

October 18, 2007



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

Re: Notice of Oral *Ex Parte* Presentation in WT Docket Nos. 06-150,  
05-211

Dear Ms. Dortch:

On October 17, 2007, Harold Feld of the Media Access Project, Shawn Chang of Free Press, and John Windhausen representing Public Knowledge, met with Chairman Martin, Aaron Golberger, wireless advisor to the Chairman, and Fred Campbell, Chief of the Wireless Bureau, with regard to the above captioned matter to discuss the availability of a DE credit for licensees offering to wholesale 100% of their spectrum on non-discriminatory terms.

PISC has consistently supported the introduction of wholesale spectrum access as an important public interest objective. As detailed extensively in PISC's filings, mandatory wholesale will promote competition, the broader interests of the Communications Act, and the values of the First Amendment by enhancing the ability of individuals to speak directly to each other via the electronic spectrum. Accordingly, PISC supports making a designated entity (DE) credit available to a licensee that agrees to wholesale 100% of its spectrum in an open and non-discriminatory manner that would further these vital goals.

At the same time, however, PISC recognizes that the Commission must impose significant safeguards to ensure that incumbents do not simply absorb all of the available spectrum capacity, even if a non-incumbent avails itself of the DE credit and holds the license. *See, e.g., Ex Parte Comments of PISC*, WT Docket No. 06-150 at Appendix A (filed April 5, 2007) (*PISC April 5 Comments*). The Commission must consider the lesson of the Educational Broadband Radio Service (EBRS), formerly the Instructional Television Fixed Service (ITFS). There, the Commission permitted non-commercial licensees to license up to 95% of their total capacity with few other limitations on the wholesale market. As a consequence, the available wholesale

spectrum has been largely aggregated by two providers – Sprint and Clearwire – in long-term contracts that effectively prevent the EBRS licensees from making their spectrum available to others in the market for the duration of the agreement.

Without passing judgment on the merits of the EBRS regulatory scheme as it now stands, PISC has advocated throughout this proceeding for a very different vision of a wholesale market. Rather, as explained in previous filings, wholesale access should enable multiple providers within a market and prevent any single retailer, incumbent or small group of incumbents from effectively warehousing or denying it to competitors by leasing the entire available capacity in long term leases. Furthermore, it is critical that the Commission take steps to ensure that the market for wholesale spectrum is both transparent and non-discriminatory. Otherwise, large incumbents will enjoy significant advantages in negotiating deals, or the wholesale licensee may use its superior market knowledge and resources to exert market power over smaller wireless providers.

Certain wholesale proposals, such as the proposal provided by PISC, *see Comments of PISC*, WT Docket No. 06-150, Appendix A (filed May 23, 2007), or the proposal for real-time dynamic auctions provided by Google, are inherently safe from the danger that a single provider or small number of providers will monopolize the available wholesale bandwidth. These systems are both transparent and allow an infinite number of providers. Other wholesale models exist, however, and PISC does not believe limiting a potential DE credit to these two models would serve the public interest. Nevertheless, consistent with previous PISC filings, PISC asks the Commission to establish safeguards to ensure that any entity receiving a DE credit and asking for an exception to the existing DE wholesale limit will not enter into agreements the effect of which – whether intended or not – is to frustrate the public interest goal of providing spectrum for competing services in a transparent and non-discriminatory manner.

***Limit the capacity any one entity may lease.*** As an initial matter, PISC asks the Commission to limit the capacity any one entity may limit. In comments submitted previously, PISC initially suggested permitting a single entity to lease up to 51% of the licensee’s capacity, *see PISC April 5 Comments* at Appendix A, as the wholesale licensee reserved 75% of its capacity for “non-incumbents.” *See Ex Parte Comments of Ad Hoc Public Interest Spectrum Coalition*, WT Docket No. 06-150, at 10 (filed April 3, 2007) (“*PISC April 3 Comments*”). This recommendation was raised in the context of other safeguards (such as spectrum caps). Further, in the *Second Report and Order* the Commission rejected proposals for “new entrant” credits and limitations on “incumbent” bidding because the Commission determined that it would be difficult to formulate a suitable definition for “incumbent” or “new entrant.”

Accordingly, PISC now proposes that any entity receiving a DE credit wishing to

wholesale spectrum above the current DE limit must wholesale 100% of its spectrum capacity, but must not provide more than 20% of its capacity to a single entity. This will prevent the two largest national providers from obtaining more than 40% of the spectrum, and will ensure that even in markets where the four largest providers each lease 20% of the available capacity, the same leased capacity will remain available for a new entrant.

In the context of a national or REAG license, such as the C Block licenses, it is necessary to further define what is meant by “20% of capacity.” It would not serve the public interest goals that justify an exception to the existing rules if the DE licensee could divide the capacity of its license to a single provider on a geographic basis, or in other ways that allowed a single provider to effectively monopolize the available wholesale spectrum in a given market. For example, if a national licensee could lease 100% of its capacity to a single entity in the top DMAs under a theory that this amounted to only 20% of its total license capacity, or if it could wholesale 100% of its capacity to a single entity during the peak hours of the day, or if it could wholesale 20% of the theoretical capacity when it has only built out a portion of the system, it would defeat the purpose of making wholesale spectrum available.

Accordingly, PISC recommends the Commission require that, to be eligible for a DE credit, a wholesale licensee may lease no more than 20% of its actual signal capacity at any time to a single entity, as measured on an EA basis. By limiting the spectrum available to a single operator to 20% of the actual signal capacity rather than the theoretical capacity, the Commission will avoid the problem of a single entity monopolizing the available wholesale spectrum within a definable geographic area or monopolizing the peak times of use. Further, by limiting the 20% capacity on an EA by EA basis, the Commission can ensure that wholesale spectrum will be available to multiple providers in every market.

***Conditions to ensure non-discrimination and transparency.*** A functioning market depends on transparency. Because the number of wholesalers is likely to be limited to a single licensed entity (at least initially), there is no way for potential lessees to establish a competitive market price or determine whether terms are non-discriminatory unless the Commission imposes rules to create this transparency.

Traditionally, the Commission has ensured non-discrimination and transparency in such circumstances by requiring providers to tariff the rate or, at the least, make a rate card available upon request. If the Commission does not require a DE wholesale licensee to provide a tariff or standard rate card, the Commission must, at the least require disclosure of all contracts and prohibit the use of non-disclosure agreements (NDAs). If the permission permits the license to engage in private negotiations without also requiring disclosure of all relevant terms or conditions, it will be impossible for the market to set a fair and competitive price for wholesale access as

intended. Nor will it be possible to determine whether the licensee is, in fact, making spectrum available on a non-discriminatory basis.

***Conditions to prevent warehousing and ensure spectrum efficiency.*** As the Commission determined in the context of the D Block in the *Second Report and Order* it is possible for a licensee to lease spectrum on an as available or “interruptible” basis, with the spectrum returned to the priority user under necessary circumstances. Thus, the D Block licensee may lease capacity from the public safety block, but must ensure that public safety can access the spectrum instantly when it has need. PISC believes this same technology can enhance spectrum efficiency and prevent warehousing in the wholesale context. For purposes of explanation, PISC will refer to spectrum that must be made available to a licensee immediately upon request as “demand spectrum” and the lessee in such cases as the “primary user.” PISC will refer to spectrum leased on an as available basis, subject to demand from a primary user, as “interruptible spectrum” and the lessee as the “secondary user.”

To ensure spectrum efficiency, PISC proposes that the 20% per entity limit apply only to “demand spectrum.” Thus, while a single entity could only lease 20% of capacity as a primary user, it could lease any remaining available spectrum as a secondary user, subject to the demands of other primary users. This will ensure that in smaller markets, where there may be fewer than five users seeking to use the spectrum, the available capacity does not lie fallow. At the same time, as new competitors enter the market, they may “bump” the secondary user back to its demand spectrum.

In addition, PISC suggests that the wholesale licensee must make available on a secondary basis all leased demand spectrum not in use, subject to the demand of the primary user. This will prevent primary users from warehousing spectrum by leasing it and not using it. Furthermore, this will promote spectrum efficiency, potentially allowing spectrum to become available on a realtime basis. At the very least, if the Commission does not wish to require the wholesale DE to lease the demand spectrum not in use at any given time, the Commission must prohibit the wholesale DE from signing any agreement that would limit its right to do so.

Again, the example of the EBRs spectrum should provide the Commission with sufficient reason to adopt this safeguard. Many EBRs licensees sign exclusive contracts that prevent this sort of secondary leasing of available capacity. As a result, much spectrum capacity lies fallow, because the lessee of the EBRs spectrum has not yet deployed systems or has not yet acquired sufficient customers to need the capacity.

***Limit the length of contracts.*** The EBRs experience also provides an important lesson with regard to the length of contracts. Initially, the Commission permitted EBRs licensee to lease access for the duration of the license – a term of 15 years. This

has had the effect of preventing a dynamic market from emerging. Instead, the standard has become for EBRS licensees to sign contracts setting a rate for the length of the license, with a right of renewal for the lessee on renewal of the license and clause permitting the lessee to acquire permanent rights to the EBRS licensee's spectrum in the event a change in the Commission's rules makes this permissible.

Again, without passing judgement on the merits of this in the context of the BRS/EBRS band, PISC has advocated for a very different result in the wholesale market here. Accordingly, PISC asks the Commission to limit any wholesale contracts to a term of 1 yr. This will give lessees sufficient certainty, while still ensuring that a dynamic and competitive market emerges. In addition, it makes it possible for a provider that might not even exist today to hope to buy wholesale capacity in the future. If the Commission permits a wholesale DE to enter into longer term contracts, there is a serious danger – as demonstrated in the EBRS context – that a handful of entities will enter into what amount to permanent leases for the spectrum capacity and foreclose capacity from future competitors.

PISC believes that it would serve the public interest to provide a DE credit to an entity that would wholesale 100% of its spectrum in a non-discriminatory basis, subject to the safeguards proposed. Although PISC continues to believe that the Commission should have required mandatory wholesale, the use of a DE credit to encourage the development of a non-discriminatory wholesale model will greatly enhance the availability of spectrum to competitors and innovators.

In accordance with Section 1.1206(b) of the Commission's Rules, 47 CFR §1.1206, this letter is being filed with your office.

Respectfully submitted,

/s/

Harold Feld  
Senior Vice President

cc: Chairman Martin  
Aaron Goldberger  
Fred Campbell