

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Reallocation of 30 MHz of 700 MHz Spectrum) RM No. 11348
(747-762/777-792 MHz) From Commercial)
Use)
)
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)

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

AT&T Inc., on behalf of its affiliate, AT&T Mobility LLC (f/k/a Cingular Wireless LLC) (“AT&T”), hereby opposes the Petition for Reconsideration (“Petition”) filed by Cyren Call Communications Corporation (“Cyren Call”) on December 4, 2006.¹ The Petition seeks a reversal of the Public Safety and Homeland Security Bureau’s (“Bureau”) dismissal² of Cyren Call’s Petition for Rulemaking (“PFR”)³ which sought to reallocate 30 MHz of 700 MHz

¹ Petition of Cyren Call Communications Corporation for Reconsideration, RM 11348 (filed Dec. 4, 2006) (“Petition”); *Petition for Reconsideration of Action in Rulemaking Proceeding, Public Notice*, Report No. 2805 (rel. Feb. 2, 2007), summarized at 72 Fed. Reg. 9335 (Mar. 1, 2007).

² *Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) from Commercial Use*, RM No. 11348, *Order*, 21 F.C.C.R. 13123 (PSHSB 2006) (“Order”).

³ Petition of Cyren Call Communications Corporation for Rule Making, RM No. 11348 (filed Apr. 27, 2006) (“PFR”); *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed, Public Notice*, Report No. 2794 (rel. Oct. 30, 2006).

spectrum (747-762/777-792 MHz) from commercial to public safety use. For the reasons that follow, the dismissal was proper and the Petition should be denied.

I. THE FCC LACKS AUTHORITY TO ACT ON CYREN CALL'S RULEMAKING PROPOSAL

Cyren Call's PFR sought the reallocation of 30 MHz of commercial 700 MHz spectrum (747-762/777-792 MHz) for a "nationwide, interoperable, broadband public safety network."⁴ Sections 309(j)(15)(C) and 337(a)(2), however, mandate that the FCC auction this spectrum for commercial use by January 28, 2008.⁵ Cyren Call recognized that the FCC could not adopt its proposal without statutory changes.⁶ Thus, the Bureau properly determined that the Commission "has no authority to take further action on the request" and therefore dismissed Cyren Call's PFR pursuant to 1.401(e) of the Commission's Rules⁷ which states:

Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.⁸

The Wireless Telecommunications Bureau and Office of Engineering and Technology previously rejected a similar proposal pursuant to Section 1.401(e).⁹

⁴ PFR at v.

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, 120 Stat. 4, 22 § 3003(a)(2) (2006).

⁶ See *Order*, 21 F.C.C.R. at 13124 (*citing* Letter from Morgan E. O'Brien, Chairman of the Board, Cyren Call, to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, RM-11348, at 3 (filed Nov. 2, 2006)); *see also* Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, FCC, to Michael W. Grady, Vice President, Technology, Engineering and Quality and Sector Chief Technical Officer, Northrop Grumman Information Technology, DA 03-2940 (Sept. 24, 2003) ("Northrop Grumman Dismissal Letter").

⁷ *Order*, 21 F.C.C.R at 13124.

⁸ 47 C.F.R. § 1.401(e).

⁹ See Northrop Grumman Dismissal Letter.

Dismissal was equally proper because the Commission lacks authority to issue the requested notice of proposed rulemaking. The Commission historically has relied on Sections 4(i), 303(f), and 303(r) when adopting notices of proposed rulemaking that involve public safety.¹⁰ These provisions require the Commission, however, to act consistently with the Communications Act. For example, Section 4(i) provides:

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions.¹¹

Section 303 states that “[e]xcept as otherwise provided in this Act,”¹² the Commission may make rules and regulations “not inconsistent with law.”¹³

Cyren Call cites to Sections 1 and 403 of the Act as a basis for issuing the rulemaking,¹⁴ but Cyren Call’s selective quote from Section 1 omits the mandate that the Commission “execute and enforce the provisions of this Act.”¹⁵ One of these provisions is Section 337(a) which requires that the spectrum identified by Cyren Call be auctioned for commercial use. The

¹⁰ See, e.g., *The Developmental 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, *Eighth Notice of Proposed Rulemaking*, 21 F.C.C.R. 3668, 3687 (2006); *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 4873, 4921 (2002).

¹¹ 47 U.S.C. § 154(i) (emphasis added). Cyren Call cites to Section 4(k) as a basis for the Commission’s rulemaking authority. See Petition at 6. This provision, however, requires the Commission to make an annual report on many issues, including the need for additional legislation. See 47 U.S.C. § 154(k). A notice of proposed rulemaking is not necessary to accomplish this objective and, therefore, does not support Cyren Call’s PFR.

¹² *Id.* at § 303.

¹³ *Id.* at §§ 303(f), (r).

¹⁴ *Id.* at §§ 151, 403.

¹⁵ *Id.* at § 151. Moreover, Section 403 simply authorizes Commission inquiries. It does not authorize the commencement of a rulemaking proceeding proposing rules that, if adopted, would violate other statutory provisions. See *id.* at § 403.

Commission would be taking action inconsistent with the Act if it adopted Cyren Call's proposal to re-allocate the subject spectrum from commercial to public safety use. Section 4(i) cannot be invoked to cure this problem, especially where Congress has expressly withdrawn authority over how this spectrum should be allocated.¹⁶ Accordingly, the Bureau properly dismissed the PFR.

II. CYREN CALL'S PROPOSAL WOULD NOT SERVE THE PUBLIC INTEREST

Section 309(j)(15)(C) mandates that the FCC must auction the 700 MHz spectrum currently allocated for commercial use by January 28, 2008.¹⁷ Congress committed nearly \$11 billion in anticipated revenues from this auction to several emergency and homeland security programs, including \$1 billion for public safety interoperability grants.¹⁸ These funding commitments, as well as the auction deadline, were established by Congress just last year. Cyren Call's proposal would jeopardize the funding for these public safety commitments by withdrawing approximately half of the 700 MHz spectrum from the auction, thereby significantly reducing auction revenue.¹⁹ Indeed, the FCC's Independent Panel on Hurricane Katrina, which issued a series of recommendations last year on public safety communications,

¹⁶ See *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 801, 805-06 (D.C. Cir. 2002), *rehearing and rehearing en banc denied* (D.C. Cir. 2003).

¹⁷ 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).

¹⁸ *Id.* at §§ 3004-3012.

¹⁹ Although Congress has directed that these funds be allocated prior to the auction, NTIA can only take advances from the anticipated auction revenue. *Id.* at § 3006(b). Cyren Call's proposal would reduce this revenue by half.

stressed the need to maintain the integrity of the 700 MHz auction in order to fund the public safety interoperability grant program.²⁰

Public safety communications needs are extremely important, but Cyren Call's proposal is not the solution for a number of reasons. First, 24 MHz within the 700 MHz band has been reallocated for public safety use²¹ and the Commission has previously concluded that it would be premature to allocate additional spectrum:

[T]here is a lack of unanimity within the public safety community regarding how much spectrum will be needed. We expect that public safety's long-term needs will become clearer as existing spectrum allocations in the 700 MHz, 800 MHz, and 4.9 GHz bands are fully deployed and initiatives to make more efficient use of existing spectrum are completed.²²

Second, it is far from clear whether an additional 30 MHz is necessary to support a nationwide, broadband, interoperable public safety network. Nearly 100 MHz of spectrum has been allocated for public safety use²³ and a recent study concluded that, given current

²⁰ See *Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and Recommendations to the Federal Communications Commission*, at 38 (June 12, 2006).

²¹ See *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, *Report and Order*, 12 F.C.C.R. 22953 (1998).

²² See *Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State, and Location Emergency Response Providers — Submitted Pursuant to Public Law No. 108-458*, DOC-262865, 37 CR 706, ¶ 98 (2005). The Commission further noted that, without adequate funding, any additional allocation may lay fallow. *Id.* at ¶ 99.

²³ Public Safety is currently allocated 24 MHz in the 700 MHz band, 50 MHz in the 4.9 MHz band, 9.5 MHz in the 800 MHz band, 6.3 MHz in the 25-50 MHz band, 3.6 MHz in the 150-174 MHz band, and 3.7 MHz in the 450-470 MHz band.

technologies, public safety's spectrum needs could be *satisfied through 2010 with an allocation of only 8.3 MHz.*²⁴

Third, the public safety objectives of the Cyren Call proposal can be achieved within the existing public safety spectrum allocation and without reducing the auction revenue available for critical public safety programs. In this regard, on December 20th, the FCC proposed to revise the 700 MHz public safety band plan and set aside 12 MHz from the already allocated 700 MHz public safety spectrum for the creation of "a nationwide, interoperable, broadband public safety network."²⁵ If adopted, this revised band plan would obviate Cyren Call's proposal.

Finally, Cyren Call's proposal is a blatant attempt to create a private business opportunity from an alleged public safety need. It is no coincidence that Cyren Call "volunteered" to serve as the manager of the public safety system it proposed.²⁶ There is no public interest benefit associated with creating a private business opportunity for Cyren Call if the Commission's proposal is adopted. The Commission's proposed broadband, interoperable public safety network would be run by an entity with not-for-profit status and significant public safety experience.

²⁴ See Jon M. Peha, Professor of Electrical Engineering and Public Policy, Associate Director of the Center for Wireless and Broadband Networking, Carnegie Mellon University, *How America's Fragmented Approach to Public Safety Wastes Money and Spectrum*, Abstract presented at 33rd Telecommunications Policy Research Conference, at 13 (Sept. 2005).

²⁵ *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Ninth Notice of Proposed Rulemaking*, 21 F.C.C.R. 14837, 14838 (2006).

²⁶ See PFR at 34-35.

For the foregoing reasons, Cyren Call's proposal was properly dismissed and reconsideration should be denied.

Respectfully submitted,

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March 16, 2007

CERTIFICATE OF SERVICE

I, Paula Lewis, hereby certify that the foregoing Opposition to Petition for Reconsideration was served this 16th day of March, 2007 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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