

Before the  
 Federal Communications Commission  
 Washington, D.C. 20554

In the Matter of	)	
	)	
MetroPCS Communications, Inc.	)	
Petition for Reconsideration of Public Notice	)	AU Docket No. 08-46
Announcing Procedures for Auction of AWS-1	)	
and Broadband PCS Licenses (Auction 78)	)	
	)	

**ORDER ON RECONSIDERATION**

**Adopted: March 4, 2010**

**Released: March 4, 2010**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this Order we affirm the procedures used in our 2008 auction of Advanced Wireless Services and broadband Personal Communications Service licenses. We deny a petition filed before the auction by MetroPCS Communications, Inc. (“MetroPCS”), which sought changes in those procedures.

2. In advance of each auction, the Commission’s Wireless Telecommunications Bureau releases a public notice that lists the inventory of licenses proposed to be offered in the auction, describes the Commission rules applicable to the licenses and the auction, and seeks comment from interested parties regarding proposed auction procedures. Following such a public notice for Auction 78, MetroPCS filed comments suggesting that we remove certain licenses from the inventory and make changes to the rules applicable to certain licenses and to the auction. After careful consideration, we released a public notice that established the procedures used in the auction and declined to implement MetroPCS’s suggestions. Today we affirm the determinations we made in the public notice to reject MetroPCS’s suggestions and therefore deny MetroPCS’s petition for reconsideration of the public notice.

3. Specifically, on June 30, 2008, MetroPCS filed a Petition for Reconsideration seeking review of certain of the procedures established for Auction 78, an auction of licenses for Advanced Wireless Services (“AWS-1”) and broadband Personal Communication Services (“PCS”) that we conducted in August 2008.<sup>1</sup> For the reasons discussed below, we conclude that MetroPCS has not demonstrated any material error or omission in the procedures we established for Auction 78, and has not raised any additional facts not known or existing at the time that it filed its initial comments regarding those procedures or that were not fully considered prior to the auction. In particular, we reject MetroPCS’s

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<sup>1</sup> Petition for Reconsideration of MetroPCS Communications, Inc., AU Docket No. 08-46 (filed June 30, 2008) (“MetroPCS Petition”); *see also* “Auction of AWS-1 and Broadband PCS Licenses Scheduled for July 29, 2008; Comment Sought on Competitive Bidding Procedures for Auction 78,” *Public Notice*, 23 FCC Rcd 5484 (WTB 2008) (“*Auction 78 Comment Public Notice*”); “Auction of AWS-1 and Broadband PCS Licenses Rescheduled for August 13, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 78,” *Public Notice*, 23 FCC Rcd 7496 (WTB 2008) (“*Auction 78 Procedures Public Notice*”). We note that MetroPCS refers to our *Auction 78 Procedures Public Notice* as the “Auction Notice” and our *Auction 78 Comment Public Notice* as the “Procedures Notice.” *See* MetroPCS Petition at n. 3 and n. 4.

arguments that we erred in not removing certain licenses from the auction inventory<sup>2</sup> and in not eliminating the “closed” bidding designation associated with certain C block broadband PCS licenses.<sup>3</sup> Further, we reject MetroPCS’s contentions that our limited information disclosure procedures (also referred to as “anonymous bidding”) raise a due process issue requiring us to protect the appeal rights of auction applicants who might seek reconsideration of our procedures, or that our procedures created inconsistencies between the Commission’s rules and the rules of the Securities and Exchange Commission (“SEC”) with regard to the public disclosure of an applicant’s material financial information.<sup>4</sup>

## II. BACKGROUND

4. On April 4, 2008, the Wireless Telecommunications Bureau (“Bureau”) released a public notice announcing Auction 78 and seeking comment on a variety of procedures for the auction.<sup>5</sup> The *Auction 78 Comment Public Notice* listed the inventory of licenses to be auctioned, which included 35 AWS-1 licenses for which there were no winning bids in Auction 66.<sup>6</sup>

5. In addition, the inventory listed 20 broadband PCS licenses in the C, D, E and F frequency blocks in full or partial Basic Trading Area (“BTA”) markets, including six broadband PCS 10-megahertz C block licenses, which were reconfigured from two broadband PCS 30-megahertz C block licenses formerly held by Alpine PCS, Inc. (“Alpine”).<sup>7</sup> As explained in *Auction 78 Comment Public Notice*, certain C block licenses were subject to an eligibility rule, making them available only to “entrepreneurs” in “closed” bidding.<sup>8</sup> Specifically, of the 20 broadband PCS licenses available in Auction 78, 11 were

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<sup>2</sup> MetroPCS Petition at 5-10.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 3, 11-16.

<sup>5</sup> See generally, *Auction 78 Comment Public Notice*.

<sup>6</sup> Additional information concerning AWS-1 licenses may be found in Part 27 of the Commission’s rules. 47 C.F.R. Part 27. See also “Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66,” AU Docket No. 06-30, *Public Notice*, 21 FCC Rcd 4562 (2006) (“*Auction 66 Procedures Public Notice*”); “Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006; Revised Schedule, Filing Requirements and Supplemental Procedures for Auction No. 66,” AU Docket No. 06-30, *Public Notice*, 21 FCC Rcd 5598 (2006).

<sup>7</sup> Two 30 megahertz C block licenses formerly held by Alpine automatically cancelled when Alpine failed to make timely payments of its installment debt for the licenses. Alpine PCS, Inc. Request for Waiver of Automatic Cancellation Rule for Auction No. 5 C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C). See Alpine PCS, Inc. Request for Waiver of Automatic Cancellation Rule for Auction No. 5 C Block Licenses for Santa Barbara (Mkt. No. 406-C) and San Luis Obispo (Mkt. No. 405-C), *Order*, 22 FCC Rcd 1492 (2007) (“*Alpine Waiver Denial*”), *recon. denied*, In the Matter of Alpine PCS, Inc., CommNet Communications Network, Inc., GLH Communications, Inc., Inforum Communications, Inc., Lancaster Communications, Inc., Allen Leeds, TV Communications Network, Inc., Virginia Communications, Inc., Requests for Waiver of Installment Payment Rules and Reinstatement of Licenses, *Memorandum Opinion and Order*, 25 FCC Rcd 469 (2010) (“*Installment Payment Order*”). The six 10-megahertz C block licenses that were available in the Auction 78 inventory are designated as the C3, C4, and C5 frequency blocks in the San Luis Obispo, CA BTA (BTA405) and the Santa Barbara-Santa Maria, CA BTA (BTA406).

<sup>8</sup> See 47 C.F.R. § 24.709. The Commission provided a detailed background of the eligibility restrictions on broadband PCS C and F block licenses in an order regarding C block licenses prior to Auction 58. See Eligibility Restrictions on C Block Licenses in the Broadband Personal Communication Services, RM-11019, *Memorandum Opinion and Order*, 19 FCC Rcd 20,321 (2004) (“*C Block Order*”).

open to all bidders and 9 were available only to entrepreneurs in closed bidding.<sup>9</sup> The *Auction 78 Comment Public Notice* noted that in order for a bidder to qualify as an entrepreneur and bid on the 9 licenses subject to closed bidding, it, along with its attributable investors and affiliates, must have had gross revenues of less than \$125 million in each of the last two years and must have less than \$500 million in total assets.<sup>10</sup>

6. Interested parties submitted one comment and one reply comment in response to the *Auction 78 Comment Public Notice*.<sup>11</sup> In its comments, among other things, MetroPCS argued that the Commission should eliminate the “closed” bidding designation associated with certain C block broadband PCS licenses and it should make all broadband PCS licenses in Auction 78 available without restriction.<sup>12</sup> MetroPCS maintained that circumstances had changed dramatically since the Commission amended the C block eligibility rules in 2000, and offered a number of policy-based arguments in support of its position.<sup>13</sup> MetroPCS also urged the Bureau not to adopt its proposed procedures for limited information disclosure for Auction 78, asserting that anonymous bidding would deprive small to mid-size bidders of valuable information, which in turn would reduce the level of participation in the auction and ultimately depress revenues.<sup>14</sup> MetroPCS further recommended that we modify and/or clarify the applicability of the rule prohibiting certain communications during the period between release of a public notice identifying the winning bidders after the close of bidding and the down payment deadline.<sup>15</sup> MetroPCS stated that the Commission’s anonymous bidding procedures were “irreconcilable” with SEC reporting requirements and urged the Commission to provide bidders with immunity for making such disclosures.<sup>16</sup> Additionally, MetroPCS requested that we postpone the start of bidding in Auction 78 until the fall.<sup>17</sup>

7. On the same day MetroPCS filed these comments, Alpine filed a request seeking to stay Auction 78 or alternatively requesting that the Commission revise the inventory to remove the six broadband PCS 10-megahertz C block licenses for the San Luis Obispo, California and the Santa Barbara-Santa Maria, California BTAs that covered spectrum for which it had previously held licenses. Alpine specifically sought a stay pending a decision on its petition for reconsideration of the Bureau’s denial of a waiver of the installment payment rules and consideration of its “request for restructuring debt” with regard to its installment payment obligations (“Restructuring Request”).<sup>18</sup> Subsequently, on April 29,

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<sup>9</sup> In both the San Luis Obispo, CA BTA (BTA405) and the Santa Barbara-Santa Maria, CA BTA (BTA406), two of the three licenses associated with spectrum formerly licensed to Alpine were subject to closed bidding and one license was subject to open bidding.

<sup>10</sup> See 47 C.F.R. § 24.709(a)(1).

<sup>11</sup> See Comments filed by MetroPCS Communications, Inc., dated April 18, 2008 (“MetroPCS Comments”); Reply Comments filed by Leap Wireless International, Inc. (“Leap”), dated April 25, 2008 (“Leap Reply Comments”). MetroPCS also submitted an *ex parte* filing on May 15, 2008.

<sup>12</sup> MetroPCS Comments at 4.

<sup>13</sup> *Id.* For example, MetroPCS asserted that, if the Commission opened all licenses to all Auction 78 bidders, the auction would be “more efficient and robust,” because the licenses would be more fungible. *Id.*

<sup>14</sup> MetroPCS Comments at 7; see also Leap Reply Comments at 2.

<sup>15</sup> MetroPCS asserted that the confidentiality requirements of anonymous bidding could “theoretically” be enforceable as to auction information disclosed by the Commission. MetroPCS Comments at 11.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Id.* at 15-16; see also Leap Reply Comments at 2-3. The Bureau had previously announced that Auction 78 would start on July 29, 2008. *Auction 78 Comment Public Notice*, 23 FCC Rcd at 5485 ¶ 1.

<sup>18</sup> See Motion for Stay filed by Alpine PCS, Inc. on April 18, 2008. See also Letter from Frederick M. Joyce and Christine McLaughlin, counsel for Alpine PCS, Inc., to Anthony Dale, Office of Managing Director, dated December 18, 2007 (“Restructuring Request”).

2008, the Commission's Office of Managing Director ("OMD") dismissed Alpine's Restructuring Request without prejudice, finding the request to be both "premature and incomplete."<sup>19</sup>

8. On May 16, 2008, we released the *Auction 78 Procedures Public Notice*, which announced the notice and filing requirements, minimum opening bids, upfront payments and other procedures for Auction 78. The auction start date was rescheduled to August 13, 2008, from the originally announced date of July 29, 2008.<sup>20</sup> We retained the license inventory announced in the *Auction 78 Comment Public Notice*, and we noted that Alpine's Stay Request was pending.<sup>21</sup> Addressing MetroPCS's Comments, the *Auction 78 Procedures Public Notice* stated that removing the "closed" bidding designation for certain of the PCS licenses would require modification of the Commission's rules and was beyond the scope of the proceeding to establish procedures for conducting Auction 78.<sup>22</sup> Additionally, we explained that, because MetroPCS's requested change regarding the applicability of section 1.2105(c) of the Commission's rules prohibiting certain communications would require a rule amendment, it was also outside of the scope of the proceeding.<sup>23</sup>

9. With respect to the implementation of our anonymous bidding procedures, the *Auction 78 Procedures Public Notice* explained why the Bureau rejected the suggestions made in MetroPCS's Comments. For instance, MetroPCS requested that the Commission make clear that applicants can disclose bidding-related information that the Commission has already made public after the close of the auction but before the down-payment deadline.<sup>24</sup> In rejecting this suggestion, we stated "it is difficult to envision a case in which communication of the bare facts contained in such public information by an applicant could result in violation of the anti-collusion rule," but we noted that in the absence of a factual context, and given the importance of that rule, we would not make further clarification to our disclosure procedures.<sup>25</sup> We also determined that the advantages of our limited information procedures outweigh the disadvantages alleged by MetroPCS.<sup>26</sup> Moreover, we rejected MetroPCS's request to create blanket immunity for applicants' statements filed with the SEC because we determined that doing so would violate the intent of the limited information procedures that we adopted for Auction 78.<sup>27</sup>

10. On June 30, 2008, MetroPCS filed the instant Petition for Reconsideration. Departing from its earlier comments, MetroPCS requested that we remove from the Auction 78 inventory the six broadband PCS licenses associated with spectrum formerly licensed to Alpine.<sup>28</sup> Additionally, MetroPCS charged that we did not address or that we dismissed the concerns it raised in its comments to the *Auction 78 Comment Public Notice*, including those regarding the "closed" bidding designation of certain PCS

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<sup>19</sup> Letter from Regina Dorsey, Deputy Chief Financial Officer, Federal Communications Commission, to Frederick M. Joyce and Christine McLaughlin, Counsel for Alpine PCS, Inc., dated April 29, 2008. As noted above, the Commission recently denied Alpine's Petition for Reconsideration seeking reversal of the denial of its request for waiver of the Commission's installment payment rules. *See Installment Payment Order*, 25 FCC Rcd at 470 ¶ 1.

<sup>20</sup> *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7517 ¶¶ 65-67.

<sup>21</sup> *Id.* at 7499 n.3.

<sup>22</sup> *Id.* at 7502 ¶ 14.

<sup>23</sup> *Id.* at 7506 ¶ 26. *See* 47 C.F.R. § 1.2105(c). This prohibition has sometimes been referred to as the "anti-collusion rule." The Commission recently amended the heading of section 1.2105(c), which formerly read "Prohibition of collusion" to read "Prohibition of certain communications." Procedural Amendments to Commission Part 1 Competitive Bidding Rules, WT Docket No. 10-18, *Order*, 25 FCC Rcd 521 (2010).

<sup>24</sup> *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7506 ¶ 27.

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

<sup>26</sup> *Id.* at 7536 ¶ 157.

<sup>27</sup> *Id.* at 7537-38 ¶ 166.

<sup>28</sup> *See generally*, MetroPCS Comments at 3-6; *see also* MetroPCS Petition at 5-9.

licenses as well as those concerning the application of the rule prohibiting certain communications under procedures for anonymous bidding.<sup>29</sup> MetroPCS alleged that as a consequence, and despite its interest in certain of the licenses scheduled to be auctioned, it decided not to file a short-form application to participate in Auction 78.<sup>30</sup> Further, MetroPCS maintained that because we failed to address sufficiently the issues it raised, the *Auction 78 Procedures Public Notice* was arbitrary and capricious, and should be reconsidered.<sup>31</sup>

11. On July 7, 2008, the Bureau's Auctions and Spectrum Access Division ("Division") released an order denying Alpine's Stay Request on the grounds that Alpine had not demonstrated that it was likely to prevail on the merits, that it would be irreparably harmed, and that other parties would not be harmed by a stay of the auction.<sup>32</sup> Moreover, the Division found that the public interest did not favor a stay.<sup>33</sup> In denying the Stay Request, the Division made no changes to the Auction 78 license inventory.

### III. DISCUSSION

12. *Threshold Procedural Matters.* MetroPCS argues that, despite its decision not to participate in Auction 78, it has standing to file the instant petition as an interested person because it was the only party to file initial comments responding to the *Auction 78 Comment Public Notice*, and because it alleges that it was directly and adversely affected by the Bureau's refusal to establish procedures for Auction 78 that were consistent with the requests it made in its comments.<sup>34</sup> We conclude that we need not address this issue because "irrespective of formal standing, pursuant to Section 403 of the Act, the Commission possesses independent discretion to consider the merits of a controversy where the issues raised are in the public interest."<sup>35</sup>

13. We therefore resolve MetroPCS's Petition for Reconsideration pursuant to section 1.106 of the Commission's rules.<sup>36</sup> As the Commission has explained in other circumstances, "[r]econsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters."<sup>37</sup> MetroPCS fails to meet this standard. Moreover, as discussed below, although MetroPCS explains why the *Auction 78 Procedures Public Notice* may not have served MetroPCS's particular

<sup>29</sup> MetroPCS Petition at 2.

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

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Alpine Request for Stay of Auction 78 for the Broadband PCS C Block Licenses in the San Luis Obispo, CA and the Santa Barbara-Santa Maria, CA Basic Trading Areas, *Order*, 23 FCC Rcd 10,485, 10,487 ¶ 8 (WTB/ASAD 2008) ("*Alpine Order*").

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

<sup>34</sup> MetroPCS Petition at 4.

<sup>35</sup> Application of Central Mobile Radio Phone Service, *Memorandum, Opinion and Order*, 65 FCC 2d 648 ¶ 7 (1977), *citing* Barney Enterprises, Inc., 55 FCC 2d 721 (1975).

<sup>36</sup> 47 C.F.R. § 1.106. Metro PCS incorrectly states that it petitions for reconsideration of the *Auction 78 Procedures Public Notice* pursuant to section 1.429(a) of the Commission's rules. Section 1.429(a) permits interested persons to petition for reconsideration of a final action in a rulemaking proceeding conducted under subpart C of the Commission's Part 1 rules. However, the Bureau's pre-auction establishment of auction procedures is not a rulemaking proceeding. Rather, in establishing such procedures, the Bureau is implementing the Commission's Part 1 competitive bidding rules to establish specific procedures to govern the day-to-day conduct of a particular auction.

<sup>37</sup> *See e.g.*, General Motors Corporation and Hughes Electronics, *Order on Reconsideration*, 23 FCC Rcd 3131, 3132 ¶ 4 (2008).

interests, it does not persuade us that our implementation of the Commission's rules was arbitrary or capricious, or contravenes the public interest.

14. *Auction Inventory*. MetroPCS asserts that it was contrary to the public interest to include in the Auction 78 inventory the six PCS licenses associated with spectrum formerly licensed to Alpine while Alpine's claims to the cancelled licenses remained pending.<sup>38</sup> MetroPCS argues that commencing an auction before resolving Alpine's pending claims to the cancelled licenses would harm the public interest because the uncertainty associated with those requests would have a chilling effect on the auction and require bidders to risk bidding on licenses they might have to return, while at the same time potentially subjecting bidders to the loss of interest on monies they pay to the Commission to participate in the auction.<sup>39</sup> MetroPCS therefore concludes it would be contrary to the public interest objectives of the Communications Act to offer in Auction 78 licenses that are subject to pending legal challenges.<sup>40</sup>

15. MetroPCS further asserts that our *Auction 78 Procedures Public Notice* did not properly consider and evaluate the impact of holding an auction that includes contested licenses and asserts that the failure to do so is arbitrary and capricious under the standard of review applied by courts to Commission rulemaking proceedings. It also maintains that its own decision not to apply to participate in Auction 78 proves that bidders would be dissuaded from participating in the auction, which would lead to the spectrum not being acquired by the entity that values it the most.<sup>41</sup>

16. At the outset, we note that the existence and factual substance of Alpine's pending legal challenges related to certain licenses in the Auction 78 inventory were matters of public record, as were the Commission's resolution on delegated authority of a number of other challenges by Alpine on related issues, including the denial of Alpine's request for waiver of the automatic cancellation rule with respect to the licenses it formerly held.<sup>42</sup> Prior to an auction, we routinely advise bidders that they are solely responsible for conducting due diligence to investigate and evaluate all technical and marketplace factors that may bear upon their decision to bid upon a license being offered at auction.<sup>43</sup> Thus, bidders are urged to consider any pending challenges in determining whether and how much to bid on licenses at auction.

17. It is well settled that the Commission does not routinely delay the offering of spectrum licenses while it resolves all such challenges.<sup>44</sup> As the Division explained in denying Alpine's request for

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<sup>38</sup> MetroPCS Petition at 5-6.

<sup>39</sup> *Id.* at 7. MetroPCS cites to the Commission's return of auction-related deposits to certain Auction 35 winning bidders while litigation relating to NextWave Personal Communications, Inc. was pending, and argues that the stakes are higher in Auction 78 because the Commission's rules now require full payment of a winning bid following the close of an auction. *Id.* at 9.

<sup>40</sup> *Id.* at 8-10.

<sup>41</sup> *Id.* at 10.

<sup>42</sup> See *Alpine Waiver Denial*, 22 FCC Rcd 1492 (2007), *recon. denied*, *Installment Payment Order*, 25 FCC Rcd 469.

<sup>43</sup> See e.g., *Auctions 78 Procedures Public Notice*, 23 FCC Rcd at 7513-15 ¶¶ 51-61.

<sup>44</sup> *Alpine Order*, 23 FCC Rcd at 10491-92 ¶ 22, *citing e.g.*, *Northcoast Communications L.L.C. et al., Order*, 16 FCC Rcd 15,637, 15,641 ¶ 6 (WTB/CWD 2001), *citing Bachow Communications, Inc. v. Federal Communications Commission*, 237 F.3d 683 (D.C. Cir. 2001) (applicants for licenses in the 39 GHz band sought review of FCC interim procedures adopted during transition from comparative to competitive application process); *PLMRS Narrowband Corp. v. Federal Communications Commission*, 182 F.3d 995 (D.C. Cir. 1999) (applicants for licenses in the 220 MHz band sought review of FCC decision to assign licenses by auction rather than lottery); *Fresno Mobile Radio, Inc. v. Federal Communications Commission*, 165 F.3d 965 (D.C. Cir. 1999) (incumbent licensees sought review of FCC decision to allocate licenses in the 800 MHz band by auction). See also *Application of Wireless Co., L.P. for a License to Provide Broadband PCS Service on Block A in the San Francisco*

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stay, “[p]ending administrative and judicial appeals may often be associated with licenses offered at auction.”<sup>45</sup> Furthermore, if we were to delay Commission auctions or refrain from offering licenses at auction each time a regulatory or court challenge arose, it would undermine our ability to promote the policy objectives of Section 309(j) of the Communications Act. We therefore conclude that, contrary to the assertions of MetroPCS, the public interest favored proceeding with the announced Auction 78 procedures and inventory.

18. We also disagree that MetroPCS’s decision not to apply to participate in Auction 78 demonstrates that applicants generally would be discouraged from participating in the auction. We have no way of discerning the reasons for MetroPCS’s (or any other party’s) decision not to submit an application and do not find convincing the post-hoc assertions in its Petition filed June 30, 2008 regarding its state of mind prior to the application filing deadline of June 19, 2008.

19. MetroPCS fails to demonstrate that we acted arbitrarily or capriciously or committed any material error or omission with respect to the license inventory contained in the *Auction 78 Procedures Public Notice*. Moreover, MetroPCS fails to raise additional facts not known or not existing at the time MetroPCS filed its initial comments. Accordingly, we deny the MetroPCS Petition with respect to the Auction 78 inventory.

20. *Entrepreneur Eligibility*. MetroPCS next argues, as it did in its comments, that we should have made available all broadband PCS licenses without the application of the Commission’s “closed” bidding rule.<sup>46</sup> In particular, MetroPCS charges that we disregarded the portion of its comments that argued that the Commission’s 2006 designated entity rule changes resulted in policy and rule discrepancies that warrant the removal of the closed bidding requirements of certain PCS licenses.<sup>47</sup> As we stated in the *Auctions 78 Procedures Public Notice*, this argument seeking a rule change falls outside the scope of a proceeding to establish on delegated authority procedures for conducting Auction 78.<sup>48</sup> It therefore does not provide a basis upon which to reconsider our procedures.

21. *Anonymous Bidding*. MetroPCS next argues that we should reconsider our *Auction 78 Procedures Public Notice* because applying our anonymous bidding procedures to an auction that includes licenses subject to pending legal challenges cuts off the substantive appeal rights of auction applicants.<sup>49</sup> In particular, MetroPCS claims that, under our anonymous bidding procedures, it had to forgo applying to participate in Auction 78 in order to file the instant Petition for Reconsideration without violating the rule prohibiting certain communications during the auction process.<sup>50</sup> MetroPCS contends

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Major Trading Area, *Order*, 10 FCC Rcd 13,233, 13,236 (WTB 1995) (denying petitions to deny applications for A and B block broadband PCS licenses in the San Francisco and Boston Major Trading Areas pending resolution of litigation addressing petitioners’ pioneer preference requests for these markets).

<sup>45</sup> *Alpine Order*, 23 FCC Rcd at 10491-92 ¶ 22.

<sup>46</sup> MetroPCS Petition at 4, 11-13.

<sup>47</sup> *Id.* at 11-13.

<sup>48</sup> *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7502 ¶ 14. We note that the existing rules that reserve particular C block licenses for eligible entrepreneurs in closed bidding were adopted almost a decade ago with the provision that these rules would apply to “any subsequent auctions of C or F block licenses.” Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16,266, 16,267 ¶ 1 (2000) (“*C/F Block Sixth Report and Order*”). The Commission has rejected subsequent arguments urging it to refrain from applying those rules. *See C Block Order*, 19 FCC Rcd at 20,321.

<sup>49</sup> MetroPCS Petition at 13-14.

<sup>50</sup> *Id.* *See* 47 C.F.R. § 1.2105(c).

that the because the *Auction 78 Procedures Public Notice* failed to address this purported due process issue, the *Auction 78 Procedures Public Notice* is arbitrary and capricious. MetroPCS further states that this point also supports its argument to remove certain licenses from the Auction 78 inventory.

22. MetroPCS is correct to recognize that a petition for reconsideration such as the instant request could constitute a communication in violation of section 1.2105(c) of the Commission's rules because it would disclose to other applicants an interest in particular licenses. MetroPCS's arguments, however, provide no grounds for reconsideration of the *Auction 78 Procedures Public Notice*. An applicant can file a short-form application to participate in a Commission auction and still file a petition for reconsideration, as long as the applicant also files a request for confidentiality under section 0.459 of the Commission's rules.<sup>51</sup>

23. We routinely caution auction applicants that they must be familiar with section 1.2105(c) of the Commission's rules and avoid any disclosures that might be considered a violation.<sup>52</sup> As noted in the *Auction 78 Procedures Public Notice*, however, neither the rule nor our limited information procedures preclude an applicant from raising issues before the Commission in a confidential manner.<sup>53</sup> MetroPCS's arguments therefore do not support the removal of contested licenses from the auction inventory. Additionally, because the Commission's rules afford auction applicants safeguards to preserve their appeal rights, MetroPCS does not raise a due process issue. We therefore deny MetroPCS's Petition on this point because such protections already exist within the Commission's rules.

24. *SEC Disclosures*. We are not persuaded by MetroPCS's allegations of inconsistencies between our limited information procedures and SEC financial disclosure requirements.<sup>54</sup> In its comments responding to the *Auction 78 Comment Public Notice*, MetroPCS requested that we create a safe harbor for applicants' statements that are filed with the SEC.<sup>55</sup> In the *Auction 78 Procedures Public Notice*, we declined to follow this suggestion because we determined that doing so would violate the intent of the limited information procedures that we adopted for Auction 78.<sup>56</sup> In requesting reconsideration on this issue, MetroPCS alleges that the Bureau did not adequately address its concerns, and that the Bureau cannot proceed with applying a rule that is not clear to those entities that must abide by it.<sup>57</sup> MetroPCS further argues that the Auction 78 anonymous bidding procedures are not in the public interest because they "potentially conflict" with SEC reporting obligations. MetroPCS therefore asks that we reconsider its request to create such a safe harbor because it contends that doing so would eliminate all risk that such a conflict may develop.<sup>58</sup>

25. MetroPCS advances no new arguments to support its position. Further, we disagree with MetroPCS's contention that the operation of the Commission's anonymous bidding procedures and the Commission rule prohibiting certain auction-related communications are not clear. Section 1.2105(c) prohibits communications (including by means of public disclosure) about bids or bidding strategies

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<sup>51</sup> See 47 C.F.R. § 0.459.

<sup>52</sup> *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7504-08 ¶¶ 19-34.

<sup>53</sup> *Id.* at 7528 ¶ 118; see e.g., Letter to Carl Northrop and Lisa Roberts, from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 23 FCC Rcd 4750 (2008) (responding to MetroPCS 700 MHz, LLC's Petition for Waiver of the short-form application filing deadline and request for confidential treatment).

<sup>54</sup> MetroPCS Petition at 14.

<sup>55</sup> MetroPCS Comments at 9-10.

<sup>56</sup> *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7537-38 ¶¶ 165-66.

<sup>57</sup> MetroPCS Petition at 14-16.

<sup>58</sup> *Id.*

among applicants for licenses covering any of the same geographic areas.<sup>59</sup> As with all Commission spectrum auctions, the *Auction 78 Procedures Public Notice* provided extensive explanation of the nature and scope of the prohibition on certain communications, as well as references to numerous additional Commission documents discussing the rule.<sup>60</sup> We also note that, regardless of whether an auction is subject to anonymous bidding or full information bidding procedures, an applicant's public disclosure, including disclosure to the SEC, of certain financial information or other auction-related information could violate the rule if such information reveals its bids or bidding strategies.<sup>61</sup>

26. Under the Auction 78 anonymous bidding procedures, because certain auction-related information was not disclosed by the Commission until after the close of bidding, the communication of information regarding an applicant's license selections, upfront payments and bidding eligibility, as well as information that might reveal the identities of bidders placing bids and taking other bidding-related actions, could violate section 1.2105(c).<sup>62</sup> Whether a particular communication would violate the rule, however, depends upon the specific facts involved. Likewise, whether the SEC considers certain financial information to be subject to disclosure also depends upon the nature and materiality of the specific information involved.<sup>63</sup> Accordingly, we conclude there is no definitive inconsistency between our anonymous bidding procedures and the SEC reporting rules that warrants creating a broadly applicable safe harbor such as that advocated by MetroPCS.<sup>64</sup>

27. Furthermore, we conclude that the creation of a safe harbor for SEC disclosures could significantly undermine the purpose and the public interest benefits of limited information procedures. Such a safe harbor would, moreover, place applicants that are publicly held and subject to the SEC disclosure rules at a distinct advantage over other applicants by allowing them to engage in certain communications not permitted by other applicants. Similarly, creating such a safe harbor in the context of anonymous bidding could result in the disclosure of applicant bidding information that might be impermissible even under our full information auction bidding procedures. We see no justification for creating such an anomaly in our procedures. We therefore deny the MetroPCS Petition to the extent it requests that we establish a safe harbor under our anonymous bidding procedures for bidders that make financial or other auction-related disclosures to the SEC.<sup>65</sup>

#### IV. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED, pursuant to the authority granted in Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r),

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<sup>59</sup> 47 C.F.R. § 1.2105(c).

<sup>60</sup> See e.g., *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7504-11 ¶¶ 19-43, 7537-38 ¶¶ 161-66.

<sup>61</sup> See 47 C.F.R. § 1.2105(c)(7)(ii) ("The term bids or bidding strategies shall include capital calls or requests for additional funds in support of bids or bidding strategies."); see also *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7507 ¶ 30, 7511 ¶¶ 42-43.

<sup>62</sup> *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7535 ¶ 155, 7537 ¶¶ 161-64.

<sup>63</sup> MetroPCS acknowledges this point. MetroPCS Petition at 16 (noting that SEC disclosures are triggered by the "materiality" of specific circumstances with respect to the filer); see also MetroPCS Petition at 17 (seeking the reconciliation of "potential" rule inconsistencies).

<sup>64</sup> We note that, in Auction 78, the Bureau urged that, to the extent auction applicants believed that such a disclosure was required by law or regulation, including regulations issued by the SEC, they should consult with the Commission before making such disclosure. *Auction 78 Procedures Public Notice*, 23 FCC Rcd at 7537-38 ¶ 166.

<sup>65</sup> Because we decline to grant reconsideration on this issue, we need not address whether the establishment of such a safe harbor would require modification of section 1.2105(c) pursuant to a notice and comment rule making proceeding. 47 C.F.R. § 1.2105(c).

and 309(j), that the Petition for Reconsideration filed by MetroPCS Communications, Inc., IS DENIED. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman, Chief  
Wireless Telecommunications Bureau