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December 11, 2008

57739-000020

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

Re: Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band  
(WT Docket No. 07-195) (AWS-3); Service Rules for Advanced Wireless Services in  
the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands  
(WT Docket No. 04-356) (AWS-2)

Dear Ms. Dortch:

MetroPCS Communications, Inc. (“MetroPCS”)<sup>1</sup> respectfully submits this letter to reiterate its apprehension about the Commission’s proposed AWS-3 allocation, as well as to articulate its concern that the Commission may violate its statutory obligation to proscribe “competitive” bidding rules under Section 309(j) of the Communications Act if it proceeds with its proposed allocation.

MetroPCS has substantial concerns about the proposed AWS-3 “designer” allocation, which includes a mandate for supposedly “free” wireless broadband service subject to a series of ill-conceived, vague and ambiguous government-imposed requirements. Recently, this MetroPCS concern has been echoed by the United States Department of Commerce.<sup>2</sup> The public interest demands, and MetroPCS prefers, an allocation that maximizes the number of paired channels available for wireless services and ensures robust competition for any spectrum offered to the public. Moreover, numerous parties in this proceeding have disclosed the substantial and significant concerns that the proposed AWS-3 allocation will cause harmful interference to AWS-1 licensees if the Commission proceeds down its proposed course.<sup>3</sup> If, however, the

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<sup>1</sup> For purposes of this *ex parte*, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

<sup>2</sup> See Letter from Carlos M. Gutierrez, United States Department of Commerce, to the Honorable Kevin J. Martin, dated Dec. 10, 2008.

<sup>3</sup> See *Ex Parte* Letter from MetroPCS to Marlene H. Dortch in WT Docket Nos. 07-195 and 04-356 (filed Oct. 20, 2008); see also *Ex Parte* Letter from Engineers Representing AT&T, Inc., Comcast, CTIA-The Wireless Association, Ericsson Inc., Motorola, Nokia Inc., Nortel,

Commission insists upon creating a large unpaired AWS-3 block which includes the possibility of time division duplex transmissions, MetroPCS urges that it occupy at most only 20 MHz - - not 25 MHz - - of spectrum, and not destroy the currently paired 10 MHz J Block AWS-2 channel (5 MHz paired with 5 MHz at 2020 to 2025 MHz and 2175 to 2180 MHz) by reassigning 2175-2180 MHz to AWS-3. This proposed reassignment of the J-Block spectrum is not in the public interest, because it would preclude wireless carriers, particularly rural, regional and mid-tier carriers, from any meaningful opportunity to acquire sorely needed paired spectrum in the AWS-2 band for the provision of mobile wireless services competitive with other well-heeled national competitors.<sup>4</sup>

In addition to the above, MetroPCS is concerned that the Commission continues to proposed service rules for the AWS-3 spectrum allocation that require the winner to provide a “free” wireless broadband Internet service patterned after the particular business plan of a single prospective bidder - - M2Z Networks, Inc. (“M2Z”). Any such action would violate the Commission’s statutory obligation to proscribe “competitive” bidding rules under Section 309(j) of the Communications Act. While the Commission has broad leeway in devising bidding rules, its rules must meet the threshold requirement that they be reasonably expected to elicit an actual bidding competition. It is not enough for the system to be open to competitive bids only on a theoretical and artificial basis. Designer allocations (*i.e.*, auction rules that are tailored to a single applicant’s business plan) presumptively violate the statute. Here, the Commission has not established (and cannot establish) that its proposed AWS rules are reasonably expected to elicit multiple

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QUALCOMM Incorporated, T-Mobile USA, Inc., and U.S. Cellular to Chairman Kevin J. Martin, Commissioner Michael J. Copps, Commissioner Jonathan S. Adelstein, Commissioner Deborah Taylor Tate, and Commissioner Robert M. McDowell in WT Docket Nos. 07-195 and 04-356 (filed Oct. 20, 2008).

<sup>4</sup> MetroPCS’ desire for the Commission to maintain both the paired 10 MHz H Block and the paired 10 MHz J Block also means that MetroPCS does not support the T-Mobile reconfiguration proposal, which contemplates combining the 20 MHz AWS-3 band with the 10 MHz J Block to create an asymmetric pairing. *See* T-Mobile *Ex Parte* Notice in WT Docket Nos. 07-195 and 04-356, filed December 2, 2008. MetroPCS has not endorsed the T-Mobile proposal for two reasons. First, it will result in the loss of 10 MHz of sorely needed paired spectrum. Second, MetroPCS is concerned that the asymmetrical pairing is not optimal. As the Commission knows from its recent Comcast Order, the Internet has experienced a significant demand for bandwidth for uploading. Asymmetrical pairing does not take into account this phenomenon and will limit the services offered via AWS-3 spectrum. Please note, however, that MetroPCS has no objection to having the T-Mobile proposal be included in a “Cafeteria Plan” auction along with the MetroPCS-proposed 20 MHz AWS-3 allocation that preserves the 10 MHz paired J Block, which would let the marketplace determine the optimal configuration. *See* Letter from Carl W. Northrop, Counsel to MetroPCS, to Marlene Dortch, Commission Secretary, WT Docket Nos. 07-195 and 04-356 (filed Dec. 9, 2008).

serious competitive bids.<sup>5</sup> Indeed, the unified opposition of every potential bidder of record (other than M2Z, the bidder whose business plan is served by the rules) demonstrates the basis for the MetroPCS concern. In the final analysis, in the event that the Commission moves forward on this basis, the Commission runs the risk that it will be deemed to have unlawfully proposed rules that are designed to result in the award of spectrum to a single bidder whose business model it prefers for the spectrum in question, in direct violation of Section 309(j).<sup>6</sup>

### **The Commission Should Not Proceed With a Designer Allocation**

As previously noted by MetroPCS, the Commission should not create a designer allocation for the AWS-3 spectrum.<sup>7</sup> By creating service rules that require a licensee to provide “free” wireless broadband Internet, the Commission would follow the same ill-conceived path it chose with the 700 MHz D Block, by adopting out-dated command and control regulatory policies, long rejected by the Commission as ill-conceived, by specifically tailoring a valuable block of spectrum to the business plan of a single potential bidder.<sup>8</sup> When an allocation is too closely tied to a particular entity’s business model – in this case, M2Z’s – the allocation will fail if the designer’s business plan fails. MetroPCS pointed out previously that the Commission’s experience with the 700 MHz D Block clearly demonstrates the pitfalls of an allocation tailored to one company or to one particular business plan.<sup>9</sup> This tailoring is especially risky given the current state of the global capital markets. At the present time, credit, if available at all, is priced at levels which have not been used in decades. For example, MetroPCS understands that credit to new businesses, without demonstrated cash flow, would be accompanied by interest rates in the mid-to-high teens - - if credit can be obtained at all. The equity side of the capital markets also is largely closed. There have been no initial public offerings in the United States since the summer, and it is unlikely any will occur in the foreseeable future. Further, economists are predicting that the current economic recession may continue

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<sup>5</sup> If the AWS-3 spectrum is auctioned with other spectrum channels (*i.e.*, AWS-2) it is possible that multiple applicants may sign up to bid on such spectrum, thus making it difficult to determine whether applicants actually are interested in the AWS-3 spectrum. Thus, the test for whether any applicants actually are interested in this spectrum is whether parties other than M2Z actually bid on the AWS-3 spectrum at auction.

<sup>6</sup> See “Political Favors at the FCC,” Wall Street Journal, Dec. 10, 2008.

<sup>7</sup> MetroPCS Comments at 22-26.

<sup>8</sup> The D-Block was a designer allocation tailored to the business plan of Frontline Communications. The failure of Frontline, and the resulting failure of the D-Block auction, convincingly demonstrates that the Commission should not try to pick winners and losers by promoting the interests of individual potential competitors rather than promoting true competition.

<sup>9</sup> MetroPCS Comments at 24.

into 2010 or later. None of this bodes well for the Commission tailoring a spectrum allocation to an unproven business and business model. Indeed, even allocating the spectrum now will color the situation since the Commission has no idea what the wireless (or Internet) industry will look like when the current recession ends.<sup>10</sup>

Even if a designer allocation results in a license grant, which is doubtful considering the current economic climate, this approach robs the public of its right to receive a fair value for the public spectrum resource by undermining the prospect of a robust auction that generates a market price.<sup>11</sup> In sum, the “better approach would be for the Commission to retain its policy making authority, reject designer and outdated command-and-control allocations, provide minimum operating restrictions, allow flexibility of use, and let the marketplace determine the highest and best use for this spectrum.”<sup>12</sup> Indeed, such an approach led to the initial explosion of wireless firms following the PCS auctions.

Unfortunately, it does not appear that the Commission is heeding MetroPCS’s warning. MetroPCS demonstrated in its Comments that the Commission’s proposed rules set forth in the *FNPRM* appear to have been specifically designed to match the desired rules of M2Z with only minor variations from the M2Z proposed business model for the spectrum.<sup>13</sup> Not surprisingly, M2Z is the only party in this proceeding that has expressed an interest in purchasing the AWS-3 spectrum under the Commission’s proposed rules and, given the current economic situation, it is doubtful that anyone else could get funding - - even if M2Z is able to initially do so.

By setting the rules for this allocation to match one company’s business plan, the Commission violates Section 309(j) of the Communications Act, which delegates to the Commission authority to establish a *competitive* bidding process for licenses. By setting the AWS-3 allocation and rules such that only one party is seriously interested in bidding on the license, the Commission is not setting up a competitive bidding process – but rather is avoiding the competitive bidding process and effectively predetermining the winner of the spectrum.<sup>14</sup>

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<sup>10</sup> The better course is to wait on the AWS-3 allocation until both the economic conditions and the purported reason the allocation is being made - - *e.g.*, lack of competition in broadband Internet - - are more certain.

<sup>11</sup> Economists estimate that this band would fetch close to \$3 billion if auctioned without special conditions. *See supra*, note 6.

<sup>12</sup> MetroPCS Comments at 24.

<sup>13</sup> *Id.* at 22-23.

<sup>14</sup> The mere fact that multiple entities may file applications that technically qualify them to bid in an auction does not mean that the Commission has met its statutory obligation to foster competitive bidding.

### **The Commission is Statutorily Obligated to Foster Truly “Competitive” Bidding**

Congress intended the Commission to allocate spectrum and prescribe auction rules that encourage multiple applicants to participate and bid in such auctions. As an initial matter, Section 309(j) of the Communications Act authorizes the Commission to grant licenses “through a system of *competitive* bidding. . . .”<sup>15</sup> Statutory language should, when possible, be read according to its “plain meaning.”<sup>16</sup> By setting up procedures for “competitive” bidding, Congress did not intend for the Commission to set an allocation that can reasonably be expected to draw only one bidder. The word competitive means having some type of competition – which would not exist with only one serious bidder participating.<sup>17</sup> To give meaning to the statutory language, the Commission must allocate spectrum and promulgate competitive bidding rules that are reasonably expected to induce multiple parties to submit mutually exclusive applications which elicit competitive bids – not merely induce a bid from the one party whose unique business plan is a near-perfect match to the Commission’s rules. Indeed, the Commission previously has relied explicitly on the “plain meaning” rule in interpreting Section 309(j) of the Act, noting that “[i]t is well established that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose.”<sup>18</sup> In this case, crafting an allocation and service rules to meet the business plan of one and only one prospective bidder clearly contravenes the plain meaning of Section 309(j)(1) which must be read to foster interest by multiple serious contenders for the spectrum. By substantially increasing the possibility that only one party applies for the spectrum by creating a designer allocation, the Commission violates this statute.

The Commission cannot meet the standard that its proposed rules for the AWS-3 spectrum are reasonably expected to induce competitive bidding. First of all, there is nothing in the record of this proceeding to indicate that any party other than M2Z is interested in a spectrum allocation as proposed by the Commission. Indeed, the record is replete with comments of carriers opposing the allocation. Further, a comparison of the rules proposed by M2Z with the rules proposed by the Commission demonstrates that the

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<sup>15</sup> 47 U.S.C. § 309(j)(1) (emphasis added).

<sup>16</sup> *Caminetti v United States*, 242 U.S. 470 (1917).

<sup>17</sup> Indeed, the Commission previously had such a mechanism called the pioneer’s preference, which was ultimately eliminated by congressional action. This demonstrates that Congress clearly intended competitive bidding to mean more than one bidder, and allocations not specifically tailored to a specific company’s business model.

<sup>18</sup> *Implementation of Section 309(j) of the Communications Act - - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, 13 FCC Rcd 15920 (1998).

Commission clearly is designing this block of spectrum for M2Z with only minor variations from M2Z's desires:<sup>19</sup>

<b>COMPARISON BETWEEN M2Z PROPOSAL AND COMMISSION <i>FNRPM</i></b>	
<b>M2Z REQUESTS FROM M2Z MAY 5 <i>EX PARTE</i></b>	<b>COMMISSION <i>FNRPM</i><sup>20</sup></b>
Proposed framework for the provision of a new, free, nationwide wireless broadband service <sup>21</sup>	Proposed framework for the provision of a new, free, nationwide wireless broadband service
Nationwide license <sup>22</sup>	Nationwide license
Permit uplink and downlink operations throughout band <sup>23</sup>	Permit uplink and downlink operations throughout band
Licensee is only obligated to use up to 25% of capacity for the "free" service <sup>24</sup>	Licensee is only obligated to use up to 25% capacity for the "free" service
"Free" service must be provided at data rate of 768 kbps downstream <sup>25</sup>	"Free" service must be provided at data rate of 768 kbps downstream
Open platforms for devices and applications for premium service <sup>26</sup>	Open platforms for devices and applications for premium service
Only open platforms for devices for "free" service <sup>27</sup>	Only open platforms for devices for "free" service
"Always on" network-based filtering mechanism <sup>28</sup>	"Always on" network-based filtering mechanism
OBE attenuated by 43 + 10 log (P) db outside of AWS-3 band <sup>29</sup>	OBE attenuated by 60 + 10 log (P) db outside of AWS-3 band
Base station power limit should be 1000 watts/MHz ERP (2000 watts/MHz ERP in rural areas) <sup>30</sup>	Base and fixed downlink stations power limit of 1640 watts peak EIRP (3280 watts peak EIRP in rural areas)
Mobile stations should be limited to 30 watts ERP <sup>31</sup>	Mobile stations should be limited to 23 dBm/MHz EIRP
Build-out: Provide signal coverage and offer service to (1) at least 40% of the United States population within 4 years from its commencement of operations; (2) at least 75% of the population within 7 years of its commencement of operations; and (3) at least 95% of the population within ten years of its commencement of operations. Prior to the start of the time for measuring these build-out milestones, the AWS-3 licensee should be afforded a maximum of 2 years to commence operations <sup>32</sup>	Build-out: Provide signal coverage and offer service to (1) at least 50% of the total population of the nation within 4 years of commencement of the license term and (2) at least 95% of the total population of the nation at the end of the 10 year license term (although the Commission appears to give the licensee an out, and will allow for less-restrictive build-out, as well)
License Term: 15 year initial license term <sup>33</sup>	License Term: 10 year initial license term

<sup>19</sup> MetroPCS Comments at 21-23.

Notably, all other potential bidders for this spectrum have advocated rules much different than those the Commission has proposed. Although many wireless operators and spectrum holders currently are capable of providing wireless broadband Internet access service, none provide service for free with content filtering restrictions. As such, the M2Z plan does not come close to matching any business model for existing wireless carriers. If this was a desirable business models to other potential bidders, it would have been attempted by others by now. And, no one other than M2Z has indicated in comments to the Commission on the AWS-3 allocation plan that they will participate in the AWS-3 auction under these terms. Thus, the Commission has no reasonable basis or record support for believing that its proposed rules will induce other carriers to adopt M2Z's idiosyncratic business plans by bidding on the spectrum with the Commission's imposed requirements. The Commission plainly has structured this auction so that there is only one bidder - - M2Z - - and only one winner - - M2Z. This is a stark violation of the requirements of competitive bidding.

Further, by mandating a specific use of the spectrum, the Commission is eliminating the possibility that others might bid on the spectrum to provide different services. For example, MetroPCS has notified the Commission of its serious concerns that the proposed AWS-3 allocation for two-way services may interfere with the existing license of AWS-1 spectrum. By mandating a specific use of the spectrum the Commission

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<sup>20</sup> All references are to the *FNPRM*, at para 3.

<sup>21</sup> *Ex Parte* Letter from Uzoma C. Onyeije to Marlene H. Dortch, WT Docket No. 07-195 at 4 (filed May 5, 2008)

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 17.

<sup>27</sup> *Id.* at 18.

<sup>28</sup> *Id.* at 19.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.* at 10.

<sup>32</sup> *Id.* at 12.

<sup>33</sup> *Id.* at 13.

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is foreclosing other bidders (such as existing AWS-1 licensees) from buying the spectrum so that it can be combined and used in a compatible fashion with AWS-1 spectrum.<sup>34</sup> The better course is to have flexible service rules that will permit all potential bidders to bid on the spectrum and to put it to a variety of non-interfering uses.

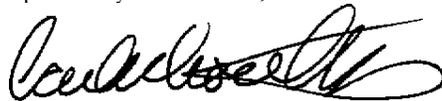
Thus, if the Commission proceeds with a designer allocation that nearly matches M2Z's business plan, then it will violate Section 309(j) of the Communications Act. The Commission instead should adopt competitive bidding rules designed to encourage widespread participation.

### Conclusion

Under the Commission's proposed AWS rules, there is a reasonable expectation there will be only one serious bidder for the AWS-3 spectrum. As noted above, the Commission has proposed a designer allocation geared toward having one bidder – M2Z – bid on and win the AWS-3 spectrum without having to compete against other bidders, as no other bidder has stated that they find the Commission's proposed allocation attractive. Thus, the Commission's proposed rules would not call for "competitive bidding" in satisfaction of statutory mandates.

Kindly refer any questions in connection with this letter to the undersigned.

Respectfully submitted,



Carl W. Northrop  
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc (via e-mail): Charles Mathias  
Angela Giancarlo  
Bruce Gottlieb  
Renee Crittendon  
Susan Fisenne

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<sup>34</sup> MetroPCS is not the only carrier concerned about the potential for interference. If the Commission merely auctioned the spectrum without the limitations, bidders may bid on the spectrum to use it for non-interfering uses -- and may be willing to pay more to prevent the interfering uses -- than an applicant intending to use technology that might interfere.