

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
)	
Service Rules for the 698-746, 747-762)	WT Docket No. 06-150
and 777-792 MHz Bands)	
)	
Implementing a Nationwide)	PS Docket No. 06-229
Broadband, Interoperable Public)	
Safety Network in the 700 MHz)	
Band)	
)	
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COMMENTS OF METROPCS COMMUNICATIONS, INC.

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Summary

Contrary to the claims of some commentators, public interest groups, public safety entities, other interested parties, the Office of Inspector General, and indeed, some Commissioners themselves,¹ in hindsight, the fact that the Commission has another opportunity to adopt a licensing plan for the 700 MHz D-Block should be viewed as a regulatory success; not a failure. Many parties who commented in the 700 MHz allocation proceeding – including MetroPCS – expressed grave concerns as to whether the previously proposed public/private partnership was economically viable and capable of delivering either the desired mission-critical nationwide interoperable public safety network or a viable commercial network. Happily, the Commission had the foresight to establish meaningful upfront payment requirements and a market-based reserve price, which prevented the spectrum from being assigned to an entity whose business plan was destined to fail which would have caused the spectrum to lie fallow in bankruptcy.

Many commenters drew parallels between the Frontline Wireless, LLC (“Frontline”) wholesale business model and the failed business plan of NextWave Wireless, Inc. (“NextWave”). Without question, the grants by the Commission of broadband wireless spectrum rights to NextWave were out of the most disastrous spectrum assignments in Commission history. The Commission came dangerously close to repeating the mistake, but wisely put in place regulatory safeguards to avoid having the D-Block end up in another bankruptcy proceeding. Properly viewed, the Commission “dodged a bullet” by the fact that the Frontline business model failed during the pre-auction application process, rather than in the post-auction

¹ See *700 MHz FNPRM* at Statement of Michael J. Copps (“So let me be crystal clear right up-front: I am not at all sure that a dual-use network along the lines proposed here will actually deliver public safety users the network they so desperately need and deserve. While I certainly support putting this proposal out for comment, even at this late date, I am going to approach it with a skeptical eye.”)

phase of its existence. The worst thing the Commission could do now, as it moves forward, is to abandon the very protections and safeguards it properly established in the prior auction to assure that any successful D-Block bidder is a serious player with the wherewithal to succeed. Indeed, given the high-profile failure of Frontline, the Commission needs to take even greater steps to avoid against having the D-Block spectrum lie fallow. In addition, if the Commission elects to retain the public/private partnership in the forthcoming D-Block auction, the Commission should provide for a prompt commercial-only re-auction in the event there is no successful bidder for the spectrum while encumbered with public safety obligations. This will ensure that the spectrum does not law fallow any longer.

MetroPCS appreciates the importance of the public safety needs that the Commission sought to fulfill through a public/private partnership model. Indeed, MetroPCS has supported rules to foster voluntary public/private partnerships in order to create market-based incentives for the public safety community to obtain the support it needs. However, MetroPCS does not agree with many of the approaches suggested in the *D-Block FNPRM* which seek to preserve certain flawed aspects of a mandatory public/private partnership. MetroPCS understands, however, that practical and political considerations might cause the Commission to try one more time to craft an allocation scheme that will foster that always elusive “free lunch.” If that proves to be the case, MetroPCS strongly urges the Commission not only to adopt additional safeguards to ensure that public safety receives the benefits of the allocation, but also to make provisions for an immediate re-auction of the spectrum, for commercial purposes, unencumbered by public safety obligations, in the event that the D-Block re-auction does not result in a winning bid. If the Commission fails to move on promptly following an unsuccessful auction, the public safety community will be the big loser. The nation’s first responders will be the ones at risk if their dedicated public safety spectrum remains in regulatory limbo. The best way to ensure that first

responders get a network is to provide public safety with immediate access to their 10 MHz of dedicated spectrum free of commercial entanglements and for Congress to set aside funding for any network not able to be funded regionally or locally.

One thing is abundantly clear from the results of the 700 MHz auction – there is a substantial unsatisfied demand for paired commercial broadband channels in relatively small geographic areas and spectrum block sizes - - and there is no commercial demand for a nationwide public/private partnership. As it did with its prior contingent Auction 76 allocation structure, the Commission should make the necessary arrangements to permit a prompt follow-on auction of unencumbered spectrum for commercial purposes in the event that no qualified bidder emerges and wins the D-Block with its public safety encumbrances.

However, if the Commission does proceed with any type of public/private partnership, it should implement additional safeguards to ensure that any D-Block winner has the seriousness of purpose and financial wherewithal to provide the Commission and public safety community with the network that it is seeking. Specifically, the safeguards should include a market-based reserve price, a requirement for a letter of credit or performance bond from any D-Block winner, along with a significant default penalty for failing to follow through with the Commission's rules and intent, and lastly, the Commission should not allow for an exception for the D-Block to its designated entity rules.

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COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),² by its attorneys, hereby respectfully submits its comments in response to the *Further Notice of Proposed Rulemaking*, FCC 08-128, released May 14, 2008 (the “*D-Block FNPRM*”)³ in the above-captioned proceedings. The following is respectfully shown:

² For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

³ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229*, Second Further Notice of Proposed Rule Making, FCC 08-128 (rel. May 14, 2008) (“*D-Block FNPRM*”), 73 Fed. Reg. 29582 (May 21, 2008).

I. THE COMMISSION SHOULD AUCTION AN UNENCUMBERED D-BLOCK FOR COMMERCIAL PURPOSES AS SOON AS POSSIBLE

The Commission's consistent theme for spectrum allocation for more than a decade has been to avoid heavy-handed "command and control" regulation that puts the government in the position of micromanaging the radio spectrum and picking winners and losers. This restraint has allowed the wireless industry to develop without unnecessary regulatory restrictions and has enabled the industry to flourish and to become extremely competitive.⁴ Significantly, these policies have been instrumental in ensuring that spectrum goes to the entity that values it the most and will put it to the most beneficial use, that competition flourishes in the wireless industry, and that the Commission does not involve itself in an unnecessary and unproductive level of governmental oversight and regulation.

In promulgating rules for the 700 MHz Band spectrum, the Commission abruptly reversed course from its prior well reasoned approach, and established a number of regulatory encumbrances on each block of spectrum – including onerous geographic build-out requirements, "open access" restrictions on a 22 MHz block of spectrum, and the unprecedented adoption of rules to establish a mandatory public/private partnership for the building of a public

⁴ The Commission repeatedly has determined that the wireless industry enjoys "effective competition." In fact, the first sentence of the Executive Summary of the Commission's 12th annual CMRS competition report states that "U.S. consumers continue to reap significant benefits - including low prices, new technologies, improved service quality, and choice among providers - from competition in the Commercial Mobile Radio Services ("CMRS") marketplace, [both terrestrial and satellite CMRS]." Furthermore, the competitive nature of the wireless industry is not solely limited to urban areas of this country, as the Commission report notes that "99.8 percent of the total U.S. population has one or more different operators offering mobile telephone service where they live." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC-08-28 at paras. 1-2 (rel. February 4, 2008).

safety broadband network.⁵ Despite substantial and repeated warnings by MetroPCS and a host of other commenters (including members of the public safety community) about the likelihood of failure of such an approach,⁶ the Commission adopted a spectrum allocation for the D-Block of 700 MHz spectrum (“D-Block”) that contained a host of regulatory restrictions and encumbrances – including a condition that the D-Block winner would have to build-out and manage a network for the public safety community and coordinate the building and management of such a network via an untested public/private partnership requiring substantial negotiation with the public safety community.

⁵ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et, al*, WT Docket No. 06-150, CC Docket No. 94-102, WT Docket No. 01-309, WT Docket No. 03-264, WT Docket No. 06-169, PS Docket No. 06-229, WT Docket No. 96-86, and WT Docket No. 07-166, Order, FCC 07-132 (rel. Aug. 10, 2007) (“700 MHz Order”).

⁶ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Former Nextel Communications, Inc. Upper 700 MHz Guard Band License and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86*, Further Notice of Proposed Rule Making, FCC 07-72 (rel. April 27, 2007), 72 Fed. Reg. 24238 (May 2, 2007) (“700 MHz FNPRM”); MetroPCS 700 MHz FNPRM Comments and Reply Comments; CTIA 700 MHz FNPRM Comments; Verizon Wireless 700 MHz FNPRM Comments; Sprint Nextel 700 MHz FNPRM Comments; Blooston Rural Carriers 700 MHz FNPRM Comments; Union Telephone 700 MHz FNPRM Comments; US Cellular 700 MHz FNPRM Comments; Region 43 Regional Planning Committee 700 MHz FNPRM Comments at 4; National Association of Telecommunications Officers and Advisors, the National Association of Counties, the U.S. Conference of Mayors, and the National League of Cities 700 MHz FNPRM Comments at 8; Region 33 (Ohio) 700 MHz Planning Committee 700 MHz FNPRM Comments at 3, 4; San Diego County – Imperial County, California Regional Communications System 700 MHz FNPRM Comments at 11; Region 9 (Florida) 700 MHz Regional Planning Committee 700 MHz FNPRM Comments at 2; Mid-America Regional Council 700 MHz FNPRM Comments at 2; State of Ohio Multi-Agency Radio Communications System 700 MHz FNPRM Comments at 3; Region 13 Illinois 700 MHz Planning Committee 700 MHz FNPRM Comments at 2; Grundy County Emergency Telephone System Board 700 MHz FNPRM Comments at 2; Region 40, 700 MHz Regional Planning Committee 700 MHz FNPRM Comments at 2.

As was predicted by some, the D-Block did not attract a bid sufficient to meet the \$1.33 billion reserve price.⁷ The license only received one bid, which may or may not have been a serious bid.⁸ There are any number of explanations for why the D-Block auction failed. For instance, the *IG Report*, in which the Inspector General investigated allegations surrounding statements made by an advisor to the Public Safety Broadband Licensee to potential bidders for the D-Block, observed a number of reasons for why the D-Block did not have a winning bidder. It concluded that “the uncertainties and risks associated with the D-Block, including, but not limited to, the negotiation framework with [the Public Safety Broadband Licensee], the potential for default payment if negotiations failed, and the costs of the build-out and the operations of the network, taken together, deterred each of the companies from bidding on the D-Block.”⁹ Statements from Reed Hundt, a principal of the company whose business plan largely influenced the “designer allocation,” confirm this conclusion.¹⁰ The fact of the matter is that not one entity found the D-Block attractive enough to bid the reserve price of \$1.33 billion – which was an enormous bargain when compared to the prices of other spectrum sold in Auction 73.¹¹

Now, the Commission is poised on the precipice of another decision regarding the D-Block – and appears to have forgotten why the original D-Block auction was unsuccessful – and

⁷ *D-Block FNPRM* at para. 1.

⁸ Letter from Kent R. Nilsson, Inspector General, to Chairman Kevin J. Martin, “D-Block Investigation,” Office of Inspector General Report, April 25, 2008 at 21 (“*IG Report*”) (“Mr. Brenner said Qualcomm placed a bid on the D-Block partly to preserve eligibility to bid on the D-Block or another block, and partly because it was interested in ensuring that the D-Block spectrum was used”).

⁹ *IG Report* at 2.

¹⁰ Mr. Hundt is quoted in the *IG Report* as indicating that “the realization gradually dawned on Frontline that the nationwide shared network the D-Block winner would likely have to build would be far more costly, and yet perhaps less reliable in terms of commercial use, than Frontline had first thought.” *IG Report* at 24.

¹¹ *See infra* at 9-10.

seems inclined to repeat the same mistakes all over again. The *D-Block FNPRM* solicits comments on a host of questions that seem to be based on the incorrect premise that a mandatory public/private partnership via a re-auction of the D-Block spectrum can work the second time around if only the rules are changed. MetroPCS fears that this is a search for fool's gold. The Commission should not follow up its previous allocation approach – which has left 10 MHz of prime commercial spectrum unauctioned and unused and prevents 10 MHz of dedicated public safety broadband spectrum from being used immediately by local and regional public safety groups trying to build interoperable networks of the kind anticipated by prior rules – with another auction patterned along the same lines which is destined to the same fate. As MetroPCS repeatedly has pointed out, there is serious irreconcilable problems inherent in any mandatory public/private partnership fashioned for public safety purposes, and MetroPCS is concerned that any such proposal, despite what may be the Commission's best efforts, may be doomed for failure.

On the other hand, as noted in greater detail below, the results of the 700 MHz Band auction conclusively demonstrate that many commercial entities were unable to fulfill their immediate needs for broadband paired commercial spectrum in the 700 MHz Band auction, and, as a result, they have substantial unsatisfied demands for additional spectrum in order to continue to provide effective competition in the wireless industry. Based on this evidence, the Commission should promulgate rules that allow the marketplace, rather than regulatory command and control, to determine the highest and best use of the D-Block, and not continue to place significant Government-imposed restrictions upon valuable paired spectrum which has been specifically designated by Congress for commercial use. As stated by former FCC Chairman Reed Hundt - - one of the founders of Frontline and a principal architect of the prior D-Block allocation - - the network envisioned by the public/private partnership arrangement

could not be considered “reliable for commercial use.”¹² The Commission should not adopt yet another designer allocation for a public/private partnership that is doomed for failure from the start, but rather should auction the D-Block off for *bona fide* commercial uses, free of public safety encumbrances, and seek congressional action to have the proceeds of such auction be used by the public safety community to build the network it needs.

Thus, rather than postpone the inevitable, the Commission should immediately auction off the D-Block, unencumbered, to the users that would value it the most and would put it to its highest and best use – and help address the substantial need for paired spectrum in the wireless industry. This auction would be the best way for the Commission to avoid yet another attempt to engineer the spectrum for a designer allocation.

In considering what to do with the D Block, the Commission should reexamine the considerations that animated its original decision to implement a mandatory private/public partnership to see if the circumstances have changed such that a new approach would be a better way to proceed. One of the main reasons for the mandatory private/public partnership was the Commission’s desire to have a nationwide interoperable network using the same technology guided by a single technology view. That objective was met when the Commission licensed the 10 MHz of public safety spectrum to the public safety trustee. With the public safety trustee now in place, the Commission can be assured that there is a central decision-maker determining the technology and network for public safety. Further, the Commission should re-examine whether encumbering the 10 MHz of commercial spectrum is the best use for such spectrum. Before Auction 73, the Commission and the industry expected that rural, regional and mid-tier carriers would be able to acquire other spectrum in the 700 MHz auction so earmarking 10 MHz of the private/public partnership would not have a deleterious effect on the competitiveness of the

¹² *IG Report* at 24

wireless industry. That unfortunately did not occur and the non-nationwide carriers proved to be unable to acquire valuable spectrum in the 700 MHz band. It is now time for the Commission to examine its policy trade-offs and find that the private/public partnership is not the best way to achieve the Commission's laudable goal of ensuring that the public safety community has an interoperable nationwide network. Rather than force a mandatory private/public partnership, the Commission should provide incentives for all commercial carriers, including a D-Block carrier, to lease spectrum and provide a network for the public safety community.

At the very least, in the event the Commission goes forward with another mandatory public/private partnership effort, the Commission should set the rules today and provide for an immediate re-auction of the spectrum, on an unencumbered basis, so it may be devoted to pure commercial purposes. This is the only approach that will ensure that this 10 MHz of prime paired commercial spectrum will not lie fallow for an unacceptable period of time.

A. The Commission Should Not Adopt Another “Designer Allocation” for the D-Block Re-auction

The Commission's prior experience with the D-Block amply demonstrates that it should not adopt auction rules tailored to one company or one particular business plan. The Commission's prior allocation was heavily influenced by the business plan of Frontline, which participated in the allocation process in an attempt to craft a spectrum allocation that would allow it to purchase 10 MHz of spectrum (and gain access to another 10 MHz of spectrum) based upon its unique business plan. Many commenters expressed the view that the rules proposed by Frontline, which were largely adopted by the Commission, would result in having only one company – Frontline – bid for the D-Block spectrum. Indeed, no other entity expressed any significant interest in purchasing the D-Block, on these terms and conditions.¹³ Thus, when the

¹³ *Id.* at 1-2.

Frontline business plan failed, so did any possibility of the Commission auctioning off the D-Block spectrum.

Ultimately, the Commission's D-Block auction plan ended up as a specially tailored "designer allocation." Designer allocations of this nature are very risky, and it should come as no surprise that this approach resulted in valuable spectrum going unsold in the D-Block auction. 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.¹⁴ Indeed, these flexible policies have led to considerable Commission success, as the wireless industry is highly competitive. The Commission has noted that "Section 309(j) embodies a presumption that licenses should be assigned as a result of an auction to those who place the highest value on the use of the spectrum," as those parties "are presumed to be those best able to put the licenses to their most effective use."¹⁵ If the Commission proceeds with a mandatory public/private partnership, it should avoid allocating spectrum based on the whims or desires of one entity, particularly for an experimental allocation that has never been proven or tested, as the Commission will risk another failed D-Block auction.¹⁶ Rather, the Commission should conduct an auction of spectrum that is free of encumbrances.

¹⁴ MetroPCS 700 MHz FNPRM Comments at 4, 27-28

¹⁵ *NextWave Personal Communications, Inc.*, Order on Reconsideration, 15 FCC Rcd 17500, 17513 (2000).

¹⁶ The pre-auction failure of Frontline demonstrates the folly of tailoring an allocation to a single company's business plan, particularly a company which is a start up. Yet, it would be an even greater folly for the Government to try to generate interest by crafting the terms of a public/private partnership in a vacuum when no serious contender has stepped forward. A

(continued...)

B. There is a Substantial Unsatisfied Need for Unencumbered Paired Commercial Spectrum

MetroPCS believes that the D-Block should be allocated, free of encumbrances, for commercial uses, as was originally intended by Congress.¹⁷ Recent auctions demonstrate that there is a real and substantial need for additional paired broadband spectrum in the wireless marketplace, and this need can best be satisfied by auctioning off the D-Block in a paired 10 MHz (5 MHz paired with 5 MHz) block. There is a severe scarcity of commercial paired spectrum suitable to meet the public's ever-increasing demand for advanced broadband commercial wireless services. Indeed, the need is particularly acute in light of recent reports that the Commission is considering dismantling a 10 MHz paired block (5 MHz paired with 5 MHz) in the AWS-2 J Block in the hopes of creating another designer allocation for a “free” wireless broadband network in the 2155-2180 MHz band.¹⁸ The possible loss of the J Block makes it critical to auction off the 10 MHz D-Block on a paired basis for unencumbered commercial uses to foster additional wireless competition.

Significantly, rural, regional and mid-tier carriers, which have been an extremely positive competitive influence in the wireless marketplace, have critical unmet 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

(...continued)

hastily formulated bidder designed to meet government specifications creates considerable uncertainty about whether the potential applicant will be able to accomplish their bid and ultimately meet any requirements the Commission imposes. The only way to ensure that the spectrum is put to use is a full and fair auction with limited restrictions on how the spectrum is used.

¹⁷ See *infra* at 13-15.

¹⁸ See “Martin to Plow Forward With Free Broadband Plan,” RCRNews.com, Jeff Silva, June 6, 2008.

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. Although all of the mid-tiered carriers were qualified to bid, several major regional wireless carriers, such as Alltel Wireless and Leap Wireless, were completely shut out of the auction. And, others, such as MetroPCS and perhaps US Cellular, were able to acquire considerably less spectrum than they would have liked in the 700 MHz auction. Indeed, the spectrum configuration and market sizes in Auction 73, with large spectrum blocks and combinatorial bidding, acted, as MetroPCS pointed out, to squeeze out these small and regional carriers.¹⁹ This is confirmed by the fact that AT&T and Verizon Wireless purchased approximately \$16 billion of the nearly \$19 billion of spectrum purchased, leaving only approximately \$3 billion for all other carriers combined.

As a result, regional, mid-tier and rural carriers continue to have substantial unsatisfied demands for paired CMRS spectrum. This dire situation is exacerbated by the continued consolidation in the wireless industry, which makes it less and less likely that a potential entrant or mid-tier carrier will be able to buy spectrum in a private sale. Any proposed Commission plan that places substantial encumbrances upon the D-Block, particularly in combination with any plan to remove unrestricted paired spectrum from the AWS-2 allocation, 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.

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 significantly higher prices per MHz/POP paid for the Lower Band

¹⁹ See MetroPCS *Ex Parte*, WT Docket Nos. 06-150, 06-164, PS Docket No. 06-229, and AU Docket No. 07-157, filed April 7, 2008.

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 MHz/POP prices paid for the Upper Band C Block in Auction 73). Indeed, the difference in prices per MHz/POP for the A and B blocks versus the C block is staggering. For the C Block the average price was \$0.76 per MHz/POP.²⁰ For the A Block the average price was \$1.16 per MHz/POP, and for the B Block the average price was a staggering \$2.68 per MHz/POP.²¹ This demonstrates the substantial demand for additional paired spectrum in small geographic areas, particularly in light of the demonstrable fact that multiple regional, mid-tier and rural carriers bid on licenses but came away empty or with less than desired.

These demonstrated needs should not go unmet in order to accommodate a designer spectrum allocation which may allow one entity to garner nationwide commercial spectrum for itself – while at the same time making an incursion into the public safety spectrum.

C. There is a Substantial Risk That Any Public/Private Partnership Will Fail Again

MetroPCS suspects that any mandatory public/private partnership for the D-Block is doomed for failure. Frontline, which obviously had devoted significant time and attention to trying to build a business case for the concept and was backed by significant venture capital firms, ultimately proved unable to adopt a viable business plan. At present, no other company has stepped forward to indicate that it is ready, willing and able to construct a nationwide interoperable public safety network without public funding, and in these challenging capital market times, it seems increasingly unlikely that one will emerge - - unless it is to buy spectrum

²⁰ “*It’s Over: 700 MHz Auction Ends After 38 Days, 261 Rounds,*” RCRNews.com, Dan Meyer, March 18, 2008.

²¹ *Id.*

for speculation. And, even if an interested party emerges, the Commission must be deeply concerned that it will fail or bow out at a critical juncture just as Frontline did.

This does not mean that MetroPCS is against establishing mechanisms to foster the build-out of a public safety broadband network. Indeed, MetroPCS has offered a number of suggestions that would enable the Commission to aid the build-out of such a public safety network.²² Pursuing an alternative would be preferable to tying the build-out of a public safety network to the build-out of a commercial network from a single monopoly provider - via an auction process that faces substantial hurdles that may preclude success. Two unavoidable problems for the mandatory public/private partnership approach are that (1) an auction is the wrong method to select a suitable partner for public safety; and, (2) a mission-critical public safety network is fundamentally and inherently different from a commercial network.

As an initial matter, the Commission should heed the warning of Commissioner Copps that “cash registers and toll booths don’t belong at the heart of our nation’s public safety planning.”²³ Competitive bidding procedures are ill-suited to select the service provider best able to meet the unique needs of the public safety community. Auctions, by their nature, favor the bidder with the best commercial plan who values the spectrum most and can pay the most - - not necessarily one focused on serving a public safety community which needs to receive service without offering a large profit margin. What public safety needs is a company devoted to building the specialized system needed by the public safety community. The commercial and public safety objectives are diametrically opposed and no set of FCC regulations can relieve this

²² See *MetroPCS 700 MHz FNPRM* Comments at 80-82. In addition, as some Commissioners have suggested, public funding of such a network which would enable the Public Safety Trustee to utilize a standard RFP process to select a system integrator would be optimal. This is how the Integrated Wireless Network (IWN) program, a joint effort by the DoJ, DHS and the Treasury to provide a consolidated nationwide Federal wireless communications service, is being pursued.

²³ *700 MHz FNPRM* at Statement of Commissioner Michael J. Copps (“Copps Statement”).

fundamental tension. The simple truth is that an auction is an ill-suited method to pick the optimal partner to construct a nationwide public safety network.²⁴ Using a commercial spectrum auction as the vehicle for selecting the nation's public safety infrastructure architect simply is not a good idea.

Moreover, even though there may be assertions that public safety's interests will come first, the management of the eventual winner of the D-Block will, as a matter of law, always have a fiduciary duty to its commercial investors. Thus, the interests of the public safety community will always be subject to compromise for commercial gain. The eventual D-Block winner inevitably will face literally thousands of issues when dealing with the needs and demands of more than 50,000 state and local public safety agencies and associations across the country. In resolving those issues, the D-Block winner's duty to its commercial investors will always play a primary role. Under the mandatory public/private partnership scenario - - even if the public safety requirements are softened by the Commission - - the public safety interests are doomed to second-class status from the start.

Commissioner Copps also was correct when he asserted that "a public safety network is a fundamentally different beast than a commercial network. It requires greater reliability and interoperability, as well as a substantially different architecture."²⁵ As was aptly stated in the 2002 Report of the Spectrum Policy Task Force:

²⁴ See *Spectrum Policy Task Force Report*, ET Docket No. 02-135, released November 2002 at pp. 42-43 (market based assignments of spectrum by auction are not suited for meeting the unique needs of public safety entities) ("Spectrum Policy Task Force Report"). The traditional way partners are chosen for public/private partnerships is through a process where the public entity is able to select the private party based on a number of criteria, including the financial considerations, experience, qualifications, etc. Here, the way to proceed is to grant the public safety licensee the flexibility to permit access to the public safety spectrum and have the public safety community make its own determination as to which private party will earn that access.

²⁵ *700 MHz FNPRM* at Copps Statement.

There are some important differences between the spectrum needs of commercial systems, which require high system capacity to support large numbers of users and applications, and those of public safety systems, which require less average capacity but need very robust and reliable communications, particularly for emergencies.²⁶

Indeed, during the course of the Inspector General’s investigation, Harlin McEwen, Chairman of the Public Safety Spectrum Trust, acknowledged that “emergency responders could not be subject to the kind of interruption and loss of service experienced by the typical cell phone user.”²⁷ Because of the vast differences between networks required for public safety and commercial network, the Commission should not mandate the building of one network for both types of uses – as such a network would not adequately satisfy either use and would guarantee that no commercial operator would have a business plan to match the use of such a network.

Thus, no matter what rules and regulations the Commission proposes for a public/private partnership for the D-Block, the reality is that there are substantial differences between a public safety network and a commercial network. There are also substantial concerns implicated by an auction to serve the needs of the public safety community. The Commission should acknowledge these substantial concerns, and immediately re-auction the D-Block as unencumbered commercial spectrum.

D. The Legality of the Public/Private Partnership Approach is Uncertain

The Commission notes in the *D-Block FNPRM* that “it would appear that, under Section 337 of the Act and in furtherance of the policies that have led to the creation of the Public Safety Broadband Licensee, the eligible users of the public safety broadband network that are represented by the Public Safety Broadband Licensee should be restricted to entities that would be eligible to hold licenses under Section 90.523. Thus, only entities providing public safety

²⁶ See Spectrum Policy Task Force Report, ET Docket No. 02-135 released November 2002.

²⁷ *IG Report* at 24.

services, as defined in the Act, would be eligible to use the public safety spectrum of the shared network of the 700 MHz Public/Private Partnership *on a priority basis.*"²⁸ This observation implies that non-eligible users of the public safety broadband network are free to use it on a non-priority basis, but there is nothing in Section 337, or its legislative history, that supports this view. Rather, Section 337 appears to draw a bright line between the spectrum devoted to commercial use and the spectrum devoted to public safety uses. The Commission risks reversible error in the Court of Appeals when it seeks to blur this distinction.²⁹ And yet, the entire economic basis of the mandatory public/private partnership is that the commercial party will enjoy access to the public safety spectrum. The Commission must conclude that statutory restrictions on the use of public safety spectrum by non-eligible commercial users present a fundamental insolvable flaw in the public/private partnership approach.

In addition to these questions, MetroPCS continues to have concerns about whether the Commission has the authority to authorize commercial users to have access to the allocated public safety spectrum, and to allow public safety users to have access to allocated commercial spectrum, without requesting Congressional intervention. While the Commission purported to address this issue in its *700 MHz Order*,³⁰ serious questions have been raised as to whether the Commission's actions exceed the Commission's statutory authority.³¹ The Balanced Budget Act of 1997 (the "BBA"), Pub. L. No. 105-33, directed the Commission to reallocate the Upper 700

²⁸ *D-Block FNPRM* at para. 29 (emphasis supplied).

²⁹ Obviously, the prospect of having both the commercial and public safety bands tied up in litigation is unacceptable and will further delay public safety from receiving its long needed interoperable network.

³⁰ *700 MHz Order* at paras. 414-430.

³¹ See Letter from Steve Largent, President and CEO, CTIA, to Chairman Kevin Martin, FCC, *Ex Parte* in Docket No. 06-150 (filed Apr. 5, 2007); see also RCC Consultants, Inc. *700 MHz FNPRM* Comments at 10-40.

MHz band for public safety use and commercial use. Specifically, the BBA mandated that the Commission allocate 24 MHz of spectrum for public safety services and the remaining 36 MHz of spectrum for commercial use to be assigned by competitive bidding. *Id.* at § 3004. (These statutory mandates are incorporated in Section 337(a) of the Communications Act of 1934, as amended 47 U.S.C. § 337(a)). Any proposal that mandates the incursions described above would change this balance by permitting public safety to use commercial spectrum and commercial users to utilize public safety spectrum. The language of the statute itself appears to defeat any similar proposal. Section 337(a) provides that the Commission "shall allocate the electromagnetic spectrum as follows: "(1) 24 MHz [for public safety]; and (2) 36 MHz [for commercial use]." With so many jurisdictional issues looming, the Commission would be best served to completely separate the D-Block from the public safety spectrum, and allow for an immediate re-auction of the D-Block without any encumbrances and to allow public safety to immediately begin use of its 10 MHz of spectrum.

Significantly, adverse parties may have refrained from pursuing this statutory authority issue in the Courts before for fear of delaying the entire 700 MHz auction. However, the same hesitancy may not apply now that the Commission is left to auctioning of the D-Block on a stand-alone basis, especially since these same interested parties are seeking a complete unencumbered auction of additional paired spectrum for commercial services. And, any order issued in response to the *D-Block FNPRM* that revisits the issue of shared use of the public safety and commercial spectrum will make the statutory authority issue ripe for appeal.

E. In Lieu of a Mandatory Public/Private Partnership, the Commission Should Provide Incentives to All Commercial Carriers to Lease Spectrum and Provide Funding to the Public Safety Community

Rather than endorsing a monopoly service provider, the Commission could provide incentives for all commercial licensees to forge cooperative arrangements with public safety

service providers. There is no requirement that additional spectrum capacity during times of emergency come from an adjacent band, and thus any current and future licensee of commercial spectrum would be able to provide excess capacity service to the public safety community.³²

The public safety community would be better served by allowing marketplace forces rather than regulatory strictures to ensure the cooperation and assistance they may need. What the Commission should do is establish rules to incent commercial operators to compete to provide public safety with service, rather than forcing public safety users to negotiate with only one provider which has complete market power.

In fact, the Commission already has established voluntary rules for priority access service from CMRS providers to public safety personnel at the federal, state, and local levels.³³ While the existing priority access rules for CMRS providers are voluntary, and may not be as robust as necessary for times of emergency, the Commission could reexamine these rules, and provide incentives for all commercial entities to opt into them.

In addition, if the ability to generate a revenue stream for the public safety community was insufficient, the Commission could provide additional incentives to commercial purchasers of spectrum to provide aid and infrastructure to public safety entities. These additional incentives could be in the form of tax certificates, subsidized service costs, or discounts on universal service fund contributions that would be strong enough to encourage commercial providers to offer service to the public safety community. By relying on established commercial carriers, the public safety community would not have to worry about having to negotiate with

³² This also might allow the public safety community to have multiple commercial operators in the same market providing capacity and services.

³³ *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, 15 FCC Rcd 16720 (rel. Jul. 13, 2000).

one party concerning fees and capacity and could rely on market forces to achieve voluntary agreements. Thus, while MetroPCS continues to believe that 10 MHz of spectrum is sufficient for a public safety broadband network, and that the public safety community should adopt state-of-the-art technologies designed to maximize the capacity of the 10 MHz – if the Commission is inclined to do more, it could establish much better alternatives than the mandatory private/public partnership.

II. THE COMMISSION SHOULD ADOPT COMMERCIAL AUCTION RULES THAT WILL PROMOTE COMPETITION IN THE MARKETPLACE

The Commission seeks comment on the “particular service rules that we should adopt for the D-Block in the event that we determine that the D-Block should be licensed without any 700 MHz Public/Private Partnership obligation.”³⁴ MetroPCS applauds the Commission for seeking comment at this time on the commercial rules if the public/private partnership safety auction is not pursued or fails. Whether the Commission decides to hold an unencumbered commercial D-Block re-auction in the first instance, or decides to hold an immediate re-auction in the likely event that a D-Block auction with public/private partnership fails again, it must adopt commercial auction rules that will promote competition in the wireless marketplace, and allow for sufficient flexibility for the spectrum to be put to its highest and best use. The service rules for a D-Block re-auction without any 700 MHz public/private partnership obligation should be based on certain core principles in order to promote the assignment of each license to the entity that values it most.

As an initial matter, MetroPCS agrees with the Commission’s conclusion not to revisit its determinations to auction off the D-Block as a 10 MHz spectrum block consisting of paired 5 MHz blocks and to apply a ten year license term to the block, consistent with the license term for

³⁴ *D-Block FNPRM* at para. 192.

all other 700 MHz licensee.³⁵ Moreover, as it repeatedly has noted, MetroPCS favors an auction which includes as many fungible licenses as possible with licensees being accorded as much flexibility possible. MetroPCS believes that the best way to achieve such a result is to have the commercial 700 MHz spectrum auctioned at the same time as AWS-2 and AWS-3. By licensing a series of potentially substitutable licenses in a single auction, the Commission ensures that the market, not artificial regulatory policies, will establish the value of such licenses and will determine winners and losers. When “one-off” auctions are held, rather than allowing market forces to sort out the multiple licenses, the licenses will not be sold for their true market value and often will not be acquired by the bidders who value them most highly. Moreover, the Commission should not apply “open access” rules,³⁶ or additional unnecessary regulation or restrictions such as a mandatory wholesale requirement, where marketplace forces continue to be at work on the D-Block. Rather, the Commission should heed a main conclusion in a report it issued 15 years ago that set forth the roadmap for a transition to the use of a market allocation of spectrum, which stated that “[a]n ideal market allocation should impose no restrictions on spectrum uses and users beyond those necessary to limit interference, to prevent anti-competitive concentration, and to comply with international agreements.”³⁷ Bearing this principle in mind, the Commission should allow for a flexible auction, consisting of as many fungible units as possible. Thus, the Commission should (1) adopt CMAs as the appropriate geographic area for

³⁵ *Id.* at paras. 197-198.

³⁶ See MetroPCS 700 MHz FNPRM Comments at 38-42; see also Letter from Carl W. Northrop, Counsel to MetroPCS, to Kevin J. Martin, Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate, and Robert M. McDowell, WT Docket Nos. 06-150, 06-169 and 96-86, PS Docket No. 06-229, filed July 16, 2007 (opposing “open access” requirements for any part of the 700 MHz Band). MetroPCS incorporates this letter by reference into this proceeding.

³⁷ Kwerel, Evan and John Williams, *A Proposal for a Rapid Transition to Market Allocation of Spectrum*, OPP Working Paper 38, Federal Communications Commission at 3-4, November 2002.

the D-Block; (2) not adopt package bidding for a D-Block re-auction; (3) not apply geographic performance requirements to an unencumbered D-Block re-auction, and (4) auction the D-Block as part of its AWS-2 and AWS-3 auction.

A. The Commission Should Adopt CMAs as the Appropriate Geographic Area for the Commercial D-Block

As advocated previously by MetroPCS, when the Commission auctions off the D-Block for purely commercial use, the Commission should adopt a band plan that is flexible and encourages broad participation by utilizing small geographic areas.³⁸ By taking a “building block” approach and offering a sufficient amount of spectrum in small geographic areas, the Commission would permit meaningful participation by a diverse group of carriers – including smaller carriers and prospective and new entrants into the marketplace.³⁹ Such an approach also allows bidders who desire large license areas to aggregate licenses into larger geographic areas as aptly demonstrated by numerous entities in the AWS-1 auction.⁴⁰ In adopting a building block approach, the Commission would also be following its statutory obligation to ensure “an equitable distribution of license and services among geographic areas” and “avoid [] excessive concentration of licenses . . . by disseminating licenses among a wide variety of applicants. . .”⁴¹ Such an approach increases the prospect that winners and losers will be determined by free market forces, rather than regulatory fiat. Moreover, by utilizing small license areas, the Commission will allow potential bidders the flexibility to construct their networks, service areas and business plans in a way of their own choosing – rather than have the Commission predetermine such choices for them.

³⁸ MetroPCS 700 MHz FNPRM Comments at 13.

³⁹ *Id.* at 13-14.

⁴⁰ *Id.* at 14.

⁴¹ 47 U.S.C. § 309(j)(3).

Moreover, based on the results of the recently concluded Auction 73, CMAs were by far the most desired geographic area size, when measured by price per MHz/POP. For instance, the CMA B-Block resulted in an average price of \$2.68 per MHz/POP.⁴² This is compared with the EA A-Block, with an average price of \$1.16 per MHz/POP, and the REAG C-Block, which resulted in an average price of \$0.76 per MHz/POP.⁴³ It is clear based on these results that there was and remains a significant unmet demand for smaller geographic areas. Most important, the results of the 700 MHz auction clearly reveal that much of the demand remains unfulfilled since many active bidders for paired channels either came away empty-handed (*e.g.* Leap Wireless, Alltel) or acquired fewer licenses than they were interested in based upon their bidding patterns (*e.g.* MetroPCS and US Cellular). Thus, the Commission should conduct any D-Block re-auction without any 700 MHz mandatory public/private partnership obligation by using CMAs as the appropriate geographic area.

B. The Commission Should Not Adopt Combinatorial Bidding for any D-Block Re-auction

MetroPCS remains steadfast in its view that the Commission should not promulgate auction rules that allow for combinatorial bidding. MetroPCS supports the use of a single SMR auction format, which was used successfully during Auction No. 66. The Commission should not incorporate combinatorial bidding into any re-auction of the D-Block. Many prior auctions confirm that combinatorial bidding is not necessary to enable carriers to assemble nationwide licenses.⁴⁴ Indeed, in Auction No. 66, SpectrumCo and T-Mobile were able to build virtually

⁴² “It’s Over: 700 MHz Auction Ends After 38 Days, 261 Rounds,” RCRNews.com, Dan Meyer, March 18, 2008.

⁴³ *Id.*

⁴⁴ MetroPCS 700 MHz FNPRM Comments at 20.

nationwide coverage without the use of combinatorial bidding.⁴⁵ This result supports the Commission's prior practice of adopting a "building block" approach in designing band plans.

Moreover, combinatorial bidding is skewed toward certain large prospective bidders, and undermines the prospects for success of smaller or regional carriers.⁴⁶ Indeed, the use of a combinatorial bidding design would harm small, rural, and regional carriers and prospective new entrants. As commenters have noted in the past, combinatorial bidding creates a "threshold problem," which occurs when small bidders cannot raise their bids enough to beat out a large bidder, even though the aggregate value of the small bidders may be greater than the large bidder's value. Ultimately, competitive problems arise when certain bidders are able to acquire spectrum at substantially lower prices per MHz of population than other bidders. Further, combinatorial bidding allows large incumbent licensees to acquire spectrum over new entrants who may have a more targeted approach to a specific geographic area. If the Commission wants to foster additional competition - - and perhaps an additional broadband pipe into the home - - it should adopt a policy which would encourage both larger and smaller new market entrants to participate and not use combinatorial bidding which is skewed towards certain prospective bidders over others.

All of these assertions were proven by the success of Verizon Wireless, soon to be the largest national wireless provider, in its acquisition of the vast majority of C-Block licenses in Auction 73. While Verizon Wireless did not win its C-Block spectrum on a combinatorial bid – the fact that combinatorial bidding was available significantly increased the complexity of the bidding process, and hindering the bidding of small, regional and mid-tier carriers. Indeed, because of combinatorial bidding, and the use of large geographic areas, regional and mid-tier

⁴⁵ *Id.* at 20-22.

⁴⁶ MetroPCS 700 MHz FNPRM Reply Comments at 12-17

carriers were unable to secure needed spectrum in Auction 73. Further, as a result of combinatorial bidding and larger license areas, the REAGs ultimately were sold for almost 66% less than the CMA licenses - - which indicates a market failure and suggests that those licenses are an anomaly and were not sold to the bidder who would value them the most. In addition, very few substantial new competitors entered the wireless marketplace via Auction 73 even though there were numerous new applicants. Taking these developments into consideration, the Commission should thus not apply combinatorial bidding to any re-auction of the D-Block.

C. The Commission Should Not Apply Geographic Performance Requirements, or a “Keep What You Use Rule” to the D-Block

The Commission should not apply arbitrary geographic performance requirements to additional spectrum.⁴⁷ Stringent build-out mandates have the effect of imposing artificial government-mandated burdens upon licensees, in lieu of relying upon market forces to drive system development. Moreover, strict geographic requirements will tend to homogenize systems and create a disincentive for carriers to offer differentiated services. Stringent geographic build out standards disadvantage new entrants, such as MetroPCS, who are entering markets to compete with entrenched incumbents. There is no level playing field when the new entrant faces a severe build out requirement that the incumbent need not meet on previously allocated spectrum. Strict geographic construction requirements also deter investment by new entrants and deter their participation in the auction. In addition, as previously noted by CTIA, geographic build-out requirements are not necessary because (1) wireless carriers already are aggressively extending their networks into rural areas; (2) forced uneconomic build-out is unwise; (3) universal service is a proven tool for encouraging network deployment in rural areas; and (4)

⁴⁷ MetroPCS 700 MHz FNPRM Comments at 29-38.

forced build-out will create unintended consequences.⁴⁸ Furthermore, the Commission repeatedly has expressed its preference for market-driven service requirements,⁴⁹ and this preference should be implemented for a D-Block auction without any 700 MHz public/private partnership obligation.

Further, geographic coverage requirements will not ensure that rural areas get covered. Any requirement that is not market based would require urban customers to subsidize rural customers. Cross-subsidies of this nature are impossible to sustain in a highly competitive market. Carriers would be forced to relinquish area that is uneconomic to serve and return it to the Commission some 4-8 years after the fact. This spectrum would be re-auctioned with little hope of being built the second time around -- or acquired by speculators who are betting that the Commission will change the rules or waive them once the true extent of the uneconomic nature of the build-out is apparent. The result will be that the original licensee - - who was best positioned to build out these areas over time - - will not have the spectrum and the area will not be served.

If the Commission believes that specific build-out rules are necessary, it should adopt a variation of its established population-based requirements, rather than imposing inherently random geographic-based requirements. For instance, the original PCS construction requirement (1/3 coverage in 5 years - - 2/3rds coverage in 10 years for 30 MHz licenses,⁵⁰ and 25% coverage in 5 years or substantial service for 10 and 15 MHz licenses⁵¹) served the public well. However, if the Commission does adopt geographic performance requirements, it should adopt the

⁴⁸ CTIA 700 MHz FNPRM Comments at 4-10.

⁴⁹ *Id.* at 32-34.

⁵⁰ 47 C.F.R. § 24.203(a).

⁵¹ 47 C.F.R. § 24.203(b).

clarifications that MetroPCS has asked the Commission to apply to the rest of the 700 MHz Band.⁵² Nevertheless, in the final analysis, the proper approach for the Commission to follow is a market-based approach to performance benchmarks that has served consumers so well up to this point.

D. The Commission Should Combine Any Auction of the D-Block with the AWS-2 and AWS-3 Spectrum

The public interest is served best when multiple fungible licenses are auctioned at the same time. Such auctions allow bidders to assess the value of all licenses at the same time and to bid on the spectrum that best meets their business plans. If the Commission decides to auction the D-Block for commercial service, the best spectrum to pair it with in an auction is the currently unlicensed AWS-2 and AWS-3 spectrum. Such an auction would allow bidders to select between 2 (or 3 if the J Block remains paired) paired spectrum blocks of 10 MHz each and a 20 MHz unpaired spectrum block. Moreover, such an auction allows bidders to have multiple license options, which would permit them to raise more money and to have greater certainty that they will come away from the auction with the licenses they seek. In addition, the Commission has shown time and time again that auctions where it has multiple licenses tend to

⁵² See “Petition of MetroPCS Communications, Inc. for Clarification and Reconsideration,” filed September 20, 2007 in *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et, al*, WT Docket No. 06-150, CC Docket No. 94-102, WT Docket No. 01-309, WT Docket No. 03-264, WT Docket No. 06-169, PS Docket No. 06-229, WT Docket No. 96-86, and WT Docket No. 07-166, Order, FCC 07-132 at paras. 414-430 (rel. Aug. 10, 2007). These proposals include (1) clarifying the portions of the rules which indicate that a licensee may be subject to monetary fines and supplemental license forfeitures for a failure to meet Commission performance requirements; (2) excluding certain additional areas from the calculation of the relevant geographic area, including bodies of water, historical areas, zip codes with less than 5 persons per square mile, and any unserved area that was wholly surrounded by served areas – the so called “hole on the doughnut.”; (3) allowing the original licensee to retain a small expansion area above and beyond the “Use-it-or-Lose-it” area that is 15% larger than the calculated service area of the existing network; and (4) allowing the original licensee to only lose territory for failing to meet a construction benchmark if a credible third party demonstrates a willingness and ability to serve the unserved area promptly.

result in licenses being acquired for higher prices and by those who value them most.

Accordingly, the Commission should combine any auction of the D-Block for commercial service with the AWS-2 and AWS-3 spectrum.

III. IF THE COMMISSION ADOPTS A PUBLIC/PRIVATE PARTNERSHIP FOR THE D-BLOCK, IT MUST ADOPT SAFEGUARDS TO ENSURE THAT ITS PUBLIC SAFETY OBJECTIVES ARE MET

As noted above, MetroPCS believes that the Commission should immediately re-auction the D-Block without the public safety encumbrance. However, if the Commission does proceed with any type of public/private partnership, it should implement adequate safeguards to ensure that any D-Block winner has the seriousness of purpose and financial wherewithal to provide the Commission and public safety community with the network that they are seeking. Specifically, the safeguards should include a market-based reserve price, a requirement for a letter of credit or performance bond from any D-Block winner, along with a significant default penalty for failing to follow through with the Commission's rules and intent, and lastly, the Commission should not allow for an exception for the D-Block to its designated entity rules.

A. The Commission Should Adopt a Substantial Reserve Price for the D-Block

In the prior auction of the D-Block, the Wireless Telecommunications Bureau ("WTB") established a reserve price of \$1.33 billion based upon prior auction results.⁵³ In the *D-Block FNPRM*, the Commission seeks comment "on an appropriate reserve price [for the D-Block], or whether we need a reserve price, other than a minimum opening bid, at all, for a new auction for the D-Block license."⁵⁴

⁵³ See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, and other Procedures for Auctions 73 and 76, *Public Notice*, 22 FCC Rcd 18141 at para. 199 (2007); *D-Block FNPRM* at para. 1.

⁵⁴ *D-Block FNPRM* at para. 163.

The Commission must establish a meaningful reserve price for any re-auction of the D-Block spectrum to ensure that the winning bidder has a substantial stake in promptly developing the services contemplated by the Commission, as well as to protect the value of a significant and scarce public resource. Section 309(j)(3) requires the Commission to balance several statutory objectives and empowers the Commission to use reserve prices to achieve these objectives.⁵⁵ Indeed, the previous 700 MHz Band reserve prices were defined by the Commission and set by the WTB as a part of a delicate balance between the public interest benefit of meeting the earmarks and scoring set by Congress for the spectrum and the desire of the Commission to experiment with additional regulatory requirements on the spectrum.

A meaningful reserve price generally will require a bidder to establish a solid business plan and to test that plan in the capital markets, which is a publicly beneficial vetting process. For example, in the case of Frontline, the fact that it was required to raise a significant amount of capital just to participate in the auction and win the license served to expose the problems with its business plan sooner rather than later. Had no such upfront payments been required, the Commission could be facing a nightmare scenario, reminiscent of the NextWave debacle, where valuable spectrum is licensed to a bidder who cannot meet the funding and building requirements, leaving the spectrum to lay fallow for an extended period of time due to the bankruptcy of the licensee.

The Commission consistently has recognized that the 700 MHz Band spectrum is especially valuable and at least as valuable as the AWS spectrum because it has particularly robust propagation characteristics.⁵⁶ The Commission observed that “spectrum in the 700 MHz

⁵⁵ 47 U.S.C. § 309(j)(7)(A).

⁵⁶ See *700 MHz Order* at paras. 203, 299. For example, Commissioner Adelstein correctly observed in his *700 MHz Order* statement that “[t]hese 700 MHz licenses are the finest crown

(continued...)

Band possesses superior propagation characteristics to AWS-1 spectrum,”⁵⁷ and noted that “as of February 18, 2009, the 700 MHz Band spectrum will be completely unencumbered, while full access to AWS-1 spectrum requires the relocation of both Government and commercial incumbent users.”⁵⁸ Indeed, this observation was borne out by the results of Auction 73, where the prices paid were two to three times or more on average than Auction 66. Thus, the Commission properly concluded that “other factors, aside, 700 MHz Band licenses with comparable geographic service areas and bandwidth should have a higher market value on a per-megahertz basis than AWS-1 licenses.”⁵⁹ Taking this into account, one is compelled to take the failure of the D-Block auction to meet its reserve price as concrete evidence that the restrictions placed on the spectrum by the Commission completely and substantially devalued the D-Block. The Congressionally-mandated competitive bidding procedures were intended to enable the public to receive fair value for valuable spectrum rights that were assigned to private parties, and that the public interest would not be served by allocation policies that devalue the spectrum unnecessarily. A substantial devaluing of 10 MHz of valuable spectrum is not what Congress intended.

Thus, MetroPCS submits that the Commission should establish a reserve price for the D-Block that is no lower than the previous reserve price of \$1.33 billion that was established for the D-Block. This would ensure that the ultimate winner is a financially secure company with a well funded and tested business plan. It also would help ensure that the objective of Section 309(j)(3) (...continued)

jewels the FCC has to put up for auction.” *Id.* at Statement of Commissioner Jonathan S. Adelstein.

⁵⁷ *Id.* at para. 304. This view is supported by the fact that a 700 MHz site will cover over two times the coverage of a comparable AWS site based on the propagation characteristics of 700 MHz.

⁵⁸ *Id.*

⁵⁹ *Id.*

of the Communications Act of allowing the public to recoup a fair value for scarce radio spectrum sold at auction is met.

Indeed, there is good cause for the Commission to establish a higher reserve price for the D-Block, based on the recent prices paid for spectrum in Auction 73. For instance, the average price for the C-Block, which was saddled with an “open access” condition and large geographic areas, was \$0.76 per MHz/POP.⁶⁰ Meanwhile, the average prices for smaller blocks of paired spectrum without “open access” conditions were much higher. The average price for the A-Block was \$1.16 per MHz/POP, while the average price for the B Block was a staggering \$2.68 per MHz/POP.⁶¹ Using these average prices as a reference, if the 10 MHz of D-Block spectrum was auctioned off using CMAs for the geographic area, as the Commission did for the B-Block, it is possible that the spectrum could be valued at \$7,654,627,926.⁶² Indeed, using only the average price paid for the C-Block, the spectrum would be valued at \$2,170,715,382. The Commission should not give away valuable spectrum at a vast discount in comparison to what the spectrum is worth. Thus, the reserve price must be, at a minimum, not lower than the \$1.33 billion established for the previous D-Block re-auction.

Significantly, the above analysis assumes that prices are being paid for only 10 MHz of spectrum. However, if the Commission follows its previous approach, any D-Block winner would receive not only the 10 MHz D-Block – but also access to provide services during non-emergencies over 10 MHz of the public safety broadband allocation. Thus, in setting a reserve

⁶⁰ “It’s Over: 700 MHz Auction Ends After 38 Days, 261 Rounds,” RCRNews.com, Dan Meyer, March 18, 2008.

⁶¹ *Id.*

⁶² This is using a population of 285,629,445, which is what the Commission used to measure the population for the D-Block in Auction 73. *See* Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, and other Procedures for Auctions 73 and 76, *Public Notice*, 22 FCC Rcd 18141 at Attachment A (2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-4171A2.xls

price, the Commission should consider the market value of receiving access to 20 MHz of prime paired spectrum. The Commission has a statutory obligation to ensure that the public receives fair value for this scarce public resource. Thus, the Commission must establish a significant reserve price for any D-Block re-auction, and such amount should be no less than the \$1.33 billion previously set as the reserve price for the D-Block.

B. The Commission Should Require that Any D-Block Winner Post a Letter of Credit or Performance Bond, As Well As Establish a Substantial Default Payment, to Ensure That Such Winner Has the Appropriate Financial Wherewithal to Meet its Obligations

In the *D-Block FNPRM*, the Commission notes that “the ability of the D-Block licensee to finance construction of the shared network is critical,” and asks whether it has “established sufficient and appropriate incentives in the 700 MHz Public/Private Partnership that ultimately will enable the D-Block licensee to finance and construct the shared network as contemplated.”⁶³ MetroPCS strongly agrees that it is essential for the Commission to ensure that any D-Block winner has the financial wherewithal to meet the Commission’s requirements for the build-out of a nationwide public safety network. To do so, the Commission must use regulatory tools it has developed in the past to guarantee performance. Any public/private partnership approach must include regulatory mechanisms sufficient to establish that the ultimate winner has adequate financial protections as a backup plan for what happens if yet another risky mandatory public/private partnership plan fails, and the wherewithal not only to acquire the license but also to build the promised network. Specifically, the Commission should impose either a letter of credit or a performance bond requirement upon any D-Block winner, as well as establish a substantial default payment penalty, in order to ensure that this valuable spectrum is not devoted to an unfunded business plan which could result in spectrum becoming tied up in bankruptcy or

⁶³ *D-Block FNPRM* at para. 114

otherwise lying fallow. The public safety community deserves a well funded partner and should not be forced to rely only upon an experimental and highly risky plan to implement the broadband, interoperable network that our nation rightfully deserves. Rather, the public safety community must be guaranteed that adequate funds are available for the build-out of the public safety network. These proposed safeguards would ensure that the finances for the building of a public safety network are secured and guaranteed upfront.

Indeed, a number of public safety commenters suggested such safeguards in their *700 MHz FNPRM* Comments. For instance, APCO asked the Commission to establish "a performance bond or other financial security to ensure continuity of service" for public safety, in the event the D-Block winner could not fulfill its obligations.⁶⁴ In addition, NPSTC asked that the Commission, "[t]o safeguard public safety operations . . . require the posting of a letter of credit or similar instrument that will . . . fund the continued investment and maintenance of the network."⁶⁵

The Commission previously has used both letters of credit and performance bonds to ensure that licensees can satisfy their license commitments. For instance, in its 800 MHz rebanding order, the Commission required Nextel to obtain a letter of credit to ensure that the promised nationwide band reconfiguration would occur – regardless of any changes in Nextel’s financial condition.⁶⁶ The Commission sought comment in the 800 MHz rebanding proceeding “on how to guarantee the availability of funding to complete the reconfiguration of the 800 MHz

⁶⁴ APCO *700 MHz FNPRM* Comments at 20.

⁶⁵ NPSTC *700 MHz FNPRM* Comments at 15.

⁶⁶ See *Improving Public Safety Communications in the 800 MHz Band et al*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969 (rel. Aug. 6, 2004).

Band regardless of the financial status of the contributing party or parties.”⁶⁷ The Commission determined that a letter of credit would best accomplish this guarantee, and required Nextel to provide an irrevocable letter of credit securing \$2.5 billion to serve as the funding sources for the costs involved with reconfiguring the 800 MHz band.⁶⁸

There are considerable similarities between the 800 MHz rebanding proceeding and the D-Block public/private partnership scenario. In the 800 MHz rebanding proceeding, Nextel was being given access to a valuable 10 MHz of contiguous PCS spectrum in exchange for its commitment to pay the costs of relocating various incumbents in the 800 MHz band. The Commission deemed it to be in the public interest to adopt specific safeguards to assure that Nextel would perform before granting it the spectrum it was to receive. Moreover, the tasks of relocating public safety were paramount and had significant public benefits that would only be achieved if the rebanding occurred. The Commission did not consider Nextel’s bare promise to fund the rebanding, even if such promise was an enforceable term of its license, to be sufficient. The Commission should insist on no less here.

The Commission also has insisted upon performance bonds in at least two different instances. First, for the construction of paging systems at 929-930 MHz, the Commission mandated performance bonds when slow growth extensions were requested.⁶⁹ The Commission stated that “[t]he applicant must also provide a construction cost estimate and must either place a sum equal to that estimate in an escrow account or obtain a performance bond payable in that amount. As construction of the system proceeds, the licensee may draw from the escrow amount

⁶⁷ *Id.* at para. 180.

⁶⁸ *Id.* at para. 182.

⁶⁹ *Amendment of the Commission’s Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, Report and Order, 8 FCC Rcd. 8318 at para. 23 (rel. Nov. 17, 1993).

or reduce the bond amount to reflect costs incurred. If the licensee fails to construct all or part of the proposed system within the slow-growth period, the escrow balance or the outstanding principal on the bond will be paid to the United States Treasury."⁷⁰

More recently, the Commission mandated performance bonds for satellite licenses issued after September 20, 2004 (with certain minor exceptions).⁷¹ Under these satellite license rules, licensees were required to post bonds within 30 days of the grant of the license, and failure to post a bond would render the license null and void.⁷² The licensee would be considered in default and lose the bond (with the bond funds going to the U.S. Treasury) if it failed to meet particular milestone construction requirements.⁷³ Licensees also were permitted to reduce the amount of the bond upon meeting certain milestone requirements.⁷⁴ The Commission noted that by "requiring satellite licensees to make a financial commitment to construct and launch their satellite, we help deter speculative satellite applications, and help expedite provision of service to the public" and that "replacing our current financial qualification requirement with a bond requirement will result in the financial community determining whether the licensee is likely to construct and launch its satellite system. Thus, financial qualifications will become a market-driven rather than a regulatory determination."⁷⁵

By applying a letter of credit and/or performance bond requirement to the D-Block winner, in an amount sufficient to cover the cost of acquiring the license, building the network

⁷⁰ *Id.*

⁷¹ *Amendment of the Commission's Space Station Licensing Rules and Policies, et al*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 12674 at paras. 170-172 (rel. May 19, 2003); 47 C.F.R. § 25.165

⁷² *Id.* at para. 170

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

and operating the network, the Commission will ensure that the public safety network will not be left for dead in the event the D-Block winner goes belly-up. Rather, by having to post a substantial letter of credit or performance bond, the D-Block winner will be ensuring that it has the financial capability to complete the requirements it has agreed to – and to ensure that its public safety obligations are met. Further, if the bond is set appropriately, the bond could fund a nationwide interoperable network. This would allow the Commission to have its cake and eat it too - - if the bidder builds the system, public safety gets its network and if it fails to build it, public safety gets the money to build one itself.

In this vein, the Commission should also establish a significant default payment for any D-Block winner.⁷⁶ MetroPCS agrees with the Commission that “the need to deter default is substantially increased” due to any public safety conditions on the D-Block. Such a default amount should be substantial enough to deter frivolous bids on the D-Block, as well as to further ensure that any D-Block winner has a seriousness of purpose in fulfilling the Commission’s public safety objectives.

C. The Commission Should Not Allow Any Exceptions to Its Designated Entity Rules

The Commission also seeks comment on “whether we should adopt a service specific exception to our impermissible material relationship rule for purposes of determining designated entity eligibility solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D-Block license.”⁷⁷ As an initial matter, MetroPCS submits that the Commission should not offer any bidding credits, or designated entity eligibility, to applicants for the D-Block license. Any D-Block winner needs to have the financial wherewithal to deploy

⁷⁶ *D-Block FNPRM* at paras. 172-175.

⁷⁷ *Id.* at para. 166.

billions of dollars on a network for public safety, and the Commission should not risk this monumental responsibility on an entity that needs an additional discount on spectrum to compete in an auction.

Moreover, the Commission should not make a special exception from its designated entity rules for the D-Block winner. Section 1.2110(b)(iv) of the rules characterizes as an "impermissible material relationship" any arrangement which results in the DE wholesaling more than 50 percent of its spectrum capacity to one or more third parties.⁷⁸ The Commission adopted this wholesale restriction for DEs because it concluded that "certain agreements, by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility because they are inconsistent with Congress's legislative intent."⁷⁹ The Commission further concluded that the definitions of material relationship that it developed "are necessary to ensure that the recipient of our designated entity benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the

⁷⁸ Section 1.2110(b)(iv)(A) states:

(iv) Applicants or licensees with material relationships--

(A) Impermissible material relationships. An applicant or licensee that would otherwise be eligible for designated entity benefits under this section and applicable service-specific rules shall be ineligible for such benefits if the applicant or licensee has an impermissible material relationship. An applicant or licensee has an impermissible material relationship when it has arrangements with one or more entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any one of the applicant's or licensee's licenses.

⁷⁹ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules Procedures*, Second Report and Order and Second Further Notice of Proposed Rule Making, WT Docket No. 05-211, at para. 23 (rel. April 25, 2006) ("*DE Order*"). As the Commission is aware, MetroPCS does not agree with the Commission's contention that wholesale arrangements are inconsistent with the statutory scheme for DEs. Nonetheless, the Commission has continued to defend this contention and this holding, although being challenged, still remains in effect.

public.”⁸⁰ The Commission should not effectively carve out a unique set of designated entity rules for the D-Block by essentially granting what can only be viewed as a waiver of the DE wholesale restriction. There are no unique or unusual factual circumstances surrounding this spectrum. The spectrum is fungible with the other 700 MHz band spectrum and there is nothing particularly unique or unusual about it. Indeed, there is no compelling rationale or any adequate legal justification for eviscerating the current DE rules by waiver in this manner.⁸¹

IV. CONCLUSION

For the foregoing reasons, the Commission should implement the proposals described above by MetroPCS in its upcoming Order regarding a re-auction of D-Block spectrum.

Respectfully submitted,

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⁸⁰ *DE Order* at para. 26.

⁸¹ If the Commission does decide to grant an exception for the D-Block, then it should reexamine whether it should maintain this rule at all for any spectrum. Any revised rules for the D-Block would not present unique circumstances and regulatory obligations to warrant an exception to the Commission’s impermissible material relationship rule.