

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

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In the Matter of)	
)	
Auction of AWS-1 and Broadband PCS Licenses)	AU Docket No. 08-46
Rescheduled for August 13, 2008)	
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_____)	

**PETITION FOR RECONSIDERATION
OF METROPCS COMMUNICATIONS, INC.**

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Summary

MetroPCS Communications, Inc. ('MetroPCS') respectfully requests reconsideration of certain aspects of its Auction Procedures Notice for Auction No. 78. Due to the final procedures adopted for Auction No. 78, MetroPCS felt compelled for business reasons not to participate in Auction 78 even though it has a *bona fide* interest in certain of the licenses that the Commission proposes to include in the auction. MetroPCS submits that (1) the public interest would be served by removing from Auction 78 the spectrum previously licensed to Alpine PCS, Inc. ("Alpine"); (2) the Commission should eliminate "closed" licenses because of the inconsistency in holding periods between "closed" licenses and licenses purchased with bidding credits by Designated Entities ("DEs"); (3) the Commission must take steps to protect the application and appeal rights of potential auction applicants who wish to seek reconsideration of procedural rules when doing so as an applicant could violate the anonymous bidding rules; and (4) the Commission must resolve the inconsistency between the SEC and FCC rules pertaining to the public disclosure of material financial information that may contravene the FCC's blind bidding rules.

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PETITION FOR RECONSIDERATION OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys and pursuant to Section 1.429(a) of the Commission’s Rules,² respectfully petitions the Commission to reconsider several aspects of the Wireless Telecommunications Bureau’s (“WTB”) *Public Notice*, DA 08-1090, released May 16, 2008 (the “*Auction Notice*”)³ which established the procedures governing upcoming Auction 78. The following is respectfully shown:

I. PRELIMINARY STATEMENT

MetroPCS was the only interested party to submit initial comments in response to the April 4, 2008 *Procedures Notice* which set forth the proposed procedures for Auction 78.⁴ MetroPCS followed up its comments with a meeting at the Commission and a related *ex parte*

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

² 47 C.F.R. § 1.429(a)

³ See Auction of AWS-1 and Broadband PCS Licenses Rescheduled for August 13, 2008, *Public Notice*, DA 08-1090, AU Docket No. 08-46 (rel. May 16, 2008) (the “*Auction Notice*”). This petition is being filed within 30 days following the date of publication of the *Auction Notice* in the Federal Register, which occurred on May 29, 2008. See 73 Fed. Reg. 30,919 (May 29, 2008). Thus, the Petition for Reconsideration is timely under Sections 1.429(d) and 1.4(b) of the FCC Rules. 47 C.F.R. Sections 1.4(b) and 1.429(d).

⁴ See Auction of AWS-1 and Broadband PCS Licenses Scheduled for July 29, 2008, Comment Sought on Competitive Bidding Procedures for Auction 78, *Public Notice*, DA 08-767, AU Docket No. 08-46 (rel. April 4, 2008) (the “*Procedures Notice*”).

submission.⁵ MetroPCS took an active role in the proceeding because it has a *bona fide* interest in certain of the licenses that were to be auctioned in Auction 78, but also had serious concerns about several aspects of the proposed auction procedures as MetroPCS indicted in its Comments on the *Procedures Notice*. Unfortunately, most of the concerns raised by MetroPCS either were unaddressed or were dismissed by the Commission. As a consequence, MetroPCS made the difficult business decision not to submit a short form application to participate in Auction 78.

As is set forth in greater detail below, the Comments submitted by MetroPCS, among other things, asked the Commission to create an auction with a level playing field for all bidders, to delay the auction and to take steps to clarify certain aspects of the anti-collusion rule and blind bidding rules that acted as a deterrent to potential bidders, and to resolve certain conflicts with Securities and Exchange Commission (“SEC”) reporting requirements. MetroPCS also asked the Commission to remove from the auction the licenses that remain subject to a litigation cloud because the public interest is not served when potential bidders are forced to assume the risks of litigation that the Commission has allowed to linger for an extended period of time.⁶ MetroPCS is well aware of the harm that was suffered by bidders when the Commission re-auctioned in Auction 35 licenses initially won by Nextwave while appeals remained pending, and the risks are even greater under the current auction procedures.⁷ This is especially the case when the

⁵ MetroPCS *Ex Parte* letter from Michael Lazarus to Marlene H. Dortch, AU Docket No. 08-46, filed May 15, 2008 (“MetroPCS *Ex Parte*”).

⁶ Specifically, as is set forth in greater detail within, various licenses in California are subject to a long pending Petition for Reconsideration and two separate Motions for Stay by Alpine PCS, Inc.

⁷ In Auction 35, winning bidders had their upfront payment and down payment money tied up for a significant time when Nextwave started to prevail in its Court challenges to the cancellation of its licenses. Under current auction procedures, winning bidders need to submit 100% of their winning bid amounts promptly following the close of the auction, meaning that a winning bidder could have more than just its upfront payment and down payment tied up if Alpine succeeds in its appeal. Further, under the Commission’s rules, these amounts are held by the Commission and, if returned, are repaid without interest. To the extent bidders have to borrow funds to make their required payments, this causes serious harm on bidders who have to pay interest on amounts that may be returned to them without interest.

Commission ultimately loses its appeal and the licenses have to be reinstated to their original owners. Consequently, MetroPCS has chosen not to participate in Auction 78 under these circumstances even though its interest in certain of the licenses being auctioned remains. Instead, MetroPCS respectfully requests the Commission reconsider its action in several key respects. Specifically, MetroPCS submits that: (1) the public interest would be served by removing from Auction 78 the spectrum previously licensed to Alpine PCS, Inc. (“Alpine”); (2) the Commission should eliminate “closed” licenses because of the inconsistency in holding periods between “closed” licenses and licenses purchased with bidding credits by Designated Entities (“DEs”); (3) the Commission must take steps to protect the application and appeal rights of potential auction applicants who wish to seek reconsideration of procedural rules when doing so as an applicant could violate the anonymous bidding rules; and (4) the Commission must resolve the inconsistency between the SEC and FCC rules pertaining to the public disclosure of material financial information that may contravene the FCC’s blind bidding rules.

II. METROPCS HAS STANDING AND RECONSIDERATION IS JUSTIFIED

The Administrative Procedures Act (“APA”) imposes a “requirement of reasoned decision-making” upon agency decisions.⁸ Those portions of the auction procedures that MetroPCS seeks to change violate the APA in a number of respects, including that the Bureau failed to consider important aspects of the serious issues raised by MetroPCS. Under the APA, an agency must produce a rule that is well-reasoned⁹ and that finds “support in the record.”¹⁰ In

⁸ *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986).

⁹ *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 52 (1983).

¹⁰ *NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982).

promulgating a rule, the Commission must “consider[] the relevant factors.”¹¹ Indeed, “an agency rule [is] arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.”¹² The Commission will entertain a petition for reconsideration if, *inter alia*, reconsideration is in the public interest.¹³ Here the Commission failed to address serious issues raised by MetroPCS and therefore the auction procedures are arbitrary and capricious. Accordingly, reconsideration is justified by Section 1.429(b)(3) of the Commission’s rules.

MetroPCS also is an “interested person” eligible to petition for reconsideration of the auction rules challenged herein.¹⁴ MetroPCS was the only party to comment during the initial comment period set by the Bureau,¹⁵ and is directly and adversely affected by the failure of the Commission to alter the auction procedures as proposed by MetroPCS. This harm is manifested in the fact that MetroPCS felt it to be necessary from a business perspective to forego participating in Auction 78 notwithstanding its desire to acquire additional spectrum in certain of the involved markets. If the reconsideration request is granted, some or all of the licenses in Auction 78 of potential interest to MetroPCS may be available in a future auction in which MetroPCS may participate. Otherwise, they will be auctioned under procedures that do not serve the public interest and in a manner (*e.g.*, closed licenses) which precludes participation by MetroPCS as to certain desirable licenses. Thus, the relief MetroPCS is seeking has a direct

¹¹ *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

¹² *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

¹³ *In the Matter of Numbering Resource Optimization*, Fourth Order on Reconsideration, 22 FCC Rcd 8047 at para. 5 (rel. Apr. 26, 2007).

¹⁴ *Cf.* 47 C.F.R. Section 1.429(a).

¹⁵ *See Auction Notice* at para. 3.

bearing on the interest that MetroPCS is seeking to protect and the harm it is seeking to redress. As a consequence, MetroPCS has standing to submit this petition for reconsideration.¹⁶

III. THE BUREAU SHOULD REMOVE FROM AUCTION 78 THE LICENSES SUBJECT TO THE LEGAL CHALLENGE OF ALPINE PCS, INC

The Bureau should reconsider its decision to allow certain licenses that remain subject to a longstanding legal challenge to remain in Auction 78. In the *Procedures Notice*, the Bureau made no mention of the fact that several of the licenses slated for inclusion in Auction 78 formerly had been licensed to Alpine, and that that Alpine was actively pursuing a timely-filed legal challenge to the Commission decision to treat the Alpine licenses as having been automatically terminated and subject to reauction. Specifically, Alpine is challenging the termination of the 30 MHz C Block licenses for the Santa Barbara (Market No. 406-C) and San Luis Obispo (Market No. 405-C) Basic Trading Areas (“BTAs”). In the *Procedures Notice*, the Commission proposed to subdivide the 30 MHz blocks in each of these two markets into three 10 MHz blocks, one of which would be treated as an “open” license and two of which would be treated as “closed” licenses.¹⁷ MetroPCS was unaware of the continuing Alpine litigation when it filed its initial comments, and initially supported going forward with the auction of these subdivided 10 MHz blocks, but with all of the licenses being treated as “open.”¹⁸ However, in the course of the Auction 78 proceeding, MetroPCS became aware of the Motion for Stay filed by Alpine with respect to the entire 30 MHz of broadband spectrum for the San Luis Obispo, CA

¹⁶ 47 C.F.R. Section 1.106(b)(1) (“any party to the proceeding, or any other person whose interests are adversely affected by an action taken by the Commission ... may file a petition requesting reconsideration of the action”).

¹⁷ *Procedures Notice* at Attachment A.

¹⁸ MetroPCS Comments at 3-6.

and the Santa Barbara-Santa Maria, CA BTAs.¹⁹ MetroPCS then reviewed the Alpine Motion For Stay, as well as an earlier-filed Alpine stay request,²⁰ the underlying Request for Waiver²¹ and the related Petition for Reconsideration²² in which Alpine sought to avoid or overturn the Commission decision to treat its licenses as having been automatically terminated.

MetroPCS takes no position on the merits of the Alpine legal challenges at this time but has concluded that the challenges were timely filed and raise non-frivolous issues, and if the relief sought is granted, would require a return of the licenses to Alpine.²³ Based on these determinations, MetroPCS has changed its initial position and believes it would be premature and contrary to the public interest for the Commission to proceed to re-auction the former Alpine spectrum at this time without resolving the legal challenge.

This is particularly true since the Alpine legal challenges have been pending for so long,²⁴ specifically request a stay of the auction, and since the latest challenge remained

¹⁹ Auction Notice at para. 3, ft. nt. 3.; Alpine PCS, Inc. Motion for Stay, *Request for Waiver of Automatic Cancellation Rules for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), and Request for Debt Restructuring, Auction of AWS-1 and Broadband PCS Licenses Scheduled for July 29, 2008*, (“Motion for Stay”) filed Apr. 18, 2008.

²⁰ Alpine PCS, Inc. Motion for Stay, *Request for Waiver of Automatic Cancellation Rules for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), and Request for Debt Restructuring*, filed Feb. 28, 2007.

²¹ *Alpine PCS, Inc., For a Waiver of Section 1.2110(g)(iv) of the Rules Relating to the Payments Due on July 31, 2002 Regarding its Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C) C Block Licenses*, Request for Waiver, filed Jul. 31, 2002.

²² *Alpine PCS, Inc., Request for Waiver of Automatic Cancellation Rules for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), and Request for Debt Restructuring*, Petition for Reconsideration, filed Feb. 28, 2007.

²³ For example, Alpine cites alleged inconsistencies between the terms of the Notes and Security Agreement that Alpine entered into with the Government and the terms of the amended automatic termination rule pursuant to which its licenses were deemed terminated. Alpine claims that the government cannot alter the terms of its installment plan by changing its Installment payments rules after the fact. See *Alpine PCS, Inc., Request for Waiver of Automatic Cancellation Rules for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), and Request for Debt Restructuring*, Petition for Reconsideration, filed Feb. 28, 2007.

²⁴ In late July of 2002, Alpine filed a restructuring request with the Commission. A few days later, it filed its Waiver Request with the Bureau, seeking additional time to resume payments for the subject licenses. The Bureau

unresolved when the short form applications for Auction No. 78 were due to be filed. In the *Auction Notice*, the Bureau stated that “Alpine’s request [for a stay] will be addressed separately.”²⁵ Yet, it had not been addressed by the June 19, 2008 short form application filing deadline. This put MetroPCS and other potential applicants in the untenable position of having to choose between preparing and filing an application, and subject themselves to the anti-collusion rule for an extended period of time *whether or not they ultimately decided to bid in the auction*,²⁶ -- while not knowing if and when the Commission would resolve the Alpine issues, and not knowing the nature of that resolution - - and not participating. This has a chilling effect on the auction and does not serve the public interest. Moreover, since it is seems certain that the Alpine challenge will not be finally resolved before the auction – bidders risk bidding on spectrum that they might have to return – as well as lose the interest they had to pay on the money paid to the Commission. Since the Alpine Motion for Stay remains pending, the application deadline is passed, and the auction is looming, MetroPCS submits that it would be in the public interest for the Bureau to remove the licenses at issue in the Alpine Motion for Stay until all pending legal issues with the relevant licenses are resolved.

In its Motion for Stay, Alpine points out that it had already filed an initial motion for stay on February 28, 2007, concurrently with its Petition for Reconsideration of the Commission Order that denied Alpine’s request for waiver of the automatic cancellation rules with respect to

released an order denying Alpine’s requests over four years later. Alpine then filed its Petition for Reconsideration and first motion for stay on February 28, 2007 (*See* Motion for Stay at 1-2).

²⁵ *Auction Notice* at ft. nt. 3

²⁶ Under the applicable rule, applicants who file short form application remain subject to the anti-collusion rule until the auction closes and upfront payments are made even if they fail to make an upfront payment or otherwise drop out of the bidding.. *See* 47 C.F.R Section 1.2105(c).

its licenses for the Santa Barbara and San Luis Obispo BTAs.²⁷ Alpine also claims that it obtained the relevant PCS licenses in Auction No. 5 but, due to circumstances beyond its control, it needed to obtain alternate financing to continue paying off its debt for the licenses to the FCC.²⁸ In July 2002, Alpine filed a request with the Commission to restructure its debt, and soon after filed a waiver request with the Bureau, which sought additional time to resume payments for the subject licenses.²⁹ For reasons unknown to MetroPCS, it took the Commission well over 4 years to act upon the Alpine waiver request, and Alpine then timely filed its Petition for Reconsideration of the long delayed denial, and its initial motion to stay. Alpine then filed an additional Motion to Stay after the Bureau released its notice requesting comment on the procedures for Auction 78. Unfortunately, the Commission has allowed these latest Alpine challenges to go unanswered while forging ahead with the reauctioning of the licenses.

There appears to be no compelling reason for the Commission to rush at this stage of the Alpine litigation to reauction these licenses. One can reasonably assume that the reason it took the Commission 4 years to resolve the initial Alpine waiver request was because it raised substantial issues.³⁰ Otherwise, the Commission should have dismissed the waiver promptly and proceeding immediately to reauction the spectrum in order to prevent it from lying fallow any longer than necessary. In view of the lengthy delay, and Alpine's persistence, this situation is

²⁷ Alpine PCS, Inc. Motion for Stay, *Request for Waiver of Automatic Cancellation Rules for Auction No. 5, C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), and Request for Debt Restructuring, Auction of AWS-1 and Broadband PCS Licenses Scheduled for July 29, 2008*, ("Motion for Stay") filed Apr. 18, 2008. MetroPCS, at this time, does not have any view on whether Alpine is correct - - rather, the mere fact that Alpine has raised significant issues is sufficient for the Commission to remove these licenses from the auction.

²⁸ Motion for Stay at 2.

²⁹ *Id.* at 2.

³⁰ This is especially interesting given that the Commission merely returned the requests and did not provide a detailed response to the requests.

eerily reminiscent of the reauctioning of the NextWave licenses in Auction 35. In that instance, the FCC deemed certain licenses granted in Auction 5 to NextWave to have been automatically cancelled. The FCC proceeded to reauction the licenses while NextWave continued to prosecute timely appeals. The winners of licenses in Auction 35 made substantial upfront payments and down payments on licenses that they thought they had won. The payments ended up being held by the Government for an extended period because of the litigation cloud. Ultimately, NextWave prevailed, the Auction 35 licenses were cancelled and the payments were returned to the high bidders, but without interest.³¹

Notably, there has been a significant change in the Commission auction procedures since the NextWave case that now makes the potential risk even greater to successful bidders in a premature reauction. After the Supreme Court ruled that the Commission could not automatically cancel licenses for non-payment if the licensee had filed for bankruptcy protection, the Commission started requiring high bidders to make their entire license payment promptly following the close of the auction rather than waiting until long form applications were processed.³² As a result, rather than just having upfront and down payment money at risk, a prospective winning bidder in Auction 78 could have the entire purchase price tied up indefinitely if Alpine makes progress in its appeal. Under these circumstances, MetroPCS believes that it would be a huge mistake, and contrary to the public interest, to allow these licenses that are subject to the Alpine challenge to continue to auction before the Commission has resolved the legal challenge. This is not a new position, but rather is one that MetroPCS

³¹ *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). *see Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35, Requests for Refunds of Down Payments Made in Auction No. 35*, Order and Order on Reconsideration, WT Docket No. 02-276, FCC 02-311 (rel. Nov. 14, 2002); *see also* News Release, “FCC Announces it Will Refund a Substantial Portion of Certain Auction #35 Down Payments,” (Mar. 27, 2002).

³² *See* 47 C.F.R. § 1.2109(a).

advocated prior to the release of the *Auction Notice*. As reflected in the *MetroPCS Ex Parte*, MetroPCS advocated in its in-person meetings with the staff that the “Commission should resolve the outstanding Petition for Reconsideration and Petitions for Stay by Alpine PCS, Inc. prior to auctioning any licenses that are the subject of such petitions.”³³ Since Alpine has vowed to continue to fight against the reassignment of the spectrum at issue in its litigation, the Commission should not auction off these licenses while this substantial legal cloud is hanging over these licenses.

In promulgating a rule, the Commission must “consider[] the relevant factors.”³⁴ Indeed, “an agency rule [is] arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.”³⁵ Here, the Bureau did not consider, or evaluate, the impact on the auction of the Alpine legal challenge and the disruption and harm that would occur if a stay was issued or if Alpine otherwise managed to prevail in its substantive claim.³⁶ The Commission also did not consider the public interest implications of reauctioning the licenses while they remain under a legal cloud. As the decision of MetroPCS not to participate attests, the Commission’s rush to relicense this spectrum while allowing the Alpine litigation to remain unresolved by final order serves to dissuade bidders, leads to spectrum not being acquired by those persons who may value it most, and thereby prevents the public from recouping fair value for the spectrum as is contemplated by the Communications Act.

Due to the above factors, the Bureau should reconsider its decision to include the licenses referenced in Alpine’s Motion to Stay in the upcoming Auction 78.

³³ *MetroPCS Ex Parte* letter.

³⁴ *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

³⁵ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

³⁶ This is especially the case considering the rather cursory rejection of Alpine’s original request.

IV. THE BUREAU DID NOT ADDRESS THE DISCREPANCIES BETWEEN THE UNJUST ENRICHMENT PROVISIONS OF THE COMMISSION’S CLOSED BIDDING RULES AND ITS DESIGNATED ENTITY RULES

In the *Auction Notice*, the Bureau ignored specific arguments made by MetroPCS with respect to the “closed” licenses in the auction. In its Comments, MetroPCS argued that the Bureau should remove the “closed” designation for particular licenses in this auction. MetroPCS listed a number of reasons to do so, including the fact that “the Commission in 2006 changed the rules with respect to DE participation in auctions by substantially reworking the DE rule.”³⁷ These changes, among other things, involved the unjust enrichment rule applicable to DEs. In the Commission’s 2006 *DE Order*, it adopted stricter unjust enrichment rules – to be applicable to all designated entities – to promote the objectives of the designated entity program.³⁸ MetroPCS noted that due to these changes, the “DE rules now contemplate considerably longer (10 year) holding periods and other safeguards that did not exist when the PCS spectrum was originally set aside for entrepreneurs” and that “comparable safeguards have not been incorporated into the closed license process, which enables an entrepreneur to acquire and flip a closed license within 5 years without penalty.”³⁹ Indeed, 47 C.F.R. § 1.2111(b)(2) allows for a 5 year unjust enrichment period for set aside licenses, while 47 C.F.R. § 1.2111(d)(2) allows for a 10 year bidding credit unjust enrichment payback period.

The *Auction Notice* completely disregarded this significant point. The Bureau mistakenly noted that “the arguments put forth by MetroPCS resemble those considered and rejected by the

³⁷ MetroPCS Comments at 4.

³⁸ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rule Making, FCC 06-52 (rel. Apr. 25, 2006).

³⁹ MetroPCS Comments at 5. MetroPCS notes that it opposed the changes to the DE rules. Since unjust enrichment rules for closed licenses was not addressed in the DE rules order, the best approach is to eliminate closed licenses rather than try and conform the rules.

Commission in 2004 prior to Auction 58” and concluded that “the C Block eligibility rules will continue to apply for Auction 78.”⁴⁰ But, the changes to the DE rules cited by MetroPCS post-dated the 2004 decision - - the DE rules changing the holding period were issued by the Commission in 2006, two years after the decision was made to continue to have closed licenses in Auction 58. Consequently, the Commission should have addressed the MetroPCS argument regarding the discrepancy between the Commission’s unjust enrichment rules with regard to “closed” licenses versus its unjust enrichment rules with regard to designated entities. Since these new rules took effect in 2006, they were not dealt with in 2004 by the Commission.

In changing the unjust enrichment rules for designated entities, the Commission was trying to avoid the sale of licenses to speculators interested in promptly flipping the licenses for a profit, or to entities that had no intention of building out the licenses that they were able to buy at a discount. The Commission noted that “the unjust enrichment rules provide a deterrent to speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use bidding credits to obtain a license at a discount and later to see it at the full market price for a windfall profit. By extending the unjust enrichment period to ten years, we increase the probability that the designated entity will develop to be a competitive facilities-based service provider.” However, the Commission did not address the fact that under “closed” bidding, the unjust enrichment period lasts for only 5 years, rather than 10. MetroPCS discussed this change in its Comments, and asked the Commission to issue a *Notice of Proposed Rulemaking* if necessary to make this change,⁴¹ but the Bureau did not discuss this issue in the *Auction Notice*.

⁴⁰ *Auction Notice* at para. 14.

⁴¹ MetroPCS Comments at 6.

It is not in the public interest to have a discrepancy between the application of the unjust enrichment rule in these similar contexts. By allowing winners of “closed” licenses to sell them after five years without penalty, the Commission is essentially ignoring the reasons that it extended the DE unjust enrichment rules to 10 years. It would be inconsistent, and certainly not in the public interest, to move forward into an auction with closed licenses with such a discrepancy in the rules. Accordingly, the Bureau should reconsider its decision to continue with closed licenses in Auction 78.

V. THE COMMISSION’S RULES PRECLUDE RECONSIDERATION BY APPLICANTS AND THEREFORE DENY DUE PROCESS

Another legal consideration warrants removing the spectrum related to the Alpine legal challenge from Auction 78. If MetroPCS had filed a short-form application to participate in Auction 78, it would have been precluded from prosecuting this petition for reconsideration due to the anti-collusion rule. The Commission has made clear that applicants in a blind bidding auction are not allowed to communicate to other bidders or the public the identity of particular licenses on which they have an interest or intention to bid. It would have been impossible for MetroPCS to abide by this restriction if it was an applicant in Auction 78 since the mere filing of this petition evidences an interest of MetroPCS in the licenses that are the subject of the Alpine claims. In effect, by proceeding to a blind auction while substantial legal issues remain unresolved with respect to particular licenses, the Commission is cutting off the substantive appeal rights of auction participants. Since the Commission has not addressed this aspect of its rules, the procedures notice is arbitrary and capricious. In addition, the effect of this rule is to deny applicants due process to challenge rules that adversely impact them. In effect, applicant has a Hobson’s choice – participate in a flawed auction and forego its appeal rights, or decline to

participate and file an appeal. The Commission's rules and the APA do not require --or permit the Commission to subject applicant/appellants to -- such a choice.⁴²

VI. THE COMMISSION MUST RESOLVE THE INCONSISTENCY BETWEEN ITS BLIND BIDDING RULES AND THE DISCLOSURE RULES OF THE SEC

The public interest standard requires the Commission to resolve potential inconsistencies between its blind bidding and anti-collusion rules and the reporting requirement rules of the SEC. MetroPCS noted in its Comments the serious adverse legal implications surrounding anonymous bidding and the accompanying anti-collusion restrictions and the inconsistency of these rules with SEC reporting requirements.⁴³ MetroPCS stated that the "Commission must craft a safe harbor for auction participants to relieve the tension between currently irreconcilable federal reporting requirements."⁴⁴ Specifically, MetroPCS noted that "there is a serious discrepancy between the FCC's requirements that auction applicants maintain absolute secrecy about bid-related information during the auction process and the Securities and Exchange Commission's ("SEC") requirement of reporting companies to divulge certain material financial information to the public."⁴⁵

The Bureau did not adequately address MetroPCS' concerns. MetroPCS cited a number of specific instances in which the SEC reporting obligation potentially conflicts with the Commission's non-disclosure requirement. For example, the amount of a Commission deposit could in some instances be material to an applicant and would have to be properly reflected in financial statements that must be publicly disclosed under the SEC reporting requirements,

⁴² *Smith Corset Shops, Inc. v. Brodeur*, 696 F.2d 971, 976 (5th Cir. 1982) (Court held that if a particular date was used an applicant would not be able to get a timely appeal as "to do so would leave appellants in a Catch-22 situation where the possibility of a timely appeal would have been cutoff by judicial action taken.").

⁴³ MetroPCS Comments at 9.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 10.

notwithstanding the fact that the Commission has specifically included the upfront payment amount as confidential bidding related information. It simply is not reasoned decisionmaking for the Commission to issue a bald conclusion that MetroPCS “has not persuaded us that the Commission’s anonymous bidding procedures are ‘irreconcilable’ with SEC reporting requirements.”⁴⁶

Worst of all, the *Auction Notice* expressly acknowledges the tension between the Commission and SEC reporting requirements and cautions applicants that “[t]o the extent an applicant believes that such a disclosure is required by law or regulation, including regulations issued by the Securities and Exchange Commission, the Bureau strongly urges that the applicant consult with the Commission before making such disclosure.”⁴⁷ The problem, of course, is that Commission staff will not and should not be giving legal advice to applicants with regard to their SEC reporting obligations, nor can the Commission staff absolve applicants from potential violations of SEC reporting requirements. And, even with respect to Commission reporting obligations, informal staff rulings do not have the force and effect of law and cannot shield an applicant from a third party challenge.

Thus, the Bureau clearly “failed to consider an important aspect of the problem” resulting from the inconsistency between these rules.⁴⁸ Allowing inconsistencies between Commission and SEC obligations is certainly not in the public interest. As MetroPCS pointed out, auction participants may be placed “in a precarious position if financially material auction-related actions that, under FCC rules cannot be publicly disclosed, occur at a time when SEC financial

⁴⁶ *Auction Notice* at para. 166.

⁴⁷ *Id.*

⁴⁸ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

disclosures become due.”⁴⁹ Indeed, material financial disclosures could include “the size of the upfront payment for a small or mid-size carrier” which “could be material to the overall finances of the applicant and therefore reportable as part of an applicant’s public financial statements or other information included in their SEC disclosures.”⁵⁰ Thus, “companies are forced to maneuver at great peril between two set of diametrically opposed federal regulations – one which values disclosure about all else and one which values confidentiality above all else.”⁵¹

These concerns are not immaterial. If a bidder is unable to issue financial statements, it might not be able to borrow the necessary funds to pay for any licenses won or may be in default under existing agreements. Unfortunately, since disclosure is triggered off of materiality, large applicants like Verizon Wireless and AT&T Wireless are less affected than smaller bidders – or those seeking to significantly expand operations. Thus, the “safe harbor” requested by MetroPCS clearly is necessary and appropriate. It would certainly be in the public interest for the Commission/Bureau to allow safe harbor “for auction participants who make a good-faith disclosure required by the SEC that otherwise could be deemed to violate the FCC’s confidentiality and anti-collusion rule requirements” as requested by MetroPCS.⁵² The Bureau/Commission cannot proceed with a rule that is not clear to those entities that must abide by it.

⁴⁹ MetroPCS Comments at 10.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

VII. CONCLUSION

Based on the foregoing, the Bureau/Commission should (1) remove the licenses referenced in the Alpine Motion to Stay from Auction 78 until the legal challenges surrounding such licenses are resolved; (2) remove the closed license designation from the Santa Barbara and San Luis Obispo licenses when they are reaucted in order to avoid perpetuating the holding period discrepancy between the unjust enrichment rules for “closed” licenses and “open” licenses; (3) change its rules to provide for an ability for applicants in blind bidding auctions to seek reconsideration without running afoul of the Commission’s rules; and (4) adopt the safe harbor requested by MetroPCS to reconcile potential inconsistencies between the Commission’s blind bidding rules and the SEC’s reporting requirements.

Respectfully submitted,

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