

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
) AU Docket No. 07-157
Competitive Bidding Procedures for)
Auction 73)

To: Wireless Telecommunications Bureau

REPLY COMMENTS OF AT&T INC.

AT&T Inc., on behalf of its affiliate, AT&T Mobility LLC (f/k/a Cingular Wireless LLC) (“AT&T”), hereby files these reply comments in response to the above-captioned *Auction Procedures Public Notice* announcing Auction 73 and soliciting comment on procedures for the auction.¹ Specifically, AT&T opposes Frontline Wireless LLC’s (“Frontline’s”) request that the Wireless Telecommunications Bureau (the “Bureau”) disqualify auction participants from bidding for licenses in markets where, if successful, the participants would hold 70 MHz or more of CMRS spectrum.² Frontline is seeking action that is both beyond the Bureau’s authority and outside the scope of this proceeding. Its request therefore should be summarily dismissed. In any event, Frontline fails to offer any new evidence or legal arguments that would warrant the

¹ See *Auction of 700 MHz Band Licenses Scheduled for January 16, 2008, Comment Sought on Competitive Bidding Procedures for Auction 73*, AU Docket No. 07-157, *Public Notice*, DA 07-3415 (rel. Aug. 17, 2007) (“*Auction Procedures Public Notice*”).

² Comments of Frontline Wireless LLC at 15 (Aug. 31, 2007) (“Frontline Comments”) (“[T]he Commission should state in a Public Notice that it will reject any short form application from an entity that, if successful at auction, would amass 70 MHz or more of CMRS spectrum . . .”).

Commission revisiting its recent decision in the *700 MHz Second R&O* not to establish eligibility requirements for Auction 73.³

The essence of Frontline’s proposal is re-imposition of a CMRS spectrum aggregation cap, a substantive rule previously eliminated by the Commission.⁴ Such action, however, is outside the scope of the Bureau’s legal authority to act in response *Auction Procedures Public Notice*. The *Auction Procedures Public Notice* was released by the Bureau at the direction of the full Commission and pursuant to the Bureau’s “existing delegated authority.”⁵ In this regard, the Bureau has delegated authority only with regard to the procedural issues related to the conduct of the auction itself and has no authority to adopt substantive rules, including a CMRS spectrum cap.⁶ In short, the scope of the Bureau’s legal authority to act with regard to the *Auction Procedures Public Notice* is necessarily limited to matters related to the conduct of the auction and does not encompass Frontline’s request to reinstitute a CMRS spectrum cap for purposes of Auction 73.

Even if the Bureau had the requisite authority, the *Auction Procedures Public Notice* does not provide notice that substantive rules of any kind are under consideration. More specifically,

³ 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*, WT Docket No. 06-150, *etc.*, *Second Report and Order*, FCC 07-132, at ¶ 256 (rel. Aug. 10, 2007) (“*700 MHz Second R&O*”) (“The record does not demonstrate that open eligibility is likely to result in substantial competitive harm in the provision of broadband services.”).

⁴ See *Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668 (2001).

⁵ See *Auction Procedures Public Notice* at ¶ 13 (citing *Amendment of Part 1 of the Commission’s Rules — Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz*, 13 FCC Rcd 374, 448 ¶¶ 124-25 (1997)) (“Consistent with the provisions of Section 309(j)(3) and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the Bureau, under its existing delegated authority, to seek comment on a variety of auction-specific procedures prior to the start of each auction.”).

⁶ See 47 C.F.R. § 0.331(d); *Auction Procedures Public Notice* at ¶ 13.

the *Auction Procedures Public Notice* does not solicit comment on eligibility requirements in general or on CMRS spectrum caps in particular.⁷ Absent discussion of such critical issues, the *Auction Procedures Public Notice* cannot serve as the basis for adopting a spectrum cap for Auction 73.⁸

While Frontline’s proposal is both beyond the Bureau’s authority and outside the scope of the *Auction Procedures Public Notice* and should thus be denied, it bears noting that the Commission specifically rejected eligibility requirements in this auction for good reason. The Commission ruled only four weeks ago that eligibility requirements are *not* necessary, noting that:

Given the number of actual wireless providers and potential broadband competitors, *it is unlikely* that ILECs, cable providers, *or large wireless carriers* would be able to behave in an anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum.⁹

The Commission found that “consumers can obtain broadband service from wireline providers, cable companies, satellite, and wireless providers, including Wireless Internet Service Providers (WISPs) that use unlicensed spectrum.”¹⁰ Further, the Commission recognized that there “is potential for additional entry into the broadband market by carriers operating on spectrum in the Wireless Communications Services (WCS), Advanced Wireless Service (AWS), Broadband Radio Service (BRS), and 3650-3700 MHz bands” and that “[s]atellite, wireless, and broadband over power lines (BPL) have been used to provide broadband services on a widespread basis for

⁷ The *Auction Procedures Public Notice* does not discuss critical issues such as what spectrum the cap would pertain to, how affiliations among companies would be defined, or what ownership levels and spectrum overlaps would be the triggers for the cap.

⁸ See 5 U.S.C. § 553(b)-(c) (requiring notice of the subject of proposed rules and opportunity to comment).

⁹ 700 MHz *Second R&O* at ¶ 256 (emphasis supplied).

¹⁰ *Id.*

a relatively short period of time, and the number of high speed lines deployed by these technologies has increased substantially.”¹¹ Indeed, the AWS-1 and 700 MHz spectrum alone will provide an additional 152 MHz of spectrum suitable for competitive wireless services, thereby calling into question the fundamental validity of Frontline’s proposed 70 MHz cap.¹²

Frontline’s contention that any spectrum holding in excess of 70 MHz is potentially problematic thus ignores the amount of spectrum that is now available, and it also ignores the public interest harms that can arise from spectrum caps. As the Commission stated:

The use of competitive bidding to assign licenses, such as the commercial 700 MHz licenses, serves the public interest by assigning licenses to the parties that value the licenses the most. Such parties are presumed to be most likely to put the public spectrum resource to its most effective use. If, however, we exclude categories of potential licensees, we risk reducing the likelihood that the party valuing the license the most will win the license and put it to use for the benefit of the public. This unavoidable uncertainty in assessing prospective competitive harms is heightened here by the substantial spectrum capacity being made available and the uncertainty regarding how that spectrum capacity ultimately will be used.¹³

¹¹ *Id.*

¹² Indeed, the Commission has never set 70 MHz as an outright limit on the amount of spectrum a licensee may hold, but has used this figure only as a “screen” to determine whether additional scrutiny was required. *See, e.g., In re Applications of Nextel Commc’ns, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 20 FCC Rcd 13967 (2005); *In re Applications of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 20 FCC Rcd 13053 (2005); *In re Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 19 FCC Rcd 21522 (2004). Once the screen has been triggered, the Commission then examined not only the amount of spectrum held by licensees in the market, but also market share and other competitive data. The Commission has allowed licensees to hold more than 70 MHz upon finding the relevant market to be sufficiently competitive. Frontline’s proposal to impose a cap would replace this careful and cautious Commission approach with a blunt regulatory instrument that interferes with the workings of the marketplace.

¹³ *Id.* at ¶ 259.

Because Frontline's proposal for eligibility requirements based on spectrum caps is beyond both the Bureau's authority in this proceeding and the scope of the *Auction Procedures Public Notice* (and, in all events, lacks substantive merit), the Bureau should reject this proposal.

Respectfully submitted,

AT&T INC.

By: /s/ Michael P. Goggin

Paul K. Mancini

Gary L. Phillips

Michael P. Goggin

AT&T INC.

1120 20th Street, N.W.

Washington, D.C. 20036

(202) 457-2054

Its Attorneys

September 7, 2007