

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

In the Matters of Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31); Auction of Licenses in the 698-746 MHz Band (Auction No. 44); Cellular Telecommunications & Internet Association Application for Review (WT Docket No. 99-168, GN Docket No. 01-74).

I do not support an open-ended, indefinite delay of our 700 MHz auctions scheduled for June 19, 2002, as advocated in the application for review filed by the Cellular Telecommunications & Internet Association (CTIA) and others, but I do believe that there are compelling reasons to invoke a short delay, until January 14, 2003, of the Upper 700 MHz band auction. I do not find any compelling reasons to delay the Lower 700 MHz band auction.

I am well aware that there has been a late-inning legislative drive by the industry to change the law and remove the dates that have been leading us to conduct these auctions at this time. If Congress passes into law such changes, the Commission will immediately and faithfully comply. While I respectfully take cognizance of these Congressional efforts, I cannot in good conscience sway from what I believe to be the right result based primarily on the *prospect* of legislative change -- particularly where Congress has already spoken definitively as to our responsibilities. By our actions today, we are *not* trying to out-race Congressional efforts to change the law. The Commission has waited until the last possible moment to issue this decision. It must announce the applications that have been accepted *today*, and will begin accepting funds next week, if no action by the Commission is taken. In other words, non-action would keep both auctions moving forward and it would be even more difficult to reverse or delay. We are making an affirmative policy judgment on when to conduct these auctions under the current circumstances, while striking a balance that is respectful of both past and potential Congressional action.

Indefinite Delay

The application for review filed by the incumbent wireless industry seeks an indefinite delay of two auctions that the Commission had previously determined should take place at this time. In reaching those timing decisions, we considered all the issues and concerns that are presented now at this very late hour, just on the eve of the start of the auctions. The salient point is that there is nothing new presented in this appeal that was not fully considered by this Commission in adopting the service rules and setting the dates for these auctions. Therefore, I support denying the CTIA application for review's request for an indefinite delay.

The application for review raises essentially two arguments for indefinite delay. First, it asserts that broadcasters will not vacate until the completion of the digital television transition, and thus, the uncertainty of when that spectrum will be cleared

frustrates its effective use. As an initial matter, auctioning encumbered spectrum is not at all unprecedented. For example, the Commission auctioned broadband PCS while encumbered by fixed microwave users and even adjusted the relocation rules after the first PCS auction. It has also auctioned the “white-space” surrounding incumbent licensees in the MDS, paging, and SMR services.¹ Second, Congress, when it directed the Commission to auction these bands by certain dates, was aware that the spectrum was encumbered by broadcasters and would remain so for a significant period of time after the auction. Third, the supposed uselessness of these bands is belied by the number of applications the Commission has received, indicating significant interest in bidding despite the problems of incumbency. Thus, it is not clear to me why we should delay indefinitely the auction of this spectrum because of incumbency, as the parties urge. Additionally, it is hard legally to credit claims that Congress’ objectives will be frustrated by this problem of incumbency, given that Congress set the dates with full knowledge that the spectrum was encumbered (having itself set in motion the DTV transition), and would remain so long after the dates it set for licensing the spectrum and depositing the auction proceeds.

More importantly, however, the problem of broadcast incumbency is one for which there is no short path to resolution. The transition to digital television could take well over a decade. One might argue that a modest delay is warranted, if there were a credible and imminent possibility that the bands at issue would be unburdened, but the proponents of delay do not offer one, and I see none. I am hesitant to keep spectrum off the market indefinitely, awaiting some as-of-yet unidentified solution that would greatly accelerate the transition. Jawboning, voluntary agreements and hope can only get us so far.

The only present possibility for clearing these bands is by way of the band-clearing mechanism established by the Commission in the Upper 700 MHz band that might induce broadcasters to leave the spectrum. Ironically, substantial delay would actually frustrate the possibility for band clearing in the upper band. Those broadcasters that occupy these bands will necessarily have to invest further in building out their digital stations and the possibility of relinquishing their extra 6 MHz licenses becomes much less attractive. Thus, substantial delay could create more uncertainty as to when and how the band might be cleared.

Additionally, some proponents of delay argue that even more spectrum in the Upper 700 MHz band could be made available for public safety users. Such suggestions, however, are quite speculative – though the Commission is deeply committed to

¹ See, e.g., Lower and Upper Paging Bands Auction Scheduled for June 26, 2001, DA 01-850, *Public Notice*, 16 FCC Rcd 7675 (2001) at 6-7 (citing interference protections post-auction new licensees will owe incumbent licensees); Auction of Licenses for Fixed Point-to-Point Microwave Services in the 38.6 to 40.0 GHz (39 GHz) Band, DA 00-112, *Public Notice*, 15 FCC Rcd 850 (2000) at 9 (same); Auction of 800 MHz Specialized Mobile Radio Service Licenses, DA 97-1672, *Public Notice*, 13 FCC Rcd 1875 (1997) at 3-4 (same); see, also, Amendment of Parts 21 and 74 of the Commission’s Rules with regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, FCC 95-230, 10 FCC Rcd 9589 at ¶¶ 56-58 (rule making adopting interference protections for existing licensees with respect to new MDS licenses to be auctioned).

improving spectrum availability and access for public safety users. For one, the problem of incumbency exists for any user of the bands. Public safety entities should be no more enthused about being moved to this spectrum than are the commercial providers that urge they be put there. In any event, there are no specific proposals that are developed that have any prospect of being realized any time soon.

I also hear some maintain that the problems associated with effective use of these bands may lead to a busted auction in which few participate and bids are low. It is important to emphasize (yet again) that good spectrum policy should not be driven by trying to garner the most dollars for the Treasury. It is such thinking, ironically, that led to the statutory auction dates that are now the subject of criticism and debate.

I would also note that requests for postponement are inconsistent with the incumbent wireless industry's consistent demands for additional spectrum. The parties seem to contend that these bands are not the spectrum they are really interested in (at least for now), so we should keep it on the government's shelf (or in the hands of analog broadcasters) until they are ready to bid on it. Withholding spectrum from auction indefinitely creates barriers to entry for new providers and may artificially shelter incumbents from competition – not a result that is in the public's interest.

The fact that a significant number of companies have applied to bid for these licenses should give pause in accepting too quickly the claims that the spectrum should not come into the market. A number of major carriers and manufacturers now would prefer that these licenses not find their way into the market, but this should not overshadow other potential users who are anxious and willing to acquire this spectrum.² This Commission very recently took conscious steps to make a substantial amount of this band available for smaller and rural entities by limiting the geographic regions to RSAs and MSAs in the Lower 700 MHz band. We also made a combination of paired and unpaired bands available for new and innovative technologies to prove themselves in the market. This spectrum is allocated for flexible use and one cannot discount innovative, and potentially competitive services that might be built on the foundation that these licenses provide. We should never side with one segment of an industry over another, and I fear that accepting an indefinite delay would do just that.

² I note with interest that on July 20, 2000, a number of large industry players asked the Commission to delay the Upper 700 MHz auction (then scheduled for September 6, 2000) until June 2001. *See* Letter to William E. Kennard, Chairman, from the Cellular Telecommunications Industry Association, AT&T Wireless Services, Inc., BellSouth Corp., Ericsson, Inc., Motorola, Inc., Nextel Communications, Inc., Qwest Wireless, LLC, SBC Communications, Inc., Verizon Wireless, and VoiceStream Wireless. These players noted that “[b]ecause of its location in the electromagnetic spectrum and its excellent propagation characteristics, the 30 MHz of spectrum to be auctioned in the 700 MHz band is ideally suited for the next generation mobile and high-speed broadband services. These services will intensify competition for all communications services and yield tremendous benefit to the public.” *Id.* at 1. In light of pending rulemaking proceedings involving the band clearing process, they urged the Commission to “work with Congress as necessary to permit a postponement of the [Upper] 700 MHz auction until June 2001.” *Id.* at 3-4.

Perhaps most importantly, appeals for the Commission to indefinitely put off the auction are further blunted by the fact that Congress has passed a statute – and signed into law by the President – that directs this agency to auction this spectrum by specific dates and for specific purposes. I recognize fully that the law affords some flexibility to miss statutory deadlines (we have done so several times with the Upper 700 MHz band), but those instances are rightfully narrow, and not a basis for indefinite disregard. A law passed by two houses of the U.S. Congress and signed by the President expresses the will of the people. Unelected members of an administrative agency, as Congress regularly reminds us, are duty bound to follow the law, no matter what our preferences might be otherwise. It should be above question that we should be conservative when being urged to push the envelope of the law, lest it contravene the will of Congress.

As I noted above, there have been aggressive attempts to change the law and remove (or modify) the current dates. But it is hazardous for an agency to take actions that contravene the law based only on the fact that there are efforts afoot to change that law. It is difficult and ill-advised to try and give odds on the chance of a given bill becoming law and to implement its terms before it does so. There have been several legislative proposals to alter the auction dates over the last several years (the same reasons were urged then as well), yet those efforts failed. Again, if Congress passes into law such changes, at any time, the Commission will immediately and faithfully implement its directives. In fact, I would encourage Congress to grant this agency the flexibility and discretion it needs for scheduling *all* auctions, not just these.

Upper 700 MHz Auction Delay

With all that said about an indefinite delay, I have reluctantly concluded that the best course is for the Commission to temporarily delay the auction of the Upper 700 MHz band until January 14, 2003. While we cannot be sure of the ultimate outcome, the potentially imminent prospect that Congress may wish to change its policy gives me pause. While this legislative activity alone would not be enough, a number of technical questions and must carry issues remain outstanding that could affect the prospects for clearing the Upper 700 MHz band for new commercial and public safety users and they should be resolved.

It bears repeating that, with this temporary delay, we are *not* imposing a deadline on Congress. Instead, we are making an affirmative policy judgment to move the auction to a date of our choosing. The Commission and its auctions staff have been planning for a long time to conduct these auctions (pursuant to Congressional direction) in a fair and efficient manner. Congress set out both the timing of such auctions and the purposes to which the spectrum should be put. There is a substantial effort underway in Congress to possibly change aspects of that policy. However, the fact that legislation has passed the House and that there are serious efforts to pass legislation quickly raises concerns in my mind about the destabilizing effect on the auction. Proceeding under this additional cloud of uncertainty could affect financing decisions and bidding behavior, thereby compromising the integrity of the auction. But I also note that just because the

Commission delayed this particular auction before, it cannot stand for the proposition that it can delay whenever and for as long as it wishes. That would make a mockery of the laws enacted by Congress and set a troubling precedent for an administrative agency.

Lower 700 MHz Auction on Schedule

With regard to the Lower 700 MHz band, I am pleased that two of my colleagues have supported the effort to keep on schedule with that auction. There is a clear Congressional directive that requires the Commission to put money in the Treasury by the end of September for this spectrum to be reclaimed from analog broadcasters. Time remains for the Commission to comply with the current statutory date, and it should endeavor to do so absent compelling circumstances or other serious outstanding issues. Such circumstances or issues, to my mind, have not been presented by the proponents of delay. Moreover, there are unique public interest benefits to putting this spectrum in the market that tip in favor of proceeding. For example, the Commission has created licensing rules that will provide unique opportunities for rural and small interests to obtain licenses -- one of the public interest objectives of Section 309(j) of the Communications Act. Additionally, the application filings show substantial interest in this particular auction.

Of course, many of the arguments for temporarily delaying the Upper 700 MHz band auction could be said of the lower band as well. However, I believe important distinctions do exist. In addition to the unique positive public interest benefits identified above, one significant distinction is the fact that the specific legislative dates for the Upper 700 MHz band have long passed. That auction was previously delayed past the dates established in the year 2000 Consolidated Appropriations Act, based on the belief that conflicts in separate and distinct legislative goals necessitated additional time. We could have easily chosen to schedule the auction a few months from now instead of the dates we did select. In my view, we have come close to resolving those original concerns, but I believe we have greater latitude to set that auction date, within a very short realm of reasonableness. Additionally, in the Upper 700 MHz band, we have established a mechanism that affords an opportunity to clear the band of incumbent broadcasters to make way for new public safety and commercial services, but some technical issues are outstanding. We declined, however, to establish a similar band clearing mechanism for TV Channels 52-58 in the lower band and thus no such basis exists for further delay.