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June 5, 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); 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)

Dear Ms. Dortch:

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits this *ex parte* letter responding to certain inaccurate assertions made by M2Z Networks (“M2Z”) in its June 3, 2008 letter (the “M2Z Letter”)² regarding the above referenced-proceedings.

Contrary to the post hoc rationalizations in the M2Z Letter, the Commission has not provided legally-sufficient notice and the required opportunity for comment on the plan - - which has been reported in the trade press but is not referenced or even alluded to or implied anywhere in either the AWS-2 or AWS-3 Notice of Proposed Rulemakings - - to combine 5 MHz of spectrum originally designated for paired use as part of the AWS-2 J Block with the 20 MHz of AWS-3 spectrum to create a contiguous 25 MHz block in the 2155 to 2180 MHz range. The two rulemakings had separate notice and comment periods separated by years and the more recent rulemaking notice did not suggest or imply that commenters should consider matters at issue in the first rulemaking in the second rulemaking. In order to attempt to address the serious Administrative Procedure Act (“APA”)³ issues raised by MetroPCS and numerous other parties, M2Z makes a number of self-serving assertions that mischaracterize the position of MetroPCS with regards to the AWS-2 and AWS-3 bands and takes completely out of context isolated references in

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

² Letter from Uzoma C. Onyeije to Marlene Dortch, WT Docket Nos. 07-195 and 04-356, filed June 3, 2008.

³ 5 U.S.C. § 553.

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the Commission's Notice of Proposed Rulemaking in the AWS-3 docket.⁴ As demonstrated below, M2Z's efforts to find adequate notice fail and the Commission should put out for notice and comment any plan which includes the 5 MHz of AWS-2 J Block spectrum.

As an initial matter, M2Z notes that "MetroPCS is on record in this proceeding suggesting that the Commission should 'take steps to consolidate this proceeding with the AWS-2 proceeding, to consider the two spectrum bands together in assessing the band plan, service rules and geographic areas, and to make all of the AWS-2 spectrum and AWS-3 spectrum available for application in a single auction.'"⁵ This is absolutely correct. MetroPCS consistently has expressed its desire for the Commission to create and auction as many fungible units of spectrum at the same time. However, MetroPCS asked the Commission to take comment on such a consolidation of the AWS-2 and AWS-3 bands in order for the Commission to deal with many of the issues that such a consolidation would bring about. For example, MetroPCS noted that "[b]y receiving comment on possible interference concerns between the bands concurrently, the Commission can ensure that such concerns are adequately resolved on a comprehensive rather than a piecemeal basis."⁶ However, the Commission never granted the consolidation that MetroPCS sought. Combining portions of AWS-2 with AWS-3 at the order stage without allowing interested parties to comment on a previously unanticipated 25 MHz AWS-3 allocation bears no relation to the approach MetroPCS was suggesting. The comment period requested by MetroPCS, and the development of a full and complete record, is necessary in order to resolve a whole host of issues raised by the radically altered band plans that have been mentioned in recent reports. The lack of Commission notice of its proposal has precluded such a full and complete record.

M2Z then suggests that the Commission's "NPRM specifically contemplated the combination of these bands, and sought comment on multiple occasions, on any ideas concerning potential Commission action to prevent harmful interference to adjacent bands."⁷ However, analysis reveals that all M2Z has managed to unearth are tiny fig leaves that are completely inadequate to cover the serious APA issues, and thus they cannot sustain the "designer allocation" M2Z is seeking from the Commission without a further notice and rulemaking. Indeed, a closer look at the portions of the *NPRM* that M2Z cites conclusively demonstrates that the Commission did not initiate the notice and comment for a 25 MHz "free" broadband Internet service required to satisfy its APA

⁴ *In the Matter of Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, Notice of Proposed Rulemaking, FCC 07-164 (rel. Sept. 19, 2007) ("NPRM").

⁵ M2Z Letter at 6; MetroPCS Comments, WT Docket 07-195 at i (filed Dec. 14, 2008) ("MetroPCS Comments").

⁶ MetroPCS Comments at 6.

⁷ M2Z Letter at 6.

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obligations. MetroPCS replicates each M2Z citation of the *NPRM* below, with the proper characterization following each citation:

- “We also seek comment on whether an auction of licenses in a simplified subset of alternative band plans with different technological approaches might be the optimal way to determine which technological approach to implement.”⁸

Here, M2Z cites an introductory paragraph of the AWS-3 *NPRM* that alludes to questions the Commission poses in the “Auction Issues” section of the *NPRM*.⁹ Clearly, the reference here to “alternate band plans” is limited to plans involving the spectrum at issue in the proceeding (2155 to 2175 MHz) and cannot properly be read to include other spectrum not under consideration in the AWS-3 proceeding. Even a cursory examination of this section reveals that the Commission was addressing a narrow range of auction options involving the “three different technological approaches that appear to raise different tradeoffs between flexibility of use and the necessary interference protection requirements . . . [and] seek[s] comment on certain related auction issues, if the Commission established a licensing regime that requires the use of competitive bidding to resolve mutually exclusive applications.”¹⁰ These paragraphs refer to the possible reliance “on an auction-based mechanism for selecting among a limited number of band plan options,”¹¹ to determine which previously identified band plan for AWS-3 spectrum: uplink/downlink, structured uplink/downlink, or downlink use would be the best use for this spectrum. This reference clearly only contemplates the band plans with respect to the 20 MHz of AWS-3 spectrum and these paragraphs do not suggest new technological approaches for the Commission to consider, and nowhere does the Commission suggest the introduction of additional AWS-2 spectrum into any of these band plans. M2Z’s attempt to shoehorn notice of a 25 MHz AWS-3 and AWS-2 block into this citation is not at all credible and in fact illustrates that the Commission only sought comment on alternatives for the 20 MHz of AWS-3 spectrum.

- “Seek comment on our proposals on the power limits, out-of-band emissions restrictions, and other technical or operational requirements that might be needed to prevent harmful interference to operations in adjacent bands.”¹²

⁸ *NPRM* at para. 2.

⁹ *Id.* at paras. 39-48.

¹⁰ *Id.* at para. 39.

¹¹ *Id.* at para. 42.

¹² *Id.* at para. 5.

Here, M2Z cites to another introductory paragraph of the AWS-3 *NPRM*. The plain meaning of this sentence is to solicit comment on the technical and operational steps that should be taken within the 2155 MHz to 2175 MHz band to avoid interference in adjacent bands. In the following paragraphs, the Commission deals with issues specifically limited to the AWS-3 band, and does not propose or infer that additional spectrum would ease any of its concerns.¹³ The Commission seeks power limits, out-of-band emissions restrictions and technical or operational requirements that relate specifically to the 2155-2175 MHz band, and not that band in combination with other spectrum. The Commission also consistently references AWS-2 spectrum separately from AWS-3 spectrum as well, and gives no indication that there might be a combination of the two at any point. Indeed, this reference should be properly read to undertake discussion of what the Commission should do to protect AWS-1 and AWS-2 spectrum – not to protect AWS-2 spectrum by eliminating it.

- “For example, a licensee could specify the 2020-2025 MHz block of AWS-2 as the mobile-transmit block, and combine the corresponding proposed AWS-2 base-transmit block with all of the AWS-3 blocks to form a larger base-transmit block at 2155-2180 MHz, providing a 5:1 ratio (25 megahertz downlink to five megahertz uplink).”¹⁴

Here, the *NPRM* specifically notes that a *licensee* could potentially combine spectrum from the separate AWS-2 band with spectrum from the separate AWS-3 band in its discussion of possible advantages of its “downlink” approach for the AWS-3 band.¹⁵ The *NPRM* does not reference or suggest that the *Commission* itself was considering a combination of the two bands in its allocation order or that the Commission was seeking comment on whether it should combine the spectrum.

- “AWS-3 base, fixed, or mobile stations could cause interference to AWS-1 and proposed AWS-2 services, which will operate in the 2110-2155 MHz and 2175-2180 MHz bands, respectively, as well as other existing services that currently operate in the upper part of the 2.1 GHz band – such as Broadband Radio Service (BRS), Fixed Microwave services (FS) and MSS/ATC. In the following paragraphs, we seek comment on possible technical and operational rules to protect these various services from harmful interference.”¹⁶

¹³ *Id.* at paras. 49-81.

¹⁴ *Id.* at para. 29.

¹⁵ *Id.* at paras. 28-29.

¹⁶ *Id.* at para. 49.

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M2Z yet again grabs a general statement from the Commission's *NPRM* and mischaracterizes it. Clearly this sentence seeks comment on technical and operational rules within the 2155 MHz to 2175 MHz band to protect AWS-1 and AWS-2 services from harmful interference. The Commission references the possible specific band plan approaches for the 2155-2175 MHz spectrum – and does not anywhere suggest or seek comment on a combination of AWS-2 and AWS-3 spectrum or that one way to protect from harmful interference is to eliminate the band that might be interfered with. The Commission even notes its concern regarding the potential for interference in the 2175-2180 MHz band if mobile operations were permitted in the 2155-2175 MHz band.¹⁷ However, the *NPRM* does not suggest or solicit any comment on whether these interference concerns could be resolved by a combination of the 2155-2175 MHz band with the 2175-2180 MHz band.

- “We therefore seek comment on what OOB attenuation, beyond our standard $43 + 10 \log P$ dB limit, might be required to enable AWS-3 mobiles to protect MSS/ATC mobiles operating in the 2180-2200 MHz band. We also ask whether we should adopt some type of variable out-of-band emission limits based on the particular technologies and system architecture used by AWS-3 licensees to protect such mobiles.”¹⁸

This last citation by M2Z demonstrates that the Commission specifically sought comment on a specific OOB attenuation that would enable AWS-3 mobiles (which are consistently referred to as 2155-2175 MHz in the *NPRM*) to protect operations in the 2180-2200 MHz band. This deals with OOB in the 2155-2175 MHz band and does not even refer to the 2175-2180 MHz spectrum. Any suggestion whatsoever that the Commission desired comment on a combination of AWS-2 and AWS-3 spectrum via this citation is absurd.

Based on the above discredited assertions, M2Z unbelievably states that “[a] logical outgrowth from those questions would be the conclusion that the best way to protect against interference to both 2175-2180 operations and operations in the 2180-2200 MHz band is to avoid licensing the 2175-2180 MHz band separately.”¹⁹ However, it is interesting to note that not one commenter in the record, prior to the Commission's announcement of its tentative agenda for the June 12, 2008 meeting, suggested or even mentioned the possible combination of the 2155-2175 MHz block with the 2175-2180 MHz block. This includes M2Z, who consistently has made submissions into the record into the AWS-3 proceeding referring to the 2155-2175 MHz band – and without mentioning any part of AWS-2 or filing anything in the AWS-2 docket - prior to the Commission's announcement of its tentative agenda.

¹⁷ *Id.* at para. 55.

¹⁸ *Id.* at para. 57.

¹⁹ M2Z Letter at 7.

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It is clear that the Commission's *NPRM* does not satisfy its APA obligations and is not a logical outgrowth of the *NPRM* and therefore would be subject to legal challenge. As previously noted by MetroPCS, the APA imposes notice-and-comment procedures that must be followed by an agency before a rule can be issued. 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"²⁰ as well as allow interested parties an opportunity to comment on the proposed rules.²¹ In addition, a court must set aside any agency-made rule in this context if it is "without observance of procedure required by law."²² Not only is following the APA required, but MetroPCS believes that the public interest is best served when auctions are not conducted with substantial clouds over them. Here, if the Commission moves forward it runs the risk of a significant APA challenge which would certainly place a dark cloud over any auction of the spectrum.

Moreover, while a final rule need not be a replica of a rule proposed in a notice, the final rule must be a "logical outgrowth" of the rule proposed.²³ A final rule is a "logical outgrowth" of a proposed rule only if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."²⁴ "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal. . . The test that has been set forth is whether the agency's notice would fairly appraise interested persons of the subjects and issues [of the rulemaking.]"²⁵ In this instance, the answer is overwhelmingly no.

The record in these proceedings contains no references to any combination of the AWS-2 and AWS-3 spectrum. Significantly, the first mentions of such a combination in the record came after Chairman Martin publicly announced to the press that such a proposal was being placed on the Commission's tentative agenda for its June 12, 2008 meeting.²⁶ In addition, the combination of AWS-2 and AWS-3 spectrum would not be considered a "logical outgrowth" of anything mentioned in the two separate NPRMs relating to the two bands. Each spectrum block consistently has been dealt with separately, including the separate promulgation of technical rules for each band in a

²⁰ 5 U.S.C. § 553(b)(3).

²¹ 5 U.S.C. § 553(c).

²² 5 U.S.C. § 706(2)(D).

²³ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

²⁴ *International Union, United Mine Workers, of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1258 (quoting *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)).

²⁵ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

²⁶ "FCC May Auction Another 25 MHz of Spectrum," RCRNews.com, Jeff Silva, May 23, 2008.

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separate docket, and as demonstrated above M2Z is unable to point to any evidence in the *NPRM* that the Commission intended to solicit comment on such a proposal. Indeed, the *NPRM* is “wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal” at issue.²⁷

Meanwhile, the fact that submissions have now been made in these dockets regarding the Commission’s proposed 25 MHz plan does not eliminate the Commission’s obligation to seek notice and comment of the plan. The Commission cannot use comments made in its docket as a mitigating factor for not allowing for full notice and comment under the APA. It is established law that the comments of other interested parties do not satisfy the Commission’s obligation to give notice.²⁸ “As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap from a comment.”²⁹

Perhaps the most important point to be made in response to M2Z is that the Commission should not be making an important spectrum allocation when the allocation plan has not been thoroughly vetted and commented on by interested parties. The issue should not be whether there is some vague generalized assertion in the *AWS-3 NPRM* that can be broadly construed to permit this allocation. The purpose of the APA is to foster reasoned agency decisionmaking, and the core premise of the administrative process is to provide adequate notice in order to foster meaningful comment which will lead to reasoned decisionmaking. Notice is at the core of this requirement and without such notice, there would likely not be such reasoned decisionmaking. None of the citations offered by M2Z alter the demonstrable fact that no one - - not even M2Z - - read either the *AWS-2* or *AWS-3* notice to seek comment on a possible reassignment of 5 MHz of *AWS-2* spectrum to the *AWS-3* block. If the Commission wants to consider such an assignment, it must give interested parties a reasonable opportunity to comment. A Commission order that adopts a 25 MHz “free” broadband Internet proposal may face a serious APA challenge if the Commission does not provide interested parties advance notice and a meaningful opportunity to comment – which it has not done in this situation.

²⁷ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986).

²⁸ *Id.*

²⁹ *Id.*; quoting *AFL-CFO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985).

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

Respectfully submitted,

/s/ Carl W. Northrop

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cc: (via email) Chairman Martin
Commissioner McDowell
Commissioner Adelstein
Commissioner Copps
Commissioner Tate
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