Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
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

To: The Commission

COMMENTS AND OPPOSITION OF CTIA – THE WIRELESS ASSOCIATION®

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SUMMARY

The 700 MHz auction is now set to begin January 24, 2008, and CTIA urges the Commission to act on the petitions for reconsideration expeditiously to provide regulatory certainty and, where appropriate, modify the rules to further advance the promise of the 700 MHz Band.

CTIA limits its comments to five areas, commenting in favor of some petitions and in opposition to others: buildout policy; spectrum cap and other limitations; proposals to inhibit D Block bidding; universal service conditions; and the anti-collusion rule.

The Commission should revise the performance requirements to assure a rational buildout policy for the 700 MHz band. First, the Commission should extend the population coverage buildout policy to CMA and EA licenses and reject the proposal to apply the geographic buildout mandate to all licensees. As one petitioner noted, the geographic buildout requirement directs licensees "to invest in the equipment, site acquisition, site rental, and maintenance costs to serve areas ... where no one lives or travels …." The Commission decision, moreover, violated the APA – it failed to address major policy arguments raised in the record below and did not provide an explanation for deviating from stated policy adopted just three years ago. To the extent the Commission believes that specific buildout requirements are necessary, population benchmarks at least direct investment to areas where people reside and travel. The Commission, therefore, should modify the buildout rules to provide a population benchmark option for the CMA and EA licenses.

Second, if the Commission nonetheless chooses to retain the geographic area buildout requirement, it should refine the areas that must be counted. The Commission correctly concluded that government lands should not be counted for the relevant service area because such coverage may be impractical, government lands may be subject to restrictions, and they often cover only very small portions of the population in a licensed area. Petitioners point out that these criteria apply equally to other areas, and the Commission should expand its geographic area buildout exclusion to include the following: (1) bodies of water; (2) historical areas; (3) zip codes with fewer than 5 persons per square mile; (4) unserved areas wholly surrounded by served areas; and (5) Tribal lands if the Tribe does not agree to allow such coverage. In addition, the Commission should take this opportunity to clarify that its Tribal land coverage obligation does not include the unpopulated areas of "lands held by tribal governments or those held by the Federal Government in trust or for the benefit of a recognized tribe."

Third, the Commission should eliminate the potential monetary forfeiture and license termination sanctions adopted in addition to the automatic penalties imposed for failing to meet the interim or end-of-term buildout benchmarks. The Commission did not provide notice that it was considering adoption of additional, discretionary penalties, nor

did it articulate any standard for determining that the automatic penalties are insufficient and additional sanctions are warranted.

Fourth, the Commission should replace the "keep-what-you-use" policy with a "triggered" approach. As one petitioner notes, an automatic keep-what-you-use policy would take spectrum rights away from the very carrier "best positioned to build out these areas over time" – the provider offering service using the very same spectrum in immediately adjacent areas – with no guarantee that another provider is inclined to offer service. A triggered approach would allow the original carrier to retain the area – and the right to serve it – unless and until another potential service provider demonstrates a *bona fide* desire, and the wherewithal, to build-out the spectrum. The Commission can endorse the "triggered" approach on reconsideration and act subsequently as keep-what-you-use applications will not be due for years. CTIA also supports the proposal to modify the rule to allow carriers to retain a small expansion area in addition to the area served at the end of the license term, as carriers may be forced to locate or relocate towers closer to the edge of their service territory.

The Commission should reject spectrum cap proposals and other bars against existing carriers. The Commission should reject Frontline's attempt to establish a presumption against the grant of any long-form application for a 700 MHz license that would result in the winner's aggregate spectrum holdings exceeding (i) 45 MHz below 1 GHz or (ii) 70 MHz in general. The *Second Report and Order* wisely rejected calls to impose eligibility restrictions on the 700 MHz Band, concluding that, "[g]iven the number of actual wireless providers and potential broadband competitors, it is unlikely that [incumbents] … would be able to behave in an anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum." Frontline's effort is yet another veiled attempt to create bidding uncertainty and a presumption against existing carriers. Further, it fails to provide any analysis for its proposals for 45 MHz and 70 MHz screens. Similarly, the Commission should deny the Public Interest Spectrum Coalition's proposal to bar a bidder from acquiring the D Block license and C Block spectrum. Fundamentally, PISC wants a single, nationwide new entrant to acquire C Block licenses. The Commission rejected this industrial policy, instead providing for combinatorial bidding to allow an entity to acquire nationwide C Block spectrum, but not to mandate it. The Commission should refrain from adopting such bars against spectrum acquisition.

The Commission should reject proposals that would inhibit parties from bidding on the D Block license. Frontline's proposal to require the D Block licensee to construct "a wholly new" network that would not use any existing infrastructure is yet another self-serving scheme to suppress existing providers' incentives to participate in the auction. Further, it is antithetical to the public interest. Adoption of the proposal would necessarily preclude use of existing facilities – either the D Block licensees' own facilities or those of joint venture partners – and would only lead to slower deployment, delay in providing nationwide interoperable broadband for public safety users, and more

costly service. Frontline's concern has everything to do with Frontline's interest and nothing to do with the public's interest.

CTIA agrees with petitioners who urge the Commission to reconsider whether the default payment penalty should apply to the D Block winning bidder in the event it negotiates the NSA in good faith with the Public Safety Broadband Licensee but is unable to reach agreement.

The 700 MHz band should not be used as a test bed for universal service. The Commission should reject NTCH's proposal to replace the extensive existing universal service policies with a public interest condition on the Lower 700 MHz A Block license that would require those licensees to provide discounted spectrum leasing rates to eligible telecommunications carriers ("ETCs"). The proposal is poor policy, violates the law, and is procedurally defective.

The Commission should ensure that the Anti-Collusion Rule is appropriately applied in the event of a subsequent auction. Finally, CTIA requests that the Commission consider the consequences of the decision to extend the anti-collusion rule for all entities that submit short-form applications in the 700 MHz auction through the down payment deadline of the *subsequent auction*, if one is necessary.

The 700 MHz band offers significant opportunities for wireless broadband. Given the importance of this spectrum the Commission should act quickly to resolve the petitions for reconsideration as discussed above and ensure that the auction begins January 24, 2008.

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To: The Commission

COMMENTS AND OPPOSITION OF
CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® ("CTIA") hereby comments in favor of certain petitions for reconsideration and in opposition to others filed in response to the Commission's *Second Report and Order* in the above-captioned proceeding.[1] The 700 MHz auction is now set to begin January 24, 2008, and CTIA urges the Commission to

[1] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket 06-150 *et al.*, FCC 07-132 (rel. Aug. 10, 2007) ("*Second Report and Order*").

act on these petitions expeditiously to provide regulatory certainty and, where appropriate, modify the rules to further advance the promise of the 700 MHz Band.

I. THE COMMISSION SHOULD REVISE THE PERFORMANCE REQUIREMENTS TO ASSURE A RATIONAL BUILDOUT POLICY

A. The Commission Should Extend the Population Coverage Buildout Policy to CMA and EA Licenses and Reject the Proposal to Apply the Geographic Buildout Mandate to All Licensees

CTIA shares the Commission's desire for widespread provision of mobile wireless services – but the adoption of geographic buildout requirements for CMA and EA licenses was misguided as a matter of policy and arbitrary and capricious as a matter of law. CTIA thus strongly supports the Blooston Rural Carriers' petition calling for the FCC to provide a population coverage buildout option for the CMA and EA licenses and opposes the Rural Telecommunications Group ("RTG") effort to extend the geographic buildout requirement to the REAG licenses.[2]

As an initial matter, the Blooston Rural Carriers correctly observe that geographic benchmarks are bad for a competitive marketplace *and* bad for consumers. The geographic buildout requirement directs licensees "to invest in the equipment, site acquisition, site rental, and maintenance costs to serve areas ... *where no one lives or*

[2] *See* Blooston Rural Carriers, Petition for Partial Reconsideration and/or Clarification, WT Docket No. 06-150 *et al.*, at 3-11 (filed Sept. 24, 2007)("Blooston Petition"); Rural Telecommunications Group, Inc., Petition for Reconsideration, WT Docket No. 06-150 *et al.* (filed Sept. 24, 2007)(("RTG Petition"). While the Blooston petition focuses on CMA licenses, it states that "[t]he Blooston Rural Carriers believe that the public interest would best be served by creating a population-based coverage option for all 700 MHz licensees, including those acquiring Economic Area (or "EA")-sized market areas." Blooston Petition at 4 n.3.

travels ….”[3] Geographic benchmarks “will literally necessitate the construction of transmitters and related infrastructure in areas that are not inhabited” or that “have little or no traffic.”[4] The end result is that the carrier is faced with a decision to utilize scarce capital resources in areas where there is little or no population, or surrender spectrum that might otherwise be put to use in the future to serve actual customers. Licensees do not have unlimited capital expenditure budgets and must make strategic decisions regarding how and when to deploy those resources. This could discourage bidding in the auction[5] – to the detriment of rural consumers. In contrast, to the extent the Commission believes that specific buildout requirements are necessary, population benchmarks more sensibly direct investment to areas where people reside and travel. The Commission should modify the buildout rules to provide a population benchmark option for the CMA and EA licenses.

The decision to impose a geographic benchmark requirement was arbitrary and capricious on several counts. First, an agency must address significant evidence and arguments in the record, and the Commission did not do so here.[6] The *Second Report and Order*, for example, did not explain why geographic benchmarks are necessary in light of evidence submitted in the record demonstrating: (i) wireless providers are aggressively extending coverage into underserved areas;[7] (ii) a plethora of spectrum

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[3] *Id.* at 3-4 (emphasis added).
[4] *Id.* at 4.
[5] *Id.* at 3.
[6] *See, e.g., Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).
[7] *See, e.g.*, Comments of CTIA, WT Docket No. 06-150 *et al.*, at 5 (filed May 23, 2007) (“CTIA Comments”) (noting that in September 2006 the Commission found that rural counties (*i.e.*, counties with 100 or fewer persons per square mile) had an average of 3.6

opportunities exist to provide wireless service in rural areas; [8] and (iii) the FCC's market-oriented policies ensure that spectrum can be put to its highest and best use.[9]

Further, the *Second Report and Order* did not take up *any* of the major policy arguments that commenters raised against a geographic buildout requirement. As CTIA observed in the record below, forced buildout in areas with little or no traffic will "result in uneconomic and unsustainable deployment – potentially stranding capital investment in markets where it is not justified and limiting competitors from fully investing in markets where it is."[10] Such uneconomic investment has real world consequences for consumers. For example, a provider seeking to retain rights to a market could have no choice but to deploy lower-cost, lower-grade networks merely to satisfy an arbitrary geographic coverage requirement instead of deploying broadband systems in more targeted areas. Forced buildout, moreover, could require providers with finite capital expenditure resources to spend on uneconomic deployments rather than invest in enhanced capacity or coverage where subscribers need it most. As CTIA previously noted, it makes little sense to require multiple licensees to overbuild into the far reaches of each licensed area according to an arbitrary government timeline where consumer

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mobile competitors – up from 3.3 competitors three years earlier, citing *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Eleventh Report, 21 FCC Rcd 10947, 10982 (2006) ("*Eleventh CMRS Competition Report*")); CTIA Comments at 4-5 (noting that, according to the Commission, "98 percent of the total U.S. population have three or more different operators (cellular, PCS and/or digital SMR) offering mobile telephone service in the counties in which they live," *Eleventh CMRS Competition Report*, 21 FCC Rcd at 10964, up from 88 percent in 2000, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fifth Report, 15 FCC Rcd 17660, 17665 (2000)).

[8] *See, e.g.*, CTIA Comments at 7-9.

[9] *Id*.

[10] *Id.* at 6 (internal quotation omitted).

demand may not be able to sustain this number of competitors.[11] Taking spectrum from licensees that otherwise would ultimately build into certain areas has the perverse impact of removing the ability of the one licensee that may actually have the economies of scale and scope to serve a lower density area.

The *Second Report and Order* ignored all of these arguments and many more.[12] It simply identified the goal "to promote service across as much of the geographic area of the country as is practicable" and claimed that "the uniqueness of the 700 MHz spectrum justifies the use of geographic benchmarks."[13] However, the Commission's reliance on favorable propagation characteristics does not justify investment in network buildout *everywhere*, an issue the Commission failed to address.

Finally, an agency is obligated to recognize and explain changes in policy – and the *Second Report and Order* provided no explanation for its reversal of the performance policy it adopted just three years ago.[14] In the *Rural Wireless Order*, the Commission rejected calls for onerous buildout requirements and instead concluded, "[i]n keeping with our market-oriented policies, we do not propose to require licensees to deploy services where their market studies or other analyses indicate that service would be

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[11] *Id*.
[12] *See e.g.*, Letter from Verizon Wireless to the FCC, WT Docket No. 06-150 *et al.* (filed Apr. 4, 2007) ("Verizon Wireless Ex Parte").
[13] *Second Report and Order* ¶ 158.
[14] *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41-44 (1983) (holding that an agency changing course must supply a reasoned analysis for the change).

economically unsustainable."[15] The *Second Report and Order* did not even recognize the *Rural Wireless Order* despite numerous references in the record.[16] Instead, it merely concluded that geographic benchmarks are intended "to promote service across as much of the geographic area of the country as is practicable"[17] – without any explanation for deviating from the stated policy recognizing economics of buildout policies. The decision is arbitrary and capricious, and on reconsideration the Commission should extend the population benchmarks to all licenses, including the CMA and EA licenses.

For the reasons discussed above, the Commission also should reject RTG's proposal to impose geographic benchmarks on REAG licenses. RTG's proposal would only make a bad situation worse by extending the geographic benchmarks to another block of spectrum. Its claims, moreover, are without substance and should be rejected.

B. If the Commission Retains the Geographic Area Buildout Requirement, It Should Refine the Areas that Must Be Counted

If the Commission nonetheless chooses to retain some form of geographic benchmarks, which CTIA maintains it should not, it should refine the relevant service

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[15] *Facilitating the Provision of Spectrum-Based Service to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Service*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19122 (2004).

[16] *See, e.g.*, CTIA Comments at 4; Verizon Wireless Ex Parte at 4, 6.

[17] *Second Report and Order* ¶ 158. The Commission also suggests that its new buildout requirements will put spectrum to use to "serve the majority of users in their license areas," *id.* ¶ 154, and "promote rapid service to the public, especially in rural areas," *id.* ¶ 155. Of course, the Commission's geographic benchmarks will force construction beyond where users live or travel.

area for purposes of measuring compliance with the rule, as proposed by MetroPCS and the Blooston Rural Carriers.

As MetroPCS observed, the *Second Report and Order* correctly excluded "land owned or administered by government as part of the relevant service area" to be covered, if the licensee so chooses.[18] The Commission wisely recognized that: (i) "covering certain government land may be impractical," (ii) government lands "are subject to restrictions that prevent a licensee from providing service or make provision of service extremely difficult"; and (iii) government lands "often include only very small portions of the population in a license area."[19]

In this instance, the criteria set forth above apply equally to other areas similarly encumbered, as described below.[20] As a result, the Commission should allow licensees to exclude the following areas from the calculation of the relevant area for meeting the geographic benchmarks:

(1) Bodies of Water. By definition, coverage requirements extending over bodies of water are "impractical," and the rule should not require that licensees include such areas for purposes of compliance. [21]

(2) Historical Areas. Historical areas are often subject to construction limits and preservation rules that prohibit or restrict network deployments. [22]

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[18] MetroPCS Communications, Inc., Petition for Clarification and Reconsideration, WT Docket No. 06-150 *et al.*, at 11 (filed Sept. 20, 2007) ("MetroPCS Petition") (citing *Second Report and Order* ¶¶ 224-25).
[19] *Second Report and Order* ¶ 160.
[20] Agency rulemaking must contain a rational connection between the facts found and the choice made. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).
[21] MetroPCS Petition at 11. *See also* Letter from MetroPCS to the FCC, WT Docket No. 06-150 *et al.*, at 7 (filed Apr. 4, 2007) ("MetroPCS Ex Parte").
[22] MetroPCS Petition at 11. *See also* MetroPCS Ex Parte at 7.

These preservation rules clearly are "restrictions that prevent licensees from providing service or make provision of service extremely difficult."

(3) Zip Codes with Fewer than 5 Persons Per Square Mile. MetroPCS points out that these low density areas include roughly 0.7% of the population.[23] CTIA agrees that "these areas have little need for supplemental service coverage, and serving them would put an undue economic strain on licensees without any corresponding public benefit."[24] In many circumstances, these areas are "impractical" to cover and typically "include only very small portions of the population in a license area."

(4) Unserved Areas Wholly Surrounded by Served Areas. In most "hole in the doughnut" scenarios, "the unserved area has difficult terrain, or … zoning or other site restrictions, or [] the area is so remote that it does not get visited."[25] In each such instance, it is "impractical" to expect coverage now. Coverage in the future, however, may be a possibility.

(5) Tribal Lands if the Tribe Does Not Agree to Allow Such Coverage. Blooston Rural Carriers point out that Tribal lands are subject to the coverage requirement, but "it is necessary to secure the cooperation of the Tribal government in order to provide service to its territory."[26] Without such permission, the licensee is in effect "subject to restrictions that prevent [it] from providing service."

Each of these scenarios represents a circumstance analogous to the government-owned or administered land that makes coverage "impractical," and the Commission should expand its geographic buildout exclusion list to include these categories.

The Commission should also take this opportunity to clarify the Tribal land coverage obligation. The *Second Report and Order* states that "excluded areas do not include those populated lands held by tribal governments or those held by the Federal Government in trust or for the benefit of a recognized tribe."[27] Many Tribal lands,

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[23] MetroPCS Petition at 11.
[24] MetroPCS Petition at 12. *See also* MetroPCS Ex Parte at 7.
[25] MetroPCS Petition at 12.
[26] Blooston Petition at 19-20.
[27] *Second Report and Order* ¶ 160 n.386.

however, cover thousands of square miles, and the populated areas within these lands are just a small proportion of the land mass.[28] While CTIA shares the Commission's view that the government land exclusion should not "discourage deployment to populated tribal areas,"[29] a buildout obligation across thousands of square miles of a Tribal land because there are small populated areas on the land makes no sense. The Commission can readily address this issue by clarifying that its Tribal land coverage obligation does not include the unpopulated areas of "lands held by tribal governments or those held by the Federal Government in trust or for the benefit of a recognized tribe."[30]

C. The Commission Should Eliminate the Vague Monetary Forfeiture and License Termination Penalties

The *Second Report and Order* established clear, automatic penalties for failure to meet the interim buildout benchmark (a shortened license term) and end-of-term buildout benchmark (a "keep-what-you-use" rule) for the 700 MHz licenses – but it also went on to adopt additional, potential sanctions involving monetary forfeitures and license termination.[31] Adoption of these supplemental sanctions was unnecessary in light of the automatic penalties, and likely violated the Administrative Procedures Act ("APA"). CTIA supports the Blooston Rural Carriers' call to eliminate the monetary forfeiture and

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[28] For example, the size of the Navajo Reservation is 24,433 square miles, the Uintah and Ouray Reservation is 6,816 square miles, the Cheyenne River Reservation is 4,406 square miles, and the Tohono O'odham Nation is 4,345 square miles. *See* Federal Communications Commission, *List of Federally Recognized Tribal Lands and Telephone Penetration Rates* (2000), avail. at http://wireless.fcc.gov/auctions/data/crossreferences/Auc_2000CensusandTLwithout1990.pdf.

[29] *Second Report and Order* ¶ 160 n.386.

[30] *Id*.

[31] *Id.* ¶ 153.

license termination sanctions to ensure that the Commission's buildout policy provides regulatory certainty and does not deter entry.

The APA requires an agency to provide notice of, and an opportunity to comment on, new regulations.[32] In this case, the Commission provided no notice that it was considering a rule to provide itself with "the unfettered discretion to impose unspecified fines and license forfeitures over and above those automatically arising from a failure to meet an applicable benchmark."[33] These supplemental sanctions, moreover, are not well-reasoned policy.[34] The *Second Report and Order* contains no justification in support of the additional penalties of monetary forfeiture or the "death penalty" for a license – "they are merely tacked on," as the Blooston Rural Carriers observe.[35] A fine, for example, "serves a purely penal end – it does not involve the freeing up or reallocation of unused license territory" and is thus beyond the scope of action contemplated in the proceeding.[36]

Further, the *Second Report and Order* does not articulate any standard or identify any circumstances under which the Commission would conclude that the automatic penalties are insufficient and additional sanctions are warranted. Potential licensees, therefore, are subjected to significant regulatory uncertainty where, for example, they are considering giving up an unbuilt area rather than providing service – an option the rules

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[32] 5 U.S.C. §553.
[33] MetroPCS Petition at 8.
[34] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 52 (1983) (requiring an agency to provide "reasoned analysis" for any change of its existing policy).
[35] Blooston Petition at 13.
[36] *Id.* at 18.

provide for. "[T]his form of 'extra punishment,' with no guidelines as to when and how it will be applied, only injects more uncertainty into the auction process…."[37] As MetroPCS concludes, "the problem with these portions of the new rules is that absolutely no standard is articulated that would put licensees on notice as to when these supplemental sanctions might be imposed."[38] The Commission improperly adopted the additional, potential sanctions and, for the reasons stated above, the Commission should eliminate them.

D. The Commission Should Replace the "Keep-What-You-Use" Policy With a "Triggered" Approach and Allow for Limited Service Expansion

The Commission should modify the "keep-what-you-use" policy to increase the likelihood that spectrum not yet deployed in a given area is put to use. Specifically, the Commission should modify the keep-what-you-use policy and instead adopt a "triggered" approach in the event a licensee does not satisfy the end-of-term benchmark. Otherwise, those licensees with the greatest incentive and opportunity to provide service (simply by extending their service areas) will not do so. Further, "it is possible that unserved areas may be stripped from the licenses of an incumbent carrier, and then lie fallow for years to come."[39] In addition, the Commission should provide for a small expansion area immediately beyond the contours of a licensee's served area to promote continued service deployment.

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[37] *Id.* at 12.
[38] MetroPCS Petition at 8.
[39] *Id.* at 16.

The *Second Report and Order* asserted that the "keep-what-you-use" policy was adopted to "promot[e] access to spectrum and the provision of service, especially in rural areas."[40] The reality is, in circumstances where spectrum has not been put to use, there may be little or no economic justification for investing in expanded service coverage. Of course, this doesn't mean that an area is unserved. For example, an area may already be served by three competitors but have insufficient market demand to justify buildout by a fourth provider by the end-of-term benchmark. An automatic keep-what-you-use policy would take spectrum rights away from the very carrier "best positioned to build out these areas over time"[41] – the provider offering service using the very same spectrum in immediately adjacent areas – with no guarantee that another provider is inclined to offer service. This carrier very likely could be the next licensee to provide service in an area.

A better course is a triggered keep-what-you-use policy, a proposal the Commission raised in the rulemaking proceeding but failed to address in the *Second Report and Order*. A triggered approach would "allow the original carrier to retain the area – and the right to serve it – unless and until another potential service provider demonstrates a *bona fide* desire, and the wherewithal, to build-out the spectrum…."[42] With a triggered approach, the Commission's ultimate goals at the end-of-term benchmark would be served – promoting access to spectrum and the provision of service. If a *bona fide* new provider emerges, it gains access to the spectrum. If not, the existing

[40] *Second Report and Order* ¶ 156.
[41] MetroPCS Petition at 14.
[42] *Id.* at 15.

licensee – again, the entity "best positioned to serve less populous areas economically and [with] the greatest economic incentive to do so"[43] – retains the opportunity to do so.

On reconsideration, the Commission should endorse triggered keep-what-you-use. MetroPCS properly recognizes that any 700 MHz keep-what-you-use applications will not be due for many years – and that "all the Commission need do now is announce its intention to adopt a triggered use it or lose it approach so that applicants in the upcoming auction can bid with confidence that their licensed territory will not be needlessly reduced and can more accurately assess the value of licenses."[44]

CTIA also supports the proposal that the Commission modify the keep-what-you-use rule to "allow carriers to retain a small expansion area (*e.g.*, +15%) in addition to the area served at the end of the license term."[45] Markets are constantly developing and demographics are always shifting, and licensees often expand coverage beyond the bounds of their service area – in some instances after their initial ten-year license term where serving these areas sooner would not have made economic sense. Additionally, carriers often are forced to relocate or move sites to address a variety of issues. Under the current rules, this type of regular network management could be precluded. Further, if keep-what-you-use is imposed at the service contour edge at the end-of-term benchmark, adjacent areas "would likely go unserved by any carrier since they can only be served economically on an incremental basis by a carrier with a substantial presence in

[43] *Id.* at 15.
[44] *Id.* at 16-17.
[45] *Id.* at 13.

the market."[46] Adoption of a small expansion area beyond the service contour will enhance the likelihood and timeline that the spectrum will be deployed in those areas, and that carriers will be able to maintain coverage in existing areas.

II. THE COMMISSION SHOULD REJECT PETITIONERS' CALLS TO IMPOSE A SPECTRUM CAP OR OTHER BAR AGAINST EXISTING CARRIER PARTICIPATION IN THE 700 MHZ AUCTION

A. The Commission Should Reject the Attempt to Re-impose a Spectrum Cap for the 700 MHz Auction

Frontline once again is attempting to limit who can participate in the 700 MHz auction. Frontline would have the Commission create a presumption against the grant of any long- form application for a 700 MHz license resulting in the winner's aggregate spectrum holdings exceeding (i) 45 MHz for spectrum below 1 GHz or (ii) 70 MHz in general.[47] This proposal should be seen for what it is – a self-serving attempt by a prospective auction bidder to suppress bidding. At its core, Frontline's proposal seeks to restrict opportunities for existing wireless providers in the 700 MHz auction. CTIA recognizes that the Commission has a statutory obligation to find that the public interest, convenience, and necessity will be served by particular license grants – but it is unnecessary for the Commission to reinstitute a "pseudo-spectrum cap"[48] for this auction or any other presumption against eligibility. Rather, the Commission should conduct reviews of long-form applications according to the public interest standard as it has done in the AWS-1 and other auctions.

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[46] *Id.* at 14.
[47] Frontline Wireless LLC, Petition for Reconsideration, WT Docket No. 06-150 *et al.*, at 8-11 (filed Sept. 24, 2007) ("Frontline Petition").
[48] Verizon Wireless, Reply Comments, AU Docket No. 07-157, at 17 (filed Sept. 7, 2007).

In the *Second Report and Order*, the Commission rejected calls to impose eligibility restrictions for the licenses in the 700 MHz Band, and its findings should inform consideration of the Frontline proposal here.[49] The Commission concluded, "[g]iven the number of actual wireless providers and potential broadband competitors, it is unlikely that [incumbents] … would be able to behave in an anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum."[50] Previously, the Commission had eliminated the 45 MHz CMRS spectrum aggregation limit in 2001 for reasons that are even more relevant today: the competitiveness of the wireless industry and the availability of additional spectrum resources in the near future.[51] Since then, the indicia of competitiveness reflect an even more robust market –for example, average revenue per minute is down, capital expenditures remain robust – and the amount of CMRS spectrum available in the marketplace has increased substantially.

Frontline's 70 MHz "screen" proposal is nothing more than a veiled effort to create a presumption against the award of spectrum to existing wireless providers. Its focus on 70 MHz is wholly inappropriate.[52] Frontline, moreover, fails to suggest why a 70 MHz screen is appropriate for today's marketplace. The 70 MHz threshold was chosen in large part because the relevant spectrum market – the Part 22 cellular, Part 24

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[49] *See Second Report and Order* ¶¶ 256-259.
[50] *Id.* ¶ 256.
[51] *See 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, 22693-702 (2001).
[52] The Commission has in the past employed a 70 MHz "screen" in the merger context as a threshold to exclude overlaps from further review but it is not a limit or a cap or a presumption. *See, e.g., Applications of Western Wireless Corp. and ALLTEL Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 13053, 13074 (2005); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21569 (2004).

broadband PCS and Part 90 ESMR spectrum – totaled roughly 200 MHz.[53] Today, the available spectrum for wireless and wireless broadband services, however, has increased considerably – for example, the 194 MHz of 2.5 GHz BRS/EBS spectrum, 90 MHz of AWS-1 spectrum at 1.7/2.1 GHz, plus the 84 MHz of commercial spectrum that is or will be available in the 700 MHz band, in addition to the existing CMRS spectrum. Further, with respect to spectrum below 1 GHz, Frontline offers no rationale for a 45 MHz limit. It ignores the fact that licensees spent nearly $14 billion to acquire AWS-1 spectrum in the 1.7/2.1 GHz bands, which suggests that spectrum above 1 GHz is highly valuable and offers direct competition in the mobile marketplace.

The Commission should reject Frontline's proposal and conduct long-form application reviews as it has done in other auctions.

B. The Commission Should Deny the Petition to Bar a Bidder from Acquiring the D Block and C Block Spectrum

The *Ad Hoc* Public Interest Spectrum Coalition ("PISC") argues that the Commission should adopt a rule prohibiting the winner of the D Block license from holding any C Block licenses, reasoning that a contrary outcome "significantly reduces the likelihood that a new national competitor will emerge from the auction."[54] For the reasons previously addressed, the Commission should not impose a spectrum cap-like bar in this auction.

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[53] *See, e.g.*, *Applications of Nextel Communications, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, 13994 (2005).

[54] *See* Ad Hoc Public Interest Spectrum Coalition, Petition for Reconsideration, WT Docket No. 06-150 *et al.*, at 3-4 (filed Sept. 24, 2007)("PISC Petition").

PISC's request is fundamentally grounded in a desire for C Block spectrum to be awarded to a single entity that emerges as a stand-alone nationwide competitor.[55] While the Commission adopted a combinatorial bidding policy to enable such a result, it declined to adopt a nationwide C Block license.[56] Rather than engage in a sort of industrial policy, the Commission appropriately preferred to leave to market forces the job of determining the highest and best use for the C Block spectrum. Further, as noted above, the Commission concluded that under the current rules (which allow a bidder to acquire the D Block and C Block spectrum), it is unlikely that an existing provider "would be able to behave in an anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum."[57] The Commission should reject PISC's call to bar acquisition of C and D Block spectrum.

III. THE COMMISSION SHOULD REJECT PROPOSALS THAT WOULD INHIBIT PARTIES FROM BIDDING ON THE D BLOCK LICENSE

A. The Commission Should Reject the Proposal to Require the D Block Licensee to Construct a "Wholly New" Network

In addition to its calls for a spectrum cap, Frontline is attempting (again) to limit competition through another proposal. Frontline asks the Commission to "confirm" that the D Block licensee is subject to a "'new build' requirement" and barred from using existing facilities.[58] This is yet another self-serving scheme by Frontline to suppress existing providers' incentives to participate in the auction. As an initial matter, the *Second Report and Order* made no such suggestion, and Frontline's scheme is beyond the

[55] *See id*.
[56] *See Second Report and Order* ¶¶ 290-292.
[57] *Id.* ¶ 256.
[58] Frontline Petition at 20.

scope of the proceeding.[59] As such, the Commission should deny Frontline's request to "confirm" a "new build" requirement.

In addition, Frontline's proposal to require "a wholly new" network that would not use any existing infrastructure is antithetical to the public interest. Frontline brazenly asserts that existing networks are "unacceptable to the public safety community," and it argues that the Commission must act "right now" to bar the D Block licensee and the Public Safety Broadband Licensee from considering the use of existing facilities as part of the network sharing agreement ("NSA").[60]

Just like Frontline's other schemes and proposals in the docket, the "new build" requirement is designed to suppress competition in the auction and increase the likelihood that Frontline will win spectrum rights at the lowest possible cost.[61] Indeed, Frontline's petition is remarkably clear in this regard: "Without a 'new build' requirement, the incumbents would have a large advantage in the auction" that will "hinder[] competition."[62]

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[59] "Section 1.106(c) only allows new arguments to be raised in a petition for reconsideration when facts or circumstances have changed since the last opportunity to present such matters; or when facts have arisen which were unknown to the petitioner until after his or her last opportunity to raise such matters." *Application of American Cellular Services U.S.*, Memorandum Opinion and Order, 6 FCC Rcd 65, 66 (CCB 1991). *See also Airadigm Communications, Inc.*, Order on Reconsideration, 21 FCC Rcd 3893, 3896-97 (WTB 2006). Frontline does not identify any new facts or circumstances that warrant reconsideration here.
[60] Frontline Petition at 21.
[61] *See* Letter from CTIA to the FCC, WT Docket No. 06-150 *et al.*, (filed Oct. 4, 2007)("CTIA Ex Parte")(identifying ten Frontline proposals specifically aimed at suppressing auction competition).
[62] Frontline Petition at 21.

Of course, use of existing facilities and networks would provide significant benefits to the public safety community, including: substantially speedier deployment, major cost savings, and proven network arrangements. Frontline conveniently ignores these issues – except to claim that cost savings would allow an existing provider to bid more at auction.[63] The auction of this piece of spectrum is not about a benefit to Frontline, but rather to our nation's first responders. Adoption of the proposal would necessarily preclude use of existing facilities – either the D Block licensees' own facilities or those of joint venture partners – and would only lead to slower deployment, delay in providing nationwide interoperable broadband for public safety users, and more costly service. Frontline's concern has everything to do with Frontline's interest and nothing to do with the public's interest. The Commission should reject Frontline's "new build" scheme.

B. The Commission Should Not Apply the Default Payment Penalty to the D Block Winning Bidder If It Negotiates in Good Faith But Is Unable to Reach Agreement on an NSA

CTIA is unaware of any entity that opposes the proposal to have the Commission reconsider whether the default payment penalty should apply to the D Block winning bidder in the event it negotiates the NSA in good faith with the Public Safety Broadband Licensee but is unable to reach agreement.[64] The public-private partnership set forth in the *Second Report and Order* holds great promise but involves significant risk given that

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[63] *Id*.

[64] *See* AT&T, Petition for Reconsideration and Clarification, WT Docket No. 06-150 *et al.*, at 7-9 (filed Sept. 24, 2007) ("AT&T Petition"); Cyren Call Communications Corp., Petition for Reconsideration and for Clarification, WT Docket No. 06-150 *et al.*, at 5 (filed Sept. 24, 2007); Frontline Petition at 23.

much will remain unresolved at the time of the auction and beyond. Indeed, the D Block winning bidder will be unusually situated in that it does not have control over whether default occurs, and the conditions it must satisfy to avoid default are not clear.[65] It is the NSA negotiation that will affirmatively establish public safety wants and demands for the public-private broadband network.

As AT&T observes, "[g]iven the complexity of these post-auction negotiations, the Commission should not subject the winning D Block bidder to default payment obligations in the event that the PSBL declines to accept reasonable NSA terms proposed in good faith by the D Block winner."[66] CTIA agrees and urges the Commission to remove the threat of default payment obligations in such circumstances.

IV. THE 700 MHZ AUCTION IS NOT THE APPROPRIATE VEHICLE TO SOLVE THE NATION'S UNIVERSAL SERVICE WOES

NTCH, Inc. ("NTCH") argues on reconsideration that the Commission should replace its extensive existing universal service policies with a public interest condition on the Lower 700 MHz A Block license that would require those licensees to provide discounted spectrum leasing rates to eligible telecommunications carriers ("ETCs").[67] This proposal must be rejected.

As a fundamental matter, the 700 MHz band should not be the proving ground for the trial of random universal service proposals. Historically, the Commission's spectrum

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[65] *See* Frontline Petition at 23.
[66] AT&T Petition at 9.
[67] NTCH, Inc., Petition for Partial Reconsideration, WT Docket No. 06-150 *et al.* (filed Sept. 21, 2007) ("NTCH Petition").

auctions have been enormously successful in large part because it adopted a flexible use policy and refrained from imposing business plans on prospective bidders. Already, much of the 700 MHz band spectrum has been linked to significant policy and business plan initiatives. For this reason alone, the Commission should steer clear of NTCH's proposal.

NTCH's proposal, moreover, violates the law. The Commission has statutory obligations to establish universal service programs that are, *inter alia*, "sufficient" to ensure that services and rates are "reasonably comparable" between rural and urban areas.[68] The Commission also has adopted a universal service principle of "competitive neutrality."[69] NTCH has made no showing that its proposal would satisfy any of these requirements.

In addition, the pressing need for reform of the Commission's universal service mechanisms is being considered in the Commission's ongoing universal service docket.[70] NTCH implicitly acknowledged as much by filing its Petition as an *ex parte* filing in the universal service docket as well.[71] In that context, CTIA has presented comprehensive

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[68] 47 U.S.C. § 254(b)(3), (5).
[69] 47 U.S.C. § 254(b)(7) (permitting the Joint Board to recommend, and the Commission to adopt, additional universal service principles). *Federal-State Joint Board on Universal Service*, Report & Order, 12 FCC Rcd 8776, 8801 (1997), *aff'd sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (adopting the competitive neutrality principle).
[70] *See generally* WC Docket No. 05-337.
[71] Letter from NTCH, Inc. to the FCC, WC Docket No. 05-337 (filed October 1, 2007).

universal service reform proposals that far better fulfill the statute and reflect marketplace realities.[72]

Finally, even if NTCH's proposal had any substantive merit (which CTIA maintains it does not), it is beyond the scope of what can properly be granted on reconsideration of the *Second Report and Order*. The rulemaking did not propose – and NTCH does not suggest – that the Commission consider the ambitious idea of replacing the current universal service program with a public interest obligation on 700 MHz licensees; thus, the concept was not in any way before the Commission when the *Second Report and Order* was adopted and it should be rejected.[73]

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[72] *See, e.g.*, Letter from CTIA to the FCC, WC Docket No. 05-337 (filed July 20, 2007); CTIA Reply Comments, WC Docket No. 05-337 (filed July 2, 2007).

[73] "Section 1.106(c) only allows new arguments to be raised in a petition for reconsideration when facts or circumstances have changed since the last opportunity to present such matters; or when facts have arisen which were unknown to the petitioner until after his or her last opportunity to raise such matters." *Application of American Cellular Services U.S.*, Memorandum Opinion and Order, 6 FCC Rcd 65, 66 (CCB 1991). *See also Airadigm Communications, Inc*., Order on Reconsideration, 21 FCC Rcd 3893, 3896-97 (WTB 2006). No facts or circumstances have changed or arisen since NTCH's last opportunity to comment in this proceeding. Thus, NTCH cannot properly raise its proposal on reconsideration.

V. THE COMMISSION SHOULD ENSURE THAT THE ANTI-COLLUSION RULE IS APPROPRIATELY APPLIED IN THE EVENT OF A SUBSEQUENT AUCTION

Finally, CTIA requests that the Commission consider the consequences of extending the anti-collusion rule for all entities that submit short-form applications in the 700 MHz auction through the down payment deadline of the *subsequent auction*, if one is necessary.[74] The Commission should be wary of imposing an extended anti-collusion rule to all initial auction short-form applicants, which would have a chilling effect on commercial business generally for an extended period, up to seven months according to one petitioner.[75] On reconsideration, the Commission should permit an entity that does not wish to participate in the second auction to "opt out" of the anti-collusion rule.[76]

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[74] *Second Report and Order* ¶ 316. In the recent 700 MHz auction public notice, the Wireless Telecommunications Bureau observed that it lacked authority to consider a proposal to allow an "opt-out" from the anti-collusion rule if the subsequent auction is conducted for those entities that do not intend to bid in that auction – but it did not address the substance of the request. *See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008, Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76*, Public Notice, DA 07-4171, ¶ 20 (WTB rel. Oct. 5, 2007).
[75] MetroPCS Petition at 22-23.
[76] *Id.* at 20-23.

VI. CONCLUSION

The Commission should act expeditiously to resolve the issues raised on reconsideration consistent with the positions discussed above to provide regulatory certainty as far in advance of the January 24, 2008 auction date as is possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marlea Leary, hereby certify that, on October 17, 2007, a copy of the attached "Comments and Opposition" was delivered via first-class mail to the following:

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