

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Service Rules for the 698–746, 747–762 and 777–792 MHz Bands)	WT Docket No. 06-150
)	
Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones)	WT Docket No. 01-309
)	
Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services)	WT Docket No. 03-264
)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules)	WT Docket No. 06-169
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
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
)	
Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti- Collusion Rule)	WT Docket No. 07-166
)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules)	WT Docket No. 05-211

To: The Commission

**OPPOSITION OF FRONTLINE WIRELESS, LLC
TO PETITIONS FOR RECONSIDERATION**

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SUMMARY

The 700 MHz auction offers an historic opportunity to make a lasting contribution to public safety communications in this country and to the vitality — in terms of competition, innovation and technological sophistication — of the nation’s wireless broadband services. But specific implementation decisions will determine whether these laudable, essential objectives will be achieved or whether the opportunity presented in this proceeding will be squandered. These are the decisions on which the Commission should focus in the reconsideration stage of this proceeding.

The first policy goal of national scope and importance in this proceeding is to facilitate and rationalize the public/private partnership that will bring this country’s public safety communications network into the twenty-first century. It is addressed in Section II of this Opposition. The *Order*’s imposition on the D Block high bidder of a severe default penalty, without any finding of wrongdoing or bad faith, is a serious, unwarranted and unlawful impediment to the successful launch and operation of this partnership. In addition, the Commission was generally prudent in leaving technical specification issues to the future negotiation, under its oversight, of the network sharing agreement between the public safety licensee and the D Block licensee. But the *Order*’s premature and highly specific definition of “sufficient coverage” is an exception to the Commission’s wise approach to issues of this kind and has no foundation in the record. The Commission on reconsideration should at this time establish only a general principle with respect to the sufficiency of coverage issue and go no further until the network sharing agreement is being negotiated.

The second major policy goal is to inject new competition into the wireless marketplace. It is addressed in Section I of this Opposition. That goal can be achieved (a) under the antitrust laws and Commission’s public interest mandate by preventing incumbents from aggregating

undue amounts of wireless spectrum by company acquisitions or in spectrum auctions in which they employ competition-blocking bidding strategies and (b) under the Designated Entity program by enabling eligible small businesses to participate in the auctions in reliance on the only viable business model available to them — one that greatly enhances competition and innovation — the wholesaling of services on a network they fully construct and operate on their own.

The Commission has existing tools with which to achieve both ends. It has an existing 70 MHz threshold for scrutinizing spectrum acquisitions in the form of deals that it can and should apply to auctions and that it can and should fortify by adopting a 45 MHz threshold for spectrum holdings below 1 GHz. Similarly, the Congressionally-mandated Designated Entity program can and should be used to promote the entry of small businesses in the wireless broadband marketplace. The Commission has never ruled on the bidding-credit eligibility of a small business that wishes to build out and operate its own network, is not a front for any incumbent or other large company, will offer wholesale services, and will meet and honor all of the Commission's other DE requirements. The Commission should not artificially constrain the business judgments of bona fide DEs by refusing to allow them bidding credits if they engage in a facilities-based, wholesale operation.

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To: The Commission

**OPPOSITIONS OF FRONTLINE WIRELESS, LLC
TO PETITIONS FOR RECONSIDERATION**

Frontline Wireless, LLC (“Frontline”), pursuant to 47 C.F.R. § 1.429(f), hereby submits comments on two issues raised in the ten petitions for reconsideration filed in the Commission’s

700 MHz proceeding: (1) measures to protect consumers from excessive concentration in the wireless market and to make possible small business participation; and (2) modification of the D Block default provision, which subjects the D Block auction winner to possible penalties for circumstances outside its control regardless of whether it has acted in good faith, and clarification of the coverage obligations for the D Block licensee.

I. THE COMMISSION SHOULD PROTECT AGAINST UNDUE SPECTRUM CONCENTRATION AND FACILITATE NEW ENTRANT PARTICIPATION.

A. The Commission Should Prevent Incumbents' Aggregations Of 700 MHz Spectrum That Would Result In Harmful Concentration In The Wireless Market.

As Frontline showed in its reconsideration petition and in its comments in the auction rules proceeding before the Wireless Bureau, “the acquisition of the C Block or the D Block by one of the incumbent wireless service providers in many parts of the country would result in levels of spectrum concentration that would violate the Communications Act” and trigger the antitrust laws.¹ The Public Interest Spectrum Coalition (PISC)’s reconsideration petition also discussed the dangers of excessive consolidation in the wireless market, and the Commission’s obligation under the Communications Act to “promote competition” by “avoiding excessive concentration of licenses.”² As it stated, “a general finding of competitiveness” in the wireless industry “based on general national trends does nothing to address” the *regional* effects of cartelization of spectrum aggregations in markets across the country.³

¹ Frontline Supplemental Comments, 700 MHz Auction Rules Proceeding, AU Docket No. 07-157 (Sept. 21, 2007) at 3 [herein “Frontline Auction Rules Supplemental Comments”]. Incumbent acquisition of other 700 MHz licenses may raise the same concerns.

² PISC Petition for Reconsideration at 1-3 (citing 47 U.S.C. § 309(j)(3)(B)).

³ *Id.* at 3.

The modest additions to the short form application that Frontline has proposed — requiring bidders to disclose (1) whether an acquisition of 700 MHz spectrum in the January 2008 auction would result in their holding 70 MHz or more of spectrum in a particular geographic market, and (2) whether acquisition of the auctioned spectrum would result in the applicant’s holding 45 MHz or more of CMRS spectrum below 1 GHz — will assist the Commission in fulfilling its public interest obligations under the Communications Act.⁴

As Frontline demonstrated in the auction rules proceeding, the 70 MHz figure has been used to analyze incumbent acquisitions of other spectrum-holding companies for possible anti-competitive effects.⁵ The Commission presumably will undertake the same analysis as to AT&T’s recently announced acquisitions of Aloha Partners and Dobson Communications. The 70 MHz and 45 MHz thresholds apply with equal force to spectrum concentrations resulting from the 700 MHz auction.

B. Allowing Otherwise Eligible DEs To Adopt A Wholesale Business Model And Still Receive Bidding Credits Would Serve The Public Interest.

On May 25, 2006, prior to the AWS auction, the Commission amended its DE rules to impose far tighter eligibility requirements on small businesses seeking bidding credits, including the so-called 50% “wholesale rule.”⁶ Council Tree Communications filed a petition for reconsideration of those amendments, asking the FCC to repeal the newly adopted restrictions. On June 2, 2006, the Commission rejected those arguments, and on June 7, 2006, Council Tree

⁴ Of course, the Commission’s award of a license in these circumstances would not immunize an anticompetitive accumulation of spectrum under the antitrust laws. *See* Frontline Auction Rules Supplemental Comments at 4.

⁵ *See id.*

⁶ 47 C.F.R. § 1.2110(b)(3)(iv)(A).

petitioned the Third Circuit Court of Appeals for review of the FCC's order. The Commission then proceeded to conduct the AWS auction.

While that Court case was pending, the Commission moved forward with the 700 MHz proceeding at issue here. In this proceeding several parties, including Frontline, argued that the wholesale rule should not be interpreted to apply to otherwise eligible DEs who build out and operate a facilities-based network, who are not a front for large incumbents, and who wholesale network services to third parties. In its *Second Report & Order*, the Commission held that otherwise eligible small businesses should receive DE bid credits for the C and D Blocks but did not rule on how the wholesale rule should be interpreted in these circumstances.⁷ Two months after the Commission's 700 MHz *Second Report & Order*, on September 28, 2007, the Third Circuit rejected Council Tree's challenge to the DE rules (and, indirectly, the AWS auction) on the grounds that it was incurably premature. In the wake of the *Council Tree* decision, Commissioner Adelstein noted that the Commission now had "a chance to move quickly" on crafting rational DE policies for the 700 MHz auction — including allowing eligibility for wholesalers — that would better get spectrum into the hands of small businesses, thereby effectuating the intent of the DE rules for services in the 700 MHz band.⁸

The *Council Tree* decision removed any impediment to the Commission's ability to interpret the wholesale rule so as to allow an otherwise eligible DE that will provide facilities-based wholesale services to qualify for a bid credit. The record adopting the wholesale rule

⁷ Second Report & Order, *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al.*, WT Docket No. 06-150 *et al.*, ¶¶ 296 (C Block), 535 (D Block) (July 31, 2006) [herein "700 MHz *Second Report & Order*"].

⁸ "Adelstein Says U.S. Needs Plan to Regain Telecom Lead," *Communications Daily*, Oct. 3, 2007.

made clear that it was promulgated out of concern for the flipping of licenses⁹ and that the DE program “may be subject to potential abuse from larger corporate entities.”¹⁰ Thus the Commission sought to ensure that “the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.”¹¹ The Commission has never applied the rule in a context where a facilities-based provider, such as a new entrant in the 700 MHz proceeding, plans to offer wholesale services on its fully built-out, fully operational network.

The rule bars “lease or resale (including wholesale) of spectrum capacity.”¹² The Commission should not repeal or interpret away that prohibition as it applies to DEs who traffic in raw spectrum capacity. Instead, the Commission should make clear that if the C or D Block small business licensee builds and operates the required multi-billion dollar network and sells wholesale services on that network, it will not lose its DE eligibility. Because of the rule barring sales of more than 25% to any one entity, the C or D Block licensee will also not be selling wholesale services primarily to one entity, let alone to an entity for which it is acting as the cat’s paw. Frontline has always argued that all other DE rules should continue to apply, including the prohibition on selling more than 25% of its services to a single entity and the extension of the

⁹ See John Eggerton, “Martin Pitches Small-Business Friendly Auction Rules,” *Broadcasting & Cable* (Oct. 10, 2007) (Chairman Martin tells House Small Business Committee that the rule change was designed to prevent “flipping” of licenses and gaming of the auction system).

¹⁰ Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, 21 F.C.C. Rcd. 1753, 1759 ¶ 10 (2006).

¹¹ See *id.* ¶ 15; Second Report and Order and Second Notice of Proposed Rulemaking, *id.*, 21 F.C.C. Rcd. 4753, 4762 ¶ 24 (2006).

¹² As the language of the rule shows, “including wholesale” modifies “lease or resale” of spectrum capacity. However Frontline is proposing neither to resale or lease spectrum capacity. The modifier, therefore, would not even apply to Frontline at all.

unjust enrichment period.¹³ As a consequence, there is no risk that the C or D Block winner would be, at the time of the auction or in the future, a sham DE created to allow a big business to escape paying the full value of its license to the Treasury.

Nor should small businesses adopting a wholesale business model be held ineligible for credits on the ground that Congress intended that “every recipient of our DE benefits is an entity that uses its licenses to directly provide services for the benefit of the public.”¹⁴ A C or D Block winner wholesaling network services *will* directly provide network services by virtue of building and operating the network, and it will be doing so “for the benefit *of* the public.” The quoted language does not say that the services must be provided directly “*to* the public.” It requires that the services be “for the benefit of the public,” and lower prices, increased competition at the retail level and a path to innovation all will benefit the public.

As the Commission has recognized, encouraging participation by new entrants is an important goal, and it is particularly important in this auction.¹⁵ An interpretation of the wholesale rule that bars small business wholesalers that build and operate extensive networks is the equivalent of barring small businesses altogether, because those entities must adopt a wholesale model in order to compete.¹⁶ Such an interpretation would discriminate against the only business model that is viable for a small business new entrant.

¹³ Council Tree challenged both of these rules, but Frontline supports them.

¹⁴ 700 MHz *Further Notice* ¶ 287.

¹⁵ See 700 MHz *Second Report & Order* ¶ 201 (“[W]e believe that it is appropriate to take a measured step to encourage additional innovation and consumer choice at this critical stage in the evolution of wireless broadband services by removing some of the barriers that developers and handset/device manufacturers face in bringing new products to market”).

¹⁶ See 47 U.S.C. § 309(j)(4)(D). The Commission has an alternative opportunity to adopt an effective solution to this problem. Petitions for Reconsideration filed by Council Tree and others in the AWS competitive bidding rules proceeding remain outstanding. The Commission could amend the wholesale (continued...)

Moreover, both the 700 MHz C and D Blocks have unique conditions attached to them that make a prohibition on wholesaling built-out network services particularly inappropriate. The D Block has unprecedented buildout and other conditions attached to it which will add significantly to the costs associated with the license. Indeed, a small business winning the D Block under the Commission's rules would be expected to achieve a feat that *no* major carrier has: building a network serving 99% of the population. Such a network will be cost-prohibitive for a small business without a DE credit. With the DE credit, however, a well-financed small business will be able to construct a new, 4G, interoperable broadband network to public safety specifications and offer that capacity to local commercial entities. On the C Block, the open access requirements create a needed new opportunity in which new entrants and small businesses should be encouraged to participate.

The Commission also has consistently made clear, including in the present proceeding, that it defines small businesses on a service-by-service basis in order to allow itself optimal flexibility “to benefit small businesses in future auctions,”¹⁷ and stated that “while it standardizes many auction rules, the Commission will continue a service-by-service approach when it comes to defining small businesses” for the purposes of bidding credit eligibility.¹⁸ The Commission should exercise that flexibility in defining “small business” for the purpose of this auction and

DE rule in that proceeding to make clear that the wholesale proscription would not apply to a small business that plans to build out and operate its own network and then wholesale network services on that network to third parties.

¹⁷ *In the Matter of Amendment of Part 1 of the Commission's Competitive Bidding Procedures Rules*, 13 F.C.C. Rec. 10,274 ¶ 18 (1997).

¹⁸ Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al.*, WT Docket No. 06-150 *et al.* (Apr. 27, 2007) ¶ 284 [herein “700 MHz Further Notice”]; 700 MHz *Second Report & Order* ¶ 536 (the Commission “employs a service-by-service approach when it comes to defining designated entities eligible for small business bidding credits”).

should clarify that eligible small businesses who intend to offer built-out network services on a wholesale basis should be eligible for DE bid credits.

Facilitating bidding by small businesses with an open access/wholesale model will help to ensure the development and continued availability of a platform for new devices, services and technologies. Otherwise, both auctions will be severely biased in favor of incumbents because, as Frontline has previously shown, they will be rationally motivated to incorporate a very large blocking premium in their auction bidding strategy to ensure no new entrants in the wireless market.¹⁹ A real small business bidding credit program, not one that is gutted by a wholesale bar, is necessary to offset this bias in favor of large incumbents.

II. THE COMMISSION SHOULD FOSTER AN EFFECTIVE PUBLIC/PRIVATE PARTNERSHIP BETWEEN THE D BLOCK AND THE PUBLIC SAFETY BROADBAND LICENSEE.

A. The D Block Default Provision Should Assess A Penalty On The D Block License Winner Only If It Does Not Negotiate With The PSBL In Good Faith.

Frontline’s reconsideration petition urged modification of the Commission’s reliance on the current default provision in its rules, 47 C.F.R. § 1.2104(g), to impose a penalty on the D Block winning bidder for an impasse in negotiations with the PSBL. Section 1.2104(g) should not be used mechanistically to impose a punitive default payment on an auction winner for an outcome in the negotiations that could be completely outside of its control. Where the D Block high bidder “negotiate[s] with the PBSL in good faith for months to establish a fair public-private partnership and be ready to move forward with such an agreement,” and the PBSL “for

¹⁹ See Frontline *Ex Parte*, WT Docket No. 96-86 (June 28, 2007), Attachment, at 3 (the “incumbent’s license valuation is its economic value *plus* the foreclosure value (which is the loss of incumbent’s oligopoly rents were an entrant to win that license) — that is, the incumbent’s valuation includes the value of deterring entry”).

no reason or a bad reason, refuses to agree,”²⁰ then no penalty should apply. A sanction in those circumstances is doubly arbitrary and capricious since the D Block auction winner will be unable to determine in advance many of the conditions that might cause negotiations to fail.

Both AT&T and Cyren Call, the only other parties to discuss the default penalty, stated the same concerns. AT&T noted that “a D Block winner that has negotiated in good faith and met all of the requirements imposed by the Commission and the reasonable needs of the PSBL may nonetheless be faced with a choice between entering into an NSA that is contrary to its business judgment or incurring a potentially substantial default payment obligation.” Forcing the prospective licensee into making such a choice will “present prospective bidders needing to make rational, economically viable business decisions with a very strong disincentive to bid on the D Block license.”²¹ Cyren Call stated that the default penalty contradicts the general principle that “sanctions should be fault-based.”²² It also argued that “retention of the rule in its current form without clarification could jeopardize the public/private partnership opportunity from the outset,” because “if potential bidders also have to accept the prospect of forfeiting hundreds of millions of dollars for a failed NSA negotiation, even absent a finding of bad faith action on their part,” then “the possible rewards of securing the D Block license will not be viewed as outweighing the risk.”²³

AT&T, Cyren Call, and Frontline all proposed the same solution to this problem: if the D Block winner negotiates with the PSBL in good faith, but negotiations fail for reasons outside the

²⁰ Frontline Petition for Reconsideration at 23-24.

²¹ AT&T Petition for Reconsideration at 7-9.

²² Cyren Call Petition for Reconsideration at 5.

²³ *Id.* at 5-7.

reasonable control of the D Block winner, then no default penalty should be imposed.²⁴ The Commission should clarify this point or modify Section 90.1415(g) of the *Order*'s proposed rules accordingly.²⁵

B. The Commission Should Clarify That The Definition Of “Sufficient Coverage” Will Be Left To The Network Sharing Agreement Negotiations.

While the Commission appropriately established baseline standards for the shared commercial/public safety network, it should refrain from prematurely ruling on specific technical issues. Specifically, while Frontline agrees that the shared network should provide “[s]ufficient signal coverage to ensure reliable operation throughout the service area consistent with typical public safety communications systems,” the Commission should delete the parenthetical reference which reads “(*i.e.*, 99.7 percent or better reliability).”²⁶ There is no basis for establishing this extremely high level of coverage. More importantly, this is exactly the type of specification that should be left to the negotiation of the network sharing agreement, subject, of course, to Commission oversight.

Cyren Call also addressed this issue in its petition for reconsideration, and asked the Commission to clarify this requirement. Cyren Call noted that it was unable to find anything in the record recommending the 99.7% figure, and it “believes that [the requirement] substantially overstates the signal coverage typically required by public safety entities to ensure reliable operation through a service area.”²⁷ Further, Cyren Call echoed Frontline’s position that while

²⁴ See Frontline Petition for Reconsideration at 24-25; AT&T Petition for Reconsideration at 9; Cyren Call Petition for Reconsideration at 7.

²⁵ See 700 MHz *Second Report & Order* at 304.

²⁶ 700 MHz *Second Report & Order* ¶ 405.

²⁷ Cyren Call Petition for Reconsideration at 8.

sufficient coverage is an important requirement, the details should be left to the network sharing agreement.²⁸

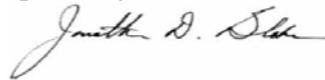
Accordingly, the Commission should clarify that the shared network must provide public safety with sufficient coverage but that the technical specifications will be left to negotiations between the PSBL and the D Block auction winner.

CONCLUSION

The petitions for reconsideration in this proceeding showed that while the Commission's *Order* sought to achieve goals of historic importance in the 700 MHz spectrum, it also contains certain provisions that would frustrate those goals. It should address these deficiencies on reconsideration by protecting consumers against anticompetitive accumulations of spectrum, clarifying that facilities-based DEs with a wholesale business model will be eligible for bidding credits, providing the default penalty will be imposed on the D Block winner only if it fails to negotiate with public safety in good faith, and leaving technical coverage requirements of the shared public-private network to the NSA negotiations process.

²⁸ *Id.* at 8-9.

Respectfully submitted,



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I hereby certify that on this 17th day of October 2007, I caused copies of the foregoing

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