

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Service Rules for the 746-764 and)	WT Docket No. 99-168
776-794 MHz Bands, and Revisions to)	
Part 27 of the Commission's Rules)	
(Television Channels 60-69))	
)	
Reallocation and Service Rules for the)	GN Docket No. 01-74
698-746 MHz Spectrum Band)	
(Television Channels 52-59))	
)	
Auction of Licenses in the 747-762)	DA 02-260
and 777-792 MHz Bands)	Report No. AUC 02-31-A
Scheduled for June 19, 2002)	(Auction No. 31)
)	
Auction of Licenses in the)	DA 02-563
698-746 MHz Band)	Report No. AUC 02-44-B
Scheduled for June 19, 2002)	(Auction No. 44)

To: The Commission

OPPOSITION TO CTIA'S APPLICATION FOR REVIEW

Spectrum Exchange Group, LLC ("Spectrum Exchange") hereby submits this Opposition to the Application for Review¹ of the Wireless Telecommunications Bureau's denial² of the April 3, 2002 request by the Cellular Telecommunications & Internet Association ("CTIA") to postpone the auction of licenses in the Upper and Lower 700 MHz bands (Auction Nos. 31 and 44). Spectrum Exchange respectfully requests that the Commission go ahead with the auction of licenses in the 700 MHz band on the current scheduled start date of June 19, 2002.

¹ *Application for Review* in WT Docket No. 99-168 and GN Docket No. 01-74 filed by CTIA on April 24, 2002.

² Letter from Thomas J. Sugrue, Chief of Wireless Telecommunications Bureau, to Thomas E. Wheeler, President/CEO of Cellular Telecommunications & Internet Association, Denying CTIA's Request for Delay of Auction Nos. 31 and 44 ("*Wireless Bureau Denial*"), dated April 10, 2002.

Spectrum Exchange, www.spectrum-exchange.com, was established with the mission to create value for the public by promoting efficient exchange of spectrum. Spectrum Exchange was formed by principals of Market Design, Inc., www.market-design.com, which since 1995 has designed and conducted high-stakes auctions in the telecommunications, energy and e-commerce industries, in the U.S. and internationally. Spectrum Exchange has been working closely with Allen & Company Incorporated and the Spectrum Clearing Alliance in an attempt to create a private market mechanism for the clearing of the Upper 700 MHz spectrum currently used by television broadcast stations.

In the second paragraph of its letter requesting the delay³, CTIA describes its own request as “seemingly incongruent from an industry that has characterized itself as ‘spectrum starved.’” Spectrum Exchange agrees. This incongruence arises from the countervailing interests of CTIA’s dominant members. The major commercial wireless operators, like the incumbents in most industries, at times have an incentive to restrict new capacity to limit competition. At other times, they do better with restrictions lifted to expand their own capacity. In making spectrum decisions, the Commission should ignore the first voice and listen to the second.

Indeed, Spectrum Exchange is surprised by the antitrust concerns raised by CTIA with respect to the activities of the Spectrum Clearing Alliance. Borrowing language from CTIA’s Application,⁴ if any antitrust concerns should be aroused today, it is that CTIA’s prolonged effort to keep the Upper 700 MHz band off the market may itself be viewed as “a concerted action by a combination of licensees who clearly exercise market power” in the *cellular telephone market*

³ *Letter Requesting Delay of Auctions 31 and 44* (“CTIA Letter”) from Thomas E. Wheeler, President/CEO of CTIA, to the Hon. Michael K. Powell, Chairman of the Federal Communications Commission, filed April 3, 2002.

⁴ In footnote 6 of its *Application for Review*, CTIA writes: “Rather than removing uncertainty, this concerted action by a combination of licensees who clearly exercise market power over the disposition of the upper 700 MHz band spectrum raises antitrust concerns, and thus creates even more uncertainty.”

to restrict capacity and deter entry in that market.⁵

Despite CTIA's characterization of the Upper 700 MHz Band as "ideally suited for next generation mobile and high-speed broadband services,"⁶ CTIA's involvement in the two proceedings, WT Docket No. 99-168 and GN Docket No. 01-74, has been minimal and primarily directed toward delay. CTIA's main comment to date has been an earlier *ex parte* letter, filed July 20, 2000, requesting the postponement of Auction No. 31 until June 2001.⁷

Similar to the recent CTIA Letter, the July 2000 CTIA Letter also asserted that Section 309(j) of the Communications Act required a postponement, for the following reasons:

- CTIA noted that the Commission had issued its package bidding procedures for the 700 MHz auction less than 3 weeks earlier. Bidders required time to develop software and auction analysis tools, to test their internal systems, and to participate in a mock auction.⁸
- CTIA noted that the Commission had issued a Memorandum Opinion and Order and Further Notice of Proposed Rulemaking affecting band-clearing procedures less than 3 weeks earlier. "Thus, the Commission's deliberations on the significant issues raised in the Further Rulemaking in this proceeding must be concluded prior to the auction."⁹

Subsequent filings by the cellular industry demanded further delays, adding a third reason to the list: the ongoing saga of Auction No. 35. According to the industry, the 700 MHz auction needed to be postponed, first to allow time for Auction No. 35 to conclude, and second to allow time so that the uncertainties concerning the Auction No. 35 licenses could be resolved.

Spectrum Exchange takes note that there have been no fundamental changes to the Auction No. 31 package bidding procedures since July 2000, and that an industry test of the

⁵ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products. (See footnote 2 of the *Application for Review*.)

⁶ *Letter Requesting Delay of Auction Scheduled for September 6, 2000* ("July 2000 CTIA Letter") from Brian Fontes, Senior Vice President of CTIA and others, to the Hon. William E. Kennard, Chairman of the Federal Communications Commission, filed July 20, 2000, p. 1.

⁷ *July 2000 CTIA Letter*, p. 5.

⁸ *July 2000 CTIA Letter*, p. 2.

package bidding software was conducted in January 2001. Public notices containing the final auction procedures for both Auctions No. 31 and 44 were issued three months in advance of the scheduled June 19, 2002 auction date.¹⁰

Spectrum Exchange further takes note that most uncertainties regarding the band-clearing regime for the Upper 700 MHz Band were resolved by the *Third Report and Order*, FCC 01-25, issued more than a year ago, and the *Order on Reconsideration of the Third Report and Order*, FCC 01-258, issued more than half a year ago. There are currently no open proceedings on WT Docket 99-168 or on the rules for Auction No. 31.¹¹

The current *CTIA Letter* and *Application for Review* raise several additional issues that are irrelevant if not misleading. The *Application for Review* asserts that Congress has now acted on the Administration's proposal to delay the auctions, noting that legislation was introduced in the House of Representatives on April 24, 2002. However, it omits that the Administration's proposal to delay the auction was issued more than a year ago in the *FY 2002 Budget Blueprint* (Feb. 28, 2001) and the *FY 2002 Budget* (Apr. 9, 2001), yet no new legislation has been enacted to date. Congress has acted, by declining to extend the deadlines in the year since the extension was proposed; and the Sept. 30, 2000 and Sept. 30, 2002 deadlines for Auctions No. 31 and 44 remain U.S. law today.

The *CTIA Letter* also waves the flag that "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

⁹ *July 2000 CTIA Letter*", p. 3.

¹⁰ *Public Notice DA 02-659*, Mar. 19, 2002 and *Public Notice DA 02-563*, Mar. 20, 2002.

¹¹ There do remain some major uncertainties concerning Auction No. 44. The comment period for the petitions for reconsideration and clarification of the Report and Order, FCC 01-364, on the Lower 700 MHz Band only recently closed. More importantly, the Commission has thus far declined to extend the voluntary band-clearing regime from the Upper 700 MHz Band to the Lower 700 MHz Band, or to utilize the package bidding procedures for Auction No. 44. Public policy might be served by waiting to hold Auction No. 44 until after Auction No. 31 has concluded,

prematurely.” Spectrum Exchange notes, to the contrary, that the Spectrum Clearing Alliance plan for clearing the Upper 700 MHz Band includes the clearing of 24 MHz of public safety spectrum together with 30 MHz of commercial spectrum. Compensation to incumbents for accomplishing the clearing would come at the expense of the commercial licensees—a fair outcome given that Channels 59-68 need to be cleared for both public safety and commercial purposes. By contrast, CTIA’s legislative vehicle apparently includes a “finding that the 700 MHz band may provide a solution for the interference problems Public Safety communications are experiencing in the 800 MHz band,”¹² but provides no viable plan for clearing the 700 MHz spectrum in the foreseeable future. One must conclude that the Spectrum Clearing Alliance plan would make 24 MHz of spectrum available to public safety many years earlier than the plan that CTIA advocates.

Finally, the *Application for Review* takes the position that: “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.*”¹³ However, it was well understood when the Commission set the June 19, 2002 date for Auction No. 31 that this would entail auctioning the Upper 700 MHz spectrum before the advanced wireless services spectrum.¹⁴ Moreover, the FCC is following the intent of Congress in auctioning the Upper 700 MHz spectrum sooner: Congress set a September 30, 2000 deadline for the Upper 700 MHz auction, but a September 30, 2002 deadline for the advanced wireless services spectrum auction.

In every spectrum auction, the value of the spectrum being auctioned always depends on the supply to be auctioned in future auctions. If CTIA’s position were valid that Section 309(j) of

and if the voluntary band-clearing regime and package bidding procedures are judged to be successful, to extend these to the Lower 700 MHz Band.

¹² *Application for Review*, p. 5.

¹³ *Application for Review*, p. 5 [*emphasis added*].

¹⁴ See “Bush Administration Unveils New 3G Plan, Removing Threat to DoD,” *Communications Daily*, Oct. 9, 2001.

the Communications Act required auctions to be postponed whenever there was any uncertainty about future spectrum supplies, then in 2002, we would still be waiting for the U.S. to hold its first spectrum auction.

Meanwhile, there is a compelling public interest in holding the Upper 700 MHz auction now. In the course of the past two years, the Commission has issued a series of innovative orders that establish a regulatory regime conducive to voluntary band-clearing arrangements. In recent months, the Spectrum Clearing Alliance has formally constituted, and broadcasters have expressed a willingness to vacate the Upper 700 MHz spectrum pursuant to band-clearing arrangements. We have an opportunity for voluntary clearing to work. But the opportunity is fragile, and delay could cause it to quickly slip away. Absent band-clearing arrangements, these broadcasters are required by Commission rules to begin DTV simulcasts. If broadcasters conclude that the Upper 700 MHz auction will be subject to perpetual delay, they will decide to get on with their businesses. Once they do their DTV build-outs, the likelihood of their clearing before the end of the digital transition becomes remote.

For the reasons set forth above, Spectrum Exchange respectfully urges the Commission to hold to the current June 19, 2002 auction date. To further delay the auction is not only contrary to statute, but also contrary to the public interest. Another delay would simply postpone the time when commercial wireless, private wireless, and public safety can begin offering wireless services on this valuable spectrum. We urge you to carefully consider these matters and to deny CTIA's application for review.

Respectfully submitted,

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