

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

T-MOBILE USA, INC. OPPOSITION TO STAY

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T-MOBILE USA, INC. OPPOSITION TO STAY

T-Mobile USA, Inc. (“T-Mobile”) hereby files its opposition to the Motion for Expedited Stay filed by the Minority Media and Telecommunications Council (“MMTC”), Council Tree Communications, Inc. (“Council Tree”), and Bethel Native Corporation (“BNC”) (collectively “Petitioners”). Petitioners ask the Commission to stay the effectiveness of the rule changes regarding designated entities (“DEs”) adopted in the *Second Report and Order* in WT Docket No. 05-211 on April 25, 2006 (“New DE Rules”),^{1/} and the start of Commission’s upcoming auction of Advanced Wireless Services (“AWS-1”) licenses (“Auction 66”).

INTRODUCTION AND SUMMARY

Petitioners ask the Commission to do what it has often been asked to do but has never done—stay a major auction of spectrum licenses because some potential bidders

^{1/} *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rulemaking, WT Docket No. 05-211 (rel. April 25, 2006) (“*Second Report and Order*”).

are unhappy with the auction or eligibility rules.^{2/} Petitioners would prefer that the rules be more favorable to their particular interests, but they have satisfied none of the four criteria required to justify deferral of an auction that has been more than three years in the planning:^{3/} that (1) they are likely to prevail on the merits; (2) they will suffer irreparable injury if relief is denied; (3) other parties will not be harmed if relief is granted; and (4) the public interest favors a stay.^{4/}

A petitioner must make a strong showing that it will likely succeed on the merits unless the three equitable factors are unusually weighty.^{5/} As discussed below, Petitioners have not demonstrated that they have a realistic chance of prevailing on reconsideration or appeal or that they will suffer irreparable injury absent a stay. By contrast, Petitioners have all but ignored the significant harm to other auction participants and consumers that would result from a delay of Auction 66. The requested stay should be denied.

Petitioners are unlikely to prevail on reconsideration or appeal because the New DE Rules were not unlawfully adopted, as Petitioners claim.^{6/} Although T-Mobile

^{2/} In response to the Petition, one other prospective DE has likewise asked the Commission to stay Auction 66 so that the rules can be better fine-tuned to suit its particular business objectives—although its objectives are at odds in some respects with those of Petitioners. *See* Letter from Rick Cantu, President, STX Wireless, Inc., to Chairman Kevin J. Martin, WT Docket No. 05-211, AU Docket No. 06-30 (filed May 8, 2006).

^{3/} *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Notice of Proposed Rulemaking, 17 FCC Rcd 24135 (2002).

^{4/} *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (“*Holiday Tours*”) (applying and interpreting factors set forth in *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *see also Implementation of Section 254(g) of the Communications Act of 1934*, Order, 12 FCC Rcd 15739, 15748 ¶ 18 & n.55 (1997) (citing cases).

^{5/} *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

^{6/} In addition to their arguments regarding the effect of the New DE Rules on prospective Auction 66 participants, Petitioners contend that new unjust enrichment rules are unsound

continues to believe—as it argued in the rulemaking proceeding—that wholesale revisions to the previous DE regime were unnecessary to further the goals of the DE program and protect it from fraud and abuse, it was well within the Commission’s discretion to reach a different conclusion and adopt a different approach. Likewise, it was legally permissible for the Commission to depart from Petitioners’ preferred solution. The Commission adequately supported its decision to restrict certain material relationships between DEs and other entities and expand the unjust enrichment period from five to ten years as a means to deter ““participation in the licensing process by those who have no intention of offering service to the public.””^{7/} Notwithstanding Petitioners’ disappointment, the Commission’s action was not arbitrary or capricious or in any other respect unlawful.^{8/}

Nor is a stay justified on the ground that the Commission allegedly failed to provide sufficient notice of and opportunity for comment on the rule changes it ultimately adopted. In seeking comment on the problem that Council Tree had flagged, the *Further Notice* of course invited commenters to address Council Tree’s proposed solution—but it

because they “apply to *existing* designated entity relationships that were formed under, and in reliance upon, the current provisions of Section 1.2111(d)(2).” Stay Petition at 4 (emphasis in original). T-Mobile does not read the *Second Report and Order* to apply the 10-year unjust enrichment schedule to existing DEs that hold licenses they have won in past auctions. But if Petitioners’ interpretation is correct, T-Mobile agrees that that particular aspect of the decision is unreasonable and unlawful. Importantly, however, that portion of the *Second Report and Order* can be clarified or challenged in the normal course and does not warrant a stay of Auction 66.

^{7/} *Second Report and Order* ¶ 3 and n.9 (quoting H.R. REP. NO. 103-111, at 257-58 (1993)).

^{8/} Indeed, adoption of Council Tree’s proposal to prohibit material relationships solely between DEs and large, in-region wireless carriers would have raised considerably more serious legal issues than the across-the-board rules set forth in the *Second Report and Order*. As T-Mobile and other commenters emphasized, singling out a handful of companies for disparate treatment absent any evidence that they have undermined the letter or spirit of the DE program would be arbitrary and unreasonably discriminatory. *See, e.g.*, T-Mobile Reply Comments at 4-6; Cook Inlet Comments at 13; Dobson Communications Comments at 2.

also asked whether the new rules should limit material relationships that DEs may have not only with major wireless carriers, but also with other communications companies, and with “additional entities” as well.^{9/} The Commission further specifically asked about the time period over which unjust enrichment penalties should apply in the event *any* DE loses eligibility for its bidding credits.^{10/} Commenters clearly understood this notice to cover a range of possible solutions, and submitted comments that addressed both the issue of leasing and resale agreements and the application and length of the unjust enrichment penalty period.

Similarly, the proximity of adoption of the New DE Rules to the short-form application filing deadline does not warrant a stay of the auction. As an initial matter, while Petitioners rely on Section 309(j)(3)(E) of the Communications Act, this provision applies to the auction-specific rules and mechanisms relating to day-to-day auction conduct, not to non-auction-specific substantive rules such as those regarding DE benefits.^{11/} In addition, the Commission’s rules permit DEs to add investors up to and throughout the auction, so the short-form deadline does not present an obstacle to continued negotiations. In any event, Petitioners have made no showing that they require additional time to develop business plans and assess market conditions under the new regime. To the contrary, Petitioners argue that it will be impossible for them to attract financing with the New DE Rules in place regardless of how much time they are given. Thus, unless Petitioners can demonstrate a likelihood that they will prevail in their

^{9/} *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Further Notice of Proposed Rulemaking, WT Docket No. 05-211, 21 FCC Rcd 1753, ¶ 19 (2006) (“*Further Notice*”).

^{10/} *Id.* ¶ 20.

^{11/} *See* 47 U.S.C. § 309(j)(3)(E).

attempt to overturn the New DE Rules (which they cannot), imposition of a stay would serve no purpose.

The balance of harms and the public interest also plainly favor denial of Petitioners' stay request. In support of their claim of irreparable harm, Petitioners have produced a single affidavit from BNC, an entity that hoped to participate as a DE in the AWS-1 auction, but which apparently had no binding commitments for funding prior to release of the New DE Rules. Unlike BNC, moreover, which is lately interested in the telecommunications industry as a means to broaden its investment portfolio, T-Mobile has an ongoing business with millions of customers, and it can immediately put the AWS-1 licenses to good use. These licenses are the first full blocks of nationwide spectrum to be made available for wireless broadband services in a decade—they encompass a full 90 megahertz of spectrum and cover the entire United States. Failure to disseminate these licenses rapidly would undermine carrier efforts to ensure that consumers have access to the increasing range of affordable and innovative wireless services they demand and deserve.

With this objective in mind, the United States Congress, the President, the Department of Commerce, and the Commission have all been working diligently to ensure a June 2006 auction. Among other things, a trust fund and detailed procedures for the relocation of government incumbents in the AWS-1 bands have been established to ensure that the spectrum can be used expeditiously for commercial purposes. Delay of Auction 66 not only would undermine the Commission's and Congress's interest in deploying spectrum rapidly for the benefit of consumers, it would disrupt the current

government users of the spectrum that are well along in the planning process for moving their operations.

DISCUSSION

I. PETITIONERS ARE UNLIKELY TO PREVAIL ON THE MERITS

A. The Commission’s Adoption of the New DE Rules Was Not Arbitrary, Capricious, or Otherwise Unlawful.

Petitioners’ complaint about the New DE Rules boils down to their displeasure that the Commission adopted different remedies than those Council Tree proposed. The Commission has the responsibility to balance two competing statutory goals—to promote “economic opportunity and competition”^{12/} by involving DEs in the provision of wireless services, and at the same time to “prevent unjust enrichment as a result of the methods employed to issue licenses.”^{13/} Council Tree proposed that the Commission address the latter goal by denying bidding credits to any DE that enters into a “material relationship” with a large incumbent wireless carrier. T-Mobile and other commenters, by contrast, argued that the existing DE program (perhaps with enhanced enforcement measures) appropriately balanced both goals.

The Commission considered these arguments, but reached a different conclusion. In striking its own balance between the competing statutory goals, the Commission determined that the record did not support an absolute restriction aimed at a small group of potential DEs, as proposed by Council Tree. Nor did the Commission agree with T-Mobile’s assessment of the previous regime. Instead, the Commission decided that the

^{12/} See 47 U.S.C. § 309(j)(3)(B).

^{13/} *Second Report and Order* ¶¶ 7-8 (quoting 47 U.S.C. § 309(j)(4)(E)); see also *id.*, Statement of Commissioner Copps (expressing need to deter “those who try to twist the rules in order to gain unwarranted entry into these programs”).

objectives of the DE program would be better realized through certain specified material relationship limitations applicable to *all* DEs, as well as an extended unjust enrichment reimbursement period for DEs that lose their eligibility.^{14/}

There is no basis for Petitioners' contention that the New DE Rules are arbitrary, capricious or otherwise unlawful simply because they are not in line with Petitioners' wishes. The Commission made a decision that the DE program should be reformed by focusing its benefits on entities that use their licenses "to directly provide facilities-based telecommunications services for the benefit of the public."^{15/} To be sure, the means it adopted to achieve this end—resale and leasing restrictions and a ten-year unjust enrichment penalty period—may well curtail the ability of some DEs to obtain financing. But that will not be the case for all DEs—in particular, DEs that intend to enter and stay in the market as facilities-based providers of retail services are likely to find their ability to raise capital significantly enhanced. While T-Mobile did not endorse lengthening the unjust enrichment period or placing new restrictions on the leasing and resale activities of DEs, it does not dispute the Commission's legal authority to take this approach. In fact, the new unjust enrichment rules actually occupy a middle ground between the five-year period in the immediately preceding rules and the ten-year period, with no late-term payment reductions, in the rules the Commission initially adopted in 1994.^{16/} In short,

^{14/} See *Second Report and Order* ¶¶ 3-4 ("These definitions of material relationships are necessary to strengthen our implementation of Congress's directives with regard to designated entities . . . and modifications to strengthen our unjust enrichment rules [will] better deter entities from attempting to circumvent our designated entity eligibility requirements. . . .").

^{15/} *Id.* ¶ 3.

^{16/} *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2395, ¶ 264 (1994), *recon.*, Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994); *Amendment of the*

the New DE Rules represent a permissible balancing of the competing statutory objectives. Contrary to Petitioners' contention, the Commission has clearly articulated a rational connection between the facts found and the choice made.^{17/}

B. The Commission Gave Sufficient Notice and Opportunity for Comment.

The fact that a final rule varies from a proposal, even substantially, does not automatically void the regulations. Rather, a court will determine whether the final rule was in character with the original proposal and a logical outgrowth of the notice and comments received.^{18/} Given the rule amendments proposed in the *Further Notice* and the comments filed in response, there is no room for the Petitioners to argue that they lacked notice of the challenged rules. The rule changes with which the Petitioners take issue may not be the specific changes that Petitioners proposed when they asked the Commission to revamp its DE rules, but they are without a doubt a logical outgrowth of the Commission's proposals.

With regard to the Commission's application of new "material relationship" restrictions, Council Tree itself petitioned the Commission for these rules, although it suggested that they be limited to large, in-region wireless carriers. In the *Further Notice*,

Commission's Rule—Competitive Bidding Procedures, 13 FCC Rcd 374, 408-409 ¶¶ 55-56 (1997) (shortening period to five years and adopting declining payment obligation).

^{17/} As noted above, to the extent the *Second Report and Order* is interpreted to apply the new unjust enrichment schedule to licenses already issued to existing DEs, it is subject to reconsideration or reversal on that ground. A stay of Auction 66, however, is not necessary to mount that challenge.

^{18/} See, e.g., *American Paper Inst. v. EPA*, 660 F.2d 954, 959 n. 13 (4th Cir. 1981) (noting that an agency may make substantial changes if they "are in character with the original proposal and are a logical outgrowth of the notice and comments already given"); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 203, *clarified*, 885 F.2d 253, *later proceeding*, 885 F.2d 1276 (5th Cir. 1989) (upholding limitations not originally specifically proposed by the EPA because they were a logical outgrowth of notice and comments).

the Commission asked whether these restrictions should be imposed just as Council Tree recommended, or whether it should expand the scope of application to all “entities with significant interests in communication services,”^{19/} and then asked whether “there [are] *additional* entities that we should consider including as part of our proposed definition” of what constitutes a prohibited material relationship.^{20/} This request for comments provided much more than the required “germ” for the rule eventually promulgated,^{21/} and the Petitioners “should have anticipated that such a requirement might be imposed,”^{22/} as evidenced by the fact that numerous commenters, including Petitioners themselves, did in fact comment specifically on this point. It is obvious in this case that “the agency . . . alerted interested parties to the possibility of the agency's adopting a rule different than the one [precisely] proposed.”^{23/}

Council Tree, a Petitioner, argued in its comments that the Commission should adopt a prohibition limited to large, in-region wireless carriers rather than one applicable to all communications-related businesses, an alternative put forward in the *Further Notice*.^{24/} At the other end of the spectrum, Dobson Communications, which is not among the Petitioners, argued that, if adopted, the prohibition should be extended to all large investors, not just to in-region wireless carriers or even to communications-related businesses.^{25/} Nearly all commenting parties voiced an opinion about the extent to which

^{19/} *Further Notice* ¶ 19.

^{20/} *Id.* (emphasis added)

^{21/} *See Nat’l Ass’n of Psychiatric Health Sys. v. Shalala*, 120 F.Supp.2d 33, 39 (D.D.C. 2000).

^{22/} *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

^{23/} *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

^{24/} Comments of Council Tree at 35-41.

^{25/} Comments of Dobson Communications at 1-3.

the “material relationship” rules should or should not be extended to include other parties,^{26/} and it became apparent early in the proceeding that many commenters advocated a remedy broader than Council Tree preferred.^{27/} The fact that the Commission chose to follow a path that addressed the concerns it found most pressing but is at odds with Petitioners’ desires is of no moment under Administrative Procedure Act (“APA”) precedents.

Likewise, Petitioners’ complaints regarding the unjust enrichment window adopted in the *Second Report and Order* reflect only their dissatisfaction with the substantive outcome and do not identify an APA violation. The Commission gave clear notice of its intent to revisit the issue of the unjust enrichment period when it included an “Unjust Enrichment” subsection in the *Further Notice*, in which it asked: “If we require reimbursement by licensees that, either through a change of ‘material relationships’ or assignment or transfer of control of a license, lose their eligibility for a bidding credit

^{26/} See, e.g., Comments of Dobson Communications at 2 (“If it is proven true that the benefits designed for small businesses are instead being realized by large strategic investors, it surely should not matter whether that investor is an in-region incumbent wireless service provider or not.”); Comments of Poplar Associates, LLC at 3-4 (“With respect to the question of eligibility of non-carriers, Poplar submits that it would be both impractical and inequitable to single out existing wireless carriers for eligibility restrictions.”); Comments of CTIA at 5-6 (arguing against limiting the class of entities with which DEs could partner); Comments of Madison Dearborn Partners, LLC at 2 (noting that it does “not support the idea of expanding the prohibition to include designated entity relationships with other communications service providers”); Reply Comments of T-Mobile at 7 (arguing that focusing only on wireless carriers would be discriminatory); Reply Comments of Cingular at 2 (“Prohibiting DEs from forming ‘material relationships’ with four or five large wireless entities hardly solves the problem, given that DEs are free to form such relationships with the remaining Fortune 1000—some of which are substantially larger than any wireless carrier.”).

^{27/} A number of commenters, including Petitioner MMTC, also discussed under what conditions leasing and other arrangements between DEs and non-DEs should be deemed impermissible. See, e.g., Comments of MMTC at 6; *Ex Parte* Submission of Department of Justice at 4-5.

pursuant to any eligibility restriction that we might adopt, over what portion of the license term should unjust enrichment provisions apply?”^{28/}

Petitioners’ suggestion that they were not given adequate notice about possible changes to the unjust enrichment window is disingenuous at best. Indeed, Council Tree’s own comments expounded on this point and asked the Commission to keep the existing five-year window:

The Commission also seeks comment over what portion of the license term should the unjust enrichment provisions apply. *See FNPRM* at ¶ 20. There is no reason to depart from the terms of Section 1.2111 in this context.^{29/}

And, as Petitioners acknowledge, Petitioner MMTC actually urged the Commission to consider extending the window to the full ten-year license term.^{30/} The Commission’s decision to set the window at ten years does not evidence a lack of notice, especially considering that the *Further Notice* asked this question in such an obvious way that Council Tree and MMTC felt compelled to offer their views regarding any potential changes.

C. Petitioners Do Not Need or Seek a Stay for Purposes of Auction Preparation

Petitioners make much of the fact that the Commission issued its New DE Rules just two weeks before the short-form application filing deadline and argue that this timing violates Section 309(j)(3)(E) of the Communications Act, which requires the Commission “to see that an adequate period is allowed ‘after issuance of bidding rules, to

^{28/} *Further Notice* ¶ 20.

^{29/} Council Tree Comments at 58-59. Note that Section 1.2111 of the Commission’s rules contains the former five-year unjust enrichment window.

^{30/} Petition for Expedited Reconsideration, WT Docket No. 05-211, AU Docket No. 06-30, at 16 (filed May 5, 2006).

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.”^{31/}

Petitioners’ reliance upon Section 309(j)(3)(E) is misplaced, as that provision does not apply to the type of substantive, non-auction-specific Commission action represented by the New DE Rules. The Commission has interpreted Section 309(j)(3)(E) to require only that, prior to the short-form filing deadline, the Bureau give notice of “auction-specific information” and “seek comment on *specific mechanisms relating to day-to-day auction* conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation.”^{32/} Since the New DE Rules are neither “auction specific” nor “specific mechanisms relating to day-to-day auction conduct,” Section 309(j)(3)(E) does not apply.

In any event, the timing of the release of the New DE Rules does not divest Petitioners of a fair opportunity to develop business plans and attract financing. The Commission’s rules allow DEs to add non-controlling investors up to and throughout the auction. Thus, the short-form deadline does not represent a drop-dead date by which all negotiations with potential investors must cease. To the extent Petitioners actually

^{31/} Stay Petition at 17 (quoting 47 U.S.C. § 309(j)(3)(E)).

^{32/} *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374, 448 ¶ 125 (1997) (emphasis added).

required additional time to adjust their business plans to the New DE Rules, they have ample time to do so: they were given more than a month between the issuance of the *Second Report and Order* and the upfront payment deadline, and two months between the decision's release and the commencement of the auction.

But Petitioners have not even tried to show that the relatively short interval before the auction is preventing them from arranging financing or developing business plans. To the contrary, Petitioners assert (without foundation) that the substance of the new rules makes it impossible for them to obtain financing.^{33/} Providing extra time to prepare for the auction—whether it be weeks, months, or years—will not resolve that asserted difficulty, absent a Commission or court decision to “set aside the rule changes adopted as part of the *Second Report and Order*.”^{34/} The record on Petitioners' stay request lacks even a shred of evidence that Petitioners have been denied sufficient time to make adjustments to their business plans that they would make if given more time to accommodate the changed rules.

Potential bidders have been aware from the outset of this proceeding that the new rules would come down shortly before the auction. The *Further Notice* made this clear and in fact put prospective participants on notice that they would be required to certify their compliance with any new rules adopted in this proceeding even if the rules did not become final until *after* the short-form filing deadline.^{35/} Petitioners and other potential bidders have known for many months that they would need to be prepared to adjust their plans on a fairly tight schedule.

^{33/} Stay Petition at 17.

^{34/} *Id.* at 5.

^{35/} *Further Notice* ¶ 21.

II. THE BALANCE OF HARMS AND PUBLIC INTEREST MILITATE AGAINST GRANT OF THE REQUESTED STAY

To show the prospect of irreparable injury, the burden is on the movant to demonstrate that the injury claimed “is both certain and great.”^{36/} Petitioners have not met this burden. Rather, they include the affidavit of a single entity, BNC, which claims that it “and others were finalizing agreements that would give the backing that it needs to bid for licenses in Auction 66. . . .”^{37/} BNC provides no evidence that it actually would have been able to secure financing if the rules had not been changed or whether that financing, if forthcoming, would have been sufficient to allow it to purchase any licenses at auction. BNC’s belief that it “could restore some or all of the transaction on which [it was] working if the Commission made clear that the rules will not change as they apply to Auction 66 and the resulting licenses” does not demonstrate an injury concrete enough to justify the grant of the extraordinary relief Petitioners seek.^{38/}

Moreover, unlike BNC, which has just recently “chosen to seek opportunities in the telecommunications industry . . . to diversify the economic base from which [it] serve[s] [its] shareholders,”^{39/} companies like T-Mobile *currently* have tens of millions of

^{36/} *Cuomo* 772 F.2d at 976.

^{37/} Stay Petition, Affidavit of Anastasia C. Hoffman at 4. The other two Petitioners make only general assertions of harm, but provide no evidence that they have been adversely affected by the New DE Rules.

^{38/} *Id.*

^{39/} *Id.* at 2-3. Contrary to BNC’s contention, moreover, Auction 66 does not represent “a unique and crucial one-time chance for companies such as BNC to enter into the telecommunications industry.” *Id.* at 3. While the AWS-1 licenses clearly will play an important part in the wireless industry’s efforts to service their existing customers, BNC and others that are just beginning to think about entering the telecommunications field will have additional opportunities to purchase licenses, both at auction and in the secondary market. Indeed, because of the ten-year unjust enrichment period, DEs that win Auction 66 licenses will likely look first to other entities that qualify as DEs if they want to sell their spectrum. In addition, Congress has set a date certain—January 28, 2008—by which 60 megahertz of spectrum in the 700 MHz band must be auctioned. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

wireless customers, virtually all of whom are demanding high quality, reliable, ubiquitous service—from traditional voice service to the most advanced services and technologies available (or soon to be available) in the marketplace. This is an extremely important auction for wireless carriers and their customers. The delay Petitioners seek could undermine the Commission’s interest in deploying more spectrum to promote competition and innovation in the wireless marketplace. T-Mobile is ready and able to put the AWS-1 licenses to good use, leveraging its existing facilities and infrastructure to bring new services and technologies to consumers across the United States.

For similar reasons, grant of the requested stay would not serve the public interest. As the D.C. Circuit Court of Appeals has held, one highly relevant measure “by which the public interest should be gauged” is the conclusion of the administrative agency charged by Congress with determining the contours of the public interest in the relevant field.^{40/} In this case, the Commission has made clear its desire to proceed with Auction 66 in a timely manner.^{41/} Similarly, in the face of past pleas for auction delays, the Commission has determined that “grant of [the petitioner’s] Request for Stay would not serve the public interest, because doing so would defeat one of the underlying policy objectives of Section 309(j), which requires the Commission to promote the ‘rapid deployment of new technologies, products and services for the benefit of the public . . .

^{40/} *Cuomo*, 772 F.2d at 978.

^{41/} *Further Notice* ¶ 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”). . . .”); *see id.*, Separate Statements of Commissioners Copps (“I said before that I am committed to sticking to our schedule for the AWS auction.”) and Adelstein (“I have repeatedly stated my commitment to try to avoid unnecessary delays to the AWS auction.”).

without administrative or judicial delays.”^{42/} Indeed, just this week the Commission denied a request for stay of Auction 65, stating that “[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. These goals can best be met by moving forward with the Auction No. 65 license assignment process and by maintaining the announced auction schedule.”^{43/}

The Commission’s most vital public interest objective here is to ensure that essential spectrum resources are introduced into the marketplace in a timely fashion. Council Tree itself agreed with this proposition, declaring that “the single most important aspect of this proceeding is that it not disrupt the timing or certainty of [Auction 66].”^{44/} Given the thin showing of irreparable harm proffered by Petitioners, postponing Auction 66 on the eve of its commencement would severely undermine the Commission’s consistent objective.^{45/}

The Commission is not alone in believing that the public interest requires the auction to move forward. Together with the Commission, Congress, the President, and

^{42/} *Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, Order, 17 FCC Rcd 19746, 19754 ¶ 15 (2002) (“*VHF Stay Order*”) (denying petition for reconsideration of designated entity decision and for stay of auction because a stay would be contrary to Congress’s intention as expressed in 47 U.S.C. § 309(j)(3)(A)).

^{43/} *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 6-7 ¶ 16 (rel. May 9, 2006).

^{44/} Council Tree March 20, 2006 Ex Parte at n.2; *see also* Comments of Council Tree at 38-39 (stating that the auction “should not be delayed.”).

^{45/} *See VHF Stay Order, supra* note 40; *see also, e.g., Motions for Stay of Auction No. 57 and Requests for Dismissal or Disqualification*, Order, 19 FCC Rcd 20482, 20489 ¶ 20 (2004) (“[T]he Bureau must consider whether the public interest warrants a stay of the due date for the upfront payment and start of Auction No. 57. We believe that the public interest is best served by maintaining the current schedule . . .”).

the Department of Commerce have all expended significant effort to ensure a June 2006 auction of the AWS-1 frequencies. In particular, on December 23, 2004, Congress passed, and the President signed into law, the Commercial Spectrum Enhancement Act (“CSEA”), which set up a trust fund for relocation of government incumbents and provided for an auction of AWS spectrum within 18 months of the Commission’s notice to the National Telecommunications and Information Administration (“NTIA”).^{46/} A week later, the Commission provided the requisite notice to NTIA, stating that it would be holding the AWS auction in June 2006. On August 5, 2004, after receiving and reviewing proposals and comments on proposals from carriers, manufacturers and numerous other interested parties, the Commission issued a new pro-competitive band plan for the AWS spectrum.^{47/} NTIA timely delivered its relocation report, with estimated costs and schedules on December 27, 2005—allowing the auction to commence six months later.^{48/} On January 24, 2006, the Commission issued an Order implementing the CSEA.^{49/} The government users in the AWS-1 bands are well along in developing their plans to move off the frequencies, as anticipated by the CSEA. A delay at this point would significantly disrupt those plans, as well as the expectations of the commercial wireless industry, NTIA, and Congress.

^{46/} Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004) (codified in various sections of Title 47 of the United States Code).

^{47/} *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058 (2005).

^{48/} See NTIA Website: <http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm>. NTIA noted that “[t]he total number of frequency assignments that will be relocated by 12 federal agencies is 2,240 and the cost for the relocation of Federal Government operations is estimated to be \$935,940,312.”

^{49/} *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Report and Order, FCC 06-4 (rel. Jan. 24, 2006).

CONCLUSION

For the foregoing reasons, T-Mobile urges the Commission to deny Petitioners' stay request. Petitioners have not met their burden of demonstrating they are likely to prevail on the merits of the petition for reconsideration or any judicial appeal that may be filed, or that they will suffer irreparable harm absent a stay. By contrast, the interests of other potential bidders and millions of wireless consumers would be significantly undermined by delay of Auction 66.

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