

March 19, 2008



Chairman Kevin Martin
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*
WT Docket No. 06-150

*Implementing a Nationwide, Broadband, Interoperable Public Safety
Network in the 700 MHz Band*
PD Docket No. 06-229

Dear Chairman Martin:

With the conclusion of Auction 73, the Public Interest Spectrum Coalition (PISC)¹ write to ask that the Commission not move immediately to reauction the D Block. Rather, as consistent with public statements made by several members of Congress and Commissioner Adelstein, PISC requests that the Commission sever the D Block from auction 73, reveal the results of the auction, and conduct a thorough investigation into why the D Block failed to attract bidders. After conducting the investigation, the Commission should place any proposed changes or remedies, including a decision to award the D Block to the current bidder, on public notice.

In particular, PISC asks the Commission to investigate carefully the allegations surrounding a purported meeting between Frontline, its financial backers, and Morgan O'Brien of Cyren Call that may have had the effect of preventing Frontline from attracting needed capital and discouraging other bidders. PISC does not suggest that – even if the facts detailed in press accounts are correct² – any wrongdoing or violation of Commission rules necessarily took place. Nevertheless, the Commission must determine whether concerns over the possible financial exposure of the D Block winner and/or the role of Cyren Call as an intermediary played a role in the failure of D Block to attract bidders.

¹The Public Interest Spectrum Coalition Consists of, in alphabetical order: The CUWIN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDU-CAUSE, Free Press (FP), Media Access Project (MAP), the National Hispanic Media Coalition (NHMC), the New America Foundation (NAF), Public Knowledge (PK), and U.S. PIRG.

²See, e.g., Corey Boles, *Frontline Wireless Bid Failed Amid Investor Concern, Bid Rules*, Dow Jones Newswires, Jan. 28, 2008.

Only on a full examination of all relevant facts can the Commission propose a viable solution.

1. The Commission Has Met Its Obligations Under the Digital Transition Act of 2005, and May Therefore Take the Time To Conduct A Thorough Investigation.

As an initial matter, the Commission should consider that it has fulfilled its obligations under the Digital Transition Act of 2005. *See* Deficit Reduction Act of 2005, Title III, Pub. L. 109-171 (“DTA”). The DTA required the Commission to commence an auction of the designated frequencies by January 28, 2008, and to deposit the revenue in the Treasury by June 30, 2008. *See* 47 U.S.C. § 309(j)(14). The Commission has held the required auction, and will presumably deposit the revenue by the deadline. As some licenses always remain unassigned after an auction, a fact of which Congress must surely be aware after more than ten years of experience with FCC auctions, the statutory command to hold an auction, absent something more, cannot reasonably be interpreted as a requirement to dispose of all the spectrum before June 30.³

Accordingly, while the needs of public safety remain urgent and no one wants to see needless delay, the Commission has the time to conduct a thorough investigation and consider whatever remedies it deems appropriate. This includes taking the necessary time to coordinate with members of Congress that have expressed interest in conducting parallel inquiries, and ensuring that the public has the opportunity to participate fully in the process. Even if a strict reading under the Administrative Procedure Act (APA) would not require public comment for certain actions, such as a decision to grant the license to the sole bidder without regard to the reserve price, PISC strongly urges that the Commission take additional steps to seek public comment on this matter of vital national importance.

2. The Commission Should Consider A Broad Range of Possible Actions To Make Productive Use of D Block.

Because the Commission has fulfilled its obligations under the DTA, the Commission may consider a broad range of possible dispositions for the remaining spectrum. In doing so, the Commission must balance the needs of the public safety community with its broader public interest obligations under the Communications Act.

Certainly the same concerns that drove the Commission to adopt the current D Block rules continue to shape the Commission’s choices today. Congress ordered construction of a national interoperable broadband safety network without providing sufficient funding to pay for it. But the Commission must consider whether the concept of a public/private partnership is workable – and if so under what terms. At the same time, the Commission must consider whether it is wiser to sever D Block from the public safety spectrum and use the spectrum to promote increased competition and enhance broadband deployment. Such solutions might include reexamination of previous PISC proposals, such as spectrum caps or wholesale open access. They might include rules designed to

³PISC notes that, in addition to the failure of the D Block to reach its reserve price, eight licenses in other blocks attracted no provisional winning bids (PWBs) and remain in the hands of the Commission.

encourage consortium bidding, non-exclusive licenses, or other sorts of common pool management. The Commission should also consider whether division of the single national license into smaller geographic licenses would make build out more manageable for a private partner, and thus encourage bidders for a public/private partnership.

PISC does not, at this time, recommend any particular approach for the disposition of D Block.⁴ Until the Commission severs the D Block from Auction 73, reveals the results, and conducts an investigation into the allegations surrounding the demise of Frontline, neither PISC nor anyone else has enough information to make an informed recommendation. But as the Commission moves forward, it must not allow the past to become a straightjacket. Rather than focusing on a narrow question of how to tweak the current D Block rules in the hopes of attracting a bidder, the Commission should seize this opportunity to consider what best serves the public interest.

In conclusion, the Commission can take considerable pride in the successes of Auction 73. Auction 73 attracted 214 qualified bidders, all blocks with the exception of D Block met their reserve prices, and only eight licenses failed to attract a provisional winning bid. In addition, the auction revenue nearly doubled the projection of the Congressional Budget Office (CBO). Compare these statistics with the purportedly “wildly successful” AWS auction in 2006 (Auction 66), which attracted only 168 qualified bidders, and where large conglomerates won national footprints at – in the words of the cable consortium Spectrum Co. – “attractive prices.”

The successes of Auction 73 are the direct result of the Commission conducting several rulemakings to consider a broad range of controversial and unorthodox options. Some of these, such as anonymous bidding, proved wildly successful. Others, such as the attempt to create a public/private partnership, proved unsuccessful. But the Commission must not allow the failure of D Block to reduce it to timidity and investigation of only conventional solutions. Instead, the Commission should transform the failure of the D Block to attract sufficient bidders into an opportunity to investigate how this last piece of unencumbered “beachfront” spectrum can best serve the public interest.

Sincerely,

Harold Feld
Senior Vice President
MEDIA ACCESS PROJECT
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 232-4300
Counsel for PISC

⁴PISC continues to support the proposal in its pending *Petition for Reconsideration* that the Commission prohibit the C Block winner from bidding on the D Block, however.