



## OFFICE OF INSPECTOR GENERAL

### REPORT

**DATE:** April 25, 2008

**TO:** Chairman Kevin J. Martin

**FROM:** Kent R. Nilsson  
Inspector General

**SUBJECT:** D Block Investigation

#### SUMMARY

*Initiating Events.* On March 18, 2008, the Federal Communications Commission's ("FCC" or "Commission") 700 MHz Auction (73) closed with a record \$19.6 billion in bids. The D Block (the commercial spectrum made available for a public/private partnership to create a nationwide public safety network) received only one bid, from Qualcomm, which was significantly lower than the \$1.33 billion reserve price. On March 20, 2008, Chairman Martin asked the Inspector General to open an investigation regarding allegations in several online wireless newspapers and "blogs" and included in a March 19, 2008 letter to the Chairman from Harold Feld, Senior Vice President of the Media Access Project ("MAP") and a representative of the Public Interest Spectrum Coalition ("PISC"). PISC, through Mr. Feld's letter, specifically asked that the Commission investigate the allegations regarding "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."

*Investigation.* The Office of Inspector General ("OIG") investigation officially began on March 24, 2008. The investigative team interviewed officials from the FCC, AT&T, Cyren Call Communications Corporation ("Cyren Call"), Frontline Wireless ("Frontline"), Public Safety Spectrum Trust ("PSST"), Qualcomm Incorporated ("Qualcomm"), Verizon Wireless ("Verizon"), and Mr. Feld. During the course of the investigation, the OIG received requests for confidentiality for business proprietary information from Cyren Call, PSST, AT&T, and Qualcomm. The team also reviewed FCC orders and documents relating to the auction of the D Block, including notices of *ex parte* meetings involving the above mentioned entities. The scope of the investigation focused on Cyren Call's meetings with potential bidders and whether the information provided at these meetings affected potential bidders' involvement in the auction. The investigation did not look into the broad-ranging policy criticisms and

suggestions made in the PISC letter of March 19, 2008 concerning the public-private partnership envisioned by the Commission in the *700 MHz Second Report and Order*. Those matters are under consideration by the Commission and thus conclusions by the OIG on broader regulatory policies would not be appropriate at this time.

*Findings.* Cyren Call officials met with Frontline and Verizon to discuss an estimated spectrum lease payment amount of \$50 to \$55 million (amount varied depending on the interviewee) per year for a period of ten years. All of these meetings took place prior to the “Quiet Period,”<sup>1</sup> when the anti-collusion rule was in effect. The lease payment was discussed as an estimated amount that was included in the PSST business plan, but it was clear that the actual number would result from negotiations after the auction. Frontline, as well as other entities interviewed, stated that the lease payment amount was only one of many factors it considered in deciding whether to participate in the D Block. Witnesses from all of the entities interviewed also described a host of problems and concerns with the D Block that, as a whole, deterred their participation in the D Block.

*Conclusion.* After a thorough investigation, the OIG concluded that the evidence established that the lease payment discussed at Cyren Call’s meetings with Verizon and Frontline was not the only factor in the companies’ decision not to bid on the D Block. Rather, potential bidders stated that the uncertainties and risks associated with the D Block, including, but not limited to, the negotiation framework with PSST, the potential for default payment if negotiations failed, and the costs of the build-out and the operations of the network, taken together, deterred each of the companies from bidding on the D Block.

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<sup>1</sup> The Quiet Period commenced on December 3, 2007, at 6:00 PM ET, when the Short Form application filing window closed and ended on April 3, 2008, at 6:00 PM ET, when the down payment deadline expired. After that date, the anti-collusion rules prohibitions were lifted.

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## **I. CHRONOLOGY OF EVENTS**

Provided below is a chronology of events that has been organized by relevant category. As explained below, some of the key individuals and entities interested in the 700 MHz proceeding, as well as a public/private partnership established by the Commission, have been pursuing their respective visions for the spectrum at issue for several years. The positions of the entities and individuals involved have also been, for the most part, a matter of public record. Thus, a great deal of contemporaneous evidence is available through a review of public filings at the Commission and/or press releases available on the Internet. Meetings between and among PSST, Cyren Call, and potential bidders (including Frontline), however, are not documented in the public record in the same level of detail. Thus, the critical meetings that are the focus of this investigation are noted in the chronology below and are covered in detail in the witness interview section of this report.

### **A. Regulatory Proceedings**

*700 MHz Proceedings.* The Commission issued a *Further Notice of Proposed Rulemaking* in April of 2007 that proposed the creation of a nationwide public safety broadband license (“PSBL”) and the creation of a nationwide public safety network built through a public safety-commercial partnership with the commercial operator securing its license through a spectrum auction.<sup>2</sup> The network would be used to provide both a commercial service and a broadband network service to public safety entities.<sup>3</sup> The commercial operator would have access to the public safety broadband spectrum on a preemptible secondary basis and broadband public safety users would have priority access to the network in times of emergency. Subsequently, on July 13, 2007, the Commission adopted the *700 MHz Second Report and Order*.<sup>4</sup> The

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<sup>2</sup> Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, 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, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007) (“*700 MHz Further Notice*”).

<sup>3</sup> Section 337(f) of the Communications Act of 1934, as amended, defines public safety services, 47 U.S.C. § 337(f); 47 C.F.R. § 90.523.

<sup>4</sup> Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, 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, Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15,289, 15,428-79 ¶¶ 386-553 (2007) (“*700 MHz Second Report and Order*”).

order established a regulatory framework for the Commission-approved public safety-commercial partnership between the soon to be Commission-selected PSBL licensee and the winning bidder of the D Block license.<sup>5</sup> The Commission determined that the D Block commercial license would be awarded to a winning bidder only after it entered into a Commission approved Network Sharing Agreement (“NSA”) with the PSBL licensee. At the same time, the Commission imposed, among other requirements, stringent build-out requirements for the D Block licensee requiring it to eventually serve 99.3 percent of the population of its nationwide license area.<sup>6</sup> The *700 MHz Second Report and Order* was released by the Commission on August 10, 2007 and was published in Federal Register on August 24, 2007.

*Lowering Default Payment and Further Clarification of NSA Process.* On November 2, 2007, the Wireless Telecommunications Bureau (“WTB”) lowered the default payment for the D Block from 15 to 10 percent of the defaulted bid or of the subsequent winning bid, whichever was less. At the same time, WTB and the Public Safety Homeland Security Bureau (“PSHSB”) announced that the two Bureaus would not exercise their authority to immediately deny the long-form application filed by the winning bidder for the D Block license as a result of any dispute over the negotiation of the terms of the NSA absent issuance of a decision on the disputed issues and other procedures.<sup>7</sup>

*PSST granted PSBL.* Implementing the *700 MHz Second Report and Order*, in early September 2007, the PSHSB issued a Public Notice soliciting applications for the PSBL.<sup>8</sup> PSST filed an application for the PSBL in October and on November 19, 2007, PSST was granted the license.<sup>9</sup>

*Relevant Filings in 700 MHz Proceeding After Adoption of the Second Report and Order*<sup>10</sup>. On September 20, 2007, Frontline filed a request that the Commission adopt a no-profit, no-loss principle for the service to be provided by the shared network to the public safety community.<sup>11</sup> On September 24, 2007, Frontline filed a petition for reconsideration requesting that the Commission, among other things, change the designated entity rule, address the potential for excessive concentrations of spectrum, lower the reserve price for the D Block,<sup>12</sup> limit the default penalty only to cases of bad faith,

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<sup>5</sup> The D Block is located in the upper portion (the 758-763 and 788-793 MHz bands) of the 700 MHz Band. See “Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 73 and 76,” *Public Notice*, DA 07-4171, 22 FCC Rcd 18,141, 18,143 n.1 (2007)(WTB).

<sup>6</sup> 47 C.F.R. § 27.14(m)(1); *700 MHz Second Report and Order*, ¶ 437.

<sup>7</sup> Auction of 700 MHz Band Licenses; Revised Procedure for Auctions 73 and 76: Additional Default Payment for D Block Set at Ten Percent of Winning Bid Amount; Disputed Issues in the Negotiation of Network Sharing Agreement, *Public Notice*, DA 07-4514 (rel. Nov. 2, 2007) (WTB PSHSB).

<sup>8</sup> Public Safety and Homeland Security Bureau Solicits Applications for the 700 MHz Public Safety Broadband License, *Public Notice*, DA 07-3885 (rel. Sept. 10, 2007) (PSHSB).

<sup>9</sup> Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, *Order*, FCC 07-199 (rel. Nov. 19, 2007).

<sup>10</sup> This is not an exhaustive list of filings, merely a list of filings that are useful to understanding the position of Frontline prior to the meetings in November of 2007.

<sup>11</sup> Request to Further Safeguard Public Safety Service, filed by Frontline Wireless, LLC, dated September 20, 2008. [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519731514](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519731514).

<sup>12</sup> Frontline subsequently withdrew its request to lower the reserve price. Amendment to Petition for Reconsideration,

confirm certain points regarding the build-out requirement for the shared network, and clarify the signal coverage requirement for the shared network.<sup>13</sup>

*Waiver of Designated Entity Rule.* On November 15, 2007, the Commission waived one of its designated entity eligibility rules – the impermissible material relationship rule - for the D block license.<sup>14</sup>

## **B. PSST and Cyren Call**

In the summer of 2007, in anticipation of being granted the proposed PSBL, PSST was organized as a non-profit corporation under the laws of the District of Columbia.<sup>15</sup> The initial officers were President Harlin McEwen, International Association of Chiefs of Police; Vice President Bob Gurss,<sup>16</sup> Association of Public-Safety Communications Officials-International; and Secretary –Treasurer Alan Caldwell, International Association of Fire Chiefs. In further anticipation of being selected as the PSBL licensee, PSST issued a request for proposal (“RFP”) seeking an advisor during July of 2007. Ten entities responded to the RFP in August 2007. On October 5, 2007, Cyren Call<sup>17</sup> was formally selected as advisor to PSST.<sup>18</sup> Prior to being formally selected as PSST’s advisor, Cyren Call was actively involved in the 700 MHz proceeding with key executives of Cyren Call working closely with Messrs. McEwen, Gurss, and Caldwell.<sup>19</sup>

*NPSTC’s Statement of Requirements.* At some point during the late summer/early fall of 2007, the National Public Safety Telecommunications Council (“NPSTC”)<sup>20</sup> commenced work on a Statement of

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filed by Frontline Wireless, dated December 4, 2007.

[http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519816736](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519816736).

<sup>13</sup>Petition for Reconsideration, filed by Frontline Wireless, LLC, dated September 24, 2007.

[http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519743269](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519743269).

<sup>14</sup>Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules For the Upper 700 MHz Band D Block License, Order, FCC 07-197 (rel. Nov. 15, 2007).

<sup>15</sup> PSST’s Articles of Incorporation and Bylaws can be found at <http://www.psst.org/orgdocuments.jsp> (last visited on April 10, 2008).

<sup>16</sup> Mr. Gurss was subsequently replaced by Kevin McGinnis in November of 2007.

<sup>17</sup> The following is a list of Cyren Call’s main staff: (1) Morgan O’Brien is a co-founder and Chairman; (2) Keith Kaczmarek is a co-founder and President; (3) Tom Sidman is a co-founder and Executive Vice President, Business Processes; (4) John Melcher is Executive Vice President, External Affairs of Cyren Call Communications; (5) David Knutson is the Vice President of Development; (6) Brian McAuley serves on the Board of Directors and chairs its Finance Committee; (7) John Lane is the Senior Policy Advisor to the Chairman; (8) Bruce Cox is the Vice President of Government Affairs; (8) Thomas D. Hickey is Vice President and General Counsel; (9) Greg Meacham is Vice President Industry Relations for Cyren Call Communications; (10) Tim O’Regan is Vice President of Communications, overseeing all matters pertaining to the company’s external communications; and (11) Jay Paull is Vice President and Managing Director, Strategic Initiatives; [http://www.cyrencall.com//index.php?option=com\\_content&task=view&id=16&Itemid=57](http://www.cyrencall.com//index.php?option=com_content&task=view&id=16&Itemid=57) (last visited on April 8, 2008).

<sup>18</sup> <http://www.psst.org/documents/PSSTPress100507.pdf> (last visited on April 10, 2008).

<sup>19</sup> Cyren Call was founded by Morgan O’Brien along with other former associates from Nextel. O’Brien Interview; Caldwell Interview; McEwen Interview.

<sup>20</sup> NPSTC is a federation of organizations representing public safety telecommunications. The NPSTC Charter can be found at <http://www.npstc.org/charter.jsp>.

Requirements (“SoR”) for the nationwide public safety network.<sup>21</sup> The telecommunications industry had the opportunity to be involved in the drafting the SoR.<sup>22</sup> The work on the SoR continued through the fall with multiple versions being created.<sup>23</sup> Further, Commission staff was apprised of the SoR process and provided comments on the NPSTC SoR.<sup>24</sup>

*PSST Bidder Information Document.* Sometime after being named the advisor to PSST, Cyren Call started work on a Bidder Information Document (“BID”). This document was drawn from the technical requirements found in the NPSTC SoR, but also included information regarding the nature of the relationship between PSST and the D Block licensee.<sup>25</sup> Prior to release of the BID publicly, the document was shown to Commission staff by Cyren Call representatives. Specifically, on or about November 12-13, 2007, while attending a NPTSC conference in Atlanta, Georgia, Cyren Call staff shared a draft of the BID with Jeff Cohen, Senior Legal Counsel, PSHSB. Mr. Cohen, in turn, shared the contents of the BID with Erika Olsen, Deputy Chief, PSHSB. Mr. Cohen conveyed the staff comments on the draft BID to Cyren Call (David Knutson and Jay Paull), requesting that an estimate for the annual lease payment to PSST of approximately \$55 million be taken out of the draft BID document.<sup>26</sup>

On November 15, 2007, PSST issued the BID v. 1.0.<sup>27</sup> The estimate for the lease payment was not contained in the November 15, 2007 version released to the public. The BID v. 1.0, however, stated that PSST intended to request an “annual fixed payment amount.”<sup>28</sup> PSST released the final version of the BID – v. 2.0 – on November 30, 2007.<sup>29</sup> BID v. 2.0 also noted that PSST intended to request an annual fixed payment amount.<sup>30</sup> On the same date, one of the potential bidders, Frontline, issued a press release stating that the final version of the BID dovetailed “with Frontline’s own business and

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<sup>21</sup> A working meeting was held on the SoR in Boulder, Colorado on October 23-24, 2007. Brittingham Interview; Knutson Interview.

<sup>22</sup> NPSTC listed the following industry members as participating in the SoR: (1) 4DK, (2) Airvana, (3) Alcatel-Lucent, (4) AT&T, (5) Bearing Point, (6) Cyren Call, (7) Data Radio, Directions, (8) EADS, (9) Ericsson, (10) Frontline Wireless, (11) Inmarsat, (12) KT Signals, (13) LCC International, (14) Motorola, (15) Nortel, (16) Northrop Grumman, (17) Qualcomm, (18) RCC Consultants, Inc., (19) Tyco Electronics, and (20) Verizon. The NPSTC SoR list of participants can be found at <http://www.npstc.org/documents/700%20SoR%20Participants%20v2.pdf> (last visited on April 10, 2008). David Knutson Interview (noting open process and presence of website).

<sup>23</sup> SoR version 0.6 dated November 8, 2007.

<sup>24</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519810022](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519810022) (describing the scope of the meeting); Alan Caldwell Interview.

<sup>25</sup> Knutson Interview.

<sup>26</sup> Knutson Interview; Jeff Cohen Interview; Erika Olsen Interview. *See also* [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519811781](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519811781) (describing the meeting between Jeff Cohen and Cyren Call stating that “the parties discussed both technical and non-technical aspects of the Bidder Information Document (“BID”) being prepared by PSST in anticipation of the shared Public Safety-commercial broadband network to be deployed pursuant to the rules adopted in the above-identified proceedings”).

<sup>27</sup> <http://www.psst.org/bidsummary.jsp> (last visited on April 4, 2008).

<sup>28</sup> BID v. 1.0, Section 3.5 entitled “Spectrum Lease Payment.”

<sup>29</sup> Found at [http://www.psst.org/documents/BID2\\_0.pdf](http://www.psst.org/documents/BID2_0.pdf) (last visited on April 4, 2008).

<sup>30</sup> BID v. 2.0, Section 3.5 entitled “Spectrum Lease Payment.” This section was edited slightly between versions 1.0 and version 2.0 but in ways that were not material to the report.

construction plan.”<sup>31</sup>

*Cyren Call and PSST Meetings with Potential Bidders.* In late 2006 and early 2007, the executives of Cyren Call and what would become the executive committee of PSST had several initial meetings with interested entities regarding the public-private partnership that they were pursuing at that time.<sup>32</sup> The meetings included executives of what would become Frontline as well as representatives from Verizon. The majority of the meetings held with interested entities and potential bidders, were, however, held in the fall of 2007 (*i.e.*, after the issuance of the 700 MHz Second Report and Order).

Upon its appointment as advisor to PSST in October 2007, Cyren Call formally announced that it was engaged in meetings, telephone calls, and discussions with potential bidders and other interested entities.<sup>33</sup> A non-exhaustive list of parties that Cyren Call met or had contact with included: (1) AT&T, (2) Clearwire, (3) Council Tree, (4) Frontline, (5) Google, (6) David Grain, (7) ICO, (8) MSV, (9) Northrop-Grumman, (10) Qualcomm, (11) TerreStar, and (12) Verizon. These meetings appeared to serve multiple purposes - educating all interested parties about the D Block, obtaining feedback from potential bidders and vendors, and generally creating as much interest as possible in the D Block auction.<sup>34</sup>

*Final Meetings Prior to the Quiet Period.* As noted above, the BID v. 1.0 was released on November 15, 2007 and the final version 2.0 was released on November 30, 2007. During the period between the release of versions 1.0 and 2.0, Cyren Call had additional meetings with potential bidders. Of note for the purposes of this investigation was that on November 28, 2007, Keith Kaczmarek, David Knutson, and Tom Sidman of Cyren Call met with Verizon representatives to review the BID v. 1.0 document. The meeting lasted approximately half a day and involved various Verizon personnel (Don Brittingham, Mike Centore, Molly Feldman, and Bob Lashkari).<sup>35</sup> The meeting covered the relationship between the PSBL licensee and the D Block winning bidder. The estimated lease payment was also discussed at this meeting. Finally, on November 29, 2007, the same team with the addition of Bob Burkhardt of Cyren Call met with Tom Peters and Scott Wiener of Frontline. The meeting lasted about one hour. Cyren Call reviewed the BID and also discussed the estimated lease payment.

After November 30, 2007, neither Cyren Call nor PSST appears to have had any meetings with potential bidders. On December 4, 2007, Alan Caldwell of PSST sent an email to the Board of Directors of PSST and to the staff of Cyren Call stating that the Chief of PSHSB contacted “Chairman

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<sup>31</sup> Found at <http://www.frontlinewireless.com/uploads/File/PSST%20release%2011.30.07.doc> (last visited on April 10, 2008).

<sup>32</sup> Hundt Interview (early meetings with O’Brien held approximately in the end of 2006); O’Brien Interview (Hundt meeting in 2006); Brittingham Interview (June 22 & 28, 2007); McEwen Interview.

<sup>33</sup> Witness interviews of O’Brien and Knutson. Additionally, in a press release dated October 11, 2007, Cyren Call states that “representing the interests of PSST, has now begun conversations with parties potentially interested in bidding for the upper 700 MHz D Block license to partner with Public Safety in the creation of a nationwide, wireless broadband network.” <http://www.cyrencall.com//images/cc%20press%20release%2010%2011%2007%20final.pdf> (last visited on April 8, 2008).

<sup>34</sup> Knutson Interview (*e.g.*, many Mobile Satellite Services (MSS) operators had meetings with Cyren Call but he thought it was more to get information than to actually participate in the auction).

<sup>35</sup> Brittingham Interview; Knutson Interview; and O’Brien Interview.



Harlin McEwen and advised that as of close of business yesterday, December 3, 2007, the Public Safety Spectrum Trust Corporation and its agent, Cyren Call Communications, should have no further conversations/contacts with potential D Block bidders.”<sup>36</sup>

### C. Auction Timeline

*Auction Filing Window Opens.* On November 19, 2007, the filing window opened for the submission of Form 175 (Short Form) Applications to participate in Auction 73.

*Auction 73 Quiet Period Starts.* On December 3, 2007, at 6:00 PM ET the Short Form application filing window closed. The Commission received 266 short-form applications.<sup>37</sup> Pursuant to Section 1.2105(c) of the Commission’s rules, the anti-collusion prohibitions commenced on that date and would remain in effect until after the down payment deadline for the Quiet Period.

*Upfront Payment Deadline.* On January 4, 2008, at 6:00 PM E.T., all Auction 73 upfront payments were due from bidders with accepted applications. Frontline did not make an upfront payment. On January 14, 2008, the Commission released the *Qualified Bidder Public Notice*<sup>38</sup> listing the name of each of the 214 qualified bidders.

*Auction 73.* Auction 73 commenced on January 24, 2008, and closed on March 18, 2008. The provisionally winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid.<sup>39</sup> On March 20, 2008, the Commission decided not to re-offer the D Block license immediately in Auction 76 (the contingent auction, subsequent to Auction 73). The Commission stated that this decision would provide additional time to consider other options with respect to the D Block spectrum.<sup>40</sup>

*Down Payment Deadline/Quiet Period Ends.* The Auction 73 down payment deadline was on April 3, 2008. After that date, the anti-collusion rules prohibitions lifted.

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<sup>36</sup> Email from Mr. Caldwell, dated December 4, 2007, to the PSST Board of Directors (subsequently forwarded to PSHSB). As provided by the Commission’s rules, the Quiet Period began at 6:00 PM Eastern Time on December 3, 2007. 47 CFR §1.2105(c).

<sup>37</sup> Auction of 700 MHz Band Licenses: Upfront Payment Deadline Rescheduled for January 4, 2008; Mock Auction Rescheduled; Status of Short-Form Applications to Participate in Auction 73, *Public Notice*, DA 07-5030 (rel. December 18, 2007)(WTB).

<sup>38</sup> Auction of 700 MHz Band Licenses; 214 Bidders Qualified to Participate in Auction 73; AU Docket No. 07-157, *Public Notice*, DA 08-993 (rel. January 14, 2008)(WTB).

<sup>39</sup> Auction of 700 MHz Band Licenses closes; Winning Bidders Announced for Auction 73, *Public Notice*, DA 08-595 (rel. March 20, 2008)(WTB).

<sup>40</sup> Auction of the D Block License in the 758-763 and 788-793 MHz Bands, *Order*, FCC 08-91 (rel. March 20, 2008) (WTB).

**D. Ex Parte Meetings at the Commission.**<sup>41</sup>

*PSST/Cyren Call Meetings.* On November 5, 2007, Mr. Gurs of PSST and Messrs. Knutson, O'Brien, and Sidman of Cyren Call met with Derek Poarch (Chief of the PSHSB), Ms. Olsen (PSHSB Deputy Bureau Chief), Tim Peterson (PSHSB Chief of Staff), and Mr. Cohen (PSHSB Senior Legal Counsel) to discuss the NPSTC SoR.<sup>42</sup>

On November 13, 2007, Messrs. Knutson and Paull of Cyren Call met with Mr. Cohen regarding technical and non-technical aspects of the BID being prepared by PSST.<sup>43</sup>

On December 6, 2007, Messrs. Caldwell and McEwen of PSST and Messrs. Cox and O'Brien of Cyren Call, met with Messrs. Cohen, Peterson, and Poarch and Ms. Olsen of PSHSB, Ajit Pai, (Office of General Counsel ("OGC"), Associate General Counsel), David Horowitz (OGC Assistant General Counsel), Fred Campbell (WTB Bureau Chief), James Schlichting (WTB Deputy Bureau Chief), Roger Noel, (WTB Division Chief), Margaret Wiener (WTB Division Chief), and John Branscome (WTB Division Chief).<sup>44</sup> On December 13, 2007, Messrs. Caldwell and McEwen of PSST and Mr. Cox of Cyren Call, met with Mr. Cohen of PSHSB, Gary Michaels (WTB Deputy Division Chief), Paul Murray (WTB Legal Advisor), Ms. Wiener, and Mr. Schlichting of WTB.<sup>45</sup> Both meetings involved a discussion of the Commission's anti-collusion rules.

*Frontline Meetings.* On December 13, 2007, Mr. Hundt and Mr. Jonathan Blake of Frontline met with Chairman Kevin Martin, Aaron Goldberger (Legal Advisor to Chairman Martin), and Mr. Campbell (WTB Bureau Chief). The meeting was characterized as discussing "FCC's default provisions as they apply in the context of the upcoming NSA negotiations between the D Block high bidder and the PSBL."<sup>46</sup> A meeting on the same topic was held on December 14, 2007, when Mr. Blake met again with Mr. Campbell. Additionally on the same date, a meeting was held on the same topic when Gerard Waldron and Mr. Blake from Frontline met with Bruce Gottlieb (Legal Advisor to Commissioner Michael Copps).<sup>47</sup>

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<sup>41</sup> The record in the proceedings is replete with *ex parte* filings. The ones identified here were determined to be relevant to the investigation. Interested parties can search the commission's ECFS for a complete record of *ex partes* filed by PSST, Cyren Call, and/or Frontline.

<sup>42</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519810022](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519810022).

<sup>43</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519811781](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519811781).

<sup>44</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519817290](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817290).

<sup>45</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519818914](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519818914).

<sup>46</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519819091](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519819091).

<sup>47</sup> [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519819091](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519819091).

## II. SCOPE OF THE INVESTIGATION

As noted above, at the end of March 2008, Mr. Feld of MAP and PISC<sup>48</sup> sent a letter to Chairman Martin seeking, among other things, an investigation focused on “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.”<sup>49</sup> Similar allegations regarding meetings between Frontline and Cyren Call were also mentioned in press reports and “blogs” on the Internet.<sup>50</sup> In its letter, and in a subsequent interview with the author of the letter, PISC did not suggest any wrongdoing or violation of Commission rules on the part of Cyren Call and/or PSST. Nevertheless, in its letter PISC requested that the Commission “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.”<sup>51</sup>

The investigation focused on the role of Cyren Call as advisor to PSST, the meetings held between and among Cyren Call, PSST and potential bidders in Auction 73, and how, if at all, statements at these meetings (or Cyren Call’s role) affected the decisions of potential bidders in regard to Auction 73. In particular, the investigation inquired into whether Cyren Call had discussed with potential bidders a specific monetary amount for the lease payment mentioned in the BID and, if so, whether Cyren Call’s stated position affected subsequent decisions by potential bidders. The investigation did not look into the broad-ranging policy criticisms and suggestions made in the PISC letter of March 19, 2008 concerning the public-private partnership envisioned by the Commission in the *700 MHz Second Report and Order*. Those matters are under consideration by the Commission and thus conclusions by the OIG on broader regulatory policies would not be appropriate at this time.

Consistent with the focus of this investigation, investigators interviewed key players in Cyren Call, PSST, and Frontline. Investigators also interviewed knowledgeable individuals with other potential bidders, and knowledgeable individuals within the Commission. As noted in the chronology, the investigators determined that Cyren Call had, as alleged, provided potential bidders with an estimate of the annual lease payment PSST would seek in future negotiations. Therefore, the investigation addressed the question as to the extent to which this estimate or other actions by Cyren Call deterred bidding. To provide context for that analysis, the investigators sought information from potential bidders and other knowledgeable parties as to why certain entities decided not to participate in the auction and/or did not bid on the D Block license. The investigation limited this aspect to reporting the reasons given by Frontline and other potential bidders for declining to bid and avoided any forward-

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<sup>48</sup> PISC consists of, in alphabetical order: The Consumer Federation of America (CFA), Consumers Union (CU), CUWiN Foundation (CUWIN), 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.

<sup>49</sup> Letter from Harold Feld, Senior Vice President, Media Access Project, for PISC, to Chairman Martin, Federal Communications Commission, dated March 19, 2008 (“PISC Letter”).

<sup>50</sup> For example, <http://www.wetmachine.com/totsf/item/1022>, “Frontline Wireless Bid Failed Amid Investor Concern, Bid Rules,” Corey Boles (alleging that Mr. O’Brien informed Frontline in one meeting the winner of the D Block auction would be required to pay \$500 million over ten years to lease access to spectrum controlled by public safety in order to build the wireless broadband network).

<sup>51</sup> PISC Letter.

looking policy analysis.

### **III. SUMMARIES OF WITNESS INTERVIEWS**

The OIG investigatory team interviewed a number of individuals with regard to whether the failure of the D Block to attract bidders was related to any behavior of Cyren Call, and whether other reasons existed that caused or contributed to causing the lack of bidders for the D Block. Those individuals included Harold Feld of MAP; Morgan O'Brien, Thomas Sidman, and David Knutson of Cyren Call; Alan Caldwell and Harlin McEwen of PSST; Reed Hundt, Scott Wiener, and Tom Peters of Frontline; Don Brittingham of Verizon; Brian Fontes of AT&T; and Dean Brenner of Qualcomm. Additionally, the investigatory team interviewed Jeff Cohen and Erika Olsen of the FCC's PSHSB. Please note that the interview summaries below are largely expressed in the words of the interviewees.

#### **A. Harold Feld, Senior Vice President, Media Access Project:**

Mr. Feld was interviewed on March 27, 2008. Mr. Feld said that he wrote about Frontline dropping out of the auction on his blog ([www.wetmachine.com](http://www.wetmachine.com)). He received calls and emails from three sources who told him the same story about a meeting between Mr. O'Brien and unknown Frontline people (including investors) regarding the potential network sharing agreement and related costs involving the future D Block winner. Mr. O'Brien made a lot of demands regarding the shared public/private network during the meeting. In particular, Mr. O'Brien discussed a fee of \$50 million per year for ten years that the D Block winner would have to pay to have access to the public safety spectrum. Mr. Feld frequently acknowledged that he had no direct knowledge of Frontline's reasons for dropping out of the auction and was only speculating. Other reasons he posited were: the market, the high reserve price, the vague business model, the project size, and the potentially difficult network negotiations with Cyren Call. Mr. Feld said his sources all believed that it was the meeting between Mr. O'Brien and the Frontline backers that caused Frontline to back out.

Mr. Feld does not know who was present during this alleged meeting or when it took place. Mr. Feld stated his anonymous sources were not associated with the bidders, were not present at the alleged meeting, and obtained their information second hand. Mr. Feld did not hear any information regarding any other potential bidders meeting with Cyren Call. Mr. Feld said he does not believe that Mr. O'Brien talked to Frontline with the intention of scaring it off from bidding. Confirming his statement in the March 19, 2008 letter, Mr. Feld was not able to state whether this alleged meeting between Mr. O'Brien and Frontline was improper or violated any FCC rules.

#### **B. FEDERAL COMMUNICATIONS COMMISSION**

##### **Public Safety and Homeland Security Bureau**

##### **1. Jeff Cohen, Senior Legal Counsel, PSHSB:**

Mr. Cohen was interviewed on March 28 and again on April 3, 2008. Mr. Cohen stated in these

interviews that he did not know anything about a meeting between Mr. O'Brien and Frontline; although Mr. O'Brien commented on the allegation at the recent March 24, 2008 meeting with the FCC. At this meeting, Mr. O'Brien seemed anxious to give his side of the story once the anti-collusion rule had lifted. Mr. O'Brien briefly stated that the allegations that he demanded \$50 million per year for ten years were not accurate and that he thought the press had misrepresented the situation. Mr. O'Brien did not deny that he talked about costs and even suggested that he might have even thrown some numbers out. Mr. O'Brien stressed that every aspect of Cyren Call's business plan was open to negotiations with the D Block winner.

Mr. Cohen attended a NPSTC convention in Atlanta from November 12-14, 2007. At that meeting, he thinks he recalled being shown a document by Cyren Call officials. He does not recall the names of the Cyren Call officials. He was not sure what the document was, but remembered it contained a particular number that was discussed. He did not recall it as a lease payment, but thought perhaps it was an upfront payment. Mr. Cohen stated that he may have advised that this number should not be contained in the document. He did not recall checking the matter with others at the FCC. Mr. Cohen did not recall advising Cyren Call that it could tell potential bidders about the number. He said he thought it unlikely that he would have given "permission" of this sort. However, he does not think this would have been problematic, as long as the conversations were outside the Quiet Period as defined by the Commission's anti-collusion rules.

## **2. Erika Olsen, Deputy Chief, PSHSB:**

Ms. Olsen was interviewed on April 4, 2008. Ms. Olsen recalled that Mr. Cohen called her from a NPSTC convention and reported that he had been given a draft of the BID document that contained a \$50 million lease payment number. She thought it was \$50 million, but also said she was not entirely sure whether she was remembering this number correctly or instead recalling it from numerous recent press accounts. Mr. Cohen reminded Cyren Call that there would be negotiations for the NSA following the auction with the winning bidder; that the FCC will be the final arbiter of what is reasonable in these negotiations; that it might not be a good idea to prejudice those negotiations or influence bidders by placing an actual number in the BID; and that it might appear that the FCC had endorsed this number when it had not. Cyren Call was advised (although not actually instructed) to take the number out. Her belief is that she and Mr. Cohen agreed on this message and that he then conveyed it to Cyren Call. She did not recall who Mr. Cohen spoke to at Cyren Call. She did not recall any discussion concerning whether Cyren Call could convey this number verbally although she did not perceive a problem with Cyren Call's doing so.

## **C. FRONTLINE WIRELESS**

### **1. Reed Hundt, Vice Chairman, Frontline:**

Mr. Hundt was interviewed on April 1, 2008. Mr. Hundt stated that Frontline had many problems with the D Block auction that came from the FCC's *700 MHz Second Report and Order*, oral and written representations from PSST and Cyren Call, and the auction process in general. Some of Frontline's problems with the order were the build-out requirement, control given to the PSBL licensee on system

requirements, and the bankruptcy rules. The order also did not apply the open rules (proposed by Frontline) to the D Block, but to the C Block instead. Mr. Hundt thought this would create more competition for Frontline on the D Block while also making it harder to attract investors. Frontline also had issues with the technical and business requirements that PSST compiled in the NPSTC SoR and the two versions of the BID documents. The requirements were very specific and sometimes unreasonable. The strict requirements made the D Block appear more expensive and riskier than had been previously understood by Frontline.

In meetings in the fall of 2007, Mr. O'Brien told Mr. Hundt he wanted to create a Mobile Virtual Network Operator ("MVNO") for Cyren Call which would allow Cyren Call to purchase spectrum from Frontline at wholesale prices and sell it to the public safety community for a higher price to gain a profit for Cyren Call. Mr. O'Brien also stated at the meeting that it was possible that the total of the network costs would be between \$10 and \$12 billion which was about \$5 to \$7 billion more than the cost to build a commercial network, according to Mr. Hundt. Cyren Call officials explained that the target set of customers would not be limited to first time responders, but would also include all critical infrastructure people which increased the customer group from the 3 million people Frontline had estimated to 13 million people, according to Cyren Call's estimates.

The next issue that arose was that Cyren Call released information which stated that the D Block licensee would be responsible for making annual lease payments to PSST for a period of ten years for access to the public safety spectrum. Mr. Hundt learned from some unknown parties that \$50 or \$55 million was the quoted, not demanded, lease payment amount. He never heard the information first hand from PSST or Cyren Call. PSST first mentioned a lease payment in the BID v. 2.0, but did not specify an amount in any documents. The problem for Frontline investors was the unknown factor of the lease payment and knowing that the figure would not be resolved until negotiations concluded after the auction. The lease payment, however, was not "the straw that broke the camel's back" in Frontline's decision not to bid on the D Block.

The D Block winner was not guaranteed the D Block license just because it placed the highest bid. The license was contingent on a successful negotiation with PSST that would follow the auction and payment to the FCC. If the two entities were not satisfied over the details and costs, the FCC would settle any disputes. If negotiations could not be settled and there had to be another auction, the D Block winner from the first auction would have to pay a fine equal to the difference between the first auction's winning bid and the second auction's winning bid. In addition to the fine, the first D Block winner would have to forfeit 10 percent of its bid amount. The possibility of a very expensive fine in addition to not being granted the D Block license was "very bad for investors." Frontline met with the FCC often to discuss its problems with the default penalty. Mr. Hundt did not identify the Commission staff with whom Frontline met.

Frontline's decision not to bid on the D Block was made on January 1 or 2, 2008. Frontline was holding out for as long as possible to see if it could raise enough money for the minimum bid. The issues most frequently discussed among the Frontline investors were the build-out requirement, the unknown nature of the lease payments, and the penalty process. Mr. Hundt did not think that Mr.

O'Brien was acting in bad faith or purposefully misrepresenting PSST when he was meeting with potential bidders prior to the auction. Rather, Mr. Hundt thought that Mr. O'Brien's approach was "candid, audacious, and aggressive," but that in the end his claims were all made to eventually benefit the public safety community. He saw Mr. O'Brien's ideas for the shared network as unreasonable from a commercial perspective and in terms of costs. Mr. Hundt was clear that he was not accusing Cyren Call or PSST of an unlawful act. The way the auction was set up did not work with Frontline's ideas.

## **2. Scott Wiener, Senior Vice President, Partner Development, Frontline:**

Mr. Wiener was interviewed on April 4 and again on April 10, 2008. Mr. Wiener stated that he met with investors from September through December 2007. The potential partners wanted to know how much it would cost to build the network, in addition to the size of the addressable market, and how many customers would use the network. There were a lot of unclear issues relating to the costs for the D Block licensee. Frontline discussed the technical requirements of the network (provided by NPSTC in the SoR) and then later the business requirements of the network (provided by PSST in the BID documents) at meetings with Cyren Call and PSST. These meetings were supposed to help Frontline get a better understanding of the network, but they did not really talk through the issues since a negotiation could not happen until after the auction had concluded.

On November 29, 2007, Mr. Wiener and Mr. Peters met with Mr. Sidman, Mr. Kaczmarek, Mr. Knutson, and Mr. Bob Buckles<sup>52</sup> from Cyren Call. Mr. O'Brien might have stopped by the meeting, but he was not considered an attendee. Mr. Sidman led the meeting and discussed the lease payment costs. This was the first time Mr. Wiener had attended a Cyren Call meeting where this was discussed. According to Mr. Wiener, Mr. Sidman explained that the lease payment was estimated to be \$55 million per year for the length of the license. They were just providing information and made it clear that the amount was up for negotiation. Frontline tried to explore how focused Cyren Call was on the \$55 million amount. Mr. Sidman said that PSST business plan called for that amount, but that they were open to different arrangements for getting that amount. Mr. Sidman also stated that they had intended to put this amount in the BID v. 2.0, but that the FCC asked them not to specify an amount in the document. Mr. Wiener thought the lease payment was just one of the problems that was "keeping investors up at night." Mr. Wiener thought that the biggest concerns for Frontline's investors were the level of uncertainty about the negotiation results with its unknown costs (including the lease payment), the default penalty, and the very specific and costly requirements.

## **3. Tom Peters, Senior Director, Public Safety & Regulatory Engineering, Frontline:**

Mr. Peters was interviewed on April 8, 2008. Mr. Peters stated that he is a member of the Frontline Technology Team. He met with Cyren Call on a few occasions to discuss the NPSTC requirements and the BID documents. As the process progressed, some of the technical requirements for the network got less specific and less firm while others became recommendations rather than requirements. The level of uncertainty increased about the outcome of the negotiations and how much

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<sup>52</sup> Although Mr. Wiener remembered Mr. Buckles attending the meeting for Cyren Call, Cyren Call clarified that Mr. Bob Burkhardt attended the meeting, and that Cyren Call does not have an employee by the name of "Buckles."

the shared network would cost the D Block licensee.

According to Mr. Peters, on November 29, 2007, Mr. Peters and Mr. Wiener met with Cyren Call's Mr. Sidman, Mr. Kaczmarek, Mr. Knutson, and Mr. Buckles<sup>53</sup> to discuss the BID v. 2.0 and the differences from the first BID document. Mr. Wiener asked about the ballpark figure for the lease payment that was mentioned in the second BID document. Mr. Sidman responded that the annual lease payment amount was \$55 million for a period of ten years and that they had calculated that number from PSST's operating costs. The \$55 million was a starting point which was subject to change and negotiation. The first payment would be due at the signing of the NSA.

At the meeting, Mr. Sidman also discussed the addressable market stating that the customer base could be as high as 13 million people including 3 - 4 million first time responders with heavy network usage and another 9 million other emergency personnel with a lower level of usage. Cyren Call would have priority over the public safety group and leave the commercial users for the D Block licensee.

After the meeting, Frontline discussed how it thought that the additional 9 million public safety users would greatly increase the network's traffic which would negatively affect the value of the commercial side. Mr. Peters believed that Frontline thought that the FCC would back them up on limiting the number of public safety users. Investors, however, was still concerned about the unknown factors that would greatly affect the network. Mr. Peters thought investors were also concerned with Cyren Call's role in the network (especially with Cyren Call's plan to be a MNVO), whether Frontline would be able to successfully negotiate with Cyren Call, and the network's high level of uncertainty and unknown costs.

#### **D. PUBLIC SAFETY SPECTRUM TRUST**

##### **1. Harlin McEwen, Chairman, PSST:**

Mr. McEwen was interviewed on April 8, 2008. Mr. McEwen stated that before the start of the auction, PSST and Cyren Call frequently met with potential D Block bidders. They were "not restricted in any way" in what they could say in these meetings. Mr. McEwen said PSST's whole purpose was to encourage bidders to bid. PSST met with AT&T, Frontline, Google, and Verizon; although Frontline was the only company that made a public statement that it intended to bid on the D Block. Mr. McEwen met with Frontline on many occasions. Qualcomm, which was the only company that bid on the D Block, never met with Mr. McEwen. The FCC told Mr. McEwen on or about December 3rd that PSST and Cyren Call could not have conversations with potential bidders after the Quiet Period commenced. PSST obeyed the rules and refrained from discussions with potential bidders during the Quiet Period.

Mr. McEwen did not attend any meetings in which the lease payment figure was mentioned. Mr. O'Brien told Mr. McEwen that PSST's business plan included a \$50 million lease payment (to cover PSST's operating costs) from the D Block licensee in the first year. This amount would have been

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<sup>53</sup> See the preceding footnote.



partially based on the winning bid amount and the type of company that won the D Block. Mr. McEwen stated that the lease payment number was “fuzzy” because at that point there were unknown costs involving an unknown partner. In the first year when the network was not built there would not be any revenue. In later years as revenue grew, the lease payment amount might not be as high as \$50 million. Any excess money from the lease payments would go back to public safety users or to the D Block licensee. Cyren Call was not going to be paid by PSST based on revenue, but just for its services. The \$50 million amount was not set in stone as an absolute requirement. Mr. O’Brien was in no position to demand this amount since the amount was up for negotiation at the end of the auction. Mr. McEwen disagreed with Mr. O’Brien’s decision to even share this number with potential bidders.

Mr. McEwen stated that he was surprised that Frontline did not bid since it had praised the November 30<sup>th</sup> BID in a press release. There were, however, problems evident early on. Prior to the auction, Frontline frequently met with PSST and was continuously trying to push PSST into negotiation-like conversations as if they were already the D Block licensee. Mr. McEwen thought Frontline’s demands were unreasonable. Mr. McEwen thinks the biggest issue with Frontline not bidding was that they were just not able to raise enough money. Mr. McEwen thought that once Frontline withdrew from the auction, the major carriers were no longer threatened by a possible competitor and perhaps lost its interest in the D Block. All of the potential bidders wanted less requirements and less cost which is why Mr. McEwen thought the C Block was more successful than the D Block in the end.

## **2. Alan Caldwell, Secretary-Treasurer, PSST:**

Mr. Caldwell was interviewed on April 8, 2008. Mr. Caldwell stated that PSST had numerous discussions with Cyren Call. These discussions involved determining the best possible approach to potential bidders and those that PSST and Cyren Call thought should become potential bidders, but had not shown an interest in the D Block auction.

Mr. Caldwell also met with members of the wireless industry regarding the D Block including AT&T, Clearwire, Frontline, and Verizon. With regard to Mr. Caldwell’s meeting with Verizon, Mr. Caldwell stated that Verizon clearly wanted to get a feel for what a public safety broadband network would look like. PSST did most of the talking at the meetings with Verizon and discussed preemption, 4G technology, hardening of sites (a public safety requirement), business models - how the public safety network would operate, who would manage the database, who would manage the operation centers, what technology would be used, what were the build-out requirements, when would it be expected, and how satellite would be incorporated into the network. With regard to PSST’s meetings with AT&T, Clearwire, and Frontline, the meetings were informational - PSST was trying to find out what those companies had in mind, and they were trying to find out what was in PSST’s mind.

On the issue of the BID document, spectrum lease payments, and the inclusion of a specific lease payment amount in discussions between Cyren Call and potential bidders, Mr. Caldwell stated that he was aware that a number was being “bandied around” as the BID was being put together. Additionally, PSST made sure that they got feedback from the FCC regarding the BID document, although they did not get it through official channels. Mr. Caldwell stated that this was done because PSST had to know that the FCC would be proud of what PSST did, so PSST could not afford to have

the document come out and have someone at the FCC say “what were you thinking?” According to Mr. Caldwell, the first feedback from the FCC was with respect to the SoR. Mr. Derek Poarch and Mr. Cohen of the FCC’s PSHSB communicated to PSST that the language in the SoR was too much “thou shalt” and should be toned down.

As to the impact of the amount of the estimated spectrum lease payment or any other items in the BID v. 1.0 on potential bidding activity, Mr. Caldwell stated that between the release of the first and second BIDs, PSST and Cyren Call were of a like mind that they needed to get as much information as possible to potential bidders as to whether there were any drop-dead items and it appeared to Mr. Caldwell that there were none. Mr. Caldwell stated that everyone wanted to know whom the public safety people would be, how big the group would be, and did the definition of public safety users include critical infrastructure. Some of them may have disagreed with PSST’s approach, but the BID set forth that the public safety customers were the ones that PSST wanted to manage—customer service, provision of devices, achieving what the public safety customers need, and being generally responsible for the public safety users. Mr. Caldwell was not aware that any potential bidders found anything in the BID that would have caused them to avoid the auction. Mr. Caldwell stated that he was nearly certain that Frontline would participate in the D Block auction because they set up its business to do just that. He was reasonably certain that AT&T or Verizon would bid.

## **E. CYREN CALL**

### **1. Morgan O’Brien, Chairman, Cyren Call:**

Mr. O’Brien was interviewed on April 2, 2008. Mr. O’Brien stated that Cyren Call, under the direction of PSST, participated in the NPSTC conference, created the BID to help inform potential bidders, and sought to stir up as much interest among potential bidders for the D Block spectrum as possible. To this end, Mr. O’Brien stated that he and others from Cyren Call contacted potential bidders and entities that Cyren Call felt “ought to” be interested in bidding and met with Verizon and Frontline after the release of BID v. 1.0.

Mr. O’Brien also stated that he believed that Mr. Knutson had received guidance from Mr. Cohen of the PSHSB before the release of BID v. 1.0 on the issue of including the estimated spectrum lease payment amount in the BID. Mr. O’Brien understood that Mr. Cohen discussed this with other members of the PSHSB, and subsequently told Mr. Knutson and Mr. Paul that the number should be removed from the document and that Cyren Call was allowed to discuss the estimated amount in meetings with potential bidders.

As to why the D Block auction failed to attract bidders, Mr. O’Brien stated that he was dismayed that Frontline did not bid, but not too surprised that others did not. From Mr. O’Brien’s perspective it appeared that Frontline was enthusiastic about the auction, and he cited Frontline’s release of a November 30, 2007 press release commending PSST. With regard to other potential bidders, Mr. O’Brien was less surprised that there was not a lot of activity. He said that during the lead-up to the Quiet Period, he did not feel like many of the potential bidders were asking the questions that would demonstrate a heightened level of interest in the auction. He stated that initially he thought perhaps

AT&T and Verizon would compete in another area of the auction for spectrum and, then, whoever lost in that area would find the D Block spectrum more attractive. However, when AT&T announced on October 9, 2007 that it had purchased another telecommunications entity, Mr. O'Brien's hope receded because he believed that AT&T's purchase made an AT&T-Verizon spectrum bidding contest less likely.

As to the impact of the disclosure to potential bidders of the estimated spectrum lease payment amount, Mr. O'Brien did not believe that this significantly impacted the D Block bidding activity. According to Mr. O'Brien, neither Frontline nor any other potential bidder questioned Cyren Call as to the \$50 million dollar estimate. In the BID documents and in private discussions, Cyren Call made clear that this figure was subject to negotiation. Mr. O'Brien opined that the default bidder penalty provision was likely a problem for the potential bidders and stated that Cyren Call, itself, opposed the default bidder penalty provision.

**2. Thomas Sidman, Executive Vice President, Business Processes, Cyren Call:**

Mr. Sidman was interviewed on April 2, 2008. Mr. Sidman recounted that while attempting to drum up interest in the D Block, he became aware that some of the people whom he contacted were simply not interested. Mr. Sidman also stated that the \$50 million estimated payment amount was mentioned in the November 29, 2007 meeting between Mr. Knutson of Cyren Call and Mr. Wiener and Mr. Peters of Frontline. It was presented to Frontline as a yearly payment for each of the ten years of the license term. He also said that this number was presented to Frontline as being subject to negotiation.

**3. David Knutson, Executive Vice President, Development, Cyren Call:**

Mr. Knutson was interviewed on April 7, 2008. Mr. Knutson stated that while attending the NPSTC conference on November 13, 2007 in Atlanta, Georgia, he gave Mr. Cohen the draft BID for any feedback PSHSB might have. According to Mr. Knutson, Mr. Cohen took the draft and on November 14, 2007 discussed with Mr. Knutson removing the \$55 million figure from the document before communicating it to potential bidders. Mr. Knutson said that Cyren Call removed the dollar amount from the draft BID, but he asked whether Cyren Call could mention an actual dollar figure during its discussions with potential bidders. During his interview on this matter, Mr. Knutson stated that Mr. Cohen agreed to Cyren Call's request.

Mr. Knutson stated that Cyren Call met with Verizon on November 28, 2007 and with Frontline on November 29, 2007. During his interview with the OIG, Mr. Knutson stated that in both meetings Cyren Call communicated that it was PSST's position, subject to negotiation, that the spectrum lease payment would be \$50 million per year over the ten-year term of the license. Mr. Knutson stated that neither Verizon nor Frontline provided much feedback during the meetings. Verizon had some questions about whether there would be two lease payments due during the first year but no specific questions on the amount. He did not recall any specific comments about the lease payments from Frontline.

## F. VERIZON WIRELESS

### 1. **Don Brittingham, Director of Wireless Policy, Verizon:**

Mr. Brittingham was interviewed on April 10, 2008. Mr. Brittingham stated during this interview that Verizon was interested in supporting the public safety community and to that end, met several times during the summer and fall of 2007 with members of the public safety community as well as with Cyren Call.<sup>54</sup> Additionally, Mr. Brittingham participated in the October 2007 NPSTC conference in Boulder, Colorado at which the SoR was vetted.

Mr. Brittingham explained during his interview that Verizon had a number of issues with regard to the D Block auction. First among those issues was the uncertain nature of the post-auction negotiation process between the auction winner and PSST as to the NSA. It appeared to Mr. Brittingham that should these negotiations fall through, the D Block auction winner would be liable for a default payment under FCC auction rules. Moreover, the potential failure of negotiations might also mean that the D Block auction winner missed a chance to win other spectrum licenses in Auction 73 because of the allocation of limited financial resources to the D Block that would have been more appropriately allocated elsewhere.

Mr. Brittingham identified additional issues with the D Block. He stated his belief that the 700 MHz rules required the auction winner to build a costly nationwide network. He also stated that the spectrum would be subject to “ruthless preemption” under the proposed priority access regime proposed by PSST. Thus, Mr. Brittingham presented the unattractive scenario of a very costly network with diminished commercial value.

Another issue of uncertainty mentioned by Mr. Brittingham was the definition of “public safety provider.” Mr. Brittingham considered the definition of public safety provider to be unsettled. Without knowing with certainty how “public safety provider” was to be defined, measuring the impact of the creation of the public-private nationwide network was not possible and, thus, difficult to account for in a business model.

Regarding the issue of the impact of announcing the estimated spectrum lease payment amount, Mr. Brittingham stated that Cyren Call informed him of the \$50 million payment at a meeting on November 28, 2007. As he understood this, Cyren Call stated that it was its position, subject to negotiation, that the winning bidder for D Block would make spectrum lease payments of \$50 million a year for each of the ten years included in the license. He further stated that, although this figure was significant, he did not believe that Verizon Wireless ever got to the point of evaluating the appropriateness of this amount because of the other issues and uncertainties surrounding the D Block.

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<sup>54</sup> Verizon met with Harlin McEwen both before and after Mr. McEwen and others incorporated PSST.

## **G. QUALCOMM INCORPORATED**

### **1. Dean Brenner, Vice President, Government Affairs, Qualcomm:**

Mr. Brenner was interviewed on April 10, 2008. Mr. Brenner said that he was aware of several discussions that Qualcomm had with Cyren Call regarding the D Block (none of which took place during the Quiet Period). During these discussions, Qualcomm never discussed an intention to bid on the D Block or even participate in the auction. Cyren Call never encouraged Qualcomm to bid on the D Block. Qualcomm's main purpose in these discussions was to market its technology to Cyren Call, as the agent for public safety. Mr. Brenner said Qualcomm placed a bid on the D Block partly to preserve eligibility to bid on the D Block or another block, and partly because it was interested in ensuring that the D Block spectrum was used. Qualcomm was interested in providing wireless solutions to public safety and wanted its technology used with the shared network. At the time, Qualcomm had not decided whether it would continue to bid on the D Block or use its bidding units elsewhere if they were outbid.

Qualcomm decided not to withdraw its bid in order to keep its options open until the last moment. In the end, Qualcomm decided not to bid against itself (as it was the only bidder) on the D Block for several reasons. These include, but are not limited to, its conclusion that the build-out requirement was too onerous, and the fact that it was far more expensive than any of the current networks.

## **H. AT&T**

### **1. Brian Fontes, External Affairs, AT&T:**

Mr. Fontes was interviewed on April 11, 2008. Mr. Fontes said that AT&T met with Cyren Call twice and PSST twice in the period from September through early October 2007. AT&T wanted to find out more about PSST and its ideas for the network. There were no discussions about the NPSTC or BID documents. Mr. Fontes' role at these meetings was to gain information about the D Block. He was not involved in the auction decision-making for AT&T. At the time AT&T met with Cyren Call, Cyren Call had not been chosen as the advisor of PSST. Cyren Call explained that it intended to be an MVNO and act as a reseller for the network, and that it would negotiate the rates of the network with the D Block winner following the auction. Lease payments were not discussed at any of these meetings. AT&T, in the OIG's opinion, did not express any views that were inconsistent with the views of other interviewees in this investigation.

## **IV. DISCUSSION**

This section addresses the questions identified earlier in the Scope of Investigation, in light of the uncontroverted facts collected and the witness interviews that were conducted during the course of this investigation.

**A. Question 1: Alleged Meeting With Morgan O'Brien and Alleged Statements to Frontline.**

Concerning the alleged meeting between Mr. O'Brien of Cyren Call and Frontline and the statements alleged in press reports regarding the \$50 million lease payment estimate, the investigation revealed the following:

On November 29, 2007, a meeting was held between Cyren Call and Frontline at which statements closely matching the allegation were in fact made. Mr. O'Brien was not the speaker. Mr. O'Brien was present only at the start of the meeting to "shake a few hands." The speaker who uttered the statements appears to have been Mr. Sidman. Also present at the meeting for Cyren Call were Mr. Kaczmarek and Mr. Burkhardt. Present for Frontline were Mr. Wiener and Mr. Peters. PSST was not represented.

At the meeting, Cyren Call discussed various aspects of what would be released the next day as the second public version of the BID. In discussing Section 3.5, Spectrum Lease Payment, Cyren Call said that PSST's business plan contemplated an initial \$50 million lease payment. Cyren Call also stated that PSST's plan contemplated payments of \$50 million per year over a ten-year period. All witnesses agreed that these statements were not couched as a demand, but rather as a reflection of what was contained in the PSST business plan. Both Frontline representatives said they sensed a high degree of flexibility and a willingness to negotiate this number when the time came.<sup>53</sup>

With respect to the ten-year duration of the payment, Mr. McEwen of PSST stated that PSST's business plan did not entail a set payment from the D Block winner over 10 years, but that future years' payments could change for a host of reasons. Mr. McEwen was not at the November 29th meeting. However, Mr. Wiener, Frontline's business consultant who attended the meeting, clearly recalled that Cyren Call suggested that the D Block winner might not be responsible for the entire payment over the ten-year period, but that Cyren Call was open to "alternative ways that the payment could be delivered," including the possibility of receiving a portion of it from public safety customers.

Mr. Hundt, one of the Frontline founders and a key Frontline decision-maker, stated that, following the November 29 meeting, Frontline and its investors did not interpret the Cyren Call statements concerning the lease payment as a hard and fast demand. Instead, as will be discussed further below, the possibility of an uncertain future lease payment was only one of many uncertainties that troubled Frontline's investors. The \$50 million number was never shown in writing to Frontline or other potential bidders.

It appears that Cyren Call's statements to Frontline on the lease payment issue were intended to be primarily informational, and also to mark the starting point for future negotiations on the issue. This was the last meeting before the release of BID v. 2.0 and in fact the last meeting Cyren Call had with Frontline before the start of the Quiet Period. Many prior meetings were held between the entities in which various sorts of information were provided; for example, information concerning specifications

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<sup>53</sup> As discussed elsewhere, the FCC's rules contemplated negotiations over the NSA between the PSBL licensee and the D Block winner. These negotiations would not commence until the auction concluded.

for the type of network PSST and Cyren Call believed would have to be built by the D Block winner to serve public safety customers. It appears that the Commission's staff was aware that Cyren Call might share its lease payment estimate with potential bidders and did not express a concern.

The OIG, therefore, concludes that statements reflecting a \$50 million payment per year over a ten-year period, were in fact made to Frontline.

**B. Question 2: Whether Cyren Call's Statements Deterred Bidding in the D Block.**

The reasons for Frontline's and others' decisions not to bid for the D Block were somewhat complex. Nonetheless, we were able to reach several definite conclusions.

**1. Frontline**

Frontline appears to have been the party most interested in bidding on the D Block, if it could resolve its many concerns. Frontline met with Cyren Call and PSST frequently in an effort to resolve those concerns. Frontline's greatest overall concern was with the uncertainty it would face if it won the D Block auction. This uncertainty manifested itself in many ways and, from the standpoint of investors, translated into a wide range of risks that Frontline would face. The major areas of uncertainty and risk can be summarized as follows:

*Bid Default Rule/Negotiating Leverage.* One major concern was that Frontline would win the auction, but then not be able to negotiate a satisfactory NSA with Cyren Call. If Frontline were unwilling to proceed along the lines demanded by Cyren Call, if the FCC took Cyren Call's side of the dispute, and if Frontline then opted to pull out, it was not clear whether, or to what extent, the FCC would apply its bid default rule. The FCC had reserved any decision concerning potential application of this rule. One possibility, though, was imposition of a penalty and holding Frontline liable for the difference between its bid and a subsequent lower winning bid. This could translate to a penalty of many millions of dollars.<sup>56</sup>

Because of this potential indeterminate regulatory penalty, Frontline believed that Cyren Call would have much greater leverage in the NSA negotiations. Added to this disparity in perceived leverage was Frontline's fear that the FCC would have a tendency to support the perceived needs of the PSBL licensee in the interests of public safety. The assurance that the FCC would monitor the negotiations, require good faith, and be the final arbiter of disputes was small comfort to Frontline, as it faced no set parameters as to what Cyren Call could demand in good faith. This left its investors facing a significant and uncertain financial exposure with respect to the amount bid and a potential penalty.

*System Specifications, Cost, and Viability.* Frontline faced considerable uncertainty as to what would be required to finance the build-out of the nationwide public safety network contemplated in the FCC's

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<sup>56</sup> The FCC has applied the rule in the past. See, e.g., *BDPCS v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003) (upholding application of two-part bid default rule, resulting in \$67 million penalty).

orders. It did financial modeling and met often with PSST and Cyren Call in an effort to ascertain what would be required. However, Mr. Hundt explained that as public documents were released showing the system expectations of PSST and Cyren Call, and as meetings between the entities to discuss these system specifications progressed, Frontline became more and more concerned with the system requirements that it thought PSST and Cyren Call would demand, with the costs that these would entail, and with the business viability of the venture.

*Quality of Service.* It became apparent to Frontline that PSST regarded the quality of service necessary for public safety to be much higher than that considered acceptable for commercial use. This was borne out by Mr. McEwen, who freely acknowledged that emergency responders could not be subject to the kind of interruption and loss of service experienced by the typical cell phone user. A system impervious to such interruptions would be much more expensive to build.

*Preemption.* It became clear that the groups that, in PSST's view, fell into the public safety user category were much larger than Frontline had originally anticipated. This would mean that commercial users on the D Block might be subject to the very kinds of service interruptions – during periods of peak preemption – deemed unacceptable to public safety. Again, Mr. McEwen confirmed Frontline's perception with respect to the groups PSST sought to serve and provide with accompanying preemption rights.

*Population coverage/build-out.* It became clear that PSST expected the D Block winner to build out the system to reach a higher percentage of the nation's public safety users than Frontline had anticipated. Mr. Hundt explained that the costs necessary to reach only a few additional users would entail a vastly disproportionate additional cost.

Without criticizing these views held by PSST/Cyren Call, Mr. Hundt explained that the realization gradually dawned on Frontline that the nationwide shared network the D Block winner would likely have to build would be far more costly, and yet perhaps less reliable in terms of commercial use, than Frontline had first thought. Of course, these things were all subject to negotiation, but as explained above, Frontline felt it would be at a disadvantage in such negotiations.

*Revenues.* Another major concern was over projected revenues. Although the goal was to build a network capable of reaching all public safety users, there was no requirement and no guarantee that any users would actually sign up to use the system. Nor was there any guarantee that commercial users would sign on. Frontline would be competing against the other major providers.

*Cyren Call as MVNO.* Finally, Frontline was concerned with Cyren Call's anticipated role as the MVNO,<sup>57</sup> the sole contractor with public safety users. Unlike PSST, Cyren Call was a for-profit company. Frontline was generally concerned that it might be unable to reach all interested public safety users.

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<sup>57</sup> Cyren Call intended to serve as a Mobile Virtual Network Operator ("MVNO"), which would allow it to purchase spectrum from the D Block licensee at wholesale prices and sell it to the public safety community.



In context of the major uncertainties and risks described above, the OIG concluded that the lease payment was just one of many concerns for Frontline. While the lease payment estimate provided on November 29, 2007 was not viewed favorably by potential investors, it was not seen as an absolute demand, and certainly was not regarded as a deal-breaker, according to Mr. Hundt. Cyren Call's statements regarding lease payments did not deter Frontline from continuing to pursue its strong interest in bidding on the D Block after November 29, 2007. Frontline attempted to come to grips with the many concerns described above until just before the start of the auction, but decided just before the deadline for upfront payments, along with its investors, that the risks and uncertainties were too serious to justify its participation in the auction.

The OIG, therefore, concludes that Cyren Call's statements regarding a \$50 million per year payment was not the deciding factor in Frontline's decision not to bid on the D Block, but was merely one of many concerns it had regarding the auction.

## **2. Other Potential Bidders in the D Block**

The statements regarding the expected lease payment were made to only one other potential bidder in the D Block – Verizon. Verizon was given the \$50 million estimate on November 28, 2007. It is clear that the statements did not deter Verizon from bidding in the D Block auction. Verizon had all but decided not to bid by the end of November 2007, and never evaluated the lease payment amount carefully. The statements regarding the expected lease payment were not made to AT&T, and did not deter AT&T from bidding on the D Block.

The OIG, therefore, concludes that the lease payment issue by itself did not affect potential bidders' decisions with respect to the D Block, but rather that these entities' decisions were made for many of the same reasons given above for Frontline's decision not to participate in the D Block.

### **C. Question 3: Rules Potentially Violated.**

The FCC advised all parties, both formally and informally, of the need to observe the anti-collusion rule<sup>58</sup> by refraining from all communications after December 3, 2007, the start of the Quiet Period and until that period ended.<sup>59</sup> We found no evidence of any communications among the entities during this period, even when certain parties were anxious to set the record straight as to the allegations investigated and reported on here. On the basis of the information before us, we conclude that there is no evidence of any violation of the FCC's anti-collusion rule.

The rule constraining parties to negotiate the NSA in good faith<sup>60</sup> also does not appear to be implicated. The rule was intended to take effect after the auction had produced a winner. Moreover, the statements that were made do not appear to have been made in bad faith, nor could they have prejudiced later good faith negotiations. Cyren Call complied with the FCC's one informal request in this regard by

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<sup>58</sup> 47 CFR §1.2105(c).

<sup>59</sup> See, e.g., n. 36 *supra*.

<sup>60</sup> 47 CFR § 27.1315(d).

taking the estimated lease payment amount out of the BID v. 2.0. As also explained above, the statements did not have the alleged adverse effect of deterring bidding in the auction.

In summary, the OIG concluded that no FCC rules appear to have been violated and that no referral is warranted.

## **V. CONCLUSION**

This investigation has concluded that the lease payment estimates conveyed to Frontline on November 29, 2007 were informational in nature, were not made in bad faith, and by themselves had no deleterious effect on the auction. The lease payment was only a drop in one of the many “buckets” that concerned Frontline and other potential bidders interviewed. As a consequence, we conclude that the lease payment was not, *per se*, the cause of the D Block’s failure to attract a bid at the reserve price. Rather, the many layers of uncertainty and risk, and the growing prospect of high network costs, as described above, were responsible for potential bidders’ decisions not to bid.