

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

In the Matter of)	
)	
Reallocation and Service Rules)	
for the 698-746 MHz Spectrum)	GN Docket No. 01-74
Band (Television Channels 52-59))	
)	
Auction of Licenses in the)	DA 02-200
698-746 MHz Band Scheduled)	Report No. AUC 02-44-A
for June 19, 2002)	(Auction No. 44)
)	

To: Chief, Wireless Telecommunications Bureau

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation (“Paxson”) hereby submits these Reply Comments concerning procedures for auction of the lower 700 MHz frequency band as set forth in the Wireless Telecommunications Bureau’s *Public Notice*.¹ In its initial Comments Paxson argued that linking the upper and lower 700 MHz auctions in any regard could result in the delay of the upper 700 MHz spectrum auction, potentially landing a death blow to the longstanding efforts over several years to clear the band and introduce critically needed public safety and commercial wireless services.²

¹ See Auction of Licenses in the 698-746 MHz Band Scheduled for June 19, 2002: Comments Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, DA 02-200, Report No. AUC-02-44-A (Auction No. 44) (rel. Jan. 24, 2002) (“*Public Notice*”). The lower 700 MHz band is comprised of the spectrum at 698-746 MHz, and the auction of that spectrum is alternatively referred to as “Auction No. 41.” The upper 700 MHz band is comprised of the spectrum at 747-762 and 777-792 MHz, and the auction of that spectrum is alternatively referred to as “Auction No. 31.”

² The FCC proposes to link these auctions by transferring the EAG-based licenses from Auction No. 44 to Auction No. 31 and by holding them on the same day. As Paxson made clear in its

Paxson noted that the Bureau articulated no benefit to auctioning the upper and lower 700 MHz EAG licenses together that might justify such a risky proposition.

The comments filed by interested parties demonstrate that there is no significant benefit to either the Commission or potential auction participants in linking the two auctions. Those commenters that favor linking the auctions mention only slight alleged benefits that fail to outweigh the serious potential risks to the Commission's 700 MHz band-clearing policies. More to the point, any suggestion that the Commission should delay the upper 700 MHz auction is contrary to the enormous benefits of band-clearing and would require the Commission to ignore the law.³ Although Paxson herein responds to the several issues raised by the commenters, the Commission must not be distracted from the central issue: if the Commission hopes to preserve its band-clearing policies, the upper 700 MHz auction must not be delayed.

initial comments, it does not necessarily object to holding both auctions on the same day, so long as (1) the upper and lower 700 MHz auctions remain functionally separate, and (2) the FCC commits to holding the upper 700 MHz auction regardless of any delays in the lower 700 MHz auction. Paxson's position should not be read as opposing the comments Spectrum Exchange Group, LLC and Allen & Company Incorporated ("Spectrum Exchange Comments") requesting that the Commission reconsider its current lower 700 MHz band plan. See Spectrum Exchange Comments at 4 & n.5. Paxson shares Spectrum Exchange's concern regarding the difficulties that the current plan creates for clearing Channel 59 and endorses their proposed solution.

³ Paxson is not philosophically opposed to delay of the lower 700 MHz auction. Given the encumbrance of that band, no significant band-clearing issues would be raised by such a delay. The Commission, however, is under a statutory mandate to deposit the proceeds of both auctions in the U.S. treasury by September 30, 2002. Absent additional Congressional action, the Commission cannot delay the lower 700 MHz auction unless the date to which it is delayed makes compliance with this statutory requirement possible.

I. THERE IS NO JUSTIFICATION FOR LINKING THE TWO AUCTIONS.

In its comments, Paxson demonstrated the risks created by the Bureau's proposal to link the upper and lower 700 MHz auctions. Against those risks, commenters in favor of linking the auctions have suggested only a few potential benefits, all of which are minor and some of which are entirely spurious. The supporting commenters' chief argument is that linking the auctions will create administrative efficiencies for the Commission and auction participants by eliminating the need for duplicative participation by bidders interested in EAG-based licenses.⁴ These commenters further argue that by so arranging the auctions by market-size rather than spectrum location, small and rural operators are more likely to be successful while larger operators will be able to construct nationwide footprints using the larger EAG-based licenses. Each of these contentions is either flawed in fact, or insufficient to justify the risk to band-clearing or both.

First, with respect to the claimed administrative efficiencies, none of the large wireless operators, supposedly most burdened by the current arrangement, thought the burden serious enough to submit comments to the FCC. Moreover, the administrative burden on the Commission will not be altered significantly by the linking proposal because two separate auctions still will be held. Additionally, Spectrum Exchange Group LLC and Allen & Company argue persuasively that changing the auction inventories now will create confusion and administrative chaos for auction participants and the Commission alike, because each has been preparing their auction plans and

⁴ See Comments of the Rural Telecommunications Group at 2, 3 ("RTG Comments"); Comments of the Rural 700 MHz Group at 2-3 ("Rural 700 MHz Comments").

associated software and tracking tools based on the current auction inventories.⁵

Therefore, the evidence suggests that the linking proposal actually will create additional administrative burdens.

Second, it is entirely implausible that linking the auctions will give rural carriers a better chance at attaining the smaller-market licenses available in Auction No. 44.⁶ The Commission decided to license parts of the lower 700 MHz band to small area licenses to discharge its statutory responsibility to ensure that licensing opportunities are available for small and rural wireless operators.⁷ Larger carriers with a need or use for the smaller area licenses, however, are entitled to bid for those licenses regardless of which auction features them.⁸ At best, small and rural operators might gain some slight advantage from the added administrative costs to the larger carriers of participating in both auctions. Again, however, this small and speculative benefit to small and rural wireless carriers is insufficient to outweigh the real risks the linking proposal presents to the Commission's band-clearing plans.

Third, several commenters argue that configuring the auctions based on the market sizes of the available licenses is more logical and will make it easier for larger

⁵ See Spectrum Exchange Comments at 5-6.

⁶ See Comments of Telcom Consulting Associates at 2 ("TCA Comments"); Rural 700 MHz Comments at 2-3; RTG Comments at 2.

⁷ See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, FCC 01-364, GN Docket No. 01-74, ¶¶ 95-96 (rel. January 18, 2002) ("*Channel 52-59 Reallocation Order*").

⁸ Additionally, the Commission has already addressed this issue, stating that given the encumbrance of the lower 700 MHz band, it may be in the public interest for a single, presumably large, operator to obtain all the area licenses at a particular frequency nationwide. See *Id.*, ¶ 141.

carriers to aggregate licenses to establish a nationwide footprint.⁹ Again the Commission should note that the large wireless operators have not submitted comment on the issue. More fundamentally, the differences between the EAG licenses in the respective auctions are greater than their similarities. The dominant characteristic of the EAG licenses in the lower 700 MHz auction is that they will be unusable for the foreseeable future, and are therefore less valuable.¹⁰ Arguments that auctioning the upper and lower EAG licenses together will allow national carriers to construct nationwide networks by aggregating upper and lower 700 MHz licenses are accordingly abstract: a nationwide footprint composed partially of lower 700 MHz licenses would be missing more than a few toes for the duration of the DTV transition which will last many more years. More important, whatever slight benefit larger operators gain from simultaneous auction of all EAG-based 700 MHz licenses would disappear if the linking proposal delays the upper 700 MHz band-clearing efforts, rendering both the upper and lower 700 MHz EAG-based licenses unusable until the close of the DTV transition. This supposed benefit of the linking proposal is no benefit at all.

Even assuming that all the potential benefits of the linking proposal identified by the commenters in this proceeding were fully realized, however, they would pale in comparison to the possible disruption that linking these auctions could cause. Further delay of the upper 700 MHz auction will effectively end the Commission's early band-clearing efforts. No benefit mentioned by the commenters supporting the linking of the auctions implicates any similarly important policy concerns. Risking upper 700 MHz

⁹ TCA Comments at 3; RTG Comments at 3.

¹⁰ See *Channel 52-59 Reallocation Order*, ¶ 182-184. Spectrum Exchange Comments at n.14.

band clearing for the small benefits identified in this proceeding is unreasonable.

Paxson accordingly urges the Bureau to resist commenters' calls for linking the lower and upper 700 MHz auctions in any regard.

II. THERE IS NO BASIS FOR DELAYING THE UPPER 700 MHZ AUCTION.

Two commenters suggest the Commission can and should delay both the upper and lower 700 MHz auctions despite the Commission's statutory mandate to conduct both auctions and deposit the proceeds of those auctions in the U.S. Treasury by September 30, 2002.¹¹ U.S. Cellular ironically argues for a delay of both auctions until there is greater certainty about when the spectrum will be available for use,¹² and TCA argues that the Commission should not allow compliance with the law to interfere with the promotion of small and rural carrier involvement.¹³ These arguments are patently inconsistent with the Commission's current policies and responsibilities under governing law.

U.S. Cellular's proposal to delay both auctions until there is greater certainty regarding when the 700 MHz spectrum will become useable is logically backwards.

¹¹ See 47 U.S.C. § 309(j)(14)(C)(ii) (codifying September 30, 2002 date for auction contained in Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 § 3003); 11 Stat. 251 § 3007 (uncodified, reproduced at 47 U.S.C. §309(j) note 3) (mandating deposit of funds in treasury by September 30, 2002).

¹² Comments of United States Cellular Corporation at 2 ("U.S. Cellular Comments"). U.S. Cellular, while opposing the Commission's current linking proposal, also proposes the even riskier and more radical course of consolidating the upper and lower 700 MHz auctions into a single auction for all the 700 MHz licenses. Paxson strenuously opposes any such course. In the first place, the Commission has not placed any such proposal on public notice for comment. Moreover, the Commission combines the two auctions, delay of the upper 700 MHz auction will be certain, and there will be no chance of broadcaster band clearing.

¹³ TCA Comments at 3-4.

Indeed, the best way for the Commission to increase certainty about the near-term availability of the upper 700 MHz spectrum is by affirming that there will be no delay in the auction. That course would preserve a pro-band-clearing environment and accelerate the timetable for the band to be opened for public safety and wireless uses.

U.S. Cellular's citation to recent legislative proposals that would postpone the dates by which the 700 MHz auctions would be required to take place cannot support delay.¹⁴ The Commission currently is bound by the September 30, 2002 deadline and cannot simply ignore it based on proposed legislation.¹⁵ It is axiomatic that the Commission's regulatory authority and its power to act *flows from* Congress's statutory directives and cannot be used to alter them.¹⁶ Unless and until the statutory auction

¹⁴ See U.S. Cellular Comments at 2.

¹⁵ See *supra* at n.11. See also, e.g., Review of the Pioneer's Preference Rules and Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055, 4060, n.53 (1994) (recognizing pending legislation related to Commission conclusion and stating "We recognize that this pending bill is not law and emphasize that our judgment on these issues is based on our own analysis and experience"); The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 FCC Rcd 17087, 17105, n.36 (1997) (pending or desired legislation insufficient to alter Commission's mandate to collect fines for violation of operator on duty and lottery broadcast requirements and stating "Unless Congress amends the Communications Act to deregulate the action in question, we will continue to issue forfeitures for this violation, as warranted in each case"); Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, *Third Report And Order*, 9 FCC Rcd 7988, 8127 (1994) (pending legislation insufficient to justify reclassification of Part 90 CMRS licensees for the purposes of fee collection under Part 22 absent prior Congressional authorization).

¹⁶ See *United States v. Storer Broadcasting*, 351 U.S. 192, 202-205 (Commission regulatory power is broad but restricted to acts "not inconsistent with the [Communications] Act of law (citing 47 U.S.C. §§ 154(i), 303(r))).

dates are changed, the Commission must prepare itself to comply with the current statutory deadlines. Indeed, the proposed legislation points up the fact that the Commission currently is violating the requirement to hold the upper 700 MHz auction by September 30, 2000.¹⁷ Furthermore, as a practical matter, passage is unlikely. Similar legislation was proposed last year but was not enacted.¹⁸ Postponing the auctions based on the possibility that Congress will enact a delay puts the Commission at a severe risk of non-compliance.

¹⁷ See See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, App. E, § 213. See also 145 Cong. Rec. at H12494-94, H12501 (Nov. 17, 1994).

¹⁸ See Conference Report on H. Con. Res. 83, Concurrent Resolution on the Budget for Fiscal Year 2002, 107th Cong., 1st Sess. (2001); Jeffrey Silva, *Senate and House Clash on Auction Dates*, RCR WIRELESS NEWS, April 16, 2001, at 4; Allyson Vaughn, *White House Backs Delays; Industry Applauds Bush's 2002 Budget Proposal*, WIRELESS WEEK, April 16, 2001, at 1. The proposal to delay the auctions is part of a package of disincentives to broadcasters to continuing analog operation past 2007. Earlier versions of this disincentive package go back to the Clinton administration. See Page Albinak, *They're Baaaack! New Budget has Spectrum Lease Fees, Delays Auctions*, BROADCASTING AND CABLE, February 11, 2002, at 35.

Similarly, the Commission cannot credit TCA's assertion that the Commission's statutory mandate with regard to the auction dates is subservient to maximum rural-carrier participation in the auctions.¹⁹ Rural carriers have had more than adequate notice regarding the dates of both 700 MHz auctions,²⁰ and the Commission has structured its 700 MHz service and auction rules specifically to enhance rural carriers' auction opportunities.²¹ The Commission should not risk failing to follow the law or disserving the substantial public interests in upper 700 MHz band-clearing to bestow an indeterminate benefit on rural telecommunications providers.²²

Finally, as Paxson already has noted, the Bureau should recognize that the major wireless carriers have elected not to file comments in this proceeding either to support the Commission's linking proposal or to request a delay in the auction. If the

¹⁹ See TCA Comments at 3-4.

²⁰ Since the Congress directed the Commission to auction the 700 MHz band, all parties have been aware that the spectrum would be auctioned according to the dates set forth in the Balanced Budget Act of 1997. See 47 U.S.C. § 337(a) (directing reallocation of the 700 MHz band); *supra* at n.11 (describing relevant dates set forth in the Balanced Budget Act of 1997). The *Public Notice* has given adequate notice of the lower 700 MHz auction. The upper 700 MHz auction date has been set six times, most recently in October of last year. Auction of Licenses for 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002, *Public Notice*, Report No. AUC-01-31-D, 01-2394 (released October 15, 2001); Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 12, 2001, *Public Notice*, Report No. AUC-01-31-A, DA 01-266 (rel. Jan. 31, 2001); See Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, *Public Notice*, FCC 00-282 (rel. July 31, 2000); Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until September 6, 2000, *Public Notice*, DA 00-942 (rel. May 2, 2000); 747-762 and 777-792 MHz Band Auction Postponed Until June 7, 2000, *Public Notice*, DA 00-573 (rel. March 17, 2000); Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, *Public Notice*, DA 00-43 (rel. January 10, 2000).

²¹ See *Channel 52-59 Reallocation Order*, ¶¶ 95-96.

²² To the extent, however, that TCA can be understood to argue that the Commission should facilitate adherence to the September 30, 2002 deadline by establishing a lower minimum opening bid for the lower 700 MHz licenses, Paxson does not oppose this position.

parties most likely to bid on the spectrum have decided not to take a position on these issues, the Bureau can be confident that the resolutions suggested by the commenters in this proceeding are not necessary to make the auctions a success. The Commission may wish to recall this fact in future months should contrary positions be taken.

CONCLUSION

The Bureau should not allow the peripheral issues raised by commenters supporting linkage of the upper and lower 700 MHz auctions to distract it from the important matters at stake here. The Commission cannot delay the upper 700 MHz auction if it still hopes to achieve early clearing of the upper 700 MHz band. The Bureau cannot link the upper and lower 700 MHz auctions in any way if it wants to ensure that the upper 700 MHz auction will not be delayed. Neither the Bureau nor the commenters supporting linking have raised any significant countervailing public interest benefit to offset the risk that linking the auctions will eliminate any chance of early upper 700 MHz band-clearing. The Commission must make clear that the June 19, 2002 auction start date will be kept. The public interest, the law, and the record in this proceeding demand that the upper 700 MHz auction not be delayed a sixth time. The upper 700 MHz auction must not be delayed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William L. Watson hereby certify that a true and correct copy of the foregoing Reply Comments was sent on this 13th day of February, 2002, via First Class U.S. Mail, postage prepaid to the following:

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