Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	))))	WT Docket No. 05-211

OPPOSITION TO PETITIONS FOR RECONSIDERATION

CTIA – The Wireless Association® ("CTIA") opposes elements of the Petition for Partial Reconsideration and/or Clarification filed by the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP ("Blooston"),[1] as well as elements of the Petition for Expedited Reconsideration filed by Council Tree Communications ("Council Tree"), Minority Media and Telecommunications Council ("MMTC"), and Bethel Native Corporation ("BNC") (jointly, "Joint Petitioners")[2] of the Second Report and Order and Second Further Notice of Proposed Rulemaking in the above-captioned proceeding ("Second Report and Order").[3] CTIA supports the Commission's efforts to clarify and finalize its rules and provide certainty in advance of the upcoming August 9, 2006 auction. The Commission provided adequate notice of its rule

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[1] Petition for Partial Reconsideration and/or Clarification, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, WT Docket No. 05-211 (filed June 2, 2006) ("Blooston Petition").

[2] Petition for Expedited Reconsideration, Council Tree Communications, Minority Media and Telecommunications Council, and Bethel Native Corporation, WT Docket Nos. 05-211, 06-30 (filed May 5, 2006) ("Joint Petitioners Petition").

[3] *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, 21 FCC Rcd 4753 (2006) ("*Second Report and Order*").

changes and sufficient certainty for Auction 66, as evidenced by the 252 applicants that filed to participate.

As indicated previously in CTIA's Opposition to the Joint Petitioners' Joint Motion for Expedited Stay, which was filed concurrently with Joint Petitioners' Petition for Reconsideration, the Commission's designated entity ("DE") rules are designed to protect against fraud and abuse in the issuance of DE benefits in auctions.[4] In light of the upcoming Advanced Wireless Services auction, the FCC initiated a proceeding to consider whether these rules continue to be effective in preventing fraud and abuse.[5] In response to this Further Notice, several commenters provided evidence that the then current unjust enrichment rules were not adequate to protect against fraud and abuse.[6] As such, the FCC amended its unjust enrichment rules in the *Second Report and Order* by, among other things, extending the unjust enrichment period to ten years.[7] In their Petitions for Reconsideration, Blooston and the Joint Petitioners make several unjustified arguments, including that the modifications were made without proper notice and are arbitrary and capricious. CTIA encourages the FCC to reject these arguments,

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[4] CTIA – The Wireless Association® Opposition to Expedited Stay Pending Reconsideration or Judicial Review, WT Docket Nos. 05-211, 06-30, 5 (filed May 11, 2006).

[5] *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 (2006) ("*Further Notice*"). All comments and submissions submitted in response to this Further Notice are short-cited herein. *See also Second Report and Order* at ¶ 15 (stating that the Further Notice was initiated "to address any concerns that our designated entity program may be subject to potential abuse").

[6] *See, e.g.*, 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").

[7] *Second Report and Order* at ¶ 36.

deny both Blooston's and the Joint Petitioners' Petitions for Reconsideration, and reaffirm the strong public interest in ensuring that Auction 66 proceed with no further delays.

First, Blooston and the Joint Petitioners argue that the Commission failed to give adequate notice of the changes to the DE rules. More specifically, Blooston argues that the Further Notice "did not adequately describe the scope of the rule changes the Commission ultimately adopted" and never provided proposed wording for the new rule.[8] Similarly, the Joint Petitioners argue that the Commission's action was "neither the subject of proper notice nor the logical outgrowth of what the Commission had proposed."[9]

These arguments flatly ignore the plain language of the Further Notice and are counter to the comments filed by one of the parties seeking reconsideration in the proceeding. As noted above, the Further Notice was intended to review the FCC's DE rules as a whole to determine whether they continue to be effective in preventing fraud. [10] As such, the FCC sought comment on any and all aspects of its DE rules.[11] In addition to this broad consideration, however, the FCC also sought specific comment on its unjust enrichment provisions, stating "[w]e 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."[12] The FCC further asked "over what

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8 Blooston Petition at 3.

9 Joint Petitioners Petition at 19.

10 *Second Report and Order* at ¶ 15.

11 *Further Notice* at ¶ 1 ("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").

12 *Id.* at ¶ 20.

portion of the license term should such unjust enrichment provisions apply."[13] Moreover, the FCC specifically asked for comment about how "spectrum leasing arrangements" should be treated.[14] Despite these explicit requests for comment, the FCC's modifications to these provisions are exactly what Blooston and the Joint Petitioners now consider to have been made without notice. The reality is that Blooston and the Joint Petitioners simply disagree with the outcome in the *Second Report and Order*. This disagreement, however, is insufficient to warrant reconsideration in this matter.

Under the Administrative Procedures Act, the FCC must provide notice of any proposed rules and the final rule must be a "logical outgrowth" of the proposed rule.[15] Further, as noted by the Joint Petitioners,[16] a final rule is a "logical outgrowth" if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[17] The plain language of the Further Notice, as detailed above, gave clear notice to all parties that the Commission could examine any part of its DE rules. Indeed, the Further Notice specifically indicated that it was re-evaluating its unjust enrichment provisions, the term over which its unjust enrichment provisions would apply, and how spectrum leasing arrangements would be treated. Moreover, in response to the Further Notice, several commenters, including one of the Petitioners, indicated that stricter rules were

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[13] *Id.*

[14] *Id.* at ¶ 16.

15 5 U.S.C. § 553(b)(3). *See, e.g.*, *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991).

[16] Joint Petitioners Petition at 19.

[17] *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1258 (D.C. Cir. 2005) (quoting *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)) (internal quotation marks omitted).

necessary to prevent fraud and abuse.[18] The FCC's final unjust enrichment rules represent a "logical outgrowth" of the proposed modifications. Accordingly, the FCC should reject Joint Petitioners' and Blooston's arguments that these rules were issued without proper notice.

Second, the Joint Petitioners argue that the extension of the unjust enrichment period to ten years was arbitrary and capricious.[19] As detailed above, the Commission sought comment on whether the term over which the unjust enrichment rules apply is sufficient.[20] In response, several parties indicated that stricter rules were necessary and MMTC expressly requested that the "unjust enrichment provisions [be extended] to encompass the entire license term and not just the first five years."[21] The FCC implemented these modifications after full consideration of the issues. Accordingly, the FCC should reject Joint Petitioners' contention that the extension of the unjust enrichment period to ten years is arbitrary and capricious.

Third, CTIA disagrees with Blooston's argument that there are "situations in past auctions in which giant corporations were able to garner the benefit of billions in bid credits."[22] This statement wrongly implies that large wireless carriers have obtained bidding credits in prior auctions through fraud or abuse – an assertion that is not supported anywhere in the record. Indeed, neither Blooston, nor any other commenter in this proceeding, has presented evidence that large wireless carriers have engaged in such fraud or abuse. As such, and as CTIA has argued throughout this proceeding, these statements should be dismissed by the Commission.

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18 *See infra* n. 6.

19 Joint Petitioners Petition at 11.

20 *Further Notice* at ¶ 20.

21 *E.g.*, Comments of MMTC at 15 ("Commission [should] consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years").

22 Blooston Petition at 3.

Finally, regardless of the outcome of Blooston's and Joint Petitioners' Petitions, the FCC must not delay Auction 66 any further. As the Joint Petitioners note in their Petition, the FCC must promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public…without administrative or judicial delays."[23] The wireless industry has an immediate need for the licenses that will be made available in Auction 66.[24] Indeed, 252 entities have submitted applications to participate in Auction 66.[25] This spectrum, once auctioned, will enable the deployment of advanced wireless services to the American public in a timely fashion. The auction already has been delayed once due to concerns regarding the DE rules.[26] Further delay will result in postponed deployment of advanced wireless services benefiting consumers and reimbursement to the Federal government for their relocation expenses. Accordingly, as many commenters note,[27] including some of the Joint Petitioners,[28]

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[23] Joint Petitioners Petition at 24 (citing 47 U.S.C. § 309(j)(3)(A) (emphasis added)).

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

[25] Auction of Advanced Wireless Service Licenses, Status of FCC Form 175 Applications to Participate in Auction No. 66, Public Notice, DA 06-1402, 1 (July 7, 2006).

[26] Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006, Revised Schedule, Filing Requirements and Supplemental Procedures for Auction No. 66, AU Docket No. 06-30, Public Notice, FCC 06-61 (May 19, 2006).

[27] *See, e.g.*, 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"); 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").

[28] Comments of Council Tree Communications Inc. at 61 ("the auction of AWS-1 licenses is a critical opportunity for small carriers…and that opportunity should not be delayed").

the public interest requires Auction 66 to proceed on schedule.

For these reasons, CTIA urges the Commission to deny Blooston's and the Joint Petitioners' Petitions for Reconsideration and proceed with Auction 66 as scheduled on August 9, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine M. Hilke, do hereby certify that on this 14th day of July 2006, I caused copies of the foregoing "Opposition to Petitions for Reconsideration" of CTIA – The Wireless Association® to be delivered to the following via First Class U.S. mail:

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