

**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	)	

To: The Commission

**REPLY TO OPPOSITIONS TO  
PETITION FOR RECONSIDERATION**

Cyren Call Communications Corporation (“Cyren Call”), in accordance with Section 1.429(g) of the Federal Communications Commission (“FCC” or “Commission”) rules and regulations, respectfully submits its Reply to Oppositions to the Petition for Reconsideration filed by Cyren Call with respect to the Commission’s November 3, 2006 dismissal<sup>1</sup> of the above-identified Petition for Rulemaking.<sup>2</sup> 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 for deployment of a nationwide, interoperable broadband network for shared Public Safety and commercial use.

Oppositions to the Petition were filed by CTIA – The Wireless Association (“CTIA”), by AT&T, Inc., on behalf of its affiliate, AT&T Mobility LLC (f/k/a/Cingular Wireless LLC) (“AT&T”) and by the Consumer Electronics Association (“CEA”) (each, individually,

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<sup>1</sup> RM 11348, *Order*, DA 06-2278 (rel. Nov. 3, 2006) (“*Order*”).

<sup>2</sup> Petition for Rulemaking of Cyren Call Communications Corporation, RM 11348, filed April 27, 2006 (“*Petition*”).

“Opposition” and, collectively, “Oppositions”). As none of the Oppositions advance credible arguments to support the dismissal of the Petition, Cyren Call again urges the Commission to reconsider its decision and to initiate a rule making proceeding consistent with the record already developed in this proceeding and with the important principles of the Cyren Call Petition.

**I. THE ARGUMENTS ADVANCED IN THE OPPOSITIONS FAIL TO RECOGNIZE THE FCC’S STATUTORY AUTHORITY OR TO ADDRESS THE NEED FOR A COMPREHENSIVE PLAN FOR DEPLOYMENT OF A NATIONWIDE BROADBAND PUBLIC SAFETY NETWORK**

**A. The FCC is Statutorily Empowered to Take Actions that Promote the Use of Spectrum to Advance the Public Interest**

In its Petition for Reconsideration, Cyren Call addressed the FCC’s statutory obligation 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,”<sup>3</sup> which obligation expressly includes the initiation of proceedings 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.<sup>4</sup>

Cyren Call noted that the Commission’s rules reaffirm this overarching responsibility, for example in FCC Rule Section 1.1 which 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.<sup>5</sup>

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<sup>3</sup> 47 U.S.C. § 151.  
<sup>4</sup> *Id.* at § 403.  
<sup>5</sup> 47 C.F.R. § 1.1.

This is not to say, and Cyren Call has never suggested, that the Commission is authorized to adopt and implement rules that are inconsistent with the Communications Act itself. To the contrary, Cyren Call has expressly recognized from the outset that the result of an FCC proceeding with respect to the Cyren Call Petition would be a Commission recommendation to Congress that Section 337(c) of the Act should be modified to permit the adoption of such rules as had been determined by the FCC to advance the public interest. However, Cyren Call explained that the fact that a statutory change would be necessary before the FCC could **implement** essential elements of the proposal set out in the Petition was not a bar to Commission **consideration** of the Petition.<sup>6</sup>

Thus, to the extent that AT&T argues that “the 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,” it is saying no more than Cyren Call already has acknowledged. However, CTIA goes substantially farther. It concludes that the FCC is legally barred from, “entering into rulemaking proceedings that presuppose a specific outcome that is prohibited by statute.”<sup>7</sup> It endeavors to distinguish the precedent identified by Cyren Call in support of the FCC’s legal authority to undertake such initiatives by stating that, in those instances, the FCC examined existing rules and the proceedings were not initiated “solely” to adopt rules that would require statutory amendment.<sup>8</sup>

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<sup>6</sup> AT&T Opposition at 4 (emphasis added).

<sup>7</sup> CTIA Opposition at 8-9.

<sup>8</sup> *Id.* at n. 27

However, CTIA offers no meaningful support for its novel interpretation.<sup>9</sup> There is nothing in the proceedings cited or in the Communications Act or the FCC rules that so restricts the FCC's authority to investigate matters involving its area of expertise or its authority to make appropriate recommendations to Congress based on those investigations. Under CTIA's interpretation, the Commission would be obligated to wait passively, hoping for Congressional direction, even if had reason to believe the public interest demanded that the Act be amended unless, of course, it could find an existing rule that provided a sufficiently sturdy bootstrap to support an agency initiative. It would be extraordinary indeed if the Federal agency charged with managing the spectrum was disempowered from investigating matters within its expertise for the purpose of making recommendations to Congress, including recommendations that might not conform to the existing statute, absent such a linkage.

**B. The Oppositions Reflect the Filing Parties' Lack of Understanding of Public Safety Broadband Requirements**

Each of the parties that filed an Opposition cited to the recent Commission investigation into potential Public Safety broadband operations on 12 of the 24 MHz at 700 MHz already allocated for Public Safety use as evidence that the problem identified in the Cyren Call Petition was being addressed.<sup>10</sup> For example, CTIA takes the position 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

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<sup>9</sup> In one of the cases cited by CTIA, the agency in question appeared to believe that it was free to issue subpoenas that exceeded its enabling legislation without securing Congressional approval *Marshall v Nichols*, 486 F. Supp. 615 (E.D.Tex. 1980). In the other, the agency's actions *vis-à-vis* a party exceeded its statutory authority. *Pender Peanut Corp. v. United States*, 20 Cl Ct 447 (1990). Neither case involved facts analogous to the instant situation wherein Cyren Call has urged the FCC to develop a record with respect to the Petition for the express purpose of **recommending** to Congress enactment of statutory changes consistent with the Commission's finding in that proceeding. Had the agencies in these two cases followed a comparable route and sought Congressional approval for changes that the agencies had determined would advance the public interest, the outcome might have been different.

<sup>10</sup> *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Ninth Notice of Proposed Rulemaking*, PS Docket No 06-229, 21 FCC Rcd 14,837 (2006) ("*Ninth NPRM*" or "*NPRM*").

an additional 30 MHz of spectrum to public safety.”<sup>11</sup> AT&T concludes that “the public safety objectives of the Cyren Call proposal can be achieved within the existing public safety spectrum allocation....If adopted, this revised band plan [in the *Ninth NPRM*] would obviate Cyren Call’s proposal.”<sup>12</sup> CEA echoes this position, stating that the *Ninth NPRM* “provides a readily achievable approach to providing nationwide, interoperable broadband to public safety without disrupting the DTV transition.”<sup>13</sup> An implicit, or in the case of CTIA explicit, presumption underlying these parties’ conclusions is that Public Safety already has adequate spectrum on which to deploy a nationwide broadband network.<sup>14</sup>

Cyren Call could explain why the *Ninth NPRM*, while addressing many of the structural regulatory changes needed to permit deployment of a nationwide, interoperable Public Safety broadband network, failed to resolve the two primary elements of such a network – sufficient spectrum and a viable, self-sustaining funding mechanism. But those fundamental deficiencies are best described by representatives of the Public Safety community itself.

Thus, in its Reply Comments in the *Ninth NPRM*, the Association of Public-Safety Communications Officials-International, Inc. (“APCO”) stated the following:

Virtually all in public safety indicated that 12 MHz was simply insufficient to meet public safety’s own data network requirements, let alone provide sufficient spectrum to facilitate economically viable public/private partnerships.<sup>15</sup>

The National Public Safety Telecommunications Council (“NPSTC”) identified the identical problem:

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<sup>11</sup> CTIA Opposition at 3.

<sup>12</sup> AT&T Opposition at 6

<sup>13</sup> CEA Opposition at 3.

<sup>14</sup> CTIA Opposition at 3. CTIA goes on to offer what it describes as “examples of efficient use of existing public safety spectrum that can be seen in two of the country’s major metropolitan areas.” *Id.* at 4. Of course, one of the two examples, the New York City wireless broadband network, is not using Public Safety spectrum at all. Rather, that City was compelled to acquire 10 MHz of spectrum in the 2.5 GHz band on which to deploy its system.

<sup>15</sup> PS Docket No. 06-229, APCO Reply Comments at 2.

Critically, the PSBT approach [recommended in the Cyren Call Petition] presents a path toward a nationwide public safety broadband network because it addresses the systemic under-funding of government radio systems on an ongoing basis. It will be able to do so, however, only if there is sufficient spectrum to attract commercial interest to invest in a shared government/commercial network. The shared environment that would emerge provides adequate spectrum to protect all interests and a funding base to construct and maintain the network, a forceful incentive for coexistence. It is this essential element that is absent in the Ninth NPRM which proposes only 12 MHz of already allocated public safety 700 MHz spectrum for this critical purpose.<sup>16</sup>

The City of Philadelphia reiterated these concerns and concluded that, “Without sufficient spectrum to provide an economic incentive for private investment, there is no basis for the public-private partnership.”<sup>17</sup>

It is unclear whether CTIA, AT&T and CEA have neglected to read the comments filed by Public Safety entities in response to the *Ninth NPRM* or whether they believe those parties are not capable of evaluating whether the FCC’s proposal is, in fact, responsive to Public Safety requirements. It is evident that the Public Safety community, unlike those three parties, has identified an absolutely fundamental difference between the approach set out in the Cyren Call Petition and the one advanced in the *Ninth NPRM*. Unless and until those spectrum<sup>18</sup> and financing deficiencies are addressed, it is simply erroneous to claim, as CTIA, AT&T and CEA do, that the *Ninth NPRM* “obviates” any need to take further action on the Cyren Call Petition.

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<sup>16</sup> *Id.*, Comments of NPSTC at 7

<sup>17</sup> *Id.*, Reply Comments of the City of Philadelphia at 3.

<sup>18</sup> It should not be necessary to refute the baseless argument that if Public Safety only would make efficient use of its existing spectrum, efficiency defined by comparison with the usage on a commercial mobile wireless network, it would find that it already has sufficient spectrum to deploy a viable nationwide broadband network, in fact even to meet all of its needs through the year 2010. *See* AT&T Opposition at 6. That claim has been exposed as entirely without merit by various Public Safety entities and representatives as well as by Cyren Call. *See, e.g.*, PS Docket No. 06-229, Comments of Cyren Call, Appendix 2.

**C. The Petition Does Not Suggest a Delay in Implementation of the DTV Transition or Guarantee a Business Opportunity for Cyren Call**

Finally, the Oppositions raise two additional issues that warrant a response. First, both AT&T and CEA claim that the Cyren Call Petition threatens to disrupt timely implementation of the DTV transition and the availability of funding associated therewith that is directed to various Public Safety-related activities.<sup>19</sup> In fact, Cyren Call has never proposed, indeed has expressly and repeatedly opposed, any delay in that process. It has not suggested that the 700 MHz auction that must be commenced by January 2008 be delayed, only that the auction should include licenses for 30 MHz, rather than 60 MHz. Further, Cyren Call has taken steps to ensure that implementation of its proposal would not result in a budget shortfall. Rather, the Public Safety Broadband Trust legislation specifically provides for the Public Safety Broadband Trust to make a Five Billion Dollar payment for the 30 MHz of spectrum that is proposed to be assigned to it for nationwide Public Safety mobile broadband use.<sup>20</sup> If that were not the case, Public Safety, a beneficiary of these auction proceeds, surely would not have endorsed and continued to work with Cyren Call to advance this legislation.

Second, AT&T, again seemingly without having read the record in PS Docket No. 06-229 or the comments of various Public Safety entities with respect to the Public Safety Broadband Trust proposal, announces in a tone of moral indignation that “Cyren Call’s proposal is a blatant attempt to create a private business opportunity from an alleged public safety need.”<sup>21</sup> Then, in an apparent attempt to draw a comparison between what it claims the Cyren Call Petition seeks and the approach recommended in the *Ninth NPRM*, AT&T endorses

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<sup>19</sup> 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 (2006).

<sup>20</sup> See, e.g., PS Docket No. 06-229, Reply Comments of Cyren Call, Exhibit at 7, 9.

<sup>21</sup> AT&T Opposition at 6.

the fact that, “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.”<sup>22</sup>

Perhaps AT&T will be surprised to learn that Cyren Call, like AT&T, fully supports the FCC’s proposal that the licensee of this nationwide network be not-for-profit and have substantial Public Safety experience. Both those factors were fundamental to the Cyren Call Petition and are included in the Public Safety Broadband Trust legislation. That legislation provides further that the Public Safety Broadband Trust’s selection of individuals or organizations needed to assist in this truly monumental undertaking must be conducted in a fair, transparent and objective manner. Thus, Cyren Call herein reiterates what has been the case from the outset: the Public Safety Broadband Trust approach creates no greater “private business opportunity” for Cyren Call than it does for the equipment vendors that undoubtedly will compete to provide the necessary equipment for network deployment, for the commercial operators that will vie for the opportunity to build the network in exchange for lease rights to its excess capacity, or for the application developers that will attempt to have their products selected for use on the network. The only opportunity that would be ensured by adoption of the approach recommended by Cyren Call would be the singular opportunity for Public Safety to have access to a next generation, self-sustaining nationwide interoperable mobile broadband network.

## II. CONCLUSION

It is extraordinary that in less than one year the debate has moved from **whether** Public Safety requires a 21<sup>st</sup> Century nationwide mobile broadband network to **how** that network can be deployed most effectively. The records in this proceeding and in PS Docket No. 06-229 reflect overwhelming Public Safety support for the network approach defined in the Cyren Call

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<sup>22</sup> *Id*

Petition. Cyren Call urges the Commission to exercise its authority and reinstate 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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March 26, 2007

## CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that I have, on this 26<sup>th</sup> day of March, 2007, caused to be mailed, first-class, postage prepaid, a copy of the foregoing to the following:

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