

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

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
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
	)	

To: The Commission

**REPLY COMMENTS**

**CYREN CALL COMMUNICATIONS  
CORPORATION**

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## PREFACE

It is the nature of the “notice and comment” administrative process to encourage the fullest and most robust expression of conflicting views in matters of complexity and public importance. It is a great strength of “on the record” rulemaking that skillful advocates from all sides of an issue are given the chance to make their arguments, to pile up supporting evidence, and to deliver a well-turned phrase, often designed to demolish the carefully constructed arguments of a proponent of an opposing view. Because it is “on the record” everyone gets to see what the other side is saying. By this means, decision makers are assisted in seeing through obfuscation, avoiding the pitfalls of specious reasoning, and getting right to the heart of the truth. All of the advocates representing the numerous parties who have contributed to the 700 MHz proceeding have done their jobs with skill, reflecting many hours of labored drafting.

Today, however, with the filing of Reply Comments, that exhausting process comes to a close. The FCC, five decision makers assisted by their Bureaus, offices and staffs for whose benefit so many have toiled, now faces the challenge of sifting through the mountain of argumentation to arrive at sound and sustainable decisions in the public interest.

Cyren Call welcomes the arrival of the “eleventh hour” when the time for final decisions draws near. Set forth below are the responses we have crafted to the arguments that have been made in the record and, more importantly, the specific recommendations we are making to the FCC for final action.

Appropriate to this occasion, particularly in this proceeding when the stakes are so extraordinarily high and passions have run just as high, are a few observations we would like to make in preface. First, this proceeding has the potential to touch in a personal way literally every one of more than 300 million Americans, any one of whom could depend tomorrow for her

very life on a first responder getting the right information and then making the right decision without hesitation or calculation of personal risk, to counter the effects of a life-threatening emergency. Even a Commission which routinely makes decisions that affect millions of Americans must pause to consider just how important and far reaching this 700 MHz matter will be.

Second, this “notice and comment” process has the very beneficial quality that equality to a remarkable degree is achieved between, on the one hand, the behemoths, some of the largest and most profitable corporations in American, and, on the other hand, newcomers, start-ups and even individuals who have been given the exact same rights and the exact same opportunities to put an argument in front of the FCC and, thus, to prevail or lose, not based on size or importance, but purely on the strength of the argument and its foundation in the public interest.

Third, and most germane to this moment in time, is the following, somewhat personal introductory observation of Cyren Call. In the matter of addressing the chronic shortcomings of Public Safety communications the most likely outcome is very far from where we started and, thus, very far from our ideal. Nevertheless, we have absolutely no hesitation in stating that the FCC will be doing a wonderful and historic thing if it brings to life a public/private partnership for the construction and operation of a nationwide, interoperable, broadband, wireless network for Public Safety. Compared to that bold, even “daring,” decision, all of the many conflicts and confusing details of implementation and execution that must be sifted through and sorted out are of secondary importance.

For the last several weeks, captured somewhat in the Reply Comments filed today, Cyren Call has reached out to others with very different views about and interests in the outcome of this proceeding in an attempt to find middle ground on the myriad of issues which, though important,

are of lesser significance than the one, all-important goal. While absolute consensus is never attainable, Cyren Call holds the view that there is a broad base of agreement that this shared Public Safety-commercial nationwide, advanced technology, broadband network can and will be built, FCC permitting, and the American public will be safer for it, now and well into the future. Cyren Call has the zeal and the stamina of a long distance runner. This effort to advance Public Safety to the forefront of communications capabilities will require months and then years to be fully realized; we pledge to assist in any appropriate capacity until this dream becomes a reality.

## EXECUTIVE SUMMARY

This Further Notice of Proposed Rulemaking is the culmination of several FCC proceedings relating to 700 MHz spectrum that will become available upon completion of the digital television transition process. While the proceeding raises a number of significant policy issues, none is more critical than the opportunity presented to the FCC to foster the development of a sound technical, operational and financial foundation for addressing long-term, advanced technology, Public Safety communications requirements. The 700 MHz spectrum under consideration represents the **only** band segment in which the mobile broadband needs of this critical user community can be satisfied at a reasonable cost. On it, Public Safety could have access to a nationwide, interoperable, IP-based network designed and deployed to meet rigorous Public Safety specifications, but with the economies of scale derived by building upon commercial-off-the-shelf devices and applications developed for the wireless consumer marketplace.

The promise of such a network is compelling. This nation cannot afford to continue down a path where the gap grows ever wider between the communications capabilities of Public Safety providers and those of the general public. On the other hand, government at the local, state or Federal levels has not made monies available to build, operate, maintain and upgrade such a network and there is no indication that government funding for this purpose will be made available.

It is for this reason that Cyren generally endorses the FCC's proposal to set aside a 10 MHz E Block at 700 MHz for the express purpose of establishing a public/private partnership similar to that proposed in the original Cyren Call Petition. The E Block auction winner would be required to build a shared nationwide broadband network to specifications determined by

Public Safety using both its spectrum and the 700 MHz Public Safety spectrum that the FCC has proposed to designate for broadband use and to license to a single entity that is representative of the Public Safety community.

Adoption of rules establishing this type of public/private partnership would represent an essential step toward meeting Public Safety communications needs, but only if the surrounding regulatory framework ensures that Public Safety will have necessary control over the network and its operations, both at the outset and throughout the life of the partnership. The need to establish appropriate protections for Public Safety is even greater, since the Commission is considering the Frontline Wireless, LLC recommendation to require the E Block licensee to adopt a business model that mandates wholesale-only operation, open access and roaming obligations. Because this model is untested in the wireless environment, the FCC must take particular care to ensure that the high bidder in the auction is qualified to become Public Safety's long-term partner.

Therefore, Cyren Call recommends that the Commission establish two conditions precedent to issuance of the E Block license. First, the successful high bidder must negotiate an acceptable Network Sharing Agreement with Public Safety, one that contains provisions consistent with the rules proposed herein and the elements identified by Cyren Call for inclusion in that Agreement in its earlier-filed Comments. Second, the E Block auction winner must demonstrate its financial qualifications to the satisfaction of Public Safety and the FCC. These complementary conditions will protect against the possibility that the high bidder has underestimated the obligations it is assuming *vis-à-vis* meeting Public Safety network specifications. The E Block license should not be issued until after the auction winner has satisfied both of them.

Thereafter, the E Block licensee should be subject to applicable Commission requirements with respect to construction and operation of the shared network, as well as other obligations associated with holding an FCC licensee. However, the rules should also provide for particular FCC oversight in instances when a failure by the E Block licensee to conform to FCC requirements or to the terms of the Network Sharing Agreement could impair ongoing network operations. The FCC must have the ability to take appropriate action to prevent the discontinuance of operations that serve critical Public Safety requirements.

Cyren Call also has addressed concerns expressed by some Public Safety entities that the public/private network proposed in the Further Notice either would be incapable of delivering a true Public Safety-grade network or would usurp local decision making and thereby compromise the effectiveness of local Public Safety operations. Cyren Call explained that the public/private partnership it supports, with the exceptions noted, is consistent with that proposed in the Further Notice:

- There is no federal mandate: No public safety agency or entity will be **required** to operate on the network; participation is entirely voluntary based on decisions made by the same communications officials who decide today how local, statewide and regional communications requirements should be met;
- 12 MHz of the 24 MHz at 700 MHz allocated to Public Safety will remain available for narrowband voice (and, as proposed by Cyren Call, wideband) operations with licenses held by individual Public Safety entities as coordinated by the Regional Planning Committees;
- Public Safety and not the commercial E Block auction winner, will define the specifications to which the broadband network would be built including such elements as coverage, reliability, survivability, redundancy, technology standards, and preemptibility; these decisions will be made based on in-depth experience with real world Public Safety operating requirements;
- Local, state and regional organizations will be able to develop virtual networks on the nationwide broadband system with network boundaries, prioritization and talk groups all defined at the applicable local, state or regional level; and

- Jurisdictions with funding to build their own broadband systems before the nationwide network will be deployed in their area are free to do so, provided the individual systems conform to the technology to be deployed by and can later be integrated into the national network, thereby balancing more immediate local requirements with the need to foster enhanced nationwide interoperability.

Finally, Cyren Call disagrees with those who argue that Section 337 of the Communications Act prohibits secondary, unconditionally preemptible commercial operations on Public Safety 700 MHz spectrum. The Commission's authority to permit secondary use of spectrum, both licensed and unlicensed, in a variety of spectrum bands and under a variety of conditions, is well-established and confirmed by Congress' express directive that this spectrum be allocated "according to terms and conditions established by the Commission." The intent by Congress to reserve 24 MHz of 700 MHz spectrum for primary Public Safety use is not compromised by the secondary usage proposed by the Commission. At any time and in any location, all of the capacity generated by Public Safety's broadband allocation, as well as some or even all of the E Block capacity, could be devoted entirely to Public Safety services for the protection of life, health or property. Because Congress intended that this spectrum be used to satisfy Public Safety communications requirements, it cannot be presumed that it would deny Public Safety the economic tool needed to put that spectrum to its intended use.

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Cyren Call Communications Corporation ("Cyren Call") respectfully submits its Reply Comments in the above-entitled proceeding.<sup>1</sup>

**I. INTRODUCTION**

The record in response to the instant FNPR leaves little doubt as to the significance of the policy issues under consideration or the impact on the communications marketplace of the

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<sup>1</sup> Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, *Report and Order and Further Notice of Proposed Rulemaking*, FCC No. 07-72, (rel. Apr. 27, 2007) ("FNPR" or "Notice"). The Reply Comment date in this proceeding was extended to June 4, 2007 pursuant to FCC Order, DA 07-2226 (rel. May 25, 2007).

decisions to be reached by the Federal Communications Commission (“FCC” or “Commission”) in resolving those matters. Virtually every party with an interest in the wireless industry, and some entities whose interests are just emerging, have submitted Comments on the FNPR. In fact, the proceeding has become the battleground for some of the more complex questions that the FCC must face: how to develop a sound technical, operational and financial foundation for addressing long-term, advanced technology Public Safety communications requirements; how to encourage a competitive environment within the Commercial Mobile Radio Service (“CMRS”) industry; and how decisions with respect to the 700 MHz band might facilitate deployment of a wireless “third pipe” for broadband services, one provided by an entity with sufficient financial and technical heft to compete effectively with national telecommunications and cable providers and with a commitment to extend service into rural as well as urban areas.

These questions go to the very heart of the Commission’s statutory mandate. The FCC is charged with making available to the people of the United States “a rapid, efficient, Nation-wide...communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of...radio communications...”<sup>2</sup>

The Commission, of course, must always seek the proper balance in managing the communications interests of its many constituencies, a task made difficult when competing interests all seek access to the same spectrum. Yet policies that place Public Safety communications at the very top of the FCC priority list, by definition, are consistent with its statutory mandate. When a Public Safety requirement has been demonstrated to be valid, as is the case with respect to a nationwide, advanced technology, interoperable, broadband Public Safety network, and when only one regulatory approach has been identified to meet that need, in

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<sup>2</sup> 47 U.S.C. § 151

this case an encumbered, conditional auction of 700 MHz spectrum in which the auction winner commits to participate in a public/private partnership to build a shared broadband network using both Public Safety and commercial spectrum, the Commission's path should be clear. While every effort should be made to reconcile FCC decisions to achieve the maximum benefit for all interested parties, when those interests collide, equipping the nation's emergency response providers with the communications tools needed to protect their lives and the lives of those they serve must remain paramount.

Cyren Call has emphasized two key issues throughout the now year-long debate about Public Safety broadband requirements. First, this nation cannot afford to continue down a path where the gap becomes ever wider between the communications capabilities of our police, fire and emergency medical technicians and those of the general public. The so-called "digital divide" between first responders and the typical wireless consumer should concern us at least as much as the more publicized divide between urban and rural communities. Public Safety users must have access to the advanced capabilities and cost efficiencies that next generation broadband will offer on a network built to their significantly more demanding specifications if we expect them to fulfill the increasingly challenging responsibilities they shoulder willingly each day in protecting the public's property and its safety.

Second, the communications capabilities that Public Safety needs are expensive.<sup>3</sup> In a more perfect world, the Federal Government would have made monies available to build, operate, maintain and upgrade a nationwide, interoperable, broadband Public Safety network after 9/11, or after Hurricane Katrina, or after any number of natural or man-made disasters that

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<sup>3</sup> In his recent statement in support of the FCC Order implementing various recommendations of the Katrina Panel, Commissioner Copps described the work that is needed to build effective Public Safety communications facilities as follows: "It is huge, it is expensive and it is totally necessary." Approving Statement of Commissioner Michael J. Copps regarding the Order implementing various recommendations of the FCC Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (May 31, 2007).

have thrown into high relief the inadequacies of emergency response provider communications in those situations. But the Federal Government has not done so and shows no signs that it will in the foreseeable future. Since the scope of this undertaking also is beyond the collective means of local or even state governments, it is clear that the Public Safety community cannot rely on government financing to fund the communications capabilities it so urgently needs.

Moreover, despite claims to the contrary whenever the requirements of Public Safety are perceived by Commercial Mobile Radio Service (“CMRS”) providers as threatening their own interests, thirty years of experience teaches that commercial wireless systems do not meet and their existing network designs cannot be retrofitted to satisfy the demanding specifications to which Public Safety systems must be designed, built and operated. Although an admittedly easier course than that urged by Public Safety and by Cyren Call, the Commission must not allow itself to be lulled into reliance on CMRS claims that this time will be different; this time it will solve Public Safety’s communications requirements.<sup>4</sup> That promise has been made and then ignored in the past. These entities suggest nothing more than that Public Safety should continue to wait and hope that a solution to its critical and growing communications capabilities shortfall

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<sup>4</sup> MetroPCS Communications, Inc. (“MetroPCS”), not previously known for its expertise in or commitment to, Public Safety communications requirements has taken this opportunity to attempt to save Public Safety from itself. It challenges the E Block proposal in the FNPR, among other reasons, on the basis that it would award a single licensee what MetroPCS describes as “monopoly” control over helpless Public Safety users that would be held hostage to the E Block winner’s “unregulated user fees.” The FCC undoubtedly will reject this entirely hyperbolic characterization of the FNPR proposal. First, no Public Safety user in the nation would be required to operate on the proposed network; participation would be entirely voluntary. While Cyren Call believes that many Public Safety entities will elect to join the network because of the extraordinary capabilities it will provide, all will be free to utilize their existing systems that may operate in low-band, VHF, 220 MHz, UHF, 470-512 MHz or 800 MHz. They will be free to acquire service from any commercial provider of their choosing, including MetroPCS. It is not possible to operate as a “monopoly” provider in such an environment. Second, contrary to MetroPCS’s characterization, the user fees on the network will not be established unilaterally by the E Block licensee as they would be on a regular commercial system operated by an entity such as MetroPCS. Rather, the fees will be negotiated by Public Safety on behalf of Public Safety in conjunction with the E Block licensee. No “monopoly” power could be exerted by the E Block licensee under the proposal advanced by the FCC in the FNPR. The “solutions” advanced by certain other wireless carriers are self-serving and/or ineffective. For instance, Verizon Wireless would have Public Safety hope for massive governmental funding to build a Public Safety-only network and also compensate a CMRS carrier for its role in constructing and perhaps even operating that network. Alternatively, these carriers propose reliance on CMRS networks, an approach that have proven too costly or not adequate to meet Public Safety requirements over the past decades.

will be identified – by some unknown source at some unidentified future date. That approach cannot form the basis for a public policy decision of this magnitude.

When it filed its original Petition in April 2006, Cyren Call issued a challenge to the wireless community and to the FCC.<sup>5</sup> It proposed a shared 700 MHz Public Safety-commercial nationwide, interoperable, advanced technology broadband network, one designed to Public Safety specifications, but privately financed and built by a commercial operator(s), as the only economically sustainable plan to secure the necessary communications facilities for Public Safety in the 21<sup>st</sup> century and to provide for their operation, maintenance and upgrade as technology advances. It urged any party with what it regarded as a better plan for accomplishing those same objectives to step forward. None has done so, except for the modified public/private partnership proposal under consideration herein.

The FCC's proposal for a 700 MHz public/private partnership in the instant proceeding, one predicated on adoption of an E Block that would be auctioned, but whose winner would be subject to Public Safety-specific obligations, differs from the original Cyren Call approach in several substantive ways that are addressed below. The proposal to mandate an open access, wholesale-only business model on the E Block licensee is particularly thought-provoking. The risk cannot be entirely discounted that, by using the E Block as the vehicle for advancing every policy initiative under consideration in this proceeding, it could sink under the weight of its various obligations and with it the only meaningful opportunity to deploy an advanced technology network designed to meet Public Safety's particular requirements.

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<sup>5</sup> See Petition for Rulemaking of Cyren Call Communications Corporation, RM 11348, filed April 27, 2006 ("Cyren Call Petition" or "Petition"). The Petition was placed on Public Notice on October 30, 2006, and assigned RM-11348. *Public Notice*, Report No. 2794 (rel. Oct. 30, 2006). The FCC dismissed the Petition on November 3, 2006, stating that because the Petition proposed the reallocation of 30 MHz of 700 MHz spectrum from commercial to public safety use it required Congressional action and was beyond the scope of the FCC's authority. RM 11348, *Order*, DA 06-2278 (rel. Nov. 3, 2006). However, the Commission left the proceeding open even after dismissal of the Petition. More than 1,300 comments were filed, virtually all of which supported the principles of Cyren Call's proposal.

Nonetheless, subject to adoption of an appropriate regulatory framework, and provided that open access and its companion restrictions are the means to achieve the more important objective, a state-of-the-art, nationwide, interoperable broadband communications system designed, built and operated to Public Safety specifications, then, in this instance, the end – “promoting safety of life and property through the use of...radio communications,”<sup>6</sup> – may justify the means.

As detailed below, the FCC can resolve this extraordinarily complex proceeding consistent with the objectives outlined above, and it can do so even within the accelerated timetable required to meet the 700 MHz CMRS auction deadline established by Congress.<sup>7</sup>

## **II. WITH AN APPROPRIATE REGULATORY FRAMEWORK, ESTABLISHING A PUBLIC/PRIVATE PARTNERSHIP TO DEPLOY A NATIONWIDE, INTEROPERABLE, ADVANCED TECHNOLOGY BROADBAND NETWORK WILL SERVE IMPORTANT PUBLIC SAFETY REQUIREMENTS**

There is substantial support in the record for the adoption of rules governing the E Block which, in conjunction with at least 10 MHz of Public Safety broadband spectrum, would establish the necessary foundation for a successful public/private partnership on which a shared nationwide, IP-based, interoperable, broadband Public Safety-commercial network can be built.<sup>8</sup> The regulatory framework governing that network must assure satisfaction of several key principles.

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<sup>6</sup> See n 2.

<sup>7</sup> See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (“DRA”). The DRA requires the FCC to commence the 700 MHz spectrum auction no later than January 28, 2008 and to deposit the proceeds of that auction in the Digital Television Transition and Public Safety Fund by June 30, 2008. Neither the original Cyren Call proposal nor the E Block proposal in the FNPR would or should delay any of the statutory timelines or commitments associated with the transition to digital television as set out in the DRA.

<sup>8</sup> See, e.g., Comments of Association of Public-Safety Communications Officials-International, Inc. (“APCO”), National Public Safety Telecommunications Council (“NPSTC”), Frontline, Oregon State Fire Fighters Council, the Massachusetts Chiefs of Police Association, the Virginia Fire Chiefs Association, Professional Firefighters of Massachusetts and Montana State Fire Chiefs Association.

First, it must ensure that Public Safety possesses a key role in the public/private partnership, including the necessary control over the implementation and operation of the shared network so that the coverage, service quality, and other demanding Public Safety-specific requirements are not compromised either at the original system design and implementation stage or during the life of the network. This will require an appropriate set of regulatory checks and balances to confirm that the E Block auction winner understands and is prepared to meet its obligations as a partner of the Public Safety Spectrum Trust Corporation (“PSST”), the proposed licensee of Public Safety’s own 700 MHz broadband spectrum.<sup>9</sup> The mutual commitment of the E Block auction winner and the PSST must be validated by negotiating a Network Sharing Agreement (“NSA” or “Agreement”) that is approved by the FCC. Further, the E Block auction winner must demonstrate to the satisfaction of the PSST and the FCC that the auction winner has the requisite financing to implement the agreed-upon network plan and otherwise satisfy its NSA obligations. No E Block license should be issued until the auction winner has successfully navigated both of those steps. Thereafter, there also must be provisions to preserve a partnership balance that will protect Public Safety interests on an ongoing basis.

To that end, while Cyren Call has expressed concerns about rules that would mandate certain business models for the E Block licensee’s commercial activities, rather than leaving those decisions to the collective judgment of that entity and its Public Safety partner, it is mindful of the arguments that have been advanced in this proceeding about the public policy benefits of creating a “third pipe,” a new competitor, in the broadband marketplace.<sup>10</sup> Cyren Call

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<sup>9</sup> Both NPSTC and APCO note in their comments that the Public Safety community has initiated the formation of a legal entity known as the Public Safety Spectrum Trust Corporation that could hold the nationwide license for the 700 MHz Public Safety broadband spectrum as proposed in the Ninth NPR. In its Comments in this proceeding, Cyren Call had referred to that entity as the “National Licensee.” In these Replies, it will instead use the name selected by the Public Safety community, recognizing that the decision to authorize such a licensee entity, as well as the appropriate entity to hold that authorization, remains with the FCC.

<sup>10</sup> See, e.g., Comments of Google, Frontline, and Cellular South Licenses, Inc.

has emphasized from the outset that although this shared public/private network would have the primary objective of meeting Public Safety's critical communications needs, it also could serve the complementary goal of extending advanced broadband capabilities to still underserved and even entirely un-served communities that have been bypassed in the telecommunications revolution.

Accordingly, if the Commission determines that adoption of the Frontline Wireless, LLC ("Frontline") wholesale, open access, roaming-receptive model for the E Block will promote other policy objectives important to the FCC and, most critically, that the Commission also is prepared to adopt a regulatory framework that ensures that those commercial restrictions can be implemented without in any way compromising or diluting the E Block licensee's ability to meet its primary obligation to serve Public Safety requirements, then it may be possible to satisfy both public interest goals.<sup>11</sup> Cyren Call must emphasize, however, that whatever decision is reached on that issue, the FCC must keep its eye fixed firmly on the more essential need to foster deployment of a nationwide broadband network that is built to Public Safety specifications and that remains securely under its control for all matters relating to Public Safety operations. Any policy initiative that poses significant risk to that primary purpose cannot be accommodated on spectrum that is intended to serve Public Safety requirements.

The regulatory framework also must clarify the role that the nationwide broadband Public Safety network contemplated herein will play in the larger context of Public Safety communications systems. Cyren Call addressed this issue in its Comments and sought to allay concerns with respect to the roles that the PSST and local Public Safety entities will play in

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<sup>11</sup> See Public Notice, "Consumer & Governmental Affairs Bureau Reference Information Center Petition For Rulemakings Filed," Report No. 2807, In the Matter of Skype Communications S.A.R.L. Petition for Declaratory Ruling (rel. Feb. 28, 2007). As the business model proposed by Frontline is, as yet, unproven in the wireless communications environment, the Commission will want to monitor its impact on the operational and financial performance of the network carefully, particularly during the network's initial years.

structuring and implementing the capabilities the network will provide. While deployment of a seamlessly interoperable nationwide network requires that network-level decisions be made on a national basis, those decisions must be informed by input from the broad Public Safety community. However, as to the ground level implementation of network capabilities and functionalities, the flexibility of the network's IP-based architecture will permit definition and governance of the network user experience to reside, as appropriate, at the local, state or regional level. Thus, Public Safety interests at all levels will have critical roles to play in assuring the successful design, deployment and operation of the country's first nationwide Public Safety network.

**III. THE E BLOCK RULES MUST REFLECT THE ESTABLISHMENT OF A TRUE PARTNERSHIP BETWEEN THE AUCTION WINNER AND PUBLIC SAFETY FOR THE PRIMARY PURPOSE OF DEPLOYING AN ECONOMICALLY SUSTAINABLE SHARED BROADBAND NETWORK DESIGNED AND OPERATED TO MEET PUBLIC SAFETY SPECIFICATIONS**

A. This Proceeding Must Remain Focused on Meeting Future Public Safety Communications Requirements

Cyren Call's original 700 MHz proposal had a single, uncompromised objective.<sup>12</sup> It proposed changes to the 700 MHz rules, and their statutory predicate,<sup>13</sup> that were intended to create a public/private partnership to build, operate and refresh a nationwide 700 MHz broadband, advanced technology, interoperable Public Safety network under Public Safety control. Since the submission of the Petition, there has been a growing consensus within and outside of the Public Safety community about the critical importance of deploying such a network. There also is general agreement that this will require a collaboration between Public Safety and commercial interests as government funding for a project of this magnitude is not, and realistically will not become, available.

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<sup>12</sup> See n. 5.

<sup>13</sup> See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 § 3004 (1997).

While the FCC dismissed the Petition, citing the Commission's lack of authority to reallocate spectrum whose classification had been established by statute, it nonetheless has undertaken a serious, dedicated effort to identify a regulatory approach that would achieve this same objective. Indeed, the FCC always has been at the forefront of promoting advances in Public Safety communications capabilities, including identifying areas in which pro-active regulatory steps were required.<sup>14</sup> Thus, the FCC initiated further actions in its ongoing proceeding exploring long-term Public Safety communications requirements, most recently proposing reconfiguration of Public Safety's 700 MHz allocation to provide for broadband use and the designation of a single entity to hold the nationwide license for that spectrum.<sup>15</sup>

There cannot be a more critical issue on the Commission's agenda than ensuring that our nation's first responders have the necessary communications tools to fulfill their ever-expanding responsibilities. As has been emphasized in this and other FCC proceedings and in testimony before Congress,<sup>16</sup> the safety of our emergency response providers and the public they serve is directly dependent on the quality of communications to which they have access. Moreover, the record on which the FCC based the Public Safety Needs Report it delivered to Congress, as well as the records developed in response to the Cyren Call Petition, the Eighth NPR and the Ninth NPR, all confirm that the 700 MHz band presents an unparalleled opportunity for deployment of a nationwide Public Safety broadband network. It represents not only the best, but, for the foreseeable future, the only opportunity to adopt an innovative regulatory framework that can be

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<sup>14</sup> The Commission was among the first to identify the compelling Public Safety need for advanced, interoperable, broadband capabilities. See 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 ¶ 26 (Dec 16, 2005) ("Public Safety Needs Report").

<sup>15</sup> See *700 MHz Public Safety Eighth Notice of Proposed Rulemaking*, WT Docket No. 96-86, 21 FCC Rcd 3668 (2006) ("Eighth NPR") and *700 MHz Public Safety Ninth Notice of Proposed Rulemaking*, WT Docket No. 96-86, PS Docket No. 06-229, 21 FCC Rcd 14837 (2006) ("Ninth NPR").

<sup>16</sup> See Testimony of Harlin R. McEwen, Chairman, Communications and Technology Committee, International Association of Fire Chiefs of Police, Before the Committee on Commerce, Science and Transportation, United States Senate, February 8, 2007, at 2

the foundation for unprecedented, long-overdue improvements in our nation's emergency communications capabilities.

It is for this reason that Cyren Call has given serious consideration to the E Block proposal set out in the FNPR. Although Cyren Call considers the amount of combined E Block and broadband Public Safety spectrum proposed in the FNPR just barely adequate to support an economically sustainable, shared, nationwide public/private broadband network, it recognizes that there are statutory constraints on the FCC's authority to reconfigure the 700 MHz allocation.<sup>17</sup> In its Comments, Cyren Call proposed an alternative 700 MHz band plan that it believes to be the optimal band configuration within those statutory limitations, but even then the very limited spectrum available for the network will make this already innovative undertaking even more challenging.<sup>18</sup>

As critically, Cyren Call and organizations such as NPSTC and APCO have indicated in the strongest possible manner that any Public Safety–E Block partnership must guarantee a key role for Public Safety. That role must be consistent with the purpose of the E Block set-aside *vis-à-vis* its Public Safety obligations, as well as with the Public Safety spectrum being contributed to the shared network, and must include provisions ensuring adequate Public Safety control over the network deployed on that combined spectrum.<sup>19</sup> As meeting future Public Safety communications requirements is the basis for creating an encumbered E Block allocation, it is imperative that Public Safety, through the PSST (consistent with the licensing structure

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<sup>17</sup> The Cyren Call Petition proposed 30 MHz for the public/private network it recommended. That calculation was based on usage, quality of service and other assumptions in a business model designed to assure adequate capacity for emergency Public Safety communications needs as well as the day-to-day requirements of Public Safety and commercial users that would be sharing the network. Cyren Call continues to believe that 30 MHz is the “right” amount of spectrum to support a financially viable shared public/private network that provides the coverage and other requirements specific to Public Safety usage. As the amount of available spectrum is decreased, network capacity will shrink as well. Compensating for this reduction will require increased capital or decreased network coverage. See Cyren Call *ex parte* filing dated June 4, 2007.

<sup>18</sup> See Cyren Call Comments at 30-32.

<sup>19</sup> *Id.* at 7-18. See also NPSTC Comments at 9-16 and APCO Comments at 13-19.

contemplated in the Ninth NPR), has the necessary leverage, both initially and throughout the life of the partnership, to direct decision-making that is consistent with assuring the satisfaction of those requirements.<sup>20</sup>

B. The Rules Must Provide Mechanisms that Ensure Appropriate Public Safety Control Over the Public/Private Broadband Network

The FNPR proposed to encumber the E Block licensee with the obligation to build a single, shared public/private broadband network to Public Safety specifications and thereafter to operate and maintain it consistent with those specialized requirements. While certain of the applicable requirements, including network build-out requirements and renewal expectancy standards, were intended to be set out in the rules themselves, the Commission also recognized that other aspects of this innovative and complex partnership would need to be defined and formalized in a contractual agreement, the NSA, between the parties.

Cyren Call expressed concern in its Comments about the unequal bargaining positions of the E Block auction winner and Public Safety.<sup>21</sup> It explained that the E Block winner, having acquired its spectrum at a discounted cost reflective of its Public Safety-related obligations, would have adequate capacity with the E Block spectrum alone to build a successful wireless business. Securing secondary access to Public Safety's broadband allocation would be desirable, but not essential to that effort and clearly would impose a cost beyond that imposed on other CMRS licensees.

In contrast, without an economic relationship with the winner of the E Block, Public Safety would be no better off than it is today – it would have spectrum, but no money to deploy

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<sup>20</sup> In its Comments, Cyren Call also emphasized that Public Safety control requirements must be balanced against the practical reality that the network would not be sustainable without operational efficiency and financial viability. See Cyren Call Comments at 9.

<sup>21</sup> Cyren Call Comments at 12-14.

an advanced, nationwide, broadband network.<sup>22</sup> Indeed, it might be in an even less advantageous position since the rules proposed that the secondary use of Public Safety's broadband spectrum should be reserved only for the E Block licensee, thereby foreclosing the PSST from entering into a partnership arrangement with any other 700 MHz CMRS licensee even if the PSST and the E Block licensee did not reach agreement on an NSA. Cyren Call also explained that the rules must provide mechanisms permitting the PSST to maintain appropriate levels of control over the network throughout the course of this public/private partnership, as well as the means to correct problems promptly and effectively should they arise.

Public Safety representatives expressed these same concerns. Thus, NPSTC stated that, "The Commission must establish the parameters under which the PSST and the E Block licensee will work together to bring about a broadband network consistent with public safety standards, pervasive interoperability and access by all eligible agencies."<sup>23</sup> It reminded the FCC that, "The agreement and conduct of the parties should be evaluated on the basis of the standards reflected in the Communications Act of 1934, as amended, and the commission's rules and policies and not simply a commercial agreement between two private parties."<sup>24</sup> APCO was equally direct: "This [E Block conditional auction] approach will only work if there are strong regulatory protections to ensure public safety retains control over public safety spectrum, and that the network is indeed designed, built and maintained to serve public safety."<sup>25</sup>

These parties therefore recommended regulatory provisions that would serve to better equalize the bargaining positions of the E Block winner and the PSST, both at the outset when

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<sup>22</sup> Cyren Call explained in its comments the inter-relationship between the spectrum and financial resources necessary to this undertaking. Those, such as AT&T, that continue to claim that Public Safety has more than adequate spectrum for this purpose seemingly fail to understand that without the economic engine of a Public Safety-commercial network, Public Safety does not have the financial wherewithal to fund nationwide broadband deployment on its 700 MHz allocation. *See* AT&T Comments at 9.

<sup>23</sup> NPSTC Comments at 6.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> APCO Comments at 6.

negotiating the NSA and throughout their partnership relationship. They also proposed measures that should be in place to protect Public Safety from a catastrophic loss of its broadband network should problems arise once the network has been built.

Based on the record in this proceeding, Cyren Call recommends adoption of the following two conditions precedent to issuance of the E Block license and further conditions on the license once issued.

- (i) First Condition Precedent: E Block License Should Not Be Issued Until NSA is Approved

First and foremost, parties representing Public Safety interests endorsed the Commission's proposal that the E Block license not be awarded until the NSA has been executed by the E Block licensee and the PSST and then approved by the Commission as the only meaningful protection for Public Safety during the NSA negotiation process against overreaching by the E Block auction winner.<sup>26</sup> In its Comments, Frontline has modified its initial proposal that the E Block license be issued before the NSA is negotiated. It now has recommended the following:

...Frontline supports the Commission's proposed two-fold approach requiring an executed network sharing agreement before the license will be issued to the E Block licensee, but accompanying this requirement will be a provision for binding alternative dispute resolution ("ADR") by the Commission.<sup>27</sup>

Frontline goes on to explain:

This approach avoids giving either party a "veto" over establishment of the crucial, public/private network for innovation and public safety communications, but, importantly, incentivizes the E Block licensee to reach a mutually beneficial agreement with the [PSST] in a timely manner.<sup>28</sup>

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<sup>26</sup> "NPSTC believes that an agreement between the winner of the E Block auction and the national public safety licensee must be negotiated and approved by the Commission prior to issuance of the E-Block license." NPSTC Comments at 10; "The auction winner should *not* receive its license and *then* negotiate with public safety, as Frontline initially proposed." APCO Comments at 15 (original emphasis).

<sup>27</sup> Frontline Comments at 44.

<sup>28</sup> *Id.*

However, as was identified in Cyren Call's Comments and reaffirmed emphatically in those of APCO and NPSTC, the approach recommended by Frontline is entirely unacceptable to Public Safety. Binding ADR should never be the mechanism to resolve intractable disputes between the PSST and a commercial entity in a matter of such far-reaching consequences for the security of our first responders. This would be true even assuming such irreconcilable disputes were the product of good faith negotiations by the parties, supported by substantial and legitimate reasons.

APCO has given this issue careful consideration and has reached the following conclusion:

We strongly oppose that [binding ADR] option as it would also take control of the spectrum out of the hands of the public safety licensee, effectively placing it in the hands of a third party arbitrator. Public safety could be forced into a long-term arrangement governing the use of critical public safety spectrum with an unacceptable party selected solely by auction, and pursuant to terms that may be an anathema to public safety entities.

It has been suggested that the FCC itself should resolve any disputes that arise between the national public safety licensee and the E Block auction winner in the negotiation of a network sharing agreement. While preferable to binding arbitration by a third party, this approach could still force public safety into a long term partnership with an entity that fails to understand public safety needs and obtained its license merely by being the highest bidder.

We are mindful of the Commission's concerns in the FNPRM about the consequences of a failure of the parties to reach agreement on a network sharing agreement. The best solution would be to re-auction the spectrum (and return the initial auction winner's deposited funds) if no agreement is reached within a specified time period (perhaps with the benefit of non-binding "mediation").<sup>29</sup>

NPSTC has adopted a similar position:

NPSTC understands the Commission's concerns with the potential that no agreement may be reached between the E Block licensee and the national public safety licensee. The only appropriate solution in that case is to re-auction the

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<sup>29</sup> APCO Comments at 16-17.

spectrum, a result that neither party will want, but the only remedy that preserves public safety control over public safety spectrum.<sup>30</sup>

Therefore, it is clear that the auction winner must negotiate a mutually acceptable NSA with the PSST and have that Agreement affirmed by the FCC before its license is issued. Cyren Call already has identified a number of elements that it believes must be addressed to the satisfaction of Public Safety in the NSA.<sup>31</sup> These elements go to the heart of Public Safety-specific requirements as reflected in the SAFECOM report and in the informed judgment of the many Public Safety representatives with whom Cyren Call has been collaborating closely in this effort to address long-term Public Safety communications needs. No doubt the thoughtful comments submitted by others with in-depth knowledge of Public Safety requirements will provide additional, valuable information as to areas that must be resolved in the NSA. Cyren Call encourages the Commission to give careful consideration to those recommendations as well.

Of course, it is possible that the E Block auction winner will be unable to reach agreement with the PSST as to the NSA within a reasonable amount of time.<sup>32</sup> Under those circumstances, the FCC should not compel the PSST to accept an arrangement that is, in APCO's words, an "anathema" to Public Safety by subjecting it to binding ADR.<sup>33</sup> Rather, as unfortunate a result as this would be – primarily for Public Safety which, without a commercial partner, will have no means to deploy a nationwide broadband network – if the parties are unable to resolve their differences even with the assistance of the FCC, the right result is the one

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<sup>30</sup> NPSTC Comments at 11.

<sup>31</sup> Cyren Call Comments at 22.

<sup>32</sup> Cyren Call assumes that the FCC will be actively involved in the negotiation process from an oversight role. If negotiations begin to falter, or if specific problems are identified, the FCC might help the parties to resolve such issues by acting as the facilitator in voluntary mediation.

<sup>33</sup> APCO Comments at 16-17.

recommended by APCO, by NPSTC and by Cyren Call: all deposited funds must be returned to the original E Block auction winner and the spectrum made available for re-auction.<sup>34</sup>

(ii) Second Condition Precedent: E Block License Should Not Be Issued Until Auction Winner's Financial Plan Is Approved

The second condition is inter-related with the first and the two will be mutually reinforcing. There is a legitimate concern that parties without a full appreciation for the complexity of building to Public Safety specifications might underestimate the true cost of doing so in calculating their auction bid prices. Like the situation when a contractor wins a home repair job based on a low bid, and then discovers that he must either reduce his scope of work or request more money, neither Public Safety nor the E Block winner will be well-served if the auction price is inflated based on the winning bidder's failure to understand the true cost of the undertaking.

In an effort to minimize the possibility of post-auction sticker shock, Cyren Call proposed in its Comments a number of steps intended to increase the likelihood that E Block participants will come to the auction as fully informed as possible.<sup>35</sup> However, more is needed. While Cyren Call remains convinced that a 700 MHz Public Safety-commercial relationship is the only viable, economically sustainable means of supporting a nationwide, advanced technology broadband network designed to Public Safety specifications, it also recognizes that a failure of the partnership would have ramifications far beyond those of a failed commercial-only network.

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<sup>34</sup> Alternatively, the FCC could determine that the upfront payment of the E Block auction winner should be retained for deposit into the Federal Treasury if those negotiations fail. If that were the case, Cyren Call would recommend that the Commission establish a relatively modest upfront payment for this spectrum. Should a re-auction be required, the Commission will be free to determine at that time whether the re-auction should be under the same terms and conditions as the original rules, whether the requirements proposed by Frontline as to open access, wholesale operation and roaming rights, if adopted by the FCC, should be removed for re-auction purposes, or whether all encumbrances should be lifted and the E Block spectrum re-auctioned without conditions other than those applicable to CMRS licensees generally.

<sup>35</sup> Cyren Call proposed the extensive exchange of information between the PSST and potential bidders well in advance of the auction. See Cyren Call Comments at 22-23.

For that reason, the *bona fides* of the auction winner must be demonstrated in advance – to Public Safety and the FCC, not just to the Federal Treasury where the size of the auction check is the only significant factor. Thus, in addition to negotiating an NSA with the PSST, Cyren Call recommends that, as a second condition precedent to issuance of the license, the E Block auction winner secure approval from the PSST and from the Commission of the financial arrangements that it has established to provide the funding realistically required to commence and complete network deployment on a timely basis and to operate the network for a reasonable amount of time, consistent with the terms of the NSA and with the FCC rules governing the E Block license.

A promise to secure funding cannot be an adequate guarantee for issuance of a license to assume the role of Public Safety’s broadband partner, particularly if the FCC requires the E Block licensee to adopt a business model along the lines proposed by Frontline.<sup>36</sup> Since successful network financing is necessarily dependent on having a full understanding of network costs, the auction winner will gain important information during the NSA negotiation process that will inform its judgment as to its financing requirements. Conversely, working through those financial negotiations may influence the decisions reached in the NSA negotiation since the PSST and the E Block auction winner will gain a more detailed appreciation for what network options are able to be financed.

The principals of Cyren Call share the FCC’s belief that success or failure in the marketplace is the most efficient way to validate or invalidate business plans when commercial-only operations are at issue. However, that same test cannot be the exclusive determinant for a

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<sup>36</sup> Almost by definition, if the restrictions proposed by Frontline are incorporated in the rules, the E Block auction winner will be a new entrant, one without a wireless track record. Moreover, it will be required to implement an untested business plan. Under those circumstances, documented evidence of adequate financing will provide the necessary level of assurance of financial viability to both the PSST and the FCC.

system designed to support critical Public Safety communications. While the necessary financing does not ensure success, the lack of adequate funds virtually guarantees failure. Accordingly, Cyren Call strongly recommends that the FCC adopt measures so that the sufficiency of the financial capabilities of the E Block auction winner are assured before the license is issued. In the event the auction winner fails to satisfy this financial demonstration condition, the result would be the same as a failure to negotiate an FCC-approved NSA.

(iii) Conditions Subsequent: Obligations After the E Block License Has Been Issued

Assuming the successful negotiation and approval of an NSA, acceptance of the required showing of adequate financial capabilities by the E Block auction winner, and issuance of the E Block license, that licensee, like all licensees of the FCC, still would be subject to appropriate Commission requirements. Thus, the E Block licensee would be required to satisfy the construction/coverage requirements set out in the FCC rules such that a failure to meet those obligations would result in the automatic termination of the license as is the case for all CMRS systems.<sup>37</sup> However, given the innovative nature of this undertaking and the extraordinary scope of the coverage that will be needed to satisfy Public Safety requirements, adjustments to the construction benchmark deadlines may be appropriate if agreed to by both the PSST and the E Block licensee and approved by the Commission. Thus, the FCC rules that permit licensees to seek the extension of a construction deadline should be modified to require that any such extension from the E Block licensee be accompanied by written concurrence from the PSST.<sup>38</sup>

Additionally, Cyren Call recommends that the E Block license be conditioned on continued conformance with the terms of the NSA, including, but not limited to, provisions providing for the unconditional, preemptible access by Public Safety to network capacity as

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<sup>37</sup> 47 C.F.R. § 1.946

<sup>38</sup> *Id.*

required.<sup>39</sup> In the event that the PSST determines that the E Block licensee's performance does not comply with the terms of the NSA and such non-compliance has not been cured in accordance with the provisions of that Agreement, then the PSST should notify the FCC in writing with respect to the perceived deficiencies. The Commission then would conduct whatever investigation it deemed appropriate to determine whether the E Block licensee's conduct warranted initiation of a proceeding to consider whether it had the requisite qualifications to hold an FCC license.

Of course, Cyren Call would not expect these license termination provisions to be triggered in any but the most extraordinary circumstances. The PSST will have every motivation to resolve any disputes with the E Block licensee in accordance with the dispute resolution provisions provided for in the NSA. Nonetheless, in the highly unlikely event that the PSST believes that the disagreements are not susceptible to resolution, and that ongoing utility of the network for critical Public Safety communications requires the transfer of the E Block license to a different entity, either on a voluntary or involuntary basis and subject to prior FCC approval, that ultimate safety valve must be available

In that instance, as well as in situations involving the E Block licensee's insolvency or bankruptcy, the Commission should impose obligations on the authorization that are consistent with, or even more protective than, the provisions of Section 214 of the Communications Act.<sup>40</sup> The E Block licensee must not be able to "discontinue, reduce or impair service"<sup>41</sup> on the network without prior FCC approval. Moreover, the Commission must have the authority to work with the PSST and the E Block licensee, including its creditors, in fashioning operational

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<sup>39</sup> The technology to be deployed in the network will permit preemption as needed for Public Safety users, according to their pre-determined prioritization plan, and also would prioritize 911 calls placed by the general public.

<sup>40</sup> 47 U.S.C. §214

<sup>41</sup> *Id.*

and other arrangements as are necessary to avoid any adverse impact on Public Safety use of the network, consistent with applicable bankruptcy law.

Finally, Cyren Call recommends that the E Block licensee be subject to a somewhat different renewal expectancy process than other CMRS licensees. In addition to whatever other review the FCC might make of the E Block licensee's performance, license renewal also should take into consideration the evaluation of the PSST and Public Safety network users, parties whose opinions should be expressly solicited by the FCC as part of the E Block licensee's renewal evaluation.

#### **IV. THE NATIONAL LICENSE MUST BE DESIGNED, BUILT, OPERATED AND REFRESHED CONSISTENT WITH NATIONAL AND LOCAL PUBLIC SAFETY OBJECTIVES**

A number of Public Safety agencies or organizations filed comments in this proceeding in which they agreed that "business as usual" was not an acceptable answer for addressing ever-expanding Public Safety communications requirements. They recognized the urgent need for advanced broadband capability delivered via a national network, the benefits of securing the economies of scale that can be derived by building upon commercial-off-the-shelf devices and applications developed for the wireless consumer marketplace, and the reality that a new regulatory – and financial – paradigm was needed to achieve those objectives.<sup>42</sup>

Other Public Safety entities expressed concern that the type of public/private partnership proposed in the FNPR would not deliver a true Public Safety-grade network<sup>43</sup> Some objected to what they believed would be a loss of local level control over 700 MHz spectrum, including the opportunity to deploy wideband systems, and, in its stead, a "federal mandate" to use the

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<sup>42</sup> See, e.g., Comments of Missouri Highway Patrol, Region 13 Illinois Regional Planning Committee, IABPFF/BCOCO, and Montana State Fire Chiefs Association.

<sup>43</sup> See, e.g., Comments of City/County of San Francisco: Department of Emergency Management, City of Philadelphia, Joint Comments of National Association of Telecommunications Offers and Advisors, National Association of Counties, U.S. Conference of Mayors, and National League of Cities.

nationwide broadband network proposed by the FCC.<sup>44</sup> Several urged that the Regional Planning Committees (“RPCs”) should be engaged in any nationwide broadband network because of their extensive knowledge of local Public Safety requirements.<sup>45</sup>

Before describing in further detail the complementary nature of local, statewide, regional and national responsibilities with respect to a nationwide broadband network, it may be useful to identify a number of misconceptions about the particular network and public/private partnership that Cyren Call supports and that, with the exceptions noted, is proposed in the FNPR:

- There is no federal mandate: No public safety agency or entity will be **required** to operate on the network; participation is entirely voluntary based on decisions made by the same communications officials who decide today how local, statewide and regional communications requirements should be met;
- 12 MHz of the 24 MHz at 700 MHz allocated to Public Safety will remain available for narrowband voice (and, as proposed by Cyren Call, wideband) operations with licenses held by individual Public Safety entities as coordinated by the RPCs;
- Public Safety, through the PSST, and not the commercial E Block auction winner, will define the specifications to which the broadband network would be built including such elements as coverage, reliability, survivability, redundancy, technology standards, and preemptibility; these decisions that will be made based on in-depth experience with real world Public Safety operating requirements;
- Local, state and regional organizations will be able to develop virtual networks on the nationwide broadband system with network boundaries, prioritization and talk groups all defined at the applicable local, state or regional level; and
- Jurisdictions with funding to build their own broadband systems before the nationwide network will be deployed in their area are free to do so provided the individual systems conform to the technology to be deployed by and can later be integrated into the national network, thereby balancing more immediate local requirements with the need to foster enhanced nationwide interoperability.

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<sup>44</sup> See, e.g., Comments of State of California, San Diego County/Imperial County, Louisiana Statewide Interoperable Communications Executive Committee, State of Maryland.

<sup>45</sup> See, e.g., Comments of Region 27 Regional Planning Committee and Hampton Roads Interoperable Communications Advisory Committee.

A. A Nationwide Broadband Public Safety Network Must be Built to Nationally-Developed Specifications and Subject to National Oversight

The 700 MHz band plan that is under consideration in the FNPR was developed more than a decade ago.<sup>46</sup> It was developed before broadband had become the technology of choice for future wireless systems around the globe. The band plan was developed before 9/11, Hurricane Katrina and other catastrophic events that have been imprinted on our collective memory, in part because of the first responder communications failures that occurred while the nation watched. Those that argue against modifying that band plan to provide for a nationwide broadband system because it will be too hard or will take too long to build such a network cannot truly believe those objections should be persuasive in a policy debate of this significance. Projects of this scope always appear daunting when conceived, but if heed had been paid to critics of initiatives such as the national highway system, the national rail system or the national space program, this country would not enjoy its current unchallenged pre-eminence in the world.

Cyren Call believes, and a number of commenting parties concur, that the Public Safety community will not be able to fulfill its responsibilities efficiently and effectively in the next decade and beyond without access to the capabilities that can be provided only on an advanced technology broadband network built to Public Safety's exacting specifications. Yet it is highly doubtful that more than a very small number of jurisdictions will find the monies to fund broadband deployment. New York City has demonstrated that it is able to finance its own system, but at a reported \$500 Million dollar price tag. Some other areas are pursuing advanced broadband technologies as well, but it is evident that cost will restrict Public Safety broadband capability to a very limited number of locations around the nation.

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<sup>46</sup> The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements For Priority Access Service, WT Docket No 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, 14 FCC Rcd 152 (Rel. Sept. 29, 1998)

Without a national network, interoperability also will remain a challenge. Some communities or regions will have excellent capabilities, as exemplified by the interoperability plan implemented by the National Capital Region and the Central Maryland Area Radio Committee; others will struggle to establish communications with neighboring towns. Most will have to rely on ad hoc gateways to achieve even local interoperability, and all will need to do so once their need to communicate exceeds pre-determined boundaries. A nationwide network will not solve the interoperability problem immediately since many Public Safety users will continue to utilize existing systems for mission critical voice and perhaps other communications needs for the foreseeable future. Yet it will establish the foundation for a more ubiquitous, more effective interoperability model while also providing more sophisticated gateways for users of legacy systems.

If one agrees that the Public Safety community needs and deserves a nationwide, interoperable, advanced technology broadband network, then it must be accepted that certain overarching decisions about that network will be made at the national level. Sophisticated digital networks cannot be grown from the ground up, but must be conceptualized and planned from the top down. The FNPR contemplates that an entity representing Public Safety expertise, an entity such as the PSST, would act on behalf of the broader Public Safety community to make overall design control decisions. The network must be built on a single, open, non-proprietary technology platform with defined minimum coverage requirements, and with standards for reliability, redundancy, survivability and other Public Safety-established criteria that need to be consistent throughout the network. That is the only way to deliver a nationwide, interoperable, advanced technology Public Safety broadband network.

B. Local Communication Requirement Still Will Be Determined Through Meeting Local Decision-Making Processes

It is evident from the comments that some Public Safety entities fear decisions regarding the nuts and bolts of their day-to-day operations would be determined at the national level should they elect to join the system.<sup>47</sup> That is not the case. One of the most significant benefits of advanced broadband technology is its ability to facilitate the creation of and to support virtual private networks that will permit Public Safety officials at the local, state and regional levels to maintain control over matters critical to their operations. They will define and control the composition and assignment of talk groups and user groups within their virtual private networks on a dynamic basis. They will establish access classes and determine priority access for users within their virtual networks. They will determine the devices and applications to be made available to those users from among those approved for use on the network based on technical criteria designed to ensure an absence of adverse impact on network operations. They will have the ability to monitor network availability and performance, as it relates to local Public Safety network use, on a real time basis.

As with any option, the decision to use the national broadband network for some or even all communications requirements will involve trade-offs. Participants will not decide which technology they wish to use or which infrastructure they wish to deploy. Those decisions will be made at the national level, informed by input from local, state and regional entities. Network users will have input into, but will not have final authority to dictate, the build-out schedule for their jurisdictions or the site selection, a situation not unlike joining a state-wide or regional trunked system where such decisions are informed by, but not controlled by, each individual network participant.

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<sup>47</sup> See, e.g., Comments of City/County of San Francisco: Department of Emergency Management and the State of Maryland.

On the other hand, they will be relieved of the cost of a network build, a funding obligation that historically has forced Public Safety entities into a perpetual game of technology catch-up. Instead, their hard-fought dollars will be applied to network devices whose prices will reflect the same economies of scale that are enjoyed by hundreds of millions of commercial wireless subscribers, to Public Safety-specific applications, and to service charges for network access.

Over time, Cyren Call is confident that more and more Public Safety entities will find that the benefits of joining the network far outweigh the perceived control limitations. Those entities at least should have the opportunity to make that choice, a choice that would be denied to them should the FCC be guided by the opinions of those jurisdictions that already have decided that they do not and will not have a need to use a network of this type.<sup>48</sup> Those that already have decided that they do not want to use the network will not be required to do so. Participation is entirely voluntary, as provided for in the FNPR. But such decisions should not be permitted to determine whether the network will be deployed. The preference of those who choose to opt out cannot determine whether the network should be implemented since doing so would deny those who wish to participate the opportunity to do so.

C. The Nationwide Broadband Proposal Complements, Rather Than Usurps, Ongoing Local and RPC Responsibility for the Remaining 700 MHz Spectrum Which Should be Available for Narrowband and Wideband Use

Cyren Call shares the admiration for the fine work of the RPCs expressed in a number of comments in this proceeding.<sup>49</sup> Their efforts in administering the 700 MHz spectrum for the benefit of Public Safety users within their regions, and thereby for the benefit of the public those entities serve, are to be commended. Because of their expertise and their commitment to serve

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<sup>48</sup> See, e.g., Comments of the City of Philadelphia

<sup>49</sup> See n. 45.

Public Safety interests, they undoubtedly will have a strong voice in the development of the broadband network's design, implementation and operational specifications as communicated through the PSST.

The RPCs also will continue to play a vital role in the optimal use of the 12 MHz of non-broadband 700 MHz Public Safety spectrum. In its Comments, Cyren Call acknowledged the interest by certain Public Safety entities in preserving the option of deploying wideband systems in this band, an option that the FNPR had disallowed.<sup>50</sup> A number of Public Safety comments in this proceeding reaffirm the desire of some entities to retain that choice.

Cyren Call believes that those interests can be accommodated without compromising the viability of the nationwide, interoperable broadband network proposed herein. It recommended in its Comments that the rules governing Public Safety's 700 MHz allocation be modified to provide for both narrowband voice and wideband operations in the 12 MHz of 700 MHz spectrum currently dedicated to narrowband only. Since the Comments suggest that wideband would be particularly attractive for Public Safety entities operating in more rural areas where range of coverage is critical, there should be sufficient 700 MHz spectrum to meet both narrowband and wideband requirements. In the unlikely event that this spectrum is inadequate to accommodate both narrowband voice and wideband data requirements, there are likely to be 800 MHz channels available for narrowband voice applications either from the original Public Safety Pool or from the supplemental 800 MHz spectrum that will be awarded to Public Safety upon conclusion of the 800 MHz reconfiguration process.<sup>51</sup>

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<sup>50</sup> Cyren Comments at 24.

<sup>51</sup> *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969 (2004).

## V. SECTION 337 DOES NOT PRECLUDE THE SECONDARY COMMERCIAL USE OF 700 MHz PUBLIC SAFETY SPECTRUM

A few parties have raised questions regarding the legal permissibility of secondary, commercial use of Public Safety's 700 MHz spectrum in light of the language in of Section 337 of the Communications Act.<sup>52</sup> That section of the Act specifies that the Commission shall allocate 24 MHz of spectrum for Public Safety services and 36 MHz of spectrum for commercial use to be assigned by auction.<sup>53</sup> It defines Public Safety services as those the sole or principal purpose of which is to protect the safety of life, health, or property, that are provided by State or local government entities or by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the protection of the public, and that are not made available to the public on a commercial basis.<sup>54</sup>

It is important that the Commission address this issue squarely in its Order in this proceeding lest opponents of the public/private partnership contemplated herein rely on a constricted interpretation of Congress' action and the FCC's general authority to disrupt progress on the only path that will lead us to improved Public Safety communications in the 21<sup>st</sup> century. The Commission's proposal, whereby secondary commercial use would be permitted on a portion of Public Safety's 24 MHz of 700 MHz spectrum under an arrangement authorized by and under the control of Public Safety, is entirely consistent with the express and implied directives of Congress regarding this allocation.

The express terms of the legislation provide appropriate flexibility for the Commission to establish rules governing use of the Public Safety allocation, and do not preclude secondary use of this spectrum. Specifically, in directing the FCC to allocate 24 MHz for Public Safety

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<sup>52</sup> See, e.g., Sprint Nextel Corporation Comments at 7; Verizon Wireless Comments at 53; Letter from Steve Largent, CTIA-The Wireless Association, to Chairman Martin, WT Docket No. 06-150 (filed Apr. 5, 2007).

<sup>53</sup> 47 U.S.C. § 337.

<sup>54</sup> *Id.*

services, the Congress expressly providing that this spectrum would be allocated “according to the terms and conditions established by the Commission...”<sup>55</sup> By contrast, there is no comparable language conditioning the 36 MHz commercial allocation. While the absence of that language does not deprive the FCC of its authority to establish rules governing the commercial allocation, Congress clearly intended that the Commission, the agency with primary authority over and expertise with respect to Public Safety communications, should adopt a regulatory framework for that 24 MHz allocation that would best serve Public Safety’s requirements.

The FCC’s proposal to permit secondary commercial use of Public Safety’s 700 MHz allocation, outlined first in the Ninth NPR and again in the instant FNPR, is consistent with the latitude provided by Congress in the statute. The Commission’s authority to permit secondary use of spectrum, both licensed and unlicensed, in a variety of spectrum bands and under a variety of conditions, is well-established. It was evidenced recently in the FCC’s ambitious initiative to authorize entirely unlicensed, secondary use of television spectrum “white space.”<sup>56</sup> To the extent secondary use can be accommodated without causing interference to primary spectrum users, the FCC has determined that such operations can promote efficient, effective utilization of the spectrum.

In this instance, Congress unquestionably intended to reserve 24 MHz of 700 MHz spectrum for primary Public Safety use. But that purpose is not compromised by the secondary, entirely preemptible commercial use proposed herein. The allocation in question will continue to be licensed to and under the direct control of Public Safety entities providing Public Safety services as those terms are defined in the statute. The primary use of the spectrum will be by governmental entities for the purpose of protecting “the safety of life, health, or property” as

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<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g., First Report and Order and Further Notice of Proposed Rule Making*, ET Docket No. 04-186, FCC 06-156 (rel. Oct. 18, 2006).

specified by Congress. At any given moment and in any jurisdiction, one hundred percent (100%) of the network capacity generated by Public Safety's broadband allocation, as well as some or even all of the capacity generated by the E Block allocation, may be devoted entirely to Public Safety usage in this entirely shared network. The fact that network usage will be shared dynamically by Public Safety and commercial does not invalidate Public Safety's primary access to and control over the spectrum in question.

Moreover, this secondary commercial use will be permitted only pursuant to rules adopted by the FCC and, more particularly, in accordance with the terms of the NSA to be negotiated between the PSST and the E Block licensee. The NSA will define matters critical to preserving the primacy of Public Safety communications such as priority control mechanisms, network reliability, maintainability and availability requirements, disaster and emergency response scope and requirements, and local jurisdiction and entity services management and control. Thus, the spectrum at all times will retain its primary Public Safety purpose, consistent with the statutory directive.

Indeed, it cannot have been the intent of Congress to provide the Public Safety community with an allocation of spectrum and yet deprive it of the means to make use of that spectrum even if those means have been developed and embraced by Public Safety and the FCC. Congress could not have anticipated in 1998, when this allocation plan was adopted, Public Safety's critical, growing need for advanced broadband capabilities or for improved interoperability. The allocation plan pre-dated the events of 9/11, Hurricane Katrina and other crises that have highlighted the widening divide between the communications capabilities of our nation's first responders and those of the average wireless consumer. The record in this proceeding and in the Ninth NPR make clear that Public Safety does not have the ability to

deploy a nationwide, interoperable, broadband network without the financial foundation of a partnership that permits shared Public Safety-commercial operations on a single system, subject at all times to unconditional preemption rights for Public Safety usage. It is odd logic indeed to presume that the same Congress that endeavored to promote Public Safety communications options by directing an allocation of 700 MHz spectrum for its use would deprive those same users of the economic tool needed to put that spectrum to its highest and best use – as part of the shared public/private network proposed herein.

## **VI. CONCLUSION**

The record in this proceeding demands an unambiguous response by the FCC. Cyren Call urges the FCC to adopt E Block rules consistent with the recommendations contained herein and to proceed with whatever further steps are required to permit the deployment of a nationwide, interoperable, IP-based, mobile broadband network that will serve the needs of the nation's first responders in the decades to come.