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April 17, 2007

57739-000020

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

Re: WT Docket No. 06-150 (Service Rules for the 700 MHz commercial bands)

Dear Ms. Dortch:

MetroPCS Communications, Inc. (“MetroPCS”), by its attorneys, submits this *ex parte* presentation pursuant to Section 1.1206 of the Commission’s rules, to express its continuing opposition to either a keep-what-you-use licensing scheme or construction benchmarks tied to geographic service coverage for licenses to be granted in the 700 MHz commercial bands. Adopting either proposal would mark a radical reversal of long-standing Commission precedent, deter certain qualified bidders and drive down auction resources earmarked for the Digital Television (“DTV”) transaction. The Commission should enact the same substantial service rules for the 700 MHz Band that it did for the recent auction of advanced wireless service (“AWS”) spectrum.

As an initial matter, MetroPCS notes that numerous commenters in the 700 MHz band proceeding have argued that the previously established service and performance requirements should remain in effect for the 700 MHz Band.¹ In addition, on April 4, 2007, Verizon Wireless filed a well-reasoned *ex parte* opposing keep-what-you-use or geographic service coverage types of non-market-based, arbitrary construction and licensing requirements? The Commission should heed the recommendations of these diverse commenters and avoid imposing construction benchmarks and service requirements beyond the requirement to provide substantial service. Moreover, additional requirements will have the effect of imposing artificial government-mandated burdens when market forces are adequate to assure that facilities will be constructed and operated in the public interest. Moreover, the proponents of these additional requirements have

¹ Comments of Aloha at 8 (‘new, more demanding performance requirements cannot legitimately be placed upon existing 700 MHz licensees’); Comments of Blooston Rural Carriers at 7; Comments of C&W at 4; Comments of Corr at 5; Comments of Dobson at 5 (“Commission should adopt for 700 MHz licensees the same substantial service obligations made applicable to AWS licensees.”); Comments of Leap at 9; Comments of MilkyWay at 7-8; Comments of USCC at 12-13; Comments of Verizon at 6-10 (‘There is no factual basis and no legal justification for imposing new performance, constructions, or negotiation requirements on 700 MHz licensees.’); Comments of Cingular at 9-13; Comments of AT&T at 12-15; and Comments of CTLA at 7.

² *Ex parte* letter from John T. Scott, III., Counsel to Verizon Wireless, to Marlene H. Dortch, Commission Secretary, WT Docket No. 06-150, filed on April 4, 2007 (“Verizon *Ex Parte*”).

Marlene H. Dortch

April 17, 2007

Page 2

not shown any compelling evidence which would justify new or different construction requirements in the 700 MHz Band than those imposed on licensees in the AWS band.

MetroPCS agrees with Verizon Wireless that enacting geographic coverage and “keep-what-you-use” rules would contradict the Commission’s market-driven policies for CMRS providers.³ As amply demonstrated in the Verizon *Ex Parte*, the Commission never has required a geographic coverage construction benchmark for auctioned spectrum, and has only imposed a use it or lose it standard in two limited instances under the original cellular service rules.⁴ Those advocating additional build-out requirements over a substantial service requirement have not explained why the rules for 700 MHz spectrum should be any different than the AWS construction requirements, nor have they explained why the Commission should reverse its settled policy for flexible performance requirements. Nor have the advocates for “keep-what-you-use” or geographic-based benchmarks documented any real world problem that these stringent, non-market based rules would solve. There is no market failure warranting these new mandates, and service to rural areas is not being blocked in any respect by a lack of spectrum? Moreover, given the Commission has not imposed these requirements in prior CMRS auctions, the effect of these requirements on bidders and the bids placed is entirely uncertain. Given the importance of the 700 MHz auction to fund the 700 MHz DTV transition, the Commission cannot afford to experiment with untried and untrue construction requirements.

The Commission repeatedly has expressed its preference for market-driven service requirements. For instance, when the Commission promulgated its rules for AWS spectrum, it held that:

Section 27.14(a)’s substantial service requirement will provide licensees greater flexibility to determine how best to implement their business plans based on criteria demonstrating actual service to end users. This requirement provides the flexibility required to accommodate the new and innovative services that we believe will be forthcoming in these bands.⁵

In addition, the Commission rejected additional performance requirements for CMRS providers less than two years ago? And, the Commission previously has stated that “construction requirements focusing solely on population served or geography covered may not necessarily reflect the most important underlying goal of ensuring public access to quality,” and that it aimed to avoid “construction. . . solely to meet regulatory

³ Verizon *Ex Parte* at 1

⁴ *Id.* at 2.

⁵ *Id.* at 4.

⁶ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162 at para. 75 (2003).

⁷ See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19120-22 (2004).

Marlene H. Dortch

April 17, 2007

Page 3

requirements rather than market conditions.” Proponents of non-market based construction requirements for the 700 MHz Band have not illuminated any difference between the 700 MHz Band spectrum and the AWS spectrum that would necessitate a change in the Commission’s prior determination that further regulatory requirements are unnecessary. This failure is fatal because the Commission has recognized the importance of parity across CMRS services, and the Commission has worked to ensure that market forces, driven by economics, develop the CMRS marketplace – rather than regulatory strictures.⁹

The benefits of this previously used market-driven approach are amply demonstrated by the results of Auction No. 66, which show that wireless broadband spectrum sold at auction **will** fetch a substantial purchase price. As a result, the winners of this spectrum have a substantial economic incentive to put the spectrum to beneficial uses as soon as practicable, to partition areas in which the winner may not have an immediate need, and a substantial disincentive to warehouse spectrum for any considerable period of time. These very real economic incentives **will** cause carriers to build facilities based upon market needs and their own business plans – rather than based upon artificial Commission imposed arbitrary construction deadlines. As Corr Wireless has commented in this proceeding, “sheer economic logic will compel the license holders to pay the highest price for the licenses consistent with a planned productive use, and then actually put the licenses to use in the way most likely to recover the economic cost, plus some profit.”⁸ Indeed, the rationale advanced for construction requirements - - to ensure unserved areas are served and to prevent warehousing - - can be served better by other approaches.

The idea of adopting a fixed population or geographic coverage standard also is based on a faulty assumption that every geographic area merits service according to the same timetable or that even some areas need to be served at all. Indeed, giving licensees greater flexibility allows each licensee to take into account variances in the competitive landscape, population density, and other important demographics pertaining to particular services and licenses. **This** is certainly true for spectrum which **will** be used for advanced services for which equipment is not even designed and may be deployed differently by each licensee, such as the 700 MHz spectrum. Verizon also aptly demonstrates that

⁸ See Amendment of Parts 1, 21, 73, 74, and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Part 1 of the **Commission’s** Rules – Further Competitive Bidding Procedures, Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, Promoting Efficient Use of Spectrum Through Elimination of Market Barriers to the Development of Secondary Markets, Review of the Spectrum Sharing **Plan** Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands, Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Wireless Services to Support to Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606 at para. 276 (rel. Apr. 27, 2006).

⁹ Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988, 7994 (1993).

¹⁰ Comments of Corr at 5.

Marlene H .Dortch
April 17,2007
Page 4

geographic tests require considerable tailoring across the country preventing a one size fits all requirement.

Keep-what-you-use mechanisms, or specific coverage requirements are particularly burdensome for smaller and regional carriers, such as MetroPCS – which may be entering new markets with newly acquired spectrum. An incumbent carrier can rely upon existing network infrastructure in order to meet a build-out requirement with regard to a new channel. In contrast, a new entrant must construct a system from the ground up. This disadvantage to new entrants creates a serious risk that a strict population or geographic-based coverage requirement, particularly one that falls during the midst of the license terms, would severely prejudice a new entrant seeking to bring a valuable competitive service to a marketplace. This prejudice could deter these bidders from bidding as much as they might otherwise bid or deter them from participating at all on certain licenses. It also may affect the amount of financing which would be available for acquiring licenses. New entrants benefit from the ability to grow their service over time, without the imposition of rigid performance requirements that may not meet their business plans. Enacting these coverage rules could result in newer entrants losing the ability to expand their service after the initial license term, which incumbents with large existing footprints would be able to protect and retain territory much more easily.

The better approach - - which has been advocated by MetroPCS and others - - to ensure service to rural communities is to license spectrum in smaller geographic areas. This allows rural licensees to acquire the spectrum they need immediately without having to wait for spectrum to be reclaimed. Such an approach will lead to quicker service in rural communities and will allow construction requirements to ensure that rural and other unserved areas are in fact served.

Interestingly, if the Commission were to review the substantive positions taken by Verizon Wireless and MetroPCS in many docketed proceedings, it would find that the carriers have different - - and in some cases diametrically opposed - - positions in many of them based in part on their different business plans and the different scope of their operations. The fact that Verizon Wireless, MetroPCS, rural carriers and others agree on this particular component of the 700 MHz rules should be given substantial consideration.

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

Respectfully submitted,

/s/ Carl W. Northrop

Carl W. Northrop
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Marlene H. Dortch
April 17, 2007
Page 5

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