

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

In the Matter of)	
)	
Service Rules for the 746-764)	WT Docket No. 99-168
and 776-794 MHz Bands,)	
(Television Channels 60-69))	
)	
Auction of Licenses in the)	DA 02-260
747-762 and 777-792 MHz)	Report No. AUC 02-31-A
Bands Scheduled for June 19, 2002)	(Auction No. 31)
)	

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 upper 700 MHz frequency band proposed by the Wireless Telecommunications Bureau’s (the “Bureau”) *Public Notice*.¹ In its initial Comments, Paxson argued that linking the upper and lower 700 MHz spectrum auctions in any regard likely will result in delay of the upper 700 MHz auction, ruining years of band-clearing efforts and eliminating any hope that the upper 700 MHz band will become available for public safety and new wireless services prior to the close of the DTV transition. Only one commenter, U.S. Cellular Corporation (“U.S. Cellular”), disputed Paxson’s position, and it did so by proposing a plan to aggregate and delay the auctions that is so far outside the Commission’s current statutory authority, it cannot be

¹ See Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002: Comments Sought on Adding to Auction Inventory and Further Modifying Package Bidding Procedures, *Public Notice*, DA 02-260, Report No. AUC-02-31-A (Auction No. 31) (rel. February 4, 2002) (the “*Upper 700 MHz Auction Public Notice*”).

seriously considered. Additionally, U.S. Cellular's claim that issues raised by the Spectrum Clearing Alliance's Petition for Reconsideration in the Commission's Lower 700 MHz Reallocation proceeding somehow justify delay of the *upper 700 MHz auction* is spurious.² Congress has commanded that the upper 700 MHz auction process be completed by September 30, 2002 and the Bureau's only lawful duty is to determine the procedural rules that will most efficiently achieve that result.

The records of both 700 MHz auction proceedings serve only to buttress Paxson's core position: **if the Commission intends to carry out its statutory duty to expedite early clearing of the upper 700 MHz band, Auction No. 31 must not be delayed.**³ Paxson and the Spectrum Clearing Alliance have given the Commission the only plan for **substantial** band clearing, and, as the Comments of the major city police departments show, **substantial** band clearing is necessary for public safety operators to utilize the upper 700 MHz band successfully. The Bureau must not delay the June 19, 2002 auction date. After years of hard work on band-clearing, parties are entitled to certainty on this point – a certainty required to make the auctions and upper 700 MHz band-clearing a success. With regard to clearing the upper 700 MHz band, it is now or never!

² See Petition for Reconsideration or Clarification of the Spectrum Clearing Alliance in GN Docket No. 01-74, filed February 5, 2002 (the "Petition").

³ The Commission received Comments and Reply Comments in response to its *Lower 700 MHz Public Notice* on February 6 and 13. 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) (the "*Lower 700 MHz Public Notice*").

I. DELAYING THE UPPER 700 MHZ AUCTION WOULD BE UNLAWFUL AND CONTRARY TO THE PUBLIC INTEREST.

U.S. Cellular asks the Commission to disregard the statutory deadlines for completing the upper 700 MHz auction.⁴ U.S. Cellular argues that by violating the deadline the Commission instead can enhance the opportunities of small and rural carriers to compete for 700 MHz spectrum. The Bureau must recognize that the statutory mandate the Commission is now under contains **no exceptions**. The auctions must be held, and the proceeds deposited in the treasury, by September 30, 2002.⁵

Moreover, U.S. Cellular's proposal fails to take into account Congress's special concern that the upper 700 MHz band be cleared quickly so that critical public safety and new commercial wireless services can begin service.⁶ By law and by Commission decision, it would be unreasonable to subordinate clearing the upper 700 MHz band simply to give small and rural carriers an enhanced opportunity to obtain usable lower 700 MHz spectrum in the near-term.⁷

Consequently, U.S. Cellular's suggestion that the Spectrum Clearing Alliance's Petition for Reconsideration of the Commission's Channel 52-59 Reallocation Order

⁴ U.S. Cellular Comments at 2-3.

⁵ See 47 U.S.C. §§ 337(a), 309(j)(14)(C)(ii). These provisions were contained in the Balanced Budget Act of 1997, and were enacted due in no small part to "a longstanding need by public safety officials for more channels of radio communication." See Pub. L. No. 105-33, 111 Stat. 251 § 3003 (adding new Section 309(j)(14) to the Communications Act of 1934, as amended); § 3004 (adding new § 337 of the Communications Act); § 3007 (uncodified; reproduced at 47 U.S.C. § 309(j) note 3) (requiring deposit of auction proceeds by September 30, 2002), *see also* Remarks of Sen. John McCain, introducing bill to reallocate spectrum to public safety and advanced wireless services. 143 Cong. Rec. S945 (Feb. 4, 1997).

⁶ See Comments of Paxson Paxson Communications Corporation, DA 02-260 at 5-6.

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, ¶ 184 (rel. January 18, 2002) (rejecting preferential lower 700 MHz band-clearing rules) (The "Channel 52-59 Reallocation Order").

creates sufficient uncertainty about the near-term usefulness of the lower 700 MHz spectrum to justify delay must fail.⁸ Given Congress's preference for clearing the upper 700 MHz band early, uncertainty regarding the lower 700 MHz licenses cannot be allowed to interfere with the upper 700 MHz auction.⁹ Indeed, U.S. Cellular's proposal precisely demonstrates the harm about which Paxson has expressed so much concern.

U.S. Cellular's other proffered justification for delaying the auction – proposed legislation that would allow the Commission to delay the 700 MHz auctions – is equally flawed. Unenacted legislative proposals give the Commission no ground for ignoring existing statutory requirements.¹⁰ Unless and until the statutory auction dates are

⁸ Comments of United States Cellular Corporation, DA 02-260 at 3-4.

⁹ It is puzzling that U.S. Cellular did not mention The Spectrum Clearing Alliance's Petition as a basis for delaying the lower 700 MHz auction in either its Comments or Reply Comments in that proceeding. In any case, unlike the upper 700 MHz auction, Paxson has stated that it has no theoretical objection to delaying the lower 700 MHz auction. Both auctions, however, are subject to the same statutory standard: they must be completed by September 30, 2002. See Reply Comments of Paxson Communications Corporation, DA 02-200 at fn.3.

¹⁰ See Reply Comments Paxson Communications corporation, DA 02-200 at 7-8 (citing *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)).

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 not in compliance with the statute that required it to have held the upper 700 MHz auction by September 30, 2000.¹¹ Furthermore, passage of the proposed legislation is far from certain. Similar legislation was proposed last year but was not enacted.¹² Postponing the auctions based on the possibility that Congress will enact a delay puts the Commission at a severe risk of non-compliance.

II. VOLUNTARY BAND-CLEARING IS SUCCEEDING.

U.S. Cellular also argues that the Spectrum Clearing Alliance's Petition for Reconsideration of the Commission's Channel 52-59 Order should lead the Commission to doubt that voluntary upper 700 MHz band-clearing will ever occur.¹³ To the contrary, that petition was filed so that the Commission could realize the benefits of

¹¹ 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 ("Fourth Delay Notice"). The statutory directive that the Commission ignored is contained in See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, App. E, § 213; 145 Cong. Rec. H12493-94 (Nov. 17, 1999). To the extent that U.S. Cellular has raised the issue of regulatory uncertainty in an effort to draw an analogy between the current circumstances and those prevailing the last time the Commission delayed the upper 700 MHz auction in the face of a clear statutory deadline, the Bureau should keep in mind that the legality of the prior delay a subject that generated sharp disagreement among the Commissioners then sitting. Compare *Fourth Delay Notice* (separate statement of Commissioner William Kennard) with *Fourth Delay Notice* (dissenting statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani).

¹² 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.

clearing the upper 700 MHz band prior to the start of the lower 700 MHz auction.

Voluntary band-clearing is gathering momentum. Upper 700 MHz broadcasters are in agreement that what band-clearing needs is not further delay, but certainty regarding the auction date so that band-clearing negotiations can move forward.¹⁴

U.S. Cellular fails to understand what the Spectrum Clearing Alliance is asking. The Spectrum Clearing Alliance's Petition does not create any basis to doubt the strength of current band-clearing efforts. The Petition asks only that the Commission confirm that band-clearing upper 700 MHz broadcasters can temporarily relocate to the lower 700 MHz band. Paxson believes that position is manifest in several earlier Commission orders, so it should create no new uncertainty.¹⁵ Even if it represents a departure from Commission policy, however, the result will effect only a small number of band-clearing broadcasters. The issue raised by the Petition is not whether band-clearing will occur, but if the Petition is granted, band-clearing will be more comprehensive. As the Major City Chiefs' Comments show, public safety operators will need exceedingly clear spectrum to operate in the upper 700 MHz band.¹⁶ Regardless of how the Commission rules on the Spectrum Clearing Alliance's petition no new

¹³ U.S. Cellular Upper 700 MHz Comments at 3-4.

¹⁴ See Reply Comments Of Members And Supporters Of The Spectrum Clearing Alliance, DA 02-200; Reply Comments Of Entravision Communications Corporation, DA 02-200.

¹⁵ See, e.g., Service Rules for the 746-764 and 776-794 Bands and Revisions to Part 27 of the Commission's Rules, *Third Report and Order*, 16 FCC Rcd 2703, 2705, 2717-18 (2001).

¹⁶ Comments of the Major City Chiefs, DA 02-260 (explaining need for enhanced interference protection in upper 700 MHz band). Wireless service providers say that "a nationwide 'footprint' is considered necessary for large scale broadband services," so their need to obtain a large or nationwide service area means that "unless a clear path is found to clearing a *substantial* number of broadcast stations from the 700 MHz band, this spectrum could remain unusable for a long time." Comments of US West, Inc., WT Docket No. 99-168, at 2 (July 19, 1999); Comments of Verizon Wireless, WT Docket No. 99-168, at 3 (Aug. 16, 2000) (emphasis added).

uncertainty will be created regarding the near-term availability of the lower 700 MHz spectrum, which is already too heavily encumbered to permit significant use for the foreseeable future.¹⁷

III. SUBSTANTIAL BAND CLEARING MUST HAPPEN NOW.

While band-clearing efforts remain strong, Paxson has repeatedly maintained that significant upper 700 MHz band-clearing must occur now or else the spectrum will remain encumbered until the close of the DTV transition. As long ago as August 2000, Paxson alerted the Commission that it was fast approaching the point beyond which band clearing would not be practical, and it has frequently urged the Commission not to continue postponing the auction if it wants Channels 59-69 cleared.¹⁸ The Commission's five auction postponements have exhausted the Commission's margin of error.

Keeping the upper 700 MHz auction on track is integral to the band-clearing efforts undertaken by Paxson and the Spectrum Clearing Alliance. The Spectrum Clearing Alliance, with a growing list of members representing a significant number of incumbents in the upper 700 MHz band, has worked aggressively to clear the upper 700 MHz band, offering the Commission the only realistic means for doing so. The

¹⁷ 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, ¶ 184 (rel. January 18, 2002) (rejecting preferential lower 700 MHz band-clearing rules).

¹⁸ Paxson Comments in response to the *Upper 700 MHz MO&O* (filed Aug. 20, 2000). Paxson did support a single brief delay of the auction late last year to accommodate global band clearing efforts. See Notification of *Ex Parte* Communication in WT Docket No. 99-168 (filed May 1, 2001); see also Opposition of the Spectrum Clearing Alliance to MSTV Petition for Reconsideration of the Commission's *Order on Reconsideration of the Third Report and Order* in WT Docket No. 99-168, CS Docket No 98-120, MM Docket No. 00-39, FCC 01-258 (rel. Sept. 17, 2001), filed December 17, 2001; *Ex Parte* Presentation of Lowell W. Paxson in WT Docket No. 99-168, filed July 12, 2001.

momentum that the Spectrum Clearing Alliance has built up demonstrates that voluntary band-clearing can occur if allowed to proceed.

A sixth auction postponement would wipe out this momentum, and likely signal the end of the Spectrum Clearing Alliance. Membership in the Spectrum Clearing Alliance is reaching the critical mass necessary to conduct substantial band clearing, but organizing the 80 owners of the 144 incumbent stations in the upper 700 MHz band is no easy task. If there is another auction delay, no one – not even the Commission – will be able to resurrect the Spectrum Clearing Alliance or anything like it. It is therefore crucial that the Bureau not undermine the Commission’s band clearing policies by taking steps likely to lead to delay the upper 700 MHz auction. Doing so will guarantee that the upper 700 MHz spectrum will remain unavailable to the public safety community and new wireless services for the foreseeable future.

CONCLUSION

Paxson has participated in both the upper and lower 700 MHz auction proceedings to urge the Bureau and the Commission to stay on course with their current band-clearing policies. The policies are sound, but band-clearing needs a strong regulatory hand of certainty to see it to its conclusion. At this point, that requires the Bureau to refrain from linking the upper and lower 700 MHz auctions in any way and to reiterate that the upper 700 MHz auction will occur as scheduled on June 19, 2002. Anything less would likely eliminate all hope of substantial band clearing and of early introduction of critical public safety and new wireless services in the band. Neither auction proceeding has provided any evidence that linking the auctions will further any significant public interest. Paxson has shown, however, that linking the auctions means

delay; and delay means the indefinite postponement of band-clearing and the significant public interests it was designed to serve.

Respectfully submitted,

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Dated: February 26, 2001

CERTIFICATE OF SERVICE

I, William L. Watson hereby certify that a true and correct copy of the foregoing Reply Comments was sent on this 26th day of February, 2002, via First Class U.S. Mail, postage prepaid, to the following:

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