

**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)	
)	
_____)	

REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its reply 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. The following is respectfully shown:

I. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO REALLOCATE THE D BLOCK SPECTRUM TO PUBLIC SAFETY

MetroPCS repeatedly has expressed its view that the Commission lacks the authority to authorize commercial users to have access to the allocated 700 MHz public safety spectrum, and to allow public safety users to have access to allocated 700 MHz commercial spectrum, absent

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).

specific and express Congressional intervention.³ While the Commission purported to address this issue in its *700 MHz Order*,⁴ and again in the *Third FNPRM* by defending the use of the 20 MHz of D Block spectrum and public safety spectrum as a combined blended resource,⁵ the fact remains that certain aspects of the latest Commission proposal, particularly as interpreted by some commenters, would violate Section 337(a) of the Communications Act of 1934, as amended (the “Act”).⁶

The Commission is prohibited by Section 337(a) of the Act from reallocating the commercial D Block to the public safety broadband licensee, or to any other non-commercial entity,⁷ and such a reallocation would disturb the delicate balance that Congress specifically struck with respect to 700 MHz spectrum for the public safety community and the needs of commercial operators in the public interest. Nevertheless, in the *Third FNPRM*, the Commission states its belief that:

³ MetroPCS Comments at 14-16 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 at 54-55 in response to *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).

⁴ *700 MHz Order* at paras. 414-430.

⁵ *Third FNPRM* at para. 79-80.

⁶ 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).

⁷ *Third FNPRM* at paras. 257-258.

at least once the Commission has put up for auction two times the entire D Block portion of the 36 megahertz of spectrum allocated for commercial use under Section 337 and assigned a substantial number of commercial licenses in this Block through competitive bidding to cover at least half of the country, at a time when the DTV transition has already taken place and all the rest of the 36 megahertz of spectrum has been made available by auction and nearly all subsequently licensed, the Commission would have satisfied the allocation and assignment obligations of Section 337(a) for those D Block licenses that have failed to sell.”⁸

A number of public safety entities support this view.⁹ In addition, a few public safety entities attempt to take this proposal to its logical conclusion and request that the Commission completely reallocate the D Block for public safety use without having an initial auction for the D Block.¹⁰ Indeed, the City of New York Police Department states that the “D Block spectrum should be made available directly to public safety.”¹¹

The Balanced Budget Act of 1997 (the “BBA”), Pub. L. No. 105-33, directed the Commission to reallocate the Upper 700 MHz band for public safety use and commercial use. The BBA mandated that the Commission allocate 24 MHz of the upper 700 MHz spectrum for public safety services and the remaining 36 MHz of upper 700 MHz spectrum for commercial use to be assigned by competitive bidding.¹² These statutory mandates are incorporated in Section 337(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 337(a), which provides that the Commission “shall allocate the electromagnetic spectrum as follows: (1) 24 MHz [for public safety]; and (2) 36 MHz [for commercial use].”¹³ There is no express exception

⁸ *Id.* at para. 258.

⁹ Public Safety Spectrum Trust Corporation Comments at 5;

¹⁰ Kentucky Wireless Interoperability Executive Committee Comments at 1; New York City Police Department Comments at 13.

¹¹ New York City Police Department Comments at 13. However, even the NYPD recognizes that congressional action would be needed for this reallocation.

¹² The Balanced Budget Act of 1997, Pub. L. No. 105-33 at § 3004.

¹³ 47 U.S.C. § 337(a).

to this mandate, nor does the legislative history provide any support for the proposition that the strict statutory demarcation between the commercial and public safety portions of the upper 700 MHz spectrum was intended to be temporary or subject to change over time. Rather, the statutory language “shall allocate” is mandatory and directive. Where a statute is express and unambiguous, the Commission must implement the express meaning of the statutory language without exception.¹⁴ There is nothing to suggest the spirit or the purpose of the legislation was to empower the FCC to alter the division of spectrum for commercial and public safety uses of the upper 700 MHz spectrum over time. And, neither the Commission nor any party has cited any authority for the proposition that a regulatory agency can comply with a statutory mandate by adopting a temporary rule that defeats the Congressional intent at a future date.

Allowing the Commission to reallocate the upper 700 MHz commercial spectrum to public safety use due to the failed D Block auction would be particularly inappropriate here since the most likely reason for such failure would be that the FCC unduly encumbered the upper 700 MHz commercial D Block with burdensome public safety obligations. Many participants in the 700 MHz commercial auction, including MetroPCS, were very interested in putting the D Block to commercial use - - as intended by Congress - - but were unwilling to accept the restrictions the Commission imposed. Having now failed to create a situation for a successful auction, under no circumstances can the Commission now – or in the future - be excused from honoring its statutory obligation to allocate 36 MHz of upper 700 MHz spectrum for commercial use by placing so many non-commercial regulatory burdens on the spectrum that it becomes unattractive in the initial auction to commercial users. In sum, any proposal that mandates the reallocation of the D Block to public safety would violate the congressionally mandated balance

¹⁴ See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Further, since the statute is clear, any decision to the contrary by the Commission will not be entitled to any deference by any Appeals Court.

of interests by removing spectrum that is greatly needed by commercial entities and is still designated by statute for commercial use. Congress did not give the Commission authority to reallocate the 700 MHz spectrum in any way that it pleased just because it fashioned an unsuccessful auction of this spectrum.

Significantly, the Commission has recognized on multiple occasions that it is unable to reallocate commercial spectrum for public safety use via its Section 337(a) obligations. When Cyren Call petitioned the Commission to reallocate 20 MHz of commercial 700 MHz spectrum for public safety, the Commission refused to do so, in part due to its obligations under Section 337(a).¹⁵ Similarly, in rejecting the Broadband Optimization Plan (“BOP”), the Commission determined that it could not reallocate commercial use guard band spectrum to public safety stating that “prior to the completion of the DTV transition, Section 337 of the Act appears to prohibit the Commission from reallocating commercial spectrum for public safety use as proposed by the BOP and Ericsson.”¹⁶ The Commission further noted that “Congress’s express instructions in Section 337 regarding our allocation of commercial and public safety spectrum in the 700 MHz Band statutorily prohibit the Commission from reallocating the spectrum at this time.”¹⁷ This reasoning still applies and the Commission has not provided any basis for altering

¹⁵ *Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) from Commercial Use; Assignment of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) to the Public Safety Broadband Trust for Deployment of a Shared Public Safety/Commercial Next Generation Wireless Network*, Order, RM No. 11348 (rel. Nov. 3, 2006).

¹⁶ *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 07-132 at paras. 97, 136-137 (rel. Aug. 10, 2007).*

¹⁷ *Id.* at para. 136.

this legal conclusion. The DTV transition has not yet been completed so the Commission still lacks the authority to reallocate 700 MHz commercial spectrum for public safety use. Moreover, there is no basis for determining that the Congressional mandate for the 36 MHz commercial spectrum allocation will evaporate when the DTV transition is completed.

Rather, the Commission must maintain the separation between the D-Block and the public safety spectrum, and should allow for an immediate re-auction of any unsold D-Block licenses without any encumbrances and to allow public safety to immediately begin use of its 10 MHz of spectrum.¹⁸ Reallocating the D Block for public safety would not serve the public interest. As MetroPCS previously noted, “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” and 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.¹⁹

II. THERE IS STRONG SUPPORT IN THE RECORD FOR FINANCIAL SAFEGUARDS, SUCH AS A LETTER OF CREDIT OR A PERFORMANCE BOND, FOR ANY D BLOCK WINNER(S)

MetroPCS expressed its strong support in its initial Comments that it is essential for the Commission to ensure that any D Block winner has the seriousness of intent and financial wherewithal to meet the Commission’s requirements for the timely build-out of a nationwide interoperable public safety network, and it encouraged the Commission to adopt a requirement that a letter of credit or performance bond be put up by any winning bidder(s).²⁰ The public

¹⁸ MetroPCS Comments at 11-12.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 8-9.

safety community must be guaranteed that any winner has the serious intent to build-out such networks (*e.g.*, the bidder is not a speculator) and has adequate funds available for the build-out of the public safety network. As MetroPCS noted, “[b]y 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.”²¹ Further, as MetroPCS pointed out, the proceeds from such a letter of credit or performance bond if exercised could provide the funds to public safety for the construction of a network over the 10 MHz of public safety spectrum.²²

It is critical to note that the requirement for financial protections received support from influential members of the public safety community. For instance, APCO supports the Commission’s proposal regarding financial protections, including a letter of credit requirement and performance bond. APCO noted that “[s]uch requirements are especially important if PSR licenses are sold at “fire-sale” prices to entities with limited financial resources.”²³ Moreover, the National Public Safety Telecommunications Council cited to the Commission’s letter of credit proposal when stating that “the Commission should rely on other mechanisms to ensure a licensee’s financial and technical integrity and commitment.”²⁴ In addition, Regional Planning Committee 20 stated that “there is merit to the concept of requiring the winning bidder to obtain

²¹ *Id.* at 9.

²² The Commission should consider whether to mandate that the letter of credit or performance bond be payable directly to the Public Safety Spectrum Trust – which would avoid any problem that may arise with the funds going directly to the U.S. Treasury, which may require legislation for a reallocation of the funds.

²³ APCO Comments at 20.

²⁴ National Public Safety Telecommunications Council Comments at 6.

an irrevocable letter of credit.”²⁵ The Commission should heed this support, and implement such financial protections into its upcoming D Block re-auction rules.

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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²⁵ Regional Planning Committee Twenty Comments at 18.