Before the
Office of Management and Budget
and the
Federal Communications Commission
Washington, DC

In the matter of

Comments on the Proposed Collection of Information Regarding Emergency Back-up Power for Communications Assets as set forth in the Commission's Rules (47 C.F.R. 12.2)	)))))	73 Fed. Reg. 52354

COMMENTS OF METROPCS COMMUNICATIONS, INC.

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MetroPCS Communications, Inc. ("MetroPCS")[1] respectfully submits the following comments to the Office of Management and Budget's ("OMB's") Office of Information and Regulatory Policy ("OIRA") and the Federal Communication Commission ("FCC" or "Commission") in response to the FCC's *Notice of Public Information Collection Being Submitted for Review to the Office of Management and Budget*[2] regarding the proposed collection of information for compliance with the emergency back-up power requirements for communications assets set forth in Section 12.2(c) of the Commission's rules.[3]

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

[2] 73 FR 52354 (September 9, 2008).

[3] 47 C.F.R. § 12.2(c)("Within six months of the effective date of this requirement, LECs and CMRS providers subject to this section must file reports with the Chief of the Public Safety & Homeland Security Bureau. (1) Each report must list the following: (i) Each asset that was designed to comply with the applicable back-up power requirement as defined in paragraph (a); (ii) Each asset where compliance with paragraph (a) is precluded due to risk to safety or life or health; (iii) Each asset where compliance with paragraph (a) is precluded by a private legal obligation or agreements; (iv) Each asset where compliance with paragraph (a) is precluded by Federal, state, tribal or local law; and (v) Each asset that was designed with less than the emergency back-up power capacity specified in paragraph (a) and that is not precluded from compliance under paragraph (b). (2) Reports listing assets falling within the categories identified in paragraphs (c)(1)(ii) through (iv) must include a description of facts supporting the basis of the LEC's or CMRS provider's claim of preclusion from compliance. For example, claims that a LEC or CMRS provider cannot comply with this section due to a legal constrain must include the citation(s) to the relevant law(s) and, in order to demonstrate that it is precluded from compliance, the provider must show that the legal constraint prohibits the provider from compliance. Claims that a LEC or CMRS provider cannot comply with

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INTRODUCTION AND SUMMARY

MetroPCS supports polices that would improve the preparedness, network reliably and nationwide system of communications in the event of a natural or other disaster. In addition, MetroPCS takes seriously its commitment to develop its own emergency preparedness plans based upon best industry practices in order to restore service to its customers as soon as possible in the event of an emergency or disaster, and the company continues to strive to improve and upgrade its plans. Moreover, MetroPCS has natural market incentives to do so, because if it ceases to provide service when others are providing service, it will be punished in the marketplace. For example, MetroPCS provides service to large sections of the state of Florida which is prone to damage from hurricanes. Just a few weeks ago, the MetroPCS systems there weathered Hurricane/Tropical Depression Fay. At that time, MetroPCS voluntarily participated in the FCC's Public Safety & Homeland Security Bureau Disaster Information Reporting System (DIRS) for Tropical Depression Fay, and conducted its own review of its preparedness following that storm. In addition, MetroPCS has hardened its switch site and taken steps to assure that it has adequate generators to provide back-up power where necessary in the event the power is lost.

Notwithstanding its support for the goals the Commission is seeking to achieve, MetroPCS has serious concerns about the manner in which the Commission has proceeded. MetroPCS previously provided comments to the Commission[4] indicating that the agency's estimate of the information collection burden was woefully inadequate, and that the

(...continued)

this section with respect to a particular asset due to a private legal obligation or agreement must include a description of the relevant terms of the obligations or agreement and the dates on which the relevant terms of the agreement became effective and are set to expire. Claims that a LEC or CMRS provider cannot comply with this section with respect to a particular asset due to risk to safety of life or health must include a description of the safety of life or health risk and facts that demonstrate a substantial risk of harm.").

[4] Comments of MetroPCS Communications, Inc. (filed January 14, 2008) in response to notice published at 72 Fed.Reg. 64221 (November 15, 2007). ("MetroPCS PRA comments")

Commission's proposed six month reporting deadline was unrealistic and unachievable.[5] Although the Commission has revised slightly its estimate of the time it will take carriers to comply - from 70.32 hours to 96 hours - this minor upward revision does not come close to quantifying the actual burden imposed on respondents. For example, under the old estimate, MetroPCS demonstrated that it would have slightly less than one minute and fifteen seconds *per site* to gather, assemble and submit the required information based on the number of sites MetroPCS had deployed more than a year ago. Under the revised estimate, MetroPCS will be able to spend an additional 30 seconds per site; still far below the actual time required.[6] And, the Commission has steadfastly refused to modify its compliance deadline, requiring compliance with the enormously time consuming reports called for under Section 12.2(c) of the Commission's rules within an unworkable six month timeframe after the date of publication of the OMB control number in the *Federal Register*.

As is explained in greater detail below, the Commission has completely failed to meet its Paperwork Reduction Act[7] ("PRA") obligations. Consequently, MetroPCS respectfully urges OMB to reject the Commission's overly burdensome collection requirement and deny the FCC's request for an OMB control number with respect to this proposed information collection requirement. Additionally, MetroPCS urges OMB to provide written comments back to the Commission urging the Commission to reassess the true burden this information requirement places on respondents and revise or abandon its ill-considered back-up power rules accordingly.

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[5] *See* MetroPCS PRA Comments.

[6] This determination is arrived at by multiplying the Commission's estimated burden times 60 and dividing that sum by 3397, which is the number of cell sites disclosed in MetroPCS' December 31, 2006 S-1 filing, as amended. That is the most recently disclosed number of cell sites operated by MetroPCS. Since then, MetroPCS has built networks to provide service in Las Vegas, Philadelphia, Shreveport, and Jacksonville, as well as have extended its networks in many of its markets. Accordingly, the actual time now would be substantially less per site.

[7] 44 U.S.C. 3501 *et seq*.

I. THE COMMISSION HAS FAILED TO DEMONSTRATE TO OMB THAT THERE IS ANY PRACTICAL UTILITY IN THE PROPOSED COLLECTION OF INFORMATION:

MetroPCS supports the ultimate goal of improving the preparedness, network reliably and nationwide system of communications in the event of a natural or other disaster. Yet, as is discussed further below, the immense burden imposed on CMRS carriers such as MetroPCS by the Commission through Section 12.2(c) of the FCC rules is counterproductive and outweighs any potential utility of the information to be collected. Further, the paperwork required by the Commission does not accomplish the ultimate objective – the paperwork will not cause service to be available at more sites in an emergency – only the actual requirements to have back-up power at critical sites will achieve that.

The term "practical utility" is defined by the Paperwork Reduction Act as "the ability of an agency to use information, particularly the capability to process such information, in a timely and useful fashion."[8] This definition is further refined in the regulations that implement the Paperwork Reduction Act[9] to mean the actual, and not merely a theoretical or potential, usefulness of the information.[10] Furthermore, the regulations explicitly state that in determining whether a proposed information collection has practical utility, OMB must examine "whether the agency demonstrates actual timely use for the information."[11] Here, the Commission's proposed information collection cannot meet this standard.

[8] 44 U.S.C. 3502(11).

[9] 5 C.F.R. 1320.

[10] 5 C.F.R. 1320.3(l).

[11] *Id.*

According to the estimates provided by commenters, it is very likely that each report required by the information collection will generate hundreds of thousands, if not millions of pages.[12] Yet, the Commission estimates it will only require two government employees, each spending only one quarter of their time,[13] to process all of the information that will be reported by the estimated 73 respondents.[14] The huge volume of requested data compared to the paltry FCC staff resources means that the agency would not be able to process the data obtained by this information collection for a significant period of time, if at all. This is precisely the type of overly burdensome and useless[15] information collection requirement by government that the PRA was intended to halt.

Furthermore, the very nature of this "one-time report" demonstrates its lack of any practical utility. The wireless phone industry continues to grow at an explosive rate,[16] which means that the "snapshot" being taken by the agency has little if any utility either when collected or in the future, particularly since the agency has underestimated the resources it will need to evaluate the reams of paper it will receive. In effect, notwithstanding the burdensome collection requirement, the Commission will remain in the dark about the level and extent of carriers' compliance. The Commission will only know if the availability of back-up power has improved

[12] *See e.g.*, PRA Comments of NextG Communications Inc. at p. 5; PRA Comments of CTIA at 7; PRA Comments of T-Mobile at 3.

[13] FCC Supporting Statement at 8.

[14] The number of respondents seems low, as there are hundreds of licensees that are required to comply with the rules. The Commission has not provided that companies can file the report on a corroborated basis, and even if they could there are many multiples more of licenses than seventy-three.

[15] The Commission claims that their information collection is necessary to ensure that the Commission has the essential information to know whether carriers have sufficient emergency back-up power during times of emergencies. *See Supporting Statement* at p.1. However, as explained further below, the Commission's information collection will only provide a one-time snapshot of the carriers' back-up capabilities, and this one-time view cannot appropriately inform the Commission for any future action on the matter.

[16] *See e.g., In re Service Rules for the 698-746, 747-762 and 777-792 MHz bands*, FCC 07-132, WT Docket No. 06-150 (Rel. August 10, 2007).

in the event of another natural disaster or other catastrophe, which means that the information request was useless.[17]

Further, as earlier noted, it is not clear what regulatory objective is being advanced by this paperwork collection. The collection of information will not ensure back-up power is available – nor will it expedite the actual provision of back-up power. To the contrary, fulfilling the paperwork requirement could be a costly distraction with no discernible regulatory benefit since the FCC will not have the resources to utilize the information it receives.

Moreover, as multiple commenters pointed out to the Commission in petitions for reconsideration of the back-up power rule,[18] the Commission's information collection also lacks practical utility because it pertains to only one isolated component of the network - power - and thus does not meaningfully address the myriad of other problems which may cause communication services to be lost. For example, wireless coverage may be interrupted during a natural disaster or other emergency even though all of the cell sites in that area have back-up power. This could be due to a variety of complications, including damage to towers, antennas or other equipment, or loss of back haul capabilities, flooding, looting, or other problems beyond a carrier's control. The Commission also has failed to explain how it determined that 8 hours of back-up power was the necessary or appropriate time frame, or that it is achievable as a general

[17] *See In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks,* ORDER EB Docket No. 06-119, WC Docket No. 06-63, (Rel. June 8, 2007) ("Hurricane Katrina Order"); *In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks,* Order on Reconsideration, EB Docket No. 06-119, WC Docket No. 06-63 (Rel. October 4, 2007) ("Recon Order").

[18] *See* CTIA – The Wireless Association, *Petition for Reconsideration, In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks,* ORDER EB Docket No. 06-119, WC Docket No. 06-63 (Filed August 10, 2007); PCIA – The Wireless Infrastructure Association, *Petition for Reconsideration, In the Matter of Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks,* ORDER EB Docket No. 06-119, WC Docket No. 06-63, (Filed August, 10, 2007).

rule.[19] Absent adequate justification for the underlying rule, the Commission is unable to demonstrate the practical utility of the extensive information it seeks to gather.

Finally, the request will require carriers to disclose attorney-client privileged information, since one of the exceptions requires carriers to disclose the relevant rule sections that preclude compliance and that providers "must demonstrate" the legal prohibition preventing compliance. By requesting detailed information as to specific regulations which would preclude a carrier from complying with the battery back-up requirement, the Commission is essentially requiring carriers to seek legal advice and analysis from specialized counsel regarding these requirements. This advice is and should remain protected by the attorney-client privilege and attorney work-product doctrines. An agency should not compel the production of information that implicates, compromises, or waives the attorney-client privilege or attorney work-product doctrines. Indeed, the Department of Justice ("DOJ") recently revised its rules surrounding the waiver of attorney-client privilege in criminal investigations. Prosecutors are no longer able to demand that corporations "produce privileged materials or waive attorney-client or work-product protections as a precondition for receiving cooperation credit."[20] Indeed, "[c]redit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work-product protection, or produced materials protected by attorney-client or work-product protections."[21]

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[19] *See* PRA Comments of Sprint Nextel at p.4. Indeed, interestingly the Commission has proposed in connection with the D Block which is to be used by first responders in emergency situations that only 35% or the sites need to have 8 hours of back-up power. It is inconceivable that the Commission could rational require a three times requirement on commercial systems than that proposed for emergency service systems. *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, Third Further Notice of Proposed Rulemaking, FCC 08-230 at para. 117 (rel. Sept. 25, 2008).

[20] *See* "Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines," Speech, (Aug. 28, 2008) *available at* http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html.

[21] *Id.*

The Deputy Attorney General also noted that federal prosecutors are no longer able to request that a "corporation disclose non-factual attorney-client privileged communications and work product, such as legal advice."[22] OMB and the Commission should follow the principles underlying this policy and not force carriers to unnecessarily provide materials protected by the attorney-client privilege and attorney work-product doctrines.

In sum, when one considers the above concerns and the overwhelming burden compliance with the information collection would impose on telecommunications carriers, it becomes clear that the Commission has not demonstrated any practical utility in this information collection.

II. THE COMMISSION'S ESTIMATED BURDEN CONTINUES TO BE WOEFULLY INACCURATE

The Commission did not properly justify its initial estimate of the burden imposed on respondents by the back-up power reporting requirement. Although the Commission subsequently revised this estimate upward - ostensibly in response to comments received - the Commission still fails to provide any credible objective analysis to support its hypotheses. As a result, its estimate fails to comport with well-established OMB guidelines.

A. DESPITE THE COMMISSION'S CLAIMS TO THE CONTRARY, THE INFORMATION REQUIRED TO BE REPORTED UNDER SECTION 12.2(C)(1)-(3) IS NOT THE TYPE OF INFORMATION READILY AVAILABLE TO METROPCS SPECIFICALLY, OR CMRS PROVIDERS GENERALLY

MetroPCS and other CMRS providers are aware of which of their sites have back-up power, and which don't. However, some of the information required by the Commission is significantly more granular in nature than carriers retain in the ordinary course and other

[22] *Id.*

requested information is not collected at all. For example, under Section 12.2 each CMRS provider must file an inventory report detailing a list of: (1) each asset that was designed to comply with the back-up power mandate; (2) each asset where compliance is precluded due to risk to safety or life or health; (3) each asset where compliance is precluded by private legal obligation or agreement; (4) each asset where compliance is precluded by Federal, state, tribal or local law; and (5) each asset designed with less than the required emergency back-up power capacity that is not precluded from compliance for the reasons stated in (2) – (4), above. Information of this nature is not kept routinely by carriers and would have to be gathered specifically for compliance with this data request on a site-by-site, asset-by-asset basis. This being the case, it is absurd for the Commission to attempt to justify its 96 hour estimate by claiming that the information can be excluded under Section 1320.3(b)(2) of OMB's rules. As OMB is well aware, Section 1320.3(b)(2) only allows agencies to exclude information that already is assembled as part of the "usual and customary" recordkeeping of a respondent.[23]

The Commission's erroneous assumption that "carriers will routinely have [the information required in 47 12.2(c)(ii) – (iv)] as part of their customary preparations for disruptions to commercial power supply,"[24] overlooks the plain fact that prior to the issuance of the Commission's Rule that accompanies this information collection request,[25] there was no back-up power requirement on wireless telecommunication providers. Since wireless telecommunication providers were not required to ensure back-up power for any particular period, or to satisfy any particular exceptions, there was no need to maintain a detailed inventory that contained the granular, asset-by-asset inventory and justifications for not having back-up

[23] 5 C.F.R. 1320.3(b)(2).

[24] FCC Supporting Statement at p. 7.

power now being required by the Commission for the first time. To now assume that the carriers have this information readily at hand, and to use that assumption to mask the true compliance burden is simply wrong. Moreover, at no time in the rulemaking proceeding or in its supporting statement to OMB has the Commission provided any rationale as to why gathering and retaining detailed information as to why a cell site cannot sustain 8 hours of back-up power, would be "usual and customary" within the meaning of 5 C.F.R. 1320.3(b)(2). This being the case, the agency cannot be allowed to exclude from its burden estimate the substantial amount of time and effort necessary to collect the information necessary to justify non-compliance on an asset-by-asset basis.

B. THE COMMISSION FAILED TO APPROPRIATELY ESTIMATE THE TIME NECESSARY TO COLLECT THE INFORMATION

The Commission's erroneous assumption that carriers routinely and regularly maintain this type of data, and its woefully low estimate of the actual time burden, are obvious based on OMB's own guidance on how agencies are supposed to calculate time burdens.[26] As the Commission must know, OMB requires agencies to estimate "the time it takes respondents to review instructions, search data sources, complete and review their responses, and transmit and disclose information." As many of the commenters have already pointed out, it will take many of the respondents more time just to drive from cell site to cell site *within one state* than the total time burden estimated by Commission.[27] However, assuming *arguendo* that every reporting telecommunications carrier already maintains adequate detailed data about the back-up power

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[25] 47 C.F.R. 12.2.

[26] Guidance on Agency Survey and Statistical Information Collections, (available at http://www.whitehouse.gov/omb/inforeg/pmc_survey_guidance_2006.pdf) (last accessed October 6, 2008).

[27] US TELECOM letter to Jerry Cowden, January 14, 2008 at 3; PRA Comments of T-Mobile at 5.

capabilities for each asset in its inventory to provide the information be requested centrally and that the carrier would not need to physically inspect each of the tens of thousands or hundreds of thousands of cell sites to ascertain that information, the Commission's estimated burden still is ridiculously low because each carrier would need to conduct a rigorous examination of each non-compliant site to ascertain which if any of the affected assets fit within one or more of the stated exceptions (compliance precluded due to safety considerations, contractual restrictions or law). As pointed out by commenters, this could run into the hundreds if not thousands of sites for each affected carrier. According to the Commission's own supporting statements, each respondent "must include a description of facts supporting the basis for each asset of the LEC's or CMRS provider's claim of preclusion from compliance."[28] In order to ensure that it has appropriately notated the exact justification for non-compliance, *i.e.*, where compliance is precluded by (1) risk to safety of life or health; (2) private legal obligation or agreement; or (3) Federal, state, tribal or local law, each carrier, including MetroPCS will be forced to undertake a rigorous examination of complex factual and legal facts *for every* asset in its inventory that does not currently possess the requisite back-up power.

For example, MetroPCS might have to determine whether a particular noncompliant site could not be brought into compliance due to any physical limitations (*e.g.*, load limits) of the site, proximity to other areas of concern (*e.g.*, a site on the roof of a school could be exposed to lightning or other weather conditions that could compromise the equipment, making it more susceptible to leakage and fire[29]), as well as space limitations. Although the Commission asserts that a *de novo* review would be unnecessary because respondents will "routinely have [this

[28] FCC Supporting Statement at 2.

[29] Hurricane Katrina Order at ¶ 24.

information] as part of their customary preparation for disruptions to [the] commercial power supply,"[30] as explained above, it is simply not true that carriers maintain the information necessary to conduct this evaluation.

Additionally, to determine the feasibility of bringing a non-compliant site into compliance, MetroPCS might have to calculate the added weight that additional batteries will add to each site and ascertain the load limit at each site. A typical battery back-up configuration sufficient to provide 8 hours of back-up power to a site transmitting on a single rf "carrier" would weigh approximately *one ton*. If a particular site required an additional one ton or more of batteries to meet the 8 hour back-up requirement, the carrier would be required to do a sophisticated structural analysis to ascertain the feasibility of that solution. Furthermore, the physical strain caused by the batteries of one carrier would be aggravated at almost all of its sites because wireless carriers typically collocate with other wireless operators, and the Commission's rule requires each CMRS provider to meet the 8 hour requirement independently.[31] This process at a minimum would require an iterative process because no one carrier knows what the other carrier has in place at a site or will need to be in compliance. This is all on top of the enormous expenditure of monies to obtain new engineering studies, load limits, etc.

In addition to determining whether there are any risks to safety, life or health that prevent MetroPCS from satisfying the back-up requirement at each cell site, the company also must examine each site to determine whether there are any existing legal obligations that would prevent the company from bringing the site into compliance. As an initial matter, any

[30] FCC Supporting Statement at 7.

[31] Hurricane Katrina Order at footnote 86, ("While we recognize the desire to collocate and the flexibility afforded by collocation, the goal of ensuring reliable and resilient communications outweighs any benefits afforded by collocation.")

examination of a legal obligation would require MetroPCS to review every lease or contractual relationship that exists for any non compliant cell site. Since nearly 100% of MetroPCS' cell sites are leased,[32] MetroPCS will be obligated to review virtually every lease it has in place for provisions or clauses that would prohibit the company from complying with the back-up power rules. Further, MetroPCS will be obligated where it does not have existing leased space to renegotiate with the landlord to ascertain whether additional space is available and what terms are requested to lease it. Such a call alone would take longer than two minutes. Moreover, MetroPCS also would be required to analyze how bringing the site into compliance (*e.g.*, placing additional batteries or a generator on-site) could effect or compromise the relevant building code integrity requirements thus creating a "legal restraint" that would prevent the carrier from complying with the back-up power requirement.[33] This would be a very time consuming task and one that certainly would require more than one full time employee earning $60,000 per year.[34]

[32] Like other CMRS providers, most MetroPCS' network operates on cell towers, DAS nodes and other antennas that do not require the company to own land rights. MetroPCS leases a significant amount of the locations it uses to construct these components of its network.

[33] For example, even if a particular lease permits the carrier to install additional batteries on site, the roof where the antenna is located may not be able to support the weight of the additional batteries. Some of MetroPCS facilities may require in excess of one ton of batteries just to meet the Commission's 8 hour back-up requirement. Making a load limit determination may take time, and could require consultation with an engineer. If additional roof space is denied, due either to landlord's refusal or physical incompatibility with the structure, MetroPCS must than analyze what other back-up power options exist for the site. While in some cases it may be possible to install a back-up power source on the ground adjacent to the cell site and to run power up to the antenna on the roof, a decision to utilize this type of back-up power source requires additional analysis regarding whether the placement of such a device violates any provision of the lease. It should also be noted that the ultimate decision to use batteries or a generator as the back-up power source may itself require additional legal analysis as to whether the placement of that type of power source would trigger a violation of relevant federal, state, local and tribal laws, which would be a time consuming endeavor wholly separate from any primary review of applicable laws to the site itself.

[34] FCC Supporting Statement at page 8.

Finally, in order to be able to cite to the specific rule or code section that precluded compliance, MetroPCS would have to undertake a review of all applicable Federal, state, tribal or local laws at the location of **each** of its noncompliant cell sites to determine what, if any, regulations exist that would have to be complied with before MetroPCS could implement the necessary back-up power. The time burden of this review is compounded by the fact that any analysis of applicable laws must be predicated on the particular type of back-up power the carrier plans to utilize to bring the site in compliance. For example, different rules and regulations are implicated depending on whether the carrier plans to use lead-acid or gel cell batteries, hydrogen cells, or generators as the source of the power supply. Each decision has separate ramifications for the applicability of relevant Federal, state, local or tribal laws.

For instance, if MetroPCS decided it wanted to install battery and/or fuel-powered back-up power systems at some of its sites in order to bring them into compliance with the Commission's back-up power rule, it would have the option of utilizing power sources that may contain lead, sulfuric acid, oil or other flammable liquids. Depending on the choice, different federal, state and local environmental and safety laws may be implicated. For example, (a) fire codes often restrict the location of batteries, power cells and generators (*e.g.*, on roof tops); (b) local building codes may limit the load limit on rooftops (which effects the placement of additional batteries or generators); (c) either federal or state environmental laws may restrict the placement and use of hazardous substances including lead-acid batteries and generators fueled by diesel oil or gasoline. These public health and safety regulations also may vary dramatically by the location of the cell site itself due to major differences in state and local ordinances. These are all factors that MetroPCS would need to analyze, in many cases on a *de novo* basis and on a cell-site by cell-site basis.

A single example[35] will provide OMB with a sense of how much time this legal review will consume. One set of federal regulations that MetroPCS would have to take into consideration for any noncompliant cell sites would be the various Occupational and Safety Health Administration ("OSHA") regulations. For example, OSHA construction regulations govern the construction of facilities for flooded lead-acid battery storage systems.[36] These construction rules require, among other things, proper ventilation, electrolyte and acid resistant racks and floors, and eye/body wash facilities within 25 feet of the "battery handling areas." While MetroPCS currently satisfies these OSHA requirements at its current sites, assessing its ability to do so for a whole group of new sites where back-up power may not currently be available or adequate will be a very time consuming process. The process is further complicated and slowed down by the fact that some OSHA requirements may prove to be unacceptable to the landlord, thus creating a new "legal obligation" precluding MetroPCS from placing a back-up power on the ground.

If the company chose to use a generator based back-up power source it also would need to ensure that the Environmental Protection Agency's *New Source Performance Standards,*[37] designed to reduce air emissions for stationary internal combustion engines, would not be violated by the placement of the requisite generator. Additionally, some local municipalities limit or prohibit back-up generators, or require specific models. Further the company may have

[35] The following example is applicable to "traditional sites" and the problems outlined are compounded at non-traditional sites, see MetroPCS PRA Comments at p. 14-15.

[36] *See* 29 C.F.R. §1926.441.

[37] 40 C.F.R. § 60.4200 etc.

to consult other relevant federal regulations if storage of underground tankers[38] or above ground fuel tanks[39] is necessary.

In addition to analyzing all applicable federal statutes and regulations, MetroPCS also would have to take into account all state, tribal or local law or ordinance that could prevent MetroPCS from bringing a particular cell site into compliance. State and local government codes generally are patterned after two model building codes – the 2006 International Building Code ("2006 IBC"), published by the International Code Council, and the 2003 Building Construction and Safety Code (titled as "NFPA standard 5000"), published by the National Fire Protection Association ("NFPA"). The National Electrical Code ("NEC"), also published by NFPA, is the leading domestic standard for the safe installation of electrical wiring and equipment. While California, Texas, Michigan, Florida and Georgia have all adopted some form of the NEC, there are variations state-to-state that would require individualized attention by MetroPCS.

In addition to ensuring compliance with building codes, MetroPCS also would have to examine the relevant fire code regulations each state has adopted. Most states have adopted either the Uniform Fire Code ("UFC"), published by the NFPA, or the International Fire Code ("IFC"), published by the International Code Council.[40] For example, both the UFC and IFC have regulations on the levels of ventilation necessary for the storage as at least 1 cubic foot per minute per square foot. In the event that MetroPCS chooses to utilize a battery based back-up power solution, it will take time, and certainly more than one minute and 45 seconds, to analyze

[38] 40 C.F.R. § 280.22(a).

[39] *See e.g.*, 40 C.F.R. § 112.12(c)(2) (regulations designed to prevent spill prevention); 29 C.F.R. § 1910.110(b) (OSHA regulations on storage of above ground fuel storage tanks).

whether the room or the storage cabinet where the batteries will be kept satisfy this regulation. The difficulty of assessing compliance with the UFC and IFC is exacerbated because these model acts are revised on a periodic basis, and different states and localities have adopted different versions and, in some cases, individual states have added their own additional obligations. Both the UFC and IFC were revised in 2006, and many states are revising their regulations to comply with the revisions. For example, California adopted a new code in January 2008 based on the 2006 IFC and Florida is considering similar action as well. MetroPCS operates in both states and the enactment of these revisions may significantly affect the company's ability to verify whether cell sites in those states can be brought into compliance or whether a state/local regulation exempts the site from compliance. In any event, special attention will be required for each state – thus increasing the time required to comply.

In reviewing the building codes of each state or location where MetroPCS has a cell site, the company's analysis would once again be predicated on what type of back-up power source it plans to use at each site. For instance, for batteries, MetroPCS would have to examine any relevant building codes to verify that placement of batteries does not violate the provisions of the code dealing with load limits on roof tops or limits on maximum allowable wind loads for towers. In addition, for those states that have adopted the NEC, there are additional requirements specifically pertaining to the installation and storage of batteries.[41] Further, to the extent others at a site may be using similar back-up power solutions, the combined effect would be required to be analyzed as the combination may implicate other regulatory requirements. For example,

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[40] State fire codes typically provide the substantive requirements for building construction and systems, and local ordinances address issues such as permitting, fees, and enforcement.

[41] *See e.g.*¸ NEC §§ 480.5, 480.6, and 480.8.

many environmental laws permit small amounts of hazardous materials to be kept without regulatory burden – but if more is kept, additional safeguards may be required.

If instead of utilizing batteries MetroPCS chooses to use back-up generators at some of its sites, other regulations also would need to be reviewed. For example, some states have adopted the NFPA Flammable and Combustible Liquids Code, titled "NFPA 30," to regulate the construction and installation of storage tanks, while other states have modified the NFPA 30 regulations, often creating stricter regulatory systems. As a result, MetroPCS will have to wade into this thicket of patchwork regulations and determine, on a site-by-site, asset-by-asset basis, what the regulation will allow. Again, it is unfathomable that such a review could be completed within the requested one minute 45 second time allotted by the Commission.

Finally, MetroPCS would have to examine applicable local ordinances at every site. At a bare minimum this review would include municipal noise ordinances,[42] as well as determining the relevant permitting process for the installation of the back-up power sources.[43] For example, each locality may have zoning restrictions that may preclude compliance as well. And, the problems associated with verifying whether a noncompliant cell site can satisfy one of the three exemptions offered by the Commission will be compounded, and thus create even more of a time burden, when CMRS providers, including MetroPCS, conducts this analysis for non-traditional cell sites.[44]

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[42] *See*, Atlanta Code of Ordinances § 74-138(h); Dallas City Code § 30-1; Detroit Code of Ordinances § 36-1-1; Los Angeles Mun. Code ch. XI, §112.04(b); Miami Mun. Code § 36-8; and Sacramento Mun. Code § 8.68.080D.

[43] *See*, CTIA Petition for Reconsideration, Hurricane Katrina Order, August 10, 2007 at footnote 12. (*See e.g.*, City of Rockville, Emergency Generator Installation Requirements, available at http://www.rockvillemd.gov/residents/inspections/generator.htm (last accessed October 7, 2008).

[44] As wireless services have proliferated, and traditional cell site antennas have become saturated, carriers have been required to develop an increasing array of non-traditional sites (*e.g.*, smaller distributed antenna systems or DAS sites on utility poles) which present unique challenges due to the space and other limitations imposed by these sites.

Given both the complexity and the nuances of local zoning ordinances, a small regional entity like MetroPCS would most likely have to hire a consultant and engage a law firm for *each* locale in which it provides service to consumers. Even if larger carriers are able to satisfy this job in-house, the Commission has also seriously underestimated the cost to respondents to comply with this information collection, as it will certainly take more than one employee earning $60,000 a year to ensure compliance. As other commenters have noted, it will very likely take an interdisciplinary team of development personnel, structural engineers, contract specialists and lawyers specializing in real estate, zoning and environmental law.[45] Further, for those carriers that do not maintain those capabilities in-house, compliance with the rule would necessitate hiring new employees, 3rd party contractors, lawyers and other consultants. Often, separate engagements will be required in each service area. Regardless of how a carrier ultimately elects to staff this obligation, it can be safely guaranteed that the total annual "In House" cost will be significantly more than the Commission's $312,600 estimate.[46]

In the final analysis, even if the rules and regulations mentioned above represented the entire universe of what needed to be analyzed – which is not the case – OMB should agree that there is absolutely no way that it can be completed within the Commission's revised estimated time burden of 96 hours or at a cost to the company of $312,600.

III. METROPCS' SUGGESTIONS TO MINIMIZE THE BURDEN OF THE PROPOSED COLLECTION OF INFORMATION ON RESPONDERS:

As a smaller carrier in an ever increasingly competitive market, MetroPCS is constantly self-motivated to improve the resiliency of its network in order to be able to provide top quality service to its customers. However, even driven by these market forces, MetroPCS simply cannot

[45] *See PRA Comments of Sprint-Nextel* at 7.

comply with the Commission's information collection within the time frame provided, nor should it be required to do so. The information sought by the Commission does not ensure or foster the establishment of increased back-up power, and in fact takes resources away from efforts to maintain service during disasters. As explained above, even though the Commission recently revised its estimated burden upward to 96 hours, this amended estimate continues to fail to adequately capture the true burden this rule imposes on respondents. By MetroPCS' own estimate, it would take the company somewhere between 2.75 and 3 hours per site, excluding transportation between sites, which represents an actual burden of between 10,992 and 11,991 hours for the company to properly review each of its 3,397 sites.[47] Second, and equally important, once the Commission has adopted a more realistic estimate, the Commission must recognize that it will be impossible for carriers to meet the six month deadline given to CMRS providers to file their reports. A much more reasonable timeframe for completing these reports, which will be the result of a voluminous amount of analysis, would be 18 months. This period of time would allow carriers to muster the resources necessary to implement the Commission's requirements.[48]

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[46] FCC Supporting Statement at p.8.

[47] However, given the growth in MetroPCS' system and its continued growth, this burden will continue to increase substantially.

[48] A byproduct of such additional time is that carriers will be more likely to be able to come into compliance because they will not only be able to identify the problem, but perhaps resolve it. A point that the Commission fails to take

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IV. CONCLUSION

The reporting requirement and the underlying back-up power rules have been stayed pending the appeal currently before the Court of Appeals for the District of Columbia Circuit.[49] Press reports have suggested that the Court in the oral argument of the case severely questioned the Commission's authority and justification for the 8-hour back-up power requirement. Not surprisingly, carriers have been reluctant to expend too many resources coming into compliance with a requirement that may well be overturned and never take effect. Consequently, notwithstanding the passage of time to date, if and when the stay is lifted, even with Herculean efforts, it will prove impossible to comply with the reporting requirement associated with section 12.2 of the Commission's rules within the Commission's estimated timeframe.

Both the Commission's time estimates of 96 hours per carrier, as well as the six month filing period from the effective date of the rule, are unrealistic for MetroPCS, as well as for any other CMRS carrier, to complete its review of all of its cell sites. For example, an estimate of 96 hours means that MetroPCS has roughly 1 minute and 45 seconds to devote to the complex analysis required for each. The reality is that a carrier can not even prepare a checklist of the items that need to be studied at each site in the allotted time, let alone than the time to conduct the aforementioned exhaustive review necessary to comply with the information request. Furthermore, it is capricious for the Commission to attempt to justify this collection under the patently erroneous assumption that affected carriers already maintain the data to be collected as part of their normal and ordinary business. Finally, given the fact that the Commission has not demonstrated that this overly burdensome information collection will provide any practical

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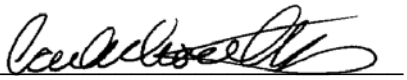
into account in its estimate of the burden. Obviously the public interest is better served by carriers being in compliance than in just reporting on their compliance.

utility to the Commission, MetroPCS urges OMB to reject this proposed information collection.

Instead of utilizing an estimated time burden that seriously underestimates the amount of time and burden on wireless telecommunications providers, the Commission would be better served to work with affected companies to arrive at a workable solution based upon best industry practices rather than the "one-size fits all" approach inherent in the arbitrary, inflexible 8-hour requirement.

Respectfully submitted,

MetroPCS Communications, Inc.

By: 

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[49] *CTIA – The Wireless Assoc. v. Federal Communications Comm'n*, No. 07-1475 Order (DC Cir. Feb. 28, 2008).