

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)	
)	
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)	PS Docket No. 06-229
)	
_____)	

**COMMENTS OF THE
PUBLIC INTEREST SPECTRUM COALITION**

The Media Access Project, on behalf of the Public Interest Spectrum Coalition (PISC),¹ hereby submits these comments with regard to the above captioned proceeding. The failure of the D Block license to attract a bidder presents the Commission with a unique opportunity to restructure this band of spectrum in a way that will both serve the needs of public safety and the broader goals of the Communications Act. To that end,

PISC makes two substantial recommendations. *First*, that the Commission rescind PSST's license and require PSST to reapply, in competition with other applicants. This will ensure that the national public safety licensee – assuming the Commission determines it would serve the public interest to maintain a single national public interest licensee – fully complies with the determinations made in this proceeding. *Second*, that the Commission adopt the pro-competitive measures urged by PISC in the previous 700 MHz proceeding: adoption of mandatory wholesale obligations, adop-

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.

tion of network neutrality and open device conditions, and adoption of spectrum caps or other eligibility requirements to enhance competition in the provision of wireless services. In addition, the Commission should move expeditiously to grant PISC's pending *Petition for Reconsideration*. See *Petition for Reconsideration of PISC, In re Service Rules for the 698-746, 747-762, 777-792 MHz Bands*, WT Docket Nos. 06-150, *et al.* (Filed September 24, 2007).

ARGUMENT

I. THE COMMISSION SHOULD RESCIND THE PSST'S LICENSE.

The Commission seeks comment on numerous aspects of the relationship between the national public safety licensee (NPSL) and the future D Block winner, between the NPSL and the broader public safety community, and between the NPSL and its contracted agents. The *Further Notice* proposes to scrutinize every aspect of the NPSL, from its possible role as a provider of services to its permissible business dealings to whether it should exist at all. In short, the Commission proposes a thorough reexamination of every aspect of the public/private partnership – and rightly so. The Commission cannot resolve the problem of restructuring public private partnership in a successful fashion without a commitment to a complete reexamination of every aspect of the concept and how it will work, and to describe the final result with sufficient certainty to avoid the ambiguity that contributed to the previous failure to attract bidders.

As a necessary first step, the Commission should rescind the existing national public safety license held by the Public Safety Spectrum Trust (PSST) and require PSST to reapply in competition with other potential national licensees. It is clear from the Inspector General Report that PSST and its agent, Cyren Call, had specific business plans in mind touching on every element under examination here. Indeed, it is fair to say that many of the questions raised in the *NPRM* respond

directly to concerns over the proposals made by Cyren Call in the course of its negotiations with potential bidders. This raises significant questions as to whether PSST can genuinely “retrofit” its planned management of the band to meet the final rules the Commission will determine best serve the public interest. Nor is it certain that potential future bidders will have confidence in PSST and Cyren Call in light of past experience in the band.

In short, it is entirely unclear whether PSST remains the best trustee of a national license – assuming the Commission maintains a national public safety license. Nor can the Commission make such a determination in the course of a proceeding to set service rules. To the contrary, it is precisely the role of a comparative procedure to find the licensee best suited to the particular community it will serve, based on the rules adopted. Where, as here, the Commission may eliminate the single national license altogether, or may radically restructure any or every aspect of the license, it can no longer rely upon its previous determination to grant the license to PSST. By contrast, if PSST remains the strongest candidate for a new national license as the Commission will define it, it can reapply and compete with other potential applicants.

In addition, the revelation that the PSST received a substantial loan from Cyren Call has triggered a Congressional inquiry into whether this loan compromises PSST’s assertion that it exercises an appropriate level of control over its agent. Members of Congress also expressed concern as to how PSST hoped to earn sufficient revenue to repay this loan, or any other initial capital or in kind contributions received by either PSST or Cyren Call.² The Commission has long recognized that certain debt instruments give rise to an attributable interest in a licensee *because* they allow the debt

²See Press Release from the Office of Rep. John Dingell, Chair, House Energy and Commerce Committee, April 16, 2008. Available at http://energycommerce.house.gov/Press_110/110nr270.shtml.

holder to exercise influence even if such influence falls short of outright control. *See, e.g., In re Implementation of Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Second Report & Order and Further Notice of Proposed Rulemaking*, 21 FCCRec 4753, 4778-83 (2006) (discussing material relationships that may compromise independence of licensee); *In re Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCCRec 12559 (1999) (adopting debt/equity rule for broadcast attribution). The concerns raised by Congress must therefore also become concerns for the Commission with regard to whether Cyren Call, or other entities that may have provided funds to either Cyren Call or the PSST, can exert significant influence over PSST as licensee. PSST can hardly justify its role as licensee managing the trust on behalf of the public safety community if its "agent" can exert influence through the loan agreement or other financial arrangements.

Again, rather than trying to determine in the context of a general rulemaking whether PSST's current or former business relationships undermine its independence as a licensee or undermine the confidence of potential bidders, the Commission should simply rescind the license and require PSST to apply for whatever new license the Commission will create. While the Commission could initiate its own investigation, such a process would take months, frustrating this rulemaking and delaying the auction. By contrast, rescission of the license and requiring PSST to compete for the new national license (if any) will provide a full opportunity for PSST to demonstrate that its financial dealings will not undermine its ability to comply with whatever new rules the Commission may impose.

PISC anticipate that PSST and Cyren Call will argue that they stand fully prepared to comply with whatever rules the Commission ultimately accepts and that no one has demonstrated that either

Cyren Call or PSST violated any rules or committed any wrong doing. While these would no doubt be factually accurate statements, these arguments are irrelevant. As a legal matter, the service for which the Commission designed the initial national public safety license did not come into being. And the Commission warned all parties in the 2007 *Report and Order* that it retained the right in the event of failure of the D Block auction to go “back to the drawing board” and try again. The question before the Commission is therefore not whether PSST or Cyren Call committed any wrongdoing, but whether PSST is the best licensee for whatever new service the Commission authorizes. That is something the Commission can only determine by rescinding the existing license and accepting new applicants, including PSST if it wishes to apply, for the new service it will authorize here.

II. THE COMMISSION SHOULD ADOPT RULES THAT ENHANCE COMPETITION IN WIRELESS SERVICES.

In numerous filings prior to the 700 MHz auction, PISC recommended a number of service rules and auction rules designed to enhance competition in the wireless industry. Specifically, PISC recommended (a) mandatory wholesale on the D Block, (b) adoption of “network neutrality” and “wireless *Carterfone*” rules, and (c) eligibility requirements that would exclude the largest spectrum holders so that competitors can remain competitive. The Commission did not adopt these proposals, although the Commission did adopt other measures designed to encourage new entrants.

A. The Need for Eligibility Restrictions.

In the year since the Commission rejected the PISC proposals, the wireless industry has become even more concentrated. Through acquisitions, AT&T and Verizon have eliminated regional rural carriers that previously provided roaming to all carriers. Nor did the 700 MHz auction alter the competitive analysis. To the contrary, despite efforts to encourage new entrants

and rules intended to restrict incumbents from engaging in strategic behavior, AT&T and Verizon won the majority of licenses. They certainly paid top dollar; AT&T and Verizon combined spent over \$16 billion. But the auction outcome clearly demonstrates that the largest incumbents will spend whatever it takes to maintain their dominant spectrum positions (Verizon, for example, paid \$9 MHz/pop for the B block license covering Chicago). In addition, because incumbents enjoy the advantage of already operating networks, deployed infrastructure, acquired customers, and avoid other expenses that new entrants or regional players seeking to expand to national footprint face, they can afford to pay more for licenses than their competitors for the simple reason that they can rationally expect to extract more value.

For these reasons, the Commission can no longer rely upon measures that simply encourage new entrants while doing nothing to neutralize the inherent advantages of incumbency. The 700 MHz auction attracted more new bidders than any previous spectrum auction, in no small part because these bidders perceived that the changes in the rules signaled a desire by the FCC to see new competitors enter the wireless market. *See* Elizabeth Wyoke, “David v. Goliath,” *Forbes* (December 18, 2007).³ Nevertheless, despite this overwhelming influx of new bidders, Verizon and AT&T won the majority of the licenses. Attracting new competitors may increase the overall revenue earned by making the auction more competitive, but it cannot change the fundamental advantages enjoyed by incumbents in spectrum auctions.

PISC therefore recommends again that the Commission adopt spectrum caps as a means of enhancing competition in the wireless market. Specifically, the Commission should prohibit bidders

³Available at: http://www.forbes.com/technology/wireless/2007/12/18/towerstream-wireless-spectrum-tech-cz_cs_1218towerstream.html (last visited June 19, 2008).

from exceeding the existing 95 MHz screen used for merger analysis. In addition, the Commission should grant PISC's pending *Petition for Reconsideration* requesting that the Commission prohibit the winner of the C Block from bidding on the D Block.

Section 309(j)(E)(3) of the Communications Act requires the Commission to adopt auction rules that “promote economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants.” 47 U.S.C. §309(j)(3)(B). In the year that has passed since the Commission last considered the D Block, the market for wireless services has become even more concentrated. The two largest players, AT&T and Verizon Wireless, cemented a nearly insurmountable dominance in spectrum services through numerous acquisitions and by capturing the lion's share of the licenses in the 700 MHz auction. If the Commission intends to give effect to the Congressional mandate to enhance competition, it can no longer rely on encouraging new bidders and hoping for the best. Rather, the Commission must adopt eligibility requirements that exclude Verizon and AT&T, and adopt mandatory wholesale to provide sufficient spectrum access for existing competitors.

B. Mandatory Wholesale Will Enhance Competition In The Wireless Market Overall, As Will Network Neutrality and Wireless *Carterfone*.

Competitors with AT&T and Verizon face two significant challenges, roaming charges and availability of backhaul. In addition to spectrum acquired in recent spectrum auctions, Verizon and AT&T have enhanced their spectrum dominance by absorbing rural carriers. This has created a “double whammy” for competitors of these two dominant carriers. Before these rural acquisitions, all national or large regional carriers could expect to pay roaming charges to acquire a national footprint. Now, the two dominant providers no longer pay roaming charges, and competitors must pay roaming charges to the dominant carriers at rates set by the dominant carriers.

Critics of the wholesale proposal frequently raise two objections. First, they argue that if a genuine market existed for wholesale, carriers would voluntarily adopt a wholesale model. Second, they argue that imposition of a mandatory wholesale condition will depress auction revenue. Neither of these arguments prevails in light of current market conditions.

First, carriers are indeed beginning to adopt a wholesale model. The new Clearwire, a joint venture between Sprint, Clearwire, major cable operators and technology companies, recently committed to wholesale as part of its new business plan. For those who look to market developments as to grant an *imprimatur* on policy, the decision by a national wireless provider to offer wholesale services validates that wholesale is possible and that demand exists. The question should then become whether the Commission's policies make sufficient wholesale spectrum available.

But while Clearwire's announcement that it will offer wholesale proves both that a demand exists for wholesale and carriers can fill this demand, it also demonstrates that the Commission must make more spectrum available for the express purpose of filling this need. The new Clearwire is itself a competitor in the wireless services and broadband market. Rather than providing wholesale capacity, Clearwire should have a wholesale provider available to it to address its backhaul and roaming needs. Instead of requiring competing carriers to cannibalize themselves, the Commission should make dedicated wholesale spectrum available to enhance the competitive position of all wireless carriers.

Second, it may well prove the case that a mandatory wholesale provision will reduce auction revenues. Section 309(j), however, plainly addresses how the Commission should resolve this conflict between maximizing revenue and enhancing competition. Whereas Section 309(j)(3)(B) and 309(j)(4)(D) explicitly directs the Commission to make spectrum available to the widest

possible number of applicants and businesses, Section 309(j)(7) explicitly *prohibits* the Commission from considering maximization of auction revenues as part of its public interest analysis. If the Commission wishes to follow the explicit statutory command of Congress, it should reject any argument premised on the importance of maximizing auction revenue.

Finally, from a practical perspective, the auction already generated almost \$19 billion in revenue for the Treasury – nearly double the amount anticipated by Congress. Surely the public will benefit more from maximizing competition in the wireless industry than from squeezing out a few additional dollars of auction revenue.

For the same reasons, the Commission should reject objections raised to adopting network neutrality and open device standards. The industry has long since recognized that it can abide by such rules as a matter of technology. Verizon’s recent statements that it will open its network to “any device, any app” and the commitment by the new Clearwire joint venture to both network neutrality and wireless *Carterfone* should end all dispute on the technological feasibility of these conditions. The willingness and ability of these major carriers to adopt these policies should likewise belie unsubstantiated claims that somehow open standards or network neutrality create untenable security risks to the public safety portion of the network.

The only credible objections therefore go to the fundamental question of whether the Commission should maximize revenue and avoid “picking winners,” or whether the Commission will adopt conditions explicitly designed to enhance competition and further the values of the First Amendment. As PISC extensively explained in its previous filings, the network neutrality and wireless *Carterfone* conditions promote competition, further the public interest goals of the of the Communications Act, and promote the public’s “paramount” First Amendment right to speak and

hear from a diversity of sources through the electromagnetic spectrum. Under Section 309(j), and in furtherance of the broader goals of the Act and the First Amendment, the Commission should adopt the PISC proposals and reject the arguments of those who believe that our national spectrum policy boils down to “show me the money.”

CONCLUSION

In the opportunity to revisit the D Block, the Commission has a second chance both to restructure the public/private partnership and to enhance competition in the wireless market. The Commission should seize this chance by rescinding the existing PSST license and starting with a clean slate. In addition, by adopting eligibility restrictions, mandatory wholesale, and other procompetitive conditions recommended previously by the PISC, the Commission can begin to undo the damage caused by permitting “excessive concentration of licenses” through mergers and previous auctions.

Respectfully submitted,

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