cingular INTERACTIVE

Brian F. Fontes, Ph.D. • Vice President, Federal Relations • phone 202.419.3010 • fax 202.419.3052

May 3, 2002

VIA ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
455 12th Street
Washington, DC 20554

Re: ***Ex Parte* Presentation**
Delay of 700 MHz Band Auction Nos. 31 and 44
WT Docket Nos. 99-168 & 02-55, GN Docket No. 01-74

Dear Ms. Dortch:

Cingular Wireless LLC ("Cingular") submits this written *ex parte* in support of the application for review filed by the Cellular Telecommunications & Internet Association ("CTIA").[1] CTIA seeks review of the Wireless Telecommunications Bureau's ("Bureau") letter decision denying postponement of the above-referenced auctions.[2] As discussed below, Cingular agrees that the Bureau erred by (i) failing to justify deviation from Commission precedent granting delay under similar circumstances; (ii) finding Congress' failure to alter relevant statutory deadlines to be dispositive; and (iii) finding that holding the auctions is consistent with public safety goals.[3]

First, Cingular agrees with CTIA that the Bureau erred by departing from Commission precedent.[4] In previously granting a delay of upper 700 MHz band auction, the Commission relied on arguments that uncertainties in the market would discourage bidder participation because bidders lacked "sufficient time to develop business plans and assess market conditions," contrary to Section 309(j)(3)(E)(ii) of the Communications Act.[5] These uncertainties included "the incumbency of . . . broadcasters" and time "to properly assess . . . spectrum needs" following the close of Auction No. 35.[6] The

[1] *See* CTIA, Application for Review, WT Docket No. 99-168 & GN Docket No. 01-74 (filed Apr. 24, 2002) ("CTIA Application"). Pursuant to Section 1.1206(b)(1) of the Commission's rules, a copy of this written *ex parte* presentation is being submitted electronically.
[2] *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC to Thomas E. Wheeler, President/CEO, CTIA (rel. Apr. 11, 2002) ("Bureau Letter"), *denying* Request from Thomas E. Wheeler, CTIA, to Chairman Michael K. Powell, FCC (dated Apr. 3, 2002) ("CTIA Request").
[3] *See* 47 C.F.R. § 1.115(b)(2)(i), (iv).
[4] *See* CTIA Application at 2-4, 5-7; 47 C.F.R. § 1.115(b)(2)(i).
[5] *See Delay of the Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31), Memorandum Opinion and Order*, 15 F.C.C.R. 17406, 17408, 17410-11 (2000) ("*Upper 700 MHz Delay Order*")
[6] *Id.* at 17410-11.

Commission felt that these uncertainties warranted a delay to ensure proper spectrum management and use of the spectrum in the public interest.[7]

Today, the Bureau acknowledges "some uncertainty undoubtedly remains."[8] In fact, there are *more* uncertainties today than when the Commission previously granted a delay. The failure to properly credit these uncertainties, summarized below, is error.

- ***Uncertain 700 MHz Spectrum Rights***. As CTIA recognizes, the 700 MHz bands are heavily encumbered and the path to clearing is far from certain, which makes bidder planning unusually complex.[9] Incumbent broadcast TV stations in the 700 MHz bands do not have to vacate their existing frequencies until the end of 2006 at the earliest, and could occupy the spectrum even longer if certain criteria are not met.[10] The Commission has also rejected imposing mandatory relocation requirements.[11] As a result, potential bidders would be forced to bid on wholly contingent spectrum rights that would not ripen for years – tying up their capital and credit – while attempting to anticipate spectrum needs in the distant future. For these reasons, the Administration and members of Congress support the delay of the upper 700 MHz auction.[12]

- ***Auction No. 35 Spectrum Uncertainties***. An assessment of carrier spectrum needs also remains difficult given the continued uncertainty surrounding Auction No. 35, a fact highlighted in Cingular's earlier *ex parte* filing in support of CTIA's request to delay the auctions.[13] As the Commission is well aware, CMRS

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[7] *See id.* at 17411-12.
[8] *See* Bureau Letter at 2.
[9] CTIA Application at 2.
[10] *See* 47 U.S.C. § 309(j)(14).
[11] *See Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket No. 99-168, *Order on Reconsideration of Third Report and Order*, 16 F.C.C.R. 21633, 21649-50 (2001). The Administration has proposed legislation that would provide for the involuntary relocation of an incumbent broadcaster after 2006 if it has received an assigned channel for relocation. *See* CTIA Request at 4.
[12] *See* CTIA Application at 4, 6. For example, Donald Evans, Secretary of Commerce, has urged for postponement, stating that the auctions are "premature and contrary to the public interest" given the uncertainties of spectrum clearing. Letter from Donald L. Evans, Secretary of Commerce, to Michael K. Powell, Chariman, FCC (rel. Apr. 18, 2002) ("Evans Letter"). Further, House Energy and Commerce Committee Chairman Billy Tauzin introduced legislation last week directing the Commission to suspend Auction Nos. 31 and 44 and eliminating the September 30, 2002 deadline. Congressman Tauzin, joined by fifty-one Commerce Committee members, introduced the Auction Reform Act of 2002 on April 24, 2002. *See* H.R. 4560, 107th Cong. (2002). The uncertainty of spectrum availability is cited as one of the principal reasons for this legislation. *See Tauzin Introduces Bill to Delay FCC Auction*, Committee News Release, at 1 (rel. Apr. 24, 2002) ("News Release"). The Committee, on May 2, 2002, reported H.R. 4560, which is now ready for consideration by the full House of Representatives. *See* <http://energycommerce.house.gov/-107/markups/05022002Markup556.htm> and <http://biz.yahoo.com/rt/020502/-congress_telecoms_auctions_2.html>.
[13] *See* Letter from Brian Fontes, Cingular, to William F. Caton, Acting Secretary, FCC, at 2-3 (dated Apr. 10, 2002).

carriers have pledged more than $16 billion for spectrum licenses in that auction to manage increasing capacity demands and to help support the development and roll out of advanced wireless services. Despite the fact that the auction concluded more than one year ago, the spectrum has been tied up in litigation that, as the result of the Supreme Court's recent decision to grant certiorari in the matter, may now continue for several years.[14] The Bureau did not even consider the impact of Auction No. 35 in reaching its decision, despite the fact that the FCC earlier found that uncertainties regarding Auction No. 35 warranted delay.[15] A re-evaluation of the Bureau's decision in favor of postponement is therefore appropriate.

- ***Unresolved Advanced Wireless Services Spectrum Issues.*** The National Telecommunications and Information Administration has yet to issue its plan for making spectrum available for advanced wireless services, and the Commission's advanced wireless services rulemaking remains pending. The study being conducted in consultation with the Department of Defense is not scheduled for release until after the June 19th auction date.[16] Even once spectrum has been allocated, the Commission will still have to adopt service rules and complete an auction – all of which bears directly on the business plans of potential bidders for 700 MHz spectrum. As CTIA notes, this uncertainty "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 continue as scheduled.[17] The Bush Administration has therefore "strongly stated its desire to delay the auction, awaiting an overall spectrum plan for advanced wireless spectrum the Commission will deliver this summer."[18]

Second, Cingular agrees that the Bureau erred in finding Congress' failure to alter the statutory deadlines dispositive.[19] To the contrary, Congress is *not* required to Act in order for the Commission to delay the auction. Pursuant to Section 309(j), the Commission has a statutory mandate to design auction rules and procedures that "manage the radio spectrum effectively and efficiently in the public interest."[20] That mandate also requires the Commission to "ensure that, in the scheduling of any competitive bidding . . .

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[14] *See NextWave Personal Communication, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1202 (2002). At least one Commissioner has commented that depending upon how long the litigation continues, it may make sense to consider dismissing the Auction 35 results. *See Abernathy: FCC Should Consider Dismissing Re-Auction Results*, RCR Wireless News (Apr. 8, 2002).

[15] *See Upper 700 MHz Delay Order*, 15 F.C.C.R. at 17411.

[16] CTIA Application at 4; News Release at 1.

[17] CTIA Application at 5.

[18] *See* CTIA Request at 1.

[19] *See* CTIA Application at 4-6; 47 C.F.R. § 1.115(b)(2)(iv). The Bureau states "[a]lthough Congress is aware of this situation, it has not acted to address it by, for example, moving the auction deadlines back or moving the DTV transition deadline forward." Bureau Letter at 2. Accordingly, it concludes Congress' inaction compels compliance with the current lower 700 MHz statutory deadline of September 30, 2002 to deposit auction proceeds. *See id.*

[20] *Upper 700 MHz Delay Order*, 15 F.C.C.R. at 17408 (citing 47 U.S.C. § 309(j)(3), (4)).

an adequate period is allowed . . . to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."[21] The purpose of these provisions is to make sure that spectrum is put to its highest and best use.[22]

This statutory mandate conflicts with the statutory deadline for depositing receipts from the lower 700 MHz auction into the U.S. Treasury by September 30, 2002.[23] Indeed, the Commission was faced with the same situation two years ago in connection with a statutory requirement to auction the upper 700 MHz spectrum by September 30, 2000. The Commission's resolution of that conflict should likewise govern here:

> In complying with conflicting statutes, . . . we believe the Commission's primary goal should be to conduct an auction that is fair, efficient, puts the spectrum to the best use, and thereby best serves the public interest. We also believe that it is of utmost importance that we allocate and assign as valuable a resource as the 700 MHz spectrum in a manner that comports with the specific statutory requirements of the Communications Act governing spectrum management and spectrum auctions. Although the Commission takes congressional deadlines very seriously, . . . postponing the auction appropriately balances our responsibilities in a manner that best serves the public interest.[24]

For these reasons, House Commerce Committee Chairman Tauzin has recently explained that the FCC can act *without* legislation: "I believe that . . . legislation should not be necessary to preclude the Commission from conducting the auctions in June. *The FCC currently has the authority to delay these auctions and should do so.*"[25] The Bureau's suggestion to the contrary is error.

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[21] 47 U.S.C. § 309(j)(3)(E)(ii).

[22] *See* H.R. Conf. Rep. No. 105-217 at 153 (July 21, 1997); *see also Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, Memorandum Opinion and Order*, 15 F.C.C.R. 25113, 25123-24 (2000).

[23] *Compare* 47 U.S.C. § 309(j)(14)(C)(ii) *with* 47 U.S.C. § 309(j)(3)(E)(ii).

[24] *Upper 700 MHz Delay Order*, 15 F.C.C.R. at 17411-12. The Commission relied upon *Western Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000). In that case, the court explained that when faced with conflicting statutory requirements where Congress has not spoken precisely to the conflict, courts will defer to agency interpretation where reasonable. *Id.* at 1173-77 (citing *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984)). The court found persuasive "the numerous cases upholding agency decisions to defer actions mandated by statute [here, depositing the lower 700 MHz auction revenues by September 30, 2002] where doing so is administratively necessary in order to realize the broader goals of the same statute [here, conducting an auction that puts spectrum to its best use and thereby serves the public interest]." *Id.* at 1173.

[25] *See Bill Would Direct FCC to Delay 700 MHz Auction Indefinitely*, Comm. Daily, at 1-2 (Apr. 25, 2002).

Finally, Cingular agrees that the Bureau erred by finding that "holding the auctions as scheduled is fully consistent with the Commission's homeland security and public safety goals."[26] While the Bureau letter focuses on the 24 megahertz of the upper 700 MHz band allocated to public safety, it ignores the interference issues currently facing 800 MHz public safety licensees and the potential for an additional 30 MHz of upper 700 MHz band spectrum to provide a potential solution.

In the FCC's pending rulemaking to examine ways to alleviate interference to public safety communications in the 800 MHz bands, the Coalition for Constructive Public Safety Interference Solutions ("Coalition") has presented a proposal to relocate existing 800 MHz public safety operations to 700 MHz spectrum.[27] The relocation would be funded in part through the auctioning of vacated 800 MHz spectrum. This proposal will benefit public safety by resolving interference concerns and more than double the proposed spectrum allocations for public safety to 54 MHz. In comments supporting the CTIA Application, the National Emergency Number Association ("NENA") makes the point that consideration of this proposal alone is worth delay:

> NENA believes that the possibility of more spectrum (beyond the presently allocated 24 MHz) for public safety at 700 MHz – albeit subject to further legislation – is a reason worth some delay in the auction.[28]

Given that the Commission has previously stated that "[e]nsuring that adequate spectrum is available to meet the present and future need of the public safety community is one of the Commission's highest priorities,"[29] the Bureau erred by failing to delay the 700 MHz auctions to allow these issues to be fully addressed in the pending public safety rulemaking.

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[26] Bureau Letter at 2; *see* CTIA Application at 5; 47 C.F.R. § 1.115(b)(2)(iv).

[27] *See* Letter from Coalition to Chairman Michael K. Powell, FCC (dated Apr. 26, 2002). The Coalition represents of small and large CMRS providers (including Cingular), manufacturing and private radio enterprises.

[28] Comments of the National Emergency Number Association in WT Docket No. 99-168 & GN Docket No. 01-74 at 2 (May 1, 2002); *see also* Letter from Glen Nash, President, Association of Public-Safety Communications Officials International, Inc. to Michael Powell, Chairman, FCC in WT Docket No. 99-168 & GN Docket No. 01-74 at 2 (May 2, 2002) ("[W]e do believe that reallocation of the 700 MHz band spectrum now scheduled for auction is at least worthy of consideration by Congress and the Commission. That in turn requires a postponement of the 700 MHz auction.").

[29] *1998 Biennial Regulatory Review, 47 C.F.R Part 90, Private Land Mobile Radio Services*, WT Docket No. 98-182, *Report and Order and Further Notice of Proposed Rule Making*, 15 F.C.C.R. 16673, 16682-83 (2000).

For all these reasons discussed above, Cingular supports the CTIA Application and respectfully urges the Commission reverse the Bureau's decision and to postpone the 700 MHz auctions.

Sincerely,

/s/ Brian Fontes

Brian Fontes
Vice President, Federal Relations
Cingular Wireless LLC
1818 N Street, NW, Suite 800
Washington, DC 20036
(202) 419-3010

cc: Attached service list

CERTIFICATE OF SERVICE

I, Joy Marie Taylor, hereby certify that copies of the foregoing "*Ex Parte* Presentation" were served this 3rd day of May, 2002 via first class U.S. mail on the following:

*Michael Powell, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554

*Kathleen Q. Abernathy, Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, DC 20554

*William J. Copps, Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, DC 20554

*Kevin J. Martin, Commissioner
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, DC 20554

*Bryan Tramont, Senior Legal Advisor to Commissioner Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, DC 20554

*Paul Margie, Spectrum and International Legal Advisor to Commissioner Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, DC 20554

*Peter Tenhula
Senior Legal Advisor to Chairman Powell
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554

*Sam Feder, Legal Advisor on Spectrum and International Issues to Commissioner Martin
Federal Communications Commission
445 Twelfth Street, SW, Room 8-A204
Washington, DC 20554

*Thomas Sugrue, Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C252
Washington, DC 20554

*Kathleen Ham, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C255
Washington, DC 20554

*Robert Pepper
Office of Plans and Policy
Federal Communications Commission
445 12th Street, SW, Room 7-C347
Washington, DC 20554

*Edward Thomas, Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, SW, Room 7-C250
Washington, DC 20554

*Kenneth Ferree, Chief
Media Bureau
Federal Communications Commission
445 12th Street, SW, Room 2-C337
Washington, DC 20554

Michael Altschul
Senior Vice President, General Counsel
Cellular Telecommunications & Internet Association
1250 Connecticut Avenue, NW
Suite 800
Washington, DC 20036

Leonard S. Kolsky
Filed on Behalf of: ArrayComm, Inc.
Lukas, Nace, Gutierrez & Sachs
1111 Nineteenth Street, NW, Suite 1200
Washington, DC 20036

Mark C. Carver
Filed on Behalf of: Utility, Cable & Telecommunications Committee
Uddo, Milazzo & Beatmann
3850 N. Causeway Blvd.
Suite 1510, Lakeway Two
Metairie, LA 70007

Paul Koplin
Filed on Behalf of: World Television of Washington, LLC
4146 Guide Meridian
Suite 102
Bellingham, WA 98226

Paul Koplin
Filed on Behalf of: Spartan TV, LLC
1943 Cedar Street
Suite A
Holt, MI 48842

Filed on Behalf of: TIA Private Radio Section 1300 Pennsylvania Ave., NW
Suite 350
Washington, DC 20004

Attn: Robert J. Speidel, Esq.
Filed on Behalf of: Com-Net Ericsson Critical Radio Systems, Inc.
P.O. Box 2000
Lynchburg, VA 24501

Lowell W. Paxson
Paxson Communications Corporation
601 Clearwater Park Rd.
West Palm Beach, FL 33401

Paul Koplin
Filed on Behalf of: Four Seasons Las Vegas, LLC
3380 S. Arville Street
Suite K
Las Vegas, NV 89102

Paul Koplin
Filed on Behalf of: Four Seasons Peoria, LLC
331 Fulton
Suite 100
Peoria, IL 61602

Richard C. Barth
Filed on Behalf of: of Motorola, Inc.
1350 I Street, NW
Suite 400
Washington, DC 20005

James B. Goldstein
Filed on Behalf of: Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191

M.S. Buddy Merrick
Filed on Behalf of: Good Companion Broadcast Inc.
262 Swamp Fox Road
Box 229
Chambersburg, PA 17201

Joe Williams
Filed on Behalf of: Brevard Community College
1519 Clearlake Rd.
Cocoa, FL 32922

James H. Thompson
Filed on Behalf of: Dove Broadcasting, Inc.
P.O. Box 1616
Greenville, SC 29602

John B. Tupper
High Mountain Broadcasting Corp.
112 High Ridge Ave.
Ridgefield, CT 06877

Wayne Wetzel
Filed on Behalf of: Christian Television of Palm Beach County, Inc.
1900 South Congress Avenue
Suite B
West Palm Beach, FL 33406-6610

Alexandra Kol
44 Melody Lane
Westbury, NY 11590

Kenneth Creech
Filed on Behalf of: WTBU Butler University
2835 N. Illinois Street
Indianapolis, IN 46208

Colby M. May
Law Offices of Colby M. May
Filed on Behalf of: Jacksonville Educators Broadcasting, Inc.
205 Third Street, SE
Washington, DC 20005

Michael D. Smith
Filed on Behalf of: Living Faith Ministries
8594 Hidden Valley Road
Abington, VA 24210

Colby M. May
Filed on Behalf of: Jacksonville Educators Broadcasting, Inc.
205 Third Street, SE
Washington, DC 20005

Lawrence M. Ausubel
Filed on Behalf of: Spectrum Exchange Group
2920 Garfield Terrace, NW
Washington, DC 20008

Mark E. Crosby
Filed on Behalf of: Industrial Communications Association et al.
1110 N. Glebe Road, Suite 500
Arlington, VA 22201

Covington & Burlington
Filed on Behalf of: Midwest Television, Inc.
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Amy Levine
Filed on Behalf of: Association for Maximum Service Television, Inc.
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044

John T. Scott
Verizon Wireless
1300 "I" Street, NW
Suite 400 West
Washington, DC 20005

Kent E. Lillie
Shop At Home, Inc.
5388 Hickory Hollow Parkway
Antioch, TN 37013

J. Geoffrey Bentley
Bentley Law Office
Filed on Behalf of: Sonshine Family Television, Inc.
P.O. Box 710207
Herndon, VA 20171

USA Broadcasting, Inc.
1230 Avenue of the Americas
New York, NY 10020

Jack N. Goodman
Filed on Behalf of: National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

Lawrence R. Krevor
Filed on Behalf of: Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191

Barry A. Friedman
Thompson Hine & Flory LLP
Filed on Behalf of: Entravision Holding, LLC
Suite 800
1920 N Street, NW
Washington, DC 20036

J. Geoffrey Bentley
Bentley Law Office
Filed on Behalf of: Maranatha Broadcasting Company, Inc.
P.O. Box 710207
Herndon, VA 20171

Brendan Holland
Shaw Pittman
Filed on Behalf of: Sinclair Broadcast Group, Inc.
2300 N Street, NW
Washington, DC 20037

Lawrence M. Ausubel
Filed on Behalf of: Spectrum Exchange Group, LLC
2920 Garfield Terrace, NW
Washington, DC 20008

George Graham
6024 Luddington Drive
Toledo, OH 43615

Kevin G. Rupy
Filed on Behalf of: Mobex Communication, Inc.
1150 18th Street, NW
Suite 250
Washington, DC 20036

Sarah R. Iles
Leventhal, Senter & Lerman, P.L.L.C.
Filed on Behalf of: TRW Inc.
2000 K Street, NW
Suite 600
Washington, DC 20006-1809

ArrayComm, Inc.
3141 Zanker Road
San Jose, CA 95134

Richard C. Barth
Motorola, Inc.
1350 I Street, NW
Washington, DC 20005

Mark Crosby
Filed on Behalf of: Industrial
Telecommunications Association, Inc.
110 N. Glebe Road
Arlington, VA 22201

Veronica M. Ahern, Esq.
NIXON PEABODY LLP
Filed on Behalf of: QUALCOMM
Incorporated
One Thomas Circle, NW, Suite 700
Washington, DC 20005

Matthew J. Plache
Catalano & Plache, PLLC
Filed on Behalf of: Rig Telephones Inc.
d/b/a Datacom
3221 M Street, NW
Washington, DC 20007-3617

Stuart Ingis
Piper Marbury Rudnick & Wolfe LLP
Filed on Behalf of: PSINet, Inc.
1200 19th Street, NW
Washington, DC 20036

Arthur L. Jones
City of Milwaukee Police Department
Police Administration Building
749 West State Street
P.O. Box 531
Milwaukee, WI 53201-0531

Sharon Devine
QWEST Communications
1801 California Street
49th Floor
Denver, CO 80202

Albert J. Catalano
Catalano & Plache, PLLC
Filed on Behalf of: DATARADIO
3221 M Street, NW
Washington, DC 20007

Robert M. Gurss
Filed on Behalf of: APCO
Shook, Hardy & Bacon, L.L.P
600 14th Street, NW, #800
Washington, DC 20005

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, NW
Fourth Floor
Washington, DC 20036

William K. Keane
Arter & Hadden
Filed on Behalf of: MRFAC, Inc.
1801 K Street, NW, Suite 400K
Washington, DC 20006-1301

Michele Farquhar
Hogan & Hartson
Filed on Behalf of: The International
Association of Chiefs of Police
555 Thirteenth Street, NW
Washington, DC 20004

Cathleen A. Massey
XO Communications
1730 Rhode Island Avenue, NW
Suite 1000
Washington, DC 20036

Stanford K. McCoy
Covington & Burling
Filed on Behalf of: Association for
Maximum Service Television, Inc.
1201 Pennsylvania Avenue, NW
Washington, DC 20044

Christine M. Gill
McDermott, Will & Emery
Filed on Behalf of: Southern LINC
600 13th Street, NW
Washington, DC 20005-3096

John Horsley
AASHTO's
444 North Capitol Street, NW
Suite 249
Washington, DC 20001

Michael D. Robinson
International Association of Chiefs of Police
515 North Washington Street
Alexandria, VA 22314-2357

E.F. Johnson Company
299 Johnson Avenue
Waseca, MN 56093

Kevin S. DiLallo
Microsoft Corporation
Levin, Blaszak, Block & Boothby, LLP
2001 L Street, NW
Suite 900
Washington, DC 20036

Dataradio Corporation
Catalano & Plache, PLLC
3221 M Street, NW
Washington, DC 20007

State of Florida
DMS, IT
Bureau of Wireless Communications
4030 Esplanade Way, 280H
Tallahassee, FL 32399

* *Via Hand Delivery*

/s/ Joy Marie Taylor
Joy Marie Taylor