

June 18, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Submission in WT Docket Nos. 04-356, 07-195

Dear Ms. Dortch:

On Tuesday, June 17, 2008, Christopher Guttman-McCabe, Vice President, Regulatory Affairs, and Paul Garnett, Assistant Vice President, Regulatory Affairs, CTIA – The Wireless Association®, met with Bruce Gottlieb, Legal Advisor to Commissioner Michael Copps, to discuss the FCC’s proposed service and technical rules for the AWS-2 bands (one paired block comprising 1915-1920 MHz and 1995-2000 MHz (the “H block”) and one paired block comprising 2020-2025 MHz and 2175-2180 MHz (the “J block”)) and the AWS-3 band (2155-2175 MHz). CTIA reiterated concerns it has already detailed in the record.¹ CTIA also focused on technical concerns raised by numerous parties, based on information submitted in the record on handset testing and filter technologies, that proposed mobile transmissions in the H block and the AWS-3 block will cause harmful interference to adjacent broadband PCS and AWS-1 operations and thereby limit the utility of portions of the broadband PCS and AWS-1 allocations. Proposed technical rules allowing mobile transmissions in the H block and the AWS-3 band, therefore, would:

- Severely harm the integrity and undermine the success of the Commission’s spectrum auction process.
- Violate Section 309(j) of the Act, which requires the Commission to place interested bidders on notice of the characteristics of licenses and bidding rules in advance of auctions.
- Violate the Administrative Procedure Act’s prohibition on retroactive rulemaking.
- Violate the Takings Clause of the Fifth Amendment to the United States Constitution.
- Represent a breach of the Commission’s contractual obligation of good faith and fair dealing in the auction process.

¹ See, e.g., Letter from Christopher Guttman-McCabe, CTIA-The Wireless Association®, to Marlene H. Dortch, FCC, in WT Docket Nos. 04-356, 07-195 (filed June 5, 2008).

Moreover, the proposed technical rules would undermine the Commission's broader goals for deployment of competitive, affordable, and reliable mobile wireless broadband services. Each of these points is discussed in greater detail below.

I. Broadband PCS and AWS-1 Licensees Purchased Their Licenses Under the Reasonable Assumption That They Would Be Free From Interference Caused by Adjacent-Channel Operations.

As discussed below, at the time the Commission auctioned the PCS and AWS-1 bands, neither of those classes of licensees were on notice that the allocation decisions and licenses contemplated by the auctions were subject to revisions that would create interference to the licenses that they purchased, potentially making a portion of the spectrum they purchased unusable. In neither case could licensees have reasonably predicted that subsequent actions by the FCC would create adjacent services, such as the H Block or the proposed AWS-3 TDD block in the 2.1 GHz band, that harbor substantial interference potential for licensed mobile services.

Auction No. 66 was an incredible success – at the time the largest, most successful auction in FCC history – grossing nearly \$13.9 billion.² Auction winners rightfully had high expectations for their spectrum. At the close of the auction, FCC Chairman Kevin Martin called the AWS-I spectrum “prime ‘spectrum real estate’” that will enable licensees “to roll out new devices, which will allow consumers to access the Internet and dedicated video services wherever they want, whenever they want.”³ AWS-1 licensees, therefore, reasonably expected that their licenses could be used for a variety of broadband mobile services.⁴

The Commission highlighted the promise of the larger AWS blocks, such as the F Block, in its service rules, stating its belief that these blocks would “enable a broader range of broadband services, including Internet access at faster speeds. These larger blocks should also accommodate future, higher data rates, and provide operators with additional capacity, and, importantly, with greater flexibility.”⁵ Accordingly, the F Block raised the highest revenue per POP per MHz of all the licenses offered for auction. The E Block raised the second highest revenue per POP per MHz of all the licenses offered for auction. Empirically, those results belie the suggestion that AWS-1 licensees had knowledge that the band would become encumbered as currently proposed. Contrary to arguments made by M2Z Networks, Inc. (“M2Z”), AWS-1 licensees operating in good faith and in reliance on

² Statement of Chairman Kevin J. Martin on the Conclusion of Advanced Wireless Services Auction, News Release (Sept. 18, 2006), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267473A1.pdf.

³ *See id.*

⁴ *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66*, Public Notice, 21 FCC Rcd 4562, 4630 (2006).

⁵ *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 44 (Nov. 25, 2003) (“AWS-1 Service Rules Order”).

FCC precedent had no advance notice that the Commission would so undermine the AWS-1 spectrum allocation.⁶

AWS-1 licensees were not “on notice” of the fact that adjacent operations in the 2155-2175 MHz band could limit the utility of portions of the spectrum and the Commission should reject M2Z’s argument to this effect. M2Z’s arguments that TDD operations with mobile transmissions in the 2155-2175 MHz band “is not a new idea” run counter to the Commission’s own statements regarding future use of AWS-3 spectrum. Not only did the *AWS-1 Service Rules Order* not project that the Commission would employ mobile transmissions in AWS-3 spectrum, but it also acknowledged that TDD operations with mobile transmissions posed the risk of causing harmful interference.⁷ Although, as M2Z notes, the Commission envisioned that it might use the AWS-3 band to support TDD operations, this was just one of several proposals contemplated by the Commission at the time. It would have been impossible for AWS-1 licensees to engineer their networks to account for all of the proposed uses of the 2155-2175 MHz band – especially given the unprecedented nature of what the FCC is now proposing for the AWS-3 band.

Similarly, broadband Personal Communications Service (“PCS”) licensees operating in the 1.9 GHz band clearly lacked notice, at the time they acquired their licenses, of potential H Block interference arising from a reallocation of that spectrum. Immediately prior to the broadband PCS auctions, the FCC stated those “auctions will constitute the largest auction of public assets in American history and are expected to recover billions of dollars for the United States Treasury.”⁸ The FCC further noted that “the auctions will lead to the introduction of an array of new telecommunications products and services that are expected to fuel our nation’s economic growth and revolutionize the way in which Americans communicate.”⁹ Although auctioned in separate blocks at different times, the FCC’s prediction was borne out as the original broadband PCS auctions raised approximately \$19.6 billion and were, at that time, the largest spectrum auctions ever conducted.¹⁰

When the broadband PCS spectrum was auctioned, the band comprising the 1915-1920 MHz portion of the H Block was allocated as an “unlicensed PCS” band.¹¹ Not only were unlicensed PCS devices very low power, those devices were authorized under Part 15 of the Commission’s rules and therefore could not cause interference to, or claim interference protection from, licensed PCS systems in the adjacent spectrum. Since the FCC’s 1994 PCS

⁶ Letter from Uzoma Onyeije, M2Z Networks, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 07-195, 04-356, 07-16, and 07-30 (June 5, 2008).

⁷ *AWS-1 Service Rules Order* at ¶ 46.

⁸ *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 5532, 5534 (1994).

⁹ *Id.*

¹⁰ The 1995 A & B Block auction (Auction No. 4) raised net bids of \$7 billion, the 1995 C Block auction \$10.1 billion (Auction No. 5), and the 1996 D, E & F Block auction \$2.5 billion (Auction No. 11).

¹¹ *See Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957 (1994) (revising PCS allocation to pre-auction format, with 1850-1910 MHz/1930-1990 MHz for licensed PCS and 1910-1930 MHz band for unlicensed PCS).

Order indicated that the FCC was looking for additional spectrum to allocate to unlicensed PCS, there was absolutely no notice that the unlicensed allocation could be replaced with potentially interfering licensed operations with significantly greater authorized power.¹²

CTIA believes that, based on the lack of notice and the change in the expected use of the bands already auctioned, the proposed H Block and AWS-3 rules may render the Commission's actions in the broadband PCS and AWS-1 auctions *ultra vires*. Section 309(j) requires the Commission to place interested bidders on notice of the characteristics of licenses and bidding rules *in advance* of the auction and, thereby, to enable those bidders to "develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."¹³ Pursuant to this obligation, the Commission has consistently noted in pre-auction service rules proceedings where the spectrum to be auctioned would be subject to harmful interference or similar limitations. For example, when the Commission established service rules for the 1710-1755 MHz and 2110-2155 MHz bands, the very spectrum and auction at issue here, it clearly stated the potential for interference to new licensees and what degree of interference these licenses would be required to tolerate.¹⁴ The FCC stated that AWS licensees would be required to accept interference from incumbent government facilities in the 1210-1755 MHz band. The FCC did not mention similar concerns regarding AWS-3. Further, it is standard practice for the Commission to outline in its service rules proceedings for yet-to-be-auctioned spectrum whether the winning bidder will be required to coordinate with incumbent licensees or otherwise protect co- or adjacent-channel licensees from harmful interference.¹⁵

Should the Commission proceed along this path, the Commission would thus risk the integrity of its auction processes generally. If the Commission is free to sell spectrum, and then to adopt rules undermining the stated purpose of a band and limiting the actual use of the spectrum, the lack of certainty would clearly present a risk that capital markets would not be able to reliably assess foreseeable risks associated with future auctions and with investment in existing spectrum assets. The net result would be uncertain auctions appealing to speculators, not those intending to put the spectrum to use.

II. Service Rules That Impair the Usefulness of Broadband PCS and AWS-1 Licenses May Violate Licensees' Statutory, Constitutional, and Contractual Rights.

If the Commission adopts service rules permitting proposed mobile transmissions in the H block and AWS-3 band, operations in those bands will cause harmful interference

¹² *Id.*, 9 FCC Rcd at 4991 (committing to instituting further proceedings to meet the long term spectrum needs of unlicensed PCS).

¹³ *See* 47 U.S.C. §§ 309(j)(3)(E)(i)-(ii).

¹⁴ *AWS-1 Service Rules Order* at ¶¶ 118-123.

¹⁵ *See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700 (1993) (imposing the burden to protect incumbent microwave licenses against interference solely on PCS licensees in the 2 GHz band); *AWS-1 Service Rules Order* at ¶¶ 113-115, 118-123, 131 (outlining the responsibilities of AWS-1 licensees to protect various incumbents from harmful interference).

sufficient to impair normal operations in the adjacent broadband PCS and AWS-1 spectrum. In doing so, the service rules will violate broadband PCS and AWS-1 licensees' legal rights. In particular, the service rules would violate the Administrative Procedure Act's ("APA's") retroactivity prohibition, constitute an unconstitutional taking, and would interfere with the existing contracts between broadband PCS and AWS-1 licensees and the Commission.

If the Commission's rules permit interfering H block and AWS-3 band operations requiring broadband PCS and AWS-1 licensees to cease using their spectrum for its originally stated purpose, the service rules for the H block and AWS-3 spectrum would appear to have a primary retroactive effect in violation of the APA. The APA limits "rules" to agency prescriptions of "future effect"¹⁶ and establishes a *per se* bar on the adoption of primarily retroactive rules.¹⁷ In this case, bidders in the PCS and AWS-1 auctions had the well-reasoned and well-settled expectation that their licenses were designed for services free from harmful interference in the entirety of the spectrum band purchased. Indeed, even if the service rules are not "primarily retroactive," they could be stricken as secondarily retroactive rules lacking adequate justification, as the rules would affect "a regulated entity's investment made in reliance on the regulatory *status quo* before the rule's promulgation."¹⁸ As knowledge of such harmful interference to broadband PCS and AWS-1 spectrum would have altered bidders' strategy at auction, the rule would likely fail the D.C. Circuit's well-established reasonableness inquiry used in cases of secondary retroactivity.¹⁹

The interference resulting from the FCC's proposed service rules may also constitute a regulatory taking in violation of the Fifth Amendment.²⁰ Government regulation that burdens property in a manner that, among other things, unfairly interferes with the owner's "investment-backed expectations" constitutes a regulatory taking.²¹ Bidders purchased PCS and AWS-1 spectrum licenses with the expectation that licenses would not be subject to harmful interference that would impact the spectrum's economic value and usefulness for wireless broadband services. Permitting proposed mobile transmissions in H block and AWS-3 spectrum would render significant portions of licensees' considerable investment in broadband PCS and AWS-1 spectrum useless, as they will be forced to move their own base station transmissions away from the H block and AWS-3 spectrum and use a portion of their own spectrum as a *de facto* guard band between the broadband PCS and H block operations and AWS-1 and AWS-3 operations.

¹⁶ 5 U.S.C. § 551(4).

¹⁷ See, e.g., *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (holding that "primarily retroactive" rules are *per se* unlawful under the APA).

¹⁸ *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

¹⁹ See, e.g., *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 590 (D.C. Cir. 2001) (determining that, in the context of a spectrum auction, a retroactive rule change was not arbitrary and capricious because bidders would not have altered their bidding strategy in light of the newly imposed rules).

²⁰ The FCC's proposed service rules may constitute a "per se" taking in violation of the Fifth Amendment. A "per se" taking results in a "permanent physical occupation" or denies the owner of all economically beneficial use of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The interference resulting from AWS-3 service could become so severe as to constitute a "per se" taking if the interference renders a portion of adjacent AWS-1 spectrum useless.

²¹ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Further, to the extent the H block and AWS-3 band plans adopted allow harmful interference to broadband PCS and AWS-1 licensees, the FCC may violate the contractual relationship established when it concluded the relevant auctions. For example, licensees' payments for spectrum obtained in Auction No. 66 established a contractual relationship, including an implied covenant of good faith and fair dealing, which the FCC could breach by adopting rules in this proceeding that impair the value of previously-purchased spectrum.

The Commission has stated that its licenses create "spectrum usage rights" that are "defined within the terms, conditions, and period of the license at the *time of issuance*."²² Indeed, Commission policy strongly disfavors interference with existing licenses.²³ As stated above, the Commission typically makes clear in its service rules proceedings when greenfield spectrum will be subject to interference from co- or adjacent-channel operations. By not forecasting a specific band plan for the H block and AWS-3, the Commission contributed to bidders' expectations that they would be able to operate in the entirety of their broadband PCS and AWS-1 spectrum free from harmful interference. The FCC also imposed certain requirements on licensees to induce them to substantially invest in and build-out their systems, thereby further fueling an expectation of continued operations free from harmful interference.²⁴

III. Conclusion

In conclusion, by allowing mobile transmissions in the H block and AWS-3 bands, as reportedly under consideration, the Commission will unfairly devalue the licenses purchased at auction, as well as violate the statutory, constitutional, and contract rights of broadband PCS and AWS-1 licensees. Importantly, the H block and AWS-3 service and technical rules, as reportedly proposed, will frustrate the Commission's own goals for deployment of competitive, affordable, and reliable mobile wireless broadband services. For the above-mentioned reasons, the Commission should reject any H block and AWS-3 band plan that allows for such operations.

²² *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, 15 FCC Rcd 24178, 24187, ¶ 22 (2000) (emphasis added).

²³ *See, e.g., In the Matter of Township of Cinnaminson, New Jersey*, Order, 22 FCC Rcd 4583 (2007) (considering possible interference with spectrum users as a factor when denying license application and related waiver request); *In the Matter of City of Richmond, Virginia*, Order, 21 FCC Rcd 14,384 (2006) (same); *Advanced Wireless Spectrum (AWS-1 Auction)*, Small Entity Compliance Guide, 21 FCC Rcd 9098, 9102 (2006) (explaining that the Commission requires that licensees not interfere with incumbent licensees); *Office of Engineering and Technology Seeks Additional Comment on Petitions for Reconsideration for Unlicensed National Information Infrastructure Devices*, Public Notice, 21 FCC Rcd 4339, 4340 (describing Commission's efforts to minimize interference with existing radiofrequency operations).

²⁴ *See e.g., 47 C.F.R. § 27.14.*

Pursuant to Section 1.1206 of the Commission's Rules, this letter is being electronically filed with your office. If you have any questions regarding this submission, please contact the undersigned.

Sincerely,

/s/ Christopher Guttman-McCabe

Christopher Guttman-McCabe

cc: Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert McDowell
Aaron Goldberger
Bruce Gottlieb
Renée Crittendon
Wayne Leighton
Amy Blankenship
Angela Giancarlo
Julius Knapp
Matthew Berry