

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

In the Matter of )  
 )  
Competitive Bidding Procedures ) AU Docket No. 07-157  
for Auction 73 )

To: Wireless Telecommunications Bureau

**COMMENTS OF FRONTLINE WIRELESS, LLC**

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## SUMMARY

The 700 MHz auction is positioned to serve communications policy goals of historic proportions. The service rules suffer from several key impediments that Frontline Wireless will address on reconsideration. But the auction rules addressed in these comments will also have a major impact on whether the Commission's and Congress's policy goals are effectively implemented or undercut and thwarted.

First, the Bureau has proposed reserve prices that are arbitrary, unsupported by the record, and irrational in that the methodology used to reach them do not reflect the goals stated in the *700 MHz Order*. More importantly, the proposed reserve prices are filled with potential for causing a failed auction. Set at this high level, the prices will depress bidder interest and, coupled with the re-auction proposal, will incentivize strategic behavior by those who want this auction to fail, and thereby jettison the open access requirements and public safety sharing requirements. The proposed reserve prices are too high because, among other reasons, they fail to take into account their special requirements. Most glaringly, the shared public/private network for public safety's benefit will easily cost \$5 billion more for the D Block licensee to construct than a comparable commercial network; yet the Bureau proposes to discount the reserve price for the D Block by only \$400 million. As the attached economist paper shows, the proposed reserve prices also ignore the massive global credit debacle of the last two months, which is widely acknowledged to have long-term consequences for the market. Indeed, an increase of just 3% in the cost of capital shrinks the present value of future spectrum earnings from \$5 billion to \$2.5 billion. These problems could be answered by dropping the reserve prices in this auction to levels that worked in past auctions – a fourth to a fifth of the current amount.

Second, the Bureau should recognize that package bidding on the C Block regional licenses and bidding on the national D Block license will be seen by some parties as substitutes. Accordingly, the activity rule should be modified, as detailed in the attached Cramton Rosston et al. paper, to facilitate bidders being able to move between the two blocks. This will serve the public interest in an efficient auction.

Third, the auction must be conducted fairly and without collusion. Both the Commission and the Department of Justice have recognized the importance and complexity of this challenge. As it has in the past, the Commission should promptly provide public warning that:

- the antitrust prohibitions against bid rigging and bid signaling apply now – before the Commission’s anti-collusion and anonymous bidding rules become effective;
- bid signaling can be effectuated not only between bidding parties but also through unilateral public statements by one bidding party or through non-complicit third-party conduits, including Commission personnel, the press, and financial analysts;
- potential bidders with market power must exercise special care about bid signaling because of their greater ability to distort the bidding process; and
- the Commission will refer any suspicious evidence of collusion, bid rigging or bid signaling to the Department of Justice, which is empowered to impose criminal penalties.

Finally, the Commission's traditional concerns regarding spectrum concentrations in highly consolidated markets should guide its auction procedures here. Therefore, it should require as part of the short-form application process that applicants disclose whether, if they won the licenses in question, their spectrum holdings in any specific market would encompass 70 MHz or more of CMRS spectrum. If so, that bidder should be disqualified from bidding for the license in question. Requiring subsequent divestiture as an alternative would not be sufficient; the results of the auction would already have been distorted, perhaps for anti-competitive reasons and with anti-competitive consequences.

With these critical modifications and complementary Commission actions, the auction rules can truly facilitate the critical Commission and Congressional goals for this spectrum auction.

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**INTRODUCTION**

The Wireless Telecommunications Bureau’s (“Bureau”) role in this proceeding is to establish rules that serve multiple objectives: implementing the Commission’s recent *700 MHz Second Report & Order*; ensuring a fair and efficient auction; complying with the guidelines of Section 309(j); and advising bidders of their legal obligations, under FCC rules and applicable antitrust laws, before and during the auction.<sup>1</sup> The proposed rules set out in the Bureau’s Public Notice (“*Auction Rules Public Notice*”) will not enable the Commission to achieve those important goals. To provide the Commission with concrete suggestions on how to amend the proposed rules to meet these critical objectives, Frontline submits these comments along with the attached white paper by a team of noted economists and auction experts (Peter Cramton, Gregory Rosston, Andrzej Skrzypacz, and Robert Wilson (hereinafter “Cramton Rosston Paper”)) to assist the Bureau in designing rules and procedures that ensure these

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<sup>1</sup> Second Report and Order, *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, WT Dockets No. 06-150, PS Docket No. 06-229 *et. al*, Aug. 10, 2007 (“*700 MHz Order*”).

statutory requirements and the Commission's own goals for the 700 MHz spectrum auction are met.

**I. RESERVE PRICES ARE TOO HIGH TO ACHIEVE THE COMMISSION'S GOALS AND ARE ARBITRARILY SET.**

The reserve prices set forth in the *Auction Rules Public Notice* are unprecedentedly and irrationally high, and more importantly, counter-productive to the objectives the auction seeks to achieve. As the Cramton Rosston Paper explains in detail, in past auctions the Commission has successfully used much lower reserve prices, set by calculating the social opportunity costs, to establish a price below which a license would not be granted. In the present case, the reserve prices are being used for a radically (and as Frontline has shown, illegally<sup>2</sup>) different purpose: to determine the market "cost" of the *public interest* conditions the Commission has placed on the spectrum to be auctioned, and to trigger a re-auction in the event the auction revenues do not jibe with the putative "cost" of the *public interest* obligations. The new reserve price rationale — aside from blatantly violating Section 309(j)(7), which states that financial considerations cannot drive auction decisions — will directly frustrate the Commission's objectives for this spectrum and this auction.

High reserve prices are contrary to auction theory, as well as Commission policy. The Cramton Rosston Paper shows that a reserve price can increase revenues where the valuation each bidder assigns to the asset to be auctioned is uncertain and there is a large gap between the valuations of the two highest bidders. If the reserve price is higher than the second-highest

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<sup>2</sup> See Frontline Reply Comments, WT Docket No. 06-150, at 38 (citing 47 U.S.C. § 309(j)(7)).

bidder's valuation of the asset, the highest bidder's first and winning bid is at the reserve price.<sup>3</sup> In this auction, however, the Commission has set a reserve price so high that the highest bidder's incentive is always to bid *below* the reserve, since the inviting prospect of re-auctioning unencumbered spectrum with no service conditions and possibly a lower reserve price (or no reserve price at all) — is dependent on the reserve price in the first auction not being met.

Moreover, the Bureau has set a reserve price for each block based not on calculating the seller's opportunity cost of alternative uses or deferring sale, as it did in the AWS auction. Instead, without justification, it based the reserve price on the "estimated market value" of the *winning bidder's bid* in what it assumes was a "comparable auction." The Cramton Rosston Paper demonstrates that establishing reserve prices for an entire block rather than license-by-license also frustrates Commission revenue-based objectives. High reserve prices will create incentives for bidders to assure that a re-auction will be necessary and thereby attempt to win spectrum unencumbered by conditions the Commission has found to be in the public interest. They will hold back bids in the initial auction to prevent the reserve from being met. They will withhold higher bids until the re-auction when there will be weaker service rules, an altered band plan, and fewer competing bidders.<sup>4</sup> These strategic incentives for major bidders to suppress their initial auction bids will be fatal to the Commission's policy goals for this spectrum. Presumably, the Commission's theory is that a re-auction will allow the licenses to bring in their true market value. But if the proposed auction rules are adopted, the result will likely be a re-auction price that is even *further* from estimated market value than the reserve

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<sup>3</sup> See Cramton Rosston Skrzypacz and Wilson Paper as Attachment A (hereinafter "Cramton Rosston Paper") at 11-12.

<sup>4</sup> As the Cramton Rosston Paper explains, a losing bidder in the first auction is much less likely to participate in the re-auction after previously having been outbid. See the Cramton Rosston Paper at 8, 12.

prices for the initial auction. Therefore, the auction rules as currently proposed create structural incentives to avoid bidding up to the fair value of the spectrum.

In its *700 MHz Order*, the Commission plainly recognized that there is a regulatory cost for the conditions it placed on the C and D Blocks – a cost borne by the license winner, but also a benefit that would inure to the public in the form of public interest benefits. Yet it set as a reserve price the full cost of the C Block, and a full cost minus 25 percent for the D. As to the C Block, the result of this spurious reasoning is that the license winner that pays the full commercial price if the reserve is met pays the full commercial price, *plus* the regulatory cost – even where there is no showing that the C Block licensee would enjoy any benefit from that regulatory cost. The only rational way to set a reserve price for the C Block is to begin by taking account, or at least attempting to approximate, this regulatory cost. The Commission has made no effort in that regard.

In addition, the particular method the Commission used to establish the “commercial price” upon which the reserve prices are based – relying on the market value of “comparable” spectrum offered in the AWS auction – relies on serious factual inaccuracies and therefore is arbitrary and capricious. The Commission admitted in its *700 MHz Order* that winning licensees will have “significantly more stringent performance requirements” than previous auction winners.<sup>5</sup> This factor alone will depress bidder valuations.

The reserve price for the D Block is especially arbitrary and unreasonable since the buildout, service and reliability requirements of the public/private partnership on that band are, by any reasonable calculation, a far greater expense than the capriciously selected \$400

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<sup>5</sup> *700 MHz Order* ¶ 153.

million the Bureau has used in discounting the D Block reserve price. As shown in the attached Technical Appendix, the difference in required land mass coverage alone between the AWS spectrum's "substantial service" 75% population requirement and the D Block's 99.3% population coverage requirement *is greater than 570%*. The cell tower build associated with the D Block coverage benchmarks, combined with the requirements that D Block base stations be hardened to ensure operation during national disasters, will likely cost well in excess of \$5 billion above what a purely commercial network would cost — an amount borne by *any* D Block licensee, whether an incumbent with an already existing network like Verizon or a new entrant like Frontline. The reserve price discount for the D Block, in other words, is about 8% of the conservative incremental capital cost that the D Block licensee will incur to fulfill its FCC-imposed coverage requirements.<sup>6</sup> By ignoring this evidence in the record as to what a D Block network might actually cost and instead setting an arbitrary reserve price reduced by an arbitrary amount, the Commission is in effect asking the bidder to agree to a price (the cost of the license plus the cost of meeting the unknown demands of public safety) without knowing what that price in fact is. That is more than doubly arbitrary; it is the height of caprice.

Spectrum prices are also not comparable across time. The price that will be paid for a house in 2008 will likely be quite different than the price paid for a similar house in 2006. The cost of borrowing money, state of the capital markets, buyers' view of the economy and their capacity to pay all fluctuate with the passage of time. The global collapse of the credit markets in recent weeks is being felt acutely in the telecom sector. Not surprisingly, projections for the wireless industry are all trending down. *See, e.g., Morgan Stanley, Telecom Services:*

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<sup>6</sup> *See* Technical Appendix at Attachment B.

*Deteriorating Wireless Trends, Revisited* (Jan. 18, 2007) (“we believe we are now seeing clear signs of a permanent slow down ... increasing competition for new subscribers will separate the winners from the losers, but has negative implications for all traditional wireless carriers”); CIBC, *2007 Wireless Industry Update* (Aug. 10, 2007) (“we expect disappointing fundamental results in 2008-09”); Morgan Stanley, *Telecom Services: Deteriorating Wireless Trends, Revisited* (Aug. 24, 2007) (“The telecom sector appears to be struggling to maintain its outperformance of recent quarters. Several of the pillars of recent strength are showing signs of weakness.”).

The impact of increases in the cost of capital on the spectrum auction cannot be overstated. As the Cramton Rosston Paper explains, raising the cost of capital a mere three percentage points, from 12% to 15%, “decreases the net present value by nearly 50%, i.e., from \$5 billion to \$2.5866 billion,” of the revenues expected to be earned from a spectrum license.<sup>7</sup> In short, “a rise in the cost of capital has a magnified effect on a firm’s valuation of a license.”<sup>8</sup> Therefore, it would be arbitrary and capricious to value future spectrum based on auction results from last year when market conditions were substantially more bullish.

The Cramton Rosston Paper sets out several alternative methodologies for calculating the reserve prices for the 700 MHz auction at pages 15–17. These methodologies would (1) be more consistent with the reserve pricing methods the Commission has followed in the past, and (2) lead to vigorous bidding and increased revenues to the Treasury.

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<sup>7</sup> See Cramton Rosston Paper at 5.

<sup>8</sup> *Id.*

## **II. THE BUREAU SHOULD MODIFY THE BIDDING PROCEDURES TO ENSURE THE FLEXIBILITY TO BID ON SUBSTITUTABLE LICENSES.**

The Commission's activity rule rightly forces bidders to be active throughout the auction. The Cramton Rosston Paper explains that the activity rule prevents bidders who are interested in multiple licenses from taking a "wait and see" approach in allowing other bidders to set valuations for those licenses, then deciding which licenses to acquire.<sup>9</sup> Where licenses in an auction are valued equally, the activity rule performs this function well. However, here the size of a package bid for the C Block license includes more than twice the megahertz as the next largest license, the D Block (22 vs. 10), and bidding on the C Block package therefore counts significantly more for a bidder's auction activity measure under the rule, even though some bidders may see each of the D Block and C Block packages as providing the licenseholder with a national footprint and are therefore in many ways substitutes.<sup>10</sup> Under the proposed rule, a bidder would be significantly penalized for alternating bids between the two licenses because the activity rule offers less credit for D Block bidding activity, even though the package bidder may find the blocks to be generally substitutable.

To ensure maximum efficiency and allow bidders to go freely back and forth between auctions for the generally substitutable D Block and C Block packages, the Bureau should revise the activity rule, as set out in detail in the Cramton Rosston Paper.<sup>11</sup> This modification will ensure that moving one's bidding to the D license should not irreversibly

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<sup>9</sup> See Cramton Rosston Paper at 19-20.

<sup>10</sup> As stated, the D Block and C Block package are the only opportunity for a new entrant to win sufficient licenses to develop a nationwide wireless service. In addition, even though the D Block only offers a license for 10 MHz, when combined with preemptible commercial use of the NPSL's spectrum, the amount of available spectrum capacity for the D Block licensee will be similar to that afforded to a C Block package winner.

<sup>11</sup> See Cramton Rosston Paper at 20-21 (stating that for activity rule purposes, the MHz-pops on the D block should include the MHz from the PPSL license, thus making it count as 22 MHz, the same as the C Block package).

prevent bidding on the C package. More bidders bidding on more blocks will increase auction revenues.

### **III. THE COMMISSION MUST TAKE SPECIFIC ACTIONS TO ENSURE ALL PERSONS COMPLY WITH FCC RULES ON COLLUSION AND APPLICABLE ANTITRUST LAWS.**

The Commission has an obligation under Section 309(j)(3) of the Communications Act to conduct an auction that “promote[s] economic opportunity and competition,” “avoid[s] excessive concentration of licenses,” and “recover[s] for the public a portion of the value of the public spectrum resource . . .” 47 U.S.C. § 309(j)(3). The Commission’s *700 MHz Order* took important steps to accomplish those goals, and the auction rules must be designed to achieve — and not undermine — those objectives. Two issues need to be addressed so that the auction serves those two vital purposes: (1) prevention of bid rigging, a *per se* antitrust violation under Section 1 of the Sherman Antitrust Act, by guarding against bid signaling (advertent or inadvertent, including through third parties and Commission personnel); and (2) prevention of undue concentration of spectrum by parties who already hold so much spectrum in specific markets that adding to it would violate Commission and Justice Department precedent against excessive spectrum aggregation, market by market.

#### **A. Meaningful Anonymous Bidding Is Essential To A Fair And Efficient Auction, And The Bureau Also Needs to Address the Risk Of Pre-Short Form Collusion.**

Following the important principles recognized in its *700 MHz Order*, the *Auction Rules Public Notice* agrees with the majority of commenters in concluding that anonymous bidding for this auction is in the public interest. As the *Order* recognized, bid signaling is a particular concern where, as here, incentives exist for incumbents in multiple-block spectrum auctions to depress auction prices by sending signals designed to keep new entrants or other

incumbents from bidding.<sup>12</sup> These concerns are not new. The Department of Justice emphasized them in the AWS auction proceeding just last year:

A goal of the FCC in designing rules [] should be to limit the opportunities for tacit collusion. This is especially true in an industry with a small number of players who recognize that bidding up spectrum prices is not necessarily in their interest in an auction where multiple blocks of spectrum are offered during successive rounds of bidding. ... less opportunity for smaller bidders to compete for certain licenses [would likely result in] loss of competition[,] lower government auction revenues and potentially less efficient allocations of markets among bidders.

*See DOJ Ex Parte, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures in the AWS Auction*, DA 06-238 (Mar. 3, 2006). Lack of anonymity also allows targeting of new entrants by incumbents: an incumbent would bid against a new entrant to prevent the development of a new competitor, but not bid against an existing competitor.

Without anonymity, new entrants are less likely to participate, and auction revenue is lower as a result. As it did in its comments in the 700 MHz proceeding, Frontline fully supports the Commission's establishment of effective anonymous bidding procedures.

The proposed rules, however, fall short of being fully effective because they fail to consider actions by the bidders themselves. The proposed rules would not on their face prevent a bidder every afternoon at 5 pm during the auction issuing a press release announcing its bids for that round. As the economists explain in the attached Cramton Rosston Paper, these or similar actions could undermine the importance of anonymous bidding, because those disclosing the information would be those most interested in intimidating or shaping the bidding behavior of others.<sup>13</sup> Accordingly, the Bureau should take two steps to make the anonymous

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<sup>12</sup> See *700 MHz Order* ¶ 275 (anonymous bidding “mak[es] it harder for existing providers to identify and impede the efforts of potential new entrants to win”).

<sup>13</sup> See Cramton Rosston Paper at 21-22.

bidding requirement more effective. First, it should adopt an auction rule that states a bidder cannot release any bidding information to the public during the course of the auction.<sup>14</sup> This would be the most straightforward means to address this serious concern. Second, the Bureau could explicitly place all parties — bidders, their consultants, Commission personnel and other unintended conduits of bid-signaling information — on notice that communications during the auction will be subject to the antitrust laws and that the Commission will refer to the Justice Department for further investigation any evidence of unlawful activity.

The rules on anonymous bidding are important to curb bid signaling, a tool that can be used to accomplish the *per se* unlawful act of bid rigging, which can involve not only agreements on prices to be bid, but also agreements not to bid. The FCC’s anonymous bidding rules only prohibit potentially illegal attempts to signal bidding strategy *after* the auction process is launched with the filing of the short form auction applications. The Bureau’s proposed rules fail to address the equally serious concern about bid signaling by entities with market power that takes place *before* the short form is filed. If incumbent wireless providers are able to scare off other potential bidders by demonstrating a coordinated plan to block entry by aggressive bidding for spectrum needed by new entrants, their task is complete prior to the initiation of the Commission’s ban on communications related to auction strategy. Frontline urges this Commission, as past Commissions have done, to address this issue head-on and aggressively to remind parties with market power that they have obligations under antitrust laws that apply

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<sup>14</sup> The rules of course should not be interpreted to bar a bidder from releasing bidding information to its investors or potential investors during the course of the auction. In addition, the economics and auction experts make a strong argument as to why the anonymous rule, especially for small companies, should be lifted after the first auction if there is a “do over” on some other block. See Cramton Rosston Paper at 22-23.

before, during and after the short form and that a violation of the antitrust laws has serious consequences for those involved.

Pre-auction signaling by bidders that occurs after the auction short-form due date would plainly violate Commission anti-collusion rules. *See* Public Notice, *Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules*, 11 FCC Rcd. 9645 (1995) (“*Anti-Collusion Notice*”) (“After the short-form filing deadline, applicants may not discuss the substance of their bids or bidding strategies with bidders, other than those identified on the short-form application. ... The post-deadline prohibition on discussions extends to providing indirect information that affects bids or bidding strategy.”) (citing 47 C.F.R. § 1.2105(c)(1)). However, as the Commission has emphasized in the past, antitrust laws *presently* in effect bar behavior aimed at reaching anticompetitive agreements on bidding strategy (even if it occurs prior to filing short form applications), which constitutes a *per se* criminal violation of the Sherman Act:

[U]nder the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same geographic market. *In addition, agreements between actual or potential competitors to submit collusive, non-competitive or rigged bids are per se violations of Section One of the Sherman Antitrust Act.*

*See id.* (emphasis added); *see also* Public Notice, *Wireless Bureau Responds to Local Multipoint Distribution Service Auction Questions*, 13 FCC Rcd. 341, 347-48 (1998) (“Public statements can give rise to collusion concerns. This has occurred in the antitrust context, where certain public statements can support other evidence which tends to indicate the existence of a conspiracy.”) The 1995 Public Notice is attached as Attachment C and can serve as a model for the necessary notice in this proceeding.

The fact that bidders might be communicating information related to bidding strategy in the context of a presentation to a government official does *not* immunize them from

antitrust scrutiny. The *Noerr-Pennington* doctrine only applies to conduct designed to influence the passage or enforcement of laws; it does not provide a shield against bid signaling activity prior to an auction, even if it is dressed up as lobbying.<sup>15</sup> Similarly, statements to the press or Wall Street or industry analysts cannot be used as cover for, or a mechanism to perpetrate, bid-signaling. Absent a legitimate, pro-competitive need to publicize what in normal circumstances would be considered highly-confidential and proprietary information, any public statements regarding bidding intentions should cause grave concern at the Commission and the Department of Justice.

Concerns about bid signaling apply with special force to a bidder or potential bidder that already holds substantial market power in the affected markets.<sup>16</sup> Any incumbent provider with substantial spectrum holdings across multiple geographic areas, and any persons dealing with those entities, needs to be especially watchful to avoid any conduct that could be construed as bid signaling, since they have an obvious motive to communicate bidding information to each other, i.e., preventing a new entrant from entering the market. The incumbents likely to participate in this particular auction, Verizon and AT&T, compete nationally today for customers, and have competed consistently in auctions for many years. They own about 40% of all spectrum below 1GHz, and together own about half of all CMRS spectrum. For the same reason, such entities have to be especially careful about discussions with other potential bidders, and about statements in public or private indicating their interest (or lack thereof) in particular spectrum blocks. As noted above, *per se* illegal bid-rigging need not take

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<sup>15</sup> See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

<sup>16</sup> Cf. *Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689, 704 & n. 38 (S.D. Tex. 1993) (discussing size of market share of alleged conspirator).

the form of an explicit agreement on bid levels. Agreements regarding which licenses to bid on or how aggressively to pursue a particular bidding strategy can have the same anticompetitive effects of a naked agreement on bid levels and are similarly illegal under Sherman Act § 1.

The Commission in the past has made clear that, as an agency of the Executive Branch, it has an obligation to assure enforcement of all laws.

To the extent the Commission becomes aware of specific allegations that may give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such allegations to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's anti-collusion rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their down payment or their full bid amount, cancellation of their licenses, and may be prohibited from participating in future auctions.

*Anti-Collusion Notice*, 11 FCC Rcd. at 9646-47 (Attachment C). The Commission well serves all persons involved in the auction process — bidders, potential bidders, their consultants, Commission personnel, and the press and financial analysts (who could inadvertently be a conduit for disseminating unlawful information) — by alerting them to the serious consequences of antitrust violations and to the enduring and ongoing applicability of the antitrust laws to the auction process. The Bureau should take the same step here.

**B. The Commission's Obligation To Prevent Excessive Concentration In The Highly Consolidated Wireless Market, And Its Own Precedent, Require The Commission To Limit Any One Entity From Controlling 70 MHz Or More Of CMRS Spectrum.**

Both the Commission and the Department of Justice have guarded against the anticompetitive dangers of a single party aggregating excessive spectrum in a particular geographic market. While the Commission no longer has a hard cap on the amount of spectrum one individual licensee may hold, the Commission does factor into its competition analysis the amount of spectrum a single licensee holds in a particular market — particularly in a market already experiencing concentration. The fundamental premise underlying merger enforcement is

that increased levels of concentration are likely to give rise to anticompetitive effects. Where significant amounts of spectrum are becoming available, the Commission and Department of Justice must examine how further acquisitions of spectrum by entities that already control significant amounts of spectrum in a relevant geographic market will affect the continued development of competitive wireless services.

As the Commission stated in its July 2005 order analyzing the public interest impact of a potential merger between Alltel and Western Wireless Corp., transactions in “those markets in which the Applicants would have 70 megahertz or more in at least part of the market post-transaction” would receive increased scrutiny 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.” *Alltel-Western Wireless Corp. Order*, 20 FCC Rcd. 13,053 (2005), ¶ 49. Consistent with the analysis undertaken by the Department of Justice under its power to review mergers pursuant to Section 7 of the Clayton Act, the Commission found that the consolidation of spectrum capacity over 70 MHz, coupled with the existing market power and other factors, was “likely to cause significant competitive harm.” *Id.* ¶ 162. As a consequence, the Commission joined the Justice Department in ordering divestiture of operating assets, including associated spectrum based on these circumstances.

This auction triggers similar concerns. As Frontline demonstrated in the 700 MHz proceeding, 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.<sup>17</sup> Significant additional accumulation of spectrum by the largest

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<sup>17</sup> See Frontline Initial Comments, WT Docket No. 06-150, Exhibit 1 at § 3.1 (May 23, 2007).

wireless carriers in this auction, coupled with current market concentration, could cripple the ability of competitors to develop new services and cause serious competitive harm in the wireless market. The Commission has stated that it wants to promote competition into the market for wireless services. Competition requires multiple competitors, and allowing dominant players in highly concentrated markets to acquire additional spectrum will not be conducive to vibrant, competitive markets – by any measure one of the Commission’s goals for this spectrum.

Consistent with this precedent and its ongoing public interest obligations, the Commission should state in a Public Notice that it will reject any short form application from an entity that, if successful at auction, would amass 70 MHz or more of CMRS spectrum in any market already experiencing concentrated market power. To enforce this requirement, the Commission should require as part of the short-form application process that applicants disclose whether, if they won the licenses in question, their spectrum holdings in any specific market would encompass 70 MHz or more of CMRS spectrum. This step is necessary or else the auction process would be distorted by a participant that cannot obtain the license even if it is the high bidder.

The proposal to not accept short form applications from entities that would hold more than 70 MHz of CMRS spectrum is supported by several reasons. First, under Commission and DOJ precedent, it is not in the public interest for an entity to hold more than 70 MHz in a highly concentrated market where such an accumulation of spectrum will cause significant anticompetitive effects, and any additional spectrum should be subjected to divestiture. *See Alltel-Western Wireless Order, supra*. Second, the C Block with its 22 MHz license, which could push some incumbents well past 70 MHz, will be licensed in large spectrum geographic areas that encompass major urban centers such as New York, Philadelphia, Atlanta, Los Angeles,

Chicago and Houston, where the two largest incumbents already have substantial holdings.

Third, the D Block, with its national 10 MHz license, can *not* be disaggregated, pursuant to the Commission’s decision in the *700 MHz Order*, so post-auction disaggregation cannot be used to remedy an incumbent’s undue concentration of spectrum. *Fourth*, no more spectrum below 1 GHz will be available for the foreseeable future. Though the Commission has turned aside arguments calling for spectrum divestiture in the past based on the promise of more spectrum in the future, that reasoning cannot apply here.

For all these reasons, the Commission should make clear at the outset that it will not accept short form applications that would result in the applicant’s acquiring 70 MHz or more of CMRS spectrum in a particular geographic market, or grant licenses after the auction that violated that limit.

\* \* \*

The Commission also needs to correct the onerous effects of the D Block default penalty both on the reserve price and interested bidders. Parties with a strong interest in partnering with the Public Safety Broadband Licensee will be discouraged from bidding because the default provision creates powerful incentives for losing bidders to disrupt the process of the D Block high bidder and the PSBL negotiating a successful and commercially viable shared network agreement. Also, imposing a substantial financial penalty on the D Block auction winner for failing to reach an agreement with the PSBL will absolutely deter bidding of entities of all types, incumbents and new entrants alike. The D Block auction winner already has a powerful incentive to close the deal — access to 12 MHz of spectrum — and does not need the financial penalty to be motivated. The possibility of a deficiency payment that could well be calculated by the difference between an auction with many entrants and a re-auction with a

single bidder – *plus* an additional 15% – would make any rational entity think twice before bidding seriously on the D Block and committing to the NSA negotiation process with public safety. The risk of default for reasons entirely out of the auction winner’s control are far too great.

Consequently, the D Block default provision must be revised to make the D Block auction process and the subsequent shared network relationship workable. In short, the default payment provisions should either be eliminated, or the reserve price on the D Block should be set at a nominal amount to ensure the cost of risk is not so high as to frustrate bidding. Frontline will address this set of critically important issues in its petition for reconsideration in connection with the *Second Report and Order*, but it mentions the issue here because the ill effects of the arbitrarily high reserve price, the re-auction process and the default provision are mutually exacerbating and highly damaging to the Commission’s policy objectives.

## CONCLUSION

For the reasons stated herein, the Bureau should revise its auction rules and provide appropriate public notice to ensure that the statutory objectives of the Communications Act and the statutory obligations of the antitrust laws are adhered to by all persons before, during and after the auction.

Respectfully submitted,



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August 31, 2007

## APPENDIX B: D BLOCK REQUIREMENTS

**Technical Requirements-** network must incorporate at a minimum the following:

- Specifications for a broadband technology platform that provides mobile voice, video, and data capability that is seamlessly interoperable across agencies, jurisdictions, and geographic areas. The platform should also include current and evolving state-of-the art technologies reasonably made available in the commercial marketplace with features beneficial to the public safety community (*e.g.*, increased bandwidth).
- Sufficient signal coverage to ensure reliable operation throughout the service area consistent with typical public safety communications systems (*i.e.*, 99.7 percent or better reliability).
- Sufficient robustness to meet the reliability and performance requirements of public safety. To meet this standard, network specifications must include features such as hardening of transmission facilities and antenna towers to withstand harsh weather and disaster conditions, and backup power sufficient to maintain operations for an extended period of time.
- Sufficient capacity to meet the needs of public safety, particularly during emergency and disaster situations, so that public safety applications are not degraded (*i.e.*, increased blockage rates and/or transmission times or reduced data speeds) during periods of heavy usage. In considering this requirement, we expect the network to employ spectrum efficient techniques, such as frequency reuse and sectorized or adaptive antennas.
- Security and encryption consistent with state-of-the-art technologies.
- A mechanism to automatically prioritize public safety communications over commercial uses on a real-time basis and to assign the highest priority to communications involving safety of life and property and homeland security consistent with the requirements adopted in this Second Report and Order.
- Operational capabilities consistent with features and requirements specified by the Public Safety Broadband Licensee that are typical of current and evolving state-of-the-art public safety systems (such as connection to the PSTN, push-to-talk, one-to one and one-to-many communications, etc.).
- Operational control of the network by the Public Safety Broadband Licensee to the extent necessary to ensure public safety requirements are met.
- The Public Safety Broadband Licensee shall have the right to determine and approve the specifications of public safety equipment that is used on the network, and the right to purchase its own subscriber equipment from any vendor it chooses, to the extent such specifications and equipment are consistent with reasonable network control requirements established in the NSA.
- A requirement, as explained more fully herein, that the Upper 700 MHz D Block licensee make available to the Public Safety Broadband Licensee at

least one handset that would be suitable for public safety use and include an integrated satellite solution capable of operating both on the 700 MHz public safety spectrum and on satellite frequencies.

***Stringent Build-Out Requirements***

- The Order requires 99.3% of the population to be covered within 10 years
  - 75% within 4 years
  - 95% within 7 years
- Public safety and D Block licensee can agree to modify these requirements with Commission approval in limited circumstances

## APPENDIX C: Alternative Reserve Price Approach

A different approach that the Commission may find attractive in setting the reserve prices for Blocks A, B, C and E (but in our opinion inferior to the recommendations above) is as follows:

1. In the re-auction set low reserve prices on the level that we recommend above and in line with previous practice. This can avoid the disaster of the 3<sup>rd</sup> auction.
2. If the idea of auction and re-auction is to test if the additional restrictions are not destroying too much value, the Commission should state explicitly how much value it assigns to these restrictions. For example, for the A, B and E Blocks, state the value of offering additional coverage and for the C Block determine the value of having the open access provisions.
3. Then, the Commission would need to estimate the revenues from the auction without the additional restrictions. In the estimation it is important to take into account the change in the cost of capital and macroeconomic conditions that we discussed in Section 1.1. In particular, the expected revenues should be lower than the revenues from the AWS auction.
4. Using our arguments above, one can then calculate the basis for the reserve prices in the original auction as a difference between the expected revenues in step 3 and the values in step 2. For example, if the Commission placed a value of \$1 billion on openness for the C Block, then it would set a reserve price for the C Block of \$1 billion less than the expected revenue without the openness restrictions, not at a level equal to the expected revenues as the Commission has attempted to do.
5. To let the market play a more important role, it would be advisable to offer the licenses in Blocks A, B, and E on a license-by-license basis rather than with aggregate reserves, since it may be efficient to have some of the auctions with the additional restrictions and others without. The C Block openness restrictions make sense to be imposed on the nationwide level, hence it makes sense to impose the reserve for the aggregate block.

If this reasoning is adopted, the D Block should be structured differently because in the case of this block the Commission is not testing whether the requirements should be relaxed: the public safety network should be started as soon as possible and there is relative agreement about the coverage and service requirements on that network. Hence, it makes no sense to start with a higher reserve price on D that could be reduced in the re-auction. To guarantee the most competition and timely awarding of this license it is necessary to set the reserve for the D Block using the previous practice of about 20% of expected revenues. While the reserve would appear low, the winner of this license will pay closer to the expected revenues and will continue paying to the public good long after the auction by building out the public safety network. The idea of sacrificing some of the revenue to pay for the public safety network is at the core of the creation of the public-private partnership and the Commission should not jeopardize that partnership by setting unreasonably high reserve on the D Block.

**Attachment B:  
Technical Statement  
Estimated Expenses for D Block Coverage Requirements  
Frontline Wireless, LLC**

The following estimates in numbers 1 through 3 below are based on figures submitted in two *ex parte* filings by Cyren Call, which we assume solely for purposes of the valuations offered here. *See* Cyren Call Ex Parte, WT Docket No. 06-150 (July 9, 2007), at 3, 5 & 13; Cyren Call Ex Parte, WT Docket No. 06-150 (July 19, 2007), at 4, 8.

**1. Geographic coverage requirements**

- 75% “substantial service” population-based coverage requirement: approx. 11% U.S. land mass coverage, or **396,000** square miles
- 99.3% population-based coverage requirement: approx. 63% U.S. land mass coverage, or approx. **2,234,000** square miles
- = **↑ 1,838,000** square miles of coverage (573% increase; most if not all in rural areas)

**2. Cell site capacity**

- estimated hexagonal coverage area of a rural cell site: **110** square miles

**3. Cell site build out requirements**

- **37,000** cell sites required to meet D Block requirements

**4. Incremental cell sites required for D Block coverage**

- an additional **16,710** cell sites (**1,838,000** square mileage coverage increase/**110** square miles per site)

**5. Increase in number of cell sites needed for D Block coverage over C Block coverage**

- **37,000 – 16,710** [number of incremental cell sites required for D Block coverage]
- = **20,290** cell sites needed for C Block coverage
- **16,710/20,290**

= **82%** increase in cell sites required for D Block coverage

**6. Cost of cell site build out**

- approx. cost of each cell site: \$250-**300,000**<sup>1</sup>
- **\$300,000** [cost per cell site]
- x **16,710** [number of additional sites needed to fulfill D Block coverage requirement]

= **\$5 billion**

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<sup>1</sup> This calculation will assume \$300,000 for the cost of a single cell site. However, cell site building costs for the D Block network will be considerably higher than \$300,000 due to hardening against natural disasters and other operability requirements that public safety’s use will require.

**Attachment C:**

Public Notice:

*Wireless Telecommunications Bureau Clarifies*

*Spectrum Auction Anti-Collusion Rules*

11 FCC Rcd 9645; 1995 FCC LEXIS 7012 (Oct. 26, 1995)

Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules

[NO NUMBER IN ORIGINAL]

FEDERAL COMMUNICATIONS COMMISSION

*11 FCC Rcd 9645; 1995 FCC LEXIS 7012*

**RELEASE-NUMBER:** DA 95-2244

October 26, 1995

**ACTION:** [\*1] PUBLIC NOTICE

**OPINION:**

The Wireless Telecommunications Bureau has received numerous inquiries concerning the Commission's auction rules and eligibility requirements for the various spectrum auctions. This Public Notice, in which the Bureau provides guidance regarding the Commission's anti-collusion rules, is meant to serve as a guideline for all auctions.

The Commission established its anti-collusion rules in order to enhance the competitiveness of the auction process and of the post-auction market structure. See Second Report and Order in *PP Docket No. 93-252, 9 FCC Rcd 2348, 2387 (1994)* ("Second R&O"). The Commission's anti-collusion rules require an applicant to identify on its short-form application all parties with whom it has entered into a bidding consortium or other joint bidding arrangement. After the short-form filing deadline, applicants may not discuss the substance of their bids or bidding strategies with bidders, other than those identified on the short-form application, that are bidding in the same geographic license areas. 47 C.F.R. § 1.2105(c)(1); Fourth Memorandum Opinion & Order in *PP Docket No. 93-253, 9 FCC Rcd 6858, 6868 (1994)* [\*2] ("Fourth MO&O"). The post-deadline prohibition on discussions extends to providing indirect information that affects bids or bidding strategy. Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division, released Dec. 1, 1994. The geographic license area is the market designation of the particular services, e.g., MTA, BTA, and EA. For example, two applicants not listed on each other's short-form applications for the 900 MHz SMR auction may not discuss bids or bidding strategies with each other if they are bidding for licenses in any of the same MTAs, even if they are not bidding for the same frequency blocks.

If an applicant has the high bid for a license, the applicant must include with its long-form application a detailed explanation of the terms and conditions and parties involved in a bidding agreement into which it has entered. 47 C.F.R. § 1.2107(d). It is important to note that for purposes of the Commission's anti-collusion rules, the term applicant includes the entity submitting the application, owners of 5 percent or more of the entity, and all officers and directors of that entity. 47 C.F.R. § 1.2105(c)(6)(i).

If parties agree in principle [\*3] on all material terms, those parties must be identified on the short-form application under Section 1.2105(c), even if the agreement has not been reduced to writing. Only at such level of agreement can it be fairly stated that the parties have entered into a bidding consortium or other joint bidding arrangement. If the parties have not agreed in principle by the filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with those parties.

There are three exceptions to the rule prohibiting discussions with other applicants after the filing of the short-form application. First, an applicant may modify its short-form application to reflect formation of bidding agreements or changes in ownership at any time before or during the auction, as long as the changes do not result in change of control of the applicant, and the parties forming the bidding agreement have not applied for licenses in any of the same geographic license areas. 47 C.F.R. § 1.2105(c)(2). Applicants may also make agreements to bid jointly for licenses, so long as the applicants have not applied for licenses in any of the same geographic license areas. [\*4] 47 C.F.R. § 1.2105(c)(3). Finally, a holder of a non-controlling attributable interest in an applicant may acquire an ownership interest in, or enter into a bidding agreement with other applicants in the same geographic license area, if (1) the owner of the attributable interest certifies that it has not communicated and will not communicate bids or bidding strategies of

more than one of the applicants in which it holds an attributable interest or with which it has a bidding agreement; and (2) the arrangements do not result in any change of control of an applicant. 47 C.F.R. § 1.2105(c)(4).

Where the applicant does not meet one of these exceptions, it may not discuss matters relating to bidding with other applicants. Even when an applicant has withdrawn its application after the short-form filing deadline, the applicant may not enter into a bidding agreement with another applicant bidding on the geographic license areas from which the first applicant withdrew. *Fourth MO&O, 9 FCC Rcd at 6867*. In addition, once the short-form application has been filed, a party with an attributable interest in one bidder may not acquire a controlling interest in another bidder [\*5] bidding for licenses in any of the same geographic license areas.

Even where the applicant discloses parties with whom it has reached an agreement on the short-form application, thereby permitting discussions with those parties, the applicant is nevertheless subject to existing antitrust laws. *Fourth MO&O, 9 FCC Rcd at 6869 n.134*. As discussed in the Fourth MO&O, under the antitrust laws, the parties to an agreement may not discuss bid prices if they have applied for licenses in the same geographic market. In addition, agreements between actual or potential competitors to submit collusive, non-competitive or rigged bids are per se violations of Section One of the Sherman Antitrust Act. *Id.* Further, actual or potential competitors may not agree to divide territories horizontally in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another for the other. *Id.*

To the extent the Commission becomes aware of specific allegations that may give rise to violations of the federal antitrust laws, the Commission may investigate and/or refer such allegations [\*6] to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's anti-collusion rules in connection with participation in the auction process may, among other remedies, be subject to the loss of their down payment or their full bid amount, cancellation of their licenses, and may be prohibited from participating in future auctions. *Second R&O, 9 FCC Rcd at 2388*.

For additional information regarding this Public Notice, please contact Aaron Goldschmidt in the Wireless Telecommunications Bureau, at (202) 418-0660, or Deborah Klein in the Office of General Counsel, at (202) 418-1880.