RM11348

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Subject: Attached Cyren Call Petition for Reconsideration re RM 11348

Attachments: Pet for Recon Final 12-4-06.pdf

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Federal Communications Commission
Office of the Secretary

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) from Commercial Use	)	RM 11348
	)	
Assignment of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) to the Public Safety Broadband Trust for Deployment of a Shared Public Safety/ Commercial Next Generation Wireless Network	)	

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To: The Commission

PETITION FOR RECONSIDERATION

Cyren Call Communications Corporation ("Cyren Call"), in accordance with Section 1.429 of the Federal Communications Commission ("FCC" or "Commission") rules and regulations, respectfully submits its Petition for Reconsideration with respect to the Commission's November 3, 2006 dismissal[1] of the above-identified Petition for Rulemaking filed by Cyren Call.[2] In its Petition, Cyren Call sought the reallocation of 30 MHz of 700 MHz spectrum and assignment of that spectrum to the Public Safety Broadband Trust ("PSBT") for deployment of a nationwide, interoperable broadband network for shared public safety and commercial use.

The FCC placed the Cyren Call Petition on Public Notice on October 30, 2006,[3] but then dismissed it without prejudice pursuant to FCC Rule Section 1.401(e) four days later.[4] In

[1] RM 11348, *Order*, DA 06-2278 (rel. Nov. 3, 2006) (*"Order"*).
[2] Petition for Rulemaking of Cyren Call Communications Corporation, RM 11348, filed April 27, 2006 ("Petition").
[3] *Public Notice,* Report No. 2794 (rel. Oct. 30, 2006) ("Public Notice").
[4] 47 C.F.R. § 1.401(e).

its dismissal Order, the Commission stated that it had no authority to take further action on the Petition because Sections 337(a) and 309(j)(15(C)(v) of the Communications Act direct the FCC to auction the spectrum requested for exclusively commercial use no later than January 28, 2008.[5] However, the FCC left the docket open and has continued to accept comments on the Petition.[6]

For the reasons described herein, Cyren Call urges the Commission to reconsider its decision and, after considering the extensive record in support of Cyren Call's proposal that already exists and continues to develop, to initiate a rule making proceeding consistent with that record and the Cyren Call Petition.

I. THE PROPOSAL SUBMITTED BY CYREN CALL PRESENTS AN UNPARALLELED OPPORTUNITY TO ADVANCE PUBLIC SAFETY COMMUNICATIONS CAPABILITIES

The inadequacies of the nation's emergency response providers' communications capabilities, both for current interoperability purposes and for future advanced technology requirements, are well-documented. The Commission itself reported this fact to Congress almost one year ago.[7] In that report, the FCC acknowledged the regrettable, yet unavoidable problem faced by this most critical of our user communities:

> Without adequate funding...it is likely that public safety would be unable to implement a nationwide, interoperable broadband network.[8]

Cyren Call proposed a revolutionary solution to this conundrum. The Petition urged the FCC to reallocate the remaining 30 MHz of uniquely suitable Upper 700 MHz spectrum to

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[5] *See* 47 U.S.C. § 309(j)(15)(C)(v), (vi), as enacted by the Digital Television Transition and Public Safety Act of 2005, Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 22 § 3003(a)(2)(2006).
[6] *Order* at 2.
[7] Report to Congress on the Study to Assess the Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State, and Local Emergency Response Providers, WT Docket No. 05-157 at ¶ 30 (Dec. 16, 2005).
[8] Report to Congress on the Study to Assess the Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State, and Local Emergency Response Providers, WT Docket No. 05-157 at ¶ 30 (Dec. 16, 2005) ("Public Safety Needs Report").

the PSBT for creation of a nationwide, interoperable, advanced technology, broadband Public Safety network.[9] However, Cyren Call recognized that spectrum is a critical, but not the only, element needed to address the chronic Public Safety communications problem. Therefore, it recommended coupling the 30 MHz of spectrum with an innovative licensing scheme whereby the PSBT would hold the authorization in trust for local, state and federal Public Safety users, as well as for the American public. Cyren Call further recommended that the PSBT should be required to lease excess capacity to commercial operators, thereby forging a public/private partnership that would fund an advanced broadband network optimized to satisfy Public Safety communications needs and, at the same time, deliver the economic and other benefits of next generation broadband service to consumers, in particular those in rural communities that historically have been bypassed by commercial providers when deploying advanced communications capabilities. The combination of Public Safety control and private sector funding would permit Public Safety, for the first time, to reap the technical benefits of ongoing commercial network upgrades and the cost efficiencies of consumer-based equipment pricing. It would ensure that the nation's emergency response providers at last would have communications capabilities equal or, preferably, superior to those routinely available to commercial subscribers, consistent with the expanding responsibilities with which we have charged our public safety providers.

[9] Cyren Call consistently has affirmed that its proposal does not involve the existing 24 MHz of Public Safety spectrum at 700 MHz, spectrum that already has been earmarked for other important communications purposes and as to which extensive system planning and even deployment is well underway.

II. THE FCC HAS THE LEGAL AUTHORITY AND THE RESPONSIBILITY TO CONSIDER PROPOSALS THAT INVOLVE THE MORE EFFECTIVE USE OF RADIO IN THE PUBLIC INTEREST, EVEN IF ADOPTION OF A PROPOSAL WOULD REQUIRE STATUTORY ACTION

The sole basis cited by the Commission in dismissing the Cyren Call Petition was the 1997 Congressional decision that the 30 MHz of 700 MHz in question should be auctioned for commercial use, as well as 30 MHz of "Lower 700 MHz" spectrum that is not at issue in this proceeding. Cyren Call certainly recognizes that Congressional action would need to be taken before the FCC could **adopt** rules consistent with the Petition since those rules would not conform to current statutory language. In fact, as noted in the *Order*, Cyren Call expressly stated in its Petition, and again in its November 2, 2006 letter to the FCC regarding this matter, that legislative action would be necessary. Cyren Call committed itself to pursuing such relief.[10] However, the fact that a statutory change would be necessary before the FCC could **implement** essential elements of the proposal set out in the Petition is not a bar to Commission **consideration** of the Petition.

The FCC is charged by Congress to regulate the use of radio communications "for the purpose of the national defense [and] for the purpose of promoting safety of life and property."[11] Its enabling statute expressly grants the Commission broad authority to initiate inquiries on its own motion with respect to subject matters properly before the agency.

> The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.[12]

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[10] That effort is ongoing in cooperation with public safety representatives and is yielding considerable favorable response.
[11] 47 U.S.C. § 151.
[12] *Id.* at § 403.

The Commission's rules confirm its right to investigate matters that fall within the ambit of its expertise. For example, FCC Rule Section 1.1 states the following:

> The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulation.[13]

There is nothing in this rule or in the Commission's enabling statute to suggest that the FCC's authority to conduct investigations into matters as to which it is obligated to provide expert guidance to Congress is itself limited to areas where Congress has not yet spoken.

On more than one occasion, the Commission, entirely properly, has initiated proceedings that required the FCC to seek Congressional action before rules could be implemented. For example, the FCC issued a Further Notice of Inquiry and Notice of Proposed Rulemaking in which it tentatively concluded that it should recommend to Congress that the telephone-cable cross-ownership ban of § 613(b) of the Cable Communications Act of 1984 be repealed or modified.[14] Based on the record developed in that proceeding, the Commission submitted its recommendation to Congress that the Cable Act be amended to permit local telephone companies to provide video programming directly to their subscribers.[15] The Commission explained its decision to recommend changes to the Act, consistent with the agency's public interest findings in the rule making proceeding, in language that could apply equally to the Cyren Call proposal:

> We find that such an amendment [to the Cable Act] would further promote our overarching goals in this proceeding by increasing competition in the...marketplace, spurring the investment necessary to deploy an advanced

[13] 47 C.F.R. § 1.1.
[14] *See Telephone Company-Cable Television Cross-Ownership Rules*, 3 FCC Rcd 5849, 5865-66 (1988).
[15] *See Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd 5781, 5847-51 (1992).

> infrastructure, and increasing the diversity of services made available to the public.[16]

The FCC also proposed alternative legislation to Congress in response to a statutory provision that the Commission believed was misguided. In 1981, Congress added § 309(i) to the Act to give the FCC authority to employ lotteries to select among competing applications. The statutory provision did not require the Commission to use lotteries in all instances, but at least arguably dictated that the agency must adopt rules and policies consistent with the legislative directive to be used in conducting lotteries in appropriate circumstances.

The FCC declined to implement the statutorily defined lottery process because it believed certain of its provisions to be legally unsustainable, in particular the requirement to award lottery preferences. Instead, the Commission proposed that Congress reconsider licensing approaches that the legislature already had rejected,[17] an appropriate action for an independent Federal agency that is expected to provide guidance to Congress on matters within the agency's specific expertise.

That the Commission is obliged to advise Congress in such areas is further confirmed in Section 4 of the Communications Act pursuant to which the FCC is charged to report to Congress with respect to, among other matters:

> ...specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable....[18]

It is evident that the FCC has both the legal authority and the obligation to consider thoughtful proposals concerning public safety communications requirements, a subject with the most direct relationship conceivable to the use of radio for the purpose of promoting safety of life and property. The FCC's authority and obligation are not circumscribed when, as in

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[16] *Id.* at 5847.
[17] *See Random Selection/Lottery Systems*, 89 F.C.C. 2d 257, 283-84 (1982).
[18] 47 U.S.C. § 154(k)(4).

this instance, implementation of the proposal would require legislative action. Indeed, in this instance, the Commission would be investigating an innovative public safety/commercial shared use of spectrum, a concept that was not considered either by the agency or by Congress when the legislation at issue was enacted. The FCC would be fulfilling its responsibility of "obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulation,"[19] a responsibility that requires it to examine new communications approaches that could better promote safety of life and property and advise Congress with respect to such matters. Because initiation of a rule making proceeding to consider the proposal set out in the Cyren Call Petition would be entirely consistent with the Commission's enabling legislation, its rules and its own prior actions, the Petition should not have been dismissed pursuant to FCC Rule Section 1.401(e) and should be reinstated.[20]

III. THE RECORD DEVELOPED TO DATE CONFIRMS THAT THE PUBLIC INTEREST WOULD BE WELL SERVED BY INITIATION OF A RULE MAKING PROCEEDING CONSISTENT WITH THE CYREN CALL PETITION

The critical importance of the Cyren Call proposal has been resoundingly affirmed by the comments received to date in RM 11348. In just 30 days, the Commission has received well over 1,000 filings from public safety associations such as the National Public Safety

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[19] *See* n. 13 *supra.*

[20] *Id.* at § 151. This rule permits the FCC to dismiss petitions that are premature, repetitive or that plainly do not warrant consideration, thereby conserving Commission resources for matters worthy of its consideration. The Petition submitted by Cyren Call does not warrant dismissal under any of those criteria. For all the reasons detailed in the Petition, it clearly is not premature. To the contrary, a failure to act by the Commission would forever preclude consideration of this absolutely vital public interest issue. Similarly, the Petition is not repetitive since the FCC has not previously conducted a substantive evaluation of the issue raised therein. *Compare, e.g., Letter Decision, Petition for Rulemaking Proposing to Amend Section 15.109(h) of the Commission's Rules Regarding Emissions from Radar Detectors in the Ka Band,* 19 FCC Rcd 24979 (2004). That it warrants consideration is evident from the record already developed with respect to the Petition. *Compare, e.g., Letter Decision, Petition for Rule Making, Changes in Parts 2, 13, 90, 95 and 97 for Control of Illegal Modified Radio Equipment or Repair Services,* 19 FCC Rd 23216 (2004).

Telecommunications Council, Association of Public-Safety Communications Officials-International, International Association of Chiefs of Police, International Association of Fire Chiefs, Major Cities Chiefs Association, Major County Sheriffs' Association, Metropolitan Fire Chiefs Association and National Sheriffs' Association; from emergency responder organizations and governmental entities such as the National Volunteer Fire Council, National Troopers Coalition, National Association of Emergency Medical Technicians, the State of California and City of Chicago, Office of the Fire Commissioner; and from individual citizens. The overwhelming majority of those who filed comments expressly supported the following key elements set out in the Cyren Call Petition:[21]

1) Reallocate the 30 MHz from exclusively commercial use to Public Safety;
2) License the 30 MHz to the Public Safety Broadband Trust for deployment of an interoperable, advanced technology, nationwide network;
3) Build the network to Public Safety specifications with extensive terrestrial coverage, complemented by satellite service in the most remote areas;
4) Use private capital to fund network deployment of this shared public/private network;
5) Lease excess capacity on the network to commercial operators, while maintaining Public Safety priority use.

This extraordinary outpouring of support confirms Cyren Call's determination that there is an urgent need for an innovative solution to Public Safety's still unsatisfied interoperability requirement, as well as for an advanced, sustainable, next generation broadband wireless network to support 21st century emergency responder communications needs. The record affirms that the Public Safety community believes the Cyren Call Petition warrants Commission consideration. There can be no serious question but that deliberation of critical matters involving the communications capabilities of those who protect the safety of our citizenry and its property is at the very heart of the FCC's statutory responsibility. Cyren

[21] Fewer than a dozen parties have submitted comments opposing, in whole or in part, the Cyren Call proposal. With only one or two exceptions, those negative comments reflect the position of certain entrenched wireless carriers who oppose the Petition for competitive, economic reasons.

Call urges the Commission to exercise its authority to investigate these matters by reinstating the Petition so that a complete record on this vital, highly time sensitive issue can be developed.

CYREN CALL COMMUNICATIONS CORPORATION

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