the debate.[35] The *FNPRM* specifically alerted the public that its rules would apply to the upcoming auction,[36] and

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[30] Motion at 7.

[31] *See In the Matter of Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, Order, 17 FCC Rcd 19746, ¶ 12 (2002) (rejecting argument for stay when movant's "assumptions are based on nothing more than its belief in the merits of its case").

[32] *Chevron*, *supra* note 24.

[33] Motion at 13.

[34] Comments of MMTC at 15.

[35] *See, e.g.*, Motion at 6, 17.

[36] *See, e.g.*, *FNPRM* at ¶ 21 ("As stated at the outset, we intend any changes adopted in this proceeding to apply to AWS licenses currently scheduled to be offered in an auction beginning June 29, 2006").

the parties did not contest this scheduling in their comments.[37] In fact, the argument wasn't raised until the result was contrary to what the Joint Petitioners had hoped for when they filed their initial proposal with the Commission. As a result, parties knew at the time of the *FNPRM* of the need to prepare both for the auction and for the Commission's possible alterations to the DE rules. The Joint Petitioners waited for at least ten days after the issuance of the *Second Report and Order*[38] before filing their motion for an expedited stay. Given the Joint Petitioners' timing in filing their motion, using the timing of the recent DE rules as an argument in favor of staying their effective date and even in favor of overturning undermines Joint Petitioners' credibility. Moreover, the risk of regulatory uncertainty for the upcoming auction is minimal. As discussed previously, the amended DE rules apply evenly and to all potential auction participants. Consequently, no party will have confusion as to whether the rules apply to it.

### B. The Joint Petitioners Have Not Satisfied the High Standard to Show Irreparable Harm.

Similarly, the Joint Petitioners have not shown that they will suffer the kind of irreparable harm that warrants an expedited stay. A party cannot allege irreparable harm generally or speculatively. Rather, the harm "'must be both certain and great' and 'must be actual and not theoretical.'"[39] "[E]ven substantial injuries in terms of money, time and energy expended in the

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[37] *See, e.g.*, Council Tree Comments at 60.

[38] *See generally Second Report and Order*.

[39] *See, e.g., In the Matter of Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of Wholesale Cellular Service Providers in the State of Connecticut*, Order, 11 FCC Rcd 848, ¶ 16 (1995) ("The standard of proof for irreparable injury is quite high, as it is well settled that such injury 'must be both certain and great' and 'must be actual and not theoretical'") (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1984)).

absence of a stay are not adequate grounds to justify a stay."[40] Of particular relevance to the Joint Petitioners' arguments, upsetting an entity's economic expectations does not rise to the level of irreparable harm, as "economic loss in and of itself cannot support a claim of irreparable harm."[41]

The affidavit of the party purportedly irreparably harmed by the Commission's DE decisions[42] fails to meet this high standard. Ms. Hoffman generally asserts that her company, BNC, lost prospective investors "as a result of the new unjust enrichment rules . . . and the regulatory uncertainty created by the Commission's eleventh-hour action."[43] As the BNC affidavit implicitly acknowledges, however, the Commission's DE amendments do not irreparably harm *any* party, with the possible exception of those absolutely committed to engage in certain types of transactions. No party is barred from bidding in the Auction 66 and from filing a short form application. No party is barred from obtaining investors – even alternative investors, in the event the first set is put off by the new provisions – to support its down payment and bid. Nowhere in the affidavit,[44] and nowhere in the body of the Motion does any party assert

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[40] *Auction of Interactive Video and Data Services Licenses Scheduled to Begin February 18, 1997*, Order, 12 FCC Rcd 19, ¶ 5 (1997) (citing *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925); *see also Wisconsin Gas*, 758 F.2d at 674 (same).

[41] *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Order, WT Docket 02-55, 21 FCC Rcd 678, ¶ 13 (2006); *see also In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5585, ¶ 17 (1993) ("Neither is there any constitutional or statutory requirement that the Commission's regulatory scheme must enable cable operators to select the option that maximizes their financial position."); *Chemical Manufacturers Ass'n*, 869 F.2d at 1536 (quoted *supra* note 34).

[42] Affidavit of Anastasia C. Hoffman, Attachment 1 to Motion.

[43] *Id*. at ¶ 10.

[44] The closest BNC comes to this kind of allegation is page 11, where it blandly asserts that

that the new DE rules will drive any entity out of business entirely.[45]

Specifically, the Commission's new rules did not introduce any regulatory uncertainty into Auction 66. Rather, they plainly apply in an even-handed manner to "all determinations of eligibility for all designated entity benefits…."[46] Parties were notified that the rules would apply to Auction 66[47] and had the opportunity to plan accordingly. Potential applicants – even those who did not anticipate the full range of rule changes mentioned in the *FNPRM* – have had over two weeks after the issuance of the rules simply to submit preliminary paperwork and may still seek sufficient financing before the date of deposit. Consequently, the Joint Petitioners have failed to present the kind of strong evidence necessary to satisfy the irreparable harm requirement.

### C. The Joint Petitioners Have Ignored How Third Parties Will be Dramatically Harmed if a Stay is Granted.

In discussing how a stay would affect the interests of outside parties,[48] the Joint Petitioners have blithely disregarded the harms that will befall virtually every other participant in the auction. For example, in direct conflict with the Joint Petitioners' position, RTG and OPASTCO commented that "ensuring that the AWS-1 auction takes place as scheduled is of paramount importance. . . . It has been RTG and OPASTCO members' experience that spectrum

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(Continued . . .)
the absence of prospective investors will prevent it and other minority-owned businesses from having "a meaningful basis to participate in Auction 66."

[45] The few times where something related to economic harm has risen to the level to justify a stay, it has done so only because "the loss threatens the very existence of the movant's business." *See Wisconsin Gas*, 758 F.2d at 674.

[46] *Second Report and Order* at ¶ 5.

[47] *Supra* note 36.

[48] Motion at 21-22.

prices tend to go up when auctions are delayed, *oftentimes putting spectrum out of reach for small carriers with limited resources*."[49] CTIA, on behalf of its members, asserts that numerous participants have carefully structured contractual and financial arrangements in preparation for the upcoming auction. Granting a stay at this time will most certainly harm those who have planned adequately to obtain financial support and who wish to abide by all of the clear policies governing Auction 66.

Many entities have indicated a need for spectrum now. As discussed previously, even Council Tree recognized the need for parties to have the opportunity to participate in the auctions when it offered its own more dramatic[50] rule changes: "In this case, the auction of AWS-1 licenses is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources. *It will be the first such major opportunity in many years, and that opportunity should not be delayed*."[51] The same holds true for every other serious participant in Auction 66. Indeed, based on this comment, it appears that Council Tree was willing to impose the same kind of "fundamental and sudden rule change"[52] on outside parties, provided those changes were to Council Tree's liking.

### D. The Public Interest Strongly Favors Conducting the Auctions as Scheduled.

As detailed in Section I, it is not in the public interest to delay the auction, push back

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[49] Comments of Rural Telecommunications Group and Organization for the Promotion and Advancement of Small Telecommunications Companies, WT Docket No. 05-211, at 6 (filed Feb. 24, 2006) (emphasis added).

[50] *See Second Report and Order*, Separate Statement of Commissioner Jonathan S. Adelstein approving in part, dissenting in part (criticizing "the majority [for] fall[ing] far short of making the meaningful modifications to the DE program that were almost universally supported by commenters in this proceeding").

[51] Comments of Council Tree at 61 (emphasis added).

[52] Motion at 17.

deployment of advanced wireless services, and fail to reimburse the Federal government for their relocation expenses. This is especially true where, as here, the motivation for a stay appears to be self-interested dissatisfaction with the outcome of a proceeding that Joint Petitioners themselves initiated. Thus, as Council Tree previously advocated, the public interest favors conducting Auction 66 on June 29, 2006, as scheduled.[53]

The public – as represented by Congress, numerous commenters, the Commission, individual Commissioners, and even some of the Joint Petitioners – have all recognized that it is in the public interest to allow Auction 66 to proceed without delay. Congress has expressed its intention that the Commission conduct auctions in a manner that will promote the "*rapid* deployment of new technologies . . . for the benefit of the public."[54] Indeed, as the Commission acknowledged in a recent order denying a stay of Auction 65, "[t]wo of the primary goals of the Commission's auction program are to ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public without delays, and promote the efficient and intensive use of the electromagnetic spectrum."[55] Auction 66 is such an auction because it holds tremendous promise for bringing advanced wireless services to the American public and, as detailed above, all of the congressional pre-requisites for conducting Auction 66

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[53] *See, e.g.*, Comments of United States Cellular Corp, AU Docket No. 06-3, at 4 (filed Feb. 14, 2006) ("U.S. Cellular strongly supports the prompt auction of the AWS-1 licenses commencing on June 29, 2006 as scheduled . . . [because it is in] the public interest [to have] additional commercial spectrum for broadband services demands."); Comments of Council Tree Communications Inc. at 61 ("[T]he auction of AWS-1 licenses is a critical opportunity for smaller carriers . . . and that opportunity should not be delayed.").

[54] 47 U.S.C. § 309(j)(3) (emphasis added).

[55] *Intelligent Transportation & Monitoring Wireless LLC and AMTS Consortium, LLC , Petition for Declaratory Ruling and Motion for Stay of Auction No. 65*, Order, DA 06-1001 at ¶. 16 (citing 47 U.S.C. § 309(j)(3 )(A) and (D)).

have now been satisfied.[56] Thus, it is in the public interest that the Commission abide by the existing timetable because the proceeds from Auction 66 are essential to achieving congressional priorities.

Moreover, there has been no shortage of commenters who have recognized that the public interest requires Auction 66 to proceed as scheduled.[57] As made plain by those commenters, potential bidders have "an immediate need for the licenses that will be offered in Auction 66."[58] The Commission has stated that "it is in the public interest to make AWS spectrum available as soon it is both reasonable and consistent with CSEA."[59] Chairman Martin, Commissioner Copps, and Commissioner Adelstein have all indicated the public interest will be served by conducting Auction 66 without unnecessary delay.[60]

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[56] *See supra* Section II; *see also* Letter to Hon. Michael D. Gallagher, Assistant Secretary, NTIA, from Michael K. Powell, Chairman, FCC, at 2 (Dec. 29, 2004) (starting the eighteen month clock under CSEA Section 202(4)(A)); *see also* NTIA's Report to Congress and to the Commission on issues related to the relocation of Federal incumbents from the AWS band (Dec. 27, 2005) (providing the six months notice required under CSEA § 202(4)(A)).

[57] Comments of T-Mobile USA, Inc., AU Docket No. 06-3 at 2 (filed Feb. 14, 2006) ("T-Mobile urges the FCC not to delay the auction for any reason" because such delay would impair the deployment of affordable wireless services.); *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, FCC 06-8, Separate Statement of Commissioner Michael J. Copps (rel. Feb. 3, 2006) ("I am committed to sticking to our schedule for the AWS auction . . . [w]e need not delay this auction- which holds great promise for bringing new wireless services to American consumers."); *id.* at Separate Statement of Commissioner Jonathan S. Adelstein ("I have repeatedly stated my commitment to try to avoid unnecessary delays to the AWS auction.").

[58] *See, e.g.*, T-Mobile Reply Comments at 4.

[59] Auction of Advanced Wireless Services Licenses Scheduled For June 29, 2006, Public Notice, FCC 06-47, ¶ 54 (Apr. 12, 2006).

[60] *See, e.g.*, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162 (2003), *recon.* 20 FCC Rcd 14058, Separate Statement of Chairman Kevin J. Martin (2005) ("Adoption of this order will allow the Commission to move forward expeditiously to auction 90 MHz of wireless spectrum. Making this large swath of spectrum available will enable carriers to provide a wide range of new and better services, including in

## IV. CONCLUSION

For the reasons discussed above, the Commission should deny the Joint Petitioners' Motion for an Expedited Stay.

Respectfully submitted,

By: */s/ Christopher Guttman-McCabe*

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rural areas.").

## CERTIFICATE OF SERVICE

I, Catherine M. Hilke, do hereby certify that on this 11th day of May 2006, I caused copies of the foregoing "Opposition of CTIA – The Wireless Association®" to be delivered to the following via First Class U.S. mail or email:

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