

COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW WASHINGTON
WASHINGTON, DC 20004-2401 NEW YORK
TEL 202.662.6000 SAN FRANCISCO
FAX 202.662.6291 LONDON
WWW.COV.COM BRUSSELS

April 10, 2007

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

Re: Availability of Designated Entity Status for “E” Block Applicants
Under Current FCC Rules; WT Docket Nos. 06-150 and 06-169

Dear Ms. Dortch:

As proposed by Frontline Wireless, LLC (“Frontline”), service rules for the upper 700 MHz “E” Block will ensure the nationwide buildout of a facilities-based, broadband network that will serve the communications needs of the public safety community and commercial users alike. Frontline writes to clarify that nothing in the Commission’s *existing* rules precludes any otherwise eligible Designated Entity (“DE”) from bidding for the E Block license and receiving a credit in doing so.

When the Commission amended its rules last year to preclude DE status for any entity that has “agreements with one or more other entities for the lease ... or resale (including under a wholesale arrangement) of, on a cumulative basis, more than 50 percent of its spectrum capacity of any individual license,”¹ it expressly tied that restriction to an agreement which “creates the potential for the relationship to impede a [DE’s] ability to become a facilities-based provider, as intended by Congress.”² In contrast, the E Block licensee will be *required* to construct facilities, and to sell services over those facilities on a reasonable and non-discriminatory basis to parties of all sizes.³

¹ *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order, WT Docket No. 05-211, 21 FCC Rcd 4753, 4763 ¶ 25 (2006), *codified at* 47 C.F.R. § 1.2110(b)(3)(iv)(A).

² *Id.* at 4762 ¶ 23.

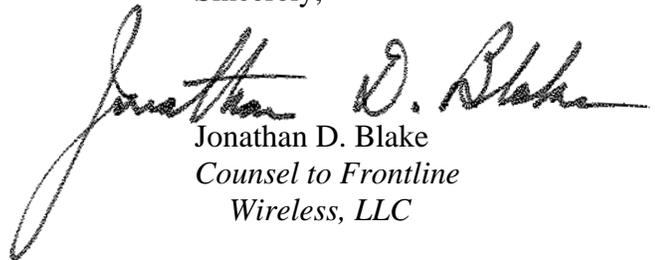
³ Indeed, these facilities must serve 98% of the population of the entire United States pursuant to the buildout requirements proposed for Section 27.14 of the Commission’s rules. *See* Letter from John Blevins, Counsel to Frontline to Marlene H. Dortch, WT Docket Nos. 06-150 and 06-169, PS Docket No. 06-229 (March 26, 2007) (proposing service rules for the upper 700 MHz “E” Block).

Simply put, the “resale” activity precluded by the Commission concerns the “flipping” of spectrum by a DE to third parties, *not* the sale of facilities-based network services. As a facilities-based provider, the E Block licensee will itself construct, own, and manage the wireless network; it will not sell bare rights to spectrum. To construe the DE rule’s use of the term “resale” to the E Block licensee would arbitrarily expand the scope of the new DE rules beyond that intended by the Commission.

The Commission accordingly can, and should, clarify that the scope of the DE rule concerning resale activity does not apply to the facilities-based activities contemplated for the “E” Block. Such action would be entirely within its authority to interpret existing rules. As the U.S. Court of Appeals for the D.C. Circuit has held, an agency may interpret its existing, substantive rules so as to “suppl[y] crisper and more detailed lines than the authority being interpreted.”⁴

Moreover, the E Block itself will uniquely enable the flourishing of small business innovators in the wireless arena. It would be ironic in the extreme were the Commission to interpret its rules so unduly narrowly as to discourage new entrants from building that open, facilities-based network.⁵ The Commission should enthusiastically embrace DE participation in the E Block auction by reasonably clarifying that its existing rules encompass such participation.

Sincerely,



Jonathan D. Blake
Counsel to Frontline
Wireless, LLC

⁴ *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (upholding as an “interpretive rule” an agency’s finding that certain x-ray readings qualified as “diagnoses” of lung disease within meaning of existing regulation). *See also Attorney General’s Manual on the Administrative Procedure Act* (1947) (defining an “interpretive rule” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers”). Also, the issuance of such an “interpretive rule” is not subject to the notice-and-comment procedures of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b).

⁵ Providing a reasonable clarification that its rules already allow DE participation in the E Block will also further the Commission’s obligation, as established by Congress in 1993, to “ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3)(B).