

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Service Rules for the 698–746, 747–762)	WT Docket No. 06-150
and 777–792 MHz Bands)	
)	
Revision of the Commission’s Rules to)	CC Docket No. 94-102
Ensure Compatibility with Enhanced 911)	
Emergency Calling Systems)	
)	
Section 68.4(a) of the Commission’s Rules)	WT Docket No. 01-309
Governing Hearing Aid-Compatible)	
Telephones)	
)	
Biennial Regulatory Review – Amendment)	WT Docket No. 03-264
of Parts 1, 22, 24, 27, and 90 to Streamline)	
and Harmonize Various Rules Affecting)	
Wireless Radio Services)	
)	
Former Nextel Communications, Inc.)	WT Docket No. 06-169
Upper 700 MHz Guard Band Licenses)	
and Revisions to Part 27 of the)	
Commission’s Rules)	
)	
Implementing a Nationwide, Broadband,)	PS Docket No. 06-229
Interoperable Public Safety Network in the)	
700 MHz Band)	
)	
Development of Operational, Technical)	WT Docket No. 96-86
and Spectrum Requirements for Meeting)	
Federal, State and Local Public Safety)	
Communications Requirements Through)	
the Year 2010)	

**PETITION FOR RECONSIDERATION
OF FRONTLINE WIRELESS, LLC**

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SUMMARY

The Commission established soaring objectives for the newly freed-up, prime 700 MHz spectrum. It properly understood that the availability of this spectrum has presented a once-in-a-generation opportunity to address nation-critical communications issues, the resolution of which is long overdue and pressing. In its August 10, 2007 *Order* the Commission saw that these ambitious goals were realizable and envisioned largely appropriate paths to their attainment. But then, unaccountably, the Commission made implementation decisions in its *Order* that put these goals in jeopardy. On reconsideration the Commission should expeditiously bring the means, which the *Order* at times got very wrong, into alignment with its ends, which the *Order* largely got right.

First, the Commission should repair the damage the *Order* inflicted on the goal of promoting small business/new entrant participation in spectrum-based businesses. Congressional mandates require this outcome, and the Commission itself made findings that new entrants would promote the policy goals of competition and innovation in the wireless and broadband markets. The Commission even expressly endorsed the eligibility of small businesses for bidding credits in the 700 MHz auction. But then the *Order* nullified these well-justified conclusions by interpreting its designated entity rules to preclude bidding credit eligibility for small business wholesalers, when wholesaling is the *only* realistic way for new entrants to participate in the broadband wireless industry. The Commission should reverse this invidious discrimination against a specific business model.

Second, the Commission's *Order* properly expressed deep concern about undue concentration in wireless and broadband and its adverse effects on competition, innovation and small business participation. But then the *Order* took no steps to address this concern. The

Commission should, therefore, employ its existing tools, after the bidding has concluded, to address the serious problems of excessive wireless and broadband consolidation by denying long-form applications where grant to the high bidder incumbent would result in excessive concentration in spectrum holdings. Actions under the antitrust laws are another remedy for this serious problem.

Third, the reserve prices for the C and D Block licenses are too high. They violate Section 309(j) of the Communications Act and the Administrative Procedure Act. When coupled with the automatic re-auction of the C Block spectrum under very different usage conditions and the more discretionary re-auction of the D Block, the unlawfully high reserve prices will nullify or disrupt and damage the Commission's carefully considered decisions as to the highest and best use of this spectrum, encourage bidding strategies that defeat these sound allocations decisions and seriously reduce auction revenues. The Bureau has the authority and obligation to reduce the reserve prices, but the Commission should act if it does not.

Fourth, with respect to the pressing need to provide the country's police and fire fighters with a new-build, nationwide, 4G, wireless broadband network, the Commission has blazed the *only* path — a public/private partnership — that can achieve this goal. This Petition specifies several steps the Commission should take to assure implementation of this goal. This is uncharted territory but it can be successfully navigated by the Commission's lowering the high reserve price for the D Block, limiting the default penalty only to cases of bad faith, confirming the "new-build" requirement for the shared network and clarifying the signal coverage requirement for the shared network. In a pleading filed four days ago, Frontline also proposed that the Commission adopt a no-profit, no-loss principle for the service to be provided by the

shared network to the public safety community. Adoption of that principle will optimize the chances for successfully implementing the Commission's lofty goals for public safety.

Vital modifications to the 700 MHz *Order* are needed prior to the start of the auction, but fortunately they are changes that are in sync with, and that would more effectively achieve, the goals embraced by the Commission in these proceedings and especially in its August 10 *Order*.

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**PETITION FOR RECONSIDERATION
OF FRONTLINE WIRELESS, LLC**

Frontline Wireless, LLC (“Frontline”), pursuant to 47 C.F.R. § 1.429(a), hereby petitions for reconsideration of four aspects of the rules and actions adopted in the Commission’s *700 MHz Second Report and Order*: (1) obstacles to meaningful small business participation such as the restriction of designated entity eligibility, which are in direct breach of Congress’s intent to facilitate spectrum opportunities for small businesses and new entrants; (2) its failure to consider

the anticompetitive implications of excessive spectrum aggregation by incumbents in a highly consolidated wireless market; (3) reserve prices and re-auctioning provisions, unlawfully adopted and unsupported by record evidence, which violate the Commission's statutory responsibility to prioritize the public interest without regard to auction revenues; and (4) an arbitrary "default penalty," which could be imposed without any fault on the part of the winning D Block bidder and instead could deny that bidder a license based on the conduct of third parties outside of its control.¹

I. THE COMMISSION HAS FAILED TO COMPLY WITH THE CONGRESSIONAL MANDATE THAT IT SUPPORT MEANINGFUL NEW ENTRANT AND SMALL BUSINESS PARTICIPATION IN THIS AUCTION.

A. Congress Has Required The Commission To Create Opportunities For Small Businesses In The Provision Of Spectrum-Based Services.

In the Communications Act, Congress set out both the objectives for the Commission's competitive bidding procedures and the means to be used in achieving them. As to objectives, the Commission is to "promot[e] economic opportunity and competition," and to "ensur[e] that new and innovative technologies are readily accessible to the American people." As to means, it is to "avoid[] excessive concentration of licenses and ... disseminat[e] licenses among a wide variety of licensees, including small businesses."²

Congress's rationales for creating opportunities for new entrants apply with particular force in this auction.³ The Commission has found that the wireless market's concentration index

¹ Second Report and Order, *In the Matter of Service Rules for the 698–746, 747–762 and 777–792 MHz Bands et. al*, WT Docket No. 06-150 *et. al* (rel. Aug. 10, 2007), 22 FCC Rcd 15289, 72 Fed. Reg. 48814 (Aug. 24, 2007) [herein *700 MHz Second Report & Order*].

² 47 U.S.C. § 309(j)(3).

³ See Frontline Initial Comments, WT Docket No. 96-86, at 58, 66–67 (May 23, 2007) [herein "Frontline Initial Comments"].

(HHI) is 50% higher than the amount the Department of Justice considers highly concentrated.⁴

Incumbents such as Verizon and AT&T, which enjoy all of the advantages of high and escalating market consolidation — such as the power to limit the devices that can be used on their networks, block other manufacturers’ device capabilities, and restrict third party applications on their handsets — could pay blocking premiums of approximately \$1.3 billion in order to prevent the entry of new competitors.⁵ New entrants, in contrast, have incentives to create alternatives to the incumbents. They would seek to do so by developing innovative technologies, partnering with other innovators, and offering choices for wireless customers that are not presently available. In short, Congress required the Commission to create opportunities for new entrants not merely for the sake of those entities, but to advance its policy goals of competition and innovation in the provision of communications services.

B. The Commission Should Not Prejudice A Particular Business Model.

Despite this express Congressional directive and despite language in its *Order* emphasizing the important pro-competitive function that new entrants and small businesses serve,⁶ the Commission has established various rules and conditions for the upcoming auction that are prejudicial to small businesses, especially the condition that discriminates against the one business model most viable for a small business new entrant: wholesale service.

⁴ See *Eleventh CMRS Concentration Report* ¶¶ 42–47 (finding the wireless industry’s HHI score to be 2700 where a score of 1800 is considered “highly concentrated”).

⁵ See *700 MHz Second Report & Order*, Statement of Commissioner Michael J. Copps, at 3; see also Frontline Initial Comments at 6; Frontline *Ex Parte*, WT Docket No. 96-86 (June 28, 2007), Attachment, at 3 (“[T]he incumbent’s license valuation is its economic value *plus* the foreclosure value (which is the loss of incumbent’s oligopoly rents were an entrant to win that license) – that is, the incumbent’s valuation includes the value of deterring entry.”).

⁶ See, e.g., *id.* ¶ 201 (“[W]e believe that it is appropriate to take a measured step to encourage additional innovation and consumer choice at this critical stage in the evolution of wireless broadband services by removing some of the barriers that developers and handset/device manufacturers face in bringing new products to market”).

To encourage small business participation in the auction, the Commission must interpret its designated entity rules so as to grant bidding credits to otherwise eligible small businesses who will build out and provide network services on a wholesale basis. The failure of the *Order* to do so was not only contrary to the Commission’s Section 309(j)(3) mandate. It also violated the Commission’s obligation under the Administrative Procedure Act to make a “rational connection between the facts found and the choice made”⁷ and arbitrarily disadvantaged the very small businesses the Commission recognized as vital to the development of true competition in wireless broadband services.

In its *Order*, the Commission decided to allow eligible small businesses to receive bidding credits in the 700 MHz auction.⁸ It also decided not to mandate wholesale on either the C or D Blocks, but provided most (but not all) licensees with the flexibility to offer wholesale services because of the competitive benefits of a wholesaler new entrant.⁹ But by recognizing the benefits of the wholesale business model and then denying bidding credits to small businesses that adopt that model, the Commission “offered an explanation for its decision that [ran] counter to the evidence before the agency”¹⁰ and was therefore arbitrary and capricious. The record in this proceeding shows that wholesaling is the only way small businesses can capitalize on the opportunities of the wireless broadband market.¹¹

⁷ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (3d Cir. 1994). “Put another way,” an agency’s decision must be “supported by substantial evidence,” and can be reversed by a reviewing court if it “makes a clear error in judgment.” *Id.* (citing *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000)).

⁸ 700 MHz Report & Order ¶¶ 535-37.

⁹ *Id.* ¶¶ 205, 545.

¹⁰ See *Prometheus*, *supra* note 7, at 390.

¹¹ See PISC Comments, WT Docket No. 96-86 at 12-29; Google *Ex Parte*, WT Docket No. 96-86 at 4-9 (July 9, 2007); see also 700 MHz Second Report & Order, Statement of Commissioner Copps at 4 (“[T]he record in this (continued...)”).

Because a wholesale model would delink the network provider and end user and create a point of market entry between them, it would spur needed new competition for devices and applications by smaller entrepreneurs.¹² Wholesaling is also the only model a new nationwide wireless network operator could realistically afford to adopt, given the massive costs associated with providing retail service — consider Verizon’s 2300 retail outlets and its \$1.9 billion annual advertising budget.¹³ The vertically integrated business model that incumbents operate, where they both own the networks and provide end-services on those networks, is completely out of reach for any new entrant, let alone a small business.¹⁴ Allowing designated entity credits for retailers but not wholesalers invidiously discriminates against both small businesses and the wholesale business model that the current wireless market requires them to adopt. Given that the Commission’s desired paradigm for the 700 MHz spectrum is competition, not consolidation, obliging new entrant small businesses to copy the current incumbents’ business model serves no rational purpose. The Commission should not tilt for or against certain business models. Such

proceeding clearly demonstrates a strong business case for the wholesale model. Some parties initially raised doubts about whether a wholesale business model could be economically self-sustaining. I believe that the record compiled in this proceeding answers that question. Several sophisticated companies and financial institutions have concluded that wholesale is indeed a viable economic model”).

¹² See *id.*, Statement of Commissioner Copps at 3 (“requiring licensees to offer network capacity on non-discriminatory terms would have been an enormous shot in the arm for smaller companies ... that aren’t interested in or capable of raising the huge sums necessary to build a full-scale network” and “would have leveled the playing field for companies that want to get into the network business but cannot break through the defenses erected by the massive incumbents who dominate the industry.”); *id.*, Statement of Commissioner Jonathan S. Adelstein at 2–3 (“[A] truly open wholesale model would stand as a breeding ground for innovation, for allowing new and diverse competitors to flourish, and for spurring unparalleled levels of competition into the broadband marketplace.”). Relatedly, wholesaling is the only business model that would ensure a truly open network. Retailers seeking to compete against the big three firms that dominate the market who cannot afford to bid for licenses or build networks need coverage from a wholesaler.

¹³ See “Verizon Wireless: Facts at a Glance,” *available at* <http://aboutus.vzw.com/ata glance.html>; *Advertising Age* (May 21, 2007) at 3.

¹⁴ Obviously, an incumbent that already offers retail service would not offer wholesale service to its potential competitors or provide a platform for new devices, services and technologies on its network.

distinctions are also unsupported by this proceeding's record, which confirms the benefits of both wholesaling and new entrants in the wireless broadband marketplace, and are unlawful. It is contrary to law to limit the definition of small business in this auction to firms that only retail their capacity.

Denying bidding credits to small business wholesalers also undercuts the Commission's policy goals of seeking to use auctions to promote new entry.¹⁵ As the Commission recognized when it adopted the designated entity rules, small businesses cannot compete straight-up at auction against entrenched, highly capitalized incumbents, where the value of the blocking premium for those incumbents in this auction is \$1.3 billion.¹⁶ By suggesting that a wholesale business model would be grounds for DE ineligibility, the Commission will deter nonincumbents' participation in the auction before it even begins. The Commission's rules should encourage new entry by any new firm with any business model. While the incumbents' incentives in this, the last major auction for the foreseeable future, are to warehouse spectrum to forestall competition, new entrants' incentives are to invest in new networks, stimulate demand with lower prices, and create new jobs and productivity. Congress recognized these competitive benefits when it passed Section 309(j)(3).

Allowing bidding credits for small business wholesalers in the C and D Block auctions is also consistent with the Commission's filings in the *Council Tree* case¹⁷ where the revisions to its AWS auction DE eligibility rules are being challenged. The Commission, itself, has stated

¹⁵ *700 MHz Report & Order* ¶ 201 (“[W]hat we decide here is important to the evolution of the next generation of wireless technology, industry structure, and institutional arrangements. This auction provides a window of opportunity to have a significant effect on the next phase of mobile wireless technological innovation, and on the evolution of market and institutional arrangements ... that will go along with that innovation.”).

¹⁶ *See supra* note 5.

¹⁷ *See Council Tree Communications et al. v. FCC*, No. 06-2943 (3d Cir. argued May 23, 2007).

that its practice is to define “eligibility requirements for small business bidding credits on a service-specific basis,” because it need[s] to “tak[e] into account the capital requirements and other characteristics” of the service at issue.¹⁸ Accordingly, the Commission should here take into account the particular capital requirements and other characteristics of the wireless broadband licenses it will be auctioning on the C and D Blocks, and then conclude that “small business” or “new entrant” in this auction is likely to mean “wholesaler.” This is so because (1) a nonincumbent would face insurmountable obstacles in offering a nationwide *retail* service on the C Block package of licenses or on the D Block license; (2) the inevitable blocking strategies of vertically integrated incumbents will put small businesses at a near fatal disadvantage in the bidding; and (3) the high barriers to entry will have a similar effect.¹⁹ By comparison, the spectrum in the AWS auction, was designated for a different set of services that did not possess these characteristics. Importantly, without a bidding credit, a small business new entrant would be unable to meet the stringent buildout requirements of the C and D Blocks, the onerous public safety conditions of the D Block license, or the open access requirements of the C Block — none of which were present in the AWS auction.²⁰

¹⁸ *In the Matter of Amending Part 22 of the Commission’s Rules*, 20 F.C.C. Rec. 4403, 4466 (2005); *see also* 700 MHz *Second Report & Order* ¶ 536. Frontline also adds that its business model is completely different from the petitioner in the *Council Tree* case because it has no relationships, financial or otherwise, with large incumbent carriers. There is no possibility whatsoever that Frontline might be a front for an otherwise ineligible wireless entity.

¹⁹ Under the current requirements the D Block licensee will have to raise an *additional* \$5 billion in costs beyond those required by a commercial network in order to meet public safety’s special demands. Frontline Comments, *Competitive Bidding Procedures for Auction 73*, AU Docket No. 07-157 (Aug. 31, 2007), at 5 & Attachment B [herein “Frontline Auction Rules Comments”].

²⁰ Moreover, unlike in the *Council Tree* case, Frontline does not seek repeal of the 25% rule or the unjust enrichment rule that were part of the DE eligibility qualifications that the Commission adopted prior to the AWS auction. *All* the other designated entity requirements would remain intact.

II. THE COMMISSION MUST PREVENT UNDUE CONCENTRATION OF WIRELESS SPECTRUM.

The August 10, 2007 *Order* rejected a categorical ban on participation in the auction by any incumbent wireless and wireline providers proposed by various public interest organizations.²¹ But its rejection of initial, across-the-board eligibility restrictions did not discharge the Commission's obligation to consider, at the time of the long-form applications, whether the award of any *particular* license would be in the public interest based on concerns about undue concentration or in any way preclude the application of the antitrust laws to acquisitions of spectrum in this auction.

In the Wireless Bureau's auction rulemaking proceeding, launched at the Commission's direction, Frontline has shown why the public interest requires the Commission to review and, when appropriate, deny long-form auction applications that would place (a) 45 MHz or more of the beachfront wireless spectrum, below 1 GHz, or (b) 70 MHz or more of all CMRS spectrum, in the hands of any one licensee.²² To permit the Commission to apply reasoned deliberation to this issue case-by-case after the bidding has concluded, the Bureau should require that applicants in their short-form applications check two boxes showing whether they would or would not exceed either of these two thresholds in any market where they seek to bid. If the applicant had

²¹ The August 10, 2007 *Order* appears to have considered this request for an eligibility bar in the context of the market for "broadband services." However, in the past the Commission has evaluated the anticompetitive consequences of spectrum acquisitions against the narrow market of mobile telephony services. See Memorandum Opinion & Order, *In the Matter of Applications of Western Wireless Corp. and Alltel Corp.*, 20 FCC Rcd. 13,053 (2005); Memorandum Opinion & Order, *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corp.*, 20 FCC Rcd. 13,967 (2005); Memorandum Opinion & Order, *In the Matter of Applications of Midwest Wireless Holdings, L.L.C. and Alltel Communications, Inc.*, 21 F.C.C. Rec. 11,526 (2006). It should do so here as well.

²² Frontline Auction Rules Comments, at 13-16. As Frontline's Supplemental Comments in the auction rules proceeding point out, the Communications Act requires the Commission to evaluate license applications for anticompetitive concerns. See Frontline Auction Rules Supplemental Comments (filed Sept. 21, 2007), at 3.

the highest bid in the auction that pushed them through these benchmarks, these bidders could, at the long-form stage, try to demonstrate why the relevant markets are not concentrated or why, otherwise, they should be allowed to increase concentration in the markets in question. This information should be in the record so that all parties — winning bidders, second-highest bidders, public interest groups, the Antitrust Division, and Congress — would be given the opportunity at the long-form stage to present their case on the issue of excessive concentration. The Commission would thereby be able to engage in the reasoned deliberation required by the APA to ensure its licensing decisions are consistent with the public interest.²³ Of course, the Antitrust Division could also open its own investigation of spectrum aggregations in consolidated markets that raise anticompetitive concerns. Even if licenses were granted in these circumstances, the resulting concentration would up the ante if the carrier subsequently sought to acquire companies with other spectrum holdings in the same markets, which is a growing and threatening trend.²⁴

Verizon and AT&T pointed out in their replies in the auction rules proceeding that the *Order* stated: “[g]iven the number of actual wireless providers and potential broadband competitors, it is unlikely that ... large wireless carriers would be able to behave in an

²³ See, e.g., Public Notice, *AT&T Inc. & Dobson Comm. Corp. Seek Consent to Transfer of Control*, WT Docket No. 07-153 (July 26, 2007) (accepting merger application for filing and establishing pleading cycle for petitions to deny application from interested parties); Comments of Mid-Tex Cellular, Ltd. (Aug. 27, 2007) (petitioning to deny merger or, in the alternative, to condition merger on divestiture based on anticompetitive effects of spectrum aggregation of 70 MHz or more in consolidated market).

²⁴ See *id.*; see also “WISP Industry Rollups” (March 29, 2007) (detailing larger wireless ISP carriers’ takeovers of rural providers), available at http://www.wispnews.net/2007/03/wisp_rollups.html.

anticompetitive manner as a result of any potential acquisition of 700 MHz spectrum.”²⁵ But elsewhere in the *Order*, the Commission, relying on record evidence, found that such anticompetitive behavior in the wireless market *was already taking place*.²⁶ Those two findings leave fully intact the Commission’s obligation to make individualized determinations of whether a particular license grant would have unacceptable anticompetitive effects. In some cases, the acquisition of a small portion of 700 MHz spectrum by an existing wireless provider may not raise unacceptable competitive issues. Other auction outcomes would be facially anticompetitive.²⁷ Those individual determinations, which will be triggered by the filing of long-form applications by the high bidders, should be undertaken based on the facts presented at that time.

Verizon admits that the 70 MHz figure applies in the context of transfer of control applications.²⁸ It also attempts to distinguish the auction context, but logic dictates that a transfer of spectrum from the public storehouse to Verizon should be subject to the 70 MHz limit just as would a transfer of spectrum from one private party licensee to another. In either case, the Commission’s charge is to determine whether the proposed aggregation of spectrum in the hands of a single entity raises anticompetitive and anticonsumer concerns.

²⁵ *700 MHz Second Report & Order* ¶ 256. This finding does not fulfill the Commission’s statutory obligation to rule on the eligibility of each potential licensee and to consider the possible harms of spectrum concentration. *See* Frontline Auction Rules Sur-Reply Comments at 4.

²⁶ *See, e.g., id.* ¶ 200 (“[w]e have not found, however, that competition in the CMRS marketplace is ensuring that consumers drive handset and application choices, especially in the emerging wireless broadband market”); ¶ 203 (“some of the restrictive practices set forth in the record appear to be used by wireless service providers for purposes other than simply protecting the network from harm”); ¶ 207 (“current practices in the industry may be impeding the development and deployment of devices and applications that consumers want to use”).

²⁷ *See* Frontline Auction Rules Supplemental Comments at 9-10 (noting that AT&T currently controls 70 MHz or more of CMRS spectrum in 86 of the 100 largest markets).

²⁸ *See* Verizon Auction Rules Reply Comments at 19.

Preventing excessive aggregations of low-frequency spectrum or of CMRS spectrum generally by incumbents is squarely within the Commission's power and is its responsibility. Spectrum is a necessary natural asset, not an earned advantage, and the Commission's public interest duty and precedent require it to ensure that any accumulation of spectrum — whether on Wall Street or at auction — comports with the public interest. If the Commission does not act, then private parties, the Antitrust Division, and/or the courts will be required to fill the gap, with the unfortunate consequence of additional delay in finalizing the auction results and putting the 700 MHz spectrum to public use.

III. THE RESERVE PRICES ARE ARBITRARILY HIGH AND, COUPLED WITH RE-AUCTION MECHANISMS, UNLAWFULLY UNDERMINE THE OPEN ACCESS PROVISIONS FOR THE C BLOCK AND THE PUBLIC SAFETY PROVISIONS FOR THE D BLOCK.

The *Order* directed the Wireless Bureau to set reserve prices and suggested guidance for the Bureau to use in setting those reserve prices.²⁹ The *Order* also specified that if the reserve prices are not met in the C Block auction, the spectrum would be reconfigured, the open platform requirements would be voided and the spectrum would be re-auctioned. The *Order* was less definitive with respect to the D Block but held out the possibility of changing the conditions for a re-auction of the D Block license if the reserve price is not met in the first auction.

The reserve prices the Bureau proposed in the auction rules proceeding are arbitrary and capricious. In that proceeding Frontline has urged that the Bureau has not only the discretion but

²⁹ Two Commissioners expressed these concerns. See *700 MHz Second Report & Order*, Statement of Commissioner Copps at 4 (“impos[ing] reserve prices on each of the individual spectrum blocks [is] something without precedent in previous auctions and something rather at odds with letting the market pick the auction block winners”); Statement of Commissioner Robert M. McDowell at 5 (dissenting from section of *Order* setting reserve prices) (“[R]eserve prices have the effect of skewing the auction and hindering the efficient allocation of spectrum. The problem with setting reserve prices is that it puts the Commission, rather than the market, in the precarious position of identifying the right value for the spectrum.”). See also Frontline *Ex Parte*, WT Docket No. 96-86 (July 23, 2007) (“Typically, a reserve price is used as a starting point for bidding, not an ending point.”).

also the obligation to set different reserve prices for the C and D Block licenses on the basis of (1) changed circumstances — the collapse of the credit markets — and, (2) the irrefutable record in that proceeding for much lower reserve prices — a record the Commission did not have the benefit of when it suggested its guidance to the Bureau. Failure of the Bureau to take proper corrective action will leave in place reserve prices that have little bearing on the current economic realities facing potential bidders and violate the law.

This action by the Bureau, however, would still leave a fundamental error that the Commission itself must correct on reconsideration — the provision that the Commission will automatically void the open access requirements and spectrum configuration of the C Block and possibly void the public safety network sharing requirements of the D Block license if the reserve prices for those licenses are not met. These provisions violate the prohibition in Section 309(j) of the Communications Act that public interest considerations, not auction revenues, must animate the Commission’s spectrum allocation decisions. The provision that these requirements will be automatically voided on the C Block also violates the Administrative Procedure Act because it forecloses agency decision-making at the time of the re-auction process as to what requirements for that spectrum best serve the country’s public policy goals.

A. The Reserve Prices Set By The Bureau Are Themselves Arbitrary And Capricious.

Frontline’s pleadings in the Bureau’s auction procedures rulemaking develop in detail, supported by leading auction economists, the respects in which the excessive reserve prices are unlawful. It is the Bureau’s responsibility to correct these fatal errors. The Commission itself need not take this step unless the Bureau fails to do so.

The Commission based its guidance on the excessive reserve prices for the C and D Block licenses on the *exit prices* of the AWS auction, not on the reserve prices in that auction. In so

doing, the Commission “offered an explanation for its decision that [ran] counter to the evidence before the agency” and was, therefore, arbitrary and capricious.³⁰ The APA requires that the Commission make a “rational connection between the facts found and the choice made.”³¹ The “fact found” — the price paid for unencumbered spectrum in the AWS auction — and the “choice made” — to use that figure as a valuation for setting the C Block’s reserve price — bear no rational connection whatsoever.³²

As Frontline outlined in its auction rules comments, the Commission’s guidance to the Bureau that it set reserve prices at the exit price levels from the AWS auction, leads to reserve prices here that are *significantly* higher than any imposed in the past and are arbitrary and capricious:

- *First*, where a winning licensee must assume the regulatory cost of the open access conditions that the *Order* found to be in the public interest with respect to the C Block auction and the special public safety build-out requirements on the D Block,³³ it is arbitrary to set a *reserve price* for encumbered spectrum derived from an exit price for unencumbered spectrum.³⁴
- *Second*, 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

³⁰ *Prometheus Radio Project*, 373 F.3d at 390.

³¹ *Id.*

³² Frontline Auction Rules Comments at 4–6.

³³ Imposing a reserve price on the D Block will translate into higher prices for public safety service and thereby undercut the public interest purposes of the allocation. Therefore, the D Block reserve price should be set at a lower level to decrease these costs. See Frontline Auction Rules Comments at Attachment A.

³⁴ In its auction rules reply comments, Verizon claims that the superior propagation characteristics of the 700 MHz spectrum is sufficient weight on the other side of the scale to offset the regulatory costs of open access. See Verizon Auction Rules Reply Comments at 10. But Verizon’s own Commission quote for the proposition clearly states that such a comparison between 700 MHz licenses and AWS-1 licenses is based on “*unencumbered*” 700 MHz spectrum. See *id.* (quoting Public Notice, *Competitive Bidding Procedures for Auction 73*, AU Docket No. 07-157 (Aug. 31, 2007) ¶ 51) [herein *Auction Rules Public Notice*] (emphasis added). Nowhere in the *Second Report & Order* did the Commission claim that 700 MHz spectrum encumbered with open access conditions is roughly equal in value to AWS-1 spectrum and there is not a particle of factual support for this claim in the record.

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.

- *Third*, spectrum values have sharply declined since the AWS auction. This is illustrated by the substantial erosion of the stock price of Leap Wireless from January 2007 to just before MetroPCS's recent bid for Leap. These decreases in spectrum values are matched by an overall reduction in the value of capital assets in this country.
- *Fourth*, the recent turmoil in the credit markets that has spread to the overall global economy will directly and dramatically increase the costs of bidding in this auction.³⁵

The Commission's decision to peg the reserve prices to the exit prices in the AWS auction, which took place 18 months prior to the 700 MHz auction, is completely out of touch with the differences in the conditions attached to the spectrum as well as current, more bearish realities in both the spectrum and credit marketplaces. As the reserve prices are arbitrary and capricious, they should be adjusted as specified in Frontline's auction rules filing.³⁶

B. The Excessive Reserve Prices And Re-auctioning Provisions Are Designed To Maximize Revenue In Violation Of Section 309(j).

By setting the reserve prices based on the exit prices from a different auction at a different time and then providing that the open requirements on the C Block would vanish and its configuration would drastically change if those reserve prices are not met, the Commission has violated Section 309(j) of the Communications Act under the standard set out in *Chevron, U.S.A. v. Natural Resources Defense Council*.³⁷ As that case states, where Congress "has directly

³⁵ See Harold Furchtgott-Roth, "Spectrum Auction Problems," *N.Y. Sun* (Sept. 17, 2007) ("The greatest threat to the success of the January auction is the current credit squeeze. Dozens of firms that planned to participate in the auction are doubtlessly being told by their banks that a large line of credit with favorable terms will not be available.").

³⁶ See Frontline Auction Rules Comments.

³⁷ 467 U.S. 837 (1984).

spoken to the precise question at issue,” and its intent is “clear” and “unambiguously expressed,” the agency must give it effect.³⁸ In Section 309(j)(7), Congress’s intent to prohibit the Commission from linking auction procedures to auction revenue considerations could not be more clearly and unambiguously expressed:

(7) CONSIDERATION OF REVENUES IN PUBLIC INTEREST DETERMINATIONS—

(A) CONSIDERATION PROHIBITED.—In making a decision ... to assign a band of frequencies pursuant to [competitive bidding], and in prescribing regulations pursuant to [section 309(j)(4)(C), which states the Commission must “promote economic opportunity for a wide variety of applicants, including small businesses”], **the Commission may not base a finding of public interest, convenience or necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.**³⁹

The Commission, itself, recognized its responsibility to prioritize public interest benefits over auction prices elsewhere in the *Order*:

[T]he focus on the statutory language [in Section 309(j)(3)] on recovery of a “portion” rather than the full value of the spectrum supports the conclusion that the Commission serves the objective of Section 309(j)(3)(C) if it recovers less than the maximum market value if necessary to obtain the benefits of other statutory objectives.⁴⁰

But in the next subsection, the *Order* strikes the exact opposite note:

[R]eserve prices should, taken together, reflect *current assessments of the potential market value* of this spectrum. ... For several reasons, using AWS-1 auction results might be an appropriate approach for setting block-specific reserve prices reflecting a conservative *estimate of market value*.⁴¹

³⁸ *Chevron*, 467 U.S. at 842–43.

³⁹ 47 U.S.C. 309(j)(7)(A) (emphasis added).

⁴⁰ *700 MHz Second Report & Order* ¶ 214.

⁴¹ *Id.* ¶¶ 298, 304 (emphasis added). The Commission’s claim in the *Order* that its reserve price/re-auction procedures are compliant with Section 307(j)(7)(A)’s prescription is unconvincing. It claims that the C Block auction’s failure to reach the reserve would show that “the cost of the open platform restrictions was too high — not because the auction would have failed to generate enough Federal revenue, but because the low level of bidding would indicate inherent problems with operating a wireless network under this type of open platform regime.” *See id.* ¶ 313. But it is changing public interest policy decisions because reserve prices are not met — in short, spectrum policy based on dollars — that is unlawful.

Changing spectrum policy decisions (block size and open requirements) based on reserve prices, is a clear violation of Section 309(j)'s bar on policy decisions that are based on revenue-raising objectives.⁴²

The *Order* attempts to avoid this conclusion with the assertion that failure to meet the reserve prices will prove that the cost of the open platforms obligations to potential bidders was higher than the Commission had thought in imposing those obligations.⁴³ Thus, the shortfall will signal a policy failure that will be automatically corrected through a re-auction without open platform obligations. For this assertion to hold any water, several conditions would have to be met: First, the Commission would have to at least attempt to place a price on the purported economic burdens of its conditions (as well as some idea of their cost); second, the Commission would have to conclude that bidder decisions should be attributed solely to the open access conditions and not other considerations, like a change in the credit markets; and third, the Commission would have to correct for strategic bidding decisions completely unrelated to the conditions that might camouflage their true valuations.⁴⁴ It is irrational to conclude that bidders' failure to meet the arbitrarily inflated reserve prices in the face of a regulatory promise to remove the spectrum encumbrances as a reward for low bids says *anything* about the open access conditions. Therefore, the *Order's* explanation of the reserve prices and re-auction provision are manifestly unrelated to any policy other than the pursuit of auction revenue.

⁴² To the extent that the reserve price figures are driven by the CBO's \$10 billion estimate of total auction revenues, this would further demonstrate that raising auction revenues motivated the Commission's decision to set excessive reserve prices.

⁴³ 700 MHz Report & Order ¶ 313.

⁴⁴ In fact, the Commission's provision for re-auction of an unencumbered and reorganized C Block *encourages* such strategic behavior. See Section III.B.

C. Re-auctioning The C And D Block Licenses With Different Requirements If The Reserve Prices Are Not Met Creates Perverse Incentives For Bidders That Are Harmful To The Public Interest.

In requiring C Block licensees to provide open platforms for devices and applications on a nondiscriminatory basis, the Commission relied on evidence in the record showing that “certain practices in the wireless industry may constrain consumer access to wireless broadband networks,” and that incumbent “wireless service providers ... block or degrade consumer-chosen hardware and applications without an appropriate justification.”⁴⁵ Open platform requirements on a portion of the spectrum to be auctioned would therefore “encourage additional innovation and consumer choice at this critical stage in the evolution of wireless broadband services ... by removing some of the barriers that developers and handset/device manufacturers face in bringing new products to market.”⁴⁶ In adopting these requirements, the Commission rejected the claim by incumbent Verizon Wireless that such measures were unnecessary and not in the public interest.⁴⁷

The “unprecedented step”⁴⁸ of mandating that, if the reserve price is not met, the C Block spectrum must be re-auctioned, stripped of these open requirements and radically reconfigured, will thwart these important objectives. It will also preclude the development of the “third pipe” that the Commission had cited as an overriding public interest goal for this auction.⁴⁹ As

⁴⁵ 700 MHz Second Report & Order ¶¶ 198, 201.

⁴⁶ *Id.* ¶ 201.

⁴⁷ The Commission also rightly rejected Verizon Wireless’s frivolous claims that imposing open access requirements on the C Block arbitrarily treats like licensees differently and violates the First Amendment. *See id.* ¶¶ 202, 215–220.

⁴⁸ *Id.*, Statement of Commissioner McDowell at 3.

⁴⁹ *See id.* ¶ 201 (“[W]hat we decide here is important to the evolution of the next generation of wireless technology, industry structure, and institutional arrangements. This auction provides a window of opportunity to have a significant effect on the next phase of mobile wireless technological innovation, and on the evolution of market and (continued...)”)

Frontline’s auction rules comments showed, the prospect of a re-auction creates an incentive 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.”⁵⁰ Bidders who place a higher value on unencumbered spectrum will “hold back bids in the initial auction to prevent the reserve from being met,” and “withhold higher bids until the re-auction when there will be weaker service rules, an altered band plan, and fewer competing bidders.”⁵¹

By requiring a re-auction without open access conditions and, through the Bureau, establishing excessive reserve prices, the Commission will have effectively abdicated its responsibility to define the public interest obligations for this spectrum and will have delegated it, instead, to the auction bidders themselves. The incumbent bidders who have both the most money with which to bid and the most to lose from open access platforms, namely Verizon and AT&T, will rationally act to defeat the conditions by refusing to bid or lowballing their bids. This motivation will be especially powerful because in its *Order* the Commission took special care to adopt a strict and rigorous enforcement regime for its open access requirements.⁵² In

institutional arrangements ... that will go along with that innovation.”); *id.*, Statement of Chairman Kevin J. Martin at 3 (“the upcoming auction presents the single most important opportunity for us to achieve the goal of a nationwide third broadband pipe”); *id.*, Statement of Commissioner Adelstein at 1 (“This coveted spectrum presents us with a historic opportunity to facilitate vibrant, spectrum-based opportunities for both consumers and wireless providers.”).

⁵⁰ Frontline Auction Rules Comments at 3.

⁵¹ *Id.*

⁵² See 700 MHz *Second Report & Order* ¶ 229 (“We intend to vigorously enforce the [open access] requirement ... A person or entity who believes that the C Block licensee’s refusal to attach a proposed device or application is a violation of the rules we adopt here may file a complaint pursuant to the Commission’s existing enforcement rules ...”).

short, the Commission will have adopted a plan for implementing its policy decisions that will prevent the very innovation and competition that open access was intended to promote.

Because the incumbents have deep pockets and can afford to bid high for the spectrum in re-auction, they will have effectively been given the opportunity to buy their way out of the open access conditions. Unless the Commission were counting on this outcome, it would not have mandated a re-auction based on eliminating the conditions it believed would serve the public interest. Such an outcome raises very serious legal and constitutional issues.

Many of the same defects undermine the reserve price and re-auction features of the D Block auction. There, at least, the re-auction and change in license conditions are not automatic. The Commission has preserved its discretion to fashion a reasonable remedy if the reserve price is not met. But there, as shown in Frontline's auction rules comments, the reserve price is completely divorced from reality.

D. These Provisions Also Violate The Administrative Procedure Act.

The new set of allocation arrangements that would automatically go into effect on the C Block if the reserve price is not met would not be based on decisions that the Commission would make at that time taking into account current facts and circumstances. The Commission would have abandoned its responsibility to make current allocations decisions at that time in favor of an out-of-date, preordained default arrangement. That outcome also violates the Administrative Procedure Act because it would not even constitute an attempt at rational decision-making.

Another fatal defect is that the Commission failed to give parties in this proceeding adequate notice of the re-auction provisions it adopted in the event the C and D Block reserve prices are not met. The Commission's *Report and Order and Further Notice of Proposed*

Rulemaking did not discuss the possibility of re-auctioning the spectrum stripped of open access or other requirements it might adopt to serve the public interest.⁵³ No commenter or prospective bidder could have reasonably predicted, based on the record, that the Commission’s service rules would impose such a condition.⁵⁴ “Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”⁵⁵

Nor would this set of decisions advance the revenue-raising goal they obviously (and unlawfully) seek to advance. A failed first auction will likely lead to lower auction revenues for both the C and D Block licenses, for the reasons set forth in Frontline’s comments in the auction proceeding.⁵⁶

IV. THE COMMISSION MUST REVISE ITS 700 MHZ RULES TO FOSTER AN EFFECTIVE PUBLIC/PRIVATE PARTNERSHIP BETWEEN THE D BLOCK AND THE PUBLIC SAFETY BROADBAND LICENSEE.

A. The Commission Should Confirm That A “New Build” Is Required For the Public/Private Shared Network.

The Commission should confirm that its network requirements for the shared public/private network include the construction of a wholly new, state-of-the-art, 4G, broadband, wireless network. Without a “new build” requirement, the incumbents will incorporate the

⁵³ See Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Service Rules for the 698–746, 747–762 and 777–792 MHz Bands et al.*, WT Docket No. 06-150 et. al (rel. April 27, 2007), 22 FCC Rcd 8064, 72 Fed. Reg. 24238 (May 2, 2007).

⁵⁴ The Bureau’s auction rules Public Notice solicited comments on the procedures that re-auction should follow, such as eligibility and bidding, but treated the substantive issue of the re-auction itself as resolved. See *Auction Rules Public Notice* ¶ 29.

⁵⁵ *Int’l Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

⁵⁶ See Frontline Auction Rules Comments at 3-6.

public safety shared network into their existing, out-of-date networks. As a result, public safety would have to settle for a network insufficient for its needs today and in the future. This threat is not hypothetical; Verizon has admitted that it would “likely . . . *integrate 700 MHz licenses with existing complements* of 800 MHz cellular [which it largely obtained for free], 2 GHz PCS and 1.7/1.9 GHz AWS spectrum.”⁵⁷ Nor should this issue be left to the negotiation of the network sharing agreement (“NSA”). The Commission should be able to conclude right now that an “old build” network is unacceptable for the public safety community. In addition, all bidders deserve to know such basic information before the D Block auction begins. Otherwise, they will be bidding on radically different premises, which will lead to confusion and even a failed auction.

Without a “new build” requirement, the incumbents would have a large advantage in the auction in addition to the blocking premium, thereby hindering competition and disadvantaging public safety. Because of the cost savings resulting from being allowed to use existing 2.5G or 3G facilities for a substantial portion of the D Block buildout requirements, the incumbents would have an even larger margin with which to bid preemptively to keep out new entrants/new competition. In the longer term, the public safety community and the country would suffer from the lack of a state-of-the-art network and the suboptimal use of 700 MHz spectrum.

In recognition of these potential problems, the Commission’s *Order* stated that the broadband technology platform for the new shared network must “include current and evolving state-of-the-art technologies reasonably made available in the commercial marketplace.”⁵⁸ Because of the likelihood that incumbents would implement an “old build” strategy, as a result of

⁵⁷ Comments of Verizon, *Service Rules for the 698-746, 747-762, and 777-792 Bands et al.*, WT Docket Nos. 06-150, 06-169, 96-86, PS Docket No. 06-229 at 26 (May 23, 2007).

⁵⁸ *700 MHz Second Report & Order* ¶ 405.

which new entrants would be outbid, and public safety would be left with an inadequate network, the Commission should insist that the D Block licensee must construct a wholly *new*, 4G wireless broadband shared network sufficient to meet public safety’s needs.

B. The Commission Should Clarify That It Has Not Pre-Determined The Meaning Of “Sufficient Signal Coverage.”

The Commission’s *Order* properly adopted baseline principles concerning coverage, reliability, security and encryption, interoperability, robustness and similar needs unique to public safety communications. By requiring the shared network to meet these requirements, the Commission ensures “all the capabilities and attributes needed for a public safety network.”⁵⁹ With respect to signal coverage, however, the *Order* could be read to have gone beyond a statement of principle and to have established a specific, and unsupported, technical requirement. The Commission should not prematurely rule on specific technical issues, but should instead allow the PSBL and D Block winner to develop those details as they negotiate the NSA — a negotiation which the Commission has wisely stated it will carefully oversee.⁶⁰

Specifically, while Frontline agrees that the shared network should provide “[s]ufficient signal coverage to ensure reliable operation throughout the service area consistent with typical public safety communications systems,” the Commission should delete the parenthetical reference which reads “(*i.e.*, 99.7 percent or better reliability).”⁶¹ There is no precedent – and certainly no evidentiary basis in the record – for adopting the 99.7 percent reliability level for

⁵⁹ 700 MHz *Second Report & Order* ¶ 406.

⁶⁰ See *id.* ¶ 447-49, 501-12; Frontline *Ex Parte*, WT Docket No. 96-86 (July 24, 2007).

⁶¹ This is not to be confused with the 99.3% coverage requirement. By choosing a 99.3% coverage requirement, as opposed to the 99% coverage requirement recommended by Frontline, the Commission added \$1 billion more in costs to the network. But this feature is subject to negotiation between the D Block high bidder and the PSBL and can be adjusted depending on the circumstances at that time.

public safety grade systems. Indeed, 95 percent signal coverage is standard for many public safety systems, and public safety's requests for proposals regularly require 95 percent signal coverage for trunked radio systems. The Commission should, accordingly, clarify that while its rules require the shared network to provide signal coverage at a level common in public safety systems, the specific level for the shared network should be determined in the NSA negotiation.

C. Failed Negotiations Between The D Block High Bidder And The PSBL Should Not Be Treated As A Default By The D Block Auction Winner, Absent Bad Faith.

The Commission conferred on the Chiefs of the Wireless and Public Safety Bureaus the authority to resolve disputes between the D Block high bidder and the PSBL, including the option to deny the high bidder's long-form application in the event of an impasse. If the Bureau Chiefs choose to deny the long-form application, however, the D Block winning bidder should not automatically "be deemed to have defaulted" and held liable for a punitive default payment.⁶² The Commission's current default provision, 47 C.F.R. §1.2104(g), requires a defaulted bidder to pay a very high penalty, including not only the difference between its bid and the bid of the subsequent licensee but also an additional payment that the Bureau has recommended be set at 20% for this auction. While this may be an appropriate penalty when a high bidder in a typical auction does not satisfy its clearly known obligations, the D Block high bidder is in a vastly different situation in two key respects: (1) the D Block high bidder is not in control of whether a default occurs, and (2) the conditions which must be satisfied to avoid default are not clear. As a result of these critical differences, the default penalty should not apply to a D Block high bidder who has negotiated in good faith with the PSBL.

⁶² 700 MHz Second Report & Order ¶ 508.

The Commission's default provisions are intended to deter a licensee from choosing not to satisfy its clear-cut obligations after being declared the high bidder. A key assumption for any deterrent is that the party to which it applies is in control of the events that trigger the penalty. In typical auctions, bidders have this control. The high bidder for the D Block license, however, could negotiate with the PSBL in good faith for months to establish a fair public/private partnership and be ready to move forward with such an agreement, yet still be subject to the penalty if the PSBL, for no reason or a bad reason, refuses to agree.⁶³ The deterrent effect under these circumstances will be that parties will avoid bidding on the D Block.⁶⁴

In addition, the D Block auction is distinct from other auctions because the conditions that the licensee must satisfy in order to avoid default will not be clearly set forth prior to the bidding. The D Block high bidder will, therefore, have no clear ability to avoid default. The only way to ensure that it will not default would be for the D Block high bidder to agree to every one of public safety's subsequent demands in the NSA negotiation process, whether or not they are reasonable. As the Commission has provided for six months for negotiation of the NSA, it clearly does not intend for the D Block auction winner to be forced to accept every public safety demand. Deeming a high bidder in default, who is willing to satisfy its license conditions, would be manifestly unjust and unlawful. Good faith is the only lawful standard to which the D Block licensee can be held. Unless this issue is resolved, bidders (new entrants and small businesses in particular) will have difficulties raising funds, and auction bids will be unnecessarily lower.

⁶³ If the D Block high bidder is subject to a default penalty under such circumstances, this effectively cedes control to the PSBL because, egged on by others, it could block negotiations from moving forward and trigger the default penalty. Allowing the PSBL to have this power is an unlawful delegation of the Commission's authority.

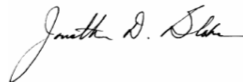
⁶⁴ Frontline Auction Rules Comments at 16-17.

The shared network concept holds high promise but also considerable risk and uncertainty. A key concern, which will affect the number of bidders and bidding levels, is the economic viability of the shared network. Both the public safety community (and, therefore, the public at large) and the D Block licensee have a powerful stake in the network's health. On September 20, Frontline submitted a "Request For Expedited Consideration And Adoption Of A No-Profit, No-Loss Plan For Public Safety Users Of The Shared Network" in PS Docket No. 06-229. The safeguards sought in this "Request" would exponentially reduce uncertainty about how the shared network would operate financially. It would, therefore, clear the way for more bidders to participate in the auction and for them to submit higher bids. The proposal would serve public safety's interests because public safety would be assured of state-of-the-art broadband services on a not-for-profit basis.

* * *

For the above reasons, the Commission should, on reconsideration, expeditiously modify the implementation decisions contained in its *700 MHz Order*. Otherwise, the forward looking policy goals that it adopted in that *Order* will be thwarted, and the great opportunities opened up by this auction of the last premium spectrum to be made available will be squandered.

Respectfully submitted,



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