Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
CTIA – The Wireless Association	)	
Petition for Rulemaking To Transition Part 22 Cellular Services to Geographic Market-Area Licensing	)	RM No. 11510

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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SUMMARY

MetroPCS Communications, Inc. ("MetroPCS") is commenting on the proposal of CTIA – The Wireless Association ("CTIA") to transition cellular services licensed under Part 22 of the FCC rules to a geographic market-area licensing scheme. MetroPCS does not disagree with the general proposition that cellular services should be converted to a market area licensing regime that reduces the burden of site-by-site licensing. However, MetroPCS cannot accept CTIA's view that, in order to implement this transition, the Commission should ignore precedent and simply issue CMA-wide licenses without charge to the incumbents rather than accepting applications for an overlay license and conducting an auction if there are competing, mutually-exclusive applications in a particular market. An overlay license auction will allow both existing licensees and new entrants to compete to serve any unserved area or white spaces, and recover for the public a fair value for the expanded operating rights that are being granted.

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COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits its comments on the Petition for Rulemaking (the "Petition")[2] filed by CTIA – The Wireless Association ("CTIA") asking the Federal Communications Commission ("FCC" or "Commission") to transition Part 22 Cellular Services to Geographic Market-Area Licenses. The following is respectfully shown:

I. THE PUBLIC INTEREST AND LONG-STANDING COMMISSION PRECEDENT REQUIRE AN OVERLAY AUCTION TO IMPLEMENT THIS TRANSITION EFFICIENTLY.

CTIA makes numerous public interest arguments, with which MetroPCS agrees, demonstrating that the existing site-by-site licensing system for Part 22 cellular services has

[1] For purposes of these Comments, the term "MetroPCS" refers to the parent company (MetroPCS Communications, Inc.) and all of its FCC-licensed subsidiaries.

[2] CTIA – The Wireless Association Petition for Rulemaking To Transition Part 22 Cellular Services to Geographic Market-Area Licensing, submitted October 8, 2008; "Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking To Transition Part 22 Cellular Services to Geographic Market-Area Licensing," RM No. 11510, DA 09-05 (rel. January 5, 2009).

become an anachronism in the current overall broadband licensing system. However, the public interest benefits of a transition to geographic market area licensing on a CMA basis for cellular systems would be completely overshadowed were the Commission to accept CTIA's proposal and simply re-issue these licenses to incumbents for free without providing an opportunity for competing applications and an auction if mutually exclusive applications are filed. A decision by the Commission to refrain from accepting competing applications to serve the white spaces followed by competitive bidding for an overlay license, with appropriate incumbent protections, would be a significant deviation from longstanding Commission precedent and would violate Section 309(j)(3)(C) of the Communications Act of 1934, as amended (the "Act").[3]

A. THE PUBLIC INTEREST IS BETTER SERVED BY AN AUCTION WHICH WOULD PREVENT UNJUST ENRICHMENT AND RECOUP VALUE.

The CTIA Petition properly notes that the Commission, on several occasions in the past, has made transitions from site-based to market-based licensing systems. However, CTIA glosses over the fact that, in effecting these transitions, the Commission consistently made an overlay license available and allowed competing applicants to bid at auction for any unserved areas in order comply with the Congressional mandate for competitive bidding for the allocation of commercial broadband spectrum. Indeed, every single one of the six examples cited by CTIA as precedents in support of the proposed transition of cellular services from site-based to market-area licensing[4] involved the use of some type of overlay auction.[5]

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[3] 47 U.S.C. Section 309(j)(3)(C).

[4] Petition at 11-13.

[5] *See e.g., Amendment of Parts 2 and 90 of the Commission's Rules to Provide For The Use of 200 Channels Outside of the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool; Implementation of Section 309(j) of the Communications Act – Competitive Bidding and Implementation of Sections 3(n) and 322 of the Communications Act,* Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd. 2639 at ¶¶3, 9; (1995) ("*900 MHz SMR Order*"); *Amendment of Part 90 of the*

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This should come as no surprise because the plain language of Section 309(j) of the Act compels an auction whenever the spectrum at issue will be used for commercial subscriber-based services. In these circumstances, Congress clearly instructed the Commission to consider the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."[6] Based on this, and other pro-competitive directives in the Act, the Commission consistently has expressed its preference for relying on market forces via an auction, rather than regulatory fiats, to assign spectrum rights.[7]

An overlay auction is particularly appropriate in the case of a transition of cellular services to market area licensing. As CTIA itself properly notes, the transition of cellular carriers from analog to digital services may have resulted in a divergence between the cellular carrier's actual digital service area and the Cellular Geographic Service Area ("CGSA") of record, which was based upon analog coverage.[8] In many instances, real world coverage may be significantly less than the protected CGSA the incumbent carrier now enjoys. In these

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Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report, 12 FCC Rcd. 19079, ¶11 (1997) ("*800 MHz SMR* Order") at ¶11; *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 12 FCC Rcd. 2732, ¶ 18 (1997) (*"Paging Services Second R&O"*); *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Report and Order*, 10 FCC Rcd. 9589, ¶ 25 (1995); *In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service and Implementation of Section 3(n) of the Communications Act,* Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd. 14569, ¶ 14 (1998); *Petition for Amendment of the Commission's Rules Regarding the 37.0 -38.6 GHz and 38.6-40 GHz Bands,* Report and Order and Second Notice of Proposed Rulemaking, 11 FCC Rcd. 1156, ¶ 2 (1997).

[6] 47 U.S.C. 309(j)(3)(C). In addition, many of these Part 22 license holders obtained their license through lottery or comparative hearings. To further expand the service area of these licenses without any payments to the public treasury should be a "bridge too far" for the Commission to cross.

[7] *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27, DA 09-54 at ¶ 65 (rel. Jan. 16, 2009).

circumstances, the incumbent's current license area should be reduced, not expanded. Thus, CTIA's proposal of simply converting these licenses for free to reflect a larger CMA-wide territory, would result in a potentially enormous windfall for the incumbents. This is the exactly the type of unjust enrichment that the competitive bidding statute was intended to prevent.[9]

The CTIA proposal would unjustly enrich incumbents in other ways as well. CTIA indicates that, "based upon staff advice, carriers have deployed digital services on a secondary basis[10] with an understanding that purely digital services [do] not contribute to the CGSA."[11] In effect, the CTIA proposal would convert secondary licenses into primary licenses without giving competing applicants a chance to apply and without recouping for the public a fair value for the superior license rights.

Given the extraordinary budget deficits our country currently faces, it is quite simply unimaginable that the Commission would choose to forgo an overlay license auction, particularly when giving the rights away would contravene the Commission's statutory mandate. Instead of following CTIA's plan to provide a windfall to incumbent license holders at the detriment of the public interest, the better course of action would be to have all cellular carriers file service maps reflecting their actual service areas using an accepted industry methodology, and to have the remaining unserved territory made available as part of an overlay auction. Since a notice and comment rulemaking proceeding is necessary and appropriate to effect a transition from site-by-

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[8] Petition at page 7.

[9] 47 USC § 309(j)(3)(C). Further, since potentially competing applicants have no idea what areas are served and what areas are unserved, the level of unserved area licensing activity does not accurately reflect real world demand.

[10] For the 900 MHz SMR spectrum, the Commission also allowed secondary site licenses. This allowance was based on a Commission expectation that these incumbents would likely be the holders of the new geographic market-based license. Notably, the Commission ceased granting these secondary licenses once the MTA licensee had been selected in order to assure potential bidders that the spectrum upon which they were bidding would not become further encumbered with secondary sites. *See 900 MHz SMR Order* at ¶46.

site to market area licensing for cellular, one useful avenue of inquiry in any such proceeding is to ascertain, depending upon the nature of the service they are providing, what technical standards the carriers should use to calculate their actual current digital service areas.

While CTIA does not address the subject directly, parts of the Petition can be read to suggest that an overlay auction is unnecessary because there is not much white space left in the cellular bands, as evidenced by the fact that there has not been much recent unserved area licensing activity of late.[12] Any such absence of activity does not justify forgoing the Congressionally required auction for several reasons. First, because at present there is no fixed timetable or deadline for interested parties to file cellular unserved area applications, there could be latent demand that simply has not yet surfaced. Second, prospective applicants have no way of knowing the extent to which incumbents have reduced their service areas in the course of the transition from analog to digital service, and thus their failure to file unserved area applications is not probative. Third, a general slow down in unserved area applications provides no justification for the incumbent to be granted an expanded license territory for free. By conducting an auction and setting a reasonable reserve price based upon the population in the unserved area (the entire unserved area based on the incumbent's actual digital service area, not the on-file CGSA), the Commission can garner a fair market value for the newly granted territory. Fourth, the rights of an overlay licensee are inherently more valuable than those of an unserved area licensee because the overlay licensee automatically garners rights to any area relinquished or abandoned by the incumbent. Finally, having the incumbent pay a reasonable market price for the new license

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[11] Petition at page 7.

[12] Petition at pp. 12-13 (indicating that the FCC conducted an overlay auction in the MDS and 39 GHz bands only because of the presence of significant "white spaces").

rights actually increases the prospect that the incumbent will quickly develop beneficial service in the newly-acquired territory rather than warehousing the spectrum in the newly acquired territory. Thus, another useful area of inquiry in any rulemaking proceeding initiated in response to the CTIA Petition would be to inquire about the appropriate reserve price on any unserved area overlay license issued by the Commission.

B. THE COMMISSION PRECEDENTS CITED BY CTIA SUPPORT THE POSITION ADVOCATED BY METROPCS.

Conducting an overlay auction, while allowing incumbents to continue to operate on an interference-free basis within their existing service contours, would comport with the long-standing and well-established Commission policy for coordinating licensing transitions of this nature.[13] In fact, all of the proceedings cited by CTIA in support of the transition from site-based to market-area licensing for cellular support the transition proposal advocated by MetroPCS.[14] Significantly, none of the transition examples cited by CTIA resulted in the Commission automatically re-issuing an expanded service area license to the incumbent license holders for free. Indeed, in other proceedings, CTIA has argued – correctly in the view of MetroPCS – that the Commission should not be in the position of picking winner's and losers, but rather should rely upon market forces to assign licenses.[15] Having the Commission re-issue geographic market licenses without charge to the incumbents for the entire CMA would fly in the face of well-established Commission precedent and sound public policy and would be arbitrary and capricious.

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[13] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications Act,* Second Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 3108, ¶ 37 (1996) ("*Paging Services NPRM*") at ¶ 37.

[14] Petition at pages 11-13.

[15] *See* Comments of CTIA in WT Docket No. 07-195 filed July 25, 2008 (opposing M2Z AWS-3 allocation proposal which promoted the business plan of a single company instead of relying on market forces).

An examination of the transition that occurred for site-by-site Part 22 paging licenses which, like these Part 22 cellular licenses, was effectuated in order to harmonize the regulatory treatment of similar services,[16] is illustrative of the well-established Commission approach to a transition from site-specific to geographic-based licensing. In the paging proceeding, the Commission auctioned off overlay licenses in each geographic market area. In doing so, the Commission concluded that the public interest would be best served by protecting the rights of incumbent licensees to operate unencumbered within their existing service areas, while preventing the incumbent from operating in new geographic areas without the consent of the overlay license who held the geographic market area license.[17] Significantly, in taking this approach, the Commission specifically rejected an effort to exempt certain incumbents from having to bid competitively for the new geographic license.[18] This is significant because, at the time of the transition, paging was a mature service and these incumbents considered themselves to be the natural and logical holders of the market-based licenses. Nevertheless, the Commission conducted an auction.

Other examples of transitions to market area licensing mentioned by CTIA further support the MetroPCS' position. For example, CTIA cites the 900 MHz SMR transition as an instance where the Commission permitted incumbents to have their "site-by-site" licenses reissued as a single license.[19] But this "re-issuance" only occurred after an auction of the white spaces was conducted and the re-issued license only permitted the incumbent to continue

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[16] *See, e.g., Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications Act,* Notice of Proposed Rulemaking, 11 FCC Rcd 3108 at ¶ 1-8 (1996) ("*Paging Services NPRM*").

[17] *Id. at* ¶ 37.

[18] *Paging Services Second R&O* at ¶¶ 44-45.

[19] Petition at page 11.

operations within its original interference contour.[20] In announcing these "portioned" licenses, the Commission specifically noted that any incumbent seeking to gain additional coverage outside of its original contour "must apply for the MTA license."[21]

CTIA also claims that the Commission permitted incumbents in the 800 MHz SMR service to convert their site-specific licenses into geographic licenses.[22] While true, what CTIA fails to disclose is that this conversion was not allowed to take place until after the auction and only with the consent of all affected parties.[23] And, in all of the remaining examples of past transitions from site-based to market-based licenses cited by CTIA[24] incumbents have only been allowed to continue to operate within the confines of their existing interference contour, and did not enjoy expanded license rights beyond the contours of the existing service and license area. CTIA's proposal effectively turns the precedents it cites on their heads and will be subject to challenge.

As CTIA points out in its petition, the Commission has long aspired to meet Congress's requirement that "consistent with the public interest, similar services are accorded similar regulatory treatment."[25] Ironically, adopting the CTIA transition approach would actually

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[20] Petition at page 11; *900 MHz SMR Order* at ¶ 42.

[21] *900 MHz SMR Order* at ¶ 42.

[22] Petition at page 11.

[23] *800 MHz SMR Order* at ¶ 72.

[24] Petition at pages 12-13. Specifically citing the MDS, 220 MHz and 39 GHz transitions (respectively cited as: *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding,* Report and Order, 10 FCC Rcd 9589, ¶¶24-29 (1995); *Amendment of part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band for the Private Land Mobile Radio Service,* Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 14569, ¶ 103 (1998); and *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6 -40.0 GHz Bands,* Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600, ¶ 79 (1997)).

[25] Petition at footnote 19 (citing, *Implementation of Section 3(n) and 332 of the Communications Act,* Second Report and Order, 9 FCC Rcd 1411, 1418 (1994)).

violate this requirement by treating the cellular transition in a different and much more incumbent-friendly fashion than any of the other licensing transitions the Commission has effected.

CTIA's proposal also contains a flawed voluntary negotiation process for settling potential disputes when there is more than one incumbent licensee in a single MTA. It is apparent on the face of the proposal that the Commission is likely to be drawn in to protracted disputes between existing licensees. CTIA has cited no prior instance of a private negotiation process of this nature in the course of a transition from site-based to market-based licensing. And, the Commission should be concerned that the parties to any such negotiation might exchange valuable consideration which would be better paid to the US Treasury in exchange for increased license rights. The public interest would be better served if all incumbent licensees are required to file service maps reflecting their existing reliable service areas according to an acceptable methodology, which will let the Commission and all potentially interested parties easily identify the remaining unserved area in each geographic market. At that point, an auction provides a much better and fairer process for multiple incumbents to resolve their respective rights to serve the unserved area.

II. THE TRANSITION OF PART 22 CELLULAR LICENSES FROM A SITE-BASED TO A GEOGRAPHIC MARKET AREA, IF CONDUCTED ACCORDING TO COMMISSION PRECEDENT, COULD SERVE THE PUBLIC INTEREST.

MetroPCS acknowledges that there will be public interest benefits should the Commission decide to transition cellular licenses to a market-based system as proposed by MetroPCS. For example, MetroPCS agrees with CTIA that this transition would bring the Part 22 licenses into conformity with other Commercial Radio Mobile Services ("CMRS") systems licensed by the Commission, and would likely reduce administrative burdens on both the Commission and the incumbent license holders ("Incumbents").

A. THE COMMISSION SHOULD PHASE-OUT THE CURRENT REPORTING OBLIGATIONS ON PART 22 CELLULAR LICENSE HOLDERS.

As CTIA correctly notes, the Commission's regulations for all of the spectrum bands used to compete with Part 22 cellular services – including 800 MHz ESMR, PCS, AWS and 700 MHz – define licenses on a geographic market basis and licensees are not obligated to provide the Commission with site-based reporting. Under the transition framework put forward by CTIA, once the transition to a geographic-based system is completed, the previous reporting obligations on Part 22 cellular incumbent operators would no longer be necessary and should therefore be terminated. MetroPCS agrees that eliminating these reporting requirements after the transition to market-based licenses would provide beneficial administrative relief to the Commission and to the Incumbents.

B. A FILING FREEZE ON UNSERVED AREA APPLICATIONS IN ADVANCE OF THE TRANSITION WOULD SERVE THE PUBLIC INTEREST.

MetroPCS agrees with CTIA that implementing a freeze on the filing of unserved area cellular applications would promote efficiency in the transition to market-based licensing.[26] MetroPCS also has no objection to the CTIA proposal that, during the pendency of this freeze, the Commission might accept and process modification applications filed by incumbents as part of their transition from analog to digital service coverage. However, any license rights granted as a result of modifications filed after the date of the freeze should be secondary to the ultimate rights of the CMA overlay license holder. MetroPCS notes that this action would be consistent with past Commission precedent for similar transitions.[27]

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[26] Petition at page 15.

[27] *See, e.g., Paging Services NPRM* at ¶ 139; *800 MHz SMR Order* at ¶¶ 15, 108; *900 MHz SMR Order* at ¶¶ 22-23.

III. CONCLUSION

MetroPCS recognizes and appreciates CTIA's efforts to encourage the Commission to create a more parallel regulatory environment for Part 22 cellular services. Nonetheless, MetroPCS strongly urges the Commission to refrain from breaking with well-established precedents and policies to provide a windfall to incumbent license holders through the re-issuance of their licenses expanded to include the entire CMA, as CTIA requests. Instead, the Commission should conduct this transition in the same manner it has performed prior licensing transitions – by allowing incumbents to continue to operate within their existing interference contours while conducting an overlay auction to allocate the licenses for the unserved areas.

Respectfully submitted,

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February 23, 2009

CERTIFICATE OF SERVICE

I, Diane Remler, hereby certify that a true and correct copy of the foregoing Comments of MetroPCS Communications, Inc. was sent via overnight delivery this 23rd day of February, 2009, to the individual on the following list:

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