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FCC ISSUES SECOND FURTHER NOTICE OF PROPOSED RULE MAKING -- 700 MHz PUBLIC SAFETY/D BLOCK SPECTRUM WT DOCKET 06-150

On May 14, 2008, the Federal Communications Commission (“FCC” or “Commission”) released a Second Further Notice of Proposed Rule Making (“Further Notice”) in its proceeding governing the 698-746, 747-762 and 777-792 MHz Bands (the “700 MHz Bands”). The FCC adopted the Further Notice because it did not receive an acceptable bid for the so-called “D Block” (758-763/788-793 MHz) spectrum in the recently concluded 700 MHz auction, and because of criticism surrounding the relationship between the Public Safety Spectrum Trust (“PSST”), the licensee of the public safety broadband license (“PSBL”) at 763-768/793-798 MHz and its advisor, Cyren Call Communications (“Cyren Call”). The FCC invites interested parties to submit comments and reply comments 30 and 45 days, respectively, after the Further Notice is published in the Federal Register (which has not yet occurred).

The Further Notice focuses on three broad topics: (1) the PSBL; (2) the relationship between the PSBL and the D Block Licensee; and (3) other options for the use of the D Block spectrum. The following is a brief summary of the Further Notice.

I. The Public Safety Broadband License

A. Users

The Commission seeks comment on whether to amend its rules to clarify the entities that are permitted to use the PSBL. The Commission notes that if it limits the definition of “public safety entity” to, for example, police, fire and similar services, utilities and other critical infrastructure entities would not be permitted to use the 700 MHz public safety band. The FCC also seeks comment on:

- The types of public safety users that can be expected to use the PSBL and on what timeframes.
- The types of public safety communications functions that are likely to migrate to the new broadband network, the types that are likely to remain on existing networks, and the factors that will be considered when making such decisions.
- Compatibility between the broadband network and existing voice and data networks.
- Issues arising from the possibility that in some areas a local jurisdiction may not elect to make use of the PSBL.
- The potential pool of users of the PSBL.
- Whether eligible users should be required to subscribe to the services offered by the PSBL.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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B. The PSBL

In part because of its inquiry into the relationship between the PSST and Cyren Call Communications (“Cyren Call”), the FCC asks questions regarding the PSBL. In particular, the FCC seeks comment on whether it should clarify that all members of the PSBL must be non-profit entities and that the PSBL may not obtain debt or equity financing from any source, unless such source is also a non-profit entity (this appears to be a reaction against Cyren Call’s loans to the PSST). The FCC asks:

- Generally about whether it should restrict the PSBL’s relationships with commercial entities.
- About the best way to fund the PSBL’s operations.
- Whether it has the legal authority to use the Universal Service Fund (“USF”) or the Telecommunications Development Fund (“TDF”) to support the PSBL’s operations.
- How any excess revenues generated by the PSBL should be used.
- Whether the PSBL may incur reasonable and customary business expenses.

The FCC previously established detailed criteria governing the structure of the PSBL, its representation and governance. The Further Notice asks whether those rules should be revised. It also asks whether State governments should have a more significant role in coordinating the participation of public safety entities in their jurisdictions. Finally, and most importantly, the FCC asks whether it should rescind the license issued to the PSST and seek new applicants.

II. The 700 MHz Public/Private Partnership

A. Terms of the Partnership and Network Operations

1. Network/System Requirements

Assuming that it determines that it should continue to require a public/private partnership as a condition of licensing for the D Block, the FCC asks whether it should adopt changes to the requirements of the network that the D Block licensee is required to construct. To focus discussion on this matter, the FCC attached an appendix to the Further Notice that contains a possible technical framework for the shared network. The FCC generally asks whether it should maintain the parties’ flexibility to negotiate network configurations, or whether those configurations should be specified in advance. The Commission also asks about particular elements of the shared network that are now specified in its rules and decisions and whether it should retain, change or further define those elements. It asks about the differences between public safety and commercial networks and how public safety networks are generally funded. In reaction to the fact that no acceptable bid was received for the D Block, the FCC asks whether the PSST’s “bid document,” which specified its expectations for the public/private partnership, affected the D Block bidding.

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The Commission asks whether it should continue to require that the D Block licensee provide the PSBL priority access, during emergencies, to the D Block spectrum. It also asks whether, if it retains this obligation, it should further define an “emergency” for the purpose of providing public safety access to the spectrum.

The FCC asks whether it should revise the performance (coverage) requirements that were imposed on the D Block licensee, noting that if reduces the required coverage, it will save the D Block licensee significant costs. It asks whether it should adopt performance benchmarks that extend beyond the initial 10-year license term and about the term of the D Block license in general. The Commission asks whether it should permit the use of mobile satellite coverage or other terrestrial or non-terrestrial services to meet the build-out requirements. It asks whether it should adopt rules to promote or facilitate access by the D Block licensee to public safety towers and/or rights of way. Finally, the FCC asks whether it should adopt a “two-tier” approach to satisfying the build out requirements, under which the licensee would be required to first meet a subset, or some lower-cost aspects of network build-out, and only later would be required to upgrade portions of the network.

2. Roles of the D Block Licensee and the PSBL

The Commission asks whether it established sufficient and appropriate incentives that will enable the D Block licensee to finance and construct the shared network. The FCC inquires whether the D Block licensee should be responsible for the network functions (billing functions, customer care, etc.) for public safety users of the shared network or just commercial users. The Commission asks for comments on the factors that will affect and determine the D Block licensee’s commercial operations and anticipated profitability.

The Commission seeks comment on whether it should revise the roles assigned to the PSBL in the shared network, particularly with respect to interaction with public safety users of the system. Responding to concerns about Cyren Call, the FCC asks whether the PSBL or any of its advisors should be permitted to be a mobile virtual network operator (“MVNO”). The FCC asks whether it should permit Federal users to employ the public safety broadband spectrum to support coordination of Federal and non-Federal activities.

The Commission asks whether it should clarify its rules regarding the fees that can be charged to public safety entities that use the shared network, including whether fees should be assessed under some circumstances and not others. It also asks whether it should provide guidance on the fees that the PSBL may assess the D Block licensee.

B. Network Sharing Agreement

The FCC asks whether it should change its rules to provide D Block bidders with more certainty regarding their obligations to the PSBL while still protecting the interests and needs of public safety entities. The Commission asks whether, if the D Block licensee and PSBL do not reach an

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agreement, the license should be offered to the next highest bidder, or whether the FCC should then re-auction the spectrum without the obligation to enter into a public/private partnership.

The Commission also asks if there are circumstances, when no agreement is reached between the D Block licensee and the PSBL, the D Block licensee should be relieved of its default payment obligations. The Commission also asks whether it should modify the mechanisms for resolving disputes that may arise during the negotiations or otherwise change the negotiation process.

C. Auction Related Issues

The Commission asks whether it should impose any eligibility restrictions on bidders for the D Block license, particularly on entities that have already secured a significant amount of 700 MHz spectrum. The FCC also asks about whether it should adopt a different approach to the reserve price or minimum opening bid for the D Block (or whether it should adopt a reserve price at all). The FCC asks whether it should change its rules that otherwise prohibit a designated entity from having an “impermissible material relationship” with a non-designated entity for purposes of the D Block auction only.

D. Narrowband Relocation

One of the obligations of the D Block licensee is to pay for public safety entities to relocate out of what will be the public safety broadband spectrum. The Commission asks whether it should eliminate or revise the current \$10 million cap on relocation expenses and the mechanics for administering the fund by which those expenses will be reimbursed. It also asks for comments on the date by which relocation must be completed. The Commission asks for comments on whether it was appropriate to establish an August 30, 2007 cut-off date for narrowband operations outside the designated narrowband spectrum.

E. Size of Geographic Areas, Other Rules and Conditions

While the FCC intended to auction the D Block on a nationwide basis, it asks whether it should change that approach. It also asks whether any of its auction rules should be changed to take into account the possibility of offering multiple licenses to use the D Block spectrum. The Commission asks whether the D Block licensee should operate on an exclusively wholesale and/or open access basis. The FCC inquires if there are other ways (besides establishing the D Block license) that it can match public safety’s needs with the capabilities of potential service providers, such as by, for example, issuing requests for proposals (“RFPs”).

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III. Other D Block Options

A. No Public/Private Partnership

If the FCC decides to auction the D Block license without the public/private partnership, it asks for comments on how the spectrum should be licensed. In particular, it seeks comment on:

- The size of the geographic areas that should be licensed.
- The performance (build-out) requirements that should be imposed on the licensee.
- The license block size and term.
- Any out-of-band emission limits and power limits that should be imposed to protect the PSBL.
- Whether license partitioning, disaggregation, assignment and transfer should be permitted.
- Any other service and auction rules and conditions.

B. Alternative Public Safety Broadband Opportunities

The FCC seeks comment on how the PSBL may satisfy its needs for additional spectrum in a time of crisis by, for example, entering into commercial arrangements with one or more entities to access additional spectrum. The PSBL licensee could, for example, trade preemptible access to its network in exchange for a commercial entity's willingness to build out some of the PSBL network or provide access to commercial spectrum, or both. The Commission asks about the level of involvement it should have in such arrangements. The FCC also asks whether it should adopt this approach if it is not successful in auctioning the D Block with a public/private partnership obligation. The Commission also asks if there are other sources of funding that could be used to build out the public safety broadband network. The Commission notes that it could permit regional, state or local build-out of a broadband network, either by permitting the PSBL to lease spectrum or by rescinding the PSST license and relicensing the spectrum to allow state, local or regional licensing. The FCC asks for feedback on these approaches. Finally, the FCC asks whether, in the absence of a public/private partnership, it should still require the D Block licensee to reimburse public safety entities that are required to relocate from the broadband segment of the public safety 700 MHz band (because they are operating narrowband systems today).