

Before the
Federal Communications Commission
Washington, DC 20554

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| In the Matter of |) | |
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| Service Rules for the 698-746, 747-762 and 777-792 MHz Bands |) | WT Docket No. 06-150 |
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| Revision of the Commission’s Rule to Ensure Compatibility with Enhanced 911 Emergency Calling Systems |) | WT Docket No. 03-264 |
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| Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones |) | WT Docket No. 06-169 |
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| Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services |) | CC Docket No. 94-102 |
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| Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules |) | WT Docket No. 01-309 |
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| Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band |) | PS Docket No. 06-229 |
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| Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 |) | WT Docket No. 96-86 |
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**OPPOSITION TO, AND COMMENTS ON,
PETITIONS FOR RECONSIDERATION**

AT&T Inc. (“AT&T”) hereby opposes certain aspects of petitions for reconsideration filed by Frontline Wireless, LLC (“Frontline”) and by Rural Telecommunications Group (“RTG”) in response to the Commission’s August 10, 2007

Second Report and Order in the above-captioned proceedings,¹ and offers comments on matters raised in petitions filed by the law firm of Blooston, Mordkofsky, Dickens & Prendergast, on behalf of its rural telephone company clients (the “Blooston Rural Carriers”), and by MetroPCS Communications, Inc. (“MetroPCS”).² As shown below, the Commission should reject Frontline’s attempt to reinstitute a spectrum cap for the upcoming auction of commercial 700 MHz Band licenses (“Auction 73”). In addition, the Commission should adopt population-based benchmarks for meeting construction requirements applicable to Lower 700 MHz Band licenses, and should refuse to reconsider its recent decision to use population-based construction requirements for licenses in the Upper 700 MHz Band.

I. Frontline Offers No New Facts or Arguments to Justify Reevaluating the Commission’s Decision Not to Impose Restrictions on Incumbent Spectrum Holders, and Its Proposal Is Otherwise Lacking in Merit

Based on the same spectrum concentration allegations made in the rule making proceeding, Frontline now asks the Commission to require that each applicant participating in Auction 73 “check two boxes” in its FCC Form 175 short-form application showing whether the award of any license specified on that application would cause its spectrum holdings to exceed certain thresholds. Frontline then suggests that any such holdings should result in a long-form application denial unless winning bidders are able to demonstrate “why . . . they should be allowed to increase concentration in the

¹ See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket 06-150 *et al.*, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (“700 MHz Second Report and Order”), 72 Fed. Reg. 48814 (Aug. 24, 2007), *pet. for review filed sub nom. Cellco Partnership d/b/a Verizon Wireless v. FCC*, No. 07-1359 (D.C. Cir. filed Sept. 10, 2007).

² See *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, Public Notice, Report No. 2833 (released September 27, 2007), 72 Fed. Reg. 56074 (Oct. 2, 2007).

markets in question.”³ Frontline is therefore requesting adoption of a presumptive spectrum cap.

Petitions for reconsideration that seek to reopen a Commission rule making decision must present “very substantial reasons” in order to warrant consideration.⁴ The Commission has recognized that such petitions should be based on new facts or new arguments which could not have been made during the proceeding or on a substantial shift in the state of the law.⁵ Frontline’s petition provides no new facts that had not already been presented to the Commission; nor does it make any arguments that could not have been raised in the rule making stage of this proceeding or present any evidence of a shift in the state of the law.

Frontline actively participated in this proceeding,⁶ but it never advocated any restrictions on eligibility – spectrum-based or otherwise.⁷ The primary proponent of eligibility restrictions, the *Ad Hoc* Public Interest Spectrum Coalition (“PISC”), requested that the Commission impose “a spectrum cap prohibition” or divestiture requirements for the 700 MHz spectrum.⁸ Though Frontline had ample opportunity to do so, it did not support the PISC proposals, and the Commission soundly rejected any restrictions on

³ Frontline Petition for Reconsideration at 9.

⁴ See *In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 15 FCC Rcd 12315 (2000); accord *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations, Memorandum Opinion and Order*, 16 FCC Rcd 2272 (2001).

⁵ *Id.*

⁶ According to the Commission’s Electronic Comment Filing System, Frontline made 58 separate submissions in the 700 MHz service rules docket before the *700 MHz Second Report and Order* was adopted on July 31, 2007.

⁷ The Commission specifically recognized that “Frontline . . . does not advocate restricting the applicants that may be eligible for licenses.” *700 MHz Second Report and Order* at ¶ 254.

⁸ See *Ex Parte Comments of the Ad Hoc Public Interest Spectrum Coalition*, WT Docket No. 06-150, *et al.* (filed April 3, 2007), at 18-19.

eligibility to participate in bidding for 700 MHz licenses.⁹ Having presented nothing new, Frontline is therefore in no position to ask the Commission to reopen the matter. Indeed, a Commission denial of Frontline’s reconsideration request would be nonreviewable.¹⁰

Even if Frontline was entitled to have its suggested Form 175 “check boxes” considered on reconsideration, this idea makes no sense. The Form 175 short-form application is not used by applicants to specify licenses that they intend to win; instead, the short-form application is the mechanism that enables each applicant to specify licenses on which it wishes to have the flexibility to be eligible to place a bid at the start of an auction, so long as its upfront payment is sufficient to permit a bid on that license. Auction applicants often indicate on their FCC Form 175 applications a desire to be eligible to bid on “all” of the licenses included in a particular auction. Such an indication does not mean that the applicant intends to win all of the available licenses, or even that it expects to place a bid on any particular license.¹¹ It means only that the applicant would like to have the flexibility to bid on any available license, assuming that its upfront payment affords it sufficient bidding units to do so. The worthlessness of Frontline’s suggestion is made obvious when one considers that any Auction 73 applicant making the

⁹ See *700 MHz Second Report and Order* at ¶¶ 256-259.

¹⁰ The U.S. Court of Appeals for the District of Columbia Circuit has held that a Commission refusal to reopen a proceeding is not reviewable unless new decisionally-significant evidence has been presented. *Southwestern Bell Telephone Co. v FCC*, 180 F.3d 307 (D.C. Cir. 1999), citing *ICC v Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987) (“*BLE*”) (“overturning the refusal to reopen requires ‘a showing of the clearest abuse of discretion’” (quoting *U.S. v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-35 (1946)). As the U.S. Supreme Court concluded in the *BLE* case: “If the petition that was denied sought reopening on the basis of new evidence or changed circumstances review is available and abuse of discretion is the standard; otherwise, the agency’s refusal to go back over ploughed ground is nonreviewable.” *BLE, supra*, 482 U.S. at 284.

¹¹ Indeed, signaling bidding intentions would run afoul of the FCC’s anti-collusion rule, which prohibits applicants from disclosing the substance of their bids or bidding strategies to other auction applicants. See 47 C.F.R. § 1.2105(c).

“all licenses” selection on its FCC Form 175 short-form application would automatically exceed Frontline’s proposed “45 MHz under 1 GHz” threshold since 62 MHz of commercial spectrum is available in Auction 73 .

Furthermore, Frontline’s proposed spectrum thresholds ignore the Commission’s recognition of the “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.¹² Given the dramatic changes in the competitive landscape that have occurred since the Commission’s 2001 repeal of the spectrum cap, Frontline’s anachronistic spectrum thresholds cannot be viewed as reasonable in today’s spectrum world where there is more than 500 MHz of spectrum available for a variety of fixed, mobile and broadband services.

II. The Commission Should Grant Reconsideration of Some of Its 700 MHz Construction Requirements, and Deny Requests to Reconsider Others

Several petitioners have asked the Commission to modify the build-out requirements adopted in the *700 MHz Second Report and Order*. AT&T supports the request that the Commission allow licensees in the Lower 700 MHz CMA and EA Blocks to satisfy the build-out requirement using population-based benchmarks. To the extent that the Commission does not adopt a population-based build-out requirement for these blocks, AT&T supports further refinement of the geography-based construction requirement adopted for the Lower 700 MHz A, B and E Blocks so as to exclude certain areas and enable the requirements to more precisely target areas in need of coverage. In

¹² See *700 MHz Second Report and Order* at ¶ 256.

addition, AT&T opposes reconsideration of the population-based construction requirement adopted for the Upper 700 MHz C Block in the *700 MHz Second Report and Order*.

1. The Commission should provide a population-based coverage option in the Lower 700 MHz Band

The construction requirement adopted by the Commission in the *700 MHz Second Report and Order* requires Cellular Market Area (“CMA”) and Economic Area (“EA”) licensees to “provide signal coverage and offer service” to at least 35 percent of the geographic area of the license within four years of the end of the DTV transition, and at least 70 percent of the geographic area of the license at the end of the license term. The Blooston Rural Carriers point out that, in many of the country’s CMAs – and especially in Rural Service Areas – the vast majority of the population often is concentrated in a small amount of the CMA’s geography.¹³ The same is true for EAs. The Commission’s current construction requirement therefore will, in some circumstances, force licensees to expend capital and construct facilities to serve unpopulated and even barren areas. These uneconomic costs naturally will be factored into bidders’ assessments of the value of these licenses, so the current rule, if not modified, could serve to depress auction bidding.

The Commission’s articulated goal in adopting geography-based construction requirements is “to better promote access to spectrum and the provision of service, especially in rural areas”¹⁴ Reconsideration of the coverage requirement for the Lower 700 MHz blocks of spectrum will help to fulfill this important goal. Allowing

¹³ See Blooston Rural Carriers’ Petition for Partial Reconsideration and/or Clarification (filed September 24, 2007), at 3 and Exhibit B.

¹⁴ *700 MHz Second Report and Order* at ¶ 153.

these licensees to meet their construction requirements through a population-based benchmark will enable them to base their investment decisions on economic realities and on their own market-based judgments as to how best to provide high-quality services to consumers. Unless the Commission acts to modify the Lower 700 MHz Band construction requirement, the uneconomic costs associated with retaining service area associated with some Lower 700 MHz Band licenses may cause some bidders to refrain from bidding on those licenses. The Commission's goal of promoting service in rural areas would be ill-served if this happens.

2. The Commission should further refine the areas to be included in calculating geography-based coverage if it doesn't adopt population-based coverage.

In the geographic-based performance requirements adopted in the *700 MHz Report and Order*, the Commission excluded from the service area calculation "land owned or administered by government" ¹⁵ The Commission concluded that covering these areas "may be impractical" because they may be subject to restrictions or may be very sparsely populated. ¹⁶ For these same reasons, if the Commission does not adopt a population-based requirement, the Commission should refine its geography-based requirements as suggested by MetroPCS in its petition for clarification and reconsideration. ¹⁷

For the reasons stated by MetroPCS in its petition, the Commission should exclude from geographic coverage calculations the following types of areas, each of

¹⁵ *700 MHz Second Report and Order* at ¶ 160; see also 47 C.F.R. § 27.14(g).

¹⁶ *Id.*

¹⁷ See MetroPCS Petition for Clarification and Reconsideration (filed September 20, 2007), at 11-13.

which exhibit characteristics similar to those that led the Commission to exclude government lands from these calculations:

- bodies of water
- historical areas
- zip codes with fewer than 5 residents per square mile
- unserved areas that are entirely surrounded by the licensee's service area

No purpose is served by including these areas in geographic coverage calculations. They typically are difficult to serve because of facility siting problems and are extremely sparsely populated. Including these areas in coverage calculations would result in carriers diverting capital from expanding capacity and/or coverage in areas of greater need by consumers. The public interest therefore dictates that these areas be excluded from geographic coverage calculations.

3. The Commission should reconsider the “keep-what-you-use” rule and allow licensees to retain a small expansion area

AT&T supports MetroPCS's request that the Commission modify the “keep-what-you-use” rule adopted for the 700 MHz Band so that a licensee who loses area under this rule is permitted to retain a small expansion area beyond the perimeter of the area it serves at the end of its license term.¹⁸ Allowing for this additional “retention area” will serve the public interest by enabling the incumbent licensee to respond quickly to population expansions and other population shifts. Situations are likely to arise wherein no carrier except the incumbent would have an incentive to serve the residents of such an area. For example, it may be uneconomic for a licensee to build-out and provide service during its license term in an unpopulated area adjacent to a population center. However, such an area may develop in subsequent years, making it a natural addition to the original

¹⁸ See MetroPCS Petition for Clarification and Reconsideration (filed September 20, 2007), at 13-14.

service area. The newly-developed area, however, may not be large enough or populated enough to support a stand-alone service; thus, it would not likely attract new bidders in any reassignment process.

The Commission's "keep-what-you-use" rule is intended to allow re-licensing to produce faster deployment of service in unserved areas. In the situation described above, the rule's application would produce exactly the opposite result. Modifying the rule to incorporate the "expansion area" concept would correct this problem.

4. The Commission should refuse to reconsider the population-based coverage requirement adopted for the Upper 700 MHz C Block

AT&T opposes the request by RTG that the Commission reconsider its decision to apply population-based construction benchmarks in the Upper 700 MHz C Block.¹⁹ The Commission's decision on this issue was the result of careful consideration of the requirements for building out a regional or national system, and the facts and public interest calculus that were the basis for this decision have not changed since adoption of the *700 MHz Second Report and Order*. Population-based benchmarks will, as the Commission recognized, allow "new and existing providers to promptly and efficiently develop . . . new services, thus reaching more consumers more quickly."²⁰

In support of its position, RTG has offered only a re-hash of positions already rejected by the Commission. The Commission recognized in the *700 MHz Second Report and Order* that "[t]he use of benchmarks based on population, rather than geographic area, may best allow a potential new entrant to achieve the economies of scale needed for a viable business model, while also ensuring that a majority of the population in a given

¹⁹ See Rural Telecommunications Group Petition for Reconsideration (filed September 24, 2007), at 5-10.

²⁰ *700 MHz Second Report and Order* at ¶ 164.

region may have access to these services.”²¹ Indeed, RTG itself noted in its comments in this proceeding that the FCC has recognized the benefit of delaying the build-out of rural areas until after carriers have determined the technology and equipment with which to build out more populous areas.²² RTG has offered no valid basis for the Commission to reconsider its decision to use population-based benchmarks for Upper 700 MHz C Block licenses.

III. Conclusion

For all the foregoing reasons, AT&T urges the Commission to (1) deny Frontline’s attempt to reinstitute a spectrum cap, (2) deny RTG’s requested reconsideration of the Upper 700 MHz C Block construction requirement, (3) modify the construction requirements applicable in the Lower 700 MHz Band as noted above, and (4) include an expansion area in the “keep-what-you-use” rule.

Respectfully submitted,

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²¹ *Id.*

²² RTG Comments, WT Docket No. 06-150, *et al.* (filed May 23, 2007), at 9.