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.

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully responds to the Commission's Supplemental *Public Notice* entitled "Comments Sought on Google Proposals Regarding Service Rules for the 700 MHz Band Spectrum" (the "Google Notice")[2] released May 24, 2007, in the above-captioned proceedings. In response, 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 Public Notice*, "Comments Sought on Google Proposals Regarding Service Rules for 700 MHz Band Spectrum," DA 07-2197 (rel. May 24, 2007), 72 Fed. Reg. 29930 (May 30, 2007).

Preliminary Statement

On May 21, 2007, Google filed an *ex parte* notice in this proceeding (the "Google *Ex Parte*") asking the Commission to rule and clarify that companies who are licensed in the 700 MHz Band are allowed to - - and perhaps should be required to - - use the same kind of real-time auction mechanisms that Google uses to sell advertisements on its search engine.[3] The proposals set forth in the Google *Ex Parte* were supplemented to some extent in the comments Google filed in response to the Commission's *Further Notice of Proposed Rulemaking* ("*FNPRM*") released April 27, 2007 with regard to the 700 MHz commercial service rules (the "Google Comments").[4]

I. The Google Filings Are Riddled With Inconsistencies

The Google *Ex Parte* and the related Google Comments pose an interesting question: can the dynamic real-time auction techniques Google uses to sell limited advertising space on its search engine be used legally by a spectrum licensee to provide end-user access to the licensed spectrum on an "as-needed" basis? Unfortunately, this worthwhile question is posed in filings that are so riddled with self-contradictions that they render the inquiry meaningless:

- Google urges the Commission to hold the 700 MHz auction "as soon as possible, and without undue delay" and recognizes the critical need for potential applicants to have "as much time as possible – preferably six months between adoption of final rules and the auction date."[5] Yet, Google did not file the Google *Ex Parte* which first introduced its radical proposal for a dynamic, real-time spectrum

[3] 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).

[4] *See* Comments of Google, Inc. filed May 23, 2007 in response to the *Report and Order and Further Notice of Proposed Rulemaking* (WT Docket No. 06-150 et al, FCC 07-72 released April 27, 2007).

[5] Google Comments, p. 6.

usage plan until May 21, 2007 - - two days before the comment deadline of May 23, 2007 in the 700 MHz proceeding. Google's timing made it impossible for its inquiry to be pursued within the normal comment and reply cycle, thus necessitating the separate Google Notice. If the Commission gives this ill-formed proposal any in-depth consideration, it will delay the Commission's finalization of the 700 MHz service rules, delay the auction and reduce the time that prospective applicants will have to prepare.

- Google states that "the instant proceeding does not provide an opportunity to consider fundamental reforms of existing spectrum policies."[6] Nonetheless, Google then proceeds to ask the Commission to "mandate" the employment of "these kinds of dynamic spectrum management techniques … for some, or even all, of the commercial spectrum to be auctioned in the 700 MHz bands."[7] Such a radical change in spectrum usage requirements must be considered precisely the kind of "fundamental reform" that Google disavows.

- Google professes strong support for a "flexible, marketplace-driving spectrum regime" in which the Federal Government relies on "market mechanisms" rather than "command and control" spectrum policies.[8] Google then, inexplicably, proceeds to endorse a series of heavy-handed proposals which would put the

[6] Google Comments, p. 3. MetroPCS agrees that this proceeding is a poor place to undertake such radical proposals, especially since the Commission faces strict statutory deadlines to commence the auction.

[7] Google *Ex Parte*, p. 4. The Google *Notice* released by the Commission specifically posits whether it would be in the public interest to impose such a mandate. 72 Fed. Reg. 29930.

[8] Google *Ex Parte*, p. 2.

Government in the role of micromanaging spectrum usage by government fiat rather than allowing free marketplace forces to work.[9]

- Google asks the Commission to skew the 700 MHz commercial rules in order to "maximize opportunities for new commercial entities" who are intent upon providing the "long-awaited 'third broadband pipe'" to the home.[10] Having adopted this deliberate stance asking the Government to gear its auction rules to a particular predetermined outcome, Google then concedes that "there is no clear evidence that a wireless commercial platform based on available 700 MHz spectrum can compete effectively with entrenched broadband incumbents."[11]

These many internal inconsistencies in the Google filings make it more difficult to take seriously its real-time dynamic spectrum management proposal.[12] This is particularly true since

---

[9] For example, Google asks the Commission: (1) to dictate that the Lower 700 MHz Band unpaired 6 MHz "E" Block (7220728 MHz) be used "primarily or exclusively" for development of broadband communications platforms (Google *Ex Parte*, p. 4); (2) to endorse the Frontline proposal and mandate that the commercial winner of the new Upper Band E-Block paired license build out a public safety network and utilize a wholesale only open access model (Google Comments, p. 8); and (3) allocate a 22 MHz channel block in the Upper Band with REAG service areas and combinatorial bidding in order to promote nationwide WiMax and EVDO uses while freezing out small bidders with alternate business plan (Google Comments, p. 7). All of these proposals are examples of the discredited "command and control" spectrum policies in which the Government seeks to compel outcomes by micromanaging particular uses of spectrum.

[10] MetroPCS already has demonstrated that numerous "third pipes" already are being built into the home. Comments of MetroPCS at 7-8.

[11] Google Comments, p. 5.

[12] One fundamental issue is whether the Google proposal seeks to alter the methodology for the auctioning of spectrum by the Commission (*e.g.*, Google complains that there are "intrinsic problems" with the current US spectrum auction model which requires large upfront payments for spectrum which take money away from infrastructure build-out and creates barriers to entry; Google favors a "more open and market-driven spectrum access policy" where payments would be made over time "as the spectrum is being used," Google *Ex Parte* at 3) or by licensees (*e.g.*, licensees could institute a dynamic auction," *Id.* at 3). For the purposes of these Comments, MetroPCS assumes Google's proposal is to allocate services by a licensee. If the proposal is to

(continued...)

Google also has been self-contradictory on the threshold issue as to whether it has any serious intention of participating as a bidder, or as an interest holder in a bidder, in the 700 MHz auction.[13] It would, indeed, be the ultimate indictment of the failed industrial "command and control" policy for the Commission to order licensees to employ dynamic, spectrum management techniques in an effort to accommodate Google, and then for Google not to show up at the auction!

II. Google Fails to Address the Core Legal Issues Raised By Its Proposal

The greatest disappointment with the Google *Ex Parte* and the Google Comments is that they fail to address the obvious legal and regulatory issues that are raised by the Google approach. As is discussed in greater detail below,[14] the Google approach appears to contemplate demand-based pricing in which consumers will be charged different prices depending upon external conditions over which they have no control (time of day, population density, etc.). In effect, the dynamic, real-time pricing scheme incorporates a method of price and service discrimination and preferences that may be fundamentally inconsistent with the Communications Act of 1934, as amended (the "Act") and the Commission's pro-competitive policies in favor of non-discriminatory, cost-based pricing.

A. Discriminatory Pricing

By it own admission, Google is planning to implement a discriminatory pricing plan. Google states:

(...continued)

change the way the Commission actually allocates spectrum, Google's proposal would violate 47 U.S.C. § 309(j).

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

[14] *See* discussion, *infra*, at p. 5-7.

> In rural areas, auction-based prices typically would be much lower than in a large city because there would be fewer competing bids and less contention for use of the spectrum.[15]

Presumably, Google also is contemplating utilizing peak-use pricing techniques, meaning that an end-user who happens to need access at the same time as a large number of other users, will pay a higher price than one who is fortunate enough to propose a use during an off-peak period.

Clearly, a pricing scheme which charges users who seek access at the same time, but happen to be in different locations (one congested; one uncongested) or have different service needs (*e.g.,* length or amount of information to send) is discriminatory. Similarly, a pricing scheme that charges users who seek access from an identical location, but happen to do so at different times of the day (one peak; one off-peak) is discriminatory. Of course, not all discrimination in pricing is illegal. Section 202(a) of the Communications Act of 1934, as amended, which governs the operations of common carriers, renders it unlawful "to make any unjust or unreasonable discrimination in charges, classifications, regulations, facilities or services for or in connection with like communication services ..."[16] Significantly, this statutory section specifically prohibits giving any undue or unreasonable preference "to any particular ... locality, or to subject any particular ... locality to any undue or unreasonable prejudice or disadvantage."[17] The Google assurance that users in rural areas would pay lower prices than users in urban areas raises the obvious question whether this approach violates the statutory prohibition against discrimination based on locality. The Google filings are silent on this important issue.

---

[15] Google *Ex Parte*, p. 6 (Appendix A).

[16] 47 U.S.C. § 201(b).

[17] *Id.* (emphasis supplied).

B. Cost-Based Pricing

Google's assurance that users in rural areas will pay rates that are typically much lower than those in large cities also implies that its dynamic pricing model will not take into consideration the fact that the cost-per-user of providing service in the rural areas is almost certain to be significantly greater than in the major metropolitan areas. The economic reality is that build-out in some rural areas has been slow to develop because the subscriber base will not support the cost of the infrastructure (and a reasonable profit). If the Google real-time pricing model plans to ignore this economic driver, the question arises whether the plan violates Commission policies in favor of cost-based pricing.[18] Again, the Google filings fail to address this important point.

C. Truth-in-Billing Issues

In some instances, the Commission is willing to endorse the imposition of particular charges on end-user customers only if there is full and fair disclosure in advance to the customer of the costs that will be incurred and clear agreement by the customer to accept the charges.[19] It could be that the proposed demand-based pricing that Google plans to offer would be "reasonable" provided that customers are adequately notified in advance of the charges that will apply. For example, if a mobile user is going to be charged $.40 a minute for access because it happens to be a peak usage period, instead of the $.10 per minute charge that would apply were there less demand, the user has a right to know. This means that the Google proposal raises

---

[18] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("a cost-based pricing methodology based on forward-looking economic costs … is the approach for setting prices that best furthers the goals of the 1996 Act.")

[19] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, Report and Order, 11 FCC Rcd 20541 at para. 16 (1996) (The Commission applied rules to ensure that consumers have full information concerning the choices available to them for the pricing of payphone services).

serious consumer notification and truth-in-billing issues. And, since Google is proposing a dynamic real-time mechanism, today's peak usage period may be during a different part of the day than yesterday's peak usage period, meaning that only a real-time disclosure of the applicable charge will adequately notify the customer. However, it is unclear from the Google proposal whether, and if so, how a customer will be able to get this notice in the same real-time basis as the charges. Thus, once again Google has failed to address foreseeable issues which are raised by the proposal that it elected to inject into the final stages of this accelerated proceeding.

D. Regulatory Status

The questions raised above about the compliance of the Google proposal with the FCC's anti-discrimination and pricing principles also lead to a further question regarding the regulatory status (i.e. common carrier vs. non-common carrier) of a licensee who is employing these dynamic real-time pricing techniques. The previously-cited statutory provisions barring discrimination apply by their express terms only to telecommunications "common carriers."[20] In order to ascertain whether current Commission policy allows a licensee to implement a dynamic pricing scheme, the Commission may need to determine the proper regulatory classification of the services offered by the licensee. The Commission recently concluded that wireless broadband Internet access services would be classified as non-common carrier services for regulatory purposes.[21] However, the 700 MHz rules provide licensees with great flexibility to

---

[20] There are, however, circumstances in which the Commission, under its broad public interest mandate, has imposed similar non-discrimination requirements on non-common carriers. *See Telefonica SAM USA, Inc. and Telephonica SAM de Puerto Rico, Inc.*, Applications for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Network Extending Between Florida, Puerto Rico, Brazil, Argentina, Chile, Peru, and Guatemala, 15 FCC Rcd 14915 at para. 29-30 (2000) (Commission applied safeguards to non-common carrier to ensure that applicants made capacity available on a non-discriminatory basis).

[21] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling WT Docket No. 07-53, FCC 07-30 (rel. March 23, 2001).

provide a wide variety of fixed, mobile and broadcast services in the 700 MHz band.[22] This means that 700 MHz licenses will not necessarily be devoted to the provision of wireless broadband Internet access. Under these circumstances, it is incumbent upon Google and the Commission to thoughtfully consider whether the nature and type of service provided affect the permissibility of implementing the Google pricing plan and methodology. Once again, Google has failed to address this important issue in any of its filings.

III. It Would Be Premature to Issue the Ruling Google Seeks

Based upon the foregoing discussion, the Commission cannot conclude that its current rules allow Google, or others, to implement the dynamic real-time pricing mechanism advocated by Google. Google is seeking a declaratory ruling, and the proponent of such a ruling must bear the burden of establishing that the ruling sought comports with the Commission's rules. Here, Google has failed to even address even the most basic critical regulatory issues raised by its filings, let alone demonstrate that the dynamic pricing mechanism it seeks to implement is "allowed" by the Commission's current rules. Having failed to make an adequate showing in this regard, the Commission certainly should not mandate that all or any portion of the 700 MHz spectrum be devoted exclusively to the use of Google's dynamic real-time pricing plan.[23]

---

[22] The 700 MHz licensees will be governed by Part 27 of the rules. Section 27.2(a) allows non-Guardband licensees in the 700 MHz band to offer "any services for which its frequency bands are allocated" subject to the applicable technical rules. 47 C.F.R. §27.2(a).

[23] Moreover, assuming that it is lawful for a 700 MHz licensee to utilize dynamic real-time auction techniques – there is no reason for the Commission to lock all potential licensees into this model. After all, this real-time auction of spectrum access at the user level is based upon the dynamic model Google uses to sell advertisements on its search engine site - - which model was developed and implemented without any Government mandate. Why should the Commission impose a scheme on the wireless industry that has developed free of federal intervention through marketplace forces elsewhere? This is exactly the kind of spectrum micromanagement that the Commission wisely has moved away from.

IV. Conclusion

In the final analysis, the Google proposal is not sufficiently well-formulated, supported by law or Commission policy, or defended by its proponent to be adopted at this time. Under these circumstances, the Commission cannot allow the 11th hour Google proposal to disrupt or delay the expedited process the Commission has undertaken to finalize the rules and allocation regarding the 700 MHz band in order to commence the auction prior to the January 28, 2008 statutory deadline. The Commission is under a strict statutory deadline to conduct the commercial 700 MHz auction – which would be difficult to meet under the best of circumstances -- and further consideration of the ill-formed Google proposal jeopardizes the Commission's ability to engage in a reasoned rulemaking and still meet the statutory deadline.

From the outset of the initiation of this 700 MHz service rules proceeding, the Commission has been mindful of the fact that the proceeding needs to be concluded in an identifiable time frame in order for the statutory auction deadlines to be met.[24] Happily, the Commission can take a pass for the time being on issuing the "clarification" that Google seeks without any perceptible effect on the 700 MHz auction. Robert Wilson, a Stanford management economist, hired by Frontline, stated that such a dynamic auction "is 5 or 10 years away."[25] This means that the Commission can decline to issue the ruling at this time that Google seeks with no adverse affects on the market or the marketplace.

Based on the foregoing, the Commission should not endorse Google's proposal at this time for a dynamic auction mechanism in its upcoming Order for the 700 MHz band.

---

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

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

Respectfully submitted,

MetroPCS Communications, Inc.

By: /s/ Carl W. Northrop
Carl W. Northrop
Michael Lazarus
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, NW
Washington, D.C. 20005
Telephone: (202) 551-1700
Facsimile: (202) 551-1705

Mark A. Stachiw
Senior Vice President, General Counsel and Secretary
MetroPCS Communications, Inc.
8144 Walnut Hill Lane, Suite 800
Dallas, Texas 75231
Telephone: (214) 265-2550
Facsimile: (866) 685-9618

Its Attorneys

June 6, 2007