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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); PS
Docket No. 06-229, WT Docket No. 96-86 (Public Safety Broadband Network)

Dear Ms. Dortch:

MetroPCS Communications, Inc. (“MetroPCS”) is submitting this *ex parte* presentation pursuant to Section 1.1206 of the Commission’s rules to express its opposition to the extremely late-filed *ex parte communications* Wed on April 3 and April 5, 2007 by the so-called Ad Hoc Public Interest Spectrum Coalition (“AHPISC”).¹ The Commission should not accept the radical proposals set forth by AHPISC. AHPISC’s radical proposals run the risk of imperiling two of the most important public policy goals for the Commission -- ensuring that the Digital Television transition occurs and securing funding for an interoperable public safety network. As these proposals threaten both goals, the Commission should reject it out of hand. However, if the Commission is inclined to even consider the late-filed proposals in any respect, it should be in the context of a separate rule-making proceeding devoted to those specific issues. Any Commission consideration of these issues should not occur as a late after thought in a proceeding that is nearing completion, is specifically dedicated to developing the 700 MHz service rules, and which already is in jeopardy of not concluding within the statutory deadlines.

AI-IPISC, which is comprised of the Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, seeks to radically alter the rules and procedures for the 700 MHz Band, by applying “open access” rules to at least 30 MHz of the band, applying “network neutrality” provisions, prohibiting wireline and large wireless incumbents from bidding on 700 MHz spectrum, and by supporting the equally radical Frontline proposal. AHPISC is

¹ *Ex Parte Comments of the Ad Hoc Public Interest Spectrum Coalition*, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 05-211, and WT Docket No. 96-86, filed April 3, 2007 (“Ad Hoc 700 MHz Rules”), *Ex Parte Comments of the Ad Hoc Public Interest Spectrum Coalition*, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 05-211, and WT Docket No. 96-86, filed April 5, 2007 (“Ad Hoc Network Neutrality Paper”); *Ex Parte Comments of the Ad Hoc Public Interest Spectrum Coalition*, WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 05-211, and WT Docket No. 96-86, filed April 5, 2007 (“Ad Hoc Open Access Paper”).

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proposing that the Commission eliminate many of the possible participants in the upcoming auction, as well as the possible services and technologies that those participants would be able to provide. By proposing limitations on eligibility, “open access” rules, and supporting Frontline’s proposals which contain their own eligibility inhibiting requirements for the 700MHz spectrum, AHPISC is attempting to remove the participation of most mobile wireless carriers from the auction – carriers who may value the spectrum most and may put it to its highest and best use. Ironically the very carriers AHPISC seeks to disenfranchise hold the best promise of providing the “third pipe” for broadband that AHPISC is advocating. The Commission has not adopted these types of broad eligibility restrictions for commercial mobile radio service auctions in the past, and AHPISC has not provided any sufficient reasons for it to do so now.²

The Commission Should Not Allow AHPISC’s Late, Far-Reaching Filing To Affect the Narrow Determination of 700 MHz Procedures

AHPISC proposes to prohibit wireline and large wireless incumbents’ from bidding in the 700MHz auction, or to require them to bid through structurally separate affiliates. AHPISC also wants to designate certain 700 MHz blocks as “open access” spectrum, and to apply so-called “network neutrality” rules to the 700 MHz Band. These proposals serve to implicate all wireless spectrum – not merely the 700 MHz Band. The Commission has not previously considered the advisability of such far reaching rules for wireless services in any spectrum; much less the 700MHz Band. Broad, far-reaching proposals such as these are best considered by the Commission in a forum in which there can be a full notice and comment period specifically dedicated to these issues.³ Issues of this nature should not be shoe horned into the late stages of a long-standing proceeding with tight statutory deadlines.⁴ AHPISC has not proposed any sufficient reasoning as to why these radical, far-reaching rules should apply uniquely to the 700 MHz Band. Indeed, the Commission cannot rule out the possibility that AHPISC slipped these proposals in at the last minute in the hope of avoiding potential discussion on these issues. Gigi Sohn,

² The Commission has in the past limited eligibility for certain licenses to designated entities or entrepreneurs, but incumbents who qualified as a designated entity or entrepreneur were eligible.

³ It is important to note that AHPISC does not put forth a definition of “incumbent” for its proposals. Thus, it is unclear whether a provider such as MetroPCS, which was the fourth highest bidder in Auction No. 66 and purchased spectrum in many new markets, would be limited or excluded from bidding in the 700 MHz auction due to the AHPISC proposals. MetroPCS successfully has been able to enter new markets through the purchase of spectrum at auction over the past five years, and has introduced new competition in each market in which it has entered. Even though MetroPCS may or may not be considered an incumbent by AHPISC, MetroPCS supports allowing the marketplace to determine winners and losers for the 700 MHz auction – not regulatory fiat.

⁴ Indeed, as noted below, certain of these proposals are already subjects of another proceeding, so any comments or resolution should be in that proceeding, not this one.

⁵ Not only would consideration of these proposals run the risk of interfering with the Commission’s ability to meet the statutory deadlines, it also imperils the long-awaited Digital Television transition. Also, it may negatively affect public safety getting the necessary funds for an interoperable broadband network.

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president of Public Knowledge, admitted to this strategy recently, stating that “It’s not unheard of for things to get changed at the very last minute. Late filings like this are common practice at the FCC.”⁶ The Commission should not allow strategically late filings, dealing with far-reaching issues, affect policy; nor should the Commission permit its process to be gamed in this fashion.

AHPISC’s proposal regarding “open access” is a broad policy proposal that affects not only the 700 MHz Band, but wireless services generally. AHPISC proposes that the Commission designate **two** spectrum blocks, totaling 30 MHz, to be licensed in the upcoming 700 MHz auction as “open access” spectrum? AHPISC would apply the *Carterfone* rules to the 700 MHz Band, by allowing “any customer to attach any compatible device to any wireless broadband network in the 700 MHz band using standard and non-proprietary interfaces.” However, as AHPISC undoubtedly realizes, the Commission recently sought comment on a petition by Skype Communications seeking a similar *Carterfone* rule for wireless services generally.⁹ As such, a comment and reply comment period has been set for public comment on this issue. The Commission should not allow AHPISC, at this late date, to seek a rush to judgment on this far-reaching proposal when the Commission is about to undergo a thorough examination of the advisability of applying *Carterfone* rules to any wireless services. This recently initiated proceeding on the Skype petition is the proper place for an examination of whether the *Carterfone* rules should apply in any wireless context. In addition, there is no need to presuppose the outcome of that proceeding by adopting rules here. The recently initiated proceeding could apply to this spectrum – and the use of this spectrum will not occur for a substantial period of time – so there is no reason, or need, to rush to judgment on these issues now.

Moreover, as AHPISC is no doubt 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.” By advocating a *Carterfone* wireless rule for 30 MHz of the 700 MHz spectrum,

⁶ “Vote of 700 MHz Auction Rules on Target for April Agenda Meeting,” Communications Daily, April 6, 2007 at 3.

⁷ Ad Hoc Open Access Paper at 10.

⁸ *Id.* at Appendix, page 1.

⁹ 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).

¹⁰ 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.

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AHPISC is attempting to preordain the types of companies that will participate in the auction. As demonstrated below, the Commission consistently has opposed proposals that limit auction participation.

The Commission Should Not Predetermine Winners and Losers for the 700 MHz Auction; Rather it Should Let Market Forces Dictate Auction Participation

AHPISC's proposed eligibility restrictions are wholly against the public interest. The Commission repeatedly has stated that the public interest is best served through an auction of spectrum in which all interested parties can participate with limited eligibility and service rules. Allowing AHPISC to circumvent these long-held Commission policies to eliminate certain competitors either directly or by adopting service rules designed to make the spectrum less attractive to certain bidders certainly would not serve the public interest. The Commission has stated that "[a]n auction is the most likely [means] to assign the license to the qualified licensee that most highly values it if the auction is open to all potentially qualified licensees."¹¹ In addition, the Commission has noted that "Section 309(j) embodies a presumption that licenses should be assigned as a result of an auction to those who place the highest value on the use of the spectrum," as those parties "are presumed to be those best able to put the licenses to their most effective use."¹² The Commission should allow the marketplace, rather than regulatory command and control, to sort out the highest and best use of the 700 MHz Band spectrum and not allow restrictions proposed late in spectrum allocation process to circumvent long-standing precedent.

The Commission in recent years consistently has opposed eligibility restrictions for auctions.¹³ The Commission has stated that "eligibility restrictions on licenses may be imposed only when open eligibility would pose a significant likelihood of substantial harm to competition in specific markets and when an eligibility restriction would be effective in eliminating that harm."¹⁴ The Commission continued it would rely on "market forces to guide license assignment absent a compelling showing that regulatory intervention to

¹¹ 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, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5738 (2006).

¹² NextWave Personal Communications, Inc., Order on Reconsideration, 15 FCC Rcd 17500, 17513 (2000).

¹³ See Amendment of Part 90 of the Commission's Rules to Provide for Flexible Use of the 896-901 MHz and 935-940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 20 FCC Rcd 3814 at para. 27 (rel. Feb. 16, 2005); Service Rules for Advanced Wireless Services in the 1915-1920 MHz; 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, 19 FCC Rcd 19263 at para. 69 (rel. Sept. 24, 2004).

¹⁴ Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, 19 FCC Rcd 19263 at para. 69 (rel. Sept. 24, 2004).

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exclude potential participants is necessary.”¹⁵ AHPISC has made no such showing. AHPISC also has failed to support its claim that spectrum aggregation caps should be applied to the 700 MHz spectrum and completely ignores the fact that the Commission recently has declined to impose spectrum aggregation limits as well.¹⁶ The Commission has found that spectrum caps were “unnecessarily inflexible and could be preventing beneficial arrangements that promote efficiency without undermining competition.””

Indeed, AHPISC ignores the fact that mobile wireless providers today are actively competing to provide the “third pipe” into the home. Commercial wireless providers are aggressively entering the broadband market. According to Commission data, from December 2005 to June 2006, 59% of new high-speed access additions came from CMRS carriers.” Additionally, either CDMA 1xRTT and/or 1xEV-DO have launched in at least some portion of counties covering roughly 99% of the population, and GPRS, EDGE, and/or WCDMA/HSDPA have launched in at least some portion of counties covering about 94% of the population.¹⁹ AHPISC clearly has not mentioned these figures as they contradict its argument to limit competition in the upcoming auction. By not telling the whole story regarding broadband via wireless, AHPISC is revealing the real reason for its filings – to favor non-incumbents even if the public would be better served by encouraging existing wireless carriers to continue building an expanding their broad band wireless networks. This desire is wholly against long-standing Commission precedent not limiting participation in auctions.”

The Commission should recognize the AHPISC proposals for what they are; late-in-the-game, far-reaching proposals intended to artificially limit participation in the 700 MHz auction. Indeed, AHPISC is advocating that the Commission predetermine winners and losers before the auction even begins. The Commission should reject this outcome as a relic of the past.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *High-Speed Services for Internet Access: Status as of June 30, 2006*, FCC Wireline Competition Bureau, at 3-4 (Jan. 2007).

¹⁹ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eleventh Report, WT Docket No. 06-17, at para. 116-117. (Sept. 29, 2006).

²⁰ If new entrants want to compete they should do what MetroPCS has had to do -- purchase spectrum at auction, at market prices, in competition with other carriers. Proceeding in any other fashion would require the Commission to engage in a regulatory game of selecting winners and losers. This would not serve the public interest or the intent of Section 309(j) of the Communications Act.

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The Radical AHPISC Proposals are Disruptive to the Commission's Effort to Enact Service Rules and Procedures for the 700 MHz Band

Each of the AHPISC proposals is disruptive to the current process that the Commission has undertaken to finalize the rules and allocation regarding the 700 MHz band and commence the auction prior to the January 28, 2008 statutory deadline. AHPISC did not submit a pleading advocating its radical plan in this 700 MHz band proceeding until April 3, 2007 – nearly seven months after the initial comment deadline and nearly six months after the reply comment period ended (October 20, 2006). The Commission 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 these proposals in any manner that would comply with the Commission's Administrative Procedure Act ("APA") obligations jeopardizes the Commission's ability to engage in a reasoned rulemaking and still meet the statutory deadline. While AHPISC has the 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.

If the Commission wanted to consider the wide-reaching AHPISC proposals in any way, it would have to issue a special public notice seeking comment. 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. In addition, as noted above, any such comments should be sought in a separate proceeding – not a tag-along to the band plan and service rules for the 700 MHz Band. The proposals set forth by AHPISC are too broad and wide-ranging to be dealt in this narrow context. Moreover, the *NPRM* in this proceeding simply did not put the public on notice that radical proposals such as these would be considered. The Commission contemplated tweaking the sizes of service areas, spectrum blocks and construction requirements, but gave no clue that it would drastically alter the rules in the manner suggested by AHPISC.

The 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"²¹ as well as allow interested parties an opportunity to comment on the proposed rules.²² In addition, a court must set aside any agency-made rule in this context if it is "without observance of procedure required by law."²³ The reasons for having such a notice-and-comment period are simple:

²¹ 5 U.S.C. § 553(b)(3).

²² 5 U.S.C. § 553(c).

²³ 5 U.S.C. § 706(2)(D).

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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.²⁴

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? 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.”²⁶ “[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.]”²⁷

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,²⁸ revising the size of spectrum blocks²⁹, the potential criteria for renewal? whether license terms should be extended,) whether the Commission should take action to help facilitate access to the spectrum and the provision of service to all customers,³² and whether power limits should be altered.³³ The Commission did not seek comment on a vastly different and wide-ranging set of rules that would apply to only the 700 MHz Band, or would substantially restrict eligibility.³⁴ The Commission’s *NPRM*, as far as any of these radical AHPISC proposals, was “wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal” at issue.³⁵

²⁴ *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).

²⁵ *National Black Media Coalition v. FCC*, 791 F.2d 1016,1022 (2nd Cir. 1986).

²⁶ *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)).

²⁷ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

²⁸ *NPRM* at para. 26.

²⁹ *Id.* at para. 49.

³⁰ *Id.* at para. 80.

³¹ *Id.* at para. 84.

³² *Id.* at para. 60.

³³ *Id.* at para. 90.

³⁴ Indeed, we understand that the Commission may have reached a similar conclusion in the context of the Frontline Wireless, LLC proposals. Press reports indicate that the Frontline proposals have been placed in a Notice of Proposed Rulemaking in order to satisfy the Commission’s APA obligations. Nothing less would be required for any of the AHPISC proposals.

³⁵ *National Black Media Coalition v. FCC*, 791 F.2d 1016,1022 (2nd Cir. 1986).

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In addition, it is established law that the comments of other interested parties do not satisfy the Commission's obligation to give notice.³⁶ "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."³⁷ The extremely late-filed AHPISC *ex parte* proposals clearly does not satisfy the Commission's obligation to give notice. If the Commission decides to seriously examine any of these proposals, 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.

From the outset of the initiation of this 700 MHz service rules proceeding, the Commission has been mindful of the fact that the proceeding needs 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.³⁸ In 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."³⁹ 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 seven 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.

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 AHPISC proposals. **This**, however, is a problem of AHPISC's own making. Obviously, AHPISC had the ability to develop and present its proposal in a more timely fashion. Having failed to do so, AHPISC should not be heard to complain if the Commission decides that it cannot reach a conclusion that any of its proposals would serve the public interest in the time available.

³⁶ *Id.*

³⁷ *Id.*, quoting *AFL-CFO v. Donovan*, 757 F.2d 330,340 (D.C. Cir. 1985).

³⁸ 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.

³⁹ *Id.* at para. 3

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Lastly, AHPISC also expresses support for the Frontline proposal. As demonstrated in MetroPCS' prior pleadings, the Frontline proposal is not in the public interest, and the Commission should conclude that it is not in the public interest to consider, much less adapt the Frontline proposal.⁴⁰

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

Respectfully submitted,

/s/ Carl W. Northrop

Carl W. Northrop
of PAUL, HASTINGS, JANOFSKY & WAILISER LLP

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⁴⁰ "Response of MetroPCS Communications, Inc. to Untimely "Comments of Frontline Wireless, LLC," WT Docket Nos. 06-150 and 01-309, CC Docket No. 94-102, filed March 26, 2007.