



February 19, 2010

Via Electronic Filing

Chairman Julius Genachowski  
Commissioner Michael J. Copps  
Commissioner Robert M. McDowell  
Commissioner Mignon Clyburn  
Commissioner Meredith Atwell Baker  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re: Written Ex Parte Presentation in WT Docket Nos. 07-195 and 04-356 and  
GN Docket Nos. 09-51 and 09-157**

Dear Chairman Genachowski and Commissioners:

A number of incumbent carriers and their trade associations seeking to delay the FCC's timely resolution of the AWS-3 (2155-2180 MHz) rulemaking proceeding<sup>1</sup> are asking the FCC to "pair" this band with federal spectrum at 1755-1780 MHz, asserting that the 1755-1780 MHz band is "readily available" for reallocation to commercial use.<sup>2</sup> As discussed in greater detail below with specific regard to the 1755-1780 MHz band – but generally applicable to any

<sup>1</sup> See e.g. Letter from Christopher Guttman-McCabe, CTIA, to Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn and Commissioner Meredith Atwell Baker, GN Docket No. 09-51 at 16 (filed Sept. 29, 2009); Letter of Howard J. Symons, representing T-Mobile, to Ms. Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356 (filed Dec. 5, 2008); Letter of Patricia Paoletta, representing 3G Americas, to Ms. Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356 (filed Oct. 23, 2008); Letter of Brian M. Joesef, CTIA to Ms. Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356 (filed Jul. 3, 2008); Comments of AT&T, Inc. in Support of T-Mobile's Request for Extension of Time to File Comments, WT Docket Nos. 07-195 and 04-356 (filed Jul. 2, 2008); T-Mobile Request for Extension of Time to File Comments, WT Docket No. 07-195 (filed Jul. 1, 2008); Letter of Kathleen O'Brien Ham to Ms. Marlene H. Dortch, WT Docket 07-195 (filed Jun. 13, 2008); Letter of Kathleen O'Brien Ham to Ms. Marlene H. Dortch, WT Docket 07-195 (filed Jun. 10, 2008); Comments of CTIA, WT Docket Nos. 07-16 and 07-30 (filed Mar. 2, 2007); Comments of Verizon Wireless, WT Docket Nos. 07-16 and 07-30 (filed Mar. 2, 2007); Comments of T-Mobile USA, WT Docket Nos. 07-16 and 07-30 (filed Mar. 2, 2007).

<sup>2</sup> See Letter from Christopher Guttman-McCabe, CTIA, to Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn and Commissioner Meredith Atwell Baker, GN Docket No. 09-51 at 16 (filed Sept. 29, 2009); CTIA has also claimed that the 1755-1780 MHz band is "readily-available" in subsequent *ex partes* in the following dockets: GN Docket Nos. 09-157, 09-47, 09-137 and WT Docket Nos. 08-165, 08-166, 08-167, 09-66 on Sept. 30, 2009; Oct. 2, 2009; Oct. 5, 2009; Oct. 29, 2009 and Nov. 3, 2009.

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Department of Defense (“DoD”) spectrum<sup>3</sup> – any inquiry into the possibility of such pairing faces a significant statutory hurdle that was put in place by Congress in order to ensure long range spectrum certainty for the over \$100 billion in national defense and homeland security infrastructure deployed in this band. Just as important, any decision by the FCC to delay the resolution of the AWS-3 rulemaking in an effort to pair the band with federal spectrum for purposes of maximizing federal revenues would violate the Communications Act, which specifically prohibits considering the potential for federal revenues when making decisions on the spectrum bands that will be auctioned. Finally, any FCC decision to undertake an inquiry on the pairing proposal will result in more unnecessary delay to the AWS-3 proceeding and further delay the American people’s right to benefit from the use of their spectrum. Permitting such a delay – especially based on assertions that are not supported by any data in the FCC record, are contrary to evidence in the public domain, and even run counter to the experience of those parties making them<sup>4</sup> – would constitute an egregious dereliction of the FCC’s principal duty, which is to make spectrum available “as rapidly as possible” for the benefit of consumers.<sup>5</sup>

## 1. Background

A number of incumbent carriers have asked the FCC to consider pairing the AWS-3 band with federal spectrum in the 1755-1780 MHz band. The proponents of this pairing seem to ignore the practical and legal hurdles to such a plan. The 1755-1780 MHz federal spectrum band is currently being used for satellite control and tactical air and ground weapon systems critical for homeland security and national defense. Indeed, because of the critical nature of these systems, the National Telecommunications and Information Administration (“NTIA”) and the Department of Defense (“DoD”) have previously determined, based on a multi-year study the agencies jointly conducted pursuant to a Congressional directive (the “NTIA Study”), that the band is not a viable choice for commercial reallocation.<sup>6</sup> The NTIA Study concluded that there

<sup>3</sup> See Comments of MetroPCS Communications, Inc., GN Docket Nos. 09-47, 09-51 and 09-137, at 2. (filed Oct. 23, 2009). MetroPCS has also suggested that AWS-3 be paired with federal DOD spectrum in the 1755-1850 MHz band. See also Letter of Kathleen O’Brien Ham to Ms. Marlene H. Dortch, WT Docket Nos. 04-356, 05-256, 06-150, 07-195 and 09-66 (filed Feb. 5, 2010) suggesting that the 1755-1780 MHz band be reallocated for commercial use and that the remaining 70 MHz of spectrum will be sufficient for U.S. government operations. We note, however, that in January 2009, the Utilities Telecomm Council (“UTC”), a group representing the interest of utilities, filed a petition with the FCC recommending that the 1800-1830 MHz band be reallocated for commercial use and be designated for utilities and related critical infrastructure applications in order to harmonize with a similar allocation in Canada. See Utilities Telecom Council, *The Utility Spectrum Crisis: A Critical Need to Enable Smart Grids*, RM-11429 (filed Jan. 30, 2009).

<sup>4</sup> See Comments of T-Mobile, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 17 (filed Jun. 8, 2009). In this and subsequent filings, T-Mobile cites to its experience with the reallocation of the 1710-1755 MHz band in admitting that repurposing of federal spectrum, especially those that involved in national defense and homeland security systems is fraught with delay.

<sup>5</sup> 47 U.S.C. §§ 151, 301, 303, 308, 309.

<sup>6</sup> See *An Assessment of the Viability of Accommodating Advanced Mobile Wireless (3G) Systems in the 1710-1770 MHz and 2110-2170 MHz Bands*, NTIA, at 4 (rel. Jul. 22, 2002) (*available at* <http://www.ntia.doc.gov/ntiahome/threeg/va7222002/3gva072202web.htm>). The NTIA Study identified three reasons preventing reallocation: DOD’s extensive operations in the band would be significantly and unacceptably impacted; the need for large geographical distances would preclude sharing with DOD terrestrial systems; and DOD satellite control stations would interfere with commercial base stations even at large distances.

was “no suitable alternative federal and/or commercial spectrum ... for satisfactory relocation of DOD systems.”<sup>7</sup>

## 2. The 1755-1780 MHz Federal Spectrum Band Is Not “Readily Available”

The position of the incumbent carriers and their associations that the 1755-1780 MHz band is “readily available” for commercial use runs counter to the federal agencies’ consistent and recent public statements regarding DoD’s need for the spectrum. The carriers’ position is also not supported by any other data in the FCC record or in the public domain. First and foremost, there is no evidence that the agencies’ conclusions regarding this band’s utility for national defense and homeland security operations or its unavailability for commercial use have changed. In fact, as recently as October 2009, DoD officials responsible for spectrum matters publicly stated that the DoD itself is facing a spectrum crisis and needs more, not less, spectrum for its use.<sup>8</sup> Moreover, a presentation posted to the NTIA website in December 2009 confirms the extensive ongoing DoD and other federal agency use of the band.<sup>9</sup> In addition to executive branch agencies, the Commission itself has also recognized that the 1755-1850 MHz band has been designated to satisfy DoD spectrum requirements, including the absorption of operations that were displaced in connection with the reallocation of the 1710-1755 MHz band.<sup>10</sup>

These incumbent carriers, most importantly, casually ignore the fact that there is a statutory bar against the surrender and reallocation of DoD spectrum until such time that equivalent replacement spectrum has been identified by NTIA *and* approved by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff as being comparable spectrum. Specifically, Section 1062 of the National Defense Authorization Act for Fiscal Year 2000 – which has been incorporated directly into NTIA’s own regulations<sup>11</sup> – states:

### (b) SURRENDER OF DEPARTMENT OF DEFENSE SPECTRUM.—

- (1) IN GENERAL.—If, in order to make available for other use a band of frequencies of which it is a primary user, the Department of Defense is required to surrender use of such band of frequencies, the Department shall not surrender use of such band of frequencies until— (A) the National Telecommunications and Information Administration, in consultation with the Federal Communications Commission, identifies and makes available to the Department

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

<sup>8</sup> See Presentation by Dr. Ronald C. Jost, Deputy Assistant Secretary of Defense for C3, Space and Spectrum, “Assuring Spectrum Access to Meet Growing National Security Requirements,” DoD Spectrum Symposium, October 14, 2009 (available at [http://freedomtechnologiesinc.com/symposium/?page\\_id=323](http://freedomtechnologiesinc.com/symposium/?page_id=323)).

<sup>9</sup> See Spectrum with Significant Federal Commitments 225 MHz – 3.7 GHz, posted Dec. 12, 2009 (available at [http://www.ntia.doc.gov/advisory/spectrum/meeting\\_files/225\\_3700MHzPresentation.pptx](http://www.ntia.doc.gov/advisory/spectrum/meeting_files/225_3700MHzPresentation.pptx)). The presentation details the uses at 1755-1850 MHz by the Army, Air Force and NASA, and by other federal agencies for “law enforcement, security and other critical public safety uses.”

<sup>10</sup> See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum below 3 GHz*, Fourth Memorandum Opinion and Order, 21 FCC Rcd. 4441 (2006) at ¶ 4, n.7.

<sup>11</sup> See Manual of Regulations and Procedures for Federal Radio Frequency Management, NTIA, September 2009 Revision, § 2.3.13, “Special Conditions for Department of Defense Use of the Spectrum.”

for its primary use, if necessary, an alternative band or bands of frequencies as a replacement for the band to be so surrendered; and (B) the Secretary of Commerce, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff jointly certify to the Committee on Armed Services and the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Armed Services and the Committee on Commerce of the House of Representatives, that such alternative band or bands provides comparable technical characteristics to restore essential military capability that will be lost as a result of the band of frequencies to be so surrendered.<sup>12</sup>

The legal requirements imposed by Section 1062 were reiterated by the House Armed Services Committee in 2001, in response to calls at that time from incumbent wireless carriers – not unlike today – for reallocation of some portion of the 1755-1850 MHz band. In its report accompanying the 2002 defense authorization legislation, the Committee recognized “the competing issues of national security and economic interest that affect the proposals” for reallocation of DoD spectrum, but noted that “the first priority for the federal government is to ensure the national security of the United States and its people.”<sup>13</sup> The Committee also noted that, even if another suitable spectrum band could be identified, relocation of DoD users could not be completed until 2030, due to the multi-billion dollar investment in existing satellite systems alone.<sup>14</sup>

The following year, senior military and DoD officials testified before House and Senate committees as to the importance of the 1755-1770 MHz band, in particular, to vital military operations. For example, the deputy assistant secretary for spectrum, space, sensors and C3 policy testified that the telemetry, tracking and command systems for some 120 satellites – valued at about \$100 billion – are located in the 1755-1770 MHz band.<sup>15</sup> Moreover, he explained that the 1755-1770 MHz band “has superior features that make it a vital resource for military applications,” and that no other available spectrum band has all of the same attributes.<sup>16</sup> Similarly, a senior naval official testified that loss of the 1755-1770 MHz band would “severely impact fleet operations, readiness training, and our ability to transform into a leaner, more agile, and more effective force to meet the security challenges of the future.”<sup>17</sup>

<sup>12</sup> Pub. L. No. 106-65, 113 Stat. 512, 768 (emphasis added).

<sup>13</sup> Report of the Committee on Armed Services on H.R. 2586, Rpt. No. 107-194 (Sept. 4, 2001) at 352. The Committee pledged to “take further legislative action as necessary to ensure that national security interests are not compromised in this critical area.” *Id.*

<sup>14</sup> *Id.* at 351.

<sup>15</sup> Testimony of Steven Price, Deputy Assistant Secretary of Defense, before the Senate Commerce, Science and Transportation Committee, June 11, 2002.

<sup>16</sup> *See id.* He also explained the complexities and delays inherent in obtaining host nation coordination for the use of a new spectrum band overseas, should any relocation be required. “Were we required to move out of 1755-1770 ... who knows for how long those [new] radios would be unusable” in key countries.

<sup>17</sup> *See* Testimony of Richard Mayo, Director, Space, Information Warfare, Command and Control Headquarters, Chief of Naval Operations, before the Subcommittee on National Security, Veterans Affairs and International Relation of the House Government Reform Committee, April 23, 2002.

In light of the above, serious consideration by the Commission of the pairing proposal would be untenable as a matter of law, given that there is no indication that NTIA has even begun to identify replacement spectrum that would be acceptable to DoD. Even if that process were to begin tomorrow, it could take decades to complete the relocation of incumbent DoD systems. Thus, any consideration of the pairing proposal by the FCC would be a waste of the public's resources and would further delay the public's ability to take advantage of new broadband services that could be provided in the 2155-2180 MHz band once it is made available.

### **3. The FCC is prohibited from considering expectation of revenues in spectrum assignment auctions.**

As best we can tell, those parties arguing for "pairing" seem to rely on the possibility that a paired auction (1755-1780/2155-2180 MHz) would generate more "value," *i.e.*, federal revenue, than an auction of AWS-3 by itself. As a matter of policy and economics, studies in the record of these proceedings have demonstrated that the consumer benefits from the auction and deployment of the unpaired AWS-3 spectrum, based on the proposed service rules in the June 2008 FNPRM, would far outweigh the potential revenues that could be generated from an auction of paired spectrum.<sup>18</sup> Any transparent and objective cost benefit analysis of this data would be in favor of a quick auction of the AWS-3 band. But more importantly, even if the cost benefit analysis was marginal, the Communications Act plainly prohibits public interest determinations related to the assignment of frequency bands for a particular use to be based on expectations of federal revenues, making this rationale for the pairing concept untenable as a matter of law. Section 309(j)(7)(A) of the Communications Act states:

#### **(7) CONSIDERATION OF REVENUES IN PUBLIC INTEREST DETERMINATIONS-**

**(A) CONSIDERATION PROHIBITED-** In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

The Commission recently acknowledged this prohibition in the 700 MHz proceeding, where it adopted use conditions on the C and D blocks that were expected to lower the value of the spectrum at auction.<sup>19</sup> Moreover, the Commission has previously explained that "[its] most basic spectrum-management power is to assign spectrum to achieve public interest benefits *other*

<sup>18</sup> See Letter from Uzoma C. Onyeije to Ms. Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356 and GN Docket Nos. 09-51, at slide 5 -6 (filed Jan. 22, 2010); Letter from Howard J. Symons, representing T-Mobile to Ms. Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 04-356, 06-150 and 07-195.

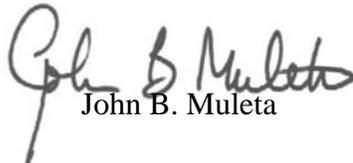
<sup>19</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007) ¶¶ 313-314. The Commission recognized that it could fulfill the goal in Section 309(j)(3)(C) to recover "a portion of the value of the public spectrum resource" without being concerned by rules that would reduce the monetary value of the spectrum. *Id.* at ¶ 214.

*than monetary recovery.*<sup>20</sup> When Congress provided the Commission with auction authority in 1993, it simultaneously prohibited the Commission from choosing whether to auction spectrum based on a “desire for federal revenue.”<sup>21</sup>

#### 4. Conclusion

A plain reading of the two statutory provisions discussed above shows that the proposal for the FCC to consider the pairing of the 1755-1780 MHz band with the AWS-3 band is a non-starter. First, the detailed multi-year NTIA Study and the multiple, and very recent, statements by government and military officials make it clear that the critical nature of the systems operating in the 1755-1780 MHz band obviates the possibility of reallocating the band for commercial use. Second, the band in any event cannot be reallocated for commercial use until comparable replacement spectrum has been identified and the transaction has been approved by the Departments of Defense and Commerce and the Joint Chiefs of Staffs, and presented to the relevant committees of the House and Senate. No such action has taken place and there is no indication that any such action is forthcoming. These legally required steps must take place before the FCC can realistically consider pairing the 1755-1780 MHz band with the AWS-3 band. Third and finally, the FCC is clearly prohibited by statute from considering this pairing proposal based on the expectation of federal revenues some unknown number of years in the future. Further delays to the resolution of the AWS-3 rulemaking based on the consideration of the pairing proposal would therefore lack any credible legal or policy support, and disserve the public interest.

Sincerely,



John B. Muleta

cc: Mr. Edward Lazarus  
Mr. Bruce Gottlieb  
Mr. Austin Schlick  
Mr. Julius Knapp  
Ms. Ruth Milkman  
Mr. John Giusti  
Ms. Angela Giancarlo  
Mr. Louis Peraertz  
Mr. Charles Mathias

<sup>20</sup> *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶ 81 (2004) (emphasis added).

<sup>21</sup> *Id.*; see also H.R. Rep. No. 103-111, at 258 (1993) (recommending that “[t]he licensing process, like the allocation process, should not be influenced by the expectation of federal revenues”).