

April 3, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

Re: Delay of Auctions 31 and 44,
WT Docket No. 99-168, GN Docket No. 01-74

Dear Mr. Chairman:

The Cellular Telecommunications & Internet Association ("CTIA") respectfully requests that the above-referenced auctions of licenses in the 700 MHz band be delayed beyond the current scheduled start date of June 19, 2002. Given the short time remaining before the May 8, 2002, deadline for the FCC Form 175 filings indicating an intention to bid in these auctions, CTIA seeks expedited consideration of this request.

This request -- seemingly incongruent from an industry that has characterized itself as "spectrum starved" -- is not taken lightly. Simply put, neither the Commission, the Administration, nor the Congress has taken the requisite actions necessary to make this auction viable:

-- The Commission is asking bidders to swing blindly at a spectrum piñata, not knowing the contents. Forcing bidders into such a situation violates Section 309 of the Communications Act. While a June auction might be called an "auction", in reality it would be the U.S. Government opening a casino and collecting the ante for a much bigger private auction to enrich broadcasters at the expense of rational spectrum policy and the welfare of American taxpayers.

-- The Bush Administration has strongly stated its desire to delay the auction, awaiting an overall spectrum plan for advanced wireless spectrum the Administration will deliver this summer. That plan will have a direct bearing on issues relevant to the business plans of multiple potential bidders (and, thus, to the fulfillment of Section 309's requirements). To continue to auction spectrum on an ad hoc basis, absent such a plan, will only exacerbate the lack of policy direction that is already affecting consumers and the economy. The Administration is also searching for solutions to Homeland Security spectrum needs for national security and public safety. The 700 MHz band could offer some potential solutions -- but not if the spectrum has been auctioned prematurely.



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-- The Congress has given conflicting instructions. On one hand it directed the Commission to auction this spectrum, yet on the other hand it passed another law that gave the broadcast incumbents seemingly perpetual use of the very same spectrum. A delay, such as that requested herein (as well as by the Administration in the President's Budget and draft legislation) will allow the Congress the opportunity to address and, hopefully, to rectify this contradiction.

Without a further delay to permit these matters to be resolved, it appears as though our government's policy will be to "auction for the sake of an auction." We urge you to eschew such temptation and to take the time necessary to put in place the policies and procedures that will best serve the legal mandate to optimize the efficient use of spectrum. At the same time, such an action would serve the best interests of Americans, both in their roles as consumers as well as taxpayers.

The original statutory deadline governing auction of the channel 60-69 UHF TV band, 746-806 MHz, ("Upper 700 MHz") was September 30, 2000. That auction date has been pushed back five times by the FCC for a variety of sensible reasons, including uncertainty over when or how the incumbent broadcasters might be convinced to leave the band. The channel 52-59 UHF TV band, 698-746 MHz ("Lower 700 MHz") is subject to a statutory requirement that receipts from the auction be deposited in the treasury by September 30, 2002. Both the Upper and the Lower 700 MHz bands are heavily encumbered, and the path to clearing the bands of their incumbents is far from clear, as the FCC has recognized on several occasions.

The many uncertainties regarding the timing of 700 MHz band clearing mean that, if the auctions are held in June 2002 as planned, bidders would be required to participate in the auction with a poor understanding of how and when the band would actually be available for commercial use. Indeed, under the current auction schedule, any benefit to the American public is placed at risk because near-term deployment in this band is not likely, and bidders are in the difficult position of trying to anticipate what services will be desired by consumers when the bands finally do become available in the distant future. Efficient spectrum management goals would be far better served if prospective bidders could obtain greater certainty and clarity regarding the realistic measures that will be required to clear the band of incumbents prior to the auction, and when those measures could be successfully implemented. Without a reasonable understanding of when the band could be made available for commercial service, it is exceptionally difficult for industry to make rational business decisions as to whether even to participate in an auction.

Under Section 309(j)(3)(E)(ii) of the Communications Act, the Commission is entrusted by Congress "to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services,"

after issuance of bidding rules.¹ If the auction proceeds as scheduled on June 19th, the Commission will not be fulfilling its duties under Section 309 (j). Under the current conditions, interested parties will not be able to “evaluate the availability of equipment for the relevant services” because manufacturers will not focus on developing equipment for this band until the timing of availability of the spectrum is clarified. Further, the fact that the availability of the spectrum for commercial use is not known and will not be known before the June auction date makes “develop[ment] of business plans” and analysis of “market conditions” virtually impossible. The Commission further clouded the picture when it failed to adopt a presumption in favor of band clearing arrangements for the Lower 700 MHz band, as it did in the Upper 700 MHz band.

CTIA recognizes that the Commission was originally subject to a statutory deadline of September 30, 2000, for the Upper 700 MHz and is subject to a September 30, 2002, deadline for depositing revenues into the Treasury from the 700 MHz auctions. CTIA submits, however, that these statutory deadlines are inconsistent with the requirements of Section 309 (j) in the context of these auctions. In situations where there is a statutory conflict such as the one that is present here, the conflict may be reconciled through reasonable statutory interpretation. A reasonable interpretation of these conflicting statutes should lead the Commission to postpone both of the 700 MHz auctions to further its statutory and public interest spectrum management responsibilities.

Additionally, if the 700 MHz auctions are held in June as scheduled, they will be completed before the FCC’s advanced wireless services rulemaking is finished, and before the auction for spectrum for advanced wireless services is completed. The industry has worked diligently with the FCC and NTIA to ensure that 120 MHz of harmonized spectrum is made available for advanced services. Significant work still remains to secure that spectrum, part of which currently is held by the Department of Defense. At the point in time when a company must decide whether it will participate in the 700 MHz auctions (in advance of filing a Form 175 on May 8th), it will likely not even know whether the 120 MHz NTIA Plan will be approved, and the FCC will still have to complete its service rules proceeding before scheduling an auction.

¹ 47 U.S.C. § 309 (j)

(3) “. . . [T]he Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in Section 1 of this Act and the following objectives:

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed –

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

This uncertainty in the availability and timing of the auction for advanced wireless services spectrum means that companies would not be able to assess their spectrum options effectively before having to decide on a 700 MHz auction strategy if those auctions were held in June. At a minimum, the FCC should not auction the 700 MHz bands until the broader proceeding on advanced wireless services spectrum is concluded, and that spectrum is auctioned.

The uncertainties surrounding both of the 700 MHz auctions increases the risk that the auctions will be skewed so that licenses are not awarded to the parties who value them most highly, and who will provide the services consumers most desire. Conducting the auctions in this environment devalues the 700 MHz spectrum and increases the likelihood that the American public will recognize neither the economic nor public interest benefits they deserve from these auctions.

The Administration has recognized the inherent problems with auctioning these two bands in June. It has proposed legislation regarding the 700 MHz auctions that would shift the statutory deadline for the Upper 700 MHz, channels 60–69, from 2000 to 2004, and shift the statutory deadline for the auction of Lower 700 MHz, channels 52–59 from 2002 to 2006. More importantly, the proposed legislation would provide for *involuntary* relocation of an incumbent broadcaster after 2006 if the FCC is able to assign the broadcaster a channel in television channels 2-58 for relocation -- offering the promise for the first time that broadcasters might be required to move in a reasonably predictable timeframe. In addition, to facilitate clearing of the analog television broadcast spectrum and provide taxpayers some compensation for use of this scarce resource, the Administration has proposed legislation authorizing the FCC to establish an annual \$500 million lease fee on the use of analog spectrum by commercial broadcasters as of 2007. Upon return of its analog spectrum license to the FCC, an individual broadcaster will be exempt from the fee.

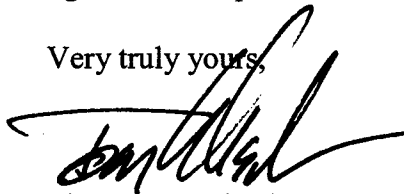
This proposed legislation has significantly changed the circumstances that faced the FCC when it previously decided to postpone the Upper 700 MHz auction. If ultimately enacted, this legislation would dramatically alter the dynamics of the 700 MHz bands, and create the potential for a much more efficient and timely use of these bands. Indeed, even the fact that this legislation has been proposed could affect the willingness of broadcasters to negotiate clearing arrangements. These factors could in turn affect the interest of all potential users of this band, including not only commercial users, but public safety and homeland security users as well.

A delay of these auctions to provide additional regulatory certainty would benefit the public and the Commission's spectrum management policies by allowing all interested parties to have as much information as possible in preparing for the auctions. A delay would also be consistent with the Administration's FY 2003 budget proposals. As the Commission has

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recognized in the past when it postponed Auction 31 for the Upper 700 MHz, a postponement of these two auctions not only is warranted, but also is the best means for satisfying the Commission's responsibilities to manage the radio spectrum in the public interest.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Tom Wheeler', written over a horizontal line.

Thomas E. Wheeler

cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau
William F. Caton, Acting Secretary