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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WT Docket No. 06-169 (700 MHz Guard Band NPRM).

Dear Ms. Dortch:

MetroPCS Communications, Inc. ("MetroPCS") is making this *ex parte* submission pursuant to Section 1.1206(a) of the Commission's rules to express its concerns about the Broadband Optimization Plan ("BOP") proposed by Access Spectrum, LLC, ("Access") Pegasus Communications Corporation ("Pegasus") et al.¹

The BOP Raises Significant Interference Concerns

There is no Commission function more critical than protecting users of spectrum against harmful interference. The special provisions in the Communications Act of 1934, as amended (the "Act"),² relating to the licensing of radio spectrum prohibit any use of spectrum "when interference is caused by such use or operation."³ With specific reference to Part 27 of the rules, which governs 700 MHz Guard Band operations, the Commission has stated explicitly that one primary purpose of Part 27 is to "prevent interference."⁴ Indeed, the Commission on occasion has described "interference avoidance" as its "primary concern."⁵

Guarding against harmful interference is particularly critical when public safety licensees may be affected. Both Congress and the FCC have made it a top priority to assure that first responders have the resources they need to respond to emergencies.⁶ This critical public interest objective would be undermined completely if the Commission were to adopt changes in the permissive uses of the 700 MHz Guard Band spectrum, and in the technical parameters of

¹ See Comments of Access Spectrum, LLC, Pegasus Communication Corporation, et al. WT Docket Nos. 06-169 and 96-86 (Oct. 23, 2006).

² 47 USC Section 151 et seq.

³ 47 USC Section 301.

⁴ 2004 Biennial Review – *Wireless Telecommunications Bureau Staff Report*, 20 FCC Rcd 124, Appendix IV (2005) (discussing Part 27).

⁵ *Amendment of Part 15 of the Commission's rules regarding Spread Spectrum Devices, Second Report and Order*, 17 FCC Rcd 10755, para.27 (2002).

⁶ See, e.g., S. 2653, the Call Home Act, as amended by Senator Stevens to require the NTIA and DHS to award no less than \$1,000,000,000 for public safety interoperability; *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements through the Year 2010, Ninth Notice of Proposed Rulemaking*, 21 FCC Rcd 14837 (2006).

Guard Band operations, that might or could result in interference to existing or future public safety licensees. Indeed, taking actions that result in interference to public safety uses of the 700 MHz band would violate the explicit Congressional directive that public safety licensees in the 700 MHz band “continue to operate free of interference.”⁷ Thus, it is no surprise that a major focus of the original 700 MHz Guard Band allocation proceeding was to establish technical rules and operating limitations designed to ensure that public safety licensees would be protected from harmful interference.⁸

Serious concerns have been raised regarding the prospects for harmful interference to public safety and commercial licensees if the BOP is adopted by the Commission. Both AT&T⁹ and Verizon Wireless¹⁰ have made detailed *ex parte* submissions indicating that adopting the BOP proposal would risk significant interference to both public safety and commercial licensees. Unlike Pegasus and Access, which as existing licensees could have an incentive to downplay the prospects for interference to public safety and other commercial licensees in order to gain more flexibility in using their assigned 700 MHz spectrum, Verizon and AT&T appear to have no axe to grind in this proceeding *other than* the avoidance of harmful interference. Under these circumstances, the Commission should give the comments of Verizon and AT&T serious consideration and weight and reject the changes proposed in the BOP.

The BOP Does Not Comply With The Statutory Scheme

The Balanced Budget Act of 1997 (the "BBA")¹¹ directed the Commission to reallocate the Upper 700 MHz band for public safety use and commercial use. Specifically, the BBA mandated that the Commission allocate 24 MHz of spectrum for public safety services and the remaining 36 MHz of spectrum for commercial use to be assigned by competitive bidding.¹² The current allocation scheme for the Upper 700 MHz channels, which includes the A and B Block Guard Band channels, was crafted to satisfy this clear statutory demarcation between the commercial and public safety allocations.

The BOP proposes to reshuffle the public safety and commercial allocations in the upper 700 MHz band in a manner that does violence to the statutory scheme. Were the BOP implemented, public safety would end up with an additional 3 MHz of spectrum, thus increasing the total public safety allocation from the statutorily mandated 24 MHz to 27 MHz (two blocks of 13.5 MHz). Pegasus and Access claim that this reallocation is permissible since the 6 MHz of Guard Band spectrum initially was licensed as commercial, which satisfies the statutory mandate, and that the Commission is now free to reallocate it as it sees fit.

⁷ H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Session at 589 (1997).

⁸ *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules* (WT Docket No. 99-168), *First Report and Order*, 15 FCC Rcd 476, para 3 (2000). The original reason for the restrictions on the uses of the Guard Bands licenses that the BOP proponents hold, and the technical rules associated therewith, was to ensure that public safety and commercial licensees were protected. Any person who proposes to change the original band plan and service rules bears a heavy burden to show that it will not cause harmful interference to adjacent licensees. The BOP proponents have failed to meet their burden.

⁹ AT&T *Ex Parte* in WT Docket No. 06-169, WT Docket No. 96-86, and WT Docket No. 06-150, filed February 23, 2007.

¹⁰ Verizon Wireless *Ex Parte* in WT Docket No. 06-169, filed February 15, 2007.

¹¹ Pub. L. No. 105-33.

¹² *Id.* at § 3004. These statutory mandates are incorporated in Section 337(a) of the Communications Act of 1934, as amended 47 U.S.C. § 337(a).

The proponents offer no legal support for the stunning assertion that the Commission can satisfy its statutory mandate by making a fleeting allocation and then revising the plan before any substantial service has been rendered to the public. Indeed, the language of the statute itself completely defeats the Pegasus/Access claim. Section 337(a) provides that the Commission "shall allocate the electromagnetic spectrum as follows": (1) 24 MHz [for public safety]; and (2) 36 MHz [for commercial use].¹³ Notably, the statutory language does not say that the Commission only need "initially" allocate, or "temporarily" allocate spectrum according to the statutory breakdown, nor is there anything in the legislative history to indicate that the statutory breakdown was intended to be transient. To the contrary, the language is compulsory and ongoing for so long as the statute remains in effect.

In commenting on many of the proposals being presented to the Commission in the 700 MHz band, MetroPCS consistently has taken the view that the Commission should adhere to the strict statutory demarcations between public safety and commercial uses in this band.¹³ The BOP violates this important principle, and as a result cannot be adopted.

Major Post-Auction Service Rule Changes Should Not be Favored

MetroPCS has been an active, successful participant in recent wireless spectrum auctions and has a significant interest in preserving the integrity of the Commission's auction process.¹⁴ This integrity is compromised when licenses are offered at auction and awarded under service rules that are changed substantially *after the fact* to the benefit of the incumbent licensees. Whenever the Commission takes such a course, it encourages speculators to participate in auctions and to purchase spectrum with an interest in changing the rules rather than an interest in providing service to the public under the existing rules. Post-auction rule changes that benefit incumbent licensees also run the risk that the entity which would value the spectrum most highly under the revised rules is not the one which ends up holding the license. In effect, dramatically changing the rules in favor of an existing licensee means that the Commission is picking winners and losers rather than letting the marketplace do so. This reduces the prospect that auctions will work efficiently.

There can be no doubt that the BOP represents a troubling post-auction re-allocation of spectrum. The plan is advocated by a coalition that purports to represent 97% of the existing 700 MHz Guard Band licensees.¹⁵ In effect, the BOP proposal would give each A Block Guard Band licensee another 1 MHz of spectrum — in some cases increasing the amount of spectrum they hold by 33% — and allow for a more flexible use of that spectrum that is potentially harmful to public safety and commercial licensees. The revised rules proposed by the licensee proponents of BOP would lift the restriction on the use of a cellular operating architecture in the previously allocated guard bands and reduce the adjacent channel power and out-of-band

¹³ For example, MetroPCS has opposed the Cyren Call plan which seeks to reallocate 30 MHz of spectrum from commercial to public safety uses, and has opposed the Frontline proposal which muddies the demarcation between the commercial and public safety bands. *See* Comments of MetroPCS Communications, Inc. in Rm 11348 filed November 29, 2006; Reply Comments of MetroPCS Communications, Inc. in PS Docket No. 06-229.

¹⁴ MetroPCS was one of the highest bidders in the recently concluded Auction 66, bidding approximately \$1.4 billion dollars for advanced wireless services (AWS) spectrum.

¹⁵ *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, Notice of Proposed Rule Making*, 21 FCC Rcd 10413, para 14 (2006) ("Guard Band NPRM").

emission limits. There can be little doubt, had these changes been made prior to the initial auction, that additional applicants would have participated in the auction, the spectrum would have been valued far higher in the auction, and other entities may have valued the spectrum more than the existing licensees. This being the case, the result of the rule changes proposed in the BOP would be a significant windfall to the incumbent licenses, which no doubt will encourage other incumbent licensees in the future to seek their own beneficial post-auction rule changes.

The Commission recognized the potential unfairness of this windfall in its *Guard Band NPRM*, asking “If the A Block incumbents receive expanded rights without being required to bid for them, how should such rights be valued, and what mechanisms should be employed to ensure that incumbents do not receive a windfall.”¹⁶ This portion of the *Guard Band NPRM* arises out of a consistent Commission policy against post-licensing rule changes that “would confer fundamentally greater rights and access to substantially more spectrum than is available to [the incumbent licensee] under its existing license.”¹⁷ For example, in the recently concluded *800 MHz Rebanding Proceeding*,¹⁸ the Commission imposed an “anti-windfall” payment obligation on Nextel in order to ensure that it did not receive an unfair benefit from its receipt of 10 MHz of contiguous spectrum in exchange for the non-contiguous 800 MHz and 900 MHz spectrum it was surrendering in the rebanding process.¹⁹ Similarly, the Commission has established rules governing spectrum assigned to so-called “designated entities” or “DEs” to assure that they do not obtain licenses at a discount and end up earning a “windfall profit.”²⁰ The consistent theme in all of these rulings is that major, post-licensing regulatory changes that result in a significant financial benefit to a particular licensee or group of licensees are not to be favored.

To the knowledge of MetroPCS, the proponents of the BOP have offered no anti-windfall payment to account for the fact that the rule changes they seek would confer a substantial financial benefit on them. Thus, even if the BOP otherwise would serve the public interest – which does not appear to be the case – sound administrative policy would require that appropriate steps be taken to avoid granting a windfall to the incumbent licensees who acquired the spectrum but have not appeared to make beneficial use of it within the confines of the current allocation scheme.

In the final analysis, the rule changes proposed in the BOP would not serve the public interest and would violate statutory mandates. If, nonetheless, the Commission elects to pursue changes of this nature, the proper course would be to require the proponents to surrender their licenses so a proper auction could be held for the drastically reconfigured licenses.

¹⁶ *Id.* at para. 48.

¹⁷ Amendment of Part 22 of the Commission’s Rules to benefit the Consumers of Air-Ground telecommunications Service (WT Docket No. 03-103), 20 FCC Rcd 4403, para. 74 (2005)(denying incumbent licensee Verizon Wireless exclusive use of a portion of the reconfigured 800 MHz air-ground band because doing so would give it “a substantial windfall”)

¹⁸ *Improving Public Safety Communications in the 800 MHz Band, Report and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004)(“*Rebanding R&O*”); *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004).

¹⁹ *Rebanding R&O* at para 64.

²⁰ See 47 C.F.R. § 1.2111(d) (setting certain unjust enrichment payment obligations for DEs which purchase a license at a discount using a bidding credit and then assign or transfer the license to a non-eligible after a short period).

Kindly refer any questions in connection with this letter to the undersigned.

Respectfully submitted,



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