Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Applications of AT&T Inc. and Dobson	)	
Communications Corporation	)	
	)	WT Docket No. 07-153
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	
	)	
File Nos. 0003092368 *et al.*	)	

PETITION FOR LIMITED CLARIFICATION OF FRONTLINE WIRELESS, LLC

Jonathan D. Blake
Timothy C. Hester
Gerard J. Waldron
James R. Dean, Jr.
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-1401
Counsel for Frontline Wireless, LLC

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SUMMARY

The Commission in its recent *AT&T/Dobson Order* appears to have modified the competitive screen that typically applies to spectrum acquisitions. The Commission's revisions to the screen are procedurally defective, are technically and factually flawed and should not be applicable to future competitive analyses, particularly the processing of 700 MHz long-form applications. Frontline Wireless, LLC ("Frontline") takes no position with respect to the specifics of the AT&T/Dobson transaction before the Commission, but seeks a limited clarification that the Commission's amendment to its threshold used to analyze CMRS spectrum transfers applies only to the AT&T/Dobson merger and will not apply to the 700 MHz auction.

In adopting a new threshold, the Commission failed to provide potentially affected parties with the requisite notice and opportunity to comment on this issue. Further, it ignored important issues regarding market definition and the degree of concentration that is acceptable in the rapidly changing markets for mobile telephony and other wireless services. It is particularly misguided for the Commission to revise its competitive screen at this time. The auction of the newly freed-up, prime 700 MHz spectrum commences in less than two months. The availability of this spectrum has presented a once-in-a-generation opportunity to address many communications issues, including the need for an interoperable network for public safety, the resolution of which is long overdue and pressing. It is therefore essential that the Commission ensure this spectrum is not used for anticompetitive purposes. Thus, in considering whether to grant long-form applications at the conclusion of the auction, the Commission must examine, market by market, various competitive concerns as part of its public interest determination. The Commission should not, and may not, use the premature and procedurally improper revision to

the competitive screen adopted in the AT&T/Dobson transaction to guide its 700 MHz auction determinations; were it to do so, the public interest would suffer.

The Commission should clarify that it will consider the competitive analysis applicable to license applications related to Auctions No. 73 and 76 at the appropriate time and it will not rely on the screen used in the *AT&T/Dobson Order*.

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Frontline Wireless, LLC ("Frontline") hereby petitions for a clarification of that portion of the *AT&T/Dobson Order* that purported to modify the competitive screen the FCC applies to spectrum acquisitions. It does not ask that grant of the AT&T/Dobson applications be reversed.

The imminent auction of the 700 MHz spectrum is an important competitive event in the rapidly changing market for mobile telephony. Consistent with its public interest mandate, the Commission should prevent anticompetitive consequences in that auction from frustrating the pro-consumer promise of that spectrum.[1] An acquisition by either Verizon or AT&T of significant amounts of 700 MHz spectrum would require detailed competitive analysis even if the Commission applied the revised threshold adopted in the *AT&T/Dobson Order*. However, the Commission should not apply the single, undifferentiated (and now less stringent) numerical screen from that *Order* to its review of the long-form applications filed by high bidders in the

[1] *See* Supplemental Comments of Frontline Wireless, LLC, AU Docket No. 07-157 (Sept. 21, 2007) ("Supplemental Comments"); Petition for Reconsideration of Frontline Wireless, LLC, WT Docket Nos. 06-150, 01-309, 03-264, 06-169, 96-86, CC Docket No. 94-102, PS Docket No. 06-229 (Sept. 24, 2007).

700 MHz auction. It should not do so because the screen was adopted with no prior public notice and without a supporting factual record and because of serious defects in the new screen.

A further reason for the Commission not to prejudge what concentration analysis is appropriate for the 700 MHz long-form applications is that the commercial mobile radio service in this country is already highly concentrated and consolidation has steadily concentrated since removal of the spectrum caps in 2003. Currently, two firms account for 53% of all industry CMRS revenue, and four firms account for 90%. According to the Department of Justice's common measure of market concentration, the wireless market is highly concentrated. The measure of market concentration ("HHI") in the wireless service industry at the end of 2005 was over 2,700 – well above the 1,800 figure that the Department of Justice finds to be highly concentrated.[2] Moreover, the two largest firms offer the broadest coverage for wireless, which allows them to charge wireless prices much higher than small firms. Verizon and AT&T's recently announced spectrum swap is further confirmation of the cartelization of the wireless market.[3] Verizon and AT&T have the great advantage of owning spectrum derived from the original cellular grants in the late 70s and early 80s, which like the 700 MHz spectrum, came from UHF television channels. The long wavelengths, relative to PCS or AWS spectrum, lead to unique coverage advantages. Additionally, the two leading firms each have even greater shares in their home wireline markets, and are in a unique position to offer a triple-play of wireless

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[2] *See* Frontline Initial Comments, WT Docket No. 06-150, Exhibit 1 at § 3.1 (May 23, 2007).

[3] Elena Malykhina, *AT&T, Verizon To Swap Rural Wireless Assets*, InformationWeek, Dec. 4, 2007, *available at* http://www.informationweek.com/management/showArticle.jhtml;jsessionid=43VTF3R0PUHLYQSNDLQSKICCJUNN2JVN?articleID=204700537.

service, broadband (DSL or fiber), and wireline phone. As they build out their fiber optic facilities they will offer a quadruple play that also includes video programming.

As Frontline has noted to the Commission in the *700 MHz Proceeding*, the current holdings of CMRS spectrum in the top 100 markets is very concentrated among a few carriers.[4] Consequently, acquisitions by existing CMRS spectrum licensees in the 700 MHz auction would raise serious competitive concerns in the majority of these geographic markets. In light of these high levels of concentration, it is imperative that the Commission undertake a detailed competitive analysis in the 700 MHz auction to determine whether competition will be inhibited and as it has done in the past examine whether any spectrum acquisitions will constrain the "deployment of next generation services."[5] The Commission's 95 MHz threshold from the recent *AT&T/Dobson Order* is flawed and cannot be used as the benchmark for making paramount wireless concentration determinations in evaluating the 700 MHz long-form applications.

I. Background

Frontline was not previously a party to the AT&T/Dobson proceeding, which involved Commission review of the acquisition by the largest national wireless provider of a relatively small wireless operator that serves predominately rural areas. AT&T and Dobson did not request that the Commission revise the competitive screen it has relied on to evaluate at least five recent

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[4] *See* Supplemental Comments at 9, Exhibit 2.

[5] In a July 2005 order analyzing the public interest impact of a potential merger between Alltel and Western Wireless Corp., the Commission used the 70 MHz screen as a starting point to determine whether such "a large enough share of the available spectrum" in a single entity was "such that other carriers may be constrained in the deployment of next-generation services." Memorandum Opinion & Order, *In the Matter of Applications of Western Wireless Corp. and ALLTEL Corp.*, 20 F.C.C. Rcd. 13,053 at 13,074 ¶ 49 (2005) (Alltel-Western Wireless Order).

transactions. Nevertheless, the Commission, acting *sua sponte*, made a radical change in its established form of analysis.[6]

Prior to the *AT&T/Dobson Order*, the FCC had considered approximately 200 MHz of spectrum suitable for CMRS providers. Transactions that would result in one entity holding 70 MHz or more of spectrum in a given geographic market would receive special competitive scrutiny. The 70 MHz threshold was selected as the maximum that would leave sufficient spectrum for three or more additional competitors to operate in the market.[7] Accordingly, AT&T and Dobson and the petitioners to deny used the 70 MHz screen to determine which, if any, of the proposed geographic markets affected by the transaction might be subject to competitive harm such that further Commission scrutiny was warranted.[8]

In the *AT&T/Dobson Order*, however, the Commission unexpectedly went beyond the scope of the applications before it and modified its existing screen to add 80 MHz of 700 MHz spectrum to the input market "for spectrum associated with the provision of mobile telephony services." The Commission purported to "apply[] the same analysis as in … recent [mobile telephony spectrum] merger orders,"[9] but instead the Commission announced its intention to "include 700 MHz spectrum in the initial spectrum screen," due to the 700 MHz spectrum's

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[6] Because Frontline was not on notice that the long-standing competitive screen would be revised, Frontline had no reason to participate in the earlier stages of this proceeding and therefore qualifies to file the present Petition pursuant to 47 C.F.R. § 47.106(b)(2).

[7] *See, e.g.*, Alltel-Western Wireless Order at ¶ 49; Memorandum Opinion & Order, *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corp.*, 20 F.C.C. Rcd. 13,967 at 13,993 ¶ 63 (2005); Memorandum Opinion & Order, *In the Matter of Applications of AT&T Wireless Servs., Inc. and Cingular Wireless Corp.*, 19 F.C.C. Rcd. 21,522 at 21,568 ¶ 106 (2004).

[8] *Order* ¶ 29 (citing AT&T/Dobson Transfer of Control Application, Exhibit 1; Mid-Tex Cellular Petition to Deny, at 2 n.3).

[9] *Order* ¶ 17.

"availability and suitability on a nationwide basis for the provision of mobile telephony services."[10] Surprisingly, the Commission used this relatively minor transaction to announce -- without prompting by the parties -- that "95 MHz, rather than [the] 70 MHz that we have previously used," would be the applicable screen. In adopting the new figure, the Commission reasoned that "the total amount of spectrum suitable for mobile telephony nationwide [was now] approximately 280 MHz," because, among other reasons, the 80 MHz of 700 MHz spectrum to be auctioned beginning in January 2008 was now "available for more immediate use"[11] and is "in many respects ideally suited for the provision of [mobile telephony] services."[12]

In addition, the Commission stated that it would include AWS-1 spectrum in the competitive screen for those markets where (i) the initial 95 MHz screen was triggered, and (ii) the AWS-1 band had been cleared in that particular market. In markets where AWS-1 spectrum is available, the denominator increases to 370 MHz, regardless of whether AWS spectrum is actually being used in that market for mobile telephony services or will be available in the foreseeable future (*i.e.*, the next 24 months).

II. The Commission's Revisions to the Competitive Screen Are Procedurally Defective and Should Not Be Assumed Applicable to Long Form 700 MHz Applications.

The FCC acted arbitrarily and capriciously by including the 700 MHz spectrum in the initial competitive screen and AWS spectrum in the overall competitive analysis. As noted by the dissents of Commissioners Copps and Adelstein, the *AT&T/Dobson Order* ignores the significant uncertainties as to how the 700 MHz spectrum will be used and on what timetable. In

[10] *Id.* ¶ 30.

[11] *Id.* ¶ 28 (quoting *CGI-Alaska DigiTel Order*, 21 F.C.C. Rcd. 14,863 at 14,878-79 ¶ 30 (2006)).

[12] *Id.* ¶ 31.

addition, until the ownership of the 700 MHz spectrum is determined, it is impossible to rely on that spectrum as offering a competitive constraint to AT&T and Dobson, the merging parties.[13]

It is well established that, during rulemaking, an agency cannot adopt a decision without providing opportunity for notice and comment.[14] However, even in the adjudicatory context, "the requirement of reasonable procedure, with fair notice and opportunities to the parties to present their case" obliges the Commission, when "changing its course," to "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." If the Commission "glosses over or swerves from prior precedents," its decisions are vulnerable upon judicial review under the Administrative Procedure Act's arbitrary and capricious standard.[15]

By including the as-yet-unauctioned 700 MHz spectrum in the new screen's denominator, without meaningful analysis or adequate explanation, the Commission's decision to adopt the 95 MHz screen fell far short of this standard. In the *Order*'s single paragraph discussing the incorporation of 700 MHz spectrum into the screen, the Commission found that because the

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[13] *See* Statement of Commissioner Michael J. Copps, Concurring in Part, Dissenting in Part (noting that "we have no idea who will be the relevant licensees (the identity of which could be highly important to the maintenance of competition.")).

[14] 7 U.S.C. § 553(b)-(c).

[15] *Greater Boston Television v. FCC*, 444 F.2d 841, 852-53 (1970), *cert. denied*, 403 U.S. 923 (1971); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (finding the "generally applicable standards of § 706" of the APA to apply to informal adjudications, including § 706(2)(A)'s requirement that an agency action in an adjudication "followed the necessary procedural requirements"). Section 706(2)(A), "which directs a court to ensure that an agency action is not arbitrary and capricious or otherwise contrary to law, imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable [a] court to evaluate the agency's rationale at the time of the decision." *PBGC v. LTV Corp.*, 496 U.S. 633, 644 (1990). As discussed *infra*, the Commission failed to take the necessary "steps" to enable an adequate determination as to whether 700 MHz spectrum should be included in its initial screen.

spectrum "will be licensed and available in the sufficiently near term," "the prospect of its availability will discipline current market behavior."[16] This ignores, however, the unprecedented conditions the Commission has placed on the C and D Blocks, which respectively require the licensees to offer their network on an open basis and to build a state-of-the-art broadband network to be shared with public safety.[17] While these conditions clearly serve the public interest, their attachment to the C and D Blocks raises serious questions of whether the 700 MHz spectrum will be available in the foreseeable future to "discipline current market behavior." "[B]y entirely fail[ing] to consider" several "important aspect[s] of the problem," the Commission contravened the APA's "reasoned decision-making" requirement.[18] In any event, the holdings in the *AT&T/Dobson Order* cannot be allowed to control decisions with respect to the long-form review process after the 700 MHz auction has closed.

The Commission's "one size fits all" approach for all CMRS spectrum also fails to account for the unique nature of the 700 MHz spectrum to be auctioned. On numerous occasions the Commission has recognized the especially favorable propagation characteristics of 700 MHz spectrum and expressed hope that new competition would emerge as a result of Auction No. 73. Yet, the mechanical screen announced in the *AT&T/Dobson Order* fails to address any of the unique aspects of the 700 MHz spectrum to be auctioned in six weeks. That failure to address

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[16] *Order* ¶ 31.

[17] *See id.* ¶¶ 222-224 (C Block requirements); ¶¶ 386-469 (D Block requirements).

[18] *Qwest Corp. v. FCC*, 258 F.3d 1191, 1205, 1199 (10th Cir. 2005); *see also Coalition for Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1361 (D.C. Cir. 1990) (when applying transfer of control policies during an adjudication, Commission cannot depart from precedent unless it "explains why and what it is doing, and complies with its process requirements"). The fact that the auction commencement, Treasury deposit, and incumbent clearance dates are all set by statute, *see Order* ¶ 31, bears no relevance to when or whether the spectrum will be available for use in the near future, given its stringent, unprecedented build-out and technical requirements.

the actual competitive dynamics of the marketplace will be particularly harmful to consumers in rural areas, who are more likely to have fewer choices of wireless providers (often limited to the two cellular licensees). The loss of the potential competition resulting from AT&T or Verizon's acquiring the nationwide D Block or regional C Block licenses must be part of any competitive analysis. Consequently, regardless of what numerical screen the Commission uses to evaluate long-form applications in the 700 MHz auction, it must not be a substitute for the necessary public interest assessment which should be performed on *all* potential acquisitions.

While the *AT&T/Dobson Order* is an adjudication in the standard sense — a determination to grant transfer of control of spectrum as between two parties — the adoption of a new screen in that proceeding could be interpreted to control Commission consideration of the 700 MHz long-form applications. In that case, the *Order* would have the effect of modifying a principle of general applicability, which can only be done following the appropriate notice and with due consideration of the relevant substantive issues. While the *Order* accurately states that the screen has been applied on a merger-by-merger (and adjudication-by-adjudication) basis, it ignores the fact that the decision to "move from the use of inflexible spectrum aggregation limits to case-by-case review of spectrum aggregation and enforcement of other safeguards" was made on a rulemaking record, with full opportunity for presently and prospectively affected parties to comment. [19] In short, the Commission should not adopt changes to an analysis generally applicable to *all* spectrum acquisitions in the discrete context of one transfer of control application.[20] To depart from a principle announced and reaffirmed in its prior recent decisions,

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[19] *In re 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 F.C.C. Rcd. 22,668, at 22,671-72 ¶ 6 (2001).

[20] The Commission implied that its *GCI-Alaska DigiTel Order* contemplated the possibility that the screen might be raised, but to contemplate a possible change in an adjudication only (continued…)

while failing to consider evidence clearly relevant to the decision to depart from established precedent, is the essence of arbitrary and capricious decisionmaking.

The acquisition of large and highly valuable spectrum that will occur as a result of the 700 MHz auction heightens the importance of an accurate and appropriate competitive screen. Notwithstanding the removal several years of spectrum caps for wireless operators, "all non pro forma license transfers are still subject to review by the Commission to determine whether they are in the public interest."[21] The Commission need not disturb the grant of the AT&T/Dobson application, but the Commission should make clear that in processing the numerous long-form applications that will be filed at the conclusion of Auctions No. 73 or 76, the Commission will assess the competition consequences of granting the applications on a case-by-case basis with no presumption that the screen used in the *AT&T/Dobson Order* is appropriate.

III. The 95 MHz Threshold is Technically and Factually Flawed.

The denominator of the screen adopted in the *AT&T/Dobson Order* overstates the amount of spectrum usable for CMRS services by including 12 MHz of unpaired 700 MHz spectrum in the amount available for mobile telephony services. Unpaired spectrum is currently being used only for one-way mobile video services and is unlikely to support mobile telephony service in the near future. Further, the Commission's prior use of "approximately 200 MHz" of CMRS

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applicable to that particular proceeding is insufficient procedural cover. In addition, by the Commission's own admission, the *GCI-Alaska DigiTel Order* anticipated that AWS-1 spectrum availability might factor into its modification of the screen — a conclusion the *AT&T/Dobson Order* flatly rejected. *See Order* ¶¶ 32-33 (declining to include AWS-1 spectrum in the screen denominator on a nationwide basis because it will take years to clear). And as noted, even the parties to the transaction could not discuss the possibility of raising the screen in their pleadings to the agency, for they could not have anticipated it.

[21] Eleventh Annual CMRS Report at ¶ 65 n. 145.

spectrum in the cellular, SMR and PCS bands overstates the true amount of spectrum available, because it improperly includes 30 MHz of SMR spectrum.

The procedure for a market-by-market determination of whether AWS spectrum should be included in the screen for a particular market suffers from a similar technical flaw. The FCC assumes that AWS spectrum will be used in any geographic market in which interfering uses have been cleared. But this ignores the fact that AWS-based services are not generally in use today and do not appear to be coming on-line within the next 24 months.[22] Just because the AWS spectrum is cleared of interfering uses in a particular local market does not mean that AWS spectrum is necessarily viable for CMRS use. Absent sufficient nationwide scale to support roll out of such services, equipment manufacturers and wireless providers will not offer service utilizing the AWS band in particular markets. Nor is it clear that all of the 700 MHz band will be put to widespread use in the next 24 months.[23] That is particularly true of the D Block which faces a long negotiation and licensing process.

IV. Various Factors Not Taken Into Account in the *AT&T/Dobson Order* Should Be Assessed in the Processing of 700 MHz Long-form Applications.

It is not necessary or even desirable to describe in depth here all of the additional factors and circumstances that the Commission should take into account in evaluating the anticompetitive consequences of granting 700 MHz licenses to spectrum-heavy incumbents. But

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[22] See Paul Kirby, "Wireless Industry Growing Frustrated With Pace of Government Band Clearing," *TR Daily*, May 7, 2007; Paul Kirby, "Speakers Cite Progress in Clearing Government Bands for AWS Services," *TR Daily*, Dec. 10, 2007; United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 3.2 (Revised Apr. 8, 1997), available at http://www.usdoj.gov/atr/public/guidelines/hmg.pdf.

[23] The Commission must not make a determination at this point as to how to count AWS spectrum for the 700 MHz auction. This should be done on a case-by-case basis in the long-form application stage of the 700 MHz auction.

here is an illustrative list, almost none of which was considered in connection with the Commission's adoption of the new screen in the *AT&T/Dobson Order*.

- the growing cartelization of CMRS spectrum by four national wireless carriers with dominance rapidly accreting to two carriers,
- the dominance of these two carriers in the wireline service industry,
- the fact that nationwide roaming is becoming more important for smaller regional carriers just as the number of potential roaming partners is shrinking,
- the huge competitive advantages of the two dominant national carriers with substantial below-1GHz spectrum, and
- the Commission's obligation to determine the appropriate geographic markets for evaluating the competitive consequences of various spectrum acquisitions

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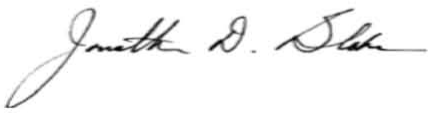
For these reasons, the Commission should clarify that the portion of the *Order* modifying its initial screen from 70 MHz to 95 MHz will not automatically govern other transactions and, in particular, long-form applications in the 700 MHz auction.

Respectfully submitted,



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