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May 29, 2008

57739-000020

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band (WT Docket No. 07-195) (AWS-3); Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands (WT Docket No. 04-356)(AWS-2)

Dear Ms. Dortch:

On May 28 and May 29, 2008, Mark A. Stachiw of MetroPCS Communications, Inc. ("MetroPCS") and Carl W. Northrop of Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings") participated in a series of separate meetings with (1) Commissioner Robert McDowell and his Chief of Staff, Angela Giancarlo (Justin Lilley of TeleMedia Policy Corp and Larry Sidman of Paul Hastings also attended this meeting); (2) Commissioner Tate and Wayne Leighton, Legal Advisor to Commissioner Tate (Mr. Lilley also attended this meeting); (3) Renee Crittendon, Legal Advisor to Commissioner Adelstein (Mr. Sidman also attended this meeting); and (4) Bruce Gottlieb, Legal Advisor to Commissioner Copps (Mr. Sidman also attended this meeting) to discuss the above-referenced proceedings.

MetroPCS made an oral presentation consistent with the pleadings filed on its behalf in the above-referenced proceedings. In addition -- in response to various trade press reports of the Commission's plan to reassign 5 MHz of spectrum originally designated for paired use as part of the AWS-2 J-Block and to combine it with the 20 MHz of AWS-3 spectrum to create a contiguous 25 MHz block in the 2155 to 2180 MHz range on which the winning bidder would be obligated to make certain "free" service offerings and, perhaps, meet various open access and content filtering requirements¹ -- over the course of the various meetings MetroPCS made the following points in its oral presentations:

¹ MetroPCS is not privy to the precise nature of the proposal under consideration and has no alternative but to act based upon press reports that may be incomplete or inaccurate. As discussed in greater detail below, the proposals under consideration appear to be sufficiently different from the proposals that were subject to proper notice in the AWS-2 and AWS-3 dockets to merit a supplemental Notice of Proposed Rulemaking and comment period.

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- MetroPCS opposes breaking up the paired AWS-2 J Block. Rural, regional and mid-tier carriers, which have been an extremely positive competitive influence in the wireless marketplace, have critical needs for additional paired spectrum resources in order to meet substantial market demands. The continuing need of these carriers for spectrum was resoundingly affirmed by the robust bidding for the Lower Band 700 MHz paired spectrum in the recently completed Auction 73.
- Unfortunately, most of the regional and mid-tier carriers were unsuccessful in meeting their spectrum needs in Auction 73 due to the relatively small number of channels that were suited to their business plans and the large spectrum appetites and financial wherewithal of certain large participants. As a result, these regional and mid-tier carriers continue to have substantial unsatisfied demands for paired CMRS spectrum. The proposed Commission plan would destroy the J Block and sacrifice 50% of the paired spectrum in the originally proposed AWS-2 allocation without any evidence in the record that the public interest would be served by that outcome. Reducing the AWS-2 allocation to a single paired frequency block would significantly compromise the Commission's efforts to foster competition in a wireless industry becoming increasingly represented by a small number of major service providers.
- The Commission's 25 MHz AWS-3 plan could result in 5 MHz of spectrum in the 2020 to 2025 MHz band -- which would be extremely valuable even when limited to low power use if paired with the higher powered 2175 to 2180 MHz base transmit frequencies -- becoming useless for the Advanced Wireless Services to which it was to be devoted. In effect, this 5 MHz block will have become "orphaned," and the prospects for beneficial use will be extremely limited if the paired 2175 to 2180 MHz band is lost to the AWS-3 allocation.
- The Commission is legally obligated to provide public notice and to seek further comment *before* adopting its proposed 25 MHz AWS-3 band plan because this plan is so radically different from all previously proposed plans. Up until now, the AWS-2 and AWS-3 spectrum allocation proceedings have been separate, and the Commission gave no notice in either docket of any intention to consider reassigning 5 MHz of AWS-2 spectrum to the AWS-3 band. Serious Administrative Procedure Act ("APA") concerns are raised by this eleventh hour change in course *if* the Commission proceeds directly to an order without giving interested parties advance notice and a meaningful opportunity to comment. Under the APA, an agency must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved"² as well as

² 5 U.S.C. § 553(b)(3).

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allow interested parties an opportunity to comment on the proposed rules.³ This has not been done.⁴

- The need for further public comment is particularly acute because the current record contains conflicting evidence regarding the potential for interference under the previously noticed AWS-2 and AWS-3 band plan options, and *no evidence* addressing the interference implications of the previously unanticipated 25 MHz AWS-3 allocation. Obviously, thoughtful consideration of potential interference issues is a core obligation of the Commission, and the development of a full and complete record on interference issues is essential. Indeed, the Commission in other instances has undertaken open and transparent interference testing and measurements in order to ensure that harmful interference does not result from an allocation,⁵ an approach which should be considered here.
- Further public comment also is desirable because robust comment on the originally-proposed AWS-3 allocation was stifled because the anti-collusion rule from Auction 73 was in place during the initial comment period, which chilled meaningful discussions and debate between industry members on the AWS-3 band plan. In addition, the record of the AWS-2 proceeding is stale given the significant changes in circumstances that have occurred since the proceeding was initiated in 2004. Moreover, the records in both proceedings would be enhanced by taking comment as to the public interest determinations that are suggested by the outcomes in Auction 73.
- A government-mandated free broadband Internet access service could completely undermine the competitive forces that already are at work to foster additional wireless broadband pipes. Recent reports have indicated that Sprint and Clearwire are moving forward to provide a commercial wireless broadband Internet access service. Injecting a mandatory “free” offering into the market could undermine these pro-competitive efforts and actually forestall additional broadband competition. Having the Government dictate the terms of a service offering by one competitor in an otherwise free market also violates the oft-stated FCC objective of fostering competition on a level playing field.

³ 5 U.S.C. § 553(c).

⁴ The May 23, 2008, *News Release* announcing the tentative agenda for the June 12th Open Meeting, and the related press conference of Chairman Martin, do not constitute adequate notice, and do not provide an adequate opportunity for comment, to satisfy the APA because they are “wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal” at issue. *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

⁵ See *Public Notice*, DA 08-118 released January 18, 2008 (announcing the latest FCC Office of Engineering and Technology White Spaces testing program).

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- The Commission's proposed allocation appears to be specifically tailored to M2Z's prior business plan proposal – so much so that this newly reported plan has the appearance of a specially tailored “designer allocation.” The recent experience with the 700 MHz D Block indicates that designer allocations of this nature are very risky, and could result in valuable spectrum laying fallow for a substantial period of time. As MetroPCS previously has indicated in multiple comments to the Commission, “command and control” spectrum allocation policies that are designed to meet specific business plans, or specific Commission-imposed objectives, are not nearly as beneficial as market-based policies in which spectrum is auctioned off with minimal restrictions and free market forces are allowed to dictate the particular uses to which the spectrum is put.
- Using Auction 73 as a guide, the market appears to be putting a high value on paired spectrum that is made available in relatively small spectrum blocks and geographic areas (this conclusion is based on the high prices paid for the Lower Band paired 700 MHz commercial channels in Auction 73) and not as high a value on spectrum blocks of 20 MHz or more geared to nationwide use (this conclusion is based upon the relatively small number of bidders and lower per pop prices paid for the Upper Band C Block in Auction 73). Taken together, these market signals indicate that the public interest will not be served by sacrificing the AWS-2 J-Block in order to create a nationwide 25 MHz allocation.
- The Commission should establish a reserve price for any nationwide allocation of AWS-3 spectrum to ensure that the winning bidder will have evidenced a seriousness of purpose and has a substantial stake in promptly developing the services contemplated by the Commission. A reserve price based upon the prices paid in the AWS-1 auction also would make sure that the objective of Section 309(j)(3) of the Communications Act of allowing the public to recoup a fair value for scarce radio spectrum sold at auction is met. In addition, the Commission should impose other mechanisms for any nationwide licenses, such as a letter of credit or bond requirement, in order to ensure that valuable spectrum is not devoted to an unfunded business plan which could result in spectrum becoming tied up in bankruptcy or otherwise lying fallow.
- To the extent that the revised AWS-3 allocation mandates content filtering, serious Constitutional/First Amendment issues are raised in light of pertinent Supreme Court decisions.⁶

⁶ See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1990); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *Ashcroft v. American Civil Liberties Union et al*, 542 U.S. 656 (2004).

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- Given the troubling APA notice and Constitutional/First Amendment issues, the Commission risks a successful legal challenge to its altered AWS-3 plan. The public interest is not served by an allocation plan that presents a meaningful litigation risk that will adversely affect potential bidders and inject possible delay into the process.

No written materials were distributed at the meetings.

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

Respectfully submitted,

/s/ Carl W. Northrop

Carl W. Northrop
Michael Lazarus
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: (via email) Commissioner McDowell
Commissioner Adelstein
Commissioner Copps
Commissioner Tate
Angela Giancarlo
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