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UNREDACTED

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Re: Request for Waiver; Redacted Version Released January 23, 2008, as DA 08-100

Dear Madam and Sirs:

This responds to the Request for Waiver, submitted January 4, 2008 on behalf of Frontline Wireless, Inc. ("Frontline") along with a letter requesting confidential treatment.¹ Frontline's Request for Waiver will be accorded confidential treatment in accordance with our rules and procedures. Accordingly, this letter will not be publicly disclosed in full by the Commission until the Commission discloses all non-public information relating to Auction 73.

Frontline requests a waiver of section 1.2105(b)(2) of the Commission's auction rules in order to allow Licenseco, LLC ("Licenseco"), a controlled subsidiary of Frontline, to select additional licenses in its short-form application to participate in Auction 73 so that it can participate in that auction and, most importantly, participate in what it regards as the likely re-auction of the D Block in Auction 76.² For the reasons described below, we hold in abeyance until after the close of bidding in Auction 73 Frontline's Request for a waiver of the current rules as that waiver relates to Frontline's desire to participate in bidding on the D Block in Auction 76. We deny Frontline's Request to the extent it seeks a waiver to permit Licenseco to change its Auction 73 short-form license selection decision to enable Licenseco to participate in bidding on the A and B Block licenses in Auction 73.

¹ Licenseco, LLC, Short-Form Applications to Participate in Auctions 73 and 76, Confidential Request for Waiver of Section 1.2105(b)(2) of the Commission's Rules, *Request for Waiver*, filed January 4, 2008 ("Request"); Letter from Christine E. Enemark, Covington & Burling LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed January 4, 2008 ("Confidential Treatment Letter"). Frontline states that it seeks confidential treatment because the Request discusses Licenseco's license selection(s), the disclosure of which would violate the Commission's procedures for anonymous bidding in Auction 73 and the anti-collusion rule. Confidential Treatment Letter at 1. Request at n 3.

² See 47 C.F.R. § 1.2105(b)(2).

Background

Auction 73 is an auction of 1099 spectrum licenses in five blocks (Blocks A – E) of the 700 MHz Band, which is scheduled to start on January 24, 2008.³ Auction 76 is the designation for a contingent subsequent auction of alternative licenses in Blocks A, B, C, and/or E of the 700 MHz Band that will be held promptly after Auction 73 if the reserve price established for any of these four license blocks is not satisfied by the results of Auction 73.⁴ If the reserve price established for the D Block of the 700 MHz Band is not satisfied by the results of Auction 73, the Commission may decide to re-offer that license subject to the same service rules or reconsider the rules applicable to that block.⁵

Consistent with direction from the Commission, the Wireless Telecommunications Bureau (“Bureau”), under its delegated authority, announced on October 5, 2007, the procedures for Auctions 73 and 76. More specifically, the Bureau announced procedures, among other things, for anonymous bidding (under which disclosures of auction-related information are limited until after the close of bidding in Auction 73 and Auction 76, if the latter becomes necessary), for aggregate reserve prices for each spectrum block of license(s), and for other aspects of the auction process such as requirements and deadlines for applications and upfront payments to purchase of bidding eligibility, as well as for the design and structure of the bidding itself. Pursuant to these procedures, an applicant that wishes to qualify to bid in Auction 76 must both become a qualified bidder in Auction 73 and file a separate application for Auction 76.⁶ In order to account for the “related nature” of any subsequent auction to the first, and to avoid unnecessary delay in the commencement of bidding in such a subsequent auction, the Commission had specifically concluded that the Bureau’s procedures should enable only applicants that become qualified bidders in the initial auction to become qualified to bid in the subsequent auction and concluded that the provisions of the anti-collusion rule should apply

³ See generally, “Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, and other Procedures for Auctions 73 and 76,” *Public Notice*, 22 FCC Rcd 18,141 (“*Auction 73/76 Procedures Public Notice*”).

⁴ See *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,141, 18,146, 18,212 ¶¶ 1, 7-9, 271-73; see also Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule, WT Docket No. 07-166, Second Report and Order, FCC 07-132, ¶¶ 298-317 (2007) (“*700 MHz Second Report and Order*”), recon. pending.

⁵ *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,146 ¶ 7; see also *id.* at 18,212-13 ¶¶ 271, 275, 276 (providing for possible re-auction of D Block in Auction 76); *700 MHz Second Report and Order* at ¶ 314.

⁶ See *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,146, 18,159-60 ¶¶ 8, 60.

without interruption through both the initial and subsequent auctions until the down payment deadline in the subsequent auction.⁷

Frontline states that it was unable to raise the \$128.21 million necessary to make an upfront payment sufficient for Licenseco to bid on the D Block license, which is the only license that Licenseco selected on its FCC Form 175 short-form application for Auction 73.⁸ Frontline further states that although the upfront payment submitted for Licenseco is not sufficient to render it eligible to bid on the D Block license, it would be sufficient to make it eligible to bid on certain of the A and/or B Block licenses.⁹ Frontline seeks a waiver to allow Licenseco to now select the licenses in the A and B Blocks on its short-form application,¹⁰ which would enable it to become a qualified bidder in Auction 73, and allow it to become eligible to participate in bidding for the D Block in the event the reserve price is not met in Auction 73 and the D Block is re-auctioned in Auction 76.¹¹ According to Frontline, grant of the requested waiver would allow Licenseco, like any applicants who may have selected very few licenses in Auction 73 and made relatively low upfront payments, the additional opportunity to raise capital between the upfront payment deadlines for Auctions 73 and 76, when, among other things, the current “credit crisis may have eased.”¹² Frontline argues that “the Commission should include [in a D Block re-auction] those applicants like Frontline who are focused exclusively on constructing and operating a nationwide network on the D Block.”¹³

As Frontline notes, to become a qualified bidder in Auction 73, an applicant must timely submit an upfront payment to purchase enough bidding eligibility to place a bid on at least one of the licenses selected on its short-form auction application,¹⁴ which Licenseco did not do, and Section 1.2105(b)(2) of the Commission’s auction rules prohibits Licenseco from changing the license selections on its application after the auction application deadline.¹⁵

Discussion

To obtain a waiver of the Commission’s competitive bidding rules, an applicant must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its

⁷ 700 MHz Second Report and Order at ¶ 316.

⁸ See Request at 1, 4, 5.

⁹ *Id.* While Frontline’s Request did not specify the upfront payment made for Licenseco, we note that the amount of that upfront payment was \$5000. An upfront payment of this amount would not be sufficient to qualify Licenseco to bid on any of the 176 A Block licenses, but would enable Licenseco to become qualified to bid on any one of eight of the 734 B Block licenses or on combinations of certain of the eight to the extent consistent with the eligibility rules. See *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,228-47, Attachment A.

¹⁰ Request at 1-2.

¹¹ See Request at 1-2, 4 & n. 9, 8-11.

¹² See Request at 5

¹³ See Request at 10-11.

¹⁴ Request at 3; see *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,174-75 ¶¶ 120-23. An applicant that does not timely submit a sufficient upfront payment will be ineligible to bid. 47 C.F.R. § 1.2106(c).

¹⁵ 47 C.F.R. §1.2105(b)(2). Request at 5.

application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.¹⁶

For the reasons described below, we hold in abeyance until after the close of bidding in Auction 73 Frontline's Request for a waiver of the current rules as that waiver relates to Frontline's desire to participate in bidding on the D Block in Auction 76. The results of Auction 73 may make a re-auction of the D Block unnecessary, rendering moot Frontline's Request. If not, we can address after Auction 73 the merits of Frontline's argument that unique circumstances justify a waiver that would enable Licenseco to become qualified to bid for the D Block in Auction 76. In addition, we deny Frontline's Request to the extent it seeks a waiver to permit Licenseco to change its Auction 73 short-form license selection decision in order to enable it to participate in bidding on A and B Block licenses in Auction 73.

1. Participation in Any Re-Auction of the D Block in Auction 76

As described above, the gravamen of Frontline's Request is that the current rules and procedures should be waived to the extent necessary as to allow Licenseco the potential opportunity to participate in Auction 76 in "the likely event" that the D Block will have to be re-auctioned because the reserve price for the D Block is not met in Auction 73.¹⁷ In particular, Frontline seeks a waiver of the prohibition against changing license selections after the short-form filing deadline in order to meet the prerequisite that it qualify to bid in Auction 73 in order to bid in Auction 76, should Auction 76 occur.¹⁸

We need not address the merits of this Request before the close of bidding in Auction 73. If, contrary to Frontline's predictions, the reserve price of the D Block is met by other, qualified bidders in Auction 73, its Request will be rendered moot. Accordingly, we hold in abeyance until after the close of bidding in Auction 73 Frontline's Request that we waive our rules to provide it with the opportunity to participate in a re-auction of the D Block in Auction 76. At that time, we will know whether the Request has been rendered moot and, if necessary, address the merits of Frontline's Request with respect to Licenseco's ability to participate in Auction 76.

2. Participation in Auction 73

In addition, we deny Frontline's Request to the extent it seeks a waiver to permit Licenseco to change its Auction 73 short-form license selection decision in order to enable it to participate in bidding on A and B Block licenses in Auction 73. At the outset, we note that, in its Request, Frontline states that it is "focused exclusively on constructing and operating a nationwide

¹⁶ 47 C.F.R. § 1.925.

¹⁷ Among the reasons underlying Frontline's prediction is the "excessively high reserve price for the D Block license in Auction 73," which Frontline sought to have reduced in its Petition for Reconsideration of the *700 MHz Second Report & Order*. Request at 9 (citing Frontline's Petition for Reconsideration of September 24, 2007). We note that Frontline subsequently withdrew its request on reconsideration seeking reduction of the D Block reserve price. See Amendment of Frontline Wireless, LLC to its Petition for Reconsideration, at 2 (filed on behalf of Frontline, December 4, 2007).

¹⁸ As Frontline notes, if it becomes a qualified bidder in Auction 73, it need not place any bids in Auction 73 in order to become qualified to participate in Auction 76. Request at 3.

network on the D Block.”¹⁹ It would thus appear that Frontline has no interest in actually bidding on the A and B Blocks in Auction 73, and that its interest in participating in Auction 73 is related solely to its desire to qualify for participation in Auction 76. To the extent Frontline's waiver request could be read to evince an intent to participate and place bids in Auction 73, however, we address the merits of the Request as it relates to Auction 73.

With respect to the first prong of the waiver standard, Frontline claims that the underlying purpose of section 1.2105(b)(2), which prohibits post-application deadline license selection changes, would not be served by its application in this case. Frontline asserts that the purpose of this rule is [to prevent collusive conduct and gaming.²⁰] Frontline argues that because information about applicants' license selections is non-public under the applicable anonymous bidding procedures, it is unnecessary to apply the prohibition on changing license selections to achieve the rule's underlying purpose of deterring collusion and gaming.²¹ Frontline further claims that application of the rule is unnecessary because changing Licenseco's license selections will not change its “anti-collusion profile” since by its selection of the nationwide D Block license it is already precluded from communicating about bids or bidding strategies with all other applicants for Auctions 73 and 76.²²

As a threshold matter, Frontline's Request fails to explain how application of the rule prohibiting license selection changes after the established deadline would not serve the underlying purpose of setting a uniform deadline by which all auction applicants must make license selections for Auction 73. Uniform deadlines for various stages of the auction application process provide applicants with certainty and give the Commission time for orderly application review and auction preparation.²³ The need for uniform deadlines and timely submission of information is especially critical for Auction 73, which is subject to a congressionally mandated deadline.²⁴ The underlying purpose of rules establishing deadlines is best served by their

¹⁹ See Request at 11.

²⁰ Request at 6.

²¹ Request at 5.

²² Request at 7. See 47 C.F.R. § 1.2105(c).

²³ See, e.g., In the Matter of First Auction of Interactive Video and Data Service (IVDS) Licenses: Request for Waiver of Applications Deadline, *Memorandum Opinion and Order*, 11 FCC Rcd 1,134 (1996) (Commission decision affirming denial of waiver of short-form filing deadline and emphasizing importance of strictly enforcing deadlines), *affirming* In the Matter of First Auction of Interactive Video and Data Service (IVDS) Licenses: Request for Waiver of Applications Deadline, *Order*, 10 FCC Rcd 5,415 (WTB 1995); Letter from William W. Huber, Associate Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Glenn S. Richards, Shaw Pittman, LLP, Counsel for Clearstone Corp., 19 FCC Rcd 24,985 (WTB 2004) (request to change license selections denied because Commission actions did not contribute to applicant's confusion about license selection process and allowing license changes after short-form deadline could permit anti-competitive conduct)(“*Clearstone Letter*”); see also Letter from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to James K. Davis, Vero Beach Broadcasting, LLC, 20 FCC Rcd 19,346 (WTB 2005) (short-form deadline provides reasonable certainty to applicants of fair and predictable application of auction rules and procedures, including enforcement of deadlines; deadlines allow applicants to plan for auction and a deadline waiver would undermine Commission's ability to review short-form applications in timely manner because it would encourage similar requests)(“*Vero Beach Letter*”).

²⁴ See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (“DRA”). Title III of the DRA is the Digital Television Transition and Public Safety Act of 2005 (“DTV Act”). The provisions of

consistent application, which provides fair and equal treatment to applicants by subjecting them to the same timeframes for making auction-related decisions.²⁵

Frontline's assertion that waiver is justified on the grounds that Licenseco's license selection options became "unconstrained" after the filing deadline demonstrates that the underlying purpose of the rule would be served by its application to this case, not the opposite. Frontline states that Licenseco's application selected only the D Block license in order to satisfy certain potential investors that were interested in investing only in Frontline's "bidding efforts" on the D Block.²⁶ Frontline states that this concern no longer "constrains" it because "these potential investors decided not to provide funding for other reasons."²⁷ In effect, Frontline argues that grant of a waiver is justified to accommodate a change in its strategy for financing possible bidding in Auction 73 that occurred after the short-form filing deadline had passed. Granting a waiver in this circumstance would render the deadline meaningless. Allowing bidders to alter their license selections after the deadline on these grounds would jeopardize the Commission's ability to conduct auctions in a timely manner, and in Auction 73 specifically, could prevent the Commission from commencing the bidding by the statutory deadline of January 28, 2008. All auction applicants, regardless of their initial license selection, are responsible for concluding their own business or other dealings with third parties in time to meet auction-related deadlines.

We also find unpersuasive Frontline's argument that we should grant its waiver because it would have no harmful impact. According to Frontline, granting the waiver would not cause harm because it would not change Frontline's "anti-collusion profile" and, given the anonymous bidding procedures adopted by the Commission for this auction, would be unavailable to other applicants (as no license selections are publicly available until after the close of bidding). In other words, Frontline is arguing that, in an "anonymous bidding" auction, the Commission should allow an applicant to modify its license selections after the short-form filing deadline so long as those modifications do not change the parties with whom the applicant is prohibited from discussing bids and bidding strategies. Such a circumstance is not unique to Frontline, however, and would be equally applicable to other applicants.²⁸ Thus, permitting Frontline to change its Auction 73 license selection would be unfair to other applicants that remain bound by the deadline and lack the opportunity to select licenses based on new post-deadline developments, especially applicants whose "anti-collusion profile" *would* change as a result.²⁹ In effect, such a rule change would permit, in anonymous auctions, only certain applicants to undertake changes in strategy after the short-form filing deadline, but not others – potentially unfairly favoring certain

the DTV Act establishing deadlines relating to the auction of 700 MHz Band licenses are codified in 47 U.S.C. § 309(j)(15)(C)(v).

²⁵ See, e.g., *Vero Beach Letter*; see also Letter from Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Ameer Flippin, 20 FCC Rcd 8,750 (WTB 2005); Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Office of the Chief Technology Officer, Government of the District of Columbia, 17 FCC Rcd 16,301 (WTB 2002).

²⁶ Request at 5.

²⁷ Request at 5.

²⁸ So long as an applicant does not add licenses after the short-form filing deadline that increase the geographic footprint of its selected licenses, the applicant would not change its "anti-collusion profile."

²⁹ We note as well that an applicant's selection of licenses in its short-form application for a particular auction does not in any way require a bidder to bid on all of those licenses during the auction.

applicants over others. Accordingly, in addition to adversely affecting the Commission's procedures as noted above, Frontline's waiver would disadvantage other bidders who would not be able to take advantage of Frontline's rule change by waiver. We decline Frontline's offer to modify our long-established rule relating to license selection deadlines outside a rulemaking context.

More broadly, we find unpersuasive Frontline's argument to the extent it is suggesting that the implementation of anonymous bidding procedures for Auctions 73 and 76 makes superfluous the rule prohibiting post-deadline license selection changes or any other rule designed to protect against collusion and gaming.³⁰ That the Commission withholds information on the interests of specific bidders in the auction(s), including information on applicants' license selections, does not eliminate the need for rules to assure that applicants do not engage in gaming and collusive conduct.³¹ Indeed, even in light of anonymous bidding procedures, the prohibition on post-deadline license selection changes functions to assure that gaming does not harm the integrity of the auction by uniformly preventing such changes without regard to whether they may have been prompted by gaming or collusion or more benign reasons. For example, allowing post-deadline license change selections would prove problematic if a particular applicant's license selection becomes public after the short-form filing deadline, contrary to the Commission's anti-collusion and anonymous bidding rules, because it might well allow other applicants to modify their license selections in response.

In addition, we note that Frontline's arguments regarding the second prong of the waiver standard – that the unique facts and circumstances of this particular case render application of the rule inequitable – address only its desire to be able to participate in any re-auction of the D Block in Auction 76. As noted above, Frontline's arguments related to participation in Auction 76 will be addressed at a later date.

Finally, we note that Frontline's Request does not rely on any of the reasons justifying waivers of the prohibition against post-deadline license selection changes in the very few cases where such waivers have been granted – where applicants were able to demonstrate that information provided by the Commission or its systems contributed to applicants' confusion in selecting licenses.³²

³⁰ See Request at 6-7.

³¹ See *Auction 73/76 Procedures Public Notice*, 22 FCC Rcd at 18,151 ¶ 23 (“disclosure of information relating to bidder interests and bidder identities that is confidential in both Auctions 73 and 76 at the time of disclosure may violate the anti-collusion rule.”).

³² Even before the rule categorized post-short form deadline license selection changes as prohibited major changes, the Commission “generally refused” to grant waivers to permit licenses selection changes. See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use; 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 413 (1997); see also *Clartone Letter* (waiver request denied because Commission actions did not contribute to applicant's confusion about license selection process and allowing license changes after short-form deadline could permit anti-competitive conduct); Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to David E. Beyerle, 15 FCC Rcd 6,220 (WTB 2000), *affirmed by* Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to David E. Beyerle, 15 FCC Rcd 7,825 (WTB 2000) (waiver request denied; although license selection process may have been complex, applicant did not exercise reasonable diligence in confirming that correct selections were made); Letter

Conclusion

As discussed above, Frontline's Request fails to justify a waiver that would permit Licenseco to become qualified to bid in Auction 73, and is denied. However, to the extent that Frontline's Request seeks a waiver that would permit Licenseco to become qualified to bid in Auction 76 without qualifying to bid in Auction 73, we hold the Request in abeyance.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.³³

Sincerely,

Fred B. Campbell, Jr., Chief
Wireless Telecommunications Bureau

from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to John Prendergast, Blooston, Mordkofsky, Jackson & Dickens, Counsel for Landmark Site Development, LLC, 15 FCC Rcd 5,721(WTB 2000) (waiver request granted; complex nature of software may have contributed to applicant's misunderstanding and waiver request was submitted with reasonable diligence); Letter from Mark Bollinger, Acting Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Melodie A. Virtue, Haley, Bader & Potts, P.L.C., Counsel for Pass Word, Inc., 15 FCC Rcd 2,824 (WTB 2000) (waiver request granted; labeling of 2,499 licenses was complex and may have contributed to applicant's misunderstanding and waiver request was submitted with reasonable diligence), *reconsideration denied by* In the Matter of Application of Pass Word, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 5,567 (WTB 2000).

³³ 47 C.F.R. § 0.331.