

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

In the Matter of )  
)  
CAVALIER WIRELESS, LLC )  
CELLULAR SOUTH LICENSES, LLC )  
CINCINNATI BELL WIRELESS LLC )  
CONTINUUM 700 LLC )  
COX TMI WIRELESS, L.L.C. ) WT Docket 12-332  
MCBRIDE SPECTRUM PARTNERS, LLC )  
METROPCS 700 MHZ, LLC )  
NEX-TECH WIRELESS, LLC )  
TOBA INLET PCS, LLC )  
TRIAD 700, LLC )  
)  
Requests for Waiver and Extension of Time )  
to Construct 700 MHz A and B Block )  
Licenses )

To: Chief, Wireless Telecommunications Bureau

**JOINT COMMENTS OF COUNCIL TREE INVESTORS, INC.  
AND BETHEL NATIVE CORPORATION**

Council Tree Investors, Inc. and Bethel Native Corporation (“CTI/BNC”) hereby provide the following comments in response to the FCC’s Public Notice, DA 12-1827, released November 13, 2012, in the above-captioned proceeding.

The FCC has before it requests (“Requests”) filed earlier this year by ten licensees (“Proponents”) seeking waiver of 47 C.F.R. § 27.14(g) and extension of time to construct eighty different 700 MHz economic area and cellular market area A and B Block licenses (“Unbuilt Licenses”).

The Unbuilt Licenses were acquired in Auction 73 in 2008, at an aggregate net cost of \$870,928,450.<sup>1</sup> More than four years later, Proponents find themselves effectively unable to construct the facilities authorized by those licenses, and now seek at least two years' extension of the rapidly approaching, June 13, 2013 deadline fixed by Rule 27.14(g) to complete construction of at least 35 percent of their respective licenses' geographic areas. Proponents have supported their Requests with various justifications, including interference issues relating to TV Channel 51. But *all* of the Proponents cite one shared reason for the Requests – their inability to procure and market handsets that are interoperable with the Long Term Evolution (LTE) systems being constructed by industry giants AT&T and Verizon Wireless on the enormous amounts of B and C Block 700 MHz spectrum those two companies won in Auction 73. Proponents state that the absence of mass-manufactured interoperable handsets has eroded their business plans both by placing the cost of this equipment beyond the reach of Proponents' target consumers and by blocking the essential roaming capabilities Proponents need to be able to offer national coverage to potential customers.

As a threshold matter, construction deadlines relating to the Unbuilt Licenses should be suspended immediately for a reason *not* cited by Proponents. That is, Auction 73, in which Proponents acquired the Unbuilt Licenses, was conducted pursuant to indisputably unlawful rules (“Unlawful Rules”). Those rules were adopted in 2006 but later vacated *as of their inception* by a 2010 decision of the Third Circuit secured as a result of a challenge brought by

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<sup>1</sup> All Proponents other than Nex-Tech Wireless, LLC purchased their Unbuilt Licenses in Auction 73. Nex-Tech purchased its 700 MHz spectrum from Verizon Wireless, through a transaction consummated in May 2012.

CTI/BNC.<sup>2</sup> The Unlawful Rules destroyed many Designated Entities' ("DEs") access to capital and devastated DEs' overall participation in the Auction 73 bidder pool, allowing AT&T and Verizon Wireless to capture 84.4 percent of the value of the licenses offered at the auction, as compared with DEs' paltry 2.6 percent, in stark contravention of directives in Section 309(j) of the Communications Act, as amended, that auctions be designed to promote ownership diversity and avoid license concentration.<sup>3</sup> Against this background, Section 706 of the Administrative Procedure Act (5 U.S.C. § 706) mandates that Auction 73 be vacated (unlawful agency action "shall" be set aside), relief which CTI/BNC are currently seeking in the United States Court of

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<sup>2</sup> *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert. denied sub nom. Council Tree Investors, Inc. v. FCC*, 131 S. Ct. 1784 (2011). The two rules vacated by the Court due to "serious" deficiencies in the challenged rulemaking, 619 F.3d at 258, made the following changes: (1) *eliminated* DE eligibility altogether for any entity that leased or resold (including on a wholesale basis) to third parties more than 50 percent of the aggregate spectrum capacity won at auction (47 C.F.R. § 1.2110(b)(3)(iv)(A) (2006) (vacated 2010)), thereby forcing start-up DEs to compete immediately with entrenched incumbents on a retail, direct-to-the-public basis; and (2) *doubled* the post-auction unjust enrichment penalty repayment period for DEs from five to ten years, and made corresponding changes in the related schedule of graduated repayment penalties over those ten years, including the imposition of a 100 percent bid credit repayment obligation (plus interest) during the first five years (47 C.F.R. § 1.2111(d)(2)(i) (2006) (vacated 2010)).

<sup>3</sup> *See* 47 U.S.C. §§ 309(j)(3)(B) and (j)(4)(D). The cost of the Unbuilt Licenses (\$870,827,450) represents 52 percent of the auction value of all A and B Block licenses won by bidders *other than* AT&T and Verizon Wireless in Auction 73 (\$1.686 billion). Other Auction 73 licensees, in addition to those holding the Unbuilt Licenses, also appear to need an extension of time to construct their facilities. *See* July 27, 2012 Request for Extension of Time of the Build-Out Deadlines for Lower 700 MHz A Block Licenses, filed with the FCC by RCA – The Competitive Carriers Associate, at n.1. Five of the ten Proponents who now find themselves trying to deal with the issues relating to the Unbuilt Licenses received DE bidding credits in Auction 73.

Appeals for the Tenth Circuit.<sup>4</sup> Given these facts, it makes no sense to enforce Proponents' construction deadlines. Construction of the Unbuilt Licenses should, rather, be held in abeyance pending resolution of the vital issues now being actively litigated in the Tenth Circuit.

As for the record established by Proponents, their showings powerfully illuminate the scope of the collateral damage which has resulted from the domination of Auction 73 by just two companies, AT&T and Verizon Wireless. A specific account of relevant facts is provided in the October 16, 2012 Request (at 2-7) of Proponent Cellular South Licenses, LLC d/b/a C Spire Wireless ("Cellular South"). According to Cellular South, AT&T, Qualcomm, Motorola and others influenced the industry-based, non-governmental international standards-setting body (the 3rd Generation Partnership Project, or "3GPP") to take steps after Auction 73 to create new boutique Band Class 17, now home to AT&T 700 MHz operations. But insofar as handset interoperability is concerned, Band Class 17 is *incompatible* with preexisting Band Class 12, still home to Proponents and the Lower 700 MHz A Block spectrum they won in Auction 73. Proponents explain that they did not become aware of the creation of this new band class until 2009 (*see, e.g.*, Cellular South Request at 3). Given the broad impact of the lack of interoperability across the entire 700 MHz band, Proponents were therefore placed at a sharp competitive disadvantage, a position that continues to bedevil them to this day.

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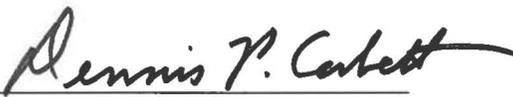
<sup>4</sup> See Case No. 12-9543 filed March 29, 2012 (10th Cir.). CTI/BNC are challenging in that case the FCC's conduct of Auction 73 pursuant to *Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules for the Upper 700 MHz Band D Block*, Order, 22 F.C.C.R. 20354 (2007), *recon. dismissed sub nom. Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures - - Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules For the Upper 700 MHz Band D Block License*, Order, 27 F.C.C.R. 908 (2012). As Petitioners before the Tenth Circuit, CTI/BNC are arguing, among other things, that the conduct of an auction pursuant to unlawful rules is itself unlawful agency action, subject to mandatory overturn on judicial review. The Court heard oral argument in the case on November 5, 2012.

CTI/BNC view the post-auction creation of Band Class 17 and the competitive harm it has wreaked on smaller competitors as the predictable byproduct of two companies' acquisition of an astonishing 84.4 percent of the spectrum value available in Auction 73. That kind of massive market power begs to be wielded, and the handset market is a logical and tempting target. The reported Class 12/Class 17 band class shenanigans since the close of Auction 73 have not only made Proponents' competitive row impossible to hoe as a practical matter, they, more importantly, help illustrate why unlawful Auction 73 needs to be redone in its entirety.

For all of these reasons, construction deadlines applicable to the Unbuilt Licenses should be suspended until such time as CTI/BNC's legal challenge to Auction 73 has been finally resolved.

Respectfully submitted,

COUNCIL TREE INVESTORS, INC. AND  
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