

**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)	

**OPPOSITION TO CYREN CALL COMMUNICATIONS CORPORATION’S
PETITION FOR RECONSIDERATION**

CTIA – The Wireless Association® (“CTIA”) respectfully submits the following opposition to Cyren Call Communications Corporation’s (“Cyren Call”) Petition for Reconsideration of the Commission’s November 3, 2006 dismissal of Cyren Call’s Petition for Rulemaking.¹ As discussed below, the Commission has properly initiated a rulemaking proceeding to consider a variety of alternatives to address the development of interoperable public safety communications systems within the legal constraints set by Congress.² The Cyren Call Petition for Rulemaking, however, operates outside of Congress’s direct mandate to the FCC, and granting Cyren Call’s Petition would have been an unlawful and procedurally inappropriate mechanism to examine these issues. In

¹ *Petition for Reconsideration of Cyren Call Communications Corporation*, RM-11348 (filed Jan. 9, 2007) (“Petition for Reconsideration”); *Petition for Rulemaking of Cyren Call Communications Corporation*, RM-11348 (filed Apr. 27, 2006) (“Petition for Rulemaking”).

² *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communication Requirements Through the Year 2010*, WT Docket No. 96-86; *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229.

addition, the FCC is under a firm statutory deadline to commence the auction of spectrum in the upper 700 MHz band by January 28, 2008. The Commission currently has four active rulemaking proceedings impacting the 700 MHz transition,³ and the Commission should be wary of disruptions to its consideration of relevant issues impacting the DTV transition. For the foregoing reasons, the FCC properly rejected Cyren Call's request.

I. THE FCC TOOK THE APPROPRIATE, LEGALLY SOUND APPROACH WHEN IT DISMISSED CYREN CALL'S PETITION FOR RULEMAKING AND INITIATED A BROADER INQUIRY.

The FCC has recently initiated a broad inquiry into the future of the 700 MHz band and interoperable public safety communications.⁴ This wide-ranging inquiry properly addresses the relevant issues raised in Cyren Call's proposal, and does so in a legally sustainable way. In fact, the record developed in response to the Cyren Call Petition for Rulemaking is consistent with the Commission's approach. Four of the five "key elements" of the proposal set forth by Cyren Call in its Petition for Rulemaking are included in the NPRM and were expressly supported by the public safety community.⁵ Indeed, many of the more substantive comments in the Cyren Call docket simply supported consideration of the broader policy issues raised by Cyren Call, rather than the specifics of Cyren Call's proposal.

³ If, as Cyren Call suggests, the Commission must wait on legislation necessary to implement the Cyren Call proposal, it is unlikely the auctions will proceed on time. Adding Cyren Call's proposal to the four other pending 700 MHz proceedings unnecessarily lengthens the timeline even further.

⁴ *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, Ninth Notice of Proposed Rulemaking, 21 FCC Rcd 14837 (2006) ("NPRM").

⁵ These four elements are: (1) a single, nationwide licensee of the broadband spectrum; (2) allowing the national public safety licensee to lease access to commercial providers on a preemptible basis; (3) allowing the national public safety licensee to establish technical parameters and specifications to ensure a robust, redundant, and reliable network; and (4) the right to obtain a third-party to manage the licensee.

CTIA submits that the only real distinction between Cyren Call's proposal and the NPRM is that the NPRM does not include the one element which would be contrary to Congressional mandate – Cyren Call's proposal to allocate an additional 30 MHz of spectrum to public safety. CTIA does not believe that the proposed reallocation of 30 MHz of commercial spectrum from the 700 MHz band is a necessary element to successfully establishing a nationwide interoperable public safety broadband network.⁶ Designating 12 MHz from the current 24 MHz public safety allocation in the upper 700 MHz band should be more than enough spectrum to support such a network.⁷

In fact, CTIA believes that it would be appropriate for the FCC to examine how to increase efficiency of already allocated public safety spectrum. As Senator Sununu stated in the February 8, 2007 Congressional hearing on the Present and Future of Public Safety Communication:

[T]he question is how we can make sure that 24 MHz of spectrum [already allocated in the 700 MHz band] is used as effectively as possible . . . that[] [i]s an area where we need to focus much more attention... We want to make sure we are using it effectively. I think the FCC has done the right thing in putting out a Notice of Proposed Rulemaking to say, look are there ways that we can use this 24 MHz we've allocated more effectively and more efficiently . . . I'm talking about the efficiency of spectrum that's already in the hands of public safety . . . I think it is fair to say that it's not necessarily being used as effectively and as efficiently as possible.⁸

⁶ Cyren Call's Petition discusses a national broadband system and therefore CTIA's Opposition to Cyren Call's Petition focuses only on a prospective broadband application.

⁷ The 700 MHz band is not the only spectrum available for public safety broadband use. As public safety has noted, the 4.9 GHz band can accommodate a variety of new broadband applications. *See, e.g.*, Region 39 4.9 GHz Regional Plan, submitted by John Johnson, Chairman, TN Emergency Management Agency, WT Docket No. 00-32, p10 (received May 12, 2005) ("The 4.9 GHz band is intended to accommodate a variety of new broadband applications"); Comments of Public Safety Wireless Network, WT Docket. No. 00-32, pp1-2 (received July 8, 2002) ("The allocation [of 50 MHz of 4.9 GHz spectrum] will provide public safety with an additional 50 MHz of spectrum suitable for supporting broadband networks").

⁸ *The Present and Future of Public Safety Communications: Senate Commerce Comm.*, 110th Cong. (Feb. 8, 2007) (Comments of Sen. Sununu) available at: [rtsp://video.webcastcenter.com/srs_g2/commerce020807.rm](http://video.webcastcenter.com/srs_g2/commerce020807.rm).

That being said, there are examples of efficient use of existing public safety spectrum that can be seen in two of the country's major metropolitan areas. In both cases, interoperable broadband public safety networks are being built using commercial off-the-shelf technologies ("COTS"):

- The National Capital Region ("NCR") has been granted a waiver to use 2.5 MHz of spectrum in the public safety portion of the 700 MHz band to provide a broadband network for Washington, DC and its surrounding areas. To implement this, the NCR contracted with Alcatel-Lucent to build a CDMA2000 1x EV-DO Revision A network in the 700 MHz band covering the nation's capital, including the White House and Congress. The Alcatel-Lucent network will have the capacity to transmit video, data and voice communications with peak speeds of nearly 5 Mbps. The District of Columbia Government noted, "This solution delivers the economy of scale of commercial cellular technologies with public safety grade construction and reliability."⁹
- Additionally, New York City has awarded Northrop Grumman a contract to deploy a citywide interoperable, wireless broadband public safety network using 10 MHz of spectrum in the 2.5 GHz band.¹⁰ The network will create interoperable communications for the Police Department, the Fire Department, the Office of Emergency Management and other city agencies – and the city will work to provide state and federal public safety access as well. The network will deploy UMTS technology in a cellular architecture comprised of roughly 400 base stations, and each base station will support 7.5 Mbps initially, with data rates expected to increase to 35 Mbps within two to three years.¹¹ This New York City network, which Northrop Grumman describes in its comments as "a system that meets all of the Commission's technological and policy objectives," shows that 10 MHz of spectrum can serve a public safety broadband network in the most populous city in the nation.¹²

⁹ District of Columbia Government, National Capital Region First to Deploy 700 MHz Wireless Network for Public Safety Communication, (Feb. 28, 2007), available at <http://dc.gov/news/release.asp?id=1071>.

¹⁰ See, e.g., Comments of the High Tech DTV Coalition at 12 n.25; Comments of Northrop Grumman at 8 ("Northrop Grumman Comments"); Comments of CTIA – The Wireless Association@ at 9 ("CTIA Comments").

¹¹ Bob Brewin, *NYC to Cover City with 2.5 GHz Wireless*, FCW.COM (Sept. 25, 2006), available at <http://www.fcw.com/article96172-09-25-06-Print>.

¹² Northrop Grumman Comments at 8.

Furthermore, in the 700 MHz proceeding, both equipment manufacturers and commercial carriers made commitments to support public safety broadband operations. The industry is ready and willing to support the needs of public safety and to help create a more efficient use of the already allocated spectrum. For example, Tropos, an equipment manufacturer, has entered the market to provide public safety mesh networking solutions.¹³ Ericsson, for its part, has stated that it “is fully committed to supplying the public safety broadband network with commercial off-the-shelf technology . . . and 700 MHz Long Term Evolution (“LTE”) systems, equipment and services that meet standardized public safety requirements.”¹⁴ Motorola also plans to provide public safety agencies both broadband and wideband solutions so they can choose the one that best matches their operability needs.¹⁵ On the carrier side, Verizon Wireless supports utilizing COTS equipment with a dedicated public safety broadband network and leveraging the existing commercial wireless infrastructure.¹⁶ Such support from the commercial industry will help public safety make efficient use its allocated spectrum.

II. GIVEN THAT THERE HAS BEEN NO CHANGE IN THE STATUTORY FRAMEWORK SURROUNDING THE 700 MHZ BAND, THE FCC PROPERLY ADHERED TO FCC PRECEDENT IN DISMISSING CYREN CALL’S PETITION FOR RULEMAKING.

The Commission’s dismissal of Cyren Call’s Petition is fully consistent with prior precedent. In fact, in 2003, the FCC dismissed a remarkably similar petition filed by Northrop Grumman, which sought to reallocate portions of the 700 MHz band for public

¹³ See, http://www.tropos.com/public_safety.html.

¹⁴ Comments of Ericsson Inc., PS Docket No. 06-229, WT Docket No. 96-86, p3 (received Feb. 26, 2006).

¹⁵ Comments of Motorola, Inc., PS Docket No. 06-229, WT Docket No. 96-86, p18 (received Feb. 26, 2006).

¹⁶ Comments of Verizon Wireless, PS Docket No. 06-229, WT Docket No. 96-86, pp 10-13 (received Feb. 26, 2006).

safety services in direct contravention of Section 337 of the Communications Act.¹⁷

Cyren Call's Petition for Rulemaking is indistinguishable from this prior proposal in all relevant aspects. As CTIA previously put forth in the record,¹⁸ there has been no change in the statutory or regulatory framework that warrants a departure from the established Northrop Grumman precedent. Therefore, consistent with its precedent and with the current statutory scheme, the FCC properly dismissed Cyren Call's Petition for Rulemaking.

III. THE FCC'S AUTHORITY TO INITIATE PROCEEDINGS DOES NOT EXTEND TO GRANTING SPECIFIC PROPOSALS THAT ARE DIRECTLY CONTRARY TO THE LETTER OF THE LAW.

The Commission has broad authority to initiate rulemaking proceedings that inquire into policy issues, but that authority does not – as Cyren Call alleges – allow the Commission to initiate rulemaking proceedings which run counter to the law. As Cyren Call notes, Section 402 of the Communications Act and Section 1.1 of the Commission's rules give the FCC broad authority to initiate inquiries with respect to subject matters properly before the agency.¹⁹ Indeed, the Commission properly relied on this authority

¹⁷ Petition of Northrop Grumman Information Technology for Rulemaking to Amend Subpart R of Part 90 of the Commission's Rules for the Purpose of Allocating Additional Broadband Spectrum for Public Safety Services, PRM03WT (filed April 21, 2003); Letter to Michael W. Grady, Vice President, Technology, Engineering and Quality and Sector Chief Technical Officer, Northrop Grumman Information Technology from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission and Edmond J. Thomas, Chief, Office of Engineering and Technology, Federal Communications Commission, DA 03-2940, 18 FCC Rcd 19284 (September 24, 2003).

¹⁸ Letter from Steve Largent, President and CEO, and Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA – The Wireless Association®, to Kevin J. Martin, Chairman, Federal Communications Commission, RM-11348 (Oct. 31, 2006).

¹⁹ 47 U.S.C. §403 (“The Commission shall have full authority and power at any time to institute an inquiry . . . 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.”) (emphasis added); 47 C.F.R. §1.1 (“The Commission may . . . 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

when it initiated a rulemaking proceeding to consider a comprehensive plan that would promote the deployment of a nationwide, interoperable, broadband public safety network. Under the Communications Act, the FCC may even make broad recommendations to Congress on specific issues.²⁰

Cyren Call’s Petition for Rulemaking, however, was properly dismissed because it did not seek a broad inquiry into issues dealing with interoperable public safety communications or recommendations to Congress. Instead, Cyren Call’s Petition for Rulemaking sought adoption of a specific proposal that could not be implemented without Congressional action.²¹ In its Petition for Rulemaking, Cyren Call “respectfully request[ed] the Commission to initiate a Notice of Proposed Rulemaking to reallocate 30 MHz of commercial 700 MHz spectrum . . . to this entirely new shared network.”²² Section 337 of the Communications Act directly prohibits this action. Section 337 specifically directs that the Commission “shall allocate” 24 MHz of the spectrum between 746 MHz and 806 MHz spectrum “for public safety services according to the terms and conditions established by the Commission” and the other 36 MHz of that spectrum “for commercial use to be assigned by competitive bidding.”²³

determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations.”) (emphasis added).

²⁰ 47 U.S.C. §154.

²¹ Cyren Call even recognizes that its plan requires Congressional action before the FCC can adopt rules consistent with its petition because those rules would not conform to current statutory language. Petition for Reconsideration at 4.

²² Petition for Rulemaking at 3.

²³ 47 U.S.C. §337(a).

It is unlawful for an agency's action to exceed its statutory jurisdiction, authority, or limitations, or to fall short of its statutory right.²⁴ It is therefore well settled that the Commission cannot initiate a proceeding that presupposes an action that is prohibited by statute. For example, where Congress had specifically given the Coast Guard and the United States Geological Survey authority to promulgate rules regarding offshore drilling operations, OSHA did not have the authority to begin an investigation of an accident where, presumably, the investigation could bring certain offshore drilling operations under the jurisdiction of OSHA's construction-industry regulations.²⁵ Moreover, the starting point for determining the parameters of agency authority is the language of the enabling statute itself.²⁶ Cyren Call's Petition for Rulemaking asks the FCC to allocate spectrum contrary to the specific scheme set forth by Congress in Section 337. Because such a proceeding would be contrary to the statute, the Commission properly dismissed the request.

Had Cyren Call submitted a petition for rulemaking that supported the initiation of a proceeding to consider a variety of alternatives for the development of a nationwide, interoperable public safety communications network within the allocated 24 MHz, then the FCC could enter into such an inquiry. Indeed, as Cyren Call notes, the Commission has entered into such inquiries in the past. The FCC, however, has not entered into rulemaking proceedings that presuppose a specific outcome that is prohibited by

²⁴ 5 U.S.C. §706(1)(C).

²⁵ *Marshall v. Nichols*, 486 F. Supp. 615, 620-622 (E.D. Tex. 1980).

²⁶ *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 453 (1990) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)). Where Congress did not provide penalties for violation of one statutory section, but did provide a penalty for another section, and the USDA nevertheless assessed a penalty for violating the first section, the Court found that the USDA lacked authority to create regulations imposing the penalties under the first section because that action was not authorized by law. *See Id.*

statute.²⁷ Because the Commission cannot take action directly contrary to its statutory mandate, the FCC properly denied Cyren Call's Petition for Rulemaking.

²⁷ Cyren Call cites three instances where the Commission made recommendations to Congress. However, unlike Cyren Call's Petition for Rulemaking, the cited proceedings examined existing Commission rules and were not initiated solely to adopt rules which would run totally afoul with a Congressional mandate. In *Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, Report and Order, 89 FCC 2d 257, 258 (1982), the Commission initiated the proceeding to implement its authority under Section 309 of the Communications Act. Although the FCC decided not to establish rules under this authority, the FCC specifically stated that its decision was "consistent with the discretion afforded to the Commission in Section 309(i)." *Id* at 283-84. In the *Telephone Company-Cable Television; Cross-Ownership Rules Sections 63.54 - 63.58*, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849, 5851 (1988), the Commission first analyzed its rules under the cross-ownership rules and "tentatively concluded that it should recommend to Congress that the cross-ownership prohibition of the Cable Act should be eliminated." Cyren Call's petition does not ask the Commission to examine its current rules, but rather asks the Commission to initiate a rulemaking totally contrary to statutory mandate. In the *Telephone Company-Cable Television; Cross-Ownership Rules Sections 63.54 - 63.58*, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992), the Commission both amended its rules "consistent with the statutory . . . restrictions" and recommended that Congress repeal the restriction.

CONCLUSION

For the foregoing reasons, the Commission properly dismissed Cyren Call's Petition for Rulemaking and Cyren Call's Petition for Reconsideration should therefore be denied.

Respectfully submitted,

By: /s/ Christopher Guttman-McCabe

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Michael F. Altschul
Senior Vice President & General Counsel

Paul W. Garnett
Assistant Vice President, Regulatory Affairs

CTIA – The Wireless Association®
1400 16th Street, NW
Suite 600
Washington, DC 20036
(202) 785-0081

Dated: March 16, 2007