

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

In the Matter of)
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)

Recommendations of the Independent Panel)
Reviewing the Impact of Hurricane Katrina on)
Communications Networks)
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EB Docket No. 06-119
WC Docket No. 06-63

**PETITION OF METROPCS COMMUNICATIONS, INC.
FOR CLARIFICATION AND RECONSIDERATION**

Carl W. Northrop
Michael Lazarus
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, NW
Washington, D.C. 20005
(202) 551-1700

Its Attorneys

Mark A. Stachiw
Senior Vice President, General
Counsel and Secretary
Melanie S. Klint
Corporate Counsel
MetroPCS Communications, Inc.
8144 Walnut Hill Lane, Suite 800
Dallas, TX 75231
(214) 265-2550

TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
I. PRELIMINARY STATEMENT	2
II. PORTIONS OF THE <i>ORDER</i> ARE AMBIGUOUS AND SHOULD BE CLARIFIED	5
III. ADEQUATE NOTICE WAS NOT GIVEN OF THE BACK-UP POWER RULE	6
IV. THE NEW RULE WAS BASED ON MISTAKES OF FACT.....	7
V. COMPLIANCE WITH THE BACK-UP POWER REQUIREMENT IS IMPOSSIBLE.....	8
A. Federal, State and Local Law Limitations.....	8
B. Space Limitations	9
C. Load Limits.....	10
D. Practical Limitations.....	11
E. Non-Traditional Sites	12
VI. THE RELIEF SOUGHT ON RECONSIDERATION	13

Summary

MetroPCS Communications, Inc. ("MetroPCS") is asking the Commission to clarify and reconsider certain aspects of the back-up power requirement specified in new Section 12.2 of the Commission's Rules which was adopted in the *Order* issued after the Commission took comment on the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks ("Katrina Panel") recommendations.

MetroPCS is asking the Commission to clarify that the 8 hour back-up power requirement for "cell sites" was not intended to cover non-traditional sites, such as distributed antenna system (DAS) nodes, cellular repeater sites, micro-cell and pico-cell locations and other non-tower structures (electricity and light poles, light fixtures, flagpoles, etc.) where compliance is not feasible.

MetroPCS also is asking the Commission to reconsider Section 12.2 of the Commission's Rules to the extent that it imposes an inflexible on-site mandatory 8 hour back-up power equivalent for all assets located at every cell site operated by wireless carriers. Instead, the Commission should adopt flexible back-up power guidelines based upon best industry practices designed to enable carriers to maintain critical voice communication service during commercial power failures while taking into consideration space limitations, load limits, permitting requirements, legal restrictions and commercial feasibility.

Reconsideration is justified because the record does not support the adopted rule, the rule was based upon a mistaken view of the operative facts, and because compliance with the rule is not feasible.

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**PETITION OF METROPCS COMMUNICATIONS, INC.
FOR CLARIFICATION AND RECONSIDERATION**

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys and pursuant to Section 1.429(a) of the Commission’s Rules,² respectfully petitions the Commission to clarify certain aspects and to reconsider other aspects of its *Order*, FCC 07-107 released June 8, 2007, in EB Docket No. 06-119, (the “*Order*”).³ The following is respectfully shown:

¹ For purposes of this Petition, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² 47 C.F.R. § 1.429(a).

³ See *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order, EB Docket No. 06-119, WC Docket No. 06-63, FCC 07-107 (rel. June 8, 2007). This petition is being filed within 30 days following the date of publication of the *Order* in the Federal Register, which occurred on July 11, 2007. See 72 Fed. Reg. 37,655 (July 11, 2007). Thus, the Petition for Clarification and Reconsideration is timely under Sections 1.429(d) and 1.4(b) of the FCC Rules. 47 C.F.R. Sections 1.4(b) and 1.429(d). MetroPCS recognizes and appreciates the fact that the Commission has issued an order postponing the effective date of Section 12.2 of the Rules for 60 days from August 10, 2007 to October 9, 2007. See *Order*, FCC 07-139, released August 2, 2007 (the “*Extension Order*”). MetroPCS is hoping that the Commission will take steps during the extension period to revise Section 12.2 of Rules in a manner that will render moot this petition and MetroPCS looks forward to working with the Commission to provide the factual information necessary to enable the Commission to meet the worthy goals of the Katrina Panel in a manner that the industry can sustain. Nonetheless, the issuance of the Extension Order does not alter the 30-day clock for the filing of a Petition for Reconsideration. Thus, MetroPCS feels compelled to file this petition at this time in order to protect its procedural rights.

I. Preliminary Statement

1. On June 12, 2006, an independent panel (the “Katrina Panel”) established by FCC Chairman Kevin J. Martin submitted a report (the “Katrina Report”) to the Commission making certain recommendations on how to improve preparedness, network reliability and communications during disasters and emergencies.⁴ The Katrina Report proposed that wireless carriers be required to follow certain National Reliability and Interoperability Council (“NRIC”) recommendations relating to the deployment of back-up power for certain critical telecommunications facilities. The Katrina Report did not propose that carriers be required to maintain on-site back-up power at all cell sites or that they maintain back-up power for any particular period of time.

2. On June 19, 2006, the Commission issued a *Notice of Proposed Rulemaking* (the “Katrina NPRM”) seeking public comment on the recommendations of the Katrina Panel.⁵ Following the comment period, the Commission adopted and released the *Order*. Among other things, the Commission promulgated a new rule pertaining to back-up power requirements for communications facilities that went beyond any recommendation of the Katrina Panel or any proposal advanced by interested parties who commented in the proceeding. Specifically, the Commission adopted new Section 12.2 of the Commission’s rules which states:

Local Exchange Carriers (LECs), including incumbent LECS (ILECs) and competitive LECs (CLECs), and commercial mobile radio service (CMRS) providers must have an emergency backup power source for all assets that are normally powered from local AC commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier

⁴ See *Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Report and Recommendation to the Federal Communications Commission, filed June 12, 2006. The Katrina Panel was convened pursuant to the Federal Advisory Committee Act, Public Law 92-463, as amended, 5 U.S.C. app. Section 2 (1988).

⁵ See *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Notice of Proposed Rulemaking, 21 FCC Rcd. 7320 (2006).

system remote terminals. LECs and CMRS providers should maintain emergency back-up power for a minimum of 24 hours for assets inside central offices and eight hours for cell sites, remote switches and digital loop carrier system remote terminals that are normally powered from local AC commercial power. LECs that meet the definition of a class B company as set forth in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers with no more than 500,000 subscribers are exempt from this rule.⁶

3. On its face, this rule states that commercial mobile radio service ("CMRS") carriers "must have" an emergency back-up power source for all assets normally powered from local AC commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals (emphasis added). However, the rule goes on to state that CMRS carriers "should maintain" emergency back-up power for eight hours for cell sites, remote switches and digital loop carrier system remote terminals (collectively, cell sites, remote switches and digital loop carrier system remote terminals are referred to herein as "Remote Sites") that are normally powered from local AC commercial power (emphasis added). The use of the word "should" in the latter instance, rather than the word "must" as in the earlier instance, could be interpreted to mean that the Commission was not intending to impose an inflexible, mandatory 8 hour requirement for all assets inside cell sites,⁷ but rather was providing a suggested guideline for CMRS carriers to work toward.⁸ However, for the purpose of this petition, out of an abundance of caution MetroPCS is assuming a worst case scenario in which the new rule is interpreted by the Commission to impose an 8 hour, on-site, automatic, uninterrupted back-up power requirement on all assets located in all cell sites, including

⁶ 47 C.F.R. Section 12.2; *Order* at Appendix B.

⁷ As set forth in greater detail within, the term "cell sites" is ambiguous. *See* discussion *infra* at para. 7.

⁸ MetroPCS would welcome a clarification along these lines. MetroPCS also expressly preserves the position that a proper reading of the rule would interpret it as a guideline, not as an inflexible mandate.

distributed antenna system (“DAS”) nodes, cellular repeater sites and micro-cell and pico-cell sites.

4. MetroPCS is an “interested person” eligible to petition for reconsideration of Section 12.2 of the Commission’s rules.⁹ The licensee subsidiaries of MetroPCS are CMRS carriers with more than 500,000 subscribers in the aggregate, and thus presumably are subject to the new rule.¹⁰ MetroPCS does not, at present, maintain emergency back-up power on-site for a minimum of 8 hours at all existing cell sites, remote switches, DAS nodes, repeater sites, micro-cells, pico-cells and digital loop carrier system remote terminals. MetroPCS would be forced to spend significant sums of money in order to attempt to comply with a strict interpretation of the newly-imposed back-up power requirement. Additionally, because compliance will be impossible at some Remote Sites, MetroPCS will be forced to discontinue service at specified sites to comply, or will risk being subject to fines and forfeitures for failing to comply. As an entity which stands to be directly adversely affected by the rule adopted by the *Order*, MetroPCS has standing to submit this petition for clarification and reconsideration.¹¹

5. The facts relied upon in this petition relate to circumstances which have changed since the last opportunity to present them to the Commission. Specifically, in adopting the 8 hour back-up power requirement for Remote Sites, the Commission promulgated a new rule that had not been suggested by the Katrina Panel and had not been advocated by any interested party in the proceeding. MetroPCS could not have anticipated, through the exercise of due diligence,

⁹ *cf.* 47 C.F.R. Section 1.429(a).

¹⁰ It is not entirely clear, however, that this is the case. Only one of MetroPCS’ subsidiaries has more than 500,000 subscribers, and the rule does not indicate that the subscribers of affiliated companies need to be aggregated to ascertain whether the threshold is met.

¹¹ See 47 C.F.R. Section 1.106(f) (“any party to the proceeding, or any other person whose interests are adversely affected by an action taken by the Commission ... may file a petition requesting reconsideration of the action”).

that the Commission would adopt a rule which effectively places the entire wireless industry in violation of the new standard without notice and without any transition period. Consequently, this petition satisfies the procedural requirements of Section 1.429(b) of the Commission Rules.¹²

6. Finally, and most importantly, clarification and reconsideration of Section 12.2 of the Commission's Rules are justified as being in the public interest as contemplated by Section 1.429(b)(3). As demonstrated in detail below, maintaining the back-up power requirement in its current form – and applying the requirement to DAS nodes, cellular repeaters and micro-cell and pico-cell sites – would subject MetroPCS and other carriers to a substantial financial hardship and would have the unintended consequence of fostering diminished rather than more robust wireless services.

II. Portions of the Order are Ambiguous and Should Be Clarified

7. The *Order* uses the phrase “cell sites” but does not define this term. It is not clear, therefore, whether the term was intended by the Commission to include non-traditional sites where compliance with the rigid back-up power requirement would be impractical or impossible. Newton's Telecom Dictionary defines “Cell Site” as a transmitter/receiver location operated by a wireless service provider through which radio links are established between the wireless system and the wireless unit. The definition then goes on to explain:

A cell site consists of an antenna tower, transmission transmission radios and radio controllers.¹³

This explanation makes clear that the term “cell site” typically refers to traditional tower sites, not to non-traditional sites (utility and light poles, light fixtures, flagpoles, DAS nodes and other similar non-tower structures). One immediate step that the Commission could and should take to

¹² 47 C.F.R. Section 1.429(b).

¹³ Newton's Telecom Dictionary, 20th Updated and Expanded Addition at 164 (2004).

mitigate the harsh effect of the new back-up power rule is to clarify that the rule will not be applied to non-traditional cell sites which are so problematic in terms of compliance with a fixed 8 hour back-up power requirement.

III. Adequate Notice Was Not Given Of The Back-Up Power Rule

8. Reconsideration of Section 12.2 of the Communications rules is justified because inadequate notice was given and an inadequate record was developed to support a strict, inflexible on-site, 8 hour back-up power requirement at all Remote Sites. Analysis reveals that the Commission failed to follow the requirements of the Administrative Procedure Act (“APA”) in promulgating the new rule.¹⁴

9. The Katrina Report contained the following recommendation:

[I]n order to ensure a more robust E-911 service, the FCC should encourage...[s]mall service providers, network operators and property managers [to] ensure availability of emergency/back-up power (e.g., batteries, generators, fuel cells) to maintain critical communication services during time of commercial power failures, including natural and manmade occurrences (e.g., earthquakes, floods, fires, power brown/black outs, terrorism). The emergency/back-up power generators should be located onsite, when appropriate.¹⁵

Notably, this recommendation made no reference to an inflexible, federally-mandated 8 hour back-up power requirement at all Remote Sites, nor did it require that a back-up power requirement apply to all types of transmission locations including DAS nodes, cellular repeaters and micro- and pico-cell sites. Rather, the recommendation, which was general in nature, was based upon the best practices guidelines of NRIC.¹⁶ In the Katrina *NPRM*, the Commission

¹⁴ 5 U.S.C. Section 553(b),(c).

¹⁵ Katrina Report at 39.

¹⁶ *NRIC VII Recommendation*, 7-7-5204.

sought comment on the recommendations by the Katrina Panel generally, made no specific mention of the on-site back-up power issue, and gave no indication that it was considering imposing any specific back-up power requirement at every Remote Site - - let alone an 8 hour requirement. Nor did any commenting party in the proceeding specifically recommend such a requirement. Thus, interested parties, including MetroPCS, were not placed on notice that such a requirement was under consideration. Nor can the inflexible, universal 8 hour emergency back-up power requirement at all Remote Sites be characterized as a “logical outgrowth” of the Katrina *NPRM*.¹⁷

10. Based upon the foregoing the Commission should reconsider Section 12.2 Rule because imposition of the rule is not consistent with the notice requirements of the APA.

IV. The New Rule was Based on Mistakes of Fact

11. Reconsideration of Section 12.2 of the Rules also is warranted because the Commission misperceived the operative facts when it adopted the rule. For example, the Final Regulatory Flexibility Act Analysis contained in the *Order* states that:

Our expectation is that this requirement will not create an undue burden since several communications providers reported in their comments that they already maintain emergency back up.¹⁸

Subsequent reports have indicated that, while back-up power at switch sites is common, no wireless service provider has reported that it routinely provides 8 hours of back-up power at all Remote Sites.¹⁹ Similarly, the *Order* states that:

¹⁷ See *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. Oct. 2005) (“Given the strictures of notice and comment rule making, an agency’s proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former”).

¹⁸ *Order*, Appendix C, para. 24.

¹⁹ Indeed, it appears that the information the Commission was relying on to conclude that compliance was feasible related only to central switch Sites, not to Remote Sites.

[W]e are not exempting from this requirement those non-nationwide CMRS providers that have grown to exceed the 500,000 subscriber threshold since 2001 as we believe that such providers are at a size where they should be able to comply with the emergency back-up power rule.²⁰

However, this Commission belief is mistaken. As demonstrated in greater detail below, compliance is not feasible for MetroPCS, which qualifies as a non-nationwide provider with more than 500,000 subscribers. Thus, the *Order* was based upon a mistake of fact.

12. Commission precedent establishes that reconsideration is appropriate when a Commission action is based upon an erroneous or incomplete understanding of the operative facts.²¹

V. Compliance With the Back-Up Power Requirement Is Impossible

13. In adopting new Section 12.2 of the Rules, the Commission overlooked a series of factors which make compliance with the rule impractical in most situations and impossible in many situations.

A. Federal, State and Local Law Limitations

14. In order to comply with an on-site back-up power rule, carriers could be required to install and maintain a large number of battery and/or fuel-powered back-up power systems. Because these systems may contain lead, sulfuric acid, oil or other flammable liquids, they are subject to many local, state and federal environmental and safety laws that may limit or

²⁰ *Order*, Appendix C., n. 60.

²¹ See, e.g., *Fred H. Whitley*, 27 FCC 2d 624 (1971) (reconsideration granted of dismissal of application for failure to prosecute when Commission mistakenly believed licensee had failed to respond to official correspondence); *Amendment of Section 1.49 of the Commission's Rules*, 9 FCC Rcd 3419 (1994) (reconsideration of the pleading typeface requirements granted based upon a mistaken understanding of the definition of "10- or 12-point type print").

significantly reduce their installation and use. For example, (a) fire codes often restrict the locations of batteries, power cells and generators (*e.g.*, on roof tops); (b) local building codes and site leases may limit the placement of generators and batteries; and (c) environmental laws may restrict the placement and use of hazardous substances including lead-acid batteries and generators which use diesel oil or gas. Public health and safety regulations also may be implicated, particularly where cell sites are located on buildings, such as churches or schools, that are subject to strict safety regulations. The bottom line is that compliance with on-site back-up power requirements simply will prove to be impossible given the strictures of various local, state and federal laws.

B. Space Limitations

15. Regardless of whether a carrier seeks to meet the back-up power requirements through the use of batteries or generators, substantial floor space and/or cabinet space is required to accommodate the back-up power source. In many instances, there simply is not enough space available to comply. As the Commission is aware, there has been an explosive growth in wireless services²² and the Commission continues to allocate additional wireless spectrum which is resulting in an ever-increasing demand for transmission sites by both incumbents and new entrants. This growth, coupled with zoning restrictions, environmental restrictions, aesthetic considerations and other impediments, has resulted in a critical shortage of suitable cell site locations. Many jurisdictions encourage or require the collocation of communications facilities, which means that a limited number of available sites are crowded with multiple wireless tenants. The result often is a critical shortage of floor space and cabinet space. Thus, even if a carrier

²² 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, 21 FCC Rcd 10947 (2006).

was able to acquire the batteries and/or generators necessary to meet the back-up power requirement, in many instances, space would not be available to permit the installation of these resources.

16. Space limitations are particularly acute for a company such as MetroPCS which is a relative newcomer to many of the markets in which it provides service. As the “new kid on the block,” MetroPCS frequently must occupy sites which already are heavily utilized and where space constraints are particularly severe. Under these circumstances, MetroPCS often simply does not have the opportunity to lease sufficient space to accommodate the power sources necessary to meet the new rule.²³

C. Load Limits

17. Batteries are heavy. A typical battery back-up configuration sufficient to provide 8 hours of back-up power to a site transmitting on a single “carrier”²⁴ would weigh approximately one ton. The weight of the batteries increases proportionally as additional batteries are added to provide sufficient power to sustain service as the capacity of the site was increased, either by adding additional carriers, or sectorizing the cell site.²⁵ Some MetroPCS facilities would require in excess of *three tons of batteries* to meet the 8 hour back-up requirement using batteries (this assumes that the network equipment would support battery back-up of this duration for the number of carriers deployed at the site, which may not be the

²³ The space limitations will become increasingly severe as the build-out of AWS facilities accelerates and the 700 MHz commercial spectrum comes on line.

²⁴ The spectrum licensed to MetroPCS can be subdivided into a number of discrete transmission paths, or “carriers,” and also can be directionalized in multiple sectors in order to provide service to the public. As a general rule, each carrier allows for 120 simultaneous channel conversations. In areas with heavy use, it would not be uncommon for MetroPCS to use up to eight carriers at a single site.

²⁵ Each additional carrier requires the use of additional batteries to maintain the same level of battery back-up because doubling the number of carriers doubles the number of radios. Similarly, sectoring a cell increases the power drain.

case).²⁶ And, each separate wireless operator at a collocation site would require its own back-up power in order to meet the 8 hour requirement independently.

18. Obviously the combined weight of all such power sources would be staggering. A traditional land-based cell site, where a tower or other structure is located on the ground, might be able to sustain this weight presuming that sufficient space is available. However, many cell sites are located on roof tops or other structures which have defined load limits. The simple reality is that, in many locations, existing roof top sites will not bear the weight of the batteries that would be required for carriers located at pre-existing sites to meet the 8 hour back-up power requirement established by the Commission for one wireless carrier, much less the number of wireless carriers located on the roof.

19. Once again the problem of load limits is particularly severe for MetroPCS. The MetroPCS business model is designed to deliver low-cost, fixed-price all-you-can eat local and long distance wireless services. This business model is best suited to more densely populated metropolitan areas, which is where MetroPCS focuses most of its resources. As a carrier serving mainly metropolitan areas, MetroPCS uses a greater percentage of roof top sites where space, load limits and other safety instructions are the most limiting. Further, in many cases, MetroPCS is the last carrier locating at a site and any added weight may be the proverbial weight that “breaks the camel’s back.”

D. Practical Limitations

20. In addition to the legal restrictions that will preclude compliance, there are a series of practical limitations which the Commission did not adequately consider when adopting

²⁶ In many cases, using batteries would be the only possible approach since most roof top landlords have prohibitions on the use of generators.

the new rule. For example, in the case of MetroPCS, it has thousands of cell sites, almost none of which are owned by the company. Because the sites are owned and controlled by third parties, MetroPCS would be obligated to negotiate in nearly every case with a third party in order to make the arrangements necessary to accommodate additional back-up power supplies (if such accommodations were physically and legally possible). And, since the entire industry apparently fails to meet the strict requirements of the new rule at most Remote Sites,²⁷ compliance also would place an enormous production strain on the producers and suppliers of batteries and generators, which raises serious issues pertaining to delivery schedules and lead times. Then, there is the issue of cost. Preliminary estimates by MetroPCS indicate that it would be required to incur costs in the *tens of millions of dollars* in order to comply with a strict interpretation of Section 12.2 of the rules at the Remote Sites where compliance is feasible. There is no evidence that the Commission took into consideration these practical, real-world limitations when it adopted the strict 8 hour back-up power requirement.

E. Non-Traditional Sites

21. The Commission's new back-up power rule also fails to take into consideration the fact that wireless carriers must, out of necessity, utilize an increasing number of "non-traditional sites" in order to provide service to the public. As earlier noted, traditional sites (i.e., guyed or free standing towers and roof tops) are becoming increasingly difficult to locate and occupy. Consequently, carriers are being forced to utilize non-traditional sites including utility and light poles, light fixtures, flag poles and other miscellaneous non-tower structures to support antennas. These non-traditional sites typically are subject to much stricter space limits, load

²⁷ See Motion for Administrative Stay of CTIA – The Wireless Association, EB Docket No. 06-119, WC Docket No. 06-63 (filed July 31, 2007); NextG Networks, Inc. Request for Partial Stay of Commission's Back Up Power Rule, EB Docket No. 06-119, WC Docket No. 06-63 (filed July 31, 2007).

limits, permitting requirements and aesthetic restrictions than traditional sites. In many instances, carriers are forced to utilize smaller and lighter DAS nodes in order to make use of these sites. In most instances, it simply would not be possible to meet an 8 hour on-site back-up power requirement at these non-traditional sites and at DAS nodes.

22. Based on the foregoing, it is apparent that compliance with the newly adopted back-up power requirement is burdensome, impractical and, in many instances, impossible. The practical effect of maintaining the rule would be either to force carriers to discontinue service to the public, or to operate in violation of the Commission's rules. Neither outcome would serve to promote the objectives of the Katrina Panel or of the Commission in adopting its *Order*. Under these circumstances, reconsideration of the rule would be in the public interest.

VI. The Relief Sought on Reconsideration

23. MetroPCS respectfully requests that at a minimum the Commission issue a clarification that the term "cell site" does not include non-traditional sites. MetroPCS also requests the Commission to rescind Section 12.2 of its rules entirely. Rather than adopt an inflexible mandatory requirement that applies to all Remote Sites, the Commission should adopt a guideline that encourages carriers to adopt and implement a plan consistent with industry best practices designed to enable them to maintain critical communications services during times of commercial power failures. In adopting this guideline, the Commission should make clear that, in formulating a commercially reasonable plan, carriers are entitled to take into consideration local, state and federal laws, space and load limitations, permitting requirements, economic feasibility and issues of commercial impracticability.

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

Melanie S. Klint

Corporate Counsel

MetroPCS Communications, Inc.

8144 Walnut Hill Lane, Suite 800

Dallas, Texas 75231

Telephone: (214) 265-2550

Facsimile: (866) 685-9618

Its Attorneys

August 10, 2007

Declaration

I, Sharon L. Cary, do hereby declare that:

1. I am the Staff Vice President of Market Operations for MetroPCS Communications, Inc.
2. I am familiar with the exact contents of the foregoing "Petition of MetroPCS Communications, Inc. for Clarification and Reconsideration."
3. The facts set forth therein pertaining to the operations of MetroPCS, and to the conditions that would pertain to an effort by MetroPCS to comply with an 8-hour on-site back-up power requirement at every Remote Site, are true and correct to the best of my knowledge, information and belief.

This declaration is given on this 10th day of August 2007 under penalty of perjury under the laws of the United States.

