

**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

MetroPCS Communications, Inc. (“MetroPCS”) is providing its comments with respect to the *Third FNPRM* pertaining to the proposed rules governing the re-auction of the 700 MHz D Block spectrum.

MetroPCS supports the goal of the Commission to provide for an interoperable nationwide network for public safety and first responders. However, the Commission should not 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. Thus, the Commission should address a number of shortcomings in its proposed rules for a re-auction of the D Block spectrum. As presently crafted: (1) the proposed rules do not provide an adequate relief valve in the event that the auction does not generate sufficient interest for a truly nationwide public safety network to emerge; and (2) the proposed rules do not have sufficient safeguards to ensure that bidders are capable of financing and building the combined public safety/commercial network. In addition, due to the current turmoil in the credit and capital markets, the auction, if held in the near term, is unlikely to succeed. Rather than lowering the threshold and post-auction requirements, the Commission should establish meaningful safeguards and a market-based reserve price in order to ensure that the D Block spectrum is not assigned to an entity whose business plan is destined to fail, with the result that this valuable spectrum will lie fallow in bankruptcy. And the Commission should wait until the capital markets stabilize before conducting a D Block re-auction in order to improve the prospects for success.

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COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments in response to the *Third Further Notice of Proposed Rulemaking*, FCC 08-230, released September 25, 2008 (the “*Third FNPRM*”)² in the above-captioned proceedings. MetroPCS has been an active participant in this docket and welcomes the opportunity to provide its comments with respect to the *Third FNPRM*. The following is respectfully shown:

I. THE COMMISSION MUST ESTABLISH SAFEGUARDS TO ENSURE THAT ANY D BLOCK WINNERS ARE ABLE TO CONSTRUCT A NATIONWIDE INTEROPERABLE BROADBAND PUBLIC SAFETY NETWORK

MetroPCS continues to have grave doubts whether the Commission’s proposed

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

² 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*, Third Further Notice of Proposed Rule Making, FCC 08-230 (rel. Sept. 25, 2008) (“*Third FNPRM*”), 73 Fed. Reg. 57750 (Oct. 3, 2008).

public/private partnership is economically viable and capable of delivering either the desired mission-critical nationwide interoperable public safety network or a viable commercial network.³ As MetroPCS repeatedly has pointed out, there are irreconcilable problems inherent in any mandatory public/private partnership authorized by a high bidder auction but fashioned for public safety purposes. As a result, MetroPCS is concerned that any such private/public partnership proposal, despite the Commission's best intentions and efforts, will be doomed to failure.⁴ Nevertheless, even though the D Block is sorely needed to meet unsatisfied commercial demand,⁵ MetroPCS recognizes that the Commission has made a policy decision to create a framework for the build-out of a nationwide interoperable public safety network. MetroPCS hopes, though, that the Commission will avoid the "worst of both worlds" scenario where the valuable D Block is assigned to an unsuccessful public/private partnership under rules that fail to foster the desired nationwide compatible interoperative network for public safety, while effectively removing the spectrum from, or making it impractical for, commercial use.

In promulgating rules governing a shared public/private network, the Commission should not lower the requirements to the point that the Commission is unlikely to reach its goal of fostering a nationwide public safety network. If the Commission adopts rules that fail to ensure that only sincere bidders win the licenses – by dramatically lowering the minimum bid/reserve price, setting rules that contain no financial safeguards (such as a letter of credit or performance

³ MetroPCS Comments in response to *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) ("MetroPCS Comments"). MetroPCS incorporates these comments into the current proceeding by reference.

⁴ MetroPCS Comments at 11-14.

⁵ As MetroPCS previously has noted, 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. See MetroPCS Comments at 9-11. This is especially true given the continued consolidation of the industry.

bond), and setting the threshold coverage population requirement at only 50% of the U.S. population -- the Commission risks licensing this valuable spectrum to one or more applicants who will not meet the goal of build-out of a nationwide interoperable public safety network. If this occurs everyone loses – public safety because the network they need will not be constructed and the industry and the public because this valuable spectrum would be tied up in a non-productive use. What the Commission should not do now, as it moves forward, is 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.⁶ Rather than lowering the threshold and post-auction requirements, the Commission should establish meaningful safeguards and a market-based reserve price in order to ensure that the D Block spectrum is not assigned to an entity whose business plan is destined to fail, with the result that this valuable spectrum will lie fallow in bankruptcy.⁷

In addition, if the Commission elects to retain the public/private partnership in the forthcoming D Block auction, the Commission should revise upward from 50% to 90% the minimum population coverage threshold for the auction to be deemed valid and for the licenses to issue. A network that only covers 50% of the nation’s population would not result in the interoperable nationwide public safety network that the Commission is seeking and the public safety community deserves and needs. Indeed, a licensee theoretically could meet the 50% population threshold without purchasing licenses that cover 35 of the 50 states.⁸ Such a build-

⁶ *Id.* at i-ii.

⁷ As MetroPCS has observed to the Commission, the prior requirements have proved a godsend by allowing the Commission to retain the spectrum when no serious bidders emerged at Auction 73. If the Commission had sold the spectrum without the modest reserve price, the Commission might now be wringing its hands trying to figure out how to recoup the spectrum – which would be substantially harder than not licensing it in the first place.

⁸ *See infra* at p. 10.

out, which would not cover the vast majority of the geographic area of the U.S., would mean that the Commission's latest effort has failed the public safety community. A higher coverage requirement also would be more in line with the performance requirements proposed by the Commission. If the lower 50% standard is used, public safety might have a network which covers only twenty percent of the population within 4 years, 37.5 percent in ten years, and then only around 50% of the population in fifteen years.⁹ This low coverage requirement and generous timetable makes it imperative that the Commission take steps to ensure that it only licenses the spectrum to serious bidders who have the wherewithal to finance and construct the network – otherwise the Commission may not know for almost a decade whether public safety will have a useful network.

Further, the Commission should make provisions for a prompt re-auction - - for commercial-only purposes - - of any spectrum or license area for which there was no successful bidder on encumbered D Block spectrum. There already has been a substantial, unfortunate delay in the licensing of D Block spectrum - - which is allocated specifically for commercial purposes - - and a prompt re-auction will ensure that none of the spectrum lies fallow longer than is completely necessary.

A. The Commission Must Establish a Meaningful Reserve Price that Would Not Essentially Donate 10 MHz of Valuable Spectrum to the Winning Bidder(s)

In the *Third FNPRM*, the Commission “tentatively conclude[s] that it is not in the public interest to adopt a reserve price beyond the minimum opening bid to assure that the adoption of the Public Private Partnership does not have an excessive negative effect on the value of the

⁹ Under the proposed rules, in four years, licensees will be required to construct 40% of the population which translates to 40% times 50% (the minimum population threshold), which equals 20% population coverage in four years; in ten years, licensees will be required to construct only 75% of the population which translates to 75% times 50% which equals only 37.5% of the population covered in ten years.

public spectrum resource.”¹⁰ The Commission notes that “a reserve price may have negative consequences by discouraging otherwise viable bidders from competing in an auction.”¹¹ The Commission then “tentatively conclude[s] that it is in the public interest to direct the Wireless Telecommunications Bureau to establish initial minimum opening bids for each set of alternative D Block licenses that equal or aggregate approximately \$750 million,”¹² which essentially sets the reserve price for the D Block at \$750 million.

MetroPCS strongly disagrees with the Commission’s tentative conclusion. The purpose of retaining a meaningful reserve price is to deter speculation and to increase the prospect that a particular bidder has a viable business plan which can be financed. One lesson to be learned from the failure of Frontline Wireless is that an operator with a poor business plan will not be able to raise capital, and consequently would not have been able to construct the interoperable network needed by public safety. Had there been no reserve price, Frontline Wireless still ultimately would have failed, but only after it was granted the D Block license and after the passage of some significant period of time.¹³ This would have been an instant replay of the Nextwave licensing debacle -- with similar consequences.

When Nextwave failed and tied broadband licenses up for years, the Commission decided it no longer would allow designated entities (“DEs”) to buy licenses on the cheap using

¹⁰ *Third FNPRM* at para. 275.

¹¹ *Id.*

¹² *Id.*

¹³ Because of the significant period of time between the license grant and the first construction benchmark, the Commission has no assurance that it will not discover that a licensee is unable to finance and build a network for at least four years – and even if it makes the four year benchmark, that it will meet the higher ten year and fifteen year benchmarks.

installment financing.¹⁴ The rules were changed to assure that DEs would be required to pay a market price at the conclusion of the auction so that speculation and poor business planning could be deterred. The same approach should be used here. The Commission should not encourage marginally qualified bidders by lowering the reserve price to a point where it fails to deter insincere bidders – especially since the remainder of the performance obligations (*e.g.*, construction obligations) will occur over a number of years. Lowering the reserve price also disadvantages the public by preventing the Commission from recouping a full fair price for scarce spectrum.

So, the Commission should establish a meaningful reserve price for any re-auction of the D Block spectrum to ensure that the winning bidder is a serious party who will be able to finance and construct the private/public interoperable network and will have 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.¹⁵ As MetroPCS noted in its prior comments, “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.”¹⁶ By not having this vetting process, it is possible that a company that is unable to raise a significant amount of capital is the only bidder for the spectrum – which could result in that company being unable to construct and operate the desired interoperable nationwide network. The Commission cannot afford to allow a company that has not demonstrated that it is able to secure substantial financial backing to control the destiny of the desired nationwide interoperable public safety

¹⁴ *Amendment of Part I of the Commission’s Rules, Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, Third Report and Order, 13 FCC Rcd 374, 397-398 (1997).

¹⁵ MetroPCS Comments at 26-30.

¹⁶ *Id.* at 27.

network. A substantial reserve price would ensure that such an entity is capable of living up to its obligations.

In addition, the Commission should not effectively donate 10 MHz of spectrum (and access to an additional 10 MHz of spectrum) to any winning bidder(s). The Commission consistently has recognized that the 700 MHz Band spectrum is especially valuable - - certainly at least as valuable as the AWS spectrum - - because it has particularly robust propagation characteristics.¹⁷ The Congressionally-mandated competitive bidding procedures are intended to enable the public to receive fair value for valuable spectrum rights that are assigned to private parties, and the public interest would not be served by an allocation policy that devalues the spectrum unnecessarily. A substantial devaluing of 10 MHz of valuable spectrum is not what Congress intended.¹⁸

Thus, MetroPCS again 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.¹⁹ This would ensure that the ultimate winner is a financially secure company with a well funded and tested business plan that will be able to secure the necessary financing to construct and operate the private/public interoperable network. It also would help ensure that the

¹⁷ *See id.* at 27-30.

¹⁸ As the latest market indication of price for a 22 MHz block of 700 MHz spectrum, Verizon agreed to pay \$4.8 billion for the C Block in Auction 73. Assuming a ten percent discount for the additional two megahertz of spectrum, the market price for 20 MHz of 700 MHz spectrum is \$4.4 billion. The \$750 million reserve price would represent an almost 83% discount to the market price for 700 MHz of spectrum. If the price for the A and B Blocks of 700 MHz of spectrum were used, this discount would even be higher.

¹⁹ Indeed, MetroPCS presented evidence in its initial comments that the reserve price should actually be higher than \$1.33 billion. *See MetroPCS Comments* at 29-30.

objective of Section 309(j)(3) of the Communications Act of allowing the public to recoup a fair value for scarce radio spectrum sold at auction is met.²⁰

B. The Commission Must Require Financial Safeguards, Such as a Letter of Credit or a Performance Bond, for any D Block Winner(s)

In the *Third FNPRM*, the Commission seeks comment on “whether a winning bidder for any D Block license should post financial security to ensure that the network will be constructed pursuant to the terms of the NSA and the Commission’s rules,” and in particular, “whether a winning bidder for D Block licenses should be required to obtain an irrevocable standby letter of credit (“LOC”) no later than the date on which its executed NSA is submitted to the Commission.”²¹ The Commission also seeks comment on whether it “should require parties to obtain performance bonds covering the cost of network construction or operation”²² as an alternative to a LOC.

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 timely build-out of a nationwide interoperable public safety network, and encourages the Commission to adopt a requirement that a LOC or performance bond be put up by any winning bidder(s). The public safety community must be guaranteed that adequate funds are available for the build-out of the public safety network. Either of these proposed safeguards would ensure that the finances for the building of a public safety network are secured and guaranteed upfront. MetroPCS demonstrated previously that the Commission has used both letters of credit and

²⁰ *Id.* at 27.

²¹ *Third FNPRM* at para. 290.

²² *Id.* at para. 293.

performance bonds to ensure that licensees can satisfy their license commitments,²³ and the Commission should follow this past precedent for any D Block winner(s).

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 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 proceeds from such a bond could fund a nationwide interoperable network if the licensee(s) fail to construct the network in accordance with the Commission’s rules. This would allow the Commission to make sure that public safety gets its network and, if the D Block winner(s) fails to build it, public safety would get the money to build one itself.

C. **The Commission Should Establish Procedures for an Immediate Re-auction If More than 90% of the Population Would Not Be Served by the Winning Bidder(s)**

The Commission should not reduce the nationwide scope of the proposed public safety interoperable broadband network. In the *Third FNPRM*, the Commission, “[i]n order to reduce the possibility that regional licensing of the D Block might result in large areas that are unserved by the public safety broadband network . . . tentatively concludes that an auction of the D Block spectrum must result in winning D Block license bidders with licenses covering at least 50 percent of the nationwide population or the results of the auction will be void.”²⁴

²³ MetroPCS Comments at 30-34.

²⁴ *Third FNPRM* at para. 70.

MetroPCS believes that establishing a threshold of 50% of the nationwide population may result in a network that does not meet public safety's goal of a nationwide network.²⁵ Indeed, such a threshold would enable regional bidders to focus only on major metropolitan areas, which could result in the construction of a public safety network for only a small portion of the country. For example, when using the 2000 U.S. Census Data provided in Appendix B of the *Third FNPRM*, it would be possible to reach the 50% population threshold by having winning bids on as few as 11 of the 58 proposed public safety regions.²⁶ This could result in bidders focusing solely on major metropolitan areas and leaving rural areas completely out in the cold. For instance, under the above scenario, this type of bidding strategy could leave 35 states without access to the public safety network to be constructed by the D Block winners. Indeed, such a prospect would certainly not reduce the possibility that regional licensing of the D Block

²⁵ MetroPCS also opposes the Commission's proposed plan to lower the minimum bids for regional licenses that do not have bids in the case that there are bids for licenses that cover at least half of the nation's population. See *Third FNPRM* at para. 249. As described above, MetroPCS does not believe that the Commission should give valuable spectrum away without receiving significant value for the public for such a scarce resource. Further, it is unclear how such a process would in fact work during an auction. During an auction, bidders have to maintain certain activity levels based on whether the auction is in Phase 1 or 2. If a bidder fails to meet the activity level in a round, its eligibility will be reduced. If the Commission reduces the reserve price during the auction, bidders may have insufficient excess activity eligibility to take advantage of the reduced reserve price. Since bidders will have no advance way of knowing if the reserve price will be reduced, or when, only bidders who are bidding on the largest amount of spectrum may have excess activity units to take advantage of such a reduction in reserve price – and they may have no desire to bid on the reduced reserve price spectrum. There may be ways of solving this problem (e.g., allow all bidders free activity eligibility for a round to take advantage of reduced reserve prices), but the Commission would need to first build such a process and then make sure that such a process does not adversely affect its bidding processes.

²⁶ *Third FNPRM* at Appendix B (purchasing Public Safety Regions New York – Metropolitan (8), Chicago – Metropolitan (8), New Jersey, Pennsylvania, Delaware (28), California – South (5), Florida (9), Ohio (33), Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut (19), Michigan (21), North Carolina (31), Georgia (10), and California – North (6) would result in population of 143,607,917).

might result in large unserved areas – in fact, it would substantially increase such a possibility.²⁷

Rather, in order to ensure that the goal of a nationwide network is met, the Commission should adopt a population threshold of 90%, as proposed by United States Cellular.²⁸ Such a threshold would ensure that the winning bidders construct a truly nationwide network – rather than a network that may only benefit a few major metropolitan areas. The Commission should not sacrifice public safety’s need to have nationwide network in order to persuade bidders to come forward. Half a loaf in this situation would actually be worse than no loaf at all – as rural areas and smaller states would be left in a worse position post-auction than they were pre-auction, with no way to rectify the situation, and no mechanism to fund the build-out of a network in their areas.

Regardless of whether the Commission revises its population threshold for the D Block, MetroPCS continues to believe that the Commission should establish rules for an immediate re-auction of an unencumbered D Block in the event that this D Block auction fails to attract either a nationwide bidder or a collection of bidders that meets the applicable population threshold. In addition, if the Commission does reach a minimum population threshold that it decides would enable it to proceed with the public safety network, the Commission should hold an immediate re-auction for any regional licenses that are not purchased by bidders even after a reduction of the minimum price for such licenses – as such valuable spectrum should not be left fallow by the Commission. If particular spectrum encumbered with these public safety responsibilities with a

²⁷ Further, to the extent that a nationwide network ensures that a significant market exists for public safety equipment, reducing the size of the coverage of the network will reduce the addressable market for equipment; thus driving up the price of such equipment and deterring equipment manufacturers from designing and building such equipment. As a result, the Commission should expect to see lower utilization of the network – which is not in the public interest.

²⁸ See *Ex Parte* of United States Cellular Corp. and Telephone and Data Systems, WT Docket No. 06-150 and PS Docket No. 06-229 (filed July 25, 2008) at 9.

significant discount is not purchased by any bidder, the Commission must recognize the possibility that such spectrum would be better off being auctioned for purely commercial purposes.²⁹

MetroPCS demonstrated previously 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.³⁰ There is a severe scarcity of commercial paired spectrum suitable to meet the public's ever-increasing demand for advanced broadband commercial wireless services. 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.³¹ The Commission must take this need into account and establish rules for the auction of an unencumbered D Block in the instance that the public/private partnership framework fails to attract a bidder (or bidders), or in the instance that certain regional licenses are not purchased.

In the event that this D Block auction fails, or there are regional licenses that are not purchased by any winning bidders, the Commission should adopt commercial auction rules that will promote competition in the marketplace, such as (1) adopting CMAs as the appropriate

²⁹ Of course the spectrum that would be auctioned and licensed for solely commercial use would be only the D Block and not the 10 MHz of public safety spectrum. An additional safeguard the Commission could and should adopt is that any provider of network equipment to a private/public D Block licensee must allow public safety to purchase the same gear used on the private/public network at the same prices to be deployed on the public safety portion of 700 MHz spectrum, which would become available if the D Block is licensed on a purely commercial basis. This would allow public safety in those areas in which no private/public partnership is available to get the benefits of economies of scale provided by the areas in which a private/public partnership exists and to build out an interoperable network. Further, the volume of the public safety purchasers should be aggregated with the D Block winners to get maximum discounts.

³⁰ MetroPCS Comments at 9-11.

³¹ *Id.*

geographic area for the D Block; (2) not adopting package bidding for a D Block re-auction; (3) not applying geographic performance requirements to an unencumbered D Block re-auction, and (4) auctioning the D Block as part of its AWS-2 and AWS-3 auction.³²

II. THE COMMISSION MUST NOT AUCTION THE D BLOCK WHILE THE CREDIT MARKETS ARE IN TURMOIL

As the Commission is well aware, the United States economy already is in a recession which is predicted to be one of the deepest in recent memory and which may well last for a significant period of time. Coupled with this recession, the United States and world financial markets are in significant turmoil, making it difficult, if not impossible, for many potential bidders to secure the necessary funding to bid on the D Block spectrum at auction in the near term and to commence construction of the required private/public interoperable network. Many of the hardest hit companies will tend to be those which are small or mid-sized – precisely the companies that the Commission seeks to attract by reducing the license size and moving to regional licenses. In sum, because of the current market conditions, many potential new entrants that might have an interest in this rulemaking and resulting auction may be unable to participate if the auction occurs too soon. If the Commission has an interest in securing the widest possible participation in the auction, the Commission needs to consider when setting the rules whether quick action now will best serve the public interest.

If the Commission decides to move forward with an auction of the 700 MHz spectrum at this time, it runs the serious risk that only the largest of bidders will be able to participate. This would be unfortunate since one impetus behind the move to regional licenses has been the interest of smaller and mid-sized carriers who were largely unsuccessful at the prior 700 MHz auction due to the dominance of AT&T and Verizon Wireless. Leaving non-nationwide carriers

³² *Id.* at 18-26.

at the starting gate would leave only the largest companies, which acquired the vast majority of spectrum in the recently concluded 700 MHz auction, in a position to acquire the remaining 700 MHz of spectrum. Accordingly, even if the Commission moves forward and adopts new rules for the D Block, in order to promote competition and diversity, the Commission must wait to auction the spectrum until the market turmoil has abated.

III. 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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