BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from **DOBSON CC LIMITED PARTNERSHIP** Transferor to **AT&T INC.** Transferee	)	WC Docket No. 07-153

OPPOSITION OF AT&T INC.
TO PETITION FOR LIMITED CLARIFICATION
OF FRONTLINE WIRELESS, LLC

AT&T Inc. ("AT&T"), on behalf of itself and its wholly-owned subsidiary Dobson Communications Corporation ("Dobson"), hereby opposes the Petition for Limited Clarification (the "Petition") filed by Frontline Wireless, LLC ("Frontline") of the Commission's Memorandum Opinion and Order in the above-captioned proceeding.[1] Frontline's Petition challenges the initial spectrum screen the Commission used in the proceeding to analyze the competitive effects of the merger, and seeks clarification that the Commission will not apply the same screen when evaluating the long-form applications in the upcoming 700 MHz Auction. The Petition should be summarily dismissed.

[1] *In re Applications of AT&T Inc. & Dobson Commc'ns Corp. for Consent to Transfer Control of Licenses & Authorizations*, WT Dkt No. 07-153, Memorandum Opinion and Order, FCC 07-196 (rel. Nov. 19, 2007) ("*AT&T/Dobson Order*").

While Frontline styles its filing as a petition for "limited clarification," the Petition is just another effort by Frontline to challenge – this time in an unrelated proceeding – the Commission's rejection of efforts to have the Commission adopt spectrum caps and small spectrum screens in the forthcoming 700 MHz Auction.[2] The Petition is an unauthorized pleading, is procedurally defective, and is utterly without merit. The Commission should promptly dismiss it.

I. Frontline's Petition Is an Unauthorized Pleading.

While Frontline relies on Section 1.106(b) of the Commission's rules as the source of authority for its filing, that section governs petitions for reconsideration. However, Frontline expressly states that it is not seeking reconsideration of the Commission's decision to grant the transfer of control applications.[3] Thus, the Petition is not authorized by the rule.

What Frontline is really seeking is an advisory opinion from the Commission addressing the manner in which the Commission will evaluate long-form applications filed once the 700 MHz Auction is complete. However, the Commission generally disfavors advisory opinions[4] and Frontline has made no showing, nor can it, that the issue it has raised warrants

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[2] In the 700 MHz Auction proceeding, the Commission rejected any restrictions on the amount of spectrum any bidder might acquire as a result of the auction. *In re Services Rules for the 698-746, 747-762 & 777-792 MHz Bands, et al.*, Second Report and Order, 22 FCC Rcd. 15289, ¶¶ 256-59 (2007) ("*700 MHz Second Report and Order*").

[3] Petition at 1.

[4] *See, e.g.*, *In re Comcast of Minnesota, Inc.*, Order, 20 FCC Rcd. 20157, ¶ 17 (MB 2005); *In re Time Warner Cable*, Memorandum Opinion and Order, 13 FCC Rcd. 13795, n.9 (CSB 1998). Further, the Petition does not seek clarification of an issue that might be appropriate for a declaratory judgment. *See* 47 C.F.R. § 1.2 (stating that the Commission may issue a declaratory ruling "terminating a controversy or removing uncertainty"); *In re Pub. Serv. Comm'n of Md. & Md. People's Counsel Applications for Review of a Memorandum Opinion & Order by the Chief, Common Carrier Bureau Denying the Pub. Serv. Comm'n of Md. Petition for Declaratory Ruling Regarding Billing & Collection Servs., the Pub. Utils. Comm'n of N.H. Petition for Rule Making Regarding Billing and Collection Servs.*, Memorandum Opinion and Order, 4 FCC Rcd. 4000, ¶ 30 ("This Commission envisioned that the procedure could be used to resolve controversies between carriers and their customers or controversies among carriers relating to

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such an opinion in this proceeding. Indeed, Frontline's issue is utterly unrelated to the Commission's evaluation of whether the AT&T/Dobson merger serves the public interest and has no place in this proceeding.[5]

II. Frontline Lacks Standing To Challenge the Initial Spectrum Screen.

Even assuming *arguendo* that Frontline's Petition is deemed a petition for reconsideration, Frontline lacks standing to file the Petition. As Frontline concedes,[6] it did not participate in the proceeding below. Under Section 1.106(b), Frontline must "show good reason why it was not possible for [it] to participate in the earlier stages of the proceeding."[7] Frontline has not borne that burden.

Contrary to Frontline's assertions, the Commission did not revise its initial spectrum screen *sua sponte*. AT&T and Dobson squarely questioned the continued relevance of the 70 MHz initial spectrum screen in the Joint Opposition they filed in the proceeding below, and discussed at length the additional spectrum the Commission should take into account in assessing

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their rights or duties under the Communications Act, under this Commission's rules, or under prior Commission orders. . . . An interested person who believes an unambiguous Commission decision is incorrect, however, should either file a timely petition for reconsideration with this Commission or a timely appeal or petition for review with an appropriate Court of Appeals. Such persons should not attempt to use a petition for declaratory ruling as a substitute for a petition for reconsideration.").

[5] As discussed below, if anything, Frontline's concern should be addressed in response to Frontline's numerous filings in the Commission's rulemaking proceedings for the upcoming 700 MHz Auction. *See* Reply of Frontline Wireless, LLC to Oppositions to Petitions for Reconsideration, WT Dkt No. 06-150, *et al.* at 3-4 (filed Oct. 29, 2007); Opposition of Frontline Wireless, LLC to Petitions for Reconsideration, WT Dkt No. 06-150, *et al.* at 2-3 (filed Oct. 17, 2007); Petition for Reconsideration of Frontline Wireless, LLC, WT Dkt No. 06-150, *et al*. at 8-11 (filed Sept. 24, 2007); *see also* Supplemental Comments of Frontline Wireless, LLC, AU Dkt No. 07-157 (Sept. 21, 2007).

[6] Petition at 3.

[7] 47 C.F.R § 1.106(b)(1). Further, the Commission must dismiss the Petition because Frontline has not shown that its "interests are adversely affected by the action taken." *Id.* Frontline makes no showing that the initial spectrum screen used in this proceeding will in any manner adversely affect its ability to be a successful bidder in Auction No. 73.

the impact of the merger on the spectrum available for mobile telephony.[8] Although given the opportunity under the procedures established by the Commission,[9] Frontline did not file a response to the Joint Opposition nor did it submit an *ex parte* filing disputing AT&T's and Dobson's position that the historic 70 MHz screen was outdated during the two months between the filing of the Joint Opposition and the release of the Commission's *Order*. Having failed to participate below, Frontline does not have a basis under Section 1.106(b)(1) to file a petition now.[10]

III. The Commission's Revisions to the Initial Spectrum Screen Are Consistent with the Administrative Procedure Act.

Frontline's assertions under the Administrative Procedure Act ("APA") can be easily dismissed. First, the *AT&T/Dobson* proceeding was not a rulemaking proceeding, and the Commission's definition of the spectrum input market for purposes of the initial spectrum screen is not a "rule" subject to the APA "notice and comment" procedures.[11] Rather, the

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[8] Joint Opposition of AT&T Inc. & Dobson Commc'ns Corp. to Petitions to Deny and Reply to Comments, WT Dkt No. 07-153, at 2-7 (filed Sept. 6, 2007) ("Joint Opposition").

[9] *AT&T Inc. & Dobson Communications Corp. Seek FCC Consent to Transfer Control of Licenses & Authorizations*, Public Notice, 22 FCC Rcd. 13659 (WTB 2007) (establishing pleading cycle that included the opportunity for parties to file replies seven days after oppositions were due and applying permit-but-disclose *ex parte* procedures).

[10] Under Section 1.106(f), Frontline was required to serve AT&T and other parties to the proceeding with a copy of its petition. 47 C.F.R. § 1.106(f); *see also id.* § 1.47. It did not do so, and its petition should be dismissed for that reason alone.

[11] *See* 5 U.S.C. § 553 (requiring notice and comment procedures in rulemaking proceedings). The initial spectrum screen is not a rule, which Section 551 of the APA defines as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). The screen satisfies none of those criteria nor does it "'grant rights, impose obligations, or produce other significant effects on private interests,' . . . or . . .'effect a change in existing law or policy.'" *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (internal citations omitted); *see also Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) ("[A] substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And, it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment.") (emphasis in original). The spectrum screen is instead an analytical tool,

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Commission's screen is simply one analytical tool used by the Commission to evaluate the competitive effects of an application proposing a merger of regulated carriers. Frontline does not challenge, nor can it, the Commission's discretion to use or adopt such a decisional tool in an adjudicatory proceeding.[12] It is well established that administrative agencies have the right to develop decisional standards in adjudicatory proceedings on a case-by-case basis,[13] and a case-by-case approach is particularly appropriate in merger proceedings given the fact-intensive nature of the competitive analysis required.[14]

Second, just as the Commission can adopt the decisional criteria it will apply to resolve adjudicatory proceedings, it has a right to evaluate how those criteria apply to evolving facts and circumstances presented in subsequent adjudications and modify applicable guidelines when the facts and circumstances warrant.[15] When it first adopted the initial spectrum screen in its

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comparable to proximate cause, that provides a decisional structure by which the Commission can determine whether a merger application poses a serious threat to competition and is consistent with the public interest.

[12] *See Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947).

[13] *Id*. at 203; *see also Cassell v. FCC*, 154 F.3d 478, 485-86 (D.C. Cir. 1998) (stating that it was proper in an adjudication for the Commission to establish a benchmark to interpret what constituted "substantial accordance" with license requirements).

[14] *See Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1463-64 (D.C. Cir. 1996) (finding that it is appropriate for the Commission to decide a request for waiver of the duopoly rule in an adjudication, rather than in a rulemaking proceeding, given the fact-intensive nature of the Commission's role in such proceedings).

[15] *See, e.g., Nat'l Labor Relations Bd. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294-95 (1974) (upholding NLRB's discretion to interpret a statutory term based on specific characteristics of certain employees of regulated companies, particularly since the industry's reliance on the Board's past decisions would not result in adverse consequences, such as new liability, fines or damages); *Office of Commc'n of the United Church of Christ v. FCC*, 590 F.2d 1062, 1070 (D.C. Cir. 1978) (upholding the Commission's decision in an adjudicatory proceeding to expand its interpretation of the on-the-spot coverage of news event exception to the equal opportunity requirement of Section 315 by providing that broadcasts delayed up to one day presumptively fall within the exemption); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852-53 (D.C. Cir. 1970) (recognizing that the Commission's view of what is in the public interest may change).

decision approving the merger of Cingular Wireless and AT&T Wireless,[16] the Commission defined the input spectrum market based on "spectrum that is suitable for provision of mobile telephony services."[17] The Commission identified several criteria that would be used to determine what constitutes suitable spectrum,[18] and it used that very standard in the *AT&T/Dobson Order*.[19] However, applying the criteria to the facts, the Commission found that the amount of spectrum that is suitable for mobile telephony services has increased and adjusted the spectrum aggregation screen accordingly.[20] That decision fully complied with the APA and the decisions implementing it. Under those decisions, the Commission only is required to provide a reasonable explanation for any change in its decisional criteria.[21] Here, the Commission clearly provided a reasoned explanation as to why the 700 MHz spectrum met the mobile telephony "suitability" criteria.[22]

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[16] *See In re Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp. for Consent to Transfer of Control of Licenses & Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶ 109 (2004) ("*Cingular/AT&T Wireless Order*").

[17] *Id*. ¶ 81.

[18] *Id*. ("Suitability is determined by the physical properties of the spectrum, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony.").

[19] *See AT&T/Dobson Order* ¶¶ 26-31 (describing its analysis of the input market for spectrum based on its suitability for the provision of mobile telephony services and citing *Cingular/AT&T Wireless Order*).

[20] *Id*. ¶ 30.

[21] *See Greater Boston Television Corp.*, 444 F.2d at 852-53 (stating that an agency must articulate a reasoned analysis when it deliberately changes prior policies and standards and concluding that the Commission set forth a "reasoned decision" for applying different decisional criteria than it normally applied in a renewal proceeding).

[22] *AT&T/Dobson Order* ¶ 31 (explaining that the 700 MHz spectrum is technically capable of supporting mobile services, that it is ideally suited for the provision of these services, and that it will be licensed and available on a nationwide basis in less than a year and a half based on the statutory deadlines for commencing the auction, depositing the proceeds with the U.S. Treasury and clearing the spectrum of broadcast incumbents).

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IV. This Merger Proceeding Is Not the Appropriate Proceeding to Consider Frontline's 700 MHz Auction Concerns.

Finally, Frontline's backdoor effort to get the Commission to adopt a spectrum aggregation screen for the upcoming 700 MHz Auction is irrelevant to this proceeding and should be summarily dismissed. The Commission already has made clear in its *Order* that this merger proceeding is not the appropriate forum to address spectrum aggregation limits for the upcoming 700 MHz Auction. In its petition to deny the transaction, Mid-Tex Cellular Ltd. argued that, as a condition of the merger, the Commission should impose certain spectrum aggregation limits on AT&T's participation in the upcoming 700 MHz Auction.[23] The Commission denied Mid-Tex Cellular's proposed condition and stated that the appropriate forum to address whether spectrum aggregation limits should apply to the 700 MHz Auction was in "the context of that rulemaking proceeding."[24] Because Frontline's Petition raises arguments

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In any event, while public notice and comment were not required under the APA, the Commission placed Frontline and others on notice at the time it adopted the screen – and in subsequent adjudicatory proceedings – that it would continue to evaluate in merger proceedings the types of spectrum to include in the input spectrum market for purposes of calculating the initial spectrum screen. *See, e.g., In re Applications for the Assignment of License from Denali PCS, L.L.C to Alaska Digitel, L.L.C. & the Transfer of Control of Interests in Alaska Digitel, L.L.C. to General Commc'n, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd. 14863, ¶ 30 (2006) (stating that in the near future it would need to re-evaluate whether additional spectrum should be viewed as suitable for mobile telephony services); *In re Applications of Midwest Wireless Holdings, L.L.C. & ALLTEL Commc'ns, Inc. for Consent to Transfer Control of Licenses & Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd. 11526, n. 129 (2006) (accord); *In re Applications of Nextel Commc'ns, Inc. & Sprint Corp. for Consent to Transfer Control of Licenses & Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13967, n.156 (2005) (accord); *Cingular/AT&T Wireless Order* at n.283 (noting that Advanced Wireless Service and Multipoint Distribution Service spectrum did not currently meet the Commission's criteria because it was committed to non-mobile telephone uses currently and for the near-term future). In addition, as discussed above, the AT&T/Dobson Joint Opposition provided Frontline sufficient notice that the issue of the spectrum suitable for mobile telephony was before the Commission in the proceeding, and the Commission's procedures allowed for public comment in response to the Joint Opposition.

[23] *See* Petition to Deny of Mid-Tex Cellular Ltd., WT Dkt No. 07-153, at 7 (filed Aug. 27, 2007).

[24] *AT&T/Dobson Order* ¶ 93.

that have been previously considered and rejected, it should be denied.[25] Moreover, as noted above, Frontline currently has pending before the Commission a petition for reconsideration of the *700 MHz Second Report and Order* in which it raises the very concerns it raises here.[26] That industry-wide proceeding is the appropriate forum to address Frontline's concerns, not this merger proceeding.[27] Any further deliberations about the 700 MHz Auction rules in this proceeding would be improper and a waste of Commission resources.

[25] *See In re Infinity Broad. Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd. 4216, ¶ 2 (2004).

[26] *See* Petition for Reconsideration of Frontline Wireless, LLC, WT Dkt No. 06-150, *et al*. at 8-11 (filed Sept. 24, 2007). As AT&T has shown in response to that petition, Frontline's assertions are entirely without merit. *See* Opposition To, and Comments On, Petitions for Reconsideration, AT&T Inc., WT Dkt No. 06-150, *et al*., at 2-5 (filed Oct. 17, 2007).

[27] In any case, AT&T is unaware of any CMRS auction proceeding since the Commission lifted the spectrum cap on January 1, 2003 in which the Commission has adopted a spectrum aggregation screen as part of its auction procedures.

V. Conclusion

For all of the foregoing reasons, AT&T urges the Commission promptly to deny Frontline's Petition for Limited Clarification.

Respectfully submitted,

AT&T Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2007, I caused true and correct copies of the foregoing Opposition of AT&T Inc. to the Petition for Limited Clarification of Frontline Wireless, LLC to be served by first class mail, postage prepaid, or electronic mail to the following:

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