



PUBLIC NOTICE

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**AUCTION OF LICENSES IN THE 747-762 AND 777-792 MHz BANDS (Auction No. 31)
POSTPONED UNTIL JANUARY 14, 2003;**

**AUCTION OF LICENSES IN THE 698-746 MHz BAND (Auction No. 44) WILL
PROCEED AS SCHEDULED.**

Report No. AUC-02-31-F (Auction No. 31) and AUC-02-44-D (Auction No. 44)

The upcoming auction of licenses in the 747-762 and 777-792 MHz band (Auction No. 31), scheduled to begin on June 19, 2002, hereby is postponed until January 14, 2003, in order to provide additional time for Congress to consider legislation affecting the timing of that auction and, accordingly, bidder preparation and planning. Pursuant to the previously announced schedules, the Commission computer system window to file short-form applications (FCC Form 175) to participate in Auction No. 31 closed at 6 p.m. ET on Wednesday, May 8, 2002. Any short-form applications to participate in Auction No. 31 that are in the system will be deemed ineffective and purged from the system in seven (7) days. Any party will be able to submit a short-form application to participate in Auction No. 31 pursuant to the new schedule. Applicants wishing to participate pursuant to the new schedule must file in compliance with the deadlines listed below. The new filing window for short-form applications to participate in Auction No. 31 will open on November 14, 2002.

The new schedule is as follows:

Filing Deadline for FCC Form 175:	November 25, 2002; 6:00 PM ET
Upfront Payment Deadline:	December 13, 2002; 6:00 PM ET
Mock Auction:	January 9, 2002
Auction Start Date:	January 14, 2003

The upcoming auction of licenses in the 698-746 MHz Band (Auction No. 44), scheduled to commence on June 19, 2002, will proceed as scheduled. Pursuant to the previously announced schedule, the Commission computer system window to file short-form applications (FCC Form 175) to participate in Auction No. 44 closed at 6 p.m. ET on Wednesday, May 8, 2002. Any short-form applications to participate in Auction No. 44 that are in the system will be

processed and the Wireless Telecommunications Bureau will issue appropriate public notices shortly.

The Commission will memorialize its views supporting this decision in a separate opinion.

Action by the Commission on May 24, 2002, by Chairman Powell; Commissioners Abernathy and Copps issuing separate statements and Commissioner Martin approving in part, dissenting in part and issuing a statement.

For further information, contact Lisa Stover, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (717) 338-2888; or Howard Davenport, Legal Branch, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418-0660.

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**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-pace 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

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

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 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

(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).

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.

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.

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.

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.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31) Postponed Until January 14, 2003; Auction of Licenses in the 698-646 MHz Band (Auction No. 44) Will Proceed as Scheduled (adopted May 23, 2002)

The compromise resolution we reach today is far from elegant, but I believe it best balances the conflicting demands placed on us by the statute, congressional activity, sound spectrum management, and the public interest.

I look forward to holding the lower 700 MHz auction on time and the deployment of new services into the “white space” in those bands. Unlike the upper band, where band clearing seems more viable, the lower 700 MHz band is not likely to clear in the short term. In the interim, I believe there is a valid public interest in allowing new services into the “white spaces” rather than allowing that spectrum to remain fallow indefinitely. In turn, we have adopted a licensing scheme that facilitates this goal. As I have stressed repeatedly in recent weeks, spectrum management in this age requires a diverse set of tools — including initial allocations in all shapes and sizes. Here we adhere to that principle and will auction spectrum in large regions and MSA/RSAs, in paired and unpaired blocks. I am particularly pleased that we are moving forward because of the potential for rural providers to access an additional 12 MHz of spectrum via MSA/RSA licensing.

Regarding the upper 700 MHz band, I support the brief delay we adopt here. As I have stated for months, it serves the public interest to hold both auctions before the end of the year absent a change in the statute. Recently, some key advocates in the public safety community sought a short delay of this auction. One of my primary policy motivations for going forward with the upper 700 MHz auction was to promote public safety access to the critical spectrum resources in that band — particularly the vital interoperability channels. The public safety community’s interest in delay, combined with the activity on Capitol Hill and the brevity of the delay, convinced me that we are pursuing the proper course.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

RE: Auction of Licenses in the 747-762 and 777-792 MHz Bands and Auction of Licenses in the 698-746 MHz Band.

After a great deal of deliberation, I agree with today's decision to proceed as scheduled with the auction of licenses in the 698-746 band and temporarily to postpone the auction of licenses in the 747-762 and 777-792 MHz bands.

The statutory directives related to auction dates for the 700 MHz band are ambiguous. I have spent many hours trying to parse their meaning and intent. Reasonable arguments can be made for proceeding forthwith or delaying the auctions. Just about any conclusion in this matter involves some interpretive stretch on the part of the Commission.

Legitimate, but inconsistent, interpretations of section 309(j)(14)(C)(ii) of the Communications Act of 1934 and section 3007 of the Balanced Budget Act of 1997 provide no clear statutory language on which to determine Congressional intent. Legislative history related to these provisions is, unfortunately, also inconsistent. Given these conflicting possible interpretations, I am forced to attempt to meet our responsibilities in the best way possible.

I believe that moving forward with the lower 700 MHz band will both advance the goal of deploying rural wireless services and will move us towards resolution of assignment questions for this band, which Congress appears to value. I believe that our action today on the lower 700 MHz band has a sounder basis in statute and legislative history than would a delay of the entire band. A temporary postponement of at least part of the 700 MHz band, while controversial, seems in order given the apparent intent of Congress to legislate on this matter in the near-term future. The House of Representatives has already passed legislation, and reports of possible Senate action should give the Commission pause in moving ahead in the face of these Congressional concerns. Today's delay will allow Congress time to consider pending legislation related to auctions.

It should be noted that the Commission is forced to act now because the auction clock is running and a decision could not have been made subsequent to this that would have accommodated completing an auction this fall.

For these reasons, I support today's decision on this matter.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
APPROVING IN PART AND DISSENTING IN PART**

Re: Auction of Licenses in the 747-762 and 777-792 MHz Bands (Auction No. 31) Postponed Until January 14, 2003, Auction of Licenses in the 698-746 MHz Band (Auction No. 44) Will Proceed as Scheduled, Public Notice

I approve the Commission's decision to delay the upper 700 MHz auction and dissent from its decision to proceed with the lower 700 MHz auction as currently scheduled for June 19, 2002. I believe the public interest would best be served by delaying both auctions to allow the Commission time to develop a more comprehensive approach to these spectrum issues.

The Commission has previously concluded that it has the authority to delay the 700 MHz auctions, so long as a delay would further our "statutory mandate to design our auction rules and procedures so as to manage the radio spectrum effectively and efficiently in the public interest." *Cellular Telecommunications Industry Ass'n et al's Request for Delay of the Auctions in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31)*, Memorandum Opinion, 15 FCC Rcd 17,406 ¶ 6 (2000) (Commission deciding to delay the auction for the upper 700 MHz band). This item does not alter this conclusion.

I believe the public interest would best be served by delaying both 700 MHz auctions indefinitely. The Commission is currently involved in a number of other proceedings involving complex spectrum management issues, such as our proceeding to identify additional spectrum for advanced wireless services and our proceeding to improve public safety communications in the 800 MHz band. In my opinion, we should consider these issues in a more comprehensive manner before proceeding with the 700 MHz auctions. A delay would also allow the Commission to shed light on the considerable uncertainty concerning when the spectrum in this band will actually become available to public safety and commercial users. The pathway to the transition to digital television – which would allow the spectrum in the 700 MHz band to become available – is unclear at best. While the Commission has allowed voluntary mechanisms for relocating incumbent broadcasters, we do not know whether and when such measures will bear fruit. And there remain outstanding issues here at the Commission, such as the pending short-spacing applications by some stations in the upper 700 MHz band, that will impact the transition. Members of Congress, the administration, and the public safety community have called for a delay of the 700 MHz auction for many of these same reasons.

I support the Commission's decision to postpone the upper 700 MHz band auction but would have preferred to delay auctions for the entire 700 MHz band. In addition, although I agree with one of the Commission's goals in this item – "to provide additional time for Congress to consider legislation" addressing these spectrum issues – I am troubled by the implication that we are placing a deadline by which Congress must act. As I indicated above, the Commission has already determined that it has the authority to delay this auction. Particularly in such circumstances, the Commission should not impose artificial deadlines on congressional action. I thus would have preferred merely to announce that the auctions would be delayed at this time.