

October 9, 2008

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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **WT Docket Nos. 07-195 and 04-356**
Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band

Dear Ms. Dortch:

On October 8, 2008, Tom Sugrue, Kathleen O'Brien Ham, and Sara Leibman of T-Mobile USA, Inc. ("T-Mobile") and I, on behalf of T-Mobile, met with Matthew Berry, David Horowitz, Ajit Pai, and Andrea Kearney of the General Counsel's Office, to discuss legal issues relating to the above-referenced proceeding.

1. The T-Mobile participants first expressed concern that the Commission has not yet placed on the record or sought comment on OET's analysis and conclusions concerning the field testing OET observed in early September. Since the Commission clearly will consider – and indeed, under established case law, must consider – this scientific analysis in reaching its conclusions here,^{1/} the agency has a legal obligation to place that analysis in the record for public comment. This well-established legal principle was most recently reiterated by the D.C. Circuit in *American Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008): As the court found there, the Administrative Procedure Act requires that the Commission "allow[] the parties to focus on the information relied on by the agency," including not only the underlying raw data, but the "core scientific recommendations." *Id.* at 236, 238.

Further, the law requires that the Commission provide parties with a sufficient opportunity to *comment* on such analysis – or, in the court's words, to "point out where that information is erroneous or where the agency may be drawing improper conclusions from it." *Id.* at 236. In this case, in which there have been myriad filings on a range of topics, the proper means for the Commission to do so would be to formally seek comment on OET's analysis. And parties should be given at least 30 days to digest and respond to OET's conclusions: that is the

^{1/} See, e.g., *Heartwood, Inc. v. U.S. Forest Service*, 380 F.3d 428, 435 (8th Cir. 2004) (agencies must consider all scientific evidence before them).

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minimum period of time the courts have considered appropriate.^{2/} Indeed, for the type of technical data and analysis at issue here, the Administrative Conference of the United States has concluded that 60 days is the minimum allowable time period for comment.^{3/}

The interference issues lie at the heart of this proceeding, and the Commission therefore has an obligation to collect and consider as full and informed a record as possible on those questions. It can fulfill that obligation only by sharing OET's analysis and considering interested parties' comments on that analysis. Any other approach would violate the basic precepts of the APA and leave the Commission vulnerable to legal challenge no matter what the outcome of this proceeding.

2. T-Mobile also pointed out that the Commission has a legal obligation to consider the alternative proposal that T-Mobile has put forward for this spectrum. T-Mobile proposed combining the AWS-3 spectrum, as a downlink-only band, with the J-Block downlink-uplink bands to create an asymmetric pairing with a 5-to-1 downlink-to-uplink ratio. This proposal would eliminate the potential for interference to AWS-1 services from TDD, facilitate bi-directional usage of the bands for emerging services such as wireless broadband, and immediately allow new entrants such as M2Z to bid by permitting both upload and download facilities.

It is well-established that an agency has a "duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987). Indeed, the "failure of an agency to consider obvious alternatives has led uniformly to reversal." *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986). The Commission accordingly must consider – and indeed should formally seek comment on – T-Mobile's proposal.^{4/}

^{2/} See, e.g., *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992).

^{3/} See *Petry*, 737 F.2d at 1201.

^{4/} On the other hand, the Commission may *not* adopt the proposal – made by the Public Interest Spectrum Coalition in an Informal Complaint and Petition – to allocate the J Band to general wireless microphone service. That proposal, which is hardly more than a few sentences with no technical analysis, falls well outside the Commission's notice of proposed rulemaking in this proceeding, and the Commission could not consider it without formal notice and comment. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

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3. Finally, T-Mobile noted that the AWS-1 auction created an enforceable contract between the FCC and the AWS-1 licensees.^{5/} Auction winners paid *billions* of dollars for the right to use the AWS-1 spectrum, and they did so based on auction terms that promised bidders that the auctioned spectrum could be used for AWS service, “*with a minimum of interference*, and will permit both in-band and adjacent band licensees to *operate with sufficient certainty and clarity regarding their rights and responsibilities*.”^{6/} Indeed, the FCC specifically indicated to bidders that TDD would not be permitted in the AWS-1 band because of interference concerns, and specifically noted that it would permit TDD only if its proponents demonstrated that there would be *no interference*.^{7/} Further, bidders had every reason to rely on the FCC’s prior practice of protecting prior users from interference by subsequent licensees.

Action by the FCC in this proceeding that impairs the ability of AWS-1 auction winners to use the spectrum for the bid-for purposes or diminishes the amount of usable AWS-1 spectrum, would be a decisive breach of the Commission’s contractual obligations. And Commission action that is designed to attract more auction revenues or assist one particular entity’s business plans at the expense of wireless carriers that paid *billions of dollars* based on the Commission’s word would be particularly inequitable.^{8/} Auction winners would have a legal right to seek money damages against the Commission for that breach.

^{5/} See *In re NextWave Personal Commc’ns, Inc.*, 200 F.3d 43, 60 (2d Cir. 1999) (“the close of the auction – traditionally the drop of the hammer – signals acceptance of an offer and forms an enforceable contract”); see also 7 AM. JUR. 2D *Auctions and Auctioneering* § 34 (1997); U.C.C. § 2-328 (2004); *Blossom v. Railroad Co.*, 70 U.S. (3 Wall.) 196, 206 (1865); *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995) (“Auction sales are viewed under the same rules pertaining to the formation of contracts generally.”) (citing 1 Samuel Williston, *Williston on Contracts* § 29, (3rd ed. 1957)).

^{6/} Report and Order, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, 25168 ¶ 15 (2003) (emphasis added).

^{7/} *Id.* at 25203 ¶ 109 (recognizing risk of TDD interference). And M2Z’s effort to cloud or limit the relevance of these representations is to no avail: under the doctrine of *contra proferentem*, any ambiguity in the terms of the spectrum contract must be construed against the Commission, which was the drafting party. This doctrine applies with particular force where the government is the contracting party. See *United States v. Seckinger*, 397 U.S. 203, 216 (1970) (“[t]his principle is appropriately accorded considerable emphasis . . . because of the Government’s vast economic resources and stronger bargaining position in contract negotiations.”)

^{8/} Moreover, it would undermine the industry’s trust in the auction process and negatively impact future auctions.

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We provided the attached legal memorandum on this point, as well.

Please contact me if you have any questions.

Sincerely,

/s/ Lynn R. Charytan

Lynn R. Charytan
Counsel to T-Mobile USA, Inc.

Encl.

cc: Matthew Berry
David Horowitz
Ajit Pai
Andrea Kearney
Julie Knapp
Jim Schlichting