

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
)	
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
)	

PETITION FOR RECONSIDERATION AND CLARIFICATION

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AT&T Inc. ("AT&T") hereby petitions the Commission, pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. §§ 1.106, 1.429, for reconsideration of certain aspects of its *700 MHz Second Report and Order*.¹ Specifically, AT&T asks the Commission to revise its rules to (1) require that a clear and detailed Statement of Requirements ("SOR") for meeting public safety needs through the 700 MHz Public/Private Partnership be made public at least 30 days in advance of the deadline for submitting FCC Form 175 applications for Auction 73, and (2) relieve the winner of the 700 MHz D Block license from potential default payment liability if agreement with the Public Safety Broadband Licensee ("PSBL") on a Network Sharing Agreement ("NSA") cannot be reached even though the D block winner (i) negotiated in good faith, and (ii) proposed a network that

¹ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket 06-150 *et al.*, *Second Report and Order*, 22 FCC Rcd 15289 (2007) ("*700 MHz Second Report and Order*"), 72 Fed. Reg. 48814 (Aug. 24, 2007), *pet. for review filed sub nom. Cellco Partnership d/b/a Verizon Wireless v. FCC*, No. 07-1359 (D.C. Cir. filed Sept. 10, 2007).

would satisfy all of the fundamental requirements for the public safety network that were clearly identified prior to the auction.

I. BACKGROUND

The comments in the above-captioned proceedings demonstrated that public safety and private sector interests each recognized that the 700 MHz Public/Private Partnership broadband network would have to meet the legitimate needs of public safety as well as be an economically viable platform for the D Block winner's commercial services. One public safety commenter said:

NPSTC supports an E-Block and public safety network constructed and maintained consistent with public safety standards where all agencies have secure access and commercial interests are afforded a viable investment and participation opportunity. It seeks a structure that preserves public safety communication standards. *Success will be defined by meeting these objectives while affording economic viability to the public private partnership.*²

Public safety entities understood that bidders for the D Block license would need to understand the fundamental requirements of public safety before the auction to be able to evaluate the economic viability of the 700 MHz Public/Private Partnership. Both NPSTC and APCO proposed that a public safety consortium be formed to take on the responsibilities of the PSBL, and that this entity should issue an SOR as early as possible prior to the auction.³

Commenters from the commercial sector agreed that such a disclosure well in advance of the auction was necessary.⁴ Verizon Wireless, for example, commented:

² NPSTC Comments at 9 (filed May 23, 2007) (emphasis added). References to "E Block" in comments quoted herein assumed a different band plan than was ultimately adopted, and should be read as referring to the 700 MHz D Block as designated in the *700 MHz Second Report and Order*.

³ See NPSTC Comments at 10; APCO Comments at 15 (filed May 23, 2007).

⁴ See Frontline Comments at 12-13 (filed May 23, 2007); Verizon Wireless Comments at 58-60.

In order to bid on a conditioned E Block license . . . prospective bidders must know Public Safety's requirements in advance. If the Commission elects to impose a condition requiring the E Block licensee to provide Public Safety with interoperable, broadband communications, Public Safety must define its requirements now.⁵

Likewise, AT&T emphasized that there needed to be clear "specification of the primary terms and conditions that would have to be part of a Network Service Agreement" in advance of the auction.⁶

As Verizon Wireless emphasized, bidders must know the fundamental requirements of public safety before the auction to minimize the possibility of post-auction deal-breaker surprises. If the requirements are not disclosed until negotiations, after the auction,

a bidder cannot possibly know what 'services' it will be expected to provide until after it has negotiated with Public Safety and, accordingly, the bidder cannot 'evaluate the availability of equipment for the relevant services' prior to bidding on the E Block spectrum. . . . [I]f wireless carriers have no means to determine what, exactly, their obligations will be as the E Block licensee, they will have no means to determine how much to bid for that spectrum, what their business plan should be, or what the market conditions will be for the E Block spectrum.⁷

Indeed, one commenter urged the Commission to "incorporate as many of these requirements into the final auction rules as appropriate with enough lead time for bidders to take them into account."⁸

⁵ Verizon Wireless Comments at 58-59.

⁶ AT&T Comments at 13 (filed May 23, 2007).

⁷ Verizon Wireless Comments at 59-60; *accord* Frontline Comments at 12-13 ("Issuance of the Statement of Requirements will ensure that all bidders for the E Block license will be fully aware of public safety's needs prior to bidding on the spectrum. This also helps to prevent disputes after the auction.")

⁸ Frontline Comments at 13.

In the *700 MHz Second Report and Order*, the Commission acknowledged the need for certainty on these matters but did not directly address calls for identification of public safety's specific needs prior to the auction.⁹ Instead, the Commission followed an alternative approach, setting forth a list of requirements that would have to be satisfied by the NSA between the D Block winner and the PSBL.¹⁰ The Commission believed that its identification of the terms and subjects that must be included in the NSA, as well as the requirements in its rules, "will help potential bidders on the D Block license in understanding their obligations prior to auction."¹¹ The Commission left the details to the NSA and required the D Block winner and the PSBL to negotiate in good faith¹² and provided for FCC assistance (including adjudication, if necessary) in resolving disputes.¹³ The *700 MHz Second Report and Order* also held that if no agreement is reached, the D Block winner's application would be denied, and the winner would thus be deemed in default under 47 C.F.R. § 1.2109(c) and be liable for a default payment under 47 C.F.R. § 1.2104(g).¹⁴ As such, despite the Commission's good intentions in generally outlining the requirements for the NSA, an extreme penalty could be imposed on the D block winner if an agreement cannot be reached.

II. THE FCC'S NSA NEGOTIATION REQUIREMENTS AND DEFAULT RULE SHOULD BE MODIFIED TO AVOID STIFLING BIDDING ON THE D BLOCK LICENSE

The Commission's decision to leave critical public safety requirements to the post-auction negotiations, instead of requiring the PSBL to lay out its fundamental

⁹ See *700 MHz Second Report and Order* at ¶¶ 446-47 and accompanying notes.

¹⁰ *700 MHz Second Report and Order* at ¶¶ 405, 448-453, 463-68.

¹¹ *700 MHz Second Report and Order* at ¶ 447.

¹² *700 MHz Second Report and Order* at ¶¶ 447, 505.

¹³ *700 MHz Second Report and Order* at ¶¶ 508-09.

¹⁴ *700 MHz Second Report and Order* at ¶¶ 508-511, codified at 47 C.F.R. § 90.1415(g).

requirements in a detailed pre-auction SOR, puts prospective D Block bidders at significant risk of a post-auction surprise in which the winning bidder is unable to reach agreement on an NSA – despite negotiating in good faith and making proposals that satisfy the Commission’s requirements as well as the reasonable needs of public safety. This level of risk may deter some potential bidders from participating at all. For those entities who do bid, it is reasonable to assume that the uncertainty associated with this risk will depress bidding.

To mitigate this risk, the Commission should at a minimum require that an SOR be released well in advance of the deadline for filing applications for Auction 73. In addition, the Commission should make clear that (i) the D Block winner has the right to design a shared network that meets its commercial needs, so long as it also satisfies the SOR specifications identified in advance of the auction, and (ii) the PSBL does not have the right, after the auction, to insist on technical requirements that are incompatible with the D Block winner’s commercial plans. Also, the Commission should not deem the D Block winner to be in default, and thus subject to a default payment obligation, if it negotiates in good faith but is nevertheless unable to reach agreement on the NSA with the PSBL.

A. The FCC Should Require That Fundamental Public Safety Requirements Be Clearly Specified Prior to the Auction and Make Clear That the PSBL Must Consent to Network Choices Made By the D Block Winning Bidder Provided They Satisfy These Requirements

The PSBL has not yet been chosen and the Commission has not provided a mechanism for the public safety community to disclose the most rudimentary requirements that it deems fundamental for its participation in the 700 MHz

Public/Private Partnership.¹⁵ The Commission should require that detailed public safety needs be made explicit prior to the start of Auction 73, through the issuance of an SOR. For those needs to be evaluated adequately by potential D Block bidders, the Commission should require that a clear and detailed SOR be made publicly available at least 30 days before the Auction 73 FCC Form 175 short-form applications are due. Requiring disclosure of the SOR in advance of the application deadline also would enable prospective bidders to hold discussions with public safety before the anti-collusion rule “quiet period” begins.¹⁶

The winning D Block bidder will be responsible for constructing and operating an integrated public safety and commercial broadband network, and prospective D Block bidders must consider the basic technology options and attendant costs for such a network and factor them into their bids and overall auction strategy. The Commission recognized that D Block bidders need sufficient information to “understand[] their obligations prior to auction.”¹⁷ Because the shared platform will support the D Block licensee’s commercial operations as well as non-commercial operations, D Block bidders must develop technological and business cases for the network before the auction. They will bid more confidently if they know that the shared network can be designed and constructed on the basis of technology and other choices made by them that cannot be arbitrarily rejected by the PSBL.

¹⁵ Given that the PSBL will be comprised of 11 different Public Safety members, arriving at consensus SOR may be challenging.

¹⁶ The FCC’s anti-collusion rule imposes liability on an auction applicant if a prohibited communication is related through a “conduit” to another applicant. Therefore, discussions between a D Block bidder and public safety officials about the bidder’s business plans could create anti-collusion rule problems.

¹⁷ *700 MHz Second Report and Order* at ¶ 447.

Substantial uncertainty is created for D Block bidders if, after Auction 73 is over, the PSBL is able to reject reasonable network design choices that meet public safety needs. The FCC should eliminate uncertainties to encourage participation in the D Block auction and increase the likelihood that the D Block reserve price will be met.¹⁸

In order to bid intelligently – indeed, to bid at all – the D Block bidders must be able to make plans for the common public/private network that will enable them to provide commercial services on an economically viable basis. Any prospective D Block bidder will need to include a technological platform in such plans. The PSBL should not be afforded the right to second-guess this choice in post-auction negotiations, thus the need for the FCC to clarify this issue. Lack of clarity on such a fundamental issue introduces significant unnecessary risk and leads to speculation of an undeclared technology bias.

B. The FCC Should Reconsider The Default Payment Rule Applicable to the 700 MHz D Block To Exclude a Winning Bidder That Negotiates in Good Faith But Is Unable to Reach Agreement on the NSA with the Public Safety Broadband Licensee

The FCC chose to leave details of the NSA to good faith negotiation between the winning D Block bidder and the PSBL. To assist the parties in overcoming obstacles and reaching agreement, the FCC delegated authority to the Chiefs of the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau to adjudicate disputes. Notwithstanding FCC participation in the NSA negotiations,

¹⁸ If the FCC's D Block reserve price is not met, the 700 MHz Public/Private Partnership may not become a reality, because the FCC could eliminate the D Block license conditions for the subsequent reauction. See *700 MHz Second Report and Order* at ¶ 307. Moreover, even if the FCC re-auctions the D Block license with the same conditions that exist today, failure of the D block to meet the reserve price may substantially delay the award of the D Block license and subsequent implementation of the public/private partnership broadband network.

prospective D Block bidders face the prospect of having their post-auction long-form applications rejected if they are unable to negotiate an acceptable NSA with the PSBL and the Commission adjudication does not produce an acceptable NSA.¹⁹ If the Commission applies its default rules if no agreement is reached, a D Block winner that has negotiated in good faith and met all of the requirements imposed by the Commission and the reasonable needs of the PSBL may nonetheless be faced with a choice between entering into an NSA that is contrary to its business judgment or incurring a potentially substantial default payment obligation. Unlike with typical CMRS licenses, the conditions attached to the D Block license would make it extremely difficult for a D Block winner dissatisfied with the terms of the NSA to transfer the license in the secondary market.²⁰

The Commission should amend Section 90.1415 of its rules to provide that, if the D Block winning bidder proposes in good faith NSA terms that meet the fundamental requirements for a public safety network, its proposal will enjoy a presumption of reasonableness in the event of a dispute with the PSBL. Numerous terms will need to be negotiated, many of which will affect the economics of the D Block winner's business. The Commission recognized that negotiating such an agreement will consume considerable time. The parties will have to negotiate highly detailed provisions regarding buildout schedules, deployment plans, redundancy requirements, rates for service, and a

¹⁹ Indeed, in the event of dispute over NSA terms that is submission for FCC resolution, the two Bureau Chiefs have been authorized simply to deny of the long-form application of the winning bidder without even issuing a decision on the disputed issues. *See 700 MHz Second Report and Order* at ¶ 508, codified at 47 C.F.R. § 90.1415(f).

²⁰ The Commission has not made clear when the winning bidder for the 700 MHz D Block license will have to make final payment for that license, but typically final payments are required roughly one month after bidding closes. Given the six-month NSA negotiation period, such a payment schedule for Auction 73 would serve only to exacerbate the risk of bidding on the D Block license.

plethora of like details – not to mention the fundamental technological design of the network. There are many potential pitfalls in the negotiation process, so the more definite the FCC can make the parameters for negotiation of the NSA, the more confidence prospective D Block bidders will bring to the auction.

Given the complexity of these post-auction negotiations, the Commission should not subject the winning D Block bidder to default payment obligations in the event that the PSBL declines to accept reasonable NSA terms proposed in good faith by the D Block winner.

Application of the current default payment rules to the D Block winner without any allowance for negotiating in good faith could impose significant financial burdens on the D Block winner as a result of events beyond its control. The Commission should therefore reconsider Section 90.1415(g) of its rules as suggested herein. If not remedied, this situation will present prospective bidders needing to make rational, economically viable business decisions with a very strong disincentive to bid on the D Block license.

III. CONCLUSION

The development and funding of a nationwide interoperable Public Safety network is very important to all concerned. Americans want, and deserve, a sound well functioning Public Safety Network, one they can depend upon today and tomorrow. In order to make this a reality, the Commission should eliminate as much uncertainty as possible. Rational sustaining businesses require a significant level of certainty before investing significant amounts of money. Speculators, on the other hand, are willing to invest with little knowledge of the expected outcome. Deployment of service on much of

the PCS C Block was delayed by speculation. The building of a shared commercial/public safety network on the 700 MHz D Block should not be left to speculators.

The suggestions outlined herein will encourage robust bidding on the 700 MHz D Block license, thereby giving the D block reserve price the best chance of being met and promoting the most rapid deployment of the 700 MHz Public/Private Partnership network. The Commission should ensure that the winning D Block bidder will have the ability, in good faith, to select any technology for the shared network that meets fundamental public safety requirements. Sound public policy dictates that prospective wireless network developers be able to bid on the D Block license without fear of being subjected to unreasonable demands by the PSBL or to a default payment obligation that could result from no fault of their own. Proper resolution of these issues will have a positive impact on the value and level of participation in the auction.

For all the foregoing reasons, AT&T urges the Commission to grant reconsideration of these aspects of its *700 MHz Second Report and Order*.

Respectfully submitted,

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