

**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

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

October 29, 2007

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

Frontline Wireless, LLC (“Frontline”), pursuant to 47 C.F.R. § 1.429(g), hereby submits comments on four issues raised in the eleven oppositions to petitions for reconsideration filed in the Commission’s 700 MHz proceeding: (1) requirement for a state-of-the-art shared network; (2) measures to ensure the Commission fulfills its statutory duties in protecting wireless consumers against anticompetitive consolidation; (3) modification of the D Block default provision; and (4) allowing facilities-based providers access to designated entity bidding credits. Frontline also reiterates its concerns that the Commission’s reserve price/re-auction policy is unlawful and should be changed.

**I. THE COMMISSION SHOULD REQUIRE A NEW BUILD FOR THE D BLOCK.**

As it has recognized throughout this proceeding, the Commission should ensure that public safety is served by a network that is “sufficient for its needs today and in the future.”<sup>1</sup> Allowing public safety’s network to be integrated with an existing commercial network using yesterday’s technology would be inconsistent with this bedrock principle. Of course, utilizing some existing network elements, such as cell sites and towers, will be helpful in efficiently deploying the shared network. Frontline is not advocating that the Commission require entities to unnecessarily start from the ground up, but rather that the D Block licensee is required to construct a state-of-the-art public safety network using 4G technology. This will require a “new build.” Without this requirement, the country will have wasted the opportunity to provide public safety with the communications services it requires.

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<sup>1</sup> Frontline Petition for Reconsideration, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150, *et al.*, at 21 (Sept. 24, 2007) (“Frontline Petition”); *see also* 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.*, ¶ 405 (July 31, 2006) (“Order”).

Public safety commenters agree with this requirement. As NATOA's Opposition stated, a new build would ensure that the D Block network is "innovative and take[s] advantage of the very latest advances in communications technology," and without a new build, "it is difficult to see why public safety entities would opt to use such a system over their existing networks."<sup>2</sup> A "new build" requirement does not mean that every tower and every piece of equipment must be "new" from scratch — for the sake of being new. It means that the service must be uniformly 4G, state-of-the-art — not 4G here, 2.5G there and 3G over there. Clarifying this requirement now will assure parity among bidders. More importantly, it will assure advanced services for our deserving fire fighters, police officers and other public safety users.

MetroPCS misses the point in arguing that a new build requirement is unnecessary at this time because public safety would be able to negotiate for the network it needs during the Network Sharing Agreement process.<sup>3</sup> The overall standards for the shared network should be established now, as by and large the Commission has done. The specifics are to be negotiated later. There can be no doubt that a state-of-the-art standard falls in the first category and, therefore, should be adopted at this time, prior to the auction.

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<sup>2</sup> Comments of the National Association of Telecommunications Officers and Advisors, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 7 (Oct. 17, 2007) ("NATOA Opposition").

<sup>3</sup> Opposition of MetroPCS to the Petition for Reconsideration of Frontline Wireless, LLC, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 13 (Oct. 17, 2007) ("MetroPCS Opposition"). CTIA also stated that integrating public safety's network into an existing network would result in, among other benefits, "major cost savings." Comments and Opposition of CTIA, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 19 (Oct. 17, 2007) ("CTIA Opposition"). However, as the Commission has stated, meeting public safety's needs, not cost savings to the commercial partner, is the guiding consideration in the development of the public safety network on the D Block. *See Order* ¶ 325.

## II. COMMISSION FOCUS ON ISSUES OF UNDUE WIRELESS SPECTRUM CONCENTRATION IS NECESSARY AND DOES NOT CONSTITUTE A SPECTRUM CAP.

Commission precedent, the statutory public interest standard and the antitrust laws call for a screen in the application process that identifies those applications that raise questions about undue concentration of wireless spectrum.<sup>4</sup> Several parties allege that this proposal would re-implement the Commission's spectrum cap policy.<sup>5</sup> But they misread the proposal. Frontline has only requested that the Commission, pursuant to its statutory obligations, "review and, when appropriate, deny *long-form* auction applications that would place (a) 45 MHz or more of the beachfront wireless spectrum below 1 GHz, or (b) 70 MHz or more of all CMRS spectrum in the hands of any one licensee."<sup>6</sup> This is quite different from a bar prior to when applications are filed. To facilitate this case-by-case determination, bidders should be required to disclose at the short-form stage whether an acquisition of the spectrum in question would result in the reaching of these benchmarks. Such a requirement will give the Commission the information it needs to conduct the scrutiny necessarily applied when an incumbent wireless carrier seeks to acquire more spectrum by purchasing another wireless carrier. In fact, the concern is even greater here; if incumbents warehouse purchased spectrum at auction, none of the consolidation-offsetting

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<sup>4</sup> See, e.g., Memorandum Opinion & Order, *Applications of Western Wireless Corporation and ALLTEL Corporation*, 20 FCC Rcd. 13,053 (2005) ¶ 162.

<sup>5</sup> See AT&T Opposition to, and Comments on, Petitions for Reconsideration, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 2-3 (Oct. 17, 2007) ("AT&T Opposition"); CTIA Opposition at 14. U.S. Cellular Corp. claims that adoption of a spectrum cap would require a separate proceeding, "in which the Commission would examine the issues of concentration and market power in the current wireless marketplace," Comments of United States Cellular Corporation on Petitions for Reconsideration, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 8 (Oct. 17, 2007) ("U.S. Cellular Opposition"), but just one page later it asks that the Commission adopt just such a cap for this auction – i.e. a prohibition on the same party holding the D Block and any of the REAG C Block licenses. See *id.* at 9.

<sup>6</sup> See Frontline Petition at 8; Frontline Comments, 700 MHz Auction Rules Proceeding, AU Docket No. 07-157, at 13-16 (Sept. 21, 2007) (emphasis added).

synergies of the kind that occur in the company acquisition context would result here. Federal, state and private antitrust actions may also be triggered.

CTIA questioned the continuing relevance of using 70 MHz for measuring consolidation in today's wireless marketplace, claiming that this benchmark was adopted at a time when the total available spectrum in the CMRS market was only 200 MHz.<sup>7</sup> But the Commission initially adopted the 70 MHz threshold with full knowledge that it planned to make future spectrum available via the AWS and 700 MHz auctions. Indeed, in the 2001 proceeding where the Commission determined that its public interest obligations required it to independently assess the possible anticompetitive effects of CMRS spectrum acquisitions on a case-by-case basis, CTIA itself pointed to the additional spectrum from the upcoming AWS and 700 MHz allocations and auctions, but the Commission did not buy this argument when it developed the 70 MHz screen.<sup>8</sup> In fact, the Commission has used the 70 MHz threshold as a trigger for further competitive review as recently as March of this year, *after* the licensing of the AWS spectrum.<sup>9</sup>

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<sup>7</sup> CTIA Opposition at 15-16. Rural Telecommunications Group, while in general agreement with Frontline's anti-competitive concerns, suggests that the figure should be set at 90 MHz rather than 70 MHz because of the recent licensing of AWS spectrum. See Opposition of the Rural Telecommunications Group, Inc. to and Comments on Petitions for Reconsideration, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 9-10 (Oct. 17, 2007).

<sup>8</sup> See Reply Comments of the CTIA, WT Docket No. 01-14, at 22-23 (May 14, 2001) (stating that "the FCC has already commenced proceedings to allocate additional spectrum in recognition" of the "imminent requirement" for the next generation of wireless technologies) (citing *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of AWS Services*, ET Docket No. 00-258 (Jan. 5, 2001) and Policy Statement, *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, 14 FCC Rcd. 19,868 (1999)).

<sup>9</sup> See Memorandum Opinion & Order, *In the Matter of Verizon Communications, Inc., Transferor and America Movil, S.A. DE C.V., Transferee*, 22 FCC Rcd. 6195, 6210 (2007); Order, *In re Applications of E.N.M.R. Telephone Cooperative*, 22 FCC Rcd. 4512 (2007); see also Reply Comments of Verizon Wireless, 700 MHz Auction Rules Proceeding, AU Docket No. 07-157, at 19 (Sept. 21, 2007) (stating that the 70 MHz threshold is used in the transfer of control context).

### **III. LIMITING THE DEFAULT PENALTY TO CASES OF BAD FAITH IS CONSISTENT WITH COMMISSION PRECEDENT.**

Other parties, in addition to Frontline, pointed out that the default penalty should not apply in cases where the D Block winner has negotiated in good faith with the Public Safety Broadband Licensee. As CITA stated, “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.”<sup>10</sup> AT&T and Cyren Call correctly pointed out that the default penalty provision will discourage bidder participation in the D Block auction.<sup>11</sup>

Commission precedent makes clear that the default penalty has been limited exclusively to situations where the sanctioned party was at fault. *See, e.g., In re Wilbur Johnson*, 21 FCC Rcd. 13,198 (2006) (default penalty imposed where winning bidder failed to file long form by required deadline and was therefore found to have defaulted); *Auction of Lower 700 MHz Band Licenses Closes*, 20 FCC Rcd. 13,424, 13,428 (2005) (finding that “if a provisionally winning bidder defaults or is disqualified after the close of the auction,” it will be subject to default payment). Therefore, its use here in the context of the D Block high bidder would constitute a radical departure from past practice. It would also be unfair, unnecessary,<sup>12</sup> counterproductive, unlawful and possibly unconstitutional.

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<sup>10</sup> CTIA Opposition at 20.

<sup>11</sup> *See* AT&T Petition for Reconsideration and Clarification, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 9 (Sept. 24, 2007) (“AT&T Petition”); Cyren Call Petition for Partial Reconsideration and for Clarification, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 7 (Sept. 24, 2007) (“Cyren Call Petition”).

<sup>12</sup> The Commission is empowered to impose fines for rule violators. Accordingly, there is not even a need for the arbitrary and capricious default penalty provision contained in the *Order*.

NATOA, the only party favoring the default penalty, claimed that it “serves as an incentive to the commercial licensee to negotiate in good faith.”<sup>13</sup> However, the problem with the default penalty provision is that it applies in the event of impasse *whether or not* the D Block licensee negotiates in good faith. Deterrence can only work if the threat of punishment — the default penalty — is associated with the commission of an act — bad faith negotiation. But here there is no correlation between the punishment and the act. Under the provision adopted by the Commission, impasse, not bad faith negotiation, is the event that triggers the penalty, and the triggering event can occur even in the case of good faith negotiation by the D Block licensee.

**IV. INTERPRETING, CLARIFYING OR MODIFYING THE DE RULES TO ALLOW A FACILITIES-BASED PROVIDER TO EARN A BID CREDIT WOULD BE APPROPRIATE AND PROMOTE A SUCCESSFUL AUCTION.**

U.S. Cellular Corp. claims that allowing designated entity (“DE”) benefits for otherwise eligible facilities-based providers who intend to wholesale built-out network services would constitute customized rulemaking, and should not be considered in this proceeding.<sup>14</sup> This is incorrect. First, as Frontline demonstrated, this issue is a case of first impression that the Commission has *not* previously addressed. Second, the Commission itself recognized the general applicability of the issue Frontline and others have raised by combining this reconsideration proceeding with the DE eligibility docket where the impermissible material relationships rule was first adopted.<sup>15</sup>

Interpreting or modifying the rules to permit DEs to conduct facilities-based wholesale

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<sup>13</sup> See NATOA Opposition at 6. The *Order* already requires good faith by both parties in their negotiation of the NSA, independent of the default penalty’s application. See *Order* ¶ 447.

<sup>14</sup> See U.S. Cellular Corp. Opposition at 10.

<sup>15</sup> See Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding*, WT Docket No. 06-150 *et al.* (Sept. 27, 2007) (adding WT Docket No. 05-211 to the reconsideration proceeding).

operations has been shown to serve the public interest and fulfill the Congressional mandate incorporated in Section 309(j)(3) of the Communications Act to ensure opportunities for small businesses in spectrum auctions.<sup>16</sup> U.S. Cellular Corp’s flawed procedural cavil should not stand in the way of the Commission’s ensuring that Congress’s mandate of encouraging small business participation is fulfilled.

**V. THE RE-AUCTION PROVISION FOR THE C AND D BLOCKS VIOLATES THE ADMINISTRATIVE PROCEDURE AND COMMUNICATIONS ACTS AND CONSTITUTIONAL SEPARATION OF POWERS PRINCIPLES.**

**A. The Re-Auction Provision Violates The Administrative Procedure Act.**

As Frontline showed in its reconsideration petition, no commenter or prospective bidder could have reasonably predicted, based on the record, that the Commission would take the “unprecedented step”<sup>17</sup> of re-auctioning the C and D Block spectrum, free of any conditions, if its block-by-block reserve prices are not met. The Commission’s failure to give notice of its intent to adopt this re-auction provision deprived affected parties the opportunity to “develop evidence in the record to support their objections to the rule.”<sup>18</sup> In addition, to attribute the failure to reach reserve prices to the open platform conditions, the Commission would necessarily have to have estimated the net benefit of open access obligations. The *Order* implies that the initial bidders’ failure to meet the reserve price would prove that the Commission’s “valuation” of the economic costs and benefits of open access conditions to potential bidders was mistaken, and would signal to the Commission that it undervalued the costs of open access.

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<sup>16</sup> See Reply Comments of Frontline Wireless, Inc., WT Docket No. 06-150 *et al.*, at 38 (June 4, 2007); Google *Ex Parte*, WT Docket No. 06-150 *et al.*, at 4 (July 9, 2007); *Ex Parte* Comments of the *Ad Hoc* Public Interest Spectrum Coalition, WT Docket No. 06-150 *et al.*, at 11-12 (Apr. 3, 2007).

<sup>17</sup> See *Order*, Statement of Commissioner McDowell at 3.

<sup>18</sup> Frontline Petition at 20 (citing *Int’l Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)).

However, the Commission’s *Order* contained no discussion or estimation of the “cost” of open access conditions, nor any discussion of why auction underperformance would signal *only* that the open access “cost estimate” was too high, as opposed to the underperformance being based on other considerations. It is irrational to conclude that bidders’ failure to satisfy inflated reserve prices in the face of a regulatory promise to remove license conditions as a reward for low bids says *anything* about open access, and there is nothing in the record to support the proposition that low bids should be so interpreted.<sup>19</sup>

**B. The Commission Has Violated the Communications Act By Tying Policy To Revenue.**

Tying spectrum policy to the amount of money raised at auction for that spectrum, as the re-auction provision currently does, is contrary to the Communications Act. As Section 309(j)(7) clearly states, “the Commission may not base a finding of public interest, convenience or necessity on the expectation of Federal revenues” from an auction.<sup>20</sup> However, a shortfall in auction revenues in this proceeding — namely, the failure of “Federal revenues” to meet the Commission’s “expectation” as set out in the reserve price — is exactly what will trigger a change in policy. The Act expressly forbids such a relationship between revenues and policy.<sup>21</sup>

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<sup>19</sup> Adopting MetroPCS’s suggestion to remove the reserve price on re-auction, *see* Petition of MetroPCS Communications, Inc. for Clarification and Reconsideration, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket No. 06-150 *et al.*, at 19-20 (Sept. 24, 2007) (“MetroPCS Petition”), would provide further support to the conclusion that the Commission has unlawfully delegated the ability to adopt spectrum policy to a private party in violation of separation of powers principles. *See* III.C. *infra*.

<sup>20</sup> Frontline Petition at 15-16.

<sup>21</sup> If the Commission were to allow bidding credits for entities offering complete wholesale service and who are otherwise eligible, the reserve prices would likely be met, and Frontline would not pursue the objections stated in Section V in this Reply.

**C. Making The Grant Of A Public Benefit Dependent On A Private Third Party's Payment Of The Reserve Price Is An Unconstitutional Subdelegation Of Legislative Authority.**

The Commission found when it provisionally adopted open access conditions on the C Block and the public-private partnership on the D Block that those conditions were in the public interest. But it has not granted those benefits outright; rather, it has conditioned their grant on a private third party's decision as to whether to make a bid equal to the reserve price. By doing so, the Commission has unconstitutionally delegated its legislative authority to a third party.

The U.S. Constitution vests exclusive authority to execute the laws in the legislative branch.<sup>22</sup> However, the Supreme Court has regularly held that it is within Congress's constitutional authority to delegate its legislative power to executive branch agencies, so long as it articulates an "intelligible principle" to guide the agency's exercise of discretion.<sup>23</sup> As to the Commission, Congress's "intelligible principle" is the public interest standard set out in the Communications Act's Section 309(a), which directs the Commission to grant broadcast license applications when it "find[s] that public interest, convenience, and necessity would be served," and Section 316, which gives it the authority to modify a license "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity."<sup>24</sup>

While delegations from Congress to the Commission are consistent with separation of powers principles, it is also well-settled that the Commission, or any other agency, is barred from taking properly delegated legislative authority and subdelegating that authority in turn to a private party. As the D.C. Circuit has found,

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<sup>22</sup> See U.S. Const. Art. I.

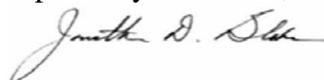
<sup>23</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>24</sup> See *Transp. Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1064 (D.C. Cir. 2003).

[T]he case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization. ... When an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. Also, *delegation to outside entities increases the risk that these parties will not share the agency's national vision and perspective, and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.*<sup>25</sup>

By nullifying the conditions placed on the C and D Blocks as serving the public interest based on the actions of third parties — that is, parties who choose not to submit bids that meet the reserve — the Commission has given auction bidders the ability to overrule its policy choices. To permit private entities unaccountable to the legislative process to hold what is in effect a veto over the Commission's delegated lawmaking authority would violate separation of powers principles, as well as other principles, since “almost the entire determination of whether”<sup>26</sup> to “modify a license to promote the public interest, convenience and necessity” under Section 316 rests with “another actor” — not the agency, but the bidders. It also “increases the risk” that the party receiving the subdelegation “would pursue goals inconsistent with those of the agency and the underlying statutory scheme” — here, the goal of withholding auction bids so as to ensure the reserve price is not met and the spectrum is reaucted free of encumbrances.

Respectfully submitted,



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<sup>25</sup> *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (emphasis added) (citations omitted).

<sup>26</sup> *Id.* at 567.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of October 2007, I caused copies of the foregoing  
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