Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones	)	WT Docket No. 01-309

RESPONSE OF METROPCS COMMUNICATIONS, INC.
TO UNTIMELY "COMMENTS" OF FRONTLINE WIRELESS, LLC

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Summary

Frontline Wireless, LLC ("Frontline") seeks a nationwide set aside of 10 MHz of prime 700 MHz commercial spectrum for a nationwide license to be used by a monopoly wholesale network provider who would be obligated to allow public safety agencies priority, emergency access to their spectrum. This proposal is radical and disruptive to the current process that the Commission has undertaken to finalize the rules and allocation regarding the 700 MHz band. Frontline did not submit a pleading advocating its radical plan in this 700 MHz band proceeding until March 6, 2007 – nearly six months after the initial comment deadline and nearly five months after the reply comment period ended (October 20, 2006). The Commission already is under a strict statutory deadline to conduct the commercial 700 MHz auction – which would be difficult to meet under the best of circumstances -- and consideration of the Frontline proposal jeopardizes the Commission's ability to engage in a reasoned rulemaking and still meet the statutory deadline.

The procedural problems posed by the Frontline plan are accompanied by significant substantive concerns as well. The Frontline proposal is ill advised, unnecessary, questionable on legal and policy grounds, and should be rejected by the Commission. For example, Frontline proposes "poison pill" rules that will make the spectrum unattractive to potential bidders, and wholesale operating restrictions that will make the E Block unavailable to designated entities ("DEs") without an evisceration of the current DE rules. Further, Frontline proposes to make public safety users hostage to a monopoly service provider which would have the right to extract unregulated user fees. The Frontline proposal also places public safety users at the mercy of an untested and uncertain public/private partnership arrangement for which there can be no assurance of success.

The Frontline proposal also proposes a legally questionable incursion of public safety users into commercial spectrum and would give commercial users access to spectrum specifically designated by Congress for public safety use. Given the many controversial components of this Frontline proposal, it should not be given serious attention by the Commission. If the Commission wants to give it any consideration, the Commission must place it on public notice and have it thoroughly vetted in comments by interested parties.

The public safety community deserves a network built out and operated solely for its own use – not a shared network. If the Commission wants commercial licenses to assist the public safety community in constructing and operating a nationwide interoperable network, the Commission should use the power of the marketplace – through incentives to all 700 MHz band licensees -- to foster this assistance, rather than hastily adopted regulatory strictures that serve to earmark the spectrum to a single party. Accordingly, the Commission should proceed with its current proposal to modify the rules governing 12 MHz of public safety 700 MHz spectrum to foster an interoperable broadband pubic safety network. MetroPCS reiterates its belief that the public safety community needs an interoperable broadband network for first responders and the proper place to deploy this network is in 12 MHz of the existing 24 MHz of 700 MHz spectrum already dedicated for public safety uses. MetroPCS strongly opposes Frontline's 11th hour proposal.

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RESPONSE OF METROPCS COMMUNICATIONS, INC.
TO UNTIMELY "COMMENTS" OF FRONTLINE WIRELESS, LLC

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its response to the untimely "Comments" filed on behalf of Frontline Wireless, LLC ("Frontline") with reference to the *Notice of Proposed Rulemaking, Fourth Further Notice of Proposed Rulemaking, and Second Further Notice of Proposed Rulemaking,* FCC 06-114, released August 10, 2006 (the "*NPRM*")[2] in the above-captioned proceedings (the "Frontline 700 MHz *Ex Parte*"). The following is respectfully shown:

[1] For purposes of these Comments, the term "MetroPCS" refers to the parent company (MetroPCS Communications, Inc.) and all of its FCC-licensed subsidiaries.

[2] *See* In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 04-356, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4 of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, *Notice of Proposed Rule Making, Fourth Further Notice of Proposed Rule Making, and Second Further Notice of Proposed Rule Making*, FCC 06-114 (rel. Aug. 10, 2006) ("*NPRM*"), 71 Fed. Reg. 48506 (Aug. 21, 2006).

Preliminary Statement

The Commission released its *NPRM* in this proceeding on August 21, 2006.[3] Formal comments were due on or before September 29, 2006.[4] Reply comments were due on or before October 20, 2006. These deadlines were established in order to allow the Commission to meet the statutorily mandated auction commencement date and auction proceeds dates.

Frontline did not file comments or reply comments on the dates established by the Commission. Rather, its first submission in the proceeding was made on March 6, 2007, nearly six months after comments were initially due and nearly five months after replies were due. Though styled as a formal pleading and self-designated by Frontline as a set of "Comments," the submission is in fact nothing more than an *ex parte* filing made in the very-late stages of a rulemaking proceeding proposing a radical and substantive change to the Commission's proposals.[5] While Frontline has the unquestionable right to make an *ex parte* submission at any time, this does not alter the extremely disruptive nature of the manner in which it has chosen to proceed.

By any measure, the Frontline proposal is a radical proposal. As is discussed in greater detail below, Frontline seeks to earmark 10 MHz of valuable commercial broadband spectrum nationwide for a monopoly wholesale network that just happens to correlate perfectly to its business plan. In the process, Frontline proposes "poison pill" rules that will make the spectrum

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[3] *See infra* note. 2.

[4] *See* In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 04-356, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4 of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, DA 06-1880, *Order*, released September 15, 2006.

[5] Chairman Martin and several other Commissioners have made clear their desires to conclude this proceeding as soon as practicable so that the auction can commence thereby assuring that the FCC will meet the statutory deadline of June 30, 2008 by which it is obligated to remit the auction proceeds to the specially created Digital TV transaction fund. "FCC Mulls Classifying Wireless Broadband as Information Services," Telecommunications Reports, February 15, 2007; "700 MHz Auction Could Start as Early as August, Martin Says," Telecommunications Reports, February 7, 2007.

unattractive to potential bidders, will require substantial involvement by the Commission after the fact to mediate the inevitable disputes that will erupt between the monopoly service provider and the public safety community, will rely on regulation rather than the marketplace to provide assistance to the public safety community, and applies wholesale operating restrictions that will make the E Block unavailable to designated entities ("DEs") without an evisceration of the current DE rules.[6] Frontline proposes to turn away from marketplace forces to assist public safety community and rather make public safety users hostage to a monopoly service provider which would have the right to extract unregulated user fees without setting the incentives so as to avoid disputes or any mechanism to mediate the inevitable disputes.[7] Further, it proposes a legally questionable incursion of public safety users into commercial spectrum and would give commercial users access to spectrum specifically designated by Congress for public safety use.[8] The Frontline proposal also places public safety users at the mercy of both a historically failed business model – wholesale carrier-to-carrier services – and an untested and uncertain public/private partnership arrangement for which there can be no assurance of success. Given the many controversial components of the Frontline proposal, the Commission should not give the Frontline proposal any serious consideration. If the Commission nonetheless feels obligated to consider the Frontline proposal, then it must be placed on public notice and thoroughly vetted in comments by interested parties.

Unfortunately, the problem, which is of Frontline's own making, is that there isn't time to give the Frontline proposal adequate consideration. Before commencing the auction of the 60 MHz of 700 MHz commercial spectrum, the Commission must first adopt service rules in this proceeding. The Commission has indicated that it plans to give applicants a minimum of six

[6] *See* discussion *infra* at pp. 9-11.

[7] *See* discussion *infra* at pp. 16-20.

[8] *See* discussion *infra* at p. 8.

months after these rules are adopted before the auction commences.[9] Then, the Commission needs to release a *Public Notice* seeking comment on the auction procedures (activity rules, minimum bid amounts, upfront payment requirements, bidding rules, etc.). The Commission's own published auction guidelines indicate that this *Public Notice* should be released "[a]pproximately 4-6 months prior to auction" and that the order establishing the procedures, terms and conditions for the auction event should be released "[a]pproximately 3-5 months prior to auction."[10] This timeline, when considered in the context of the looming statutory deadlines -- which must be considered inviolate -- simply does not contain enough leeway to permit the Frontline proposal to be properly vetted even if the Commission wanted to give it serious consideration – which it should not.

When the commercial 700 MHz service rules *NPRM* was released, Commissioner McDowell properly noted that "[g]iven these congressional mandates, we have our work cut out for us."[11] Indeed, the Commission declined a request to extend the comment date for as long as requested by certain parties in this proceeding, and staunchly refused to extend the reply comment deadline, noting that it was mindful of its statutory obligations and that time was of the essence. Frontline's 11th hour radical proposal now has made the Commission's task even more daunting by presenting the Commission with a Hobbsian choice: either rush to judgment on the Frontline proposal - - without an adequate record - - thereby jeopardizing both the commercial and public safety spectrum allocation and risking legal challenges or subject the Frontline proposal to appropriate public notice and comment - - thereby jeopardizing the statutory

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[9] "FCC Moves to Restore Cable Limits," Daily Deal, March 15, 2007; "McDowell Says Small Carries Will Have Time to Prepare for 700 MHz Auction," Comm. Daily, March 16, 2007. Several parties have indicated that the six month period should not commence running until both the service rules and auction procedures are established, at which point they should get six months before the FCC Form 175 short form applications are filed. *See* MetroPCS, et, al., *ex parte* in WT Docket Nos. 06-150 and 06-169, filed March 5, 2007.

[10] http://wireless.fcc.gov/auctions/default.htm?job=about_auctions&page=3.

[11] *NPRM* at statement of Commissioner Robert M. McDowell.

timetable. Rather than subjecting itself to this dilemma, the Commission should conclude that it is not in the public interest to consider, much less adopt, the Frontline proposal because it was submitted by Frontline too late in the process to be properly and fully considered by the Commission in the available time.

I. The Public Interest Would Not Be Served by the Adoption of the Frontline Proposal

A. The Frontline Proposal is Designed to Minimize Potential Bidders with the Practical Effect of Earmarking 10 MHz of Spectrum for Frontline

Frontline's proposal contemplates extensive, complicated operating rules specially designed to fit its own wholesale, carrier-to-carrier business plan and to discourage other potential well-heeled bidders. If adopted, the Frontline approach could reduce dramatically, perhaps to only one company - - itself - - the number of bidders competing for what otherwise would be 10 MHz of highly valuable and sorely needed commercial spectrum. As Cyren Call correctly notes, the "auction winner will have acquired 10 MHz of commercial 700 MHz spectrum, presumably at a significantly reduced price due to its public safety encumbrances."[12] Earmarking 10 MHz of valuable commercial spectrum in this respect is completely unwise, unnecessary, and wholly unfounded. As MetroPCS has demonstrated in prior comments, there remains a scarcity of spectrum suitable to meet the public's ever-increasing demand for advanced broadband commercial wireless services.[13] These demonstrated needs should not go unmet in

[12] Cyren Call Public Safety Comments at 17 in Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Ninth Notice of Proposed Rulemaking*, FCC 06-181 (rel. Dec. 20, 2006), 72 Fed. Reg. 1201 (Jan. 10, 2007) ("*Public Safety NPRM*") (All comments in this docket will be hereinafter referred to as "Public Safety Comments").

[13] MetroPCS Comments at 11-12, Petition for Rulemaking of Cyren Call Communications Corporation, RM-11348, filed April 27, 2006. ("MetroPCS Cyren Call Comments"). The procedure in that docket of taking comments on a proposal which has already been dismissed for lack of jurisdiction was unusual. Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) from Commercial Use; Assignment of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) to the Public Safety Broadband Trust for Deployment of a Shared Public Safety/Commercial Next Generation Wireless Network, *Order*, RM No. 11348 (rel. Nov. 3, 2006). However,

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order to accommodate Frontline's attempt to garner nationwide commercial spectrum for itself while making an incursion into the public safety spectrum. Adoption of the Frontline proposal could impede public safety use by tying the build-out of the nationwide interoperable network to the ability of the E Block licensee to secure financing, build the network, and negotiate acceptable terms for use of the network with the public safety community. Moreover, the proposal will foster legal challenges which could inhibit the financing (if indeed the E Block licensee otherwise was able to secure financing) necessary for the construction of a public safety network. Public safety has waited long enough for the needed interoperable network and should not be required to wait until all of these actions are completed by the E Block licensee.

A close examination of Frontline's proposed rules confirms that Frontline is attempting to have this 10 MHz of E Block spectrum earmarked to itself so that it can purchase 10 MHz of spectrum with little if any competition at a greatly reduced price. For example, Frontline proposes that "all spectrum holdings of the E Block licensee would be subject to a nationwide roaming requirement."[14] This appears to mean that any carrier purchasing the E Block spectrum at auction would be forced to adhere to an automatic roaming requirement for all of its spectrum.[15] As Frontline is no doubt aware, each of the major national wireless carriers has vehemently opposed the imposition by the Commission of an automatic roaming requirement.[16]

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MetroPCS submitted its comments because of the importance of retaining the 30 MHz of 700 MHZ spectrum already allocated for commercial uses and the need to address certain aspects of Cyren Call's proposal.

[14] Frontline 700 MHz *Ex Parte* at 21.

[15] Frontline's explanation for this "requirement" is to ensure "that the E Block licensee has no incentive to discriminate among customers based on whether they used the E Block spectrum or other spectrum licensed to the E Block licensee." *Id.*

[16] Verizon Wireless Comments, T-Mobile Comments, Cingular Comments, and Sprint Nextel Comments in Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, FCC 05-160, 20 FCC Rcd 15047 (2005). While MetroPCS has opposed the carrier's views and believes that automatic roaming for voice and data services should be mandated, it does not change the fact that requiring a bidder to agree to this requirement which reaches beyond the 700 MHz spectrum itself would have a chilling effect on potential bidders for this spectrum.

Thus, properly viewed, this aspect of the Frontline proposal is in the nature of a "poison pill" purposefully designed to dissuade the well-heeled incumbent nationwide wireless service providers from bidding on the nationwide spectrum that Frontline is seeking to set aside for itself. By proposing this "poison pill" rule which would affect spectrum outside of the particular E Block, Frontline is attempting to guarantee that no major wireless carrier will bid for this spectrum in an auction – which would certainly drive down the price of the E Block, and allow Frontline to acquire this otherwise valuable 10 MHz at a severe discount.

Similarly, Frontline is proposing that the Commission impose a wireless *Carterfone* rule to this E Block of spectrum.[17] The Commission recently sought comment on a petition by Skype Communications seeking a similar *Carterfone* rule for wireless services generally.[18] However, as Frontline is undoubtedly aware, CTIA already has announced its intention to oppose the Skype Petition and many of CTIA's carrier members, including the major national wireless carriers, are expected to join the opposition when comments are filed.[19] By advocating a *Carterfone* wireless rule for the E Block of spectrum, Frontline once again is making the spectrum as undesirable as possible for the major wireless carriers, thereby advancing its effort to earmark this 10 MHz of spectrum for itself.[20]

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[17] Frontline 700 MHz *Ex Parte* at 9. A wireless *Carterfone* rule would enable end-users to utilize any technically compatible equipment on a network and limit the ability of the network carrier to designated approved equipment;

[18] *See* Skype Communications S.A.R.L., Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attached Devices to Wireless Network (filed Feb. 20, 2007) ("Skype Petition"). *See also* Public Notice, "Consumer and Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed," Report No. 2807 (CGB rel. Feb. 28, 2007); Petition to Confirm a Consumer's Rights to Use Internet Communications Software and Attach Devices to Wireless Networks, *Order,* RM-11361 (Mar. 15, 2007) (Order extending time for comment period to April 30, 2007). This recently initiated proceeding is the proper place for an examination of whether the *Carterfone* rules should apply in any wireless context.

[19] CTIA-The Wireless Association President and CEO Steve Largent Blasts Call for Carterfone Rules, Press Release, February 23, 2007. MetroPCS agrees with CTIA's position on the Skype Petition. That can be no doubt that the imposition of a *Carterfone* rule on this spectrum will have a deterrent effect on potential bidders.

[20] One of the reasons behind Frontline's proposal may be because it is advocating a wholesale plan – meaning that the retail resellers, rather than Frontline, are responsible for equipment and services. In effect, the *Carterfone* rule that Frontline advocates will have little if any impact on Frontline, but could have an adverse impact on its resellers. It would be no surprise if these resellers were opposed to this *Carterfone* rule just as incumbent carriers have voiced

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If Frontline is correct that there is no legal barrier to the shared use of commercial spectrum by Public Safety users, and vice versa,[21] then Frontline would be able to implement its wholesale operator business plan by purchasing 10 MHz of auctioned spectrum – without the Commission changing the auction process at all and without the Commission having to impose these "poison pill" rules. Frontline would then be free to negotiate with the national public safety licensee for excess capacity on the public safety 12 MHz broadband network, in return for its helping to build out the public safety infrastructure.[22] This being the case, the only apparent reason for Frontline to earmark spectrum and to propose rules that will deter other bidders is its hope that doing so will enable it to obtain 10 MHz of spectrum at a greatly reduced price. By limiting the auction of spectrum to a specific business model – a wholesale, nationwide network provider – Frontline is attempting to have 10 MHz of spectrum essentially set aside for itself.

In the face of a clear need by commercial users for all 60 MHz of the Congressional allocation of spectrum for retail commercial providers,[23] Frontline has presented no compelling

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opposition to a *Carterfone* rule in other bands. This prospect raises additional concerns about the efficacy of Frontline's historically unsuccessful wholesale business model.

[21] The Frontline proposal is premised on the assumption that commercial users may have access to the allocated public safety spectrum, and that public safety users may have access to allocated commercial spectrum, without requesting Congressional intervention. However, we note that the Commission's *NPRM* broadband proposal has been questioned as to whether it exceeds the Commission's statutory authority. *See* RCC Consultants, Inc. Comments at 10-40. The Balanced Budget Act of 1997 (the "BBA"), Pub. L. No. 105-33, 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. 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 current allocation scheme for the Upper 700 MHz channels was crafted to satisfy this clear statutory demarcation between the commercial and public safety allocations. The Frontline proposal would allow this balance to be changed by allowing public safety to use commercial spectrum and commercial users to utilize public safety spectrum. Frontline offers no legal support for its view that this proposal satisfies its statutory mandate. Indeed, the language of the statute itself completely defeats the Frontline proposal. 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]."

[22] If these voluntary negotiations were to fail, then it would give even greater weight to the concern that the monopoly status sought by Frontline would enable it to extract excessive fees from the public safety users.

[23] The demand for commercial spectrum is amply demonstrated by the large number of incumbents and potential new entrants who have filed comments in this proceeding indicating that they have unsatisfied needs for service and

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evidence that the existing public safety allocation is inadequate to meet foreseeable needs. Nor has Frontline demonstrated that a nationwide, wholesale operator will be able to finance and proceed with a successful business plan; indeed, a plan that would have to be successful enough to fund the entire cost of building a nationwide infrastructure for a 4G, interoperable public safety broadband network.[24] Of equal concern, Frontline would create an auction process that does not appeal to major wireless competitors, with the result that the total amount of funds raised by the auction of this 10 MHz block would be substantially diminished.[25]

B. The Frontline Proposal Raises Serious Concerns Under the Designated Entity Program

Frontline acknowledges that its wholesale-service-only proposal would, under the current designated entity ("DE") rules, preclude any existing or future DE from being an eligible licensee of the 10 MHz of spectrum. This is because Section 1.2110(b)(iv) of the rules characterizes as an "impermissible material relationship" any arrangement which results in the DE wholesaling more than 50 percent of its spectrum capacity to one or more third parties.[26] Since the Frontline service rules would require 100 percent of the E Block spectrum to be

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expressing their intention to participate in the auction. Indeed, the Commission no doubt will have difficulty accommodating in the available 60 MHz all of the commenters, many of whom have advocated variant band plans tailored to meet their particular service objectives. Given this evidence of commercial demand, the Commission should not look favorably on the Frontline effort to chip away at the clear demarcation made by Congress between public safety and commercial spectrum.

[24] Indeed, as the Commission is well aware, carrier-to-carrier plans of NextWave and PCS Development Corp. historically have experienced difficulty and resulted in bankruptcy filings.

[25] Major carriers tend to have their own retail distribution channels. If they bought this spectrum they would have to create an entirely new business model which has not been a glaring success.

[26] Section 1.2110(b)(iv)(A) states:

> (iv) Applicants or licensees with material relationships--
>
> > (A) Impermissible material relationships. An applicant or licensee that would otherwise be eligible for designated entity benefits under this section and applicable service-specific rules shall be ineligible for such benefits if the applicant or licensee has an impermissible material relationship. An applicant or licensee has an impermissible material relationship when it has arrangements with one or more entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

committed to wholesale services, the Frontline proposal would create a *per se* violation of section 1.2110(b)(iv)(A) of the Commission's designated entity rules for a DE licensee.[27]

The Commission adopted this wholesale restriction for DEs because it concluded that "certain agreements, by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility because they are inconsistent with Congress's legislative intent."[28] The Commission further concluded that the definitions of material relationship that it developed "are necessary to ensure that the recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public."[29] Recognizing the obvious flaw of a licensing scheme which would disenfranchise all designated entities, Frontline proposes to ignore these recent rulings and effectively carve out a unique set of designated entity rules for this E Block of spectrum by requesting a waiver of the DE wholesale restriction. It appears that Frontline is hoping to garner an even greater discount on the spectrum it seeks by creating a possibility of structuring itself as a designated entity and securing a bidding discount. However, Frontline has offered no compelling rationale nor any adequate legal justification for eviscerating the current DE rules by waiver in this manner.[30]

It is well-settled that waivers are not routinely granted. A party seeking a waiver has the burden of demonstrating (i) unique or unusual factual circumstances such that the application of

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[27] Frontline 700 MHz *Ex Parte* at 8.

[28] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, WT Docket No. 05-211, at para. 23 (rel. April 25, 2006) ("*DE Order*"). As the Commission is aware, MetroPCS does not agree with the FCC contention that wholesale arrangements are inconsistent with the statutory scheme for DEs. Nonetheless, the FCC has continued to defend this contention and the holding to this effect, although being challenged, still remains in effect.

[29] *DE Order* at para. 26.

[30] If the Commission decided to grant this request, then the Commission should reexamine whether it should maintain this rule at all for any spectrum, because there is nothing unique in Frontline's proposal that would warrant different treatment between DEs

a particular rule would be inequitable, unduly burdensome or contrary to the public interest, or that there is no reasonable alternative to the waiver, or (ii) that the underlying purpose of the DE rule would not be served, or would be frustrated, by applying the rule.[31] Frontline has utterly failed to make a sufficient showing to meet this waiver standard, nor can it. For example, there are no unique or unusual factual circumstances surrounding this spectrum. The spectrum is fungible with the other 700 MHz band spectrum and there is nothing particularly unique or unusual about it. What Frontline is really seeking is not a waiver, but rather wholesale rule changes for this spectrum to serve its own private interests but no identifiable public interest purpose.[32]

C. The Frontline Business Model is Unproven and Exceedingly Risky

Not surprisingly, the Frontline proposal does not discuss what happens if its unproven business model of wholesale services or shared public safety/commercial usage fails. If Frontline's Nextwavesque business goes bankrupt, the public safety community's reliance on it to build out a public safety broadband network infrastructure would result in, rather than avert, a national disaster. It makes no sense for the Commission to wager the country's critical public safety infrastructure needs on an untried and unproven business plan. If Frontline garners the spectrum it seeks but is unsuccessful, the public safety community would be worse off than it is today since it would not have a network and its spectrum would be encumbered by the rights held by Frontline.[33] This is especially true given the construction schedule that Frontline has proposed. Frontline has proposed only constructing 25% of the geographic coverage within four

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[31] 47 C.F.R. § 1.928(b)(3).

[32] The fact that Frontline's wholesale business model has not worked historically does not mean it is sufficiently unique as to justify a waiver. Indeed, the previous failures of this business model argue against granting special relief in the form of a waiver.

[33] For example, if Frontline goes the route of NextWave, the first responder community would have to wait years before they would have the benefit of an interoperable network.

years, 50% within seven years, and only 75% within ten years.[34] To the extent that the public safety community needs this network now, over 75% of the geography in the United States will not be covered for at least 4 years, while 25% may never be covered. Further, to the extent that the E Block licensee does not secure financing, under its own proposal the Commission would have to wait four years before it could automatically cancel the E Block licensee's license – and the Commission may be unable to cancel it even then if the E Block licensee is in bankruptcy. This requires the public safety community to wait too long for its interoperable spectrum and will hold it hostage to the business success of an unproven business model.

The Frontline proposal includes no backup plan or criteria for what happens if its risky business plan fails. The public safety community should not be forced to rely on this experimental and highly risky plan to implement the broadband, interoperable network that our nation rightfully deserves. Instead, the first responder community should be given, through the legislative process, any additional funding it needs to construct and operate a dedicated broadband public safety network as soon as possible rather than forcing it to rely upon the largess of a monopoly service provider whose ultimate business model is a commercial model.

D. The FCC's 12 MHz Proposed Allocation for Public Safety Broadband Use is Sufficient for Public Safety Needs

As MetroPCS demonstrated in its Public Safety Comments, 12 MHz is more than sufficient for an interoperable, broadband network for public safety.[35] The FCC previously has recognized that 10 MHz is sufficient for traditional commercial wireless networks to operate over an extended population of users,[36] as well as that a network only requires 2.5 MHz of paired

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[34] Frontline 700 MHz *Ex Parte* at 12-13.

[35] MetroPCS Public Safety Comments at 3-4.

[36] *See e.g.,* Service Rules for Advanced Wireless Services in the 1.7 and 2.1 GHz Bands; *Order on Reconsideration,* 20 FCC Rcd 14058 at para. 12 (rel. Aug. 15, 2005).

spectrum to provide broadband data rates.[37] And, the operating experience of MetroPCS in Detroit and Dallas demonstrates that state-of-the-art broadband networks that provide both voice and data services can be provided in 10 MHz of spectrum.[38] Most importantly, recent public safety undertaking in both New York City and Washington, DC demonstrate than 10 MHz is sufficient to establish a robust broadband network. A network in New York City is being constructing using 10 MHz of spectrum using UMTS technology,[39] and Alcatel-Lucent recently was awarded a contract to provide a seamless interoperable, redundant wireless broadband network of networks with the capacity to transmit video, data and voice communications with peak speeds of nearly 5 Mbps using only a paired 1.25 MHz channel, and 1xEV-DO Revision A technology.[40]

Numerous commenters in PS Docket No. 06-229 noted that 12 MHz is more than adequate for this broadband public safety network.[41] For example, AT&T demonstrates that "new technologies make it possible to satisfy public safety needs for broadband services with 10 MHz of spectrum," and that "[s]ome present-day technologies require as little as 1.25 MHz to provide broadband service."[42] Most revealingly, the First Response Coalition, a "501(c)(3) non-profit organization promoting the needs of America's first responders in the areas of communications interoperability and data/information preparedness," which consists of "tens of thousands of concerned citizens and first responders," believes that:

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[37] Criterion Economics, "Improving Public Safety Communications," Peter Cramton, Thomas S. Dombrowsky, Jr., Jeffrey A. Eisenach, Allan Ingraham, and Hal Singer, February 6, 2007 at 31 ("Criterion Report").

[38] MetroPCS Public Safety Comments at 4.

[39] *See* Criterion Report at 31.

[40] *See* Press Release, "National Capital Region First to Deploy 700 MHz Wireless Network for Public Safety Communication," February 28, 2007, available at http://www.dc.gov/news/release.asp?id=1071

[41] AT&T Pubic Safety Comments at 9-11; CTIA Public Safety Comments at 7-11; High Tech DTV Coalition Public Safety Comments; Verizon Public Safety Comments at 5-6.

[42] AT&T Public Safety Comments at 10.

> Particular focus should be placed on using spectrum more efficiently, and not solely on the continued allocation of additional spectrum that ignores recent and ongoing technological advances. Rapidly-evolving technology has allowed users to make more efficient use of limited spectrum, in many cases, obviating the need for large, inefficient spectrum allocations.[43]

MetroPCS agrees that the public safety community should endeavor to use its existing spectrum in as efficient a way as possible. A robust, interoperable, broadband public safety network can be established in the 12 MHz of spectrum proposed by the Commission – with a proper focus on utilizing recent and technological advances to do so.[44] This being the case, there is no demonstrated public interest justification for endorsing the self-serving, flawed and risky proposal advanced by Frontline.

E. Emergencies are not the Time to Conduct Public-Private Partnership Experiments

The Frontline proposal envisions public safety relying upon use of 10 MHz of commercial spectrum only during times of national emergency. However, having a system that must rely on a complex priority access scheme during times of emergency would not be beneficial to the public safety community, nor serve the public interest. The Commission previously has recognized the difficulties of determining how priorities should be implemented and when a particular priority should take effect. In the *Fourth Report and Order and Fifth*

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[43] First Response Coalition Public Safety Comments at 6.

[44] Cyren Call, in its Public Safety Comments, argues that a 12 MHz network would be able to support only approximately 1.2 million public safety users, while the public safety community of first responders actually consists of 3 million public safety users. Cyren Call Public Safety Comments at 14 and Appendix 1. As an initial matter, Cyren Call provides no basis for its assertion that there will be 3 million public safety personnel by 2018. In fact, this assertion is disputed in the Criterion Report, which asserts that approximately 1.9 million first responders work in the United States. Criterion Report at 29. In addition, the Cyren Call analysis assumes that all 3 million public safety users will be served within the 12 MHz of spectrum mentioned here. This analysis does not take into the account the 99.7 MHz of spectrum that is currently allocated for public safety use, much of which, based on recent reports, is largely unused today. MetroPCS Public Safety Comments at 4-5. Further, first responders are distributed over the entire United States. Assuming that all first responders lived in only the top 10 cities, that would result in only 190,000 users per network. A 10 MHz network can serve easily even double or triple this amount of users during regular use, which means this capacity would suffice to meet even higher than normal usage during emergencies.

Notice of Proposed Rule Making for the public safety 24 MHz of the 700 MHz band, the Commission stated, in response to a recommendation that the Commission adopt a priority scheme for the use of interoperability channels within this 24 MHz, that "[w]e remain concerned that creating yet another set of priority levels would serve only to create confusion during a large-scale or multiagency response. Thus, based on the information before us, it is premature to adopt a rigid access priority regime for the 700 MHz band."[45] Despite this clear indication of concern, Frontline has failed to conjure up rules that would allow for an effective priority access system, stating that the "procedures, protocols, and fees for such [public safety priority access use] would be defined in an agreement between the E Block licensee and the national public safety licensee."[46]

Another point overlooked by Frontline, is that in order for its spectrum to be used in conjunction with the 12 MHz of spectrum already allocated (a) the public safety community and the nationwide operator would need to use the same technology (in which case the handsets would merely have dual frequencies) or (b) the handsets used on both networks would have to be compatible with both technologies. If the handsets are unique (which they would be with only a single commercial user), there would be limited economies of scale and scope for the handset. Public safety users would bear the burden of purchasing these handsets, and this need for dual protocols would drive up the costs and deter public safety from being able to deliver this radio to all first responders. Moreover, in order for the interoperable nationwide network to be worthwhile, it would need to be used all the time and all first responders would need handsets

[45] The Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Though the Year 2010, *Fourth Memorandum Opinion and Order*, WT Docket No. 96-86, 17 FCC Rcd 4736 at paras. 18-20 (rel. Mar. 14, 2002).

[46] Frontline 700 MHz *Ex Parte* at 14.

able to use the network.[47] On the other hand, if the Commission gave incentives for all 700 MHz band licensees to participate with public safety there is a possibility that a larger market could be available for these handsets making the costs to public safety considerably less.

The public safety community deserves a network solely dedicated to its own use, not one that needs to rely on undefined priority access during times of national crisis. No regulatory mechanism is offered in the event that the voluntary negotiation process fails.

F. The Commission Should Reject a Monopoly Provider Model; If Necessary, the Commission Can Provide Incentives to Commercial Carriers to Lease Spectrum and Provide Funding to the Public Safety Community

MetroPCS believes that a robust, interoperable broadband public safety network can and will be established in 12 of the 24 MHz of spectrum allocated for public safety in the 700 MHz band. However, if the Commission wants to make additional spectrum capacity available to the public safety community, or wants to secure additional funding for infrastructure build-out, the Frontline proposal - - which seeks to turn the nation's critical public safety infrastructure over to a monopoly service provider - - is not the Commission's best option. The rules proposed by Frontline would allow one – and only one - - commercial party to service the public safety community. But, the commercial operator and the public safety community may not agree during negotiations with one another and the proposal by Frontline does not include any mechanism for resolving those disputes.[48] Frontline concedes this point by noting that "The

[47] All of the proponents of additional spectrum assume that every first responder will be on the network all the time. If the number of users is limited solely to a limited subset of users (or only at certain times), then even less than 12 MHz would be more than adequate to meet their needs. MetroPCS believes, however, that in order for first responders to truly get the most use out of this network in times of national emergency, the radios they carry must at all times have the ability to use the spectrum so that the users are familiar with and are trained in their use. The last thing the public safety community should want are handsets that are kept locked up until there is a need to use them because users may not be familiar with their use and may not be able to adequately use them – esp. in times of emergency.

[48] Frontline assumes that there will be sufficient incentives on the commercial operator's part to negotiate reasonable terms. MetroPCS does not agree. *See infra* at pp. 16-19. If there are insufficient incentives, the Commission undoubtedly will be drawn into disputes and will be forced to resolve the issues. Of course, there are no rules proposed by Frontline that would guide the Commission's resolution of matters (e.g., no requirement that services

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National Public Safety Licensee would not be obligated to take the service offered by the E Block winner."[49]

The Frontline scheme also contemplates that "In addition to constructing the public safety broadband network, the E Block licensee would be responsible for managing and operating it. It would be permitted to collect a reasonable network management fee from the National Public Safety Licensee to cover those reasonable costs of maintaining or upgrading the network that are attributable to public safety's use of the network infrastructure."[50] However, Frontline has offered no rules or procedures to govern the situation if the E Block licensee and the public safety broadband licensee do not agree on a network sharing agreement, stating only that the "E Block licensee will want to gain secondary access to public safety's excess capacity in its 12 MHz of spectrum."[51] However, with 10 MHz of unencumbered nationwide commercial spectrum at its disposal, there is no assurance that the E Block licensee will actually want this secondary public safety capacity.[52] Thus, the leverage that the winner of the E block auction would have over the National Public Safety Licensee would be great; in stark contract, the National Public Safety Licensee would be captive and have no other option.[53] As noted by

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be provided at cost plus a fixed fee, etc.). This being the case, the Commission would be in the unenviable position of trying to resolve these issues without any rules. Any delay would further jeopardize the prospect of the public safety community getting the nationwide interoperable network it needs and deserves.

[49] Frontline Public Safety Comments at 33. If Frontline would be relieved of its obligations to the public safety community in the absence of an agreement, while retaining access to the E Block for commercial purposes, Frontline may not have any real incentive to reach an agreement. The Commission should avoid creating a licensing scheme that creates perverse disincentives of this nature.

[50] *Id.* at 27.

[51] Frontline Public Safety Comments at 15.

[52] With the new technologies that are currently available, and will be available in the foreseeable future, 10 MHz of spectrum will allow licensees to offer service in what may take 20 MHz today. For example, with six-sector antennas, EVRC-B or 4G vocoders, smart antennas, and the like, networks are becoming more efficient at using spectrum.

[53] What is even worse is that there is no time frame proposed by Frontline in which it would need to negotiate such terms. Accordingly, the E Block licensee could stall negotiations for a number of years while focusing attention on its commercial customers and network, and then finally refuse to agree to terms with the public safety users. This

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Cyren Call, the broadband network "will be built for and accessible by public safety if, and only if, public safety is able to conclude successful negotiations with a commercial auction winner. Since public safety will have little or no leverage in those negotiations . . . the outcome of that process could be disastrous for public safety and the public it serves."[54] The public safety community should not be held hostage to a single licensee which has a government-granted monopoly.

The public safety community should remain in complete control of its broadband network, without private interference. As Cyren Call notes, if the negotiations between public safety and the E Block licensee are unsuccessful:

> "the auction winner will have sufficient, low-cost spectrum on which to build a commercial business. Public safety will have inadequate spectrum even to satisfy its own broadband requirements, no funding to build a network, and an entirely uncertain, ongoing relationship with a "partner" not of its own choosing."[55]

Moreover, Cyren Call correctly points out that the risks of the public safety commercial partner are great, even if negotiations are successful, as the "failure of the auction winner in fulfilling its ongoing FCC commitments or the terms of its negotiated agreements with public safety, or worse, its decent into bankruptcy would leave public safety without access to the network, to the spectrum that might attract other willing partners . . . or to any other certain recourse to preserve its broadband operations."[56]

If the Commission were to insist upon providing additional spectrum capacity for public safety users in times of emergency, rather than endorsing a monopoly service provider, it could

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would increase the E Block licensee's leverage and would delay public safety from received its needed interoperable nationwide network.

[54] Cyren Call Public Safety Comments at 16.

[55] *Id.* at 18.

[56] *Id.* at 19.

provide incentives for all commercial licensees in the upcoming 700 MHz spectrum to forge cooperative arrangements with public safety service providers. There is no requirement that additional spectrum capacity during times of emergency come from an adjacent band, and thus any potential winner of 700 MHz commercial spectrum would be able to provide excess capacity service to the public safety community.[57] The public safety community would be better served by allowing marketplace forces rather than regulatory strictures to ensure the cooperation and assistance they may need. What the Commission should do is establish rules to incent commercial operators to compete to provide public safety with service, rather than forcing public safety users to negotiate with one provider which has complete market power, as per the Frontline plan.

In fact, the Commission already has established voluntary rules for priority access service from CMRS providers to public safety personnel at the federal, state, and local levels.[58] While MetroPCS has noted above the understandable concerns with priority access rules, if the Commission ultimately selected this approach, there is no reason to limit the allowance of excess capacity to only one commercial operator. While the existing priority access rules for CMRS providers are voluntary, and may not be as robust as necessary for times of emergency, the Commission could reexamine these rules, and provide incentives for all commercial entities operating in the 700 MHz band to opt into them.

In addition, if the ability to generate a revenue stream for the public safety community was insufficient, the Commission could provide additional incentives to commercial purchasers of spectrum to provide aid and infrastructure to public safety entities. These additional

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[57] This also might allow the public safety community to have multiple commercial operators in the same market providing capacity and services.

[58] The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service, WT Docket No. 96-86, 15 FCC Rcd 16720 (rel. Jul. 13, 2000).

incentives could be in the form of tax certificates, subsidized service costs, or discounts on universal service fund contributions that would be strong enough to encourage commercial providers to offer service to the public safety community. By relying on established commercial carriers, the public safety community would not have to worry about having to negotiate with one party concerning fees and capacity and could rely on market forces to achieve voluntary agreements. Thus, while MetroPCS continues to believe that 12 MHz of spectrum is sufficient for a public safety broadband network, and that the public safety community should adopt state-of-the-art technologies designed to maximize the capacity of the 12 MHz – if the Commission is inclined to do more, it could establish much better alternatives than the Frontline proposal.

G. The Commission Cannot Adopt the Frontline Proposal Without an Adequate Public Notice and Comment Period

Before the Frontline proposal could be given any serious consideration, the Commission would have to issue a special public notice seeking comment on the proposal. The only way for the Commission to create an adequate record would be to solicit comment and give all interested parties a fair opportunity to respond. The *NPRM* in this proceeding simply did not put the public on notice that a proposal this radical would be under consideration. The Commission contemplated tweaking the sizes of service areas, spectrum blocks and construction requirements, but gave no clue that it would drastically alter the commercial uses in the extreme manner suggested by Frontline.

The Administrative Procedure Act ("APA") imposes notice-and-comment procedures that must be followed by an agency before a rule can be issued. Under the APA, an agency must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved"[59] as well as allow interested parties an opportunity to comment on the proposed

[59] 5 U.S.C. § 553(b)(3).

rules.[60] In addition, a court must set aside any agency-made rule in this context if it is "without observance of procedure required by law."[61] The reasons for having such a notice-and-comment period are simple:

> Notice is said not only to improve the quality of rulemaking through exposure of a proposed rule to comment, but also to provide fairness to interested parties and to enhance judicial review by the development of a record through the commentary process.[62]

Moreover, while a final rule need not be a replica of a rule proposed in a notice, the final rule must be a "logical outgrowth" of the rule proposed.[63] A final rule is a "logical outgrowth" of a proposed rule only if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[64] "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal . . . The test that has been set forth is whether the agency's notice would fairly appraise interested persons of the subjects and issues [of the rulemaking.]"[65]

In the *NPRM*, the Commission solicited comment on the possibility of making changes to its existing rules and spectrum sizes in the 700 MHz Band, including the possibility of revising the size of service areas for the unauctioned licenses in the 700 MHz Band,[66] revising the size of spectrum blocks[67], the potential criteria for renewal,[68] whether license terms should be

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[60] 5 U.S.C. § 553(c).

[61] 5 U.S.C. § 706(2)(D).

[62] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980).

[63] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

[64] *International Union, United Mine Workers, of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1258 (quoting *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)).

[65] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

[66] *NPRM* at para. 26.

[67] *Id.* at para. 49.

extended,[69] whether the Commission should take action to help facilitate access to the spectrum and the provision of service to all customers,[70] and whether power limits should be altered.[71] The Commission did not seek comment on a vastly different and wide-ranging set of rules that would apply to only 10 MHz of the 700 MHz band, seek comment on essentially set-asides of spectrum, nor did it contemplate having public safety use of any of the commercial spectrum to be auctioned. The Commission's *NPRM*, as far as the Frontline proposal, was "wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal" at issue.[72]

In addition, it is established law that the comments of other interested parties do not satisfy the Commission's obligation to give notice.[73] "As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap from a comment."[74] The extremely late-filed Frontline *ex parte* proposal clearly does not satisfy the Commission's obligation to give notice. If the Commission decides to seriously examine the Frontline proposal, which it should not because of the need to auction the 700 MHz spectrum by the statutory deadlines, it must put the proposal out for comment and give all interested parties a fair opportunity to respond.

There is ample precedent demonstrating that if the Commission wants to give the Frontline proposal serious consideration – which it should not – then the proper course is for the Commission to put out a supplemental public notice in order to establish a complete record on

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[68] *Id.* at para. 80.

[69] *Id.* at para. 84.

[70] *Id.* at para. 60.

[71] *Id.* at para. 90.

[72] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

[73] *Id.*

[74] *Id., quoting AFL-CFO v. Donovan,* 757 F.2d 330, 340 (D.C. Cir. 1985).

Frontline's novel proposal since it was presented to the Commission in a rulemaking proceeding after the reply period has expired. For example in the *Intercarrier Compensation Reform Proceeding,*[75] the Commission put out a supplemental public notice seeking comment on the Missoula intercarrier compensation reform plan that was submitted in comments in the proceeding long after the formal pleading cycle was passed.[76] Indeed, the Commission went so far as to issue a second supplemental public notice seeking further comment when the proponents of the Missoula Plan modified the reform proposal.[77] Here, the need for a public notice of the Frontline proposal is even more compelling than was the case in the *Intercarrier Compensation Reform Proceeding*[78] since the Frontline proposal represents a more radical departure from the topics covered in the 700 MHz services rule *NPRM* than was the Missoula plan from the topics teed up in the intercarrier compensation proceeding.

Another consideration argues strongly in favor of the Commission giving proper notice of the Frontline proposal before giving it any serious consideration. From the outset of the initiation of this 700 MHz service rules proceeding, the Commission has been mindful of the fact that the proceeding needed to be concluded in an identifiable time frame in order for the statutory auction deadlines to be met. Thus, when interested parties sought to extend the comment and reply comment deadlines in this proceeding, the Commission declined to extend the comment date for as long as requested, and refused to extend the reply comment deadline at all.[79] In

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[75] *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92.

[76] *Comments sought on Missoula Intercarrier Compensation Reform Plan in CC Docket No. 01-92,* 21 FCC Rcd 8524 (2006).

[77] *Comments Sought on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism,* DA 07-738, rel. February 16, 2007.

[78] The initial Notice of Proposed Rulemaking issued in the intercarrier compensation proceeding proposed bottoms up review of all aspects of the compensation system and explored a wide array of alternatives ranging from scrapping the entire system in favor of a Bill & Keep system to maintaining the current system. Thus, the Missoula plan fell within the parameters of the issues identified by the Commission as being "in play."

[79] *See supra* note 4.

taking these actions, the Commission specifically indicated that it was "mindful of [its] statutory obligations," and did not want to take any action that would "unduly delay this proceeding."[80] Having elected to hold firm on the deadline for the filing of Reply Comments in this proceeding, the Commission cannot reasonably expect interested parties to be looking for a radically different allocation proposal to surface nearly six months after the initial comment date when the proceeding is nearing resolution and only days before the Commission was hoping to act to establish the final allocation for the 700 MHz band. The only way for the Commission to create an adequate record under these circumstances would be to put out a proper public notice seeking comment by interested parties on the Frontline plan. Otherwise, any order incorporating elements of the Frontline plan will be subject to serious legal challenge on procedural grounds (as well as on substantive grounds given the earlier-noted infirmatives in the Frontline plan). If the Commission wants to give the Frontline proposal any serious consideration, it has a Hobson's choice – either consider the Frontline proposal and run the risk of appellate challenges which may delay the auction or put the Frontline proposal out for public comment and run the risk of violating the Congressionally imposed deadlines. With the statutory auction deadlines looming, the Commission can ill-afford to take a procedurally flawed course of action which may result in legal challenges that could cause the Commission to miss the Congressional timetable.

The problem, of course, is that there is precious little time for the Commission to establish an adequate record on the many extreme aspects of the Frontline proposal. This, however, is a problem of Frontline's own making. Obviously, Frontline had the ability to develop and present its proposal in a more timely fashion. Having failed to do so, Frontline should not be

[80] *Id.* at para. 3

heard to complain if the Commission decides that it cannot reach a conclusion that the Frontline proposal would serve the public interest in the time available.

Conclusion

As indicated in prior comments, MetroPCS submits that the proposal in the *Public Safety NPRM* represents an important step toward optimizing the use of the public safety band. This bona fide FCC proposal should not be co-opted by Frontline's opportunistic proposal. The Commission should reject the 11th hour proposal by Frontline.

Respectfully submitted,

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