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cc: 'Mark Stachiw'; Northrop, Carl

Subject: MetroPCS 700 MHz Comments Filed in WT Docket Nos. 06-150, 06-169, 96-86 and PS Docket No. 06-229

Attachments: MetroPCS Comments in the 700 MHz Proceeding.pdf

Attached, please find a courtesy copy of MetroPCS' Comments filed in WT Docket Nos. 06-150, 06-169, 96-86 and **PS** Docket No. 06-229 yesterday through the Electronic Comment Filing System.

This transmittal e-mail is being filed electronically with the Commission today pursuant to 47 C.F.R. section 1.1206.

Please call or email me with any questions.

Mike Lazarus

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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
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 06-169
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

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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Summary

MetroPCS Communications, Inc. ("MetroPCS") is commenting on the *Further* Notice *of* Proposed *Rulemaking* ("*FNPRM*") released April 27,2007 in this proceeding.

For more than a decade, the Commission has taken an enlightened, market-based approach to spectrum allocations in a conscious effort to promote investment, competition, innovation, and consumer choice. The Commission has purposefully avoided "command and control" allocation schemes which put the government in a position for which it has proved to be ill-suited - - that of micromanaging the radio spectrum and picking winners and losers. The evolutionary approach of allowing the wireless industry to develop without unnecessary regulatory restrictions has enabled the commercial mobile radio service sector to flourish and to become extremely competitive.

Some of the proposals under consideration in the *FNPRM* reflect a throwback to a heavy-handed regulatory approach and a rejection of the free market allocation principles that have served the public interest so well. A number of proposals on which comment is sought in the FNPRM would impose non-market based rules on both the auction, and on the winners of the auction, and require the Commission to take on an intensive, ongoing regulatory oversight role. And, the Frontline proposal regarding public safety would tie the fate of the nation's critical need for an interoperable public safety network to the commercial business plan of a monopoly service provider selected through an auction process designed to identify the highest bidder, not the bidder most committed and best able to serve the public safety community.

The Commission is considering a band plan for the Upper 700 MHz Band Proposal that would include a 22 MHz spectrum block specifically designed to accommodate the desires of a small, select group of large participants which the Commission hopes will deliver a third broadband pipe to the home, Trying to predetermine the outcome of an auction in this fashion

prior to bidding would be a dangerous and unwise path for the Commission to take. The Commission should not be picking services or service providers by fiat. Moreover, any effort of the Commission to predetermine that a large chunk of upper band 700 MHz spectrum will be devoted to providing a third broadband pipe to the home also violates the important principle that the Commission should establish a level competitive playing field and remain technology-neutral. There are many possible avenues for prospective competitors to take to deliver broadband services to the home (e.g., broadband over power lines, 2.5 GHz etc.) and the Commission should not give one approach a competitive advantage by creating an allocation specially-tailored to the business plan of a select identifiable group of potential competitors.

Rather, the Commission should adopt a flexible 700 MHz commercial band plan, which allows entities of all types and sizes to participate robustly in the upcoming auction. A diverse group -- comprised of industry groups, industry representatives and carriers of all sizes with many different business models, and at different stages of development (incumbents and new entrants) -- has advocated a balanced 700 MHz band plan that consists of a variety of geographic area sizes and smaller spectrum blocks. This "consensus plan" – which is incorporated into the Lower 700 MHz band that the Commission adopted and into Proposal 2 for the Upper 700 MHz band – permits meaningful participation by smaller and regional carriers, while still allowing larger carriers to aggregate spectrum and geography if they so desire. By allowing an open auction process utilizing a building block approach, the Commission will ensure another successful distribution of spectrum akin to its wildly successful AWS auction.

The Commission also would be making a serious mistake, do violence to a host of regulatory principles, and subject public safety and first responders to significant risk that a nationwide interoperable network would not be built to its needs, were the Commission to endorse the Frontline proposal in any significant respect. The Frontline proposal attempts to

earmark spectrum for Frontline's own specialized and unproven business plan. Frontline contemplates a monopoly provider of services to public safety which would require unprecedented Commission oversight, impose unknown costs on public safety users and present unprecedented risk to public safety's need for a nationwide interoperable network. The Frontline proposal also is unsustainable on legal and policy grounds.

Perhaps most important, the Frontline proposal has not received ringing endorsements either from the public safety community, or from the Department of Homeland Security, which is charged by statute with the responsibility for coordinating state, local and federal emergency responses. 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. Indeed, Frontline, and the other commercial backers of this concept, such as Cyren Call, are all profit-seeking enterprises backed by venture capital firms whose primary motive is to make money. It was this troubling fact that led Commissioner Copps to caution that "cash registers and toll booths don't belong at the heart of our nation's public safety planning." The simple truth is that the use of a commercial high-bid auction is a poor way to select an appropriate partner for public safety. The better approach would be to encourage state and local public safety users to partner with the federal government which already is actively developing its nationwide interoperable IWN network. Alternatively, the Commission should create incentives for any and all 700 MHz commercial licenses - - not just the E Block licensee - - to assist in the construction and operation of public safety.

The *FNPRM* also takes comment on the possibility of resurrecting arbitrary, government-imposed geographically-based performance standards and preclusive eligibility restrictions that previously have been abandoned by the Commission for good reason. Any fixed coverage requirement, particularly a geographic requirement, inevitably forces licensees to build networks

according to a government-imposed timetable rather than according to market demands. And, uniform percentage coverage standards are inherently arbitrary and do not properly account for dramatic variations in population density from one region to another.

Finally, the proposal of Media Access Project and others to impose eligibility restrictions precluding or limiting the participation of some wireless incumbents in the 700 MHz band should be rejected. This restrictive approach reverts to having the government dictate market composition, which is unwise when there has been no demonstrated market failure. Since the Commission's marketplace approach has led to robust competition, and has continued to foster new competitive entry, the Commission should not change its open eligibility requirements.

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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

COMMENTS OF METROPCS COMMUNICATIONS. INC.

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its comments in response to the *Further Notice of Proposed Rulemaking,* FCC 07-72, released April 27,2007 (the "*FNPRM*")[2] in the above-captioned proceedings. The following is respectfully shown:

[1] For purposes of these Comments, the term "MetroPCS" refers to 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. 06-1.50, Former Nextel Communications, Inc. Upper 700 MHz Guard Band License and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, 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,* Further Notice of Proposed Rule Making, FCC 07-72 (rel. April 27,2007) *("FNPRM"),*72 Fed. Reg. 24238 (May 2,2007).

I. INTRODUCTION

MetroPCS is among the fastest growing facilities-based wireless telecommunications carriers in the United States and provides wireless broadband personal communications services ("PCS") to over 3 million subscribers in a number of major metropolitan areas throughout the United States.[3] MetroPCS targets a mass market which often goes unserved by the national wireless carriers. MetroPCS offers wireless voice and data services on a no long-term contract, flat rate, unlimited usage basis, with service plans beginning as low as $30/month. Over 80% of MetroPCS customers utilize MetroPCS' service as their primary telecommunications service, meaning that MetroPCS is a significant substitute for landline telephone service in the metropolitan areas it serves.[4] MetroPCS also is expanding the universe of wireless customers since approximately 65% of MetroPCS' customers are first time wireless users. The fact that MetroPCS is meeting a substantial unfulfilled need for services is evidenced by the dramatic growth in subscribership that MetroPCS is enjoying.'

MetroPCS AWS, LLC, a wholly-owned subsidiary of MetroPCS, was an active participant in Auction 66, the recently concluded Advanced Wireless Services ("AWS") auction, and ended **up** as the fourth largest winner (by net provisionally winning bid totals) with high

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[3] MetroPCS launched its innovative wireless service in 2002 in the Miami, Atlanta, Sacramento and San Francisco metropolitan areas. More recently, MetroPCS launched service in the Tampa/Sarasota metropolitan area in October 2005, in the Dallas/Ft. Worth metropolitan area in March 2006 and in the Detroit metropolitan area in April 2006. Royal Street Communications, LLC ("Royal Street"), a company in which MetroPCS owns a non-controlling interest, acquired licenses in Auction 58 for the Orlando basic trading area, parts of northern Florida, and the Los Angeles basic trading area. Royal Street is building its networks and began offering service in the Orlando and Lakeland-Winterhaven metropolitan areas in November 2006 and expects to begin offering service in Los Angeles in 2007.

[4] Because the MetroPCS service often is the customer's sole or primary telecommunications service, MetroPCS also ends up providing essential communications services during times of national emergency, natural disasters and during other crises.

[5] MetroPCS saw first quarter profits in 2007 more than double from 2006 due to subscriber growth, The company added 454,000 net subscribers in the first quarter of 2007.

bids in an aggregate amount of approximately $1.4 billion.[6] MetroPCS plans to continue to expand its services into new metropolitan areas which share characteristics similar to its existing markets, and to offer new services, including innovative data services, when demand warrants. As a consequence, MetroPCS is actively considering its participation in the upcoming auction of spectrum in the 698-746,747-762 and 777-792 MHz bands (the "700 MHz Band"). Thus, as a successful licensee with additional spectrum needs, and as a potential bidder in the 700 MHz Band commercial auction, MetroPCS has a substantial interest in the outcome of this proceeding. And, as a veteran from the AWS auction and prior auctions: MetroPCS has a substantial basis in experience for informed comment in this proceeding.

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[6] MetroPCS was the high bidder on six (6) C Block BEAs and two (2) D Block REAGs. ***See*** Auction No. 66 Reports, Top Bidders, http://wireless.fcc.gov/auctions/66/charts/66press_1.pdf. See Auction No. 66 Closing Chart, Licenses by Bidder http://wireless.fcc.gov/auctions/66/charts/66cls2.pdf; BEAO 10-C (NYC-Long Island, NY-NJ CT), BEA057-C (Detroit, Ann Arbor, Flint, MI), BEA 062-C (Grand Rapids-Muskegon, MI), BEA088-C (Shreveport-Bossier City, LA), REA 127-C (Dallas-Forth Worth, TX-AR), BEA 153-C (Las Vegas NV-AZ-UT), REA001-D (Northeast), and REA006-D (West). The Northeast REAG license area on which MetroPCS was announced as the high bidder encompasses the entire U.S. east coast corridor from Philadelphia to Boston, including New York City, the remainder of the state of New York as well as the entire states of Connecticut and Massachusetts. The West REAG on which MetroPCS was announced as the high bidder includes, among other metropolitan areas, San Diego, Los Angeles, Portland, San Francisco, Sacramento, Seattle and Las Vegas. In sum, once the Auction 66 licenses are constructed, MetroPCS will own or have access to wireless licenses covering a population of approximately 140 million in the United States, which includes 9 of the top 12 and 14 of the top 25 most populous metropolitan areas in the United States.

[7] In 1996, General Wireless, Inc. (MetroPCS' predecessor company) participated in the FCC's C Block auctions of broadband PCS spectrum. MetroPCS also participated in Auction 58 (via its non-controlling interest in Royal Street) and in Auction 66. Principals of MetroPCS also have participated in numerous other auctions.

11. PRELIMINARY STATEMENT

In a recent speech, Chairman Martin espoused a regulatory policy designed to encourage investment, competition, innovation, and consumer choices.[8] This approach echoes pro-competitive, "let-the-market-place decide" policies articulated by his predecessors - - from both political parties -- which have served the American economy, consumers, and the telecommunications industry well.[9] The consistent theme for more than a decade has been to avoid heavy-handed "command and control" regulation which puts the government in the position of micromanaging the radio spectrum and picking winners and losers. The Commission's approach of allowing the wireless industry to develop without unnecessary regulatory restrictions has enabled the industry to flourish and to become extremely competitive."

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[8] "Martin Makes Clear Where His Differences With Cable Lie," Telecommunications Report Daily, May 8, 2007.

[9] *In The Matter of IP-Enables Services,* 19 FCC Rcd 4863, (rel. Mar. 10,2004) (Statement of Chairman Michael Powell) ("The Commission's pro-competitive and deregulatory policies allowed competition to flourish and helped usher in a period of growth and innovation unlike any in ow recent history"); Reed Hundt, Chairman, FCC, "Address before the Freedom Forum and Georgetown University: The Long and Winding Road (or: the Seventh Ending Stretch)" (February 7, 1997) ("If your competition policy is a success, then government will never be in a position to declare an industry or a firm to be a winner or loser: the market will do that. . .The key to our wireless successes has been Congressional and Commission spectrum and auction policies. We need to continue moving toward our goals of private competition and public benefits from competition. Specifically, that means the following: auctioning as many licenses as possible, and giving purchasers flexibility in ways to use those licenses. In this way, we will eliminate the artificially, scarcity of spectrum that limits competition and flexibility is essential to new investment innovation"); William E. Kennard, Chairman, FCC, "Remarks to the National Association of Regulatory Utility Commissioners" (Nov. 11, 1998) ("Our common vision is embodied in the Telecommunications Act of 1996 - - a pro-competitive, de-regulatory framework for telecommunications . . . Lets be clear - - our approach is a deregulatory one").

[10] The Commission has determined that the wireless industry has "effective competition." In the market for wireless services, as noted by the Commission's 11th annual CMRS competition report, "98 percent of the total U.S. population lives in counties with access to three or more different operators offering mobile telephone service . . . up from 88 percent in 2000." In addition, this Commission report found that "[w]ith respect to carrier conduct, the record indicates that competitive pressure continues to drive carriers to introduce innovative pricing

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Allowing a broad cross section of companies to purchase spectrum at auction and to build networks according to their substantial economic interests and individualized business plans has resulted in a flourishing and growing market for wireless services that is characterized by increasing innovation, improved customer service, and new products and services all being offered at an impressive rate. Robust competition for mobile voice customers now is translating to the mobile broadband market as well. The FCC has found that the mobile wireless share of total broadband lines rose from 1% to 17% of total broadband lines from June 2005 to June 2006.[11] In addition, 59% of all total high-speed line adds were mobile wireless subscriptions."

In stark contrast to the free market principles that have allowed mobile wireless services to flourish, some of the proposals set forth in the *FNPRM* reflect a throwback to a less enlightened regulatory approach when the Commission would be trying to choose winners and losers by regulatory fiat and having to monitor and enforce unnecessary regulations. **A** number of proposals in the Commission's *FNPRM* would impose non-market based rules on both the auction, and the winners of the auction. Further, the proposal regarding public safety would tie the fate of a nationwide interoperable public safety network to a commercial business selected

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plans and service offerings, and to match the pricing and service innovations introduced by rival carriers." There currently are four nationwide wireless providers, as well as numerous regional players, such as MetroPCS, rural carriers, and new entrants, all who have been providing substantial new and innovative services for the benefit of consumers. *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, FCC-06-142 at paras. 2-3 (rel. Sept. 29,2006). However, not all segments of the wireless market are competitive. For example, in the automatic roaming market, the large carriers are using their dominant market position to deny fair and reasonable roaming rates. See MetroPCS Comments filed May 8,2007 in response to certain questions posed with reference to the upcoming 12th CMRS Competition Report in the Commission's *Public Notice,* DA 07-1652, released April **6,** 2007 in WT Docket 07-71.

[11] FCC Report on "High-speed Services for Internet Access," Jan. 2007.

[12] *Id.*

not on the merits of their qualifications to serve public safety, but rather through an auction process where the high bidder is selected regardless of the bona fides of its public safety commitment.

A. The Upper 700 MHz Baud Should Not Include a 22 MHz Spectrum Block

For example, the Commission is considering a band plan for the Upper 700 MHz Band that would include a 22 MHz spectrum block that would be accessible and useful to only a select group of large participants. One argument advanced in support of this allocation is that it will facilitate the market entry of certain "leading technology companies – Google, Intel, Skype Yahoo, along with DirectTV and Echostar" who have "promised to try to provide a national, wireless broadband alternative" - - the so-called "third broadband pipe to the home."[13] But, a spectrum band plan should not be skewed to favor a small subset of potential bidders. Precedent clearly establishes that the FCC's "statutory duty is to protect efficient competition, not competitors:"[14]

> Our role is not to pick winners and losers, or to select the best technology to meet consumer demand. We intend to rely as much as possible on free markets and private enterprise."

In light of this well-established role, the Commission must resist any inclination to tilt the allocation plan in favor of a select group of powerful companies. Influencing the outcome of an auction in this heavy handed fashion prior to bidding would be a dangerous and unwise path for

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[13] *See FNPRM* at p. 193 (Statement of Chairman Kevin J. Martin). MetroPCS has reviewed the ***ex*** partes filed by the mentioned companies and finds no "promise" by any or all of these companies to establish a national third pipe to the home.

[14] 437 *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company,* 12 FCC Rcd 22280,22288, para. 16 (1997) (citing *SBC Communications, Inc. v. FCC,* 56 F3d 1484, 1491-92 (DC Cir 1995)).

[15] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 14 FCC Rcd 2398, *(1999).*

the Commission to take.[16] In addition. to the extent the Commission believes that additional competition is necessarily in the already competitive wireless industry, it should not predetermine that the answer is to foster only a single new entrant by allocating one large spectrum block. Setting aside a significant block of spectrum for one licensee is risky because that licensee could fail and the opportunity for increased competition could be lost. A more reasoned approach would be an allocation that would produce multiple licensees, which would reduce the risk by creating opportunities for multiple new entrants while still enabling a single bidder to aggregate spectrum if desired.

Any effort of the Commission to predetermine that a large chunk of upper band 700 MHz spectrum will he devoted to providing a third broadband wireless pipe to the home also violates the important principle that the Commission should remain technology-neutral whenever possible. The reality is that there are many possible avenues incumbents and new entrants may take to deliver another pipe to the home. Indeed, in addition to the broadband services being rolled out by wireless carriers, multiple other ''pipes'' to the home already are being deployed. For example, new broadband capacity is being generated via broadband-over-power-lines ("BPL") (with even DirecTV contemplating a service test),[17] via Sprint's new 4G network over

[16] As is discussed in greater detail within, the band plan supported by MetroPCS adopts a building block approach. This creates potential opportunities for both large and smaller companies who can compete for the spectrum in a fair and open auction. This increases the prospect that the licenses will be assigned "to those who place the highest value on the use of the spectrum" and who are "best able to put the licenses to their most effective use." *NextWave Personal Communications, Inc.,* 15 FCC Rcd 17500, 17513 (2000).

[17] *See* "DirecTV May Try Broadband on Power Lines," Reuters, May 14,2007 ("DirecTV and others are talking to companies that specialize in providing broadband through the electrical grid"); "BPL Networks Work Their Way Into Smart Grid Efforts; Finally Starting to Recognize Potential," Electric Utility Week, Apr. 16,2007 ("The move for more efficient retail pricing and demand response is catching up with metering and power line technologies so that more utilities will view BPL service as an enabling technology and not a niche broadband play." . . .Texas utilities have engaged in BPL deployments, New York and California have approved policy statements regarding BPL deployments, and Arkansas may soon approve BPL legislation, as

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its 2.5 GHz spectrum,[18] via Clearwire's 2.5 GHz spectrum," and from municipal Wi-Fi networks.[20] This increased development of technology-neutral broadband options, coupled with the increased penetration of mobile wireless broadband via the nationwide wireless carriers, demonstrates that the marketplace already is reacting to the need for a third (and, perhaps a fourth, and fifth) broadband pipe – without a specific earmark of spectrum to do so. Accordingly, setting aside a large block of spectrum for members of the 4G coalition would be both unwise and unnecessary.[21]

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reported by Electric Utility Week on April 16,2007); "The World Begins to Flip the BPL Switch," Telecom Policy Report, Mar. 19,2007 ("Predictions are that 2007 will be the hottest year yet for broadband over power line – for in-home distribution of broadband, so-called "access BPL" for delivery of broadband to homes and businesses, and for use as a technology to control power nets and read meters.").

[18] "Digital Future of the United States: Part III, Spectrum Opportunities and the Future of Wireless, Hearing of the Telecommunications and the Internet Subcommittee of the House Committee on Energy and Commerce, Apr. 19,2007 (Sprint's Chief Technology Officer Barry West noted that "Sprint Nextel is using its 2.5 gigahertz spectrum to build a 4G nationwide broadband mobile network. This transformational technology is designed to offer consumers and business customers faster speeds, lower costs, greater convenience and enhanced multimedia quality using WiMAX and enabled devices" . . . [b]y the end of next year, we expect to reach 100 million Americans with our new network").

[19] "Clearwire and AOL Expand Distribution Agreement," Business Wire, May 3, 2007 ("Clearwire. . . launched its first market in August 2004 and now offers service in 38 metro markets, covering approximately 8.9 million people in more than 400 municipalities in Alaska, California, Florida, Hawaii, Idaho, Minnesota, Nevada, North Carolina, Oregon, Texas, Washington, and Wisconsin.").

[20] Numerous cities, including Philadelphia, New Orleans, and Anaheim are testing or operating municipal wireless Internet networks. Numerous others, including Houston, and San Francisco, have recently contracted to build a citywide wireless Internet network. 68 city or countywide wireless broadband networks are currently in operation for public access and municipal use, with 135 planned deployments. Companies such as EarthLink and Google are participating in many of these wireless networks. ***See*** "EarthLink Land Largest Municipal Wi-Fi Network Deal," Atlanta Business Chronicle, Apr. 12,2007; **see** *also* "Houston Partnering with EarthLink to Build Citywide Wi-Fi Network," Associated Press Financial Wire, Feb. 14,2007; "San Francisco, EarthLink Have Tentative Wi-Fi Deal," CIO Insight.com, Jan. 6,2007; "Wi-Fi Cities, A Plan of Action; Municipal Wireless Network," Information Today, Dec. 1,2006.

[21] Of course, these potential new entrants clearly have the resources to acquire this spectrum if they wanted to do so. Further, the Commission should not make the mistake of favoring these

(continued...)

So, the Commission should adopt a flexible band plan, which allows entities of all types and sizes to participate robustly in the upcoming auction. **A** diverse group - - comprised of industry groups, industry representatives and carriers of all sizes, with many different business models, and at different stages of development (incumbents and new entrants) - - has advocated a 700 MHz band plan that consists of a variety of geographic area sizes and smaller spectrum blocks. This band plan – which is endorsed by the Commission's Lower 700 MHz band proposal and reflected in the Commission's Proposal 2 for the Upper 700 MHz band – permits meaningful participation by smaller and regional carriers, while still allowing larger carriers to aggregate spectrum and geography for their particular business plan. By allowing an open auction process to pick winners and losers, the Commission will ensure another successful distribution of spectrum akin to its highly acclaimed AWS auction.

B. The Frontline Proposal is Fatally Flawed and Violates Sound Spectrum Allocation Principles

The Commission also would be making a serious mistake, do violence to a host of regulatory principles, and be subjecting public safety and first responders to significant risk were it to endorse the Frontline proposal in any significant respect. The Frontline proposal reflects a throwback to prior eras when the Commission sought - - and failed - - to dictate market outcomes by micromanaging the use of spectrum. The Frontline proposal attempts to earmark spectrum for Frontline's own specialized and unproven business plan. Frontline contemplates a monopoly provider of services to public safety which would require unprecedented Commission oversight and threaten public safety's ability to achieve a nationwide interoperable network. The

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national companies. As Commissioner McDowell pointed out, broadband may get rolled out faster if the Commission allows multiple smaller operators to purchase spectrum. With that approach, the Commission's risk of failure would be reduced and the likelihood of coverage and local service would be enhanced.

Frontline proposal also is unsustainable on legal and policy grounds. For example, Frontline proposes a legally unsupportable incursion of public safety users into commercial spectrum and would give commercial users access to spectrum specifically designated by Congress for public safety use. And, 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, thereby violating the core principle that the Commission rules should encourage, not discourage, diverse applicants from participating. Further, the monopoly service provider envisioned by Frontline would have the ability to hold public safety users hostage and to extract unregulated user fees.

One very troubling aspect of the Frontline proposal is that it has not received a ringing endorsement either from the public safety community, or from the Department of Homeland Security, which is charged by statute with the responsibility for coordinating state, local and federal emergency responses. The Frontline proposal also places public safety users at the mercy of an untested and uncertain publiciprivate partnership arrangement for which there can be no assurance of success. Ironically, the fundamental flaw in this publiciprivate partnership has been best articulated by representatives of Frontline itself. In responding to a suggestion that public safety would be better off partnering with an incumbent wireless carriers, Frontline raised an alarm about "the danger to public safety of partnering with a wireless carrier that would be motivated by much larger and different business considerations."[22] Of course, Frontline, and the other commercial backers of this concept, such as Cyren Call, are all profit-seeking enterprises backed by venture capital firms whose primary motive is to make money. It was this troubling

[22] "Frontline, Cyren Call in war of words over 700 MHz Auction," RCR Wireless News, May 16,2007.

fact that led Commissioner Copps to caution that "cash registers and toll booths don't belong at the heart of our nation's public safety planning."[23]

Further, competitive bidding procedures are unlikely to select the service provider best suited to meet the unique needs of the public safety community. Auctions are inherently skewed to favor the bidder with the best commercial plan who values the spectrum most and can pay the most. However, what public safety needs is a company that is devoted to building the specialized system needed by the public safety. These two needs are diametrically opposed. The bidder who values the spectrum most on a commercial basis may be able to bid more by making a conscious decision to plan to do less for public safety. This will not serve public safety's needs for a system which may need to evolve over time and require continued investment. The simple truth is that auctions are ill-suited to pick partners for a private/public partnership to construct a nationwide public safety network.[24]

C. The *FNPRM* Revisits Regulatory Approaches That Have Prooerlv Been Abandoned in the Past

Finally, the FNPRM takes comment on the possibility of resurrecting arbitrary, govemment-imposed performance standards and preclusive eligibility restrictions that previously have been abandoned by the Commission for good reason. At the behest of certain interested parties, the Commission is considering adopting a rigorous geography-based performance standard. The problem is that any fixed coverage requirement, particularly a geographic requirement, has the inevitable effect of forcing carriers to build their networks according to a government imposed timetable rather than according to market demands. And, uniform

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[23] *FNPRM* at Statement of Commissioner Michael J. Copps.

[24] See Spectrum Policy *Task Force* Report, ET Docket No. 02-135, released November 2002 at pp. 42-43 (market based assignments of spectrum by auction are not suited for meeting the unique needs of public safety entities) ("Spectrum Policy Task Force Report").

percentage coverage standards are inherently arbitrary and do not properly account for dramatic variations in population density from one region to another."

The proposal of Media Access Project and others to impose eligibility restrictions restricting the participation of some incumbents in the band also is a throwback to previously discredited allocation policies. Nearly fifteen years ago, the Commission issued a seminal working paper that set forth the roadmap for the transition to the use of a market allocation of spectrum. The Paper indicated that in the "ideal" situation "markets, not control authorities, determine spectrum uses and users":

> An ideal market allocation should impose no restrictions on spectrum uses and users beyond those necessary to limit interference, to prevent anti-competitive concentration, and to comply with international agreements. Spectrum should not be set aside for federal users or for specific non-federal users ....[26]

The proposal to limit eligibility for the 700 MHz spectrum violates this principle, and reverts to having the government dictate the market composition. Such an outcome is particularly unacceptable here where there has been no demonstrated market failure. It again would put the Commission in a position of high risk since it, not the marketplace, would be deciding who is the best licensee for particular spectrum. Since the Commission's market place approach has led to robust competition, increased innovation and improved service, there is no need to revert to past failed policies. To the contrary, the Commission repeatedly has found the wireless broadband

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[25] As the Commission already recognizes, geographic coverage requirements include uninhabited areas, bodies of water, and other difficult to serve areas such as historical areas, government lands and preserves, etc,. As a result, geographic coverage requirements inevitably lead to problems and may force carriers to build systems where market demand does not exist. This is a form of unfunded mandate which will skew the auction in favor of incumbent carriers who already have extensive existing operations in a particular market.

[26] Kwerel, **A** and Williams, John, *A Proposal for a Rapid Transition to Market Allocation of Spectrum*, OPP Working Paper released November 2002.

industry to be highly competitive and innovative and therefore the Commission should not change its open eligibility requirements

III. THE COMMISSION SHOULD ADOPT LOWER AND UPPER 700 MHZ BAND PROPOSALS THAT PROVIDE FOR A MIX OF LICENSES OF VARYING GEOGRAPHIC SIZES AND SMALL SERVICE BLOCKS

In the FNPRM, the Commission seeks comment on different band plan proposals for the use of Cellular Market Areas ("CMAs"), Economic Areas ("EAs"), and Regional Economic Areas ("REAGs") in the Lower 700 MHz Band and the Upper 700 MHz Band.[27] As demonstrated by MetroPCS in prior filings, the Commission should adopt a band plan for the upcoming 700 MHz auction that is most likely to replicate the acknowledged success of Auction No. 66 which encouraged broad participation by utilizing smaller service blocks and smaller geographic areas. With this objective in mind, MetroPCS applauds the recommended proposal set forth by the Commission for the Lower 700 MHz Band. MetroPCS also urges the Commission to adopt its Proposal 2, or in the alternative Proposal 5, for the Upper 700 MHz Band, as these proposals are most likely to replicate the success in Auction No. 66, which was described properly by Chairman Martin as the "biggest, most successful wireless auction in the Commission's history.""

A. The Commission Should Allocate Both the Upper and Lower 700 MHz Bands Using Smaller Service Blocks and Geographic Service Areas

In previous filings, MetroPCS examined the valuable lessons learned from Auction No. 66, observing that: (1) the AWS Auction was successful in no small part because the Commission took a "building block" approach in the band plan and offered a sufficient amount of spectrum in small enough geographic areas and spectrum block sizes to permit meaningful

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[27] *FNPRM* at para. 176.

[28] FCC News Release, "Statement of Chairman Kevin J. Martin on the Conclusion of Advanced Wireless Services Auction," September 18, 2006.

participation by diverse carriers - including smaller carriers and prospective and new entrants in the marketplace[29] and (2) bidders who wanted to aggregate licenses into larger areas were successful in the simultaneous multiple-round ("SMR") auction format demonstrating that combinatorial bidding is not necessary or appropriate in order to achieve larger license areas or larger license blocks.[30] Based on those premises, MetroPCS proposed a 700 MHz Band plan that provided for the inclusion of a greater number of smaller service area licenses, as well as smaller spectrum blocks, while still maintaining some larger service area licenses. This provides meaningful opportunities to participate for diverse carriers, both incumbents and new entrants, and accommodates a variety of business plans, both traditional and innovative.

As the 700 MHz band plan proceeding progressed, MetroPCS joined with other proponents of 700 MHz Band Plans in an effort to develop a fair and balanced consensus band plan that reflects the common themes of a broad group of entities. This Balanced Consensus Band plan was jointly filed with the Commission on October 20, 2006 by a group of 21 interested parties reflecting a broad cross section of industry representatives including large regional carriers, mid-sized carriers, rural carriers, independent telephone companies, rural associations and state agencies.[31] The Balanced Consensus Plan has garnered direct and indirect

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[29] MetroPCS Comments at 4 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) ("MetroPCS 700 MHz Comments") **(All** comments and reply comments filed in response to the NPRM will be hereinafter referred to as "700 MHz Comments" or "700 **MI-Iz** Reply Comments").

[30] *Id.* at 5.

[31] See Letter from Alltel, *et al.* to Marlene H. Dortch, Secretary, FCC, Docket No. 06-150 (filed Oct. 20,2006) ("Balanced Consensus Plan") (Signatories include Alltel, Aloha, Blooston, C&W, ConnectME Authority, Con, Dobson, Leap, Maine Office of Chief Information Officer,

(continued...)

support from other commenting parties[32] and from members of Congress. In the course of the proceeding, many of the Balanced Consensus participants tiled a slightly modified band plan proposal,[33] which has been incorporated by the Commission in its recommended Lower 700 MHz Band proposal and put out for comment in its Upper 700 MHz Band Proposal 2. This modified proposal contemplated:

- In the lower band, licensing one paired frequency block on a CMA basis, and one paired frequency block on a EA basis. The remaining unpaired spectrum would be licensed on a REAG basis
- In the upper band, subdividing the 20 MHz frequency block into two 10 MHz paired frequency blocks.
- After subdividing the upper band frequency block, make at least one of the two subdivided frequency blocks available on a geographic area smaller than a REAG.[34]

B. <u>The Modified Consensus Plan Enjoys Overwhelming Support</u>

Numerous commenters representing a diverse cross-section of industry participants in this docket advocate a balanced 700 MHz Band plan that allows for spectrum to be licensed over smaller service areas than the Commission's original proposal, for reasons similar to MetroPCS.[35] For example, the modified consensus band plan proposal was endorsed by both T-

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MetroPCS, NTCA, Nebraska PSC, North Dakota PSC, Rural Cellular Association ("RCA"), Rural Telecommunications Group, ("RTG), Union, U.S. Cellular, Vermont, ***et al***, Vermont Telephone Company).

[32] For example, T-Mobile, SpectrumCo, and Frontline Wireless submitted comments consistent with this approach of smaller geographic license areas for the 700 MHz commercial spectrum.

[33] ***See Ex Parte*** Letter from members of the coalition supporting the 700 MHz Balanced Consensus Spectrum Band Plan lo Chairman Martin, Commissioner Adelstein, Commissioner Copps, Commissioner Tate, and Commissioner McDowell, WT Docket No. 06-150 (filed April 18,2007).

[34] The Balanced Consensus Plan advocated allocating two CMA frequency blocks, one of which would be in the upper band.

[35] Consumer Federation of America, Consumers Union and Free Press ("Consumer Groups") 700 MHz Comments at 4 ("The adoption of a band plan with relatively small license areas and spectrum blocks is a necessary step in the first direction."); Corr Wireless Communications, LLC ("Corr") 700 MHz Comments at 2; Frontier Communications ("Frontier") 700 MHz Comments

(continued...)

Mobile[36] and SpectrumCo[37] in letters to the Commission. In addition, many other commenters agreed that the Commission should create at least one CMA license in the 700 MHz Band in the unassigned channel blocks,[38] as well as split the Upper D Block into two 10 MHz blocks.[39] For example, Aloha Partners, L.P. - - a major holder of lower 700 MHz licenses - - ("Aloha") urged the Commission to offer licenses in a number of different market sizes, including a CMA of at least 12 MHz bandwidth, in order to "provide service to rural areas," "provide a bona fide opportunity to small businesses to be a meaningful part of the auction," and allow the Commission to comply with "its statutory mandate to avoid undue concentration with the licenses that are being auctioned."[40] Aloha also notes that "[i]f the Commission does not offer a

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at 3-5; Leap Wireless International, Inc ("Leap") 700 MHz Comments at 4; National Telecommunications Cooperative Association ("NTIA") 700 MHz Comments at 5-6; Organizations for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO) 700 MHz Comments at 2-3; RCA 700 MHz Comments at 4-8; RTG 700 MHz Comments at 2-8; and Union Telephone Company 700 MHz Comments at 2-5.

[36] ***See Ex Parte*** Letter from Kathleen O'Brien Ham of T-Mobile to Marlene H. Dortch, WT Docket No. 06-150 (filed April 18,2007).

[37] ***See Ex Parte*** Letter from Michele C. Farquhar, counsel to SpectrumCo, to Marlene Dortch, WT Docket No. 06-150 (filed April 19,2007).

[38] Blooston Rural Carriers 700 MHz Comments at 2; Vermont Department of Public Service et.al. ("Vermont") 700 MHz Comments at *3;* Aloha 700 MHz Comments at *3;* Corr 700 MHz Comments at 3 ("The virtue of smaller CMA-sized blocks is that they are truly "building blocks" which can be combined in just the right amounts of spectrum and geographic area to meet the need perceived by the licensee."); Dobson Communications Corporation ("Dobson") 700 MHz Comments at 1 ("Smaller carriers clearly do not possess the financial resources to compete for **EAG** licenses."); Frontier 700 MHz Comments at 6 ("[T]he use of RSAs/MSAs . . . will not disadvantage large entities because they can pursue and combine multiple small license areas to create statewide or regional service areas."); Leap 700 MHz Comments at 4; MilkyWay Broadband, LLC ("MilkyWay") 700 MHz Comments at 2; NTIA 700 MHz Comments at 6-7; RTG 700 MHz Comments at 2; Union Telephone Company 700 MHz Comments at 4; and USCC 700 MHz Comments at 3-5.

[39] Blooston Rural Carriers 700 MHz Comments at 4; Frontier 700 MHz Comments at 7; Leap 700 MHz Comments at 4; RTG 700 MHz Comments at 7; Union Telephone Company 700 MHz Comments at 5; and USCC 700 MHz Comments at 5.

[40] Aloha 700 MHz Comments at *3*.

mix of small, medium, and large markets, then the only companies that will be financially able to participate in the auction will be the 4-6 very large national carriers."[41] C&W Enterprises, Inc. ("C&W"), a successful bidder in Auction No. 66, noted that with smaller licenses "various small entities such as C&W are more likely to participate and to increase the revenues generated by such an auction."[42] RTG - - a leading representative of rural carrier interests - - comments that "the use of smaller size license areas results in greater auctions and market efficiency because it allows bidders to tailor their auction strategy and spectrum acquisitions to meet their business plans."[43] USCC - - which was a successful participant in Auction No. 66 as an investor in Barat Wireless, L.P. - - agrees with MetroPCS' analysis of Auction No. 66, stating that "[a]s illustrated in the Auction #66 results, the proposed use of EA and CMA building blocks has proved to be an effective way to provide realistic licensing opportunities for entities to serve regional and local coverage areas."[44] Lastly, CTIA has recognized that a "balanced approach serve[s] the wireless marketplace well" and that "a mix of different sized geographic area licenses serves the Commission's goals of balancing efficiency with the dissemination of licenses among a variety of applicants."[45]

Notably, the allocation used in Auction No. 66 was successful in promoting the participation of small businesses, rural carriers, and other designated entities ("DEs"). The Commission has highlighted the extent to which small businesses, rural carriers and other "designated entities" or "DEs" succeeded in Auction 66:

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[41] *Id*, at 5.

[42] C&W 700 MHz Comments at 2.

[43] RTG 700 MHz Comments at 5.

[44] USCC 700 MHz Comments at 6.

[45] CTIA 700 MHz Comments at 5-6.

> [B]y any objective standard, DEs participated substantially in the AWS auction. DEs comprised 100 out of the 18 qualified bidders and 57 out of the 104 winning bidders.[46]

In light of this Commission-acknowledged success, the Commission should adopt a 700 MHz Band plan that will accommodate smaller local and regional carriers as well as well-heeled incumbents.[47] As was correctly noted by Leap Wireless International, Inc. ("Leap")in its 700 MHz comments "Auction No. 66 for AWS-1 spectrum plainly demonstrated that the lion's share of spectrum carved into large geographic regions will quickly move beyond the reach and resources of small and mid-sized bidders."[48] In contrast, the results of Auction No. 66 establish that the large carriers will participate regardless of the market areas offered.[49]

As noted by Aloha in its 700 MHz comments, SpectrumCo spent $2.4 billion and purchased 157 BEA licenses and Cingular spent almost 50% more in the aggregate for CMA and BEA licenses than for regional blocks.[50] In addition, RTG points out that the "use of EAs in the AWS auction clearly did not prevent SpectrumCo from being able to aggregate smaller sized licenses into a nationwide footprint."[51] Moreover, as MetroPCS has noted, in Auction No. 66, "with one exception (in Alaska), all of the 20 MHz REAG F Block licenses were acquired by Verizon Wireless or T-Mobile" – both of which are large, national carriers.[52] Nationwide carriers (including SpectrumCo LLC, which consisted of a coalition of cable companies along

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[46] Council Tree Comm., Inc. et.al. v. FCC, Brief for Respondents at 44, Docket No. 06-2943 (3rd Cir., filed October 16,2006).

[47] It is interesting to note that the only non-national carriers able to garner licenses larger than EA in Auction 66 were the largest regional carriers participating in the auction.

[48] Leap 700 MHz Comments at 4.

[49] Of the 18 REAG licenses in the continental United States only four were garnered by carriers other than the large national carriers.

[50] Aloha 700 MHz Comments at 6.

[51] RTG 700 MHz Comments at 5.

[52] MetroPCS 700 MHz Comments at 4.

with Sprint/Nextel) also acquired the vast majority of the 10 MHz REAG licenses and the 20 MHz economic area ("EA") licenses.[53] In the meantime, the "vast majority of rural carriers and designated entities tended to gravitate towards the smaller spectrum blocks.[54] These observations regarding the behavior of nationwide, regional, and smaller carriers are confirmed by the economic analysis of Coleman Bazelon of the Analysis Group.[55] Dr. Bazelon demonstrates that past auction experience and economic principles should lead the Commission to adopt a building block approach that favors smaller geographic areas and a division of the Upper 700 MHz Band into three 10 MHz blocks.[56]

The evidence is incontrovertible. Having a variety of spectrum license areas, and an ample number of smaller (e.g. 10 MHz paired) blocks, available in the 700 MHz Band will advance the interests of all carriers, incumbent and new entrants alike, as well as the overall public interest. By having a mix of market sizes, there will be a larger number of overall bidders resulting in more robust competition for all types of market areas. Most important, the results of Auction No. 66 demonstrate that with a proper band plan, new entrants are willing and able to enter into markets and spur competition.

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[53] *Id.* at 5.

[54] *Id.*

[55] Letter from Michele C. Farquhar, Attorney for SpectrumCo, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-150 (filed Jan. 8,2007) ("The Economies of License Sizes in the FC's 700 MHz Band Auction," Coleman Bazelon, Jan. 8,2007); Letter from Michele C. Farquhar, Attomey for SpectrumCo, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-150 (filed Mar. 6,2007) ("Principles for Choosing 700 MHz Block License Sizes," Coleman Bazelon, Mar. 6,2007); Letter from Michele C. Farquhar, Attorney for SpectrumCo, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-150 (filed Apr. 20,2007) ("Why the Exclusive Use of Large Licenses in the Upper or Lower 700 MHz Bands Would Reduce the Efficiency of the 700 MHz Auction," Coleman Bazelon, Apr. 20,2007)

[56] *Id.*

C. Combinatorial Bidding is Unnecessary for Aggregation of Spectrum, and Would Complicate the Auction Process

MetroPCS supports the use of a single SMR auction format, which was successfully used during Auction No. 66. The Commission should not incorporate combinatorial bidding into any of its band plan proposals, as there is no compelling reason to do so, but there is a serious risk of harm if combinatorial bidding is used. Allowing combinatorial bidding would add unneeded complexity to the auction and create a serious risk of unintended and undesirable consequences without providing any substantial public interest benefits. By allowing combinatorial bidding, the Commission would introduce a radical change from prior auction procedures which could potentially delay or deter participation by potential bidders. Lastly, the Commission should not adopt combinatorial bidding without thoroughly vetting for public comment the specific procedures to be used. With such a limited time before the auction's statutory, mandatory start date, proposing a specific type of combinatorial bidding for the first time in the auction procedures notice, which typically has a very short time frame for comment and for discussion, would not allow entities sufficient time to react to the proposal and provide comments, much less prepare and adapt to such a substantial change in the bidding process.

Many prior auctions confirm that combinatorial bidding is not necessary to enable carriers to assemble nationwide licenses. For example, the final results in Auction No. 3 demonstrated that carriers interested in assembling a nationwide license were able to do so.[57] More recently, in Auction No. 66, SpectrumCo and T-Mobile were able to build virtually nationwide coverage without combinatorial bidding. For example, in the first rounds of bidding in Auction No. 66, all of SpectrumCo's provisional winning bids were for large REAG licenses

[57] Of the six licenses offered in the Regional Narrowband PCS Auction, four of the licenses where acquired by a single applicant in each of the five regions, resulting in four nationwide licenses. *See* Public Notice, PNWL 94-27, released November 9, 1994.

(D, E, and F Blocks).[58] By round 15, however, it found itself outbid on all but one of the REAG licenses and began bidding on a combination of BEAs and CMAs in an effort to assemble a large service area.[59] By the end of the auction, SpectrumCo had assembled a nationwide footprint made up of 133 Block B BEA licenses and one Block C BEA license.[60] This result supports the Commission's prior practice of adopting **a** "building block" approach in designing band plans. The SpectrumCo success also confirms that the Commission need not resort to licensing exclusively large geographic areas in order to enable bidders to gamer licenses in contiguous areas.

In the absence of compelling justification, the Commission should not alter the standard SMR auction procedures with which bidders are familiar and which are highly likely to result in an economically efficient assignment of licenses. With the time frame for this auction still in flux, and a statutory deadline looming, inserting additional complexity into an already condensed auction process could have extraordinarily unintended circumstances – and hinder preparations. The Commission should not undertake such a radical change in such a short expected time period and should avoid any procedures that could delay the auction or deter participation by potential bidders.

MetroPCS supports the analysis of Robert J. Weber, the Frederic E. Nemmers Distinguished Professor of Decision Sciences at the Kellogg School of Management (Northwestern University) that demonstrates the significant problems of even limited

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[58] Bidder Summary, SpectrumCo LLC, Rounds 1-10 Results, FCC Integrated Auction System.

[59] Bidder Summary, SpectrumCo LLC, Round 15 Results, FCC Integrated Auction System.

[60] See Auction No. 66 Closing Chart, Licenses by Bidder http:llwireless.fcc.govlauctionsl66lchartsl66cls2.pdf.

combinatorial bidding.[61] Dr. Weber demonstrates that combinatorial bidding should not be used in the 700 MHz auction because: (1) the withdrawal by Echostar/DirecTV from Auction No. 66 is not necessarily evidence of an "exposure" problem, as demonstrated by the aggregation of licenses in the auction by SpectrumCo; (2) a public forum is essential to obtain relevant comment on such complex and potentially controversial proposed auction methodologies; (3) package bidding brings about threshold problems for smaller bidders, and these concerns have not been adequately addressed; and (4) any form of limited package bidding may inappropriately and unfairly bias the auction rules in favor of one group of bidders over another.

Indeed, the use of a combinatorial bidding design would harm small, rural, and regional carriers and prospective new entrants. The usage of combinatorial bidding would result in a "threshold problem," which occurs when small bidders cannot raise their bids enough to beat out a large bidder, even though the aggregate value of the small bidders may be greater than the large bidder's value. This also could lead to substantial competitive problems if some bidders are able to acquire spectrum at substantially lower prices per MHz of population than other bidders. Further, combinatorial bidding would allow large incumbent licensees to acquire spectrum over new entrants who may have a more targeted approach to a specific geographic area. If the Commission wants to foster an additional pipe into the home, it should adopt a policy which would encourage both larger and smaller new market entrants to participate and not use combinatorial bidding which is skewed towards certain prospective bidders over others. After the extraordinary success of Auction No. 66, the Commission should not make any changes that could potentially diminish the success of future auctions.

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[61] Letter from George Y. Wheeler, Counsel to US Cellular, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-150 at Attachment A ("Statement of Robert J. Weber, the Frederic E. Nemmers Distinguished Professor of Decision Sciences at the Kellogg School of Management (Northwestern University) in WT Docket No. 06-150") (filed Mar. 7,2007).

D. The Commission Should Adopt its Proposed Lower 700 MHz Band Plan

For the Lower 700 MHz Band Plan, the Commission proposes the following band plan:[62]

- REAGs as the geographic area for licenses in the unpaired 6 MHz spectrum in the E Block.
- EAs as the geographic area for licenses in the 12 MHz paired A block.
- CMAs as the geographic area for licenses in the 12 MHz paired B block.

In making this proposal, the Commission correctly notes that there is "significant support in the record for a mix of licenses" and notes the potential "public interest benefits of licensing an additional spectrum block over a smaller geographic service area."[63]

The Commission's proposal for the Lower 700 MHz Band conforms to the modified consensus proposal advocated by MetroPCS and others. This reconfigured Lower 700 MHz Band proposal is supported by a broad cross section of the communications sector of the economy, including nationwide carriers, large regional carriers, mid-sized carriers, rural carriers, independent phone companies, rural associations, and state agencies (including T-Mobile, SpectrumCo – a group that consists of Comcast, Time Warner, Sprint and others, ALLTEL, Dobson Communications, Leap Wireless, MetroPCS, National Telecommunications Cooperative Association, Rural Cellular Association, Rural Telecommunications Group, United States Cellular, and many others). MetroPCS thus enthusiastically supports the Commission's Lower 700 MHz proposal as being in the public interest.

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[62] *FNPRM* at paras. 178-181.

[63] FNPRM at para. 180.

E. The Commission Should Adopt Either Proposal 2, or in the Alternative, Proposal 5, for the Upper 700 MHz Band Plan

The Commission has set forth four proposals for the Upper 700 MHz Band plan. Two of these proposals (1 and 2) are based on a possible elimination of the existing Guard Band B block entirely, with the spectrum being subsumed within the commercial spectrum in the Upper Band – resulting in a total of 34 MHz available for auction.[64] The other two proposals (4 and 5), are based on a possible reduction of the Guard Band B block from 4 to 2 MHz, and a shift in the location of both the Guard Band A and B blocks within the Upper Band – resulting in a total of 32 MHz available for auction (the "Alternative BOP Proposal").[65]

MetroPCS currently is reviewing the Alternative BOP Proposal, but is concerned that the proposal will not resolve the relevant interference concerns. In addition, the Alternative BOP Proposal would grant guard band licensees additional flexibility and capabilities that were not available when the licenses were initially auctioned – thus resulting in a windfall for the current licensees.[66]

Regardless of the approach that the Commission decides to take with regard to the structure of the Upper 700 MHz Band Plan, it should adopt a band plan that incorporates smaller service areas and smaller spectrum blocks.[67] The proposals that most closely adhere to the principles described above are Proposal 2 and Proposal 5. In Proposal 2, the Commission proposes the band plan advocated by the Balanced Consensus Plan participants in their April 18,

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[64] *FNPRM* at paras. 184-189.

[65] *FNPRM* at paras. 195-199.

[66] See *Ex Parte* from Mr. Mark Stachiw, MetroPCS to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-169 (filed Mar. 22,2007).

[67] However, in the event the Commission eliminates the Guard B Block entirely, it should not impose any license conditions upon the adjacent block licensee that would create a temporary easement into the commercial spectrum.

2007 letter.[68] This band plan proposal would provide interested bidders with the flexibility to aggregate smaller markets to create either a nationwide, large, regional or other customized market. This band plan also would allow new entrants an opportunity to provide broadband services. In the alternative, if the Commission were to adopt the Alternative BOP Proposal, it should adopt the band plan set forth in Proposal 5. This proposal includes a mix of licenses that could better support a variety of business plans and ensures that the spectrum is made available to the bidders that value it most. Both proposals also would follow the Commission's statutory obligation to ensure "an equitable distribution of licenses and services among geographic areas" and to "avoid [] excessive concentration of licenses . . . by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[69] If the Commission adopts the Frontline proposal and Proposal 5, the Commission still should retain two EAs for the Upper 700 MHz Band. In addition, the Commission should adopt either Proposal 2 or Proposal 5 without combinatorial bidding, for the reasons and principals expressed above.

The Commission definitely should not adopt Proposal 1 for the Upper 700 MHz Band Plan, as this band plan would limit auction participation to only the largest companies, would place the Commission in the position of reversing long-standing policies of not tailoring band plans and regulations to particular competitors or specific business plans, and thus would violate sound auction design principles. The Commission's Proposal 1 for the Upper 700 MHz Band Plan would create a 22 MHz paired spectrum block, and would allocate 34 MHz of spectrum on

[68] See *Ex Parte* Letter from members of the coalition supporting the 700 MHz Balanced Consensus Spectrum Band Plan to Chairman Martin, Commissioner Adelstein, Commissioner Copps, Commissioner Tate, and Commissioner McDowell, WT Docket No. 06-150 (filed April 18, 2007).

[69] 47 U.S.C. § 309(j)(3).

a REAG basis – with no Upper 700 MHz Band allocation for any smaller license areas. This proposal is specifically tailored to the desires of an identical group of entities (the members of the Coalition for 4G in America). The problem with accommodating the desires of this group is that the practical effect of their proposed allocation is to raise the threshold for participation so high that many bona fide auction participants will not be willing or able to compete for this block of spectrum. In essence, a 22 MHz REAG is a set-aside for larger auction participants. [70]

The Commission should not tailor the 700 MHz Band Plan for specific participants, because doing so is tantamount to picking winners and losers before the auction even begins. This would be particularly inappropriate since the advocates of this preclusive band plan (1) have never bid in an auction, (2) are for the most part not licensees of terrestrial spectrum so they have no experience building networks, and (3) had ample opportunities in Auction No. 66 to participate and chose either to sit the auction out or stopped bidding very early. Further, there can be no assurance that they will even bid in the upcoming 700 MHz auction, or would be willing to pay more than they bid in Auction No. 66, which demonstrated that they did not value the spectrum very highly. Indeed, the Washington telecom and media counsel for Google (a member of the Coalition for 4G in America) recently commented that "[n]one of our involvement [in the 700 MHz auction process] suggests we ourselves will roll out devices and networks and Google executives also have been quoted as saying that they "had no plans to bid in the closely watched sale of a swath of broadband spectrum."[71] Thus, there is a serious risk that the Commission would be tailoring its Upper 700 MHz Band Plan to the request of a group of

[70] See Letter from Ruth Milkman, counsel for Access Spectrum L.L.C., and on behalf of the Coalition for 4G in America, to Marlene Dortch, Secretary, FCC, WT Docket Nos. 96-86, 06-150, and 06-169 (filed Apr. 4,2007).

[71] "Google Goes Wireless," Business Week, May 3,2007; ***see*** *also* "Google Proposes Innovation in Radio Spectrum," New York Times, May 22,2007.

entities that have said they have no plans to and may in fact not actually participate to any significant degree in the spectrum auction if they do opt to participate. Consequently, the Commission should heed the words of Commissioner McDowell to "not overly tailor its auction rules to fit a particular business plan because there are never any guarantees as to who will participate at auction, or for how long."[72] On the other hand, if members of the Coalition for 4G in America do show up at the auction, an adoption of Proposals 2 or 5 would allow them to aggregate smaller spectrum blocks to create any mix of spectrum they need – for any types of services they would want to provide. And, they would appear to have the financial resources to succeed in this regard.

A recent ex parte[73] filed by U S. Public Interest Research Group ("US PIRG") removes any doubt that some want the Commission to predetermine the market structure, and pick the ultimate winners for some blocks in the auction. US PIRG urged that "to encourage the introduction of a non-incumbent national broadband wireless provider that the blocks be tailored to encourage the development of a new national competitor." This position represents a clear endorsement of the failed legacy "command and control" spectrum allocation policies that have been so thoroughly discredited in the literature. **As** noted in the Spectrum Policy Task Force Report:

> [E]xisting spectrum that is subjected to command-and-control regulations should be transitioned to the more flexible exclusive use and commons models to the greatest possible extent.[74]

Moreover, if the Commission originally had granted regional or nationwide cellular licenses in the early days of cellular, it may have foreclosed from participation some of the industry

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[72] *FNPRM* at Statement of Commissioner Robert M. McDowell.

[73] *Ex parte* of U.S. PIRG, WT Docket No. 05-211 (filed May 19,2007).

[74] ***See*** Spectrum Policy Task Force Report at p. ***6.***

pioneers (e.g., Craig McGaw, John Stanton) who deserve credit in the formative years for helping the U.S. broadband industry become innovative and competitive. Indeed, two of the current nationwide service providers (AT&T Wireless and T-Mobile) find their origins in entrepreneurial companies formed by these industry pioneers. And the nationwide networks that AT&T Wireless and T-Mobile assembled over time using a strategic building block approach might never have developed had the initial license areas been oversized. The Commission has never been successful at picking winners and losers, and this auction of 60 MHz of prime spectrum would not be a good place to try again.

Having a greater number of smaller license areas will better serve the public interest, while still enabling carriers to aggregate spectrum utilizing a building block approach. Positioning two 10 MHz licenses contiguously in the upper frequency band also offers the opportunity for any carrier that needs more than 10 MHz spectrum to couple together two licenses for 20 MHz in order to implement a particular technology choice. However, positioning the entire spectrum auction to satisfy a carrier which may need 20 MHz in a market for a particular technology choice would not serve the public interest.[75]

One further misconception advanced in this proceeding is that nationwide or large regional licenses are necessary to foster a third broadband pipe into the home. However, there is no evidence in the record that a nationwide provider is any more likely to provide high-speed broadband services using 700 MHz spectrum than a regional or rural provider. Indeed, DSL services and cable modem services are not currently offered by any provider on a nationwide basis. Rather, they are provided by regional cable companies and phone companies; and in some

[75] Indeed, since these companies decided either to sit out Auction No. 66 or to stop bidding early, what they really are seeking is a band plan that would depress auction prices and enable them to succeed despite not being the entity that values it most. This is directly contrary to the policy reasons auctions are used to assign spectrum.

cases, particularly in rural areas, by local providers and small town entrepreneurs. There is no reason to assume that a national provider would be able to provide high-speed broadband services more efficiently, more quickly or to a greater degree, than a local or regional provider.

For example, the current wireless industry was not national at the beginning. Initially, cellular licenses were granted on a local market basis, and were combined over time to form regional, and ultimately, nationwide systems. Notably, with the four large national carriers, smaller carriers continue to flourish and apply beneficial competitiveness to the market without having a national license. For example, both Leap and MetroPCS added substantial numbers of customers in the first quarter of 2007. There is no reason for the Commission to abandon this successful incremental approach to building a nationwide system. There is no need or justification for designing the spectrum blocks to foster a single national allocation -- either by combinatorial bidding or otherwise.

Thus, in order Io ensure that entities of all types and sizes participate in the upcoming 700 MHz auction, the Commission should adopt its Lower 700 MHz Band plan proposal, as well as adopt the geographic areas and service blocks illustrated in its Proposal 2, or in the alternative, Proposal 5, for the Upper 700 MHz Band plan.

IV. THE COMMISSION SHOULD REJECT PERFORMANCE REQUIREMENTS BASED ON GEOGRAPHIC BENCHMARKS AND THE "KEEP WHAT YOU USE" RULE

The Commission seeks comment on a performance requirements proposal that is a "modified version of RCA's recommendation, which combines performance requirements based on geographic benchmarks and a "keep what you use" rule."[76] Specifically, the Commission proposes that "each licensee provide coverage of 25 percent of the geographic area

[76] *FNPRM* at para. 212.

of the license within three years of the grant of the initial license, 50 percent of this area within five years, and 75 percent of the area within eight years."[77]

The Commission should reject this proposal. The Commission should not adopt either a keep-what-you-use Iicensing scheme or construction benchmarks tied to geographic service coverage for licenses to be granted in the 700 MHz commercial bands. Adopting the Commission's geographic service coverage requirements proposal would mark a radical reversal of long-standing Commission precedent, deter the participation in the auction of certain qualified bidders, drive down auction resources earmarked for the Digital Television ("DTV") transaction, and require the Commission to resolve a myriad of complex coverage issues. Instead, the Commission should use 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, diverse 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.[78] In addition, on April 4, 2007, Verizon Wireless filed a well-reasoned ***exparte*** opposing keep-what-you-use or geographic service coverage types of non-market-based, arbitrary construction and licensing requirements.[79]

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[77] *Id.*

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

[79] *Ex parte* letter from John T. Scoff, III., Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-150 (filed Apr. 4,2007) ("Verizon *Ex Parte*").

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 - - and preferred - - to assure that facilities will be constructed and operated in the public interest when sufficient demand exists to justify service. Lastly, the proponents of these additional requirements have not shown any compelling evidence of spectrum warehousing 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." 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.[81] 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 €or "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

[80] Verizon *EX Parte* at 1.

[81] *Id.* at 2.

spectrum.[82] Moreover, since the Commission has not imposed such requirements in prior CMRS auctions, the effect they would have on bids and on bidders is entirely uncertain. In addition, the call for this construction requirement grew out of the Commission's original band plan which included mainly **EAG** licensee areas. The proponents of these requirements were trying to create opportunities for themselves by forcing a partitioning of licenses. However, the better way to avoid warehousing and to provide opportunities for rural and smaller carriers is to license the spectrum in smaller geographic areas in the first instance. This has the natural benefit of allowing each carrier to acquire spectrum only in areas they need for their particular business plan - - which is a better approach than imposing construction requirements which would require licensees to wait up to 8 years before unused spectrum might be freed up. Smaller licenses areas naturally will result in expedited service to rural areas and should be used in lieu of geographic construction requirements. Further, 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.[83]

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[82] *Id.* at 4.

[83] *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).

In addition, the Commission rejected additional performance requirements for CMRS providers less than two years ago.[84] 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 requirements rather than market conditions."[85] 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.[86]

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[84] *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).

[85] *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).

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

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."[87] Indeed, the rationale advanced for construction requirements - - to ensure ubiquitous coverage and to prevent warehousing - - can be served better by other approaches, such as assigning licenses as an initial matter in small areas.

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.

[87] Corr 700 MHz Comments at 5. Of course, this assumes that the Commission does not impose any artificial requirements which would cause the spectrum to be licensed to an entity which does not pay what the spectrum may be worth.

Verizon also aptly demonstrates that 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 in artificial time periods 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, as described in further detail above. 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.

Moreover, enacting these types of performance requirements would place the Commission in a regulatory morass from which it may never escape. For example, the Commission seeks comment on whether the relevant service area should exclude all government land.[88] While the Commission should exclude governmental land from any performance requirements, it should also includes other areas, such as wilderness, wildlife protected lands, bodies of water, and historical areas and other difficult to serve areas with extremely low population (such as areas in which there is no need for coverage, and areas which would put an economic strain, without any corresponding ability to generate revenues, on any companies that were forced to build into these areas.) Thus, the Commission would be forced into the business of acting as an overseer to check and recheck coverage over only portions of service areas – areas that would be difficult to measure and confirm.

Perhaps the strongest argument against performance standards based upon a percentage of area (or population) served, is that such standards are, by nature, arbitrary. There is no objective, defensible basis for ascertaining whether 25% is too low or 75% is too high; or whether 4 years is too short or 8 years is too long. And, there is no reason to assume that the optimal economically justified build out will be the same in a densely populated northeastern state and a sparsely populated state in the western plains. Strict geographic coverage

[88] *FNPRM* at para. 213

requirements could have the unintended consequence of discouraging applicants from acquiring licenses in less densely populated areas.

The most curious aspect of the performance proposal is the Commission suggestion that it might to apply these requirements on an EA and CMA basis only.[89] This aspect of the proposal would allow winning bidders of REAG spectrum to carve out specific areas that they want, and release other, unwanted, EAs within their REAG back to the Commission for auction within eight years. In doing so, the Commission would be prolonging the time that these probably rural areas would have to wait to receive service, as these areas would have to be released back to the Commission, and then reauctioned. Instead of this proposal, the Commission should license the great majority of its service areas on an EA or CMA basis to begin with. This would allow potential bidders to purchase the spectrum areas they want – without having to give back unwanted areas later down the line to the Commission – which could extend indefinitely the time it would take to provide service to these (probably rural) areas.

The Commission has proposed that any unserved area would be reclaimed by the Commission. The Commission, however, requests comment on whether a licensee who fails to meet a geographic test would have its license cut back to the benchmark- - e.g., a licensee which failed to meet the 25% coverage requirement may be licensed up to the 25% coverage benchmark. If the Commission adopts the geographic area construction requirements, it should allow licensees to keep the geographic area up to the test. In order to make this work, the Commission would need to require the licensee to submit a map which shows the geographic coverage area it plans to keep.[90]

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[89] *FNPRM* at para. 217.

[90] Any other approach would force the Commission to draw its own arbitrary lines.

Finally, the Commission should avoid taking any action that would replicate the "unserved area" licensing scheme that proved to be a source of so many problems. The move to market area licensing had many benefits for both carriers and the Commission. For example, the need for complex engineering showings was eliminated. In addition, border disputes and interference complaints were reduced. Further, regulatory filing obligations (e.g. site-by-site applications; construction completion notices; service area maps) were lessened. Why would the Commission want to undo these benefits by adopting a "use it or lose it" approach that would necessitate another complicated unserved area licensing regime? The better course is to allow construction decisions to be dictated by market forces, not by regulatory mandate.

V. THE COMMISSION SHOULD NOT APPLY INCUMBENT ELIGIBILITY RULES OR "OPEN ACCESS" RULES TO THE 700 MHZ AUCTION OF COMMERCIAL SPECTRUM

The Commission seeks comment on proposals by the Media Access Project ("MAP") and the Ad Hoc Public Interest Spectrum Coalition ("AHPISC") to exclude certain classes of carriers from eligibility for licenses in the 700 MHz Band?' as well as to apply a condition on licenses for at least 30 megahertz of 700 MHz spectrum requiring the licensee to provide "open access,"

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[91] *FNPRM* at para. 221. 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 AI-IPISC proposals. MetroPCS is concerned, however, that a report filed by MAP with the Commission that purported to analyze the bidding patterns in the AWS auction characterized MetroPCS as a "major incumbent" even though MetroPCS did not meet the author's own definition of "major incumbent." The truth is that MetroPCS is, in most instances, a highly competitive and disruptive new entrant in most of the markets it buys at auction. MetroPCS has entered or is poised to enter many new markets successfully 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 AI-IPISC, MetroPCS supports allowing the marketplace to determine winners and losers for the 700 MHz auction – not regulatory fiat. If any eligibility restrictions were to apply to this spectrum, it is clear that they should not apply to MetroPCS.

including the right of a consumer to use any equipment, content, application or service on a non-discriminatory basis.[92]

These proposals seek to radically alter the rules and procedures for the 700 MHz Band from those that apply in other bands, without any showing that there is a market failure justifying such heavy handed regulatory intervention. In effect, **MAP** and AHPISC are proposing that the Commission disenfranchise many of the likely participants in the upcoming auction, and, as well, the beneficial services and technologies that those participants would be able to provide. By proposing limitations on eligibility and imposing "open access" requirements, AI-IPISC is attempting to stifle the participation of certain mobile wireless carriers who may value the spectrum most and could put it to its highest and best use. Notably some of the carriers AHPISC seeks to disenfranchise may offer the best promise of providing the "third pipe" for broadband that AHPISC is advocating. The Commission has not adopted broad eligibility restrictions for commercial mobile radio service auctions in the past - - for good reasons - - and AI-IPISC has not provided any sufficient reasons for it to do so now.[93]

A. <u>The Commission Should Not Give Serious Consideration to the Late-Filed MPA and AHPISC Proposals in this Forum</u>

MAP and AHPISC want to designate certain 700 MHz blocks as "open access" spectrum, and to apply so-called "network neutrality" rules to the 700 MHz Band. Applying rules of this nature to one small portion of broadband wireless spectrum in isolation is a had idea and will harm competition. MetroPCS may acquire 700 MHz spectrum in new markets where it will compete with entrenched incumbents. If the 700 MHz spectrum MetroPCS buys is saddled with regulatory obligations to which its competitors are not subject, MetroPCS will be at a

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[92] *FNPRM* at para. 290.

[93] 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.

competitive disadvantage. This violates the of€-statedand sound regulatory principle that the Commission should strive to create a level playing field for all competitors who are providing similar classes of service. Broad, far-reaching proposals such as these are best considered by the Commission on an industry wide basis in a forum in which there can be a full notice and comment period specifically dedicated to these issues,[94] and should not be shoe horned into the late stages of a long-standing proceeding with tight statutory deadlines that deals with only a small portion of spectrum.[95] AHPISC has not provided reason as to why these radical, far-reaching rules should apply uniquely to the 700 MHz Band.

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 already is in the process of seeking comment on a petition by Skype Communications proposing a similar *Carterfone* rule for wireless services generally.[96] The comment and reply comment periods have passed on the Skype petition. 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. There is absolutely no need to interfere

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[94] Indeed, as noted below, certain of these proposals are already the subject of another proceeding, so any comments or resolution should be in that proceeding, not this one.

[95] 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.

[96] *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-I 1361 (Mar. 15,2007) (Order extending time for comment period to April 30,2007).

with the outcome of that proceeding by adopting rules here. Any adoption of *Carterfone* rules for the wireless industry generally could apply to this 700 MHz spectrum – since the 700 MHz spectrum will not be put to use for a substantial period of time – and there is no reason, or need, to rush to judgment on these issues now.

Most important, however, is the fact that a *Carterfone-type* rule, or a network neutrality rule for wireless spectrum, would not serve the public interest. Numerous parties, including MetroPCS, have demonstrated a wide variety of reasons as to why applying *Carterfone* rules to wireless at this point would be a poor idea.[97] The great majority of commenters in the Skype proceeding filed substantial comments opposing the Skype request, including AT&T, CTIA, LG, MetroPCS, Motorola, Qualcomm, Sprint Nextel, T-Mobile, and US Cellular.[98] The Commission must be concerned that, by advocating a *Carterfone* wireless rule for 30 MHz of the 700 MHz spectrum, MAP and AHPISC are attempting to preordain the types of companies that will

[97] MetroPCS incorporates by reference its Comments in response to the Petition for Declaratory Ruling, RM-11361, filed February 20,2007, Public Notice, "Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed," Report No. 2807 (CGB rel. Feb. 28,2007); 47 C.F.R. § 1.405; *Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attached Devices to Wireless Networks*, RM-11361, DA07-1318, Order (rel. Mar. 15,2007) ("MetroPCS *Skype* Comments").

[98] See MetroPCS *Skype* Comments. For example, MetroPCS demonstrates in its comments that (1) Unlike the monopoly wireline network at issue in *Carterfone*, there is substantial competition for services and equipment in mobile wireless markets; (2) Skype is attempting to circumvent the Commission's auction process; (3) Spectrum resources are scarce, and carriers must have the ability to offer services of their choice over their networks; (4) Skype overlooks a key aspect of the *Carterfone* decision; and (5) The Skype petition raises thorny technical issues which would require the Commission to engage in extensive regulatory proceedings; see *also* Comments of AT&T, CTIA, LG, Motorola, Qualcomm, Sprint Nextel, T-Mobile, and US Cellular in response to Petition for Declaratory Ruling, RM-11361, filed February 20,2007, Public Notice, "Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed," Report No. 2807 (CGB rel. Feb. 28,2007); 47 C.F.R. § 1.405; *Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attached Devices to Wireless Networks*, RM-11361, DA07-1318, Order (rel. Mar. 15,2007).

participate in the auction. As demonstrated below, the Commission consistently has opposed proposals that limit auction participation.

Lastly, Google on May 21,2007 filed an *ex parte* seeking to have the Commission allow companies who are licensed in the 700 MHz Band to use real-time auctions that search engine companies use to sell advertisements.[99] Google claims that, by using such an auction, licensees may be able to improve their spectrum use and create a market for capacity on a spot basis. Although this proposal may be worthy of consideration, it is sufficiently different from any prior proposal in this proceeding that it would first have to be placed on public notice and subjected to robust industry comment. The simple fact is that this Google proposal is being made very late in course of a proceeding with tight statutory deadlines. Moreover, Robert Wilson, a Stanford management economist, hired by Frontline, stated that such a dynamic auction "is 5 or 10 years away," which should render the proposal fatal as to the 700 MHz spectrum.[100] There is no justification for trying to evaluate this radically different proposal in the closing stages of a proceeding in which there are complex issues raised by a voluminous record that need to be decided prior to the commencement of the 700 MHz auction.

B. The Commission Should Not Predetermine Winners and Losers for the 700 MHz Auction: Rather Market Forces Should Dictate Auction Participation

The AHPISC and MAP proposed eligibility restrictions also would not serve the public interest. The Commission has stated that the "ideal" spectrum auction is one in which all interested parties can participate with limited eligibility and service rules. AHPISC would undermine sound auction policy by eliminating certain competitors, either directly or by adopting service rules designed to make the spectrum less attractive to certain bidders, which

[99] Letter from Richard S. Whitt, Esq., counsel to Google, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 06-150, 96-86, 06-169, PS Docket No, 06-229 (filed May 21,2007).

[100] "Parties Begin 700 MHz Comment Party Early," Communications Daily, May 23,2007.

certainly would not serve the public interest. The Commission has stated that an auction is best able to assign licenses to the qualified licensees that value them most highly "if the auction is open to all potentially qualified licensees."[101] 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."[102] 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,[103] noting 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."[104] The Commission prefers to rely on "market forces to guide license assignment absent a compelling

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[101] *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).

[102] *NextWave Personal Communications, Inc.,* Order on Reconsideration, 15 FCC Rcd 17500, 17513 (2000).

[103] *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).

[104] *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).

showing that regulatory intervention to exclude potential participants is necessary."[105] 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.[106] The Commission has found that spectrum caps were "unnecessarily inflexible and could be preventing beneficial arrangements that promote efficiency without undermining competition."[107]

Ironically, the rule changes proposed by MAP and AHPISC would have exactly the opposite effect from what they seek. MAP and AHPISC claim to be interested in spurring wireless broadband penetration, particularly in rural areas, and fostering a third pipe to the home. However, the incumbent wireless carriers that MAP and AHPISC are trying to eliminate are among the most active participants who 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.[109] AHPISC clearly has not mentioned these figures as

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[105] *Id.*

[106] *Id.*

[107] *Id.*

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

[109] *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).

they contradict its argument to limit incumbent wireless participation 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."[110]

The Commission should recognize the AHPISC proposals for what they are; radical late-in-the-game, proposals intended to artificially limit participation in the 700 MHz auction in a manner contrary to enlightened auction policy. AHPISC is advocating that the Commission pick winners and losers by restricting participation in the auction."' The Commission should not give serious consideration to this ill considered recommendation

VI. THE COMMISSION CORRECTLY REJECTS THE BROADBAND OPTIMIZATION PLAN ("BOP")

MetroPCS supports the Commission's tentative conclusion to reject the BOP, a guard band proposal advanced by Access Spectrum and Pegasus.[112] MetroPCS agrees that the BOP as originally proposed would violate the Commission's statutory authority, and further would not serve the public interest by assigning licenses outside the competitive bidding process – which

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[110] 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.

[111] Although not entirely clear, these proposals, like the Coalition for 4G in America's proposals, appear to be designed to allow certain bidders to acquire spectrum at deflated values. Any carrier that wants to provide broadband services had the opportunity to participate in the AWS Auction. To the extent some of those same companies are now viewed as potential bidders here, their bidding activity in the AWS auction is instructive. In the AWS Auction, certain bidders dropped out in the early rounds of an 161 round auction - - long before the spectrum was fully valued. MetroPCS views the efforts of these companies to get spectrum assignments geared to their specific business plans as end runs around the seminal principle that companies should pay what this spectrum is worth compared to other uses.

[112] *FNPRM* at para. 227.

would provide incumbent licensees with a substantial windfall.[113] Lastly, MetroPCS agrees with the Commission that the adoption of the BOP would raise substantial interference concerns.[114]

As noted above, MetroPCS is currently reviewing the Alternative BOP Proposal to assess whether the proposal sufficiently resolves interference concerns, and adequately addresses its prior concern that auction integrity can be compromised when licensees benefit from rule changes that make spectrum more valuable after an auction is completed.[115]

VII. THE COMMISSION SHOULD REJECT ANONYMOUS BIDDING PROCEDURES FOR THE 700 MHZ AUCTION

The Commission seeks comment on whether it should use limited information (or anonymous bidding) procedures for the upcoming auction of new 700 MHz licenses."'

MetroPCS was a strong opponent of anonymous bidding in Auction No. 66,[117] and remains of the view that open bidding is the preferred auction technique. Auctions are intended to establish a spectrum allocation process that will deliver licenses into the hands of licensees that value them most highly because they will put the licenses to the best and highest use. This outcome is only possible if bidders have sufficient information about the market being entered to make an intelligent valuation decision. Perhaps the most important market information is knowing who the competitors are, and how much spectrum they have. For example, MetroPCS competes successfully against all of the major national incumbent wireless carriers in markets it

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[113] See *Ex Parte* letter from Mr. Mark Stachiw, MetroPCS to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-169 (filed Mar. 22,2007).

[114] *Id.*

[115] *Id.*

[116] *FNPRM* at paras. 246-250.

[117] MetroPCS Comments at 9-15 and Reply Comments at 8-14 in response to Auction of Advanced Wireless Services Licenses Scheduled for June 29,2006; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures, AU Docket No. 06-30, *Public* Notice, DA 06-238 (released Jan. 31,2006) ("MetroPCS AWS Procedures Comments" and "MetroPCS AWS Procedures Reply Comments").

has entered. MetroPCS has a very different business plan than these companies, and knows that it can distinguish its service from them. So, a market in which these known competitors are vying for more spectrum in the auction can easily be valued by MetroPCS. MetroPCS might decide to continue bidding at a higher per pop price in this market, as compared to moving to a lower cost market containing new entrants with business plans less distinguishable from that of MetroPCS.

This is a pro-competitive use of the bidder information that is only available through open bidding. MetroPCS is mindful of the concerns expressed by some that incumbent carriers can use bidder identity information to block entry by potentially disruptive new entrants. The reality is that MetroPCS is one of the competitive upstarts who would be the natural target of any such blocking plans. Its rapidly growing low cost, all-you-can use, no long term contract services have succeeded in taking market share from all of the national incumbent carriers with which it competes. Nonetheless, having participated in multiple "open" auctions, MetroPCS still considers the benefit to it of having bidder information far outweighs the risk that MetroPCS will be targeted and blocked from entering a new market by an incumbent.[118]

Ultimately, the best means for the Commission to defeat blocking strategies is to auction off relatively large amounts of spectrum at a time - - such as the 90 MHz of **AWS** spectrum and the 60 MHz of 700 MHz spectrum - - and to configure the spectrum into as many fungible licenses as possible so that the likelihood of being blocked goes down. This is one reason that MetroPCS favors breaking the Upper 700 MHz Commercial Service Band D Block into two 10

[118] ***See*** MetroPCS **AWS** Procedures Comments at 9-15 and MetroPCS **AWS** Procedures Reply Comments at 8-14. The pro-competitive benefits of having this information are clearly outweighed by any potential theoretical benefits of withholding this information. Providing bidding information is particularly important to smaller carriers and new entrants who will be relying upon outside financing to support their auction bids. In addition, complete transparency is important to the United States financial markets and helps promote confidence in the Commission's auction process.

MHz (or 11 MHz) licenses, and why MetroPCS opposes the encumbrances that Frontline seeks to impose on the new E Block license which would cause it no longer to be fungible with other paired spectrum blocks.

MetroPCS[119] has reviewed the paper entitled "How Incumbents Block New Entrants in the AWS-1 Auction: Lessons for the Future" (the "Paper") authored by Dr. Rose that was submitted to the Federal Communications Commission ("FCC") on April 23,2007, by Media Access Project in WT Docket No. 06-150. The Paper contains numerous statements, assertions and representations about MetroPCS and its conduct in FCC Auction No. 66 that are patently false. Specifically,

- The Paper makes a number of serious charges against the "major incumbents" in the auction, and includes MetroPCS within the category of "major incumbents." However, MetroPCS does not fit its definition of "major incumbent." MetroPCS only operates in a select number of major metropolitan areas. Properly characterized, it is a "new entrant" in many of the markets on which it bid in Auction 66.

- The Paper defines "blocking behavior" as action by incumbents to "identify new entrants who represented a serious competitive threat and block them by concentrating collectively on rapidly outbidding them on licenses necessary for acquisition of a national footprint." The Paper then states that "MetroPCS AWS LLC ... also engaged in this blocking behavior." This statement is false.

- At footnote 9, the Paper asserts that MetroPCS AWS LLC selected certain packages of licenses to bid on in an attempt "to block the targeted new entrants." This assertion is false.

- At pages 36 and 37, the Paper contends that MetroPCS may have acted in concert with other bidders as one of two "mid-to-late round reinforcements" in a multi-party "blocking hierarchy" that may have involved "more than tacit collusion." This contention is false. As earlier noted, MetroPCS, with its low cost fixed price "all you can eat" service, is viewed as a disruptive new entrant by incumbents in markets that MetroPCS enters. This being the case, the proposition in the Paper that other carriers colluded so as to admit MetroPCS to markets while blocking other prospective new entrants with unproven wireless business plans is simply wrong.

[119] MetroPCS acquired licenses in the auction through its subsidiary MetroPCS AWS, LLC.

- The Paper accuses the "major incumbents," a term deemed by you to include MetroPCS, of (i) "a concerted effort ... to target those new entrants which harbingered significant potential competitive threat" (ii) bidding "for the purpose of denying licenses to the new entrant rather than acquiring the licenses for themselves" (iii) implementing a "strategy of blocking" and (iv) pursuing a "tacitly-collusive strategy." These allegations are false insofar as they pertain to MetroPCS.

Since MetroPCS has demonstrated that the Rose Paper is riddled with errors, the Paper should not form the basis of a change by the Commission in its auction procedures.

VIII. FRONTLINE'S PROPOSAL WOULD NOT BENEFIT EITHER THE PUBLIC SAFETY COMMUNITY, NOR SERVE THE PUBLIC INTEREST

The Commission seeks comment on Frontline's proposal to designate a 10 MHz E Block of the Upper 700 MHz Band for a commercial license and to impose specific conditions on the E Block licensee requiring it to construct and operate a nationwide, interoperable broadband network for sharing with a national public safety licensee providing broadband service in the lower portion of the 700 MHz public safety spectrum. The Commission also seeks comment on the service rules proposed by Frontline.[120]

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 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. Frontline also proposes to make public safety users hostage to a monopoly

[120] *FNPRM* at para. ***268.***

service provider who could extract unregulated user fees. The incentives on Frontline to reach an agreement are inadequate and there is no adequate mechanism to mediate the inevitable disputes. Worst of all, Frontline 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. The Frontline proposal also places public safety users at the mercy of both a historically failed business model – wholesale carrier-to-carrier services[121] – and an untested and uncertain public/private partnership arrangement for which there can be no assurance of success. Finally, other approaches will serve the public interest better, such as incentives to existing carriers and/or partnering with the federal government's interoperable national network.

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 potentially qualified bidders who would be better suited to build a public safety network. 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 has correctly noted, the "auction winner [of the E Block as proposed by Frontline] will have acquired 10 MHz of commercial 700 MHz spectrum, presumably at a significantly reduced price due to its public safety encumbrances."[122]

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[121] Frontline provides no compelling evidence as to why this 10 MHz E Block should be limited to the provisioning of wholesale-only services.

[122] 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 (continued...)

Earmarking 10 MHz of valuable commercial spectrum in this respect is unwise, and 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.[123] These demonstrated needs should not go unmet in 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

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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").

[123] 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, 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.

proposes that "all spectrum holdings of the E Block licensee would be subject to a nationwide roaming requirement."[124] 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.[125] 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.[126] 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.

Another "poison pill" is Frontline's proposal that the E Block licensee only be allowed to offer service on a wholesale basis.[127] There currently is no nationwide wholesale wireless operator. And, ironically, the very *FNPRM* that is seeking comment on the Frontline proposal also abandons the guardband manager program, which prohibited guardband licensees from

[124] Frontline 700 MHz Comments, WT Docket No. 06-150 at 21 (filed Mar. 6,2007) ("700 MHz *Ex* Parte").

[125] 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.

[126] 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 bevond the 700 MHz spectrum itself would have a chilling effect on potential bidders for this spectrum.

[127] *FNPRM* at para. 290.

acting as retail service providers, based on a Commission finding that this restriction "hinders rather than facilitates the efficient use of spectrum."[128] By limiting access to the E Block spectrum to its unique (and previously failed) business plan, Frontline is attempting to preclude all major *retail* wireless operators from bidding on the spectrum. Frontline provides no compelling argument as to why the E block licensee should be limited to providing wholesale services – and is only doing so to lower its potential purchase price even further.

Similarly, Frontline is proposing that the Commission impose a wireless *Carterfone* rule to this E Block of spectrum.[129] **As** noted above, the Commission should not adopt such a rule to limit the participation of others in the bidding for any spectrum in the 700 MHz Band. By advocating a *Carterfone* wireless rule for the E Block of spectrum, Frontline once again is attempting to make the spectrum as undesirable as possible for the major wireless carriers, thereby advancing its effort to earmark this 10 MHz of spectrum for itself.[130]

Even the benefits that Frontline purposes to provide to commercial carriers via this network are illusory. For instance, Frontline states that "The E Block Licensee shall provide roaming service to any requesting CMRS operator whose customers are using compatible

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[128] *FNRPM*, para. 164.

[129] 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.

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

equipment."[131] Frontline does not propose a definition of what "compatible" would mean, or who would define it. As Frontline undoubtedly realizes, wireless carriers in the United States operate using different technologies. Does that mean that this roaming service will only be available to certain entities? Frontline's proposed service rules do not address the fact that no other carrier may have "compatible" equipment; which means the value of this roaming requirement to the wireless community would be essentially zero. Moreover, Frontline provides no assurance that the rates for these roaming services would be reasonable and provides no assurance that network coverage would be equal to, or match up with, the coverage other CMRS carriers. Indeed, with the extremely loose population based requirements that Frontline is proposing, it is possible that much of the geographic area of the country may never be covered. In addition, any provision of roaming services would be delayed until the E Block licensee builds its system, which could be over 5 years away at a minimum.

Moreover, if Frontline is correct that there is no legal barrier to the shared use of commercial spectrum by Public Safety users, and vice versa,[132] then Frontline would be able to

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[131] Letter from John Blevins, Counsel to Frontline, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 06-150 and 06-169; PS Docket No. 06-229 at Attachment A, page 4 (filed Mar. 26, 2007) ("Working Draft").

[132] 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 extensively questioned as to whether it exceeds the Commission's statutory authority. *See* Letter from Steve Largent, President and CEO, CTIA, to Chairman Kevin Martin, FCC, ***Ex Parte*** in Docket No. 06-150 (filed Apr. 5, 2007); see *also* 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 lo 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 change this balance by allowing public safety to use

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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. If the Commission were to designate a single national public safety licensee, Frontline would then be free to negotiate with a 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.[133] 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 *FNPRM*, the Commission seeks comment on its proposal that the E Block licensee would not receive its authorization until it has an agreement with the national public safety licensee. This proposal, however, overlooks that such a national public safety licensee does not exist. Even if a national public safety license were in place, a threshold licensing requirement of this nature also would deter bidders because they would fear being held hostage to the demands of the public safety licensee. This could slow down the licensing of this spectrum - - and delay the depositing of the proceeds - - beyond the statutory deadline of June 28, 2008. Also, to the extent that a bidder on the E Block needs to secure money from third party investors or lenders - - the scheme proposed by the Commission would deter investment – and thus lower the amount

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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]."

[133] 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.

raised by the auction. Notably, when venture capital funds draw money from their limited partner investors, they cannot return it and draw it again at a future date if the initially planned use does not work out. Rather, they would be obligated to return the funds to the initial investor showing no gain on that particular investment. This would limit the return on investment ("ROI") that the fund enjoys. As such, the FCC's scheme -- which creates a risk of an unproductive investment in **a** license which never materializes -- would deter venture capital investment.[134] All of this leads to a simple conclusion -- investment will be deterred and the funds raised for the auction decreased, which will limit the funds available for the DTV transition. Finally, any delay in licensing may violate the statutory requirement that all funds be received by June 28,2008.

In conclusion, in the face of a clear need by commercial users for all 60 MHz of the Congressional allocation of spectrum for retail commercial providers,[135] Frontline has presented no compelling 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,

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[134] Further, to the extent a bidder borrows the money, it will incur substantial interest expense which it may not be able to fund if the license is not granted.

[135] 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 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.

interoperable public safety broadband network.[136] 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.[137]

B. The Frontline Proposal is Wholly Inconsistent with Prior Public Statements of its Founders

Frontline's proposal to encumber and limit competition for 10 MHz of spectrum is in complete contradiction with numerous public statements made by two of its founders. Both Reed Hundt, former Chairman of the FCC, and Janice Obuchowski, former chief of the Commerce Department's National Telecommunications and Information Administration, have long advocated a communications policy approach of allowing the marketplace, rather than government regulation, to drive spectrum allocation decisions – as well as a policy of not having government select winners and losers. For example, Mr. Hundt noted previously that "Licensing more spectrum in an orderly manner, with sufficient advance notice, is the surest way to spur competition and deconcentrate markets. *This doctrine also recognizes that markets rather than government standards should determine how spectrum is used.* (emphasis added)"[138]

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[136] 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.

[137] 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.

[138] Reed Hundt, Chairman, Fed. Commc'n Comm'n, Speech to Commission Staff, Washington, DC (May 27, 1997) available at http://www.fcc.gov/speeches/hundt/spreh726.html

In addition, Mr. Hundt stated, while FCC Chairman, that:

> "All of our votes are intended to be pro-competition, not pro-competitor. Our decisions are not designed to select winners and losers. Winners and losers will be determined where they should be determined – in the competitive marketplace, not in the government."[139]

In stark contrast, the Frontline proposal does just that – select winners and losers prior to auction, while imposing an unnecessary government structure upon the auction of valuable spectrum.

The Frontline proposal also contradicts Mr. Hundt's prior statements regarding the benefit of providing flexible uses of auctioned licenses. He has stated that:

> The key to our wireless successes has been Congressional and Commission spectrum and auction policies. We need to continue moving toward our goals of private competition and public benefits from competition. Specifically, that means the following: auctioning as many licenses as possible, and giving purchasers flexibility in ways to use those licenses. In this way, we will eliminate the artificial, scarcity of spectrum that limits competition, and flexibility is essential to new investment and innovation.[140]

In contravention of this core auction principle, the Frontline proposal would create an encumbered 10 MHz of spectrum which would be severely inflexible in its possible uses.

Ms. Obuchowski also has commented that spectrum should be allocated on a free-market basis, and provide flexibility for the offering of different services. For instance, she has stated that "The assignment of spectrum should be based on the same principle as the rest of our economy, and that is the free-market."[141] Moreover, she has commented that "The Commission's competitive bidding rules ensure that the winning bid reflect the value of the

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[139] Reed Hundt, Chairman, Fed. Commc'n Comm'n, Remarks before the United States Telephone Association Inside Washington Telecommunication Roundtable Luncheon (May 21, 1997) available at http://www.fcc.gov/Speeches/Hundt/spreh725.html

[140] Reed Hundt, Chairman, Fed. Commc'n Comm'n, Address before the Freedom Forum and Georgetown University: The Long and Winding Road (or: the Seventh Inning Stretch), (February 7, 1997). available at http://www.fcc.gov/Speeches/Hundt/spreh705.html

[141] Bids Urged for Channels, New York Times, Feb. 28, 1991

licenses being auctioned and that the licenses are assigned to those who value them most. The introduction of spectrum auctions is an important step toward applying market principles in the management of the U.S. spectrum resource. But as NTIA noted in the report, *U.S. Spectrum Management Policy: An Agenda for the Future*, another critical set of spectrum management policy reforms also is needed to ensure the efficient use of spectrum: greater flexibility must be allowed in the offering of services within the existing spectrum block allocation scheme."[142] Lastly, Ms. Obuchowski stated, while commenting on that same spectrum management report, that:

> Although changes in regulatory procedures and the block allocation system can improve spectrum management incrementally, the report concludes that greater reliance on market principles in distributing spectrum, particularly in the assignment process, would be a superior way to apportion this scarce resource among competing and often incompatible users.[143]

Adopting the Frontline proposal would be a far cry from these free-market principles previously espoused – and apparently abandoned -- by two of Frontline's founders. Frontline has defended the legality of its proposal, and has claimed that it does not violate the Congressional segregation of commercial spectrum from public safety spectrum, because it maintains the essential commercial character of the 10 MHz E Block on which Frontline has designs. If this is true, then the E Block should be subject to the same policies that Mr. Hundt and Ms. Obuchowski espoused as being necessary to promote the public interest.

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[142] Janice Obuchowski, *The Unfinished Task of Spectrum Policy Reform*, Indiana University, Federal Communications Law Journal, Volume 47, 1994-5. available at http://www.law.indiana.edu/fclj/pubs/v47/no2/obuch.html

[143] U.S. Spectrum Management Policy: Agenda for the Future, 1991 (available at http://www.ntia.doc.gov/osmhome/91specagen/1991.html

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

MetroPCS shares the Commission's "serious concerns" about offering any bidding credits, or designated entity eligibility, to applicants for the E Block license.[144] Frontline initially acknowledged 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.[145] This was necessary 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.[146] Since the Frontline service rules would require 100 percent of the E Block spectrum to be 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.[147]

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

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[144] FNPRM at para. 284.

[145] Frontline 700 MHz Ex Parte at 8.

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

> (iv) Applicants or licensees with material lationshi --
>
> (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.

[147] Frontline 700 MHz Ex Parte at 8.

inconsistent with Congress's legislative intent."[148] 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."[149] 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 what can only be viewed as 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.[150]

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 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

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[148] *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 Commission's contention that wholesale arrangements are inconsistent with the statutory scheme for DEs. Nonetheless, the Commission has continued to defend this contention and the holding to this effect, although being challenged, still remains in effect.

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

[150] 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.

rule would not be served, or would be frustrated, by applying the rule.[151] 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.[152]

When Frontline realized that it could not possibly meet the exacting waiver standard, it changed course and began claiming that the Frontline wholesale service plan does not violate section 1.2110(b)(3)(iv)(A) of the rule. This claim is based upon the contention that the Frontline proposal does not involve "the 'resale' activity precluded by the Commission …"[153] This argument is unfounded because the applicable rule does not merely prohibit "resale", but rather prohibits "resale (including under a wholesale agreement)." 47 C.F.R. § 1.2110(b)(3)(iv)(A). The textual discussion when the Commission adopted the rule made clear that the Commission interpreted the statutory mandate as requiring DEs to sell their services directly to the public (i.e. retail service), and thus considered wholesale services to create

[151] 47 C.F.R. § 1.928(b)(3).

[152] 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. Indeed, at least one other interested party - - Cyren Call - - has indicated that it does not need this change to consider participating in an auction for this spectrum. See Letter from Elizabeth R. Sachs, counsel to Cyren Call, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 06-150, 06-169, 96-86, PS Docket No. 06-229, RM-11348 (filed May 14,2007).

[153] See Notification of Ex Parte Communication filed by Gerard Waldren, Counsel to Frontline, on April 18,2007, in WT Docket Nos. 96-98, 06-150; and PS Docket No. 06-229 at p.1.

impermissible material relationships. There can be no serious question that the Frontline wholesale-only service model violates this provision.[154]

Frontline next argues that the restrictions on resale were intended to prevent DEs from "flipping" spectrum to large non-DEs, and that the proposed sale of wholesale services by Frontline involves no such flipping. This is an unfounded reading of the Commission's rules. The Commission stated that it was imposing the rule because it wanted facilities-based service and it did not view wholesale service as meeting that requirement.'" Again, though, Frontline has failed to distinguish its situation from that of other DEs who were interested in building networks and in selling wholesale service, and were told by the Commission in no uncertain terms that such business plans, unless grandfathered at the time of the rule changes, would not be allowed.

D. 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. Indeed, If the Commission were to adopt a Frontline or Frontline-like proposal, it certainly would have to develop specific service rules to govern the actions the Commission may or must take in the event that the E Block licensee encounters financial or other problems that prevent compliance

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[154] Interestingly, Frontline supports Google's late-filed proposal to allow licensees to use real-time auctions to sell capacity on its networks. *See* footnote 71. Mr. Hundt states that Frontline proposes that "one quarter of the capacity of the network that uses this spectrum must be sold not on a long-term service contract but instead in ongoing open auctions to any and all carriers." *Id.* This further muddies the water as to what wholesale services Frontline intends to sell and further exacerbates the DE problem since the real time auction may result in service to non-eligibles. To the extent its suggests this obligation should be imposed on any licensee of the E Block, this late-filed half-baked proposal risks interjecting further delay into the auction. And, once again this proposal would deter bids by other applicants who do not share the Google/Frontline fascination for real-time auctions.

[155] Although MetroPCS does not agree with the Commission, nonetheless, Frontline's reading does not comport with the Commission's stated reasoning.

with any of its obligations.[156] The Commission could not merely rely on its general rules regarding reclaiming and re-auctioning the spectrum in this case, as the future of the build-out of the public safety network relies upon the financial viability of the E Block licensee. 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.[157]

This is especially true given the construction schedules that Frontline has proposed. Frontline initially proposed that the E Block licensee be obligated to construct 25% of the geographic coverage within four years, 50% within seven years, and 75% within ten years.[158] Frontline then submitted a revised construction proposal in its Working Draft, proposing 75% population coverage by the end of the fourth year, 95% by the end of the seventh year, and 98% by the end of the tenth year.[159] These adjustments actually reduce the build-out of the network for public safety, as 75% of population coverage may result in only 15% of geographic coverage in some areas. This means that non-metropolitan areas may never be built under these

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[156] *FNPRM* at para. 289.

[157] 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. 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.

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

[159] Working Draft at 7.

requirements. In sum, the Frontline proposal does not come close to providing the "strong assurances for an accelerated build-out schedule" called for by Commissioner Copps.[160]

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 could cause the public safety community to wait an extended period of time for its interoperable spectrum and effectively hold it hostage to the business success of an unproven business model. Worse yet, the infrastructure build-out priorities and coverage for this public safety network will be driven by commercial interests – not by public safety priorities or requirements. As Commissioner Copps has noted, "Cash registers and toll booths don't belong at the heart of our nation's public safety planning."[161]

The Frontline proposal includes no financial qualifications protections and no backup plan or criteria for what happens if this risky public/private partnership 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.

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[160] ***See*** FNPRM at Statement of Commissioner Michael J. Copps ("Copps Statement"),

[161] *See FNPRM* at Copps Statement.

E. The Fact that the Department of Homeland Security Has Not Endorsed the Frontline Plan is Fatal

In its recent report on information technology, the GAO noted that the Department of Homeland Security ("DHS") is "statutorily responsible for coordinating the federal government's networks and other communications systems . . . with state and local governments" and that federal guidance directs DHS to foster such coordination and collaboration as a means to enhance information sharing and avoid duplicative efforts.[162] A review of the Homeland Security Act of 2002 demonstrates that DHS should be integrally involved with the creation of any communications system relating *to* homeland security. For example, Section 102(c) states the following:

> With respect to homeland security, the Secretary shall coordinate through the Office of State and Local Coordination. . . with State and local government personnel, agencies, and authorities, with the private sector, and with other entities, including by … (2) coordinating, and as appropriate, consolidating, the Federal Government's communications and systems of communications relating to homeland security with State and local government personnel, agencies, and authorities, the private sector, other entities, and the public.[163]

In addition, Section 430(c) states that:

> The Office for Domestic Preparedness shall have the primary responsibility within the executive branch of Government for the preparedness of the United Slates for acts of terrorism, including … (2) coordinating or, as appropriate, consolidating communications and systems of communications relating to homeland security at all levels of government.[164]

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[162] Report to Chairman, Committee on Homeland Security, House of Representatives, "Information Technology: Numerous Federal Networks Used to Support Homeland Security Need to be Better Coordinated with Key State and Local Information-Sharing Initiatives," GAO, April 2007 at **3.**

[163] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25,2002).

[164] *Id.*

Lastly, Section 502 states that:

> Responsibilities: The Secretary, acting through the Under Secretary for Emergency Preparedness and Response, shall include … (7) developing comprehensive programs for developing interoperate communications technology, and helping to ensure that emergency response providers acquire such technology.[165]

Frontline has given no indication in its proposal that DHS has been, or will be, involved with the creation of the interoperable broadband network. To date, DHS has not even commented on, much less endorsed, the Frontline proposal. DHS is the executive branch agency tasked with coordinating the nation's public safety communications – not the Commission. It would be inappropriate and unlawful for the Commission to usurp the function assigned by statute to DHS by Congress. Without the required DHS statutory involvement in the creation of **a** communications network that protects homeland security, the Frontline proposal must be rejected.

F. 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 implementing priority access schemes and determining when a particular priority should take effect. In the *Fourth Report and Order and Fifth 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

[165] *Id.*

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."[166] 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."[167]

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, the public safety community and the nationwide operator would need to use the same technology. As was eloquently stated by the Commissioner Copps when the *FNPRM* was adopted, "a public safety network is a fundamentally different beast than a commercial network. It requires greater reliability and interoperability, as well as a substantially different architecture."[168] As was aptly stated in the 2002 Report of the Spectrum Policy Task Force:

> There are some important differences between the spectrum needs of commercial systems, which require high system capacity to support large numbers of users and applications, and those of public safety systems, which require less average capacity but need very robust and reliable communications, particularly for emergencies. [169]

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[166] *The Development of Operational, Technical, and Spectrum Requirementsfor 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).

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

[168] *FNPRM* at Copps Statement.

[169] Spectrum Policy Task Force Report, ET Docket No. 02-135 released November 2002.

These differences serve to highlight the core problem with the Frontline proposal: using a commercial spectrum auction as the vehicle for selecting the nation's public safety infrastructure architect simply is not a good idea.

G. The Public Interest Will Not Be Served If Commercial Service is Disrupted During Times of Emergency

An additional, unworkable problem with the Frontline proposal is the fact that it overlooks the important role that commercial mobile radio services play in the protection of life and the promotion of public safety during a crisis. The events of September 11, 2001 demonstrated that many people are dependant upon wireless services to communicate in times of emergency. For example, the use of a cell phone on 9/11 by a passenger on United Flight 93 that crashed in the countryside in Pennsylvania appears to have averted the far greater terrorist act that would have occurred had the plane made it to its intended target. What would have happened had that "commercial" call not been able to be completed because of public safety priority use of that spectrum? "Commercial" calls save lives occur constantly, and a preemption of commercial access during times of emergency could ultimately result in fatal consequences.[170]

Although there are many partisan disagreements over issues of telecommunications policy, one area of near unanimous accord is the need for wireless users to be able to use their cell phones to call for help in an emergency. As a result, longstanding E-911 obligations have been in place.[171] As a result, people expect to be able to use their cell phones during times of

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[170] ***See*** 2006 VITA Honorees, http://www.ctia.org/media/press/body.cfm/prid/1621. These awards, selected by a national panel of judges comprised of law enforcement and emergency response professionals, demonstrate that people constantly use their wireless phones to save lives, stop crimes, and give heroic support in emergencies. Honorees in 2006 included people helping evacuees during Hurricane Katrina, the saving of the lives of two men whose plane crashed over the Hudson River, and other instances where a wireless phone was used to save lives.

[171] Ironically, Frontline also requests that the Commission relieve the E Block Licensee from complying with CALEA or E911 obligations. This self-serving proposal does not accord with

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emergencies. Indeed, the Commission has found that for many Americans, "the ability to call for help in an emergency is the principal reason they own a wireless phone."[172] How would a company explain to its users that their access to and ability to use their cell phones may be restricted during certain times? Allowing a commercial user to be preempted by a public safety user who has priority access could create catastrophes rather than solving them. Indeed, Commissioner Copps points out the "tragic possibility of someone trapped under a building who cannot call for help because his or her cell phone relies on spectrum that has been preempted for exclusive use by first responders."[173]

The Commission previously rejected the view that consumers can be denied access to E-911 services with adequate notice. Some opponents of requiring all wireless networks to become E-911 capable argued at the time that carriers should be allowed to offer a lower cost service that was not capable of making E-911 calls provided that end users were properly advised in advance of this limitation. The Commission concluded that the ability to place E-911 calls was of paramount importance and the public interest would not be served if users were able to waive this right, and assume the risk of doing so. In light of this precedent, it would be inappropriate for the Commission to conclude that the possible loss of essential communication services by a commercial end user during an emergency due to public safety preemption of the system could be adequately addressed by mere disclosures of the risk.

(...continued)

the Commission's view of these obligations. The E Block licensee is in control of, and would in fact build the network over which traffic would flow. Allowing the E Block licensee to punt its responsibilities to comply with federal laws, on a network that it itself created, defies logic.

[172] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, CC Docket No. 94-102, ***Order*** *to Stay*, 17 FCC Rcd. 14841, 14842, para. 4 (2002).

[173] ***See*** *FNPRM* at Copps Statement.

Finally, it is worth noting that the Commission found in the FCC Public Safety Report that "[w]hile commercial wireless technologies are not appropriate for every type of public safety communication, there may now be a place for commercial providers to assist public safety in securing and protecting the homeland."[174] Indeed, an argument can be made that it would be less expensive and more efficient if public safety users were encouraged to use commercial systems to the maximum extent practicable. Removing or encumbering needed spectrum from commercial users will not promote this worthy objective.

H. The Commission Should Reiect a Monopoly Provider Model Which Would Require Unprecedented Commission Oversight

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.[175] Frontline concedes this point by noting that "The National Public Safety Licensee would not be obligated to take the service offered by the E

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[174] Report to Congress, On the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State, and Local Emergency Response Providers, Submitted Pursuant to Public Law No. 108-458, FCC, December 19, 2005 at 21. ("FCC Public Safety Report").

[175] Frontline assumes that there will be sufficient incentives on the commercial operator's part to negotiate reasonable terms. MetroPCS does not agree. If there are insufficient incentives, the Coinmission 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 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.

Block winner."[176] Indeed, MetroPCS supports the tentative conclusion of the Commission that -- at the very least -- the Commission would have to impose rigorous conditions on the E Block license to assure that obligations were being met. The Commission would need to deal with the circumstance where the bidder winning the new E Block at auction and the national public safety licensee are unable to reach agreement on a network sharing agreement."' The Commission also indicates that it would not grant a license to the bidder winning the E Block at auction until the winning bidder files a network sharing agreement with the Commission for approval.[178] The problem is that the conditions suggested by the Commission raise regulatory concerns of their own. For example, a requirement that the E Block licensee be required to reach agreement on a network sharing agreement with a national public safety licensee as a condition to getting the license creates serious logistical problems. First, and foremost, the Commission has yet to rule that there will be only a single national public safety licensee. It would be totally inappropriate for the Commission to adopt a plan premised on agreement with an as yet unspecified and unknown national public safety license. And, serious timing problems are created by the prospect that the E Block license would not be granted until an indeterminate time in the future when a network sharing agreement is in place. The Commission is obligated to deposit 700

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[176] 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. Of course, it is not clear how this works in connection with the Commission's tentative conclusion that, in order for the E Block license to be granted the licensee would have to enter into an agreement with the public safety licensee.

[177] *FNPRM* at para. 281.

[178] *Id.* While MetroPCS agrees that these restrictions would be necessary, these restrictions would undoubtedly substantially decrease the value of this 10 MHz Block of spectrum – as bidders may find difficultly securing financing for spectrum that it may not be able to use commercially, or may not receive at all in the event that it does not come to an agreement with the public safety community.

MHz auction revenues into the DTV transition fund on or before June 30,2008. Commission personnel have indicated to MetroPCS that the agency will not be in a position to make this deposit unless and until the agency has processed and granted the underlying applications. There is a very serious risk that an E Block licensee would not be able to meet all necessary and appropriate conditions and secure a grant before this date. As a consequence, the Frontline proposal puts the Commission in an impossible position. Either the Commission must forgo the protections that are required for public safety to be adequately served or it must risk missing the funding deadline. **A** better outcome would be to reject the Frontline proposal altogether.

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."[179] However, Frontline has offered no rules or procedures to govern the relationship and neither has the Commission. As a consequence, the Commission would have to maintain close and ongoing authority between everything that occurs between the E Block Licensee and the public safety licensee.

Despite its assertions that public safety interests will come first, Frontline's management will, as a matter of law, always have a fiduciary duty to its commercial investors. Thus, the interests of the public safety community will come last, also as a matter of law. Frontline inevitably will be faced with literally thousands of issues in dealing with the more than 50,000 state and local public safety agencies and associations across the country. In resolving those issues, Frontline's duty to investors will come first, and the only certainty is that user fees

[179] ***See*** Frontline Public Safety Comments at 27.

imposed on the public safety community must be sufficient to produce a profit. Under the law, the public safety interests are doomed to second-class status from the start.

As Commissioner Copps correctly notes, the regulatory oversight necessary for this type of proposal "will require unprecedented and historical coordination and cooperation."[180] The Commission should be hesitant to create another pervasive regulatory morass that would require it (or a transition administrator) to provide oversight to constant negotiations between public safety and a commercial operator. This could result in unending delays and confusion, and the Commission need not look €ar for a comparable situation. The 800 MHz rebanding process has been plagued by delays and disputes between Sprint Nextel and the public safety community. Indeed, the Assn. of Public Safety Communications Officials recently stated in a letter to the Commission that "[o]ne of the major problems with the process has been the hundreds of protracted negotiations between Sprint Nextel and public safety licensees regarding the cost of planning for and implementing the rebanding of their 800 MHz radio systems."[181] These types of delays and oversight could indefinitely postpone the creation of any network for public safety. As earlier noted, the Commission has yet to approve a national public safety licensee for the 12 MHz of broadband public safety spectrum -- a proposal that was controversial and did not receive overwhelming support in the public safety community.[182] Whether or not the Commission approves that proposal, there is no dispute that there would be a need for

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[180] ***See*** *FNPRM* at Copps Statement. It may require the formation of an entire new department or bureau at the Commission given the importance and magnitude of the task to oversee this relationship.

[181] See "Public Safety Groups Say Scarce Dollars Wasted on Rebanding Fights," Communications Daily, May 11,2007.

[182] ***See*** City of Philadelphia Public Safety Comments; National Association of Telecommunications Officers and Advisors Public Safety Comments; Region 22 (Minnesota) Public Safety Regional Planning Committee Public Safety Comments ("Prohibiting direct licensing of any portion of this spectrum to state and local governments would be catastrophic to continued advances in regional and statewide oriented first responder interoperability").

unprecedented ongoing negotiations between the E Block Licensee and the public safety community – and pervasive regulatory review of these negotiations – which may indefinitely delay the build-out of the public safety network.

I. Modifying the Frontline Proposal Would Not Remedy Its Defects

Recently, Cyren Call has advocated removing many of the "poison pills" from the Frontline proposal in an apparent effort to craft a scheme that Cyren Call might find enticing. Unfortunately, Cyren Call's proposed changes do not remedy many of the worst infirmities of the Frontline proposal. For example, Cyren Call proposes that the requirements for mandatory roaming, open access, and wholesale services be removed. While these changes might encourage other bidders may participate, they do not solve the fundamental problems with the Frontline proposal – namely: (1) a commercial auction is not a proper vehicle for choosing a suitable partner for public safety; (2) there is a sharp divergence of interests between the commercial E Block licensee and public safety; **(3)** the public/private partnership model proposed here business model is unproven and exceedingly risky; (4) licensing a monopoly service provider is a very bad idea and would force the Commission to oversee and to micromanage the relationship on an ongoing basis, and *(5)* that other alternatives would work better and more efficiently for public safety. The simple fact is that Cyren Call, like Frontline and the Coalition for 4G in America, is seeking to stack the rules so as to limit competition for these licenses in its favor – which is something the Commission should avoid.

J. The Implementation of a Nationwide Interoperable Network is Better Left to Other Agencies

Establishing and maintaining an interoperable wireless network at the federal, state and local levels is crucial to our country's public safety. Indeed, among the observations made by the 9/11 Commission in its final report was a comment about the inability of public safety agencies to communicate with one another.[183] This breakdown occurred at all levels of government.[184] The Report concluded that the ongoing operation of incompatible, inadequate communications remains an "important problem," and recommended that Congress take action at the national level to solve the problem for the benefit of all jurisdictions.[185]

The Commission, to be sure, has a public safety role. Its role is to ensure that the public safety bands across the electromagnetic spectrum, including those set aside by the Congress as part of the 700 MHz spectrum reallocation, are protected. However, it would be a serious mistake for the Commission to venture beyond that role by attempting to dictate the terms for the establishment of a nationwide interoperable wireless network for public safety. Such an action, in the context of this proceeding, would stretch the limits of the Commission's jurisdiction and authority and would enmesh the Commission in matters well outside its core expertise. This is especially true in the context of this proceeding because the proposal under consideration would not protect but encroach upon the public safety spectrum. The monumental task of establishing and maintaining an interoperable wireless network for public safety must remain under the control and direction of the federal agencies to which Congress has given explicit authority in this area.

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[183] See Nat'l Comm'n on Terrorist Attacks upon the United States, The 911 1 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States 397 (2004).

[184] *See id.*

[185] *See id.*

These federal agencies have worked very hard over the last five years to lay the groundwork for a network that will be interoperable with state and local officials. After years of planning and negotiating, the expenditure of billions of dollars (and the appropriations of billions more), and with the benefit of the advice, knowledge, and experience of the top public safety officials across the country, the U.S. Department of Justice (DOJ), the Department of Homeland Security (DHS), and the Department of Treasury (Treasury) only recently awarded a multi-billion dollar contract to design, build, and operate a nationwide federal solution for operability and interoperability for public safety. To say that this effort has been difficult for the public safety experts--those who understand most acutely the challenges in this area--is a significant understatement.

The Frontline proposal, which is only 20 pages long, does not include any details about how it would accomplish by itself exactly what the federal government has been struggling to accomplish for the past five years. Neither Frontline nor the Commission has adequate experience or expertise to make the complex policy judgments that will be required to implement Frontline's proposal.

The Frontline proposal also fails to address the fact that the U.S. Department of Justice, the Department of Homeland Security, and the Department of Treasury already have initiated a number of different programs to address the problems associated with nationwide, interoperable wireless public safety network. See, e.g., IWN; SAFECOM. In particular, the IWN program, which is a joint effort of DOJ, DHS and Treasury, is specifically directed at constructing a nationwide interoperable wireless network to link all federal law enforcement and public safety personnel, with access and interoperability for local public safety personnel as well.[186] The

[186] Overview of IWN *available at* http://www.usdoj.gov/jmd/iwn/overview.html.

budget for the IWN program is between $5 billion and $10 billion.[187] A contract was recently awarded to design, build and operate the network.[188]

It is interesting that neither the Frontline proposal, nor the *FNRPM*, mention the IWN program, or the recently announced contract. At a minimum, before adopting the Frontline proposal, and before taking any action to facilitate that proposal, the Commission should require Frontline to demonstrate in detail why **two** nationwide interoperable networks are necessary, at a potential cost of as much as $10 billion **each** and why it makes more sense for state and local public safety systems to arise out of an unrelated commercial network rather than a related Federal Government public safety network. Rather than the strange bed fellows public private partnership envisioned by Frontline, the nation would be much better off if the state and local public safety agencies were to bootstrap a network on their 24 MHz of dedicated spectrum utilizing the network that already is being pursued by the Federal Government.

In addition, apart from the obvious issue of wasted resources, it is not clear what steps would be undertaken by the E Block licensee to ensure that it would not interfere in any way with the implementation and operation of the IWN network. If the proposal for a duplicative interoperable network were adopted, there would, at a minimum, be a need to coordinate the development of compatible standards and the implementation plans for the two networks. That required coordination would inject an additional, and unnecessary, issue into the already difficult problems faced by the federal government in implementing IWN.

Further, because the IWN network is being built, the Commission should not unilaterally

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[187] Request for Comment: Draft Statement of Objectives (SOO), High Level Acquisition Strategy, Phase 1 Advisory Downselect Draft Evaluation Criteria at 7, (July 16,2004) *available at* **http:i/www.usdoj.gov/jmdiiwnlschedule.html**

[188] See USDOJ press release, *General Dynamics and Lockheed Martin Awarded Phase Two Contracts for Integrated Wireless Network (IWN)*, (June 9,2006) *available at* http:i/www.usdoj.gov/opa/pr/2006/June/06_jmd_361.html

make policy decisions in this proceeding that will have an impact on the core interests and missions of DHS, DOJ and Treasury until it has coordinated with them. While telecommunications issues sometimes intersect with homeland security, law enforcement, and public safety issues, DHS and DOJ, have been charged with making policy decisions affecting homeland security, law enforcement and public safety. Commissioner Copps noted that "[n]o plan is going to work without the close, ongoing oversight and enforcement authority of [the FCC]."[189] The Commission, however, lacks the authority and expertise to dictate how the public safety community should establish a nationwide, interoperable broadband system, or how it will operate or interoperate among its partners, including the federal law enforcement agencies. It certainly should not be arbitrating or mediating disputes between the more than 50,000 state and local public safety agencies and organizations.

Unquestionably, DHS and DOJ, rather than the Commission, have been tasked by Congress with the responsibility to balance the overlapping and sometimes potentially conflicting interests of the federal government and state and local governments on the problem of interoperability, and have been working on that problem for a number of years. The Frontline proposal essentially asks the Commission to inject itself in the middle of that difficult problem, pick a single solution, and designate a single private company to control the implementation of a nationwide public safety network for license term of at least 10 years. Worse, Frontline asks the Commission to make that momentous decision solely on the basis of written comments in this rulemaking proceeding, without the benefit of the years of study and technical analysis that DHS and DOJ have already undertaken.

The idea that the Commission would decide the fate of interoperable communications also is in conflict with Congressional mandates since Congress continues to draft and enact

[189] ***See*** *FNPRM* at Copps Statement.

legislation on exactly the same subject. The "Improving America's Security Act of 2007" **(S. 4)**,[190] for instance, passed by the Senate and currently in Conference, includes a host of different public safety communication requirements, including a requirement that the NTIA rely on the 2007 grant guidance issued under the DHS SAFECOM program to promote greater consistency in the criteria used to evaluate interoperability grant applications.[191] The Act also delegates to an Assistant Secretary of Commerce, "in cooperation with the Secretary of Homeland Security," the authority to identify and encourage the implementation of voluntary consensus standards for interoperable communications systems.[192] Not only does the Frontline proposal fail to address the existing and pending legislative commands that govern this subject, but, as mentioned above, it makes no mention whatsoever of any of the other existing, overlapping federal programs in this area, including SAFECOM. In light of all of the other potentially conflicting activity in this area, the Commission should not consider the Frontline proposal, which if enacted would effectively preempt the field for the next ten years.

K. If the Commission Insists on Acting, It Should Provide Incentives to All Commercial Carriers to Lease Spectrum and Provide Funding to the Public Safety Community

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 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 specirum 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

[190] Improving America's Security Act of 2007, S. 4, 110th Cong. § 1481 (2007).

[191] ***See*** S. 4, 110th Cong. § 1481(e) (2007).

[192] S. 4, 110th Cong. § 1481(g) (2007).

service to the public safety community.[193] 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.[194] 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 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

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

[194] *The Development of Operational, Technical and Spectrum Requirementsfor 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).

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.

Fundamentally, it is wrong to use an auction of commercial spectrum to select the appropriate partner for a private/public partnership which is to be devoted to public safety. Auctions are designed to select a licensee who values commercial spectrum most, not to ascertain who has the inclination and ability to work with public safety or to design systems that would be appropriate for public safety. The traditional way partners are chosen for public/private partnerships is through a process where the public entity is able to select the private party based on a number of criteria, including the financial considerations, experience, qualifications, etc. Here, the way to proceed is to grant the public safety licensee the flexibility to permit access to the public safety spectrum and have the public safety community make its own determination as to which in this private party will earn that access.

IX. CONCLUSION

The Commission should implement the proposals described above by MetroPCS in its upcoming Final Order for the 700 MHz Band.

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