

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

In the Matter of)	
)	
Service Rules for the 698-746, 747-762, and 777-792 MHz Bands)	WT Docket No. 06-150
)	
Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones)	WT Docket No. 01-309
)	
Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services)	WT Docket No. 03-264
)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 37 of the Commission’s Rules)	WT Docket No. 06-169
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Requirements Through the Year 2010)	WT Docket No. 96-86
)	
Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule)	WT Docket No. 07-166
)	

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR FURTHER RECONSIDERATION

Council Tree Investors, Inc. and Bethel Native Corporation (collectively, “Petitioners”), by their attorneys, hereby reply to the July 2, 2013 Opposition (“Opposition”) of Cellco Partnership d/b/a Verizon Wireless (“Verizon”) to Petitioners’ May 1, 2013 Petition for Further Reconsideration of the Memorandum Opinion and Order on Reconsideration, FCC 13-29,

released March 1, 2013 (“*Reconsideration Order*”) in the above-captioned proceeding.¹ In support whereof, the following is shown.

Verizon proffers five arguments, four of a procedural nature, followed by a more substantive contention premised in equity, all in support of its position that that Petition should be dismissed. None of Verizon’s arguments, however, has merit. Each is addressed in turn below.

First, the Petition is procedurally proper. The Petition was filed pursuant to Rule 1.429(b), 47 C.F.R. § 1.429(b), and is expressly premised on a changed circumstance since Petitioners’ last opportunity to present argument in this docket, namely the 2010 decision of the United States Court of Appeals for the Third Circuit to vacate the Unlawful Rules.² Rule 1.429(b) permits interested parties to seek reconsideration of final agency orders on the basis of changed circumstances, as Petitioners have done here. Contrary to Verizon’s claim, there is nothing “repetitive” about Petitioners’ arguments under the relevant case law.³ The Petition properly gives the Commission a first opportunity to address those arguments in this proceeding.⁴

¹ *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, 28 FCC Rcd 2671 (2013). Capitalized terms not defined herein are defined in the Petition.

² *See 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).

³ Petitions are considered “repetitious” under Rule 1.429(i) when one party to a proceeding repeatedly seeks reconsideration but raises no new facts or issues, *see, e.g., Maritel, Inc.*, 26 FCC Rcd 16579 (2011), or when a party seeks reconsideration based on arguments already fully considered and addressed by the Commission in the proceeding, *see, e.g., Numbering Resource Optimization*, Fourth Order on Reconsideration, 22 FCC Rcd 8047 (2007). Neither is the case here.

⁴ In any event, the *Reconsideration Order* did modify the Commission’s approach to the Unlawful Rules’ application to Auction 73, through new reliance on a finding of mootness. *See Reconsideration Order* at 2683 (¶ 32).

Second, contrary to Verizon's assertions, the *Council Tree* decision does indeed constitute a *major* changed circumstance since 2007. In 2007, the Commission, in advance of Auction 73, fatefully elected to apply the Unlawful Rules to that auction despite Council Tree's then pending challenge to those rules in the Third Circuit and Frontline's challenge to the 50 Percent Retail Rule in this docket. Verizon's contention that "there is no reason why Council Tree could not have addressed the Third Circuit's decision in *Council Tree* during the pendency of the Frontline Petition" is flatly wrong. No Commission rule permits interested parties to seek reconsideration at a time of their choosing, such as upon the release of a *Court* ruling. Rather, FCC rules (and Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405) direct that reconsideration must be sought within 30 days of public notice of a *Commission* order.⁵ Petitioners have squarely met these requirements by filing the Petition within 30 days of Federal Register publication of the *Reconsideration Order*. Had Petitioners followed Verizon's suggested course of action and sought some sort of "free floating" reconsideration between 2010 and this year, Verizon would undoubtedly have also challenged any such filing as procedurally improper.⁶ The hard truth here is that *Council Tree*'s vacatur of the Unlawful Rules should have prompted the *Commission*, on its own motion, to vacate Auction 73 during the pendency of Frontline's petition, because it was inarguably conducted using unlawful rules. The Commission's failure to fulfill its public interest responsibilities in that regard necessitated Petitioners' filing of the Petition.

⁵ See 47 C.F.R. § 1.429(d).

⁶ For example, in its August 2, 2012 Brief in Support of Respondents filed in pending Case No. 12-9543 in the Tenth Circuit, Verizon sided with the Commission's position that Council Tree's May 2011 Supplement to a December 2007 Petition for Reconsideration was untimely because it had not been filed within 30 days of public notice of the underlying FCC order there being challenged.

Third, the Petition clearly articulated the fundamental flaws in the *Reconsideration Order*'s abrupt conclusion that *Council Tree* had *mooted* issues relating to Auction 73.⁷ In fact, the *Council Tree* decision *confirmed* that Auction 73 was conducted pursuant to unlawful rules, and “mooted” nothing.⁸ The Petition therefore provides an ideal vehicle for FCC consideration of this ultimate question of vital importance – whether the conduct of Auction 73 pursuant to the Unlawful Rules was itself unlawful agency action, which *must be set aside as a matter of law*, without regard to equitable considerations. The Commission has not previously addressed this important legal issue.

Fourth, *Council Tree* *did not decide* the question articulated in the penultimate sentence of the previous paragraph. The only remedial question concerning auction conduct addressed and resolved by *Council Tree* related purely to the *equities* of an overturn of Auctions 66 and 73.⁹ The *Council Tree* Court certainly did not reject “the very same argument that Council Tree advances here.”¹⁰

Fifth, Verizon's repetitious equitable arguments are unavailing. As Petitioners have made clear, equitable considerations do nothing to insulate Auction 73 from overturn as a matter of law.¹¹

⁷ See Petition at 10-11.

⁸ Had the Third Circuit *upheld* the Fifty Percent Retail Rule and Ten Year Rule, subsequent challenges to Auction 73 on the basis of those rules' legality might have been “mooted.” Instead, the Third Circuit *struck down* these two Unlawful Rules.

⁹ See Section III of the *Council Tree* decision. See also Petition at 4 n.5, citing *Council Tree*, 619 F.3d at 258 n.13.

¹⁰ Opposition at 5 (unpaginated by Verizon).

¹¹ As to the equities, see Petitioners' Reply Brief, *Council Tree Investors, Inc. v. FCC*, No. 12-9543 (10th Cir.) (Aug. 9, 2012) at 21-24 (illustrating countervailing equitable considerations); see also Petition at 11-12.

* * *

As shown above, the arguments Verizon has lodged against the Petition are gossamer-thin, premised on misreadings of Commission rules or mischaracterizations of Petitioners' arguments, or proffered without legal support of any kind. The Opposition follows Verizon's well-worn playbook by raising multifarious, far flung procedural objections in an ineffectual attempt to sidetrack Council Tree's focused effort to overturn unlawfully conducted Auction 73. Verizon fails to acknowledge the "elephant" in this particular "room" – that Verizon and AT&T dominated Auction 73, acquiring an astonishing 84.4 percent of the total value of that auction's spectrum, to the detriment of competition in the wireless market, the overall public interest, and designated entities, the latter largely relegated to the Auction 73 sidelines, effectively handcuffed by the Unlawful Rules. But, in any event, the procedural dust thrown up by Verizon cannot obscure the central fact that the *Reconsideration Order* is precisely the type of *Auction 73-specific order* that Verizon itself previously acknowledged would support a challenge to the conduct of Auction 73.¹² Viewed in that context, the latest procedural arguments advanced in Verizon's Opposition are no more credible than the cries of the mischievous boy of fable who delighted in the distraction caused by his confusing cry of "wolf" at every opportunity.

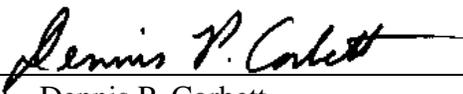
¹² See Petitioners' Brief, *Council Tree Investors, Inc. v. FCC*, No. 12-9543 (10th Cir.) (June 18, 2012) at 35 n.76 and accompanying text.

CONCLUSION

For the reasons set forth above and in the Petition, Petitioners respectfully request that the Commission reconsider the *Reconsideration Order*, overturn the unlawful conduct and results of Auction 73, and commence a lawful reauction at the earliest possible time.

Respectfully submitted,

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July 12, 2013

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CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, do hereby certify that on this 12th day of July 2013, I caused copies of the foregoing “Reply to Opposition to Petition for Further Reconsideration” to be delivered to the following via First Class U.S. mail:

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A handwritten signature in cursive script, reading "Rebecca J. Cunningham", is written over a horizontal line.