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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 to provide additional detail regarding its request that the Commission put out a Further Notice of Proposed Rulemaking with respect to the numerous unanswered questions regarding its intentions for the AWS-2 and AWS-3 bands.[2]

On May 23, 2008, Chairman Martin announced in a press conference a 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 on which the winning bidder would be obligated to make certain "free" service offerings. Since the announcement of that proposal, there have been numerous *ex parte* filings in the record showing that there has not been proper notice regarding such a plan under the Administrative Procedures Act ("APA"),[3] and raising a number of issues and possible concerns about the proposed allocation.

If the Commission solicits additional comment on the AWS-2 and AWS-3 spectrum blocks, it should provide notice and seek comment on a wide-range of issues, not only on whether a portion of AWS-2 spectrum should be combined with AWS-3 to create a 25 MHz block. For example, reports indicate that the item under consideration

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

[2] *See Ex Parte* letter filed by MetroPCS on June 5, 2008 in the above-referenced dockets.

[3] 5 U.S.C. § 553

contemplates that an AWS-3 licensee would be obligated to devote a certain portion of its capacity to "free" service, to provide a minimum data speed for the "free" service, to utilize a form of content filtering, and to meet certain open access requirements. However, the proposed rules and regulations that would seek to implement these requirements have not been subject to notice and comment as required by the APA. Putting out these proposed rules and regulations for comment would better ensure that the APA obligations and the policy objectives of the Commission are met and reduce the risk that the scarce remaining spectrum available will not be put to the highest and best use for the American public.

Ideally, the item under consideration includes detailed regulations that define "free" service and what the carrier can include with such free service, establishes specific procedures to measure the percentage of capacity devoted to free service and the speed of service, establishes fixed interference protection criteria and coordination procedures, specifies the precise open-access conditions to which the licensee is subject to, provides details regarding the precise content filtering obligations that apply, and provides substantial legal analysis on the Commission's authority to promulgate these rules and regulations. By putting those regulations out for comment the Commission can reduce the prospect that its rules will not pass legal muster, avoid unintended consequences or gaps that will enable the ultimate licensee to avoid satisfying the policy objectives the Commission is seeking to advance and to allow public comment on the policy trade-offs associated with such a service.

At the outset, MetroPCS notes its objection against any type of "designer allocations." As the Commission's experience with the D-Block demonstrates, designer allocations run the risk that they are so closely tied to a particular entity's business model that the allocation may fail if the business entity fails. The better approach is to allow flexibility of use and allow the marketplace to determine the highest and best use for this spectrum.

However, to the extent the Commission decides to move forward, at the very least, the Commission's current proposed rules should address the following questions and points – and if so, the Commission should seek comment on its proposed rules, which have not been fully examined in the record of this proceeding:

Issues pertaining to the "free" service commitment

- How is "free" wireless broadband Internet access service defined? For instance, would such a service be able to be advertiser-supported -- meaning that the user could constantly be bombarded with pop-up ads for this "free" service? If so, what limits would be imposed on such advertising-support to enable the service to be useful? What terms of

service would attach to the service – could the licensee require privacy information in order to receive such free service?

- How robust must the "free" service be? Could the licensee offer a service that only provides limited access to the Internet, thus making it little more than a teaser for premium pay services? Will the licensee of a "free" wireless broadband Internet service be allowed to create a "walled garden" for its "free" service tier, in which consumers are limited from the full use of the Internet? For example, can the AWS-3 licensee subdivide its block of spectrum and develop a premium system on 3/4ths of the spectrum with high capacity and throughput while relegating the remaining 25% of the spectrum to a lower capacity system with limited capabilities? Would the build-out requirements be the same for the 25% free and the 75% premium capability? Would anything prevent the licensee from offering reduced service coverage or building penetration to the "free" tier in order to promote its premium service?
- How will the speed of the "free" wireless broadband Internet service be calculated? If advertising or other information is conveyed along with any requested information, would this additional information detract from the speed of the "free" service? Will a licensee be required to ensure that <u>all</u> users of the network are able to reach the Internet at a specified speed – or will the licensee be allowed to satisfy the throughput requirement in a manner where the desired "minimum" speed is only reached under optimal conditions that do not often exist? To what extent will the licensee be able to utilize speed averages rather than assuring that users of the "free" service tier enjoy, at a minimum, the speeds the band is designed to enable?[4]
- If the licensee does not subdivide the spectrum, how will the Commission determine whether 25% of the licensee's capacity is devoted to free service? As the Commission is aware, the capacity of a block of spectrum is highly variable depending upon system design. How often must system capacity be measured by the AWS-3 licensee to assure that the free service obligation is being fully met? Can a licensee calculate the 25% on all hours, but limit use during busy hours or other times?
- What services can and must the AWS-3 licensee provide for "free," and are there any categories of services that are to be prohibited? For example, can or must the AWS-3 licensee allow users to utilize Skype-like

[4] MetroPCS notes that M2Z proposes that the licensee, not the Commission, make this determination (*See* Letter from Uzoma C. Onyeije to Marlene Dortch, WT Docket Nos. 07-195 and 04-356, filed June 3, 2008 ("M2Z Letter") at ft. nt. 7). MetroPCS believes that allowing the licensee to determine this is like allowing the fox to guard the hen house – and would have the same effect.

technology to provide interconnected VoIP services? If so, what implications does this have for existing competitors? If not, are the rules clear in this regard? Can the licensee limit applications which run on the "free" service – *e.g.* limit the browser used to a particular browser or limit P2P services or applications?

- What is the statutory authority for the Commission to regulate the price of a wireless broadband Internet access service (a "free" service being one where the Commission has set the price at $0.00)? For instance, does the Commission have the authority to impose rate regulation (*i.e.,* mandating a "free" wireless broadband service) upon a type of service, wireless broadband Internet service, that has been classified by the Commission as an "information service," regulated under Title I of the Communications Act of 1934?
- How would the "free" wireless broadband Internet condition conform with the Commission's existing Universal Service plan?
- What rights does the licensee have as far as system management? Given the current controversy related to Comcast and BitTorrent, what rights would the network operator have to limit use of the system?
- Can the licensee limit the amount of use of the "fee" service (*e.g.,* to a particular amount of bits of usage at particular times?).

Issues pertaining to open access

- What is the nature and the extent of the "open access" commitment?
- Is the AWS-3 licensee obligated to accommodate any and all wireless applications technically capable of running on the spectrum, regardless of their capacity usage?
- Are there any limitations on the types of equipment that the AWS-3 licensee can authorize for use on its network?
- Is wholesale service permitted or required? Are there mandates for, or restrictions on, resale?

Issues pertaining to content filtering

- What processes or mechanisms can or must the AWS-3 licensee utilize to filter the sending and receiving of information on the AWS-3 spectrum?
- Is a mechanism required or allowed for particular individuals to opt-in or opt-out of the filtering program?
- Can the proposed requirements be reconciled with Supreme Court pronouncements pertaining prior restraints on speech under the First Amendment?

- Is the delay imposed by content filtering taken into account in determining the speed of the "free" service?
- If the spectrum is acquired subject to a content filtering requirement that ultimately is struck down, will the original licensee retain the spectrum or should the license be deemed cancelled and a new auction held?

Issues pertaining to interference

- What is the effect of adding 5 MHz of spectrum from the J Block to the AWS-3 allocation in terms of interference potential? Are there other equally effective means to address interference concerns without loss of the paired J Block?
- Is the "Monte Carlo" approach advocated by M2Z a lawful approach to address interference concerns in light of the Commission's obligation under Section 303(f) of the Communications Act to "[m]ake such regulations not inconsistent with law as it may deem necessary to *prevent* interference." (emphasis supplied).[5] Since M2Z's own engineers concede that there will be mobile-to-mobile interference between AWS-3 and AWS-1 units that are in close proximity to one another, is the Commission even authorized to allow the allocation proposed by M2Z to go forward?[6]
- What support is there in the record for the assumption of M2Z and its technical consultant that the number of instances in which AWS-1 and AWS-3 units will be in proximity and will interfere with each other is acceptable or inconsequential?
- What steps is the AWS-3 licensee obligated to take if interference in fact occurs? Will a "last in time" rule apply which protects the first licensee to be authorized and to commence operations in accordance with its license against interference by a subsequently licensed operator?
- Should the Commission consider alternative methods of allocation, such as moving 5 MHz of the J block inside of the AWS-3 spectrum, at 2155-2160, for base station transmit in order to facilitate receiver filtering design and protect against interference concerns?
- Should the Commission conduct independent interference testing in order to analyze and isolate potential interference issues? Should these results be put out for peer review or public comment?

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[5] 47 U.S.C. § 303(f)

[6] *See* M2Z Letter at "Alion AWS-3 to AWS-1 Mobile-Mobile Interference Effects."

Other issues

- Should the Commission adopt safeguards to assure that any proposed national licensee has the wherewithal to construct and operate a system meeting the minimum requirements in the rules? For example, should the Commission impose other mechanisms, such as a letter of credit or performance 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 becoming fallow?
- Should the Commission direct the Auction Division to establish a minimum reserve price sufficient to ensure that the winning bidder in the AWS-3 auction will have evidenced a seriousness of purpose and has a substantial stake in promptly developing the services contemplated by the Commission (*e.g.,* a reserve price based on prior reserve prices set in AWS-1 and the 700 MHz auction)?

Allowing for public comment on these and other specific issues relating to a spectrum allocation conditioned upon a "free" wireless broadband Internet service is necessary to allow for the public to ensure that there are no loopholes that any potential bidder may be able to exploit in order to not provide what the Commission is looking for. Further, it is important that the Commission not repeat the failure of the D-block and promulgate rules without taking public comment in order to ensure that there will be competition for the license. Without public comment, the Commission cannot be assured that it will in fact reach its policy objectives.

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

Respectfully submitted,

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