

**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
)	
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones)	WT Docket No. 01-309
)	
Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services)	WT Docket No. 03-264
)	
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
)	
Declaratory Ruling on Reporting Requirement Under Commission's Parts 1 Anti-Collusion Rule)	WT Docket No. 07-166

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND FOR CLARIFICATION

**CYREN CALL COMMUNICATIONS
CORPORATION**

/s/

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EXECUTIVE SUMMARY

Cyren Call Communications Corporation (“Cyren Call”) recommends that the Federal Communications Commission (“FCC” or “Commission”) clarify or correct the *Second R&O* in the following respects:

- Modify the D Block default provisions to clarify that an auction winner will not be deemed to have defaulted in its obligations, and thereby forfeit its auction upfront payment and/or face other FCC sanctions, absent a Commission finding of bad faith in the auction winner’s actions or its negotiation of the Network Sharing Agreement (“NSA”);
- Clarify that the Public Safety network reliability standard will be defined in the NSA and will be consistent with applicable Public Safety requirements;
- Clarify that the D Block and Public Safety Broadband Licensee (“PSBL”) coverage requirements are a single obligation that can be satisfied by deployment of spectrum from either allocation, and that a D Block licensee’s failure to satisfy those requirements will not trigger sanctions vis-à-vis the PSBL; and
- Reassess the current auction schedule to provide as much time as possible between adoption of the rules in this proceeding and the due date for short-form auction applications.

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**CYREN CALL COMMUNICATIONS CORPORATION
PETITION FOR PARTIAL RECONSIDERATION AND FOR CLARIFICATION**

Cyren Call Communications Corporation (“Cyren Call”), in accordance with Section 1.429 of the Federal Communications Commission (“FCC” or “Commission”) rules and regulations, respectfully requests reconsideration or clarification of certain aspects of the FCC’s

decision in the above-entitled proceeding.¹ The *Second R&O* represents a high-water mark in FCC decision-making. The issues raised in the various 700 MHz proceedings that were resolved in this consolidated FCC action include some of the most complex policy, technical, operational, and economic considerations the Commission is likely to face. That the FCC was able to chart a course through that regulatory thicket, a path that will provide Public Safety with access to nationwide interoperability and advanced wireless broadband capabilities through a network built by commercial interests using private funds, is a credit to the agency and its staff.

Cyren Call endorses all of the key aspects of the *Second R&O* with respect to the 700 MHz Public Safety spectrum and the 700 MHz public/private partnership.² As detailed below, the Commission struck the correct balance on the essential elements of that arrangement. However, Cyren Call also has identified a small number of areas where, in its opinion, FCC reconsideration or clarification will better advance the policy goals of the decision. Cyren Call respectfully requests that the Commission consider the matters proposed herein as refinements of the regulatory framework adopted by the FCC.

I. INTRODUCTION

The Commission's obligation to address Public Safety communications requirements has been at the core of the agency's policy portfolio since the FCC was established more than seventy years ago. While access to reliable communications has always played an important role in enabling Public Safety entities to meet their primary responsibility – protection of life and property – communications devices, particularly wireless devices, have assumed an increasingly pivotal role in the past decade in enabling our emergency response providers to serve the public in a timely and effective manner. This was painfully evident during events such as the

¹ *Second Report and Order*, WI Docket No. 06-150, 22 FCC Rcd 15289 (rel. Aug. 10, 2007) (“*Second R&O*”).

² Cyren Call expresses no position on the other aspects of the decision, including the rules and policies adopted with respect to the remaining 700 MHz spectrum; that is, the spectrum not assigned to Public Safety or the D Block

September 11th attacks and Hurricane Katrina, where those devices or their related systems failed, and lives were lost as a result of those failures.

The challenge faced by the Commission and the Public Safety community has been how to overcome the financial and jurisdictional obstacles that have prevented this most critical of user groups from being in the forefront of technological capabilities. Reliance on public funding, coupled with a relatively small user base, historically has limited Public Safety's access to the most advanced technologies and has effectively prevented even the best systems, once deployed, from being refreshed. The independence inherent in the multitude of jurisdictions that comprise our Public Safety community has made development of extensive interoperable arrangements difficult.

The regulatory framework adopted in the *Second R&O* addresses both issues in a creative, but appropriately thoughtful, fashion.³ The Commission has adopted rules to establish a public/private partnership between the 700 MHz commercial D Block auction winner and the national licensee of the 700 MHz Public Safety spectrum, the Public Safety Broadband Licensee ("PSBL"). Upon the successful negotiation of a Network Sharing Agreement ("NSA") between the PSBL and the D Block winner, the latter will assume responsibility for deploying a nationwide, advanced technology wireless network for shared use by Public Safety and commercial users. The network must be built and operated consistent with the specifications set out in the *Second R&O* and with whatever further requirements and refinements are included in the NSA, subject to FCC approval.

³ Cyren Call fully appreciates that the Public Safety licensing environment is complex, with systems of varying size and scope operating in a number of bands. The nationwide network that will be deployed as a result of the *Second R&O* will supplement, not replace, many of those systems, at least in the immediate future. Participation will be entirely voluntary. However, even entities that choose not to operate on the 700 MHz network when launched can expect to have additional options for improved interoperability capability with network users through network gateways.

As discussed extensively in the record in this proceeding, this partnership represents the only economically viable, sustainable vehicle for deployment of an advanced, nationwide, broadband Public Safety network, one that will remain “evergreen” as technology advances are made available for emergency response as well as consumer applications. Its success will depend on a carefully calibrated balance of regulatory rights and responsibilities between the parties. Public Safety entities will elect to utilize the network if, and only if, it is shown to satisfy their more demanding requirements. The commitment from the D Block winner to build and maintain a network that meets those standards must be codified in the NSA pursuant to the negotiation process detailed in the FCC’s decision. Conversely, commercial interests will participate in the D Block auction if they see an attractive economic opportunity associated with the shared network. This requires an NSA negotiation process that is rational and network obligations that are achievable.

The decisions adopted in the *Second R&O* properly balance those interests in almost all respects. Importantly, the Commission was responsive to concerns about the need to preserve Public Safety control over the network to the extent necessary to ensure that the requirements of Public Safety users would not be compromised. The Commission also heeded the caution that certain measures would be needed to ensure an NSA negotiation process that did not unduly favor the commercial D Block auction winner.

The FCC adopted a number of prophylactic provisions in response to those Public Safety concerns, provisions that will help facilitate a meaningful, equitable NSA negotiation process and, thereafter, a mutually satisfactory partnership relationship:

- Detailed rules regarding how the NSA will be negotiated and executed, including FCC oversight of the negotiation process, and the provisions the NSA must contain;⁴

⁴ *Second R&O* at ¶¶ 504-509.

- NSA approval by the Commission as a condition precedent to grant of the D block license;⁵
- Measures to ensure implementation of the network and the prevention of any interruption in ongoing access to network resources;⁶ and
- Adoption of certain network requirements.⁷

There are, nonetheless, certain areas where Cyren Call believes that adjustments in the regulatory structure adopted in the *Second R&O*, either through reconsideration or clarification, are needed to fulfill the essential objective of providing our nation's emergency response providers with the communications tools needed to protect the safety of life and property into the 21st Century.

II. RECOMMENDED CHANGES

A. Modification of the D Block Default Provision

The FCC wisely made the successful negotiation of an NSA with the PSBL, an NSA that also receives Commission approval, a condition precedent to issuance of a license to the D Block auction winner. This Commission decision is the most meaningful provision the FCC could have adopted to equalize what otherwise would be a dangerously imbalanced negotiation process. The PSBL, with oversight from the FCC, will be in a position to assure that all necessary Public Safety requirements are accounted for in the NSA. In the Commission's words, "this condition for granting the license will ensure that the winning bidder for the D Block license has appropriate incentives to reach an agreement on the NSA in good faith and cannot stall the negotiations to avoid its obligations to public safety."⁸

⁵ *Id.* at ¶¶ 448 and 502.

⁶ *Id.* at ¶¶ 518-523.

⁷ *Id.* at 405.

⁸ *Id.* at ¶ 502.

Yet the rules adopted go a step beyond the referenced good faith negotiation standard to which both the D Block auction winner and the PSBL must adhere.⁹ The rules specify that if the D Block winning bidder “fails to receive final Commission approval of an NSA” it will be disqualified from securing the D Block license, its application will be denied, and “it will be deemed to have defaulted and will be subject to all payments and obligation under Section 1.2109 of our rules.”¹⁰ That would be the case irrespective of the reason for failing to receive the necessary FCC approval, presumably including even circumstances in which the D Block auction winner was determined by the FCC to have acted and negotiated in good faith with respect to the NSA.

Cyren Call urges the FCC to clarify or reconsider this aspect of its otherwise laudable structure for protecting Public Safety interests during what undoubtedly will be a complex, challenging negotiation process. While Cyren Call expects both the PSBL and the auction winner to be highly motivated to reach an NSA that satisfies their needs and all applicable FCC requirements, negotiations sometimes fail even when both parties have acted in the utmost good faith. In the highly unlikely, but not impossible, event that the NSA negotiations are unsuccessful, the Commission will be well-positioned to assess whether either or both parties have fallen below the requisite good faith standard because agency representatives will have been involved as observers throughout the entire negotiation process.¹¹ If the D Block auction winner is determined not to have proceeded in good faith, then the default payment penalty is one sanction that should be available to the FCC. However, if that is not the case, and the negotiations failed for reasons truly outside the control of the D Block winner, then no such draconian measure should be imposed.

⁹ *Id.* at ¶¶ 447, 454 and 505. The FCC has made it abundantly clear that both parties are required to act in good faith when negotiating the NSA.

¹⁰ *Id.* at 511. *See also* FCC Rule Section 27.1315(g).

¹¹ *Second R&O* at ¶ 506.

Cyren Call believes that clarifying this aspect of the rules, to reinforce the potentially severe consequences that could result from not acting or negotiating in good faith, while also emphasizing that sanctions should be fault-based, is essential to the success of the public/private partnership. This partnership arrangement, like other aspects of the FCC decision, is an innovative concept. Potentially interested bidders will need to understand the unique financial and operational obligations that attach to the D Block license by virtue of its more stringent Public Safety-based responsibilities. If potential bidders also have to accept the prospect of forfeiting hundreds of millions of dollars for a failed NSA negotiation, even absent a finding of bad faith action on their part, it is Cyren Call's belief that the possible rewards of securing the D Block license will not be viewed as outweighing the risk.

In light of the other prophylactic measures the FCC has adopted with respect to the NSA negotiation process, clarifying or modifying this rule to indicate that a default would be declared, and the upfront payment forfeited, only upon an FCC determination that the D Block winner had not acted or negotiated in good faith with respect to the NSA, will not, in Cyren Call's opinion, compromise the PSBL's negotiating ability. Conversely, retention of the rule in its current form without clarification from the FCC could jeopardize the public/private partnership opportunity from the outset by discouraging otherwise interested and qualified parties from participating in the D Block auction at all.¹²

B. Clarification of the 99.7 Percent or Better Reliability Reference

The *Second R&O* set out a list of certain obligations applicable to the shared public/private broadband network.¹³ This list of FCC-specified minimum network requirements has the twofold benefit of alerting potential D Block bidders of their future obligations and

¹² See, e.g., *Auction of 700 MHz Band Licenses Scheduled for January 16, 2008 Comment Sought on Competitive Bidding Procedures for Auction 73*, AU Docket No. 07-157, DA 07-3425 (rel. Aug. 17, 2007) ("Auction Notice"); Frontline Comments at pp. 16-17 filed Aug. 31, 2007.

¹³ *Second R&O* at ¶ 405

establishing a baseline framework within which the auction winner and the PSBL will negotiate the many other elements of the NSA that will be required by the Public Safety community, preferably as identified by Public Safety in a Statement of Requirements (“SoR”) published in advance of the auction short-form application deadline.

While the NSA necessarily will define all requirements specified in the *Second R&O*, as well as those contained in the SoR, in substantially greater detail, Cyren Call believes that the Commission has captured essential elements that must be addressed in deployment of an advanced, interoperable, broadband Public Safety network: identification of a technology platform, reliability and robustness standards, capacity requirements, security and encryption mechanisms, automatic prioritization provisions,¹⁴ Public Safety operational capabilities and controls, and subscriber equipment options, including satellite capability.

However, Cyren Call is unclear on what basis the Commission has suggested that a 99.7 percent or better reliability standard is typically available on public safety communications systems.¹⁵ Cyren Call has been unable to find a recommendation to that effect in the record and believes that it substantially overstates the signal coverage typically required by public safety entities to ensure reliable operation through a service area. The current standard for Public Safety systems is 95% reliability over 95% of a defined area. This coverage level balances the need for a highly reliable network with the real world limitations of radio link variability and the practical limitations of deploying sites optimally through a service area. While improving reliability is a goal for all public safety systems, the details of the appropriate Public Safety

¹⁴ While a mechanism to provide automatic prioritization for Public Safety communications over commercial uses is necessary, the PSBL also must have the unfettered right to control “ruthless preemption” capability, including by linking it, where needed, as part of automatic prioritization, throughout the network. In the most extreme emergencies, it is not enough to put critical communications at the head of the queue; they must be permitted to displace commercial traffic on a real-time basis.

¹⁵ *Second R&O* at ¶ 405. While the rules do not incorporate a specific reliability standard, thereby quite properly leaving its definition to the NSA negotiation process, the criterion is referenced as an essential network element.

reliability standard in the context of an advanced technology broadband network should be defined in the PSBL SoR and negotiated in the NSA, against the backdrop of the currently utilized 95%/95% standard.

C. D Block/PSBL Coverage Requirements Should be Clarified as a Singular Obligation

The innovative public/private partnership authorized in the *Second R&O* raises certain novel regulatory issues as well. The arrangement contemplates two individual licensees, the PSBL and the D Block winner, combining their spectrum to form a single nationwide network. That the Commission intends it to be a single, consolidated network is clear:

This D Block license will be conditioned upon its commercial licensee constructing and operating a nationwide, interoperable broadband network across both the D Block and the 700 MHz public safety broadband spectrum.¹⁶

That description of the network is correct. It is the capacity that can be achieved by deploying a single consolidated network utilizing both Public Safety and commercial D Block spectrum that drives the economics of this public/private partnership. Without the capacity needed to support a robust commercial subscriber base in addition to primary Public Safety usage, the business proposition for funding an advanced technology, Public Safety-grade, nationwide, interoperable network would fail.

Thus, the FCC's depiction of the network is accurate. However, because the spectrum that will be used is authorized pursuant to two distinct FCC licenses, each of which has associated obligations, it is important to clarify how network activity will be viewed with respect to those obligations.

Specifically, the FCC has adopted what Cyren Call considers appropriately aggressive construction benchmarks for this network. Rule Sections 27.14(m)(1) and 27.1327(a), rules

¹⁶ *Id.* at ¶ 386. See also FCC Rule Section 27.1307 which states that "The shared wireless broadband network developed by the 700 MHz Public/Private Partnership will operate using spectrum associated with the Upper 700 MHz D Block license in the 758-763 MHz and 799-793 MHz bands and the Public Safety Broadband License in the adjacent 763-768 MHz and 793-798 MHz bands." 47 C.F.R. § 27.1307.

which expressly govern spectrum held by the D Block licensee, specify construction requirements of coverage of 75 percent of the population within four years of February 17, 2009, 95 percent of the population within seven years, and 99.3 percent within ten years. The rule further states that the signal levels used to determine coverage must be adequate for Public Safety operations as defined in the NSA, that the services made available must be appropriate for Public Safety use, and that coverage must include major highways and interstates, as well as all incorporated communities with populations greater than 3,000. This rule, by its terms, is applicable only to the spectrum bands identified as 758-763 MHz and 788-793 MHz – the D Block spectrum.¹⁷

There is no corollary rule establishing any specific construction obligation for the spectrum bands assigned to the PSBL. Presumably this reflects the FCC's position that, because this is a shared network comprised of both D Block and PSBL spectrum, there is a single construction requirement for both.

The FCC should clarify that point and also confirm that the construction of either D Block or PSBL spectrum consistent with the coverage requirements specified in the rules satisfies the entire requirement.¹⁸ Ultimately, the capacity from the entire 20 MHz of D Block and PSBL spectrum will be required in many, perhaps all, markets. During the initial years, however, it may not be fiscally prudent to deploy the entire 20 MHz throughout the population coverage area required. Cyren Call requests that the FCC confirm that the D Block and PSBL construction obligations will be satisfied if the shared network is providing coverage to the

¹⁷ 47 C.F.R. § 27.14(m)(1).

¹⁸ The Commission also should make clear that sanctions that could be imposed on a D Block licensee for failing to satisfy construction obligations would not implicate the PSBL. Such an outcome clearly would be inconsistent with the FCC's discussion of alternate arrangements that could be implemented following a D block licensee default (*See Second R&O* at ¶¶521-526). Cyren Call requests that the Commission remove all potential doubt by clarifying the parties' construction obligations as recommended herein.

requisite population levels, as defined in the FCC rules and the NSA, irrespective of which particular spectrum has been placed in operation.

III. RECOMMENDED TIMING

In its corollary Auction Notice proceeding, the FCC invited comments on its proposed competitive bidding procedures for Auction 73.¹⁹ Although the Commission did not solicit comment on the Auction schedule, including the Auction commencement date of January 16, 2008, several parties nonetheless recommended that the FCC revisit its timelines.²⁰ They emphasized the importance of allowing as much time as possible between adoption of final 700 MHz service rules in the instant proceeding and the due date for short-form auction applications. They noted the complexity of these 700 MHz rules and indicated that the introduction of new concepts such as anonymous bidding and very high reserve prices would dictate a greater than normal education curve for prospective bidders and, as important, for prospective financing sources.

Both MetroPCS and Verizon concluded that the FCC has developed substantial expertise in reviewing short-form applications and should be able to complete that process in no more than six weeks.²¹ That would permit an application filing deadline approximately forty-five (45) days before the scheduled auction start date, thereby providing additional time on the front end, prior to submission of applications, for the due diligence and other analysis that will be needed to promote robust participation by knowledgeable bidders. MetroPCS further suggested that the FCC postpone the Auction itself from January 16, 2008 to January 25, 2008, arguing that the need for additional pre-auction preparation time is certain while the prospect of a potential glitch

¹⁹ See n. 12 supra.

²⁰ See, e.g., MetroPCS Communications, Inc. ("MetroPCS") Comments at 4-7; Verizon Wireless ("Verizon") Comments at 2-4.

²¹ MetroPCS Comments at 5-6; Verizon Comments at 2.

that would cause a delay and impact the statutorily mandated January 28, 2008 Auction start date is hypothetical.²²

Cyren Call agrees that the maximum time for bidder preparation is particularly critical with respect to Auction 73. In addition to the new regulatory issues raised by those parties, the public/private partnership on which the future of Public Safety communications depends is also a novel concept that will require investigation and education. Cyren Call previously recommended that the FCC sponsor pre-auction bidders' conferences on this particular aspect of the Auction.²³ It also has suggested that the PSBL prepare and publicize a SoR in advance of the Auction so that interested parties will have a clear understanding of the obligations to be assumed if they are the successful bidder for the D Block. Additional time would facilitate that education effort; thus, Cyren Call supports the recommendations of MetroPCS and Verizon.

IV. CONCLUSION

The *Second R&O* creates an historic opportunity for the PSBL, in partnership with the D Block auction winner, to deliver to Public Safety users a technologically advanced, sustainable, evergreen, interoperable broadband network. The Commission has developed a regulatory framework that, with the corrections and clarifications recommended herein, will ensure that this network is built and operated to Public Safety specifications, yet is able to support the requirements of both Public Safety and commercial users. Cyren Call respectfully requests the Commission to modify or clarify its rules consistent with the recommendations herein in furtherance of the objectives set out by the FCC in this proceeding.

²² MetroPCS Comments at 6.

²³ See, e.g., Cyren Call Comments at pp. 22-23 filed May 23, 2007.