

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Waiver of Section 1.2110(b)(3)(iv)(A) of the
Commission's Rules For the Upper 700 MHz
Band D Block License

ORDER

Adopted: November 15, 2007

Released: November 15, 2007

By the Commission:

1. In this order, on our own motion, we waive application of our impermissible material relationship rule for purposes of determining designated entity eligibility solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the Upper 700 MHz Band D Block ("D Block") license. As detailed below, we find that the unique regulations governing the D Block license, which require the establishment of the 700 MHz Band Public/Private Partnership subject to a Commission-approved Network Sharing Agreement - together with the application of the Commission's other designated entity eligibility requirements - eliminate for the D Block license the risks that led the Commission to adopt the impermissible material relationship rule. Given these unique requirements, we conclude that this waiver serves the public interest.

1 47 C.F.R. § 1.2110(b)(3)(iv)(A).

2 See 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, 22 FCC Rcd 15,289, 15,428-79 ¶¶ 386-553 (2007) ("700 MHz Second Report and Order") (discussion of the 700 MHz Public/Private Partnership), recon. pending.

3 See generally Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, Second Report and Order and Second Further Notice of Proposed Rule Making, 21 FCC Rcd 4753 (2006) ("Designated Entity Second Report and Order"); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, Order on Reconsideration of the Second Report and Order, 21 FCC Rcd 6703 (2006) ("Order on Reconsideration of Designated Entity Second Report and Order"); 47 C.F.R. §§ 1.2110, 1.2111, 1.2112, 1.2114.

2. In the recent *700 MHz Second Report and Order* in the 700 MHz Band proceeding,⁴ we established a regulatory framework to effectuate a Commission-approved Public/Private Partnership between the Commission-selected Public Safety Broadband Licensee in the 700 MHz Band and the winning bidder of the Upper 700 MHz Band D Block license, finding such a partnership would serve the public interest by enabling the construction of a nationwide, interoperable broadband public safety network to protect the safety of the life, health, and property of all Americans.⁵ The single nationwide 10-megahertz D Block commercial license will be awarded to a winning bidder only after it enters into a Commission-approved Network Sharing Agreement (“NSA”) with the Public Safety Broadband Licensee.⁶ Reflecting the importance of the terms of the NSA to the public interest, we provided that “the Commission will oversee the negotiation of the NSA, and will play an active role in the resolution of any disputes among the relevant parties . . . both resulting from the negotiations and once the parties are operating under the terms of the NSA.”⁷ We further provided that “[i]f a breach of the NSA occurs but is not brought to the Commission for resolution, the Commission retains authority to apply all appropriate remedies on its own initiative at any time after the breach occurs.”⁸ The holder of this commercial license also must build a robust network that will meet the requirements of a public safety communications network, as defined in the NSA. Because of the particular needs of the public safety community and the public interest in ensuring nationwide availability of the network, we imposed, among other requirements, more stringent build out requirements for the D Block than for other commercial 700 MHz Band licenses, requiring that the D Block licensee eventually serve 99.3 percent of the population of its nationwide license area.⁹ These licensing obligations subject the D Block licensee to unique requirements, including significant Commission oversight and coordination, in order to assure that it participates in the provision of extensive, uninterrupted public safety and commercial service for the benefit of the public. These obligations also mean that the D Block licensee’s network will be used by numerous public safety agencies throughout the nation.¹⁰

3. With respect to the process of assigning the D Block license, we recognized in the *700 MHz Second Report and Order* that small businesses might have sufficient resources to provide the services required to comply with the D Block license conditions and yet be deterred from competing for

⁴ *See id.* The *700 MHz Second Report and Order* is part of the 700 MHz Band proceeding in which the Commission earlier this year consolidated consideration of the rules and policies applicable to both the commercial and public safety spectrum in the 698-806 MHz band (“700 MHz Band”). *See* 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, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

⁵ *700 MHz Second Report and Order*, 22 FCC Rcd at 15,428-79 ¶¶ 386-553.

⁶ *Id.* at 15,463-64 ¶ 502; *see* 47 C.F.R. § 27.1305.

⁷ *700 MHz Second Report and Order*, 22 FCC Rcd at 15,464 ¶ 505.

⁸ *Id.* at 15,470-71 ¶ 529.

⁹ *Id.* at 15,445 ¶ 437.

¹⁰ *See id.* at 15,428-79 ¶¶ 386-553.

the license due to the difficulty of obtaining third-party financing for their bids.¹¹ Accordingly, to encourage the widest range of potentially qualified applicants to participate in bidding for the D Block license, we enabled eligible bidders for this license to seek designated entity bidding credits for small businesses, as a means to create incentives for investors to provide innovative small businesses with the capital necessary to compete for the D Block license at auction.¹²

4. Entities claiming eligibility for designated entity benefits and interested in applying for the D Block license argue that we should not apply our impermissible material relationship rule to the D Block. For example, Frontline Wireless, LLC (“Frontline”) suggests in filings in the 700 MHz Band proceeding that “wholesaling one hundred percent of the D Block spectrum” is consistent with the purpose of the Commission’s designated entity rules.¹³

5. Under our current rules, as modified last year in the *Designated Entity Second Report and Order*, a business model that involves a designated entity licensee entering into arrangements with other entities for the lease or resale (including wholesaling arrangements) that involve more than 50 percent of the spectrum capacity of a license constitutes an impermissible material relationship and renders the licensee ineligible for otherwise available size-based bidding credits. In particular, we modified our rules to require the consideration of certain spectrum leasing and resale (including wholesale) relationships – “material relationships” – in determining designated entity eligibility.¹⁴ The material relationship rules were adopted to ensure that recipients of designated entity benefits were entities that used their “licenses to directly provide facilities-based telecommunications services for the benefit of the public.”¹⁵ Specifically, the Commission found that Congress intended that designated entities (1) “become robust independent facilities-based” wireless service providers (2) “with the ability to provide new and innovative services” for the benefit of the public.¹⁶ The Commission concluded that agreements with one or more other entities for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 50 percent of the spectrum capacity of any of a designated entity’s licenses have “the potential to significantly influence a designated entity licensee’s decisions regarding its provision of service,” and, absent appropriate safeguards, might result in abuse that could impede the designated entity’s ability to become a facilities-based services provider, contrary to the intent of Congress.¹⁷ Accordingly, if an applicant or a licensee has an impermissible material relationship, it is ineligible under our rules for the award of designated entity benefits.¹⁸

6. Under section 1.925, we have discretion to waive a wireless services or auction rule on our own motion if we find that either (i) the underlying purpose of the rule would not be served, or would be frustrated, by its application in the case at hand, and a grant of the requested waiver would be in the

¹¹ *Id.* at 15,474 ¶ 537.

¹² 47 C.F.R. § 27.502.

¹³ Petition for Reconsideration of Frontline Wireless, LLC, filed in WT Docket No. 06-150, September 24, 2007 at 4-5; Opposition of Frontline Wireless, LLC to Petitions for Reconsideration, filed in WT Docket No. 06-150, October 17, 2007 at 3-8.

¹⁴ See generally *Designated Entity Second Report and Order*, 21 FCC Rcd 4753; *Order on Reconsideration of Designated Entity Second Report and Order*, 21 FCC Rcd 6703; 47 C.F.R. §§ 1.2110, 1.2111, 1.2112, 1.2114.

¹⁵ *Designated Entity Second Report and Order*, 21 FCC Rcd at 4759-60 ¶ 15.

¹⁶ *Id.* at 4762 ¶ 21.

¹⁷ *Id.* at 4762 ¶¶ 22-23.

¹⁸ *Id.* at 4759-60 ¶ 15, 4763-65 ¶¶ 25-30, 4765-68 ¶¶ 31-41; *Order on Reconsideration of Designated Entity Second Report and Order*, 21 FCC Rcd at 6712-13 ¶¶ 24-26; and 47 C.F.R. §§ 1.2110(b)(3)(iv)(A), 1.2111(d).

public interest or (ii) the unique facts and circumstances of the pending case would render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.¹⁹

7. We find that the unique circumstances and obligations of the D Block license justify a waiver of the impermissible material relationship rule under both prongs of the waiver standard. Specifically, we conclude that a D Block applicant or licensee with lease or resale (including wholesale) arrangements with other entities involving more than 50 percent of the spectrum capacity of the D Block license will not be ineligible for designated entity benefits solely on the basis of such arrangements given the unique circumstances and obligations relating to the license. We stress that this waiver applies *only* to arrangements for spectrum capacity on the D Block. We are not waiving operation of the rule as applied to arrangements that a D Block applicant or licensee may have for use of licenses other than the D Block license. Thus, under the terms of this waiver, the existence of arrangements regarding the spectrum capacity of the D Block license that would constitute an impermissible material relationship absent the waiver will not alone make the D Block licensee ineligible for the award of designated entity benefits with respect to other spectrum licenses. Also, because we are not waiving the rule with respect to arrangements for use of the spectrum capacity of licenses *other than* the D Block license, if an applicant or licensee has an impermissible material relationship with respect to the spectrum capacity of any other license(s), the normal operation of the current rules will continue to render it ineligible for designated entity benefits for the D Block license. The waiver we grant herein does not change that.²⁰

8. If a D Block applicant or licensee utilizes this waiver, it will remain subject to our other designated entity eligibility rules, including our controlling interest, unjust enrichment, attributable material relationship, audit, eligibility event and annual reporting rules.²¹ Thus, the D Block licensee will be required to demonstrate that it meets the applicable size standards for bidding credit eligibility based on attribution of its gross revenues, as well as the gross revenues of its affiliates, its controlling interests, and the affiliates of its controlling interests, under the principles of *de jure* or *de facto* control. In addition, if the D Block licensee engages in spectrum arrangements with any single entity that provide for the lease or resale (including wholesale) of more than 25 percent of the spectrum capacity of the D Block license, it must attribute the gross revenues of that entity for the purposes of determining its eligibility for designated entity benefits.²²

¹⁹ 47 C.F.R. § 1.925.

²⁰ See *Designated Entity Second Report and Order*, 21 FCC Rcd at 4763 ¶ 25; 47 C.F.R. § 1.2110(b)(3)(iv)(A).

²¹ The attributable material relationship rule requires a designated entity to attribute the gross revenues and, if applicable, total assets of any entity (including attributable interest holders) with which the designated entity has one or more agreements for the lease or resale (including under a wholesale agreement) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the designated entity. This attribution requirement can affect the designated entity's ongoing eligibility for designated entity benefits and its liability for unjust enrichment. *Designated Entity Second Report and Order*, 21 FCC Rcd at 4759-60 ¶ 15, 4763-65 ¶¶ 25-30, 4765-68 ¶¶ 31-41; *Order on Reconsideration of Designated Entity Second Report and Order*, 21 FCC Rcd at 6712-13 ¶¶ 24-26; and 47 C.F.R. §§ 1.2110(b)(3)(iv)(B), 1.2111(d). See also, 47 C.F.R. §§ 1.2110(b)(1)(i)(detailing the Commission's provisions for size attribution to determine an applicant's eligibility for designated entity benefits); 1.2110(c)(2)(defining controlling interests to include those entities with *de jure* or *de facto* control of the applicant); 1.2110(m)(subjecting designated entity licensees to the Commission's audit authority); 1.2110(n)(requiring designated entity licensees to submit annual reports to the Commission); 1.2114 (requiring licensees to seek Commission approval for events that would lead to a change in eligibility for designated entity benefits).

²² Under the terms of the *700 MHz Second Report and Order* the D Block licensee will also have access to the 10 MHz of broadband spectrum licensed to the Public Safety Broadband Licensee. 22 FCC Rcd at 15,438 ¶ 417. Because the D Block licensee's access to the 700 MHz public safety broadband spectrum is secondary and fully preemptible, however, and because access will be governed by a long-term spectrum manager lease between the

(continued....)

9. Given the unique nature of the D Block license, together with the continuing application of the other designated entity eligibility rules, including both the controlling interest and attributable material relationship rules, the underlying purpose of the rule in question would not be served by its application to the D Block, and its application to this block would be inequitable. We conclude that applying the impermissible relationship rule is not necessary to serve its underlying purpose of furthering participation in the provision of new and innovative facilities-based services by a designated entity D Block licensee. We have established a unique paradigm of licensing and service requirements for the D Block license that benefits public safety entities and the public at large, and will continue to apply our other designated entity eligibility rules to the D Block license. As explained in our *700 MHz Second Report and Order*, the D Block license is “conditioned upon its commercial licensee constructing and operating a nationwide, interoperable broadband network across both the D Block and the 700 MHz public safety broadband spectrum.”²³ This network must be used to provide both a commercial service and a broadband network service to public safety entities²⁴ to “protect the safety of the life, health and property of all Americans.”²⁵ The D Block licensee will thus be responsible for the construction and operation of a “state-of-the-art” broadband technology platform with “[s]ufficient robustness to meet the reliability and performance requirements of public safety.”²⁶ This network, operating across 10 megahertz of commercial spectrum and 10 megahertz of public safety spectrum, will be available for new and innovative public safety broadband use by first responders throughout the country.²⁷ As a result, consistent with the Congressional goals underlying our impermissible material relationship rule, the D Block licensee, by necessity, will be required to participate in the provision of facilities-based services for the benefit of the public. For these reasons, we find that a waiver of our impermissible material relationship rule would be in the public interest.

10. In addition, the unique nature of the D Block license, coupled with the application of the other designated entity eligibility rules, including the controlling interest and attributable material relationship rules, will ensure that the licensee remains sufficiently independent, and thereby makes application of our impermissible material relationship rule inequitable and contrary to the public interest. The rules adopted for the D Block license and the 700 MHz Public-Private Partnership create a unique structure providing active, ongoing oversight of the D Block licensee’s use of its license. As described above, the Commission must approve the NSA negotiated by the D Block license winning bidder and the Public Safety Broadband Licensee, and the Commission retains an ongoing role in overseeing the negotiation and implementation of the NSA. We conclude that the Commission’s significant oversight role, together with the D Block licensee’s obligations under the NSA and the Commission’s rules, as well as the role of the Public Safety Broadband Licensee in the 700 MHz Public/Private Partnership, sufficiently address our concern that an impermissible material relationship regarding the D Block’s spectrum capacity could significantly influence a D Block commercial licensee’s decisions regarding its provision of services for the benefit of the public. In addition, continued application of the controlling interest rule, attributable material relationship rule, and the unjust enrichment rule, as well as all other designated entity eligibility rules, will ensure that only bona fide small businesses, exercising control over the D Block license in accordance with our rules, will benefit from bidding credits applicable to that

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parties, we do not include the spectrum licensed to the Public Safety Broadband Licensee in our consideration of what constitutes a material relationship in this context.

²³ *Id.* at 15,428 ¶ 386.

²⁴ *Id.*

²⁵ *Id.* at 15,431 ¶ 395.

²⁶ *Id.* at 15,433-34 ¶ 405.

²⁷ *Id.* at 15,436-43 ¶¶ 412-30.

license.²⁸

11. Accordingly we find that waiver of the impermissible material relationship rule with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D Block license would not undermine the underlying purpose of the rule or risk those abuses that our impermissible material relationship rule is designed to address. Given all these safeguards, we waive the application of the impermissible material relationship rule, section 1.2110(b)(3)(iv)(A), 47 C.F.R. § 1.2110(b)(3)(iv)(A), with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D Block license.

12. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), and sections 1.3 and 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, section 1.2110(b)(3)(iv)(A), 47 C.F.R. § 1.2110(b)(3)(iv)(A), is WAIVED to the extent described herein.

13. IT IS FURTHER ORDERED that, pursuant to § 155(c) and 47 C.F.R. §§ 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the waiver granted herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁸ This attribution requirement based on D Block arrangements will affect the designated entity's ongoing eligibility for designated entity benefits. See, e.g., *Designated Entity Second Report and Order*, 21 FCC Rcd at 4759-60 ¶ 15, 4763-65 ¶¶ 25-30, 4765-68 ¶¶ 31-41; *Order on Reconsideration of Designated Entity Second Report and Order*, 21 FCC Rcd at 6712-13 ¶¶ 24-26; and 47 C.F.R. §§ 1.2110(b)(3)(iv)(B), 1.2111(d). See also, 47 C.F.R. §§ 1.2110(b)(1)(i); 1.2110(m); 1.2110(n).