TESTIMONY OF
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ON BEHALF OF
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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION- THE 700 MHz AUCTION

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Good morning. My name is Harold Feld. I am Senior Vice President of the Media Access Project (MAP). For more than 35 years, MAP has served as a non-profit law firm and public advocate to provide a voice for the public interest in our communications policy. Today, I am pleased to represent the Public Interest Spectrum Coalition (PISC), a broad coalition of citizens groups such as Public Knowledge and Free Press, think tanks such as New America Foundation, civil rights organizations, consumer organizations, and organizations representing higher education.[1]

EXECUTIVE SUMMARY

The 700 MHz Auction was both the most successful auction in FCC history and perhaps the worst failure in Communications policy in recent memory. The paradox is possible because the FCC, and sadly, not a few members of Congress as well, have reduced the entire public interest analysis for auctions to four words: "show us the money." The auction statute gives a lengthy list of public interest goals: increasing competition and avoiding "undue concentration of licenses;" promoting ownership opportunities for small businesses – especially rural, woman owned, and minority owned businesses; and providing to all Americans the economic and social benefits of wireless. To these we added to the hopes for the 700 MHz auction the creation of a wireless "third pipe" broadband provider to keep with the broadband cable modem service and DSL duopoly that controls over 90% of the residential broadband market. Finally, we expected the D Block

[1]PISC's membership, in alphabetical order: The CUWiN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDUCAUSE, 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.

public/private partnership with public safety to build the national, interoperable broadband public safety network that the 9/11 Commission and everyone else agrees we need.

None of that happened.

The auction raised over 19 billion dollars. It may have given DBS provider Echostar a boost for providing new video services. And the C Block condition may finally give subscribers to Verizon a chance to connect their own devices to the portion of Verizon's network that uses the C Block spectrum – depending on how firmly a future FCC enforces these conditions.

That's it. No third pipe. No new wireless competitors. Instead, the auction simply cemented AT&T and Verizon's position as the dominant wireless companies, free to integrate the spectrum most suited for wireless broadband with their existing wireless and wireline assets. The two companies jointly paid $16 billion dollars in exchange for staying top dogs of the wireless world for the foreseeable future. A great deal for AT&T and Verizon, but a rather nasty deal for the American people. And to make matters worse, we didn't even get the public safety network built.

Predictably, everyone has a favorite villain to blame and a cure that fits with their business model. It's Kevin Martin's fault for pushing the C Block band plan and adopting the "open device" condition that forced AT&T to beat up on MetroPCS, Leap, and the other second tier providers. It's Morgan O'Brien's fault for being too aggressive with potential bidders and scaring off the money. So all we have to do is yell at Kevin Martin to stop trying to regulate the "wildly competitive" wireless market, slap Cyren Call on the wrist, and we can fix everything.

I wish it were that simple. But, as usual, the truth is far more inconvenient. We got the auction results we deserve because the FCC and Congress absolutely refused to "pick winners" or do anything that might jeopardize the auction revenue. Where the FCC actually tried to do its job on the

public interest side – such as with the open device condition on C Block or the public/private partnership on D Block – it faced stiff resistance and had to adopt outrageously high reserve prices to protect the auction revenue. The FCC – at the urging of many members – absolutely refused to adopt any rules that would exclude incumbents or make it easier for new entrants. It was no surprise that the players with the greatest ability to "extract value" from the licenses and pockets deep enough to outbid anyone else, *i.e.*, AT&T and Verizon, won the licenses. As Woody Allen once observed, "the race is not always to the swift, nor the battle to the strong, but that's the way to bet." If you structure an auction to maximize revenue and refuse to "pick winners," you can hardly complain when the biggest wireless companies win again and again and again.

If we don't like the world created by the 700 MHz auction and our wireless polices over the last ten years, ***we need to change our policies***. To get competition, we must "pick winners." To get open networks, we must have rules that force companies to open their networks. If we want to see a real public/private partnership for our public safety network, we need to worry less about how to get at least a billion dollars for the commercial side and spend more time thinking how to make that public/private partnership work.

I am aware that many who dislike the thought of regulating the wireless industry point to the C Block as proof that regulation is bad. In particular, AT&T argues that it paid $2.68 MHz/Pop for B Block licenses rather than $0.76 Verizon paid for C Block licenses to avoid the open device condition. Bad regulation! According to AT&T, the condition reduced auction revenue by nearly $1.90 MHz/Pop.

Even if we accept that as true (and for reasons I give below, I find it hard to swallow), think about that for a minute. AT&T will pay billions of dollars to keep its networks closed. Why on

earth would it do that? Unless it plans to get that revenue from somewhere else. And they do. That $2 MHz/Pop is bribe money from AT&T to the federal government to have the freedom to charge me, and you and every other subscriber $600 for an iPhone. It's a bribe to the Treasury to be able to keep competing services off their system, so it can charge dollars for ring tones instead of the pennies people pay in Europe and Asia. It's a bribe to the Treasury to be able to keep us in the digital stone age so that AT&T can remain "master of its domain" and dictate exactly who gets to speak, what services get offered, and what price we all have to pay.

In keeping with the Passover Season, I can only say to Congress "Let the American People Go!" We can start by rethinking the D block, and trying to develop rules for a public/private partnership that puts our public interest goals first and maximizing revenue out of the picture. But whether it is thinking about how to resolve the outstanding problem of D block and getting a public safety network built, opening wireless networks, or encouraging new entrants who will provide economic opportunities to ***all*** Americans regardless of gender, color or where they live, Congress and the FCC must change course. We must stop making auction revenue our highest priority while praying that somehow the next spectrum auction will be different. Because, unless Congress and the Commission have the courage to start "picking winners," we can expect to see the same results again and again and again.

BACKGROUND

I. Rules that Maximize Revenue – And Nothing Else

Many hoped this most recent auction would transform the wireless world and lift our national broadband infrastructure out of its current doldrums by creating a wireless "third pipe." Others looked for new, powerful wireless providers to create fresh competition in an increasingly concen-

trated wireless market. For its part, PISC hoped that the auction would create an opportunity to open wireless networks and "free the iPhone" and other such edge devices and applications so that the citizens of the United States could enjoy the unfettered freedom and sophisticated services and applications taken for granted in Europe and Asia, but unknown here. PISC also hoped that this auction – described by many as the last major spectrum auction for the foreseeable future – would provide opportunities for small and disadvantaged businesses, including those owned by women and minorities, to acquire licenses and thus share the economic advantages of wireless.

At the same time, however, the Commission came under enormous pressure to maximize the auction revenue – despite the fact that Section 309(j)(7)(A) expressly prohibits the Commission from considering auction revenues in what should be a determination of what best serves the public interest. When industry incumbents warned that rules designed to advance any of these goals might reduce the auction revenue, it produced a raft of editorials and warnings from Members that the federal budget depended on reaching the $10 billion in auction revenue projected by the Congressional Budget Office. Pressure increased further as those opposed to the government "picking winners," "dictating business models," or otherwise interfering in what enthusiasts and wireless carriers described as a vibrant ad competitive market. Competition would appear, the FCC was told, by adopting the least restrictive rules for both the auction and for the service rules afterward.

Although I wish to praise Chairman Martin and the other Commissioners for their openness throughout this process and their willingness to consider a broad range of proposals, in the end the Commission adopted only very modest means to achieve the very substantial hopes for the auction. Deuteronomy warns that bribery "blinds the eyes of the wise and twists the words of the righteous."[2]

[2]Deut 17:19.

And so, it would seem, does spectrum auction revenue. The FCC adopted a number of measures it hoped would maximize revenue and tempt new entrants, such as adoption of anonymous bidding and creation of a large national license. But the FCC refused to adopt recommendations that might reduce revenues or would otherwise "pick winners," such as the PISC recommendations to exclude incumbents or create a "new entrant" credit.

II. PREDICTABLE RESULTS: MAXIMIZING REVENUES MEANS THE BIGGEST WIRELESS COMPANIES WIN.

The result was sadly predictable: an auction that succeeded beyond the wildest dreams of avarice in generating revenue – despite the current financial crisis depriving many potential bidders of needed funds – and succeeded in nothing else. By the metrics of auction participation and revenue, one cannot point to a better result. 214 bidders participated, as compared with the 168 in the AWS auction. MHz/Pop prices reached levels unseen since the .com bubble burst, well over double the average MHz/Pop valuation of the AWS auction. The over $19 billion bid represents the largest collection of auction revenue in FCC history, almost doubling the CBO projection. One can argue that even minority representation showed improvement, as the number of self-identified minority bidders doubled, as did the number of minority firms winning licenses. But since this dramatic growth represented an increase in minority bidders from 4 to 8, and an increase in the number of license winners from 2 to 4, this sample size is so small as to be statistically meaningless. Still, from the perspective of maximizing revenue and not picking winners, this was absolutely the best auction ever.

But while it wildly succeeded in maximizing revenue, the auction failed dismally for almost every other policy goal. There will be no third pipe broadband provider. The dominant wireless incumbents – AT&T and Verizon – captured the bulk of the spectrum, aggravating an increasingly concentrated wireless market. Indeed, we may have reached a tipping point in which the advantages enjoyed by these vertically integrated wireless giants make it virtually impossible for the remaining wireless companies to offer any serious challenge to their dominance.

Mind you, there were some bright spots outside the auction revenue. It is a positive development that Echostar (under the name Frontier Wireless) acquired a near national footprint in

the E Block after being shut out of the AWS auction by the cable companies. This will certainly enhance its ability to provide new video services and compete with cable and the phone companies – but not as broadband providers. We had hoped for much more from this auction than throwing a DBS provider a lifeline.

Similarly, while the FCC took a good first step toward freeing the potential for innovation and enhancing First Amendment freedoms by adopting the open device condition on the C Block, it is far, far too early to declare "Mission Accomplished" in the effort to free the iPhone. The inclusion of the open device/"wireless *Carterfone*" condition on the C Block licenses counts as a modest success for the auction. But it would be a disaster if this modest beginning becomes an excuse to dismiss Skype's pending petition seeking to allow all Americans the freedom to attach their own devices and run the applications of their choice on wireless networks. Now, Americans can only look wistfully as European and Asian subscribers use their cell phones as televisions or credit cards, and grumble as we pay fees for ring tones an instant messages that subscribers in other countries would never tolerate. Dismissing the Skype petition because of the "success" of the C Block would transform a modest step forward into a giant step backwards.

But perhaps the single greatest casualty of the insistence on maximizing revenue is the failure of the D Block experiment. At this point, we cannot tell with certainty why the D Block failed to attract bidders. But the fact that the FCC was compelled to protect the revenue potential of the D Block with a reserve price of over $1 billion certainly did not help. It also further underscores how much the effort to maximize auction revenue at the expense of all other public policy objectives has corrupted the spectrum allocation process despite an explicit statutory command to the contrary.

III. Congress Must Recognize That This Is A Natural Result Of A "Hands Off" Policy and Not Embark on A Quest For A "Fall Guy."

Congress and the FCC now face a choice for the future of spectrum policy. The 700 MHz auction represented the last major spectrum auction for the foreseeable future. As a result of our "hands off" policy in wireless and determination to use auctions to maximize revenue rather than "pick winners" other than the incumbents, the two largest competitors appear positioned to dominate the industry. As a sign of how difficult it has become for other wireless companies to compete with AT&T and Verizon, consider the rise in the number of petitions from other wireless companies at the FCC asking the Commission to reconsider its "hands off" policy in this "wildly competitive" market. Companies that once warned that if the FCC thought the words "regulation" and "wireless" simultaneously the world might end now ask the FCC to require roaming access, access to backhaul, and other aspects where the size and vertical integration of AT&T and Verizon allow them to shut out or charge high fees to rivals. For those of us who remember the struggles of the CLECs to penetrate the ILEC dominated wireline market, it's deja vu all over again.

Mind you, I do not accuse AT&T or Verizon of any misconduct – either in the auction or in their regular business dealing in wireless. To the contrary, they are doing ***exactly*** what we would expect profit maximizing firms to do – maximizing profit. That includes spending whatever it takes to accumulate the precious supply of government monopolies known as "spectrum licenses" from which they can extract maximum value – including the value of keeping these licenses out of the hands of potential rivals.

Similarly, I cannot agree with those who would blame Chairman Martin or the FCC for "throwing" the auction to Verizon or "squeezing out" other carriers like MetroPCS. To the extent certain rules were adopted that ended up favoring incumbents, such as the large C Block band plan

and the use of package bidding (which disadvantaged some bidders), the decision to include these rules arose from the desire to help new entrants without "picking winners." Indeed, PISC supported both the large C Block band plan and the use of package bidding because potential new entrants such as Echostar (which never actually bid on the C Block) and Google (which has since said that it bid up the C Block only to meet the reserve price and trigger the open device condition) stated that absent any rules designed specifically to exclude large incumbents or advantage new entrants, the presence of a large license capable of becoming a national package would entice new entrants. Given that the Commission never seriously considered PISC's recommendation of a spectrum cap or other means to favor new entrants because of its refusal to "pick winners," the only tools it had to encourage new entrants were to give potential entrants what they asked for and pray they should up with enough money to win. Sadly, hope and gentle encouragement proved no match for economic realities.

Indeed, while some additional licenses could have been created by breaking up the C Block into smaller pieces, the results at the end of the day would very likely have been the same.[3] AT&T and Verizon wanted the spectrum, and were willing to pay top dollar for it. The auction records show both companies chased the spectrum wherever they thought they could get it (contrary to its claims post auction, AT&T ***did*** bid on the C Block despite the open device condition – as did 24 other companies besides AT&T and Verizon). These two companies are the companies that will inevitably "most value" the licenses – both because their existing networks and customer base make

[3]In this regard, it is worthwhile to note that a number of entities besides Verizon and AT&T won licenses. Some, like U.S. Cellular (under the name King Street Wireless, L.P.), won a substantial number of licenses. But winning these licenses depended on avoiding conflict with AT&T and Verizon. In almost anyplace where these two companies actively sought licenses, they fought until they won.

it cheaper to deploy new systems and because they find value in keeping the spectrum away from anyone else – and are best positioned to attract needed capital to pay for them. Under orthodox auction theory, which says that "picking winners" is the worst sin government can commit, AT&T and Verizon will win ***any auction they want to win***. This is not because the rules "unfairly" favor them, but because any set of rules designed to avoid "picking winners" guarantees that their natural advantages give them a nearly unbeatable edge.

We must therefore avoid deluding ourselves into thinking that tweaking a few rules or adopting a slightly different band plan will yield a substantially different result. If we want to see positive transformative change in the wireless world, we must stop thinking that we can maximize auction revenue, avoid "picking winners," and still somehow get the winners and results we want. Congress can order Kevin Martin or any future FCC to bring in some competition and do better next time. But unless Congress signals a fundamental shift in its philosophy, and reemphasizes the public interest goals it explicitly laid out in 1993 when it passed the first FCC auction statute, this will have the same effect as Canute ordering back the tide.

IV. Blaming the C Block Condition For What Happened In The 700 MHz Auction Makes No Sense.

I am aware that those who oppose even the modest pro-innovation, pro-competition open device condition on the C Block will vociferously object to the suggestion that further regulation can be a solution. Indeed, those most opposed to regulation – a class that unsurprisingly includes the winners of the previous auction, but includes others as well – have done their best to argue that the open device condition somehow ***caused*** AT&T and Verizon to win all the licenses. Also, in yet another sign that maximizing revenue has become the highest public interest value for many, the opponents of regulation have claimed that the C Block open device condition acted to suppress auction value and "give" the C Block licenses to Verizon at the "bargain" price of approximately $4.8 billion. AT&T in particular has indicated that it did not bid on the C Block because it preferred to avoid the open device condition.

A. The Evidence From AT&T Doesn't Add Up; Other Factors Better Explain Why The C Block Sold "Cheap."

I am always suspicious when a party complains that it did not pay nearly enough for something and that it was absolutely dying to pay more for it. We should therefore view the claims by AT&T and others that the weak tea of the open device condition was such powerful poison to wireless providers that they stayed away and left the field to Google (which only sought to meet the reserve price) and Verizon. Analysis of the released auction results showed that a total of 26 bidders tried to win various C Block licenses – ***including AT&T*** – which placed bids on REAG 2 and REAG 4.[4] It is hard to treat seriously AT&T's contention that it and others fled the C Block because of the open device condition when the record shows it was simply outbid on the licenses it wanted.

To the extent C Block went too cheaply, the chief villains appear to have been the combina-

[4]The list of bidders for C Block licenses is attached as an appendix.

tion of the minimum reserve price as a condition of the open device condition, the new package bidding rules, and the way the FCC opted to display the data. Google consistently bid on the package of REAGs 1-8 because, by its own admission, its primary goal was to ensure that the C Block met its aggregate reserve price. This masked the active bidding on the individual REAGs, because the active individual REAGs did not register as potentially winning bids (PWBs). It therefore appeared as if there were no significant action on the C Block, although individual REAGs did show bids occurring. A number of bidders, including MetroPCS, which actively fought for REAGs 2 and 5, placed what would have been PWBs had package bidding not been in effect. But it wasn't until Round 26 the Qualcomm's bid on REAG 4 finally caused the individual REAG bids to exceed the total of Google's package bid and break the package. This created the opportunity for Verizon, which swooped in and grabbed the REAGs in a flurry of activity between Rounds 27 and 30. Again, the fact that Verizon did not act aggressively in C Block until Qualcomm's Round 26 REAG 4 bid broke Google's package and created a chance for Verizon appears to come rushing in with a "shock and awe" campaign designed to drive out the other REAG bidders should raise serious questions about the statements of AT&T and others that the open device condition accounts for the comparative difference between the high MHz/Pop valuation in B Block and A Block.

Other factors likely contributed to the difference in pricing on a MHz/Pop basis as well. The B Block licenses are smallest and therefore the most targeted and with least costly build out requirements. AT&T in particular, after it lost its bids on C Block REAG 2 and REAG 4, was apparently looking to plug holes in its coverage following its purchase of the Aloha licenses. In this regard, it is noteworthy that the B block licenses (1) reached significantly higher MHz/Pop valuations than comparable A Block licenses, and (2) showed a wide variation in MHz/Pop valuation, with the

valuation in the largest markets driving the extremely high valuations overall.[5] Indeed, the difference between B Block valuation and C Block valuation may be largely attributable to the difference between retail pricing and bulk pricing. B Block licenses that targeted very desirable locations went for very high prices, C Block licenses which included the B Block population centers and much other territory besides went for lower prices, rationally discounting for the increased cost of build out and the less desirable markets.

This is reflected in the different prices paid for the REAGs in C Block. The price per MHz/Pop for the REAG 4 license, the C Block license that covers the territory of greatest interest to AT&T (and for which AT&T actually bid) and which overlaps the most active B Block licenses, the MHz/Pop value was $2.36 MHz/Pop, fairly close to the average B Block MHz/Pop of $2.68. It is only when all C Block REAG licenses are averaged, including the least valuable REAGs of Alaska and the Pacific Region, does the C Block drop to the "bargain" valuation of $0.76 MHz/Pop.

B. The Claim That The C Block Condition "Forced" AT&T to Drive Competitors Out of B Block Does Not Stand Up.

But critics of the C Block open device condition do not stop there. Some have suggested, through rather tortured logic, that the C Block open device condition also accounts for the inability of second tier providers and new entrants to contest AT&T and others in the battle for the B Block and A Block licenses. Again, this theory should be viewed with considerable skepticism, as it runs

[5]Of the 8 licenses that remain in the hands of the FCC (excluding D block), 6 are B block licenses. The B Block was divided into highly desirable licenses targeting heavily populated areas and licenses in lightly populated areas. The former fetched very high prices on a MHz/Pop basis, the later much lower prices or no bids at all.

counter to both common sense and the available evidence. Even without the open device condition, there could have been only one winner of each REAG. Had Verizon lost its bid for the REAGs (and there is no reason to suppose it would have stopped bidding had others challenged it), there is every reason to believe it would have continued to push for the spectrum it wanted in the other bands. Cellco, the Verizon bidding entity, fought hard in A Block and B Block until it saw the opportunity in C Block after round 26 and switched strategies. Had AT&T fought harder and won REAGs instead of B Block licenses, Verizon would most likely have taken AT&T's place as the chief winner of B Block licenses (and possibly spent less money as a result).

V. Assuming the C Block Condition Actually Drove Away AT&T Makes The Case For Applying Open Device Rules to All Spectrum, Not Just C Block.

Nevertheless, as a final exercise in rethinking spectrum policy, let us assume that the critics of the open device condition are right. Let us take only the least sophisticated averaging of the C Block and B block valuations, ignore the fact that more than 25 bidders fought over C Block, and assume that to AT&T and other carriers the difference in value between a license with an open device condition and a license without one is the difference between the total MHz/Pop average of the B Block at $2.68 and the total MHz/Pop C Block valuation of $0.76. We will also ignore the lower valuations for A Block and C Block, so as to construct the best case against the open device condition. That means that AT&T values a closed license more than an open license by a whopping $1.92 cents MHz/Pop.

Why?

Why should AT&T place such a high value on keeping its network closed?

The answer is obvious to anyone who has paid $600 for an iPhone. AT&T extracts a great deal of monopoly value from the ability to keep its networks closed. That $1.98 MHz/Pop comes out

of the pocket of every American subscriber to a closed wireless network. It comes out of the hide of every would-be innovator that wants to offer a service on a wireless platform. That $1.98 MHz/Pop is a tax on innovation, a tax on cell phone users, and a drag on our economy as a whole. It is levied by AT&T and the other carriers operating closed networks because the federal government grants them little monopolies over the public airwaves. It is levied because AT&T and every other wireless carrier knows that without an FCC license, without the little certificate of government monopoly to use the public airwaves, the wireless market is utterly incontestable. It is an oligopoly of other companies with the same cost structures and the same economic incentives to behave in exactly the same way. Just as every one of those wireless companies came up with such consumer unfriendly innovations as early termination fees and hidden charges, so too will they continue to keep their networks closed until the government that gave them a monopoly to use the public airwaves makes them open their networks.

As long as all the wireless companies hang together, as long as they simply follow their rational economic incentive to maximize profit and capture revenue from both sides of the wireless market, then nothing will ever change unless the government forces them to change. With no open wireless networks available, consumers can't vote with their feet. And if consumers can't chose an open network, it is easy to assert that they don't want it. So the argument becomes a tautology. Consumers don't chose it because no one offers it, validating the decision not to offer it because there is no evidence people want it. And in the meantime, the wireless providers can continue to charge money from subscribers to use other people's services, and charge would-be service providers to get on the wireless platform to reach their customers.

Should we be surprised that the members of the "Wireless Club" will pay $2 MHz/Pop to

keep it exclusive and avoid something as mild as the C Block open device condition? Preserving these kinds of double-sided market revenues is cheap at $2 MHz/Pop.

What should surprise us is that we allow it. We should be amazed that we will so easily sell our digital future, and allow companies such as AT&T to dictate to us how we will speak, what we will invent, and how much we will pay for the privilege of giving these licensees the fruits of our innovation. We should be astounded that companies like AT&T and their supporters can make this argument with a straight face, and that policy makers on both sides of the aisle continue to find it persuasive – and even more astonished when the case for such a trade off rests on such flimsy evidence. But most of all, we should be shocked and offended that if we are going to sell ourselves, we should do it so cheaply. If we are going to trade our digital future for a mess of pottage, we should at least get a full bowl. I don't think a one time increase in value of $2 MHz/Pop is nearly enough to justify asking Americans to remain in the digital stone age, to give up the kind of services and prices subscribers enjoy in Europe and Asia, and to pay through the nose for the services we do get.

VI. Wireless Policy At The Cross Roads; Where Do We Go From Here?

So, to repeat, we have a choice before us. We can keep going as we have been going, possibly tweaking at the edges to try to entice some new competitors (although, as the experience with the C Block band plan and package bidding show, such attempts may well prove futile and may even backfire). In that case, we should resign ourselves to auction results very much like the 700 MHz auction results. We should give up any pretense of public policy goals other than maximizing a one time revenue infusion. We should forget about wireless innovation and content ourselves to take whatever the dominant carriers offer us, at whatever prices they chose to provide them. We should

resign ourselves to a broadband world dominated by the largest cable and incumbent telephone companies, and a wireless world that looks much the same – with perhaps just enough other players to give us the comforting illusion of competition.

Or, we can begin a serious reexamination of our wireless policies and structure them to achieve the goals we say we want: greater opportunities for all Americans to enjoy the benefits of new wireless technologies, a renaissance in freedom of speech and communication. And for those who will say we have these now, I will ask why political organizations like NARAL need to request permission to use short codes for text messaging, and why companies such as Rbtl and SkyDeck that want to offer us new services cannot do so.[6]

A. First Steps On The Right Road: From D Block "Problem" To "Opportunity."

The D Block offers us a good start to begin rethinking how to make wireless policy genuinely in the public interest. We must not squander it by simply lowering the reserve price and trying again. Similarly, the attempt to find an answer to the D Block must not degenerate into a search for a "fall guy" on whom we can blame the failure of the D Block to attract bidders. It would be nice if we could wag a finger at Cyren Call, drop the reserve price, and call it a day. But the truth is much more complicated and disturbing. We simply do not know, at this stage, what went wrong and what we need to do to make sure that the public safety network everyone agrees we must have gets built.

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[6]Details with regard to these companies and others are included in the Skype petition and comments of Public Knowledge, *et al.*, requesting that the FCC declare text messaging and short codes subject to non-discrimination regulation. *See* Comments of Public Knowledge, *et al.*, WT Docket No. 08-7 (filed March 14, 2008).

I would suggest it is far too early to conclude that the D Block public/private partnership can't work, and that we ought to spend some time trying to think creatively on how to make it work. I stress that this thinking is best done in the context of an open FCC proceeding, where all stakeholders – including the public – can participate in a fair and transparent manner. This will guarantee that the FCC's ultimate decision will have the benefit of the most complete record and enjoy the greatest legitimacy among all concerned.

Congress should conduct its own investigation, but in a manner that complements the FCC as well as provides needed oversight. In particular, the FCC must not feel that its highest policy goal for D Block is to squeeze the last ounce of revenue from the spectrum. This problem of ensuring that a public safety network gets built, in the absence of a direct allocation from Congress, requires new thinking and creative solutions. While the FCC should not delay, and we hope that a new auction of some type (if that proves the best solution) could occur before the end of the year, Congress and the FCC should avoid rushing to any particular solution simply as a matter of convenience.

If, on examination, a public/private partnership does prove unworkable, we should not simply tell public safety they are once again on their own, split the commercial spectrum from the public safety spectrum, and sell off the commercial spectrum in exactly the same way we've auctioned every other set of spectrum licenses for the last few years. That would not only prove an inexcusable failure to provide for our safety and well being, it would be an inexcusable waste of an opportunity to begin a serious reexamination of our spectrum allocation policies and begin a return to a policy more rationally designed to achieve our public interest goals. Instead, Congress and the FCC must consider other solutions that will provide for the needs of public safety and encourage

competition. For example, should the FCC divide the D Block into regions so that no one private provider needs to swallow all the responsibility and cost? Can the FCC encourage some sort of non-exclusive consortium that would provide an incentive for multiple bidders? Is it possible that local governments could assume responsibility for the spectrum, perhaps with some kind of federal funding or with the help of federal loan guarantees to local or state governments willing to undertake the risk of assuming the role that we current look to the private sector to fill? Should Congress pass a new statute which would auction D Block and channel those funds directly to public safety to build the network? I stress that PISC does not recommend any of these solutions or any other specific solution at this time. Rather, I simply propose these as examples of the kind of creative thinking Congress and the FCC can implement together if we take the time to reexamine the problem with an eye toward what will work best rather than asking what will raise the most money.

Whatever the final answer, Congress and the FCC should look at this as an opportunity to begin rethinking spectrum policy in ways that go beyond an insistence on "not picking winners" accompanied by the contradictory hope that somehow someone other than Verizon and AT&T will win. This isn't like wishing the Yankees and Red Sox would stay out of the pennant race and give the Orioles a chance. This is our national infrastructure and a critical component of our digital future. If we will depend on competitors in the wireless markets as the driver of innovation and consumer protection, then we need to make sure that a wide enough circle of competitors has access to the spectrum.

B. PISC Recommends Considering Mandatory Wholesale As A Way To Move Forward.

PISC does recommend that the FCC adopt mandatory wholesale rules for the D Block, as initially proposed by Frontline. Mandatory wholesale would provide much needed access to

spectrum for would be entrepreneurs in every market. It would create possibilities for rural providers, women owned businesses, minority owned businesses, and other would-be providers at an economic disadvantage that no auction of exclusive licenses without wholesale can provide. At the same time, it would also make capacity available to existing providers squeezed out by the high cost of licenses. In addition, PISC continues to urge the FCC to impose a spectrum cap or other form of incumbent exclusion that would prevent AT&T or Verizon from winning this spectrum as well.

CONCLUSION: THE LONGER ROAD AHEAD

Further down the road, we must consider how to unleash the potential for smart radios and how to better manage our federal spectrum. For example, perhaps agencies that do not need the entire allocation of spectrum at any given time could use networks similar to those proposed for the public/private safety networks for D Block. Federal agencies could convert their spectrum holdings into a steady stream of revenue, while retaining the availability of their spectrum for future needs. This would provide agencies with better options than the existing choices of keep spectrum unused against future need, share the spectrum with an ever increasing population of unlicensed devices, or clear the spectrum for auction to the private sector.

I offer this as a concept only, and as an example of how creative thinking about spectrum management can both serve the broader public interest and still bring in federal revenues. We have many such possibilities and choices – if we think creatively. But ever since Congress authorized the FCC to use auctions in 1993, our spectrum policy has gone increasingly down one path, a path that must inevitably lead us to an industry dominated by a few spectrum giants dictating to us our every use of the public airwaves.

Section 309(j)(3)(B) instructs the FCC to use spectrum auctions to "promot[e] economic

opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." I think that's a goal still worth fighting for, and I hope members of Congress still share that view as well. But we can't achieve these goals unless Congress and the FCC recognize that achieving these goals may mean sacrificing some auction revenue and "picking winners" rather than hoping for better results.

Thank you. I am prepared to answer any questions at this time.

APPENDIX

ENTITIES WHICH BID ON C BLOCK LICENSES

1) Alltel Corporation
2) AST Telecom, LLC
3) AT&T Mobility Spectrum, LLC (REAGs 2 and 4)
4) Bluewater Wireless, L.P.
5) Cellco Partnership d/b/a Verizon Wireless
6) Cellular South Licenses, Inc.
7) CHEVRON USA INC.
8) Choice Phone LLC
9) Club 42 CM Limited Partnership
10) Copper Valley Wireless, Inc.
11) Cox Wireless, Inc.
12) Cricket Licensee 2007, LLC
13) Google Airwaves Inc.
14) King Street Wireless, L.P.
15) Kurian, Thomas K
16) MetroPCS 700 MHz, LLC
17) NatTel, LLC
18) PTI Pacifica, Inc.
19) Pulse Mobile LLC
20) QUALCOMM Incorporated
21) SAL Spectrum, LLC
22) SeaBytes, L.L.C.
23) Small Ventures USA, L.P.
24) Triad 700, LLC
25) Vulcan Spectrum LLC
26) Xanadoo 700 MHz DE, LLC