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THE FCC'S REGULATORY MULLIGAN: EXPLORING THE OPTIONS IN THE WAKE OF A FAILED D BLOCK AUCTION

Alejandro Valencia [1]

In March 2008, the Federal Communications Commission auctioned licenses to sizeable tracts of radio frequency spectrum that will be vacated due to the analog-to-digital television conversion to occur in June 2009. The Commission conditioned the license to one portion of this spectrum—the "D Block"—on an unprecedented requirement: for the licensee to work hand-in-hand with public-safety agencies in a "public/private partnership" to deploy a nationwide public-safety communications network. At auction, the D Block garnered only minimal interest from prospective bidders and missed its reserve price by a wide margin. This failure drew the ire of policymakers, the telecommunications industry, and the public-safety community alike. The Commission subsequently reviewed its options but ultimately decided to re-auction the D Block with a modified public/private partnership requirement designed to entice more bidders. Nevertheless, in pursuing this goal, the Commission should refuse to lower D Block network performance requirements and should ensure that the public-safety community gets the earliest and most complete access to a deployed D Block network.

I. INTRODUCTION

Imagine a parcel of government-owned land wanted by a developer for the purposes of erecting a shopping mall. Then think of an adjacent parcel of land on which the government plans to build a hospital. Both of the contiguous parcels are widely considered prime real estate for their prospective purposes. There

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is a considerable amount of foot traffic that would bring business to the mall. Moreover, the parcels are both easily accessible from a major highway, which would benefit both the mall and the hospital.

The government, however, does not have the funding to build its hospital. Nevertheless, aware of the high priority the developer puts on the construction of its shopping mall, the government agrees to sell the parcel to the developer for an adjusted, below-market price. This agreement occurs under the conditions that (1) the developer also construct the hospital for the government, and (2) the shopping mall allow exclusive usage of its entire parking lot by the hospital in times when the need for medical attention is heightened, a situation that would preclude anyone from visiting the mall.

The developer, with more than enough construction equipment and personnel to operate that equipment, has ample means to facilitate the construction of both the shopping mall and the hospital. Moreover, due to the parcels' proximity, the developer could allocate its construction resources to both sites almost as if they were one. Additionally, the money saved by the developer in paying only a below-market cost for the shopping mall lot is a worthy concession for the temporary and likely rare annex of its parking lot.

A similar *quid pro quo* motivated "the public-private partnership" condition placed on certain a swath of the radio-frequency spectrum when it was auctioned in March, 2008. Whereas the hypothetical developer-government partnership occurs through land in the negotiation of a construction deal, the public-private partnership required as a condition of the spectrum auction would occur through analogous "sites" located in the radio frequency spectrum as described below.

On June 12, 2009, the Federal Communications Commission will revoke all licenses for the broadcasting of analog signals in the United States.[2] The Digital Television Transition and Public

[2] *In re* Implementation of the DTV Delay Act, *Report and Order and Sua Sponte Order on Reconsideration*, 24 F.C.C.R. 1607 ¶ 1 (Feb. 13, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-9A1.pdf

Safety Act of 2005 ("DTV Act")[3] mandates the conversion of all analog television transmissions to digital format.[4] Not only will the analog broadcast stoppage leave certain prized[5] swaths of the

("Congress extended the date for the completion of the nationwide DTV transition from February 17, 2009 to June 12, 2009. As a result, after June 12, 2009, full-power television broadcast stations must transmit only digital signals, and may no longer transmit analog signals except for limited analog "nightlight" service. . . . Congress extended the transition date in order to permit analog service to continue until consumers have had additional time to prepare."). *See also* Deficit Reduction Act of 2005, 42 U.S.C. § 1305 (2006); Digital Television Transition and Public Safety Act, 47 U.S.C. § 309 (2006) (setting a firm deadline of February 18, 2009 for revocation of analog licenses); *id.* § 337(e)(1) (2006) ("Any full–power television station licensee that holds a television broadcast license to operate between 698 and 806 megahertz may not operate at that frequency after February 17, 2009."); Phil Goldstein, *AT&T, Verizon Split Over DTV Delay*, FIERCEWIRELESS, Jan. 13, 2009, http://www.fiercewireless.com/story/t-verizon-split-over-dtv-delay/2009-01-13 (noting that AT&T favored a short delay but Verizon opposed it); Ted Hearn, *Verizon Flip-Flops on DTV Delay*, MULTICHANNEL NEWS, Jan. 17, 2009, http://www.multichannel.com/article/162373-Verizon_Flip_Flops_On_DTV_Delay.php (noting that after initially opposing the delay, Verizon switched sides after considering the delay's planned brevity and limited duration).

[3] 47 U.S.C. § 309 (2006).

[4] *See generally id.*

[5] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289, 15,564 (July 31, 2007) (statement of Comm'r Jonathan Adelstein, approving in part, concurring in part) ("These 700 MHz licenses are the finest crown jewels the FCC has to put up for auction. This coveted spectrum presents us with a historic opportunity to facilitate vibrant, spectrum-based opportunities for both consumers and wireless providers."); *see* Robert X. Cringely, *Everything You Always Wanted to Know About the 700–MHz Auction but Were Afraid to Ask: Expert Op–Ed*, POPULAR MECHANICS, Jan. 24, 2008, http://www.popularmechanics.com/technology/industry/4246037.html ("[T]he 60 MHz of spectrum that's about to be auctioned is the last prime real estate for mobile communications that will be available in the U.S. for decades to come."); Lawrence J. Movshin, *Major Issues In Wireless Telecommunications 2006-2007*, 25TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 93, 98 (2007) (recognizing the 700 MHz range of the radio frequency spectrum as the "last great frontier" for wireless telecommunications services); Posting of Carl Weinschenk to http://www.itbusinessedge.com/blogs/cip/?p=230 (Nov. 15, 2007, 13:43 EST) (comparing the value of the spectrum to that of "land in the Grand Canyon or Central Park in New York City.").

700-MHz radio frequency spectrum remarkably unencumbered,[6] it also will return that spectral property to the control of the Commission.[7]

As mandated by the DTV Act, the portions of spectrum to be vacated and returned to the Commission were to be auctioned off by March 2008, about a year in advance of the license revocation deadline.[8] Among the portions slated for auction was the legislatively designated "D Block,"[9] a pair of choice spectral bands with superior transmission characteristics located in the Upper 700 MHz range.[10] Unlike the other portions slated for auction,[11] however, the Commission would auction the D Block subject to certain obligations.[12] In particular, the Commission would award the winning bidder at auction with the license to the spectral band only after the prospective licensee accepted certain terms for the block's usage as part of a "public/private partnership."[13] This

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[6] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 4 (showing only 26 MHz of spectrum in the 698–806 MHz range as occupied, leaving bands in aggregate of 82 MHz for auction).

[7] 47 U.S.C. § 309 (2006).

[8] *Id.* The DTV Act set out the bare-bones requirements and goals of the then date-yet-to-be-determined auction. Among them were the statutory deadlines for removal of analog signals from the airwaves, the deadline for the auction, and the deadline for the Commission's depositing of the funds generated by the auctions in the U.S. Treasury. *Id.*

[9] *See In re* Auction of 700 MHz Band Licenses Scheduled for January 16, 2008, *Public Notice*, 22 F.C.C.R. 15,004 ¶ 2 (Aug. 17, 2007).

[10] Cringely, *supra* note 5 ("[T]he 60 MHz of spectrum that's about to be auctioned is the last prime real estate for mobile communications that will be available in the U.S. for decades to come.").

[11] *Public Notice*, 22 F.C.C.R. 15,004 ¶ 2 ("[T]he Commission will make available 176 licenses . . . in the A Block, 734 licenses . . . in the B Block, 176 licenses . . . in the E Block, 12 licenses . . . in the C Block, and one nationwide license . . . in the D Block.").

[12] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 4 (July 31, 2007) (specifically designating the D Block as "associated with the 700 MHz Public/Private Partnership.").

[13] *Id.* ("[I]t would serve the public interest to . . . establish[] a nationwide 10–megahertz commercial license in the Upper 700 MHz Band D Block that will be awarded to the winning bidder once it has entered into a Commission–approved

partnership would require the D Block licensee to build out a nationwide, broadband communications network on which an interoperable public safety communications network could also operate.[14] Such an arrangement would allow for the construction of a long-desired,[15] nationwide interoperable public safety network at minimal cost to the government while also retrieving through the auction the value of the spectral band.[16]

Thus, like the hypothetical developer of the shopping mall, the winning bidder at auction would obtain a license to the D Block for an adjusted price by agreeing to build the infrastructure of a nationwide, broadband interoperable public-safety network. Additionally, the licensee would be required to give priority access to that public-safety network just as the developer agreed to build the hospital and to arrange for the priority use of the shopping mall's parking lot.

The proposed public-private partnership would address the pressing need[17] for a more cohesive communication network for use in emergency situations, such as natural disasters and terrorism attacks, while also obtaining for the public the fair value for the

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Network Sharing Agreement (NSA) with the Public Safety Broadband Licensee.").

[14] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 4 ("This D Block license will be conditioned upon its commercial licensee constructing and operating a nationwide, interoperable broadband network across both the D Block and the 700 MHz public safety broadband spectrum.").

[15] *Id.* at 15,560 (statement of Comm'r Michael J. Copps, approving in part, concurring in part) ("For far too long, our nation's first responders have struggled with the lack of interoperability.").

[16] *Id.* ¶ 13 ("As the means for enabling the construction of a nationwide, interoperable broadband public safety network, we provide for the establishment of the 700 MHz Public/Private Partnership between the commercial D Block licensee and the Public Safety Broadband Licensee in the Upper 700 MHz Band.").

[17] *Id.* at 15,560 (statement of Comm'r Copps); *id.* at 15,557 (statement of Chairman Kevin J. Martin) ("We are all aware of problems that have been created by the lack of interoperability for public safety communications during recent crises like 9/11 and Hurricane Katrina . . . . It is imperative that the Commission . . . provide a communications solution for our Nation's first responders . . . .").

radio frequency spectrum, a public resource.[18] On the other hand, the commercial licensee would obtain license to a prized[19] piece of spectrum at a reduced, obligation-acknowledging cost[20] while putting into place the infrastructure required for a nationwide interoperable public-safety network and its own commercial network with the same swing of the crane.[21]

And while the Commission did hold the auction in March 2008, the D Block fetched a relatively paltry $472 million, missing its reserve price of $1.33 billion by a country mile.[22] Meanwhile, the C Block, a characteristically similar lot in the Upper 700 MHz neighborhood,[23] went for substantially more than its reserve price.[24]

The failure of D Block to sell, and the resulting inability to put into place the pieces required by the public/private partnership, has

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[18] *See* 47 U.S.C. § 309 (2006).

[19] Cringely, *supra* note 5 ("[T]he 60 MHz of spectrum that's about to be auctioned is the last prime real estate for mobile communications that will be available in the U.S. for decades to come."); *see* Movshin, *supra* note 5, at 98 (recognizing the 700 MHz range of the radio frequency spectrum as the "last great frontier" for wireless telecommunications services."); Weinschenk, *supra* note 5 (comparing the value of the spectrum to "land in the Grand Canyon or Central Park in New York City.").

[20] *In re* Auction of 700 MHz Band Licenses Scheduled for January 16, 2008, *Public Notice*, 22 F.C.C.R. 15,004 ¶ 52 (Aug. 17, 2007) ("The Commission expressly noted that the . . . limitations on the flexibility of the D Block licensee, should be given weight in assessing the D Block's potential market value. [Prior auctions] might suggest a D Block reserve price of $1.7 billion. However, in light of the [conditions on the license], it might be appropriate to expect bidders to bid only about 75 percent to 80 percent of such an amount, or about $1.33 billion.").

[21] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 386 (July 31, 2007) ("This network must be used to provide both a commercial service and a broadband network service to public safety entities.").

[22] *See In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008).

[23] With respect to signal propagation qualities, C and D Blocks are similar. *See generally* Cringely, *supra* note 5 (describing the ideal signal propagation characteristics provided by the 700 MHz band as a whole).

[24] *See Auction Closing Notice*, 23 F.C.C.R. 4572 ¶ 2 (identifying the winning C Block bid at $4.7 billion, over $100 million in excess of its reserve).

been called a "travesty"[25] and a "fiasco."[26] While the colorful language might not conjure the image of a red-taped Capitol Hill radio frequency spectrum auction, the miss soured both policymakers and the telecommunications world.[27] The D Block auction, on which many placed high hopes,[28] failed to draw more than a faint hint of interest from prospective bidders.[29] Consequently, that lack of bidding forced the Commission back to its drawing board to rethink its options.[30]

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[25] *In re* Auction of the D-Block License in the 758–763 and 788–793 MHz Bands, *Order*, 23 F.C.C.R. 5421, 5423 (Mar. 20, 2008) (statement of Comm'r Michael J. Copps) ("It is a travesty that our nation has failed, so far, to meet this urgent public safety challenge.").

[26] Jeffrey Silva, *Lawmakers Reconsider in Wake of 700 MHz Auction: Some Call for D Block Conditions to Be Removed*, RCR WIRELESS, Apr.15, 2008, *available at* http://www.rcrwireless.com/apps/pbcs.dll/article?AID=/20080415/FREE/129018992/1005.

[27] *See Auction of the D-Block License*, 23 F.C.C.R. at 5424 (statement of Comm'r Jonathan Adelstein); Silva, *supra* note 26.

[28] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289, 15,557 (July 31, 2007) (statement of Chairman Kevin Martin) ("With this Second Report and Order, the Commission takes an historic step towards two goals that have been priorities of mine as Chairman: (1) creating a nationwide, interoperable public safety broadband network and (2) furthering procompetition broadband policies designed to increase penetration and ensure that consumers benefit from innovation and technological advancements."); *id.* at 15,564 (statement of Comm'r Adelstein) ("Our decision today is one of the most significant and groundbreaking we have conducted in the time I have served . . . . This coveted spectrum presents us with a historic opportunity to facilitate vibrant, spectrum-based opportunities for both consumers and wireless providers.").

[29] *See In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008). The Commission's releasing of auction results showed bidding results for each of the five spectrum blocks in the March action, the only one of which not to meet its pre-set reserve was the D Block. *Id.*

[30] *See* Press Release, Fed. Commc'ns Comm'n, FCC Delinks 700 MHz Upper D Block From Other Blocks, Will Release Information on 700 MHz Auction Winning Bidders (Mar. 20, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280948A1.pdf.

While the Commission has conducted spectrum license auctions since 1994,[31] the auction of the D Block license was unprecedented for several reasons. [32] For the first time, the license in question drags with it conditions far beyond the typical garden-variety obligations associated with auctioned spectrum licenses, namely the requirements of the public/private partnership.[33] Moreover, the unsavory prospect of working intimately with shot-calling public-safety agencies to address undefined guidelines[34] and meet unrealistic expectations[35] with respect to the public safety network scared off bidders in the March auction,[36] resulting in a winning bid that was unexpectedly low.[37]

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[31] Fed. Commc'ns Comm'n, About Auctions, http://wireless.fcc.gov/auctions/default.htm?job=about_auctions (last visited Mar. 8, 2009) ("The Commission has found that spectrum auctions more effectively assign licenses than either comparative hearings or lotteries. The auction approach is intended to award the licenses to those who will use them most effectively.").

[32] *See* Donny Jackson, *PSST D Block Auction Picture Gets Murkier*, URGENT COMMUNICATIONS, Feb. 25, 2008, *available at* http://urgentcomm.com/mag/radio_block_auction_picture/ (commenting on the unprecedented nature of the D Block auction in light of the D Block's association with the public/private partnership).

[33] *Id.*

[34] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 (Sept. 25, 2008) (acknowledging the vagaries present in the first auction and stating the intention to "to clarify and revise the rules to clearly establish the obligations of the parties to the partnership with greater specificity and detail. These clarifications and revisions address whether the D Block will be licensed on a nationwide or regional basis, the obligations of the parties regarding the construction and operation of the shared wireless broadband network, the rules governing the process for establishing an NSA between the parties, certain auction issues, and issues related to public safety users and the Public Safety Broadband Licensee.").

[35] Art Brodsky, *Public Safety Doomed "D Block" Auction to Failure*, PUBLIC KNOWLEDGE POLICY BLOG, Mar. 26, 2008, http://www.publicknowledge.org/node/1479 ("The reasons [for the lack of interest in the D Block] are of the public safety community's own making . . . . They set conditions before the auction took place which no commercial company in its right mind would even think about meeting.").

[36] *See* Brian Dolan, *700 MHz Auction: C Block meets its reserve, open access sticks*, FIERCE WIRELESS, Jan. 31, 2008, *available at* http://www.fiercewireless.com/story/700-mhz-auction-c-block-meets-its-reserve-open-access-sticks/2008-

After having resolved to re-auction the D Block license, the Commission is currently weighing its options as to how to re-pitch the D Block.[38] More than a handful of policymakers see the re-auction as an opportunity to craft more effective auction rules for the second go-around.[39] As discussed later, the most noteworthy of those possible rule changes include a regional licensing scheme[40] and the loosening of build-out requirements and performance standards for network operation.[41]

The Commission's stated goals in the auction of the D Block are (1) promoting public safety through rapid deployment of the nationwide interoperable public-safety network,[42] (2) obtaining fair value for the spectrum,[43] and (3) promoting competition among wireless communications service providers.[44] In view of these

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01-31 (describing the effect of the public-safety obligations attached to the D Block as making potential bidders not want to "touch the D Block with a ten foot pole").

[37] *See In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008).

[38] *See generally In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 (Sept. 25, 2008).

[39] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 8047 ¶ 2 (May 14, 2008).

[40] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 3 ("With regard to the appropriate geographic area, we propose to offer the D Block both as a single nationwide license *and* on a regional basis . . . .") (emphasis added).

[41] *Id.* ¶¶ 4–15 (proposing several rules changes which focus on making build–out and network performance requirements more attainable to a wider array of prospective bidders).

[42] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 322 (July 31, 2007).

[43] *Id.* ¶ 213-214 (addressing the need to obtain fair market value for the spectrum and to promote the efficient use of the spectrum).

[44] 47 U.S.C. § 309(j)(14)(C)(i)(II) (2006). Among the objectives of Section 309(j) of the Act are "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas;" and "promoting economic opportunity and competition and ensuring that the 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

goals, the Commission can take certain actions that would allow it to juggle these competing interests so as to maximize the benefit to the general public good.

The Commission should consider both national and regional licensing models in proceeding with the D Block, but it should maintain stringent performance requirements for the operation of the interoperable public-safety network. The public interests central to the auction cannot be fully satisfied simultaneously. [45] The desperate need for a public safety communications network to assist our first responders has been highlighted in recent years by the uncoordinated and sluggish response efforts after Hurricane Katrina and 9/11.[46] Nevertheless, the Commission has a duty to ensure that the public receives just compensation for public resources, which in this case is the increasingly limited[47] amount of radio frequency spectrum.[48] In addition, the Commission must

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businesses, rural telephone companies, and businesses owned by member of minority groups and women." *Id.* § 309(j)(3).

[45] As evidenced by the March auction, the goal of a high–standard, rapidly deployed public–safety network and the goal of selling the D Block for fair value cannot both be achieved. The Commission will need to make concessions either to the interest of public safety by lowering proposed network operating standards so as to make the D Block more palatable to prospective bidders, or to the interest of obtaining fair value for public resources by taking a considerable amount less than it had hoped in exchange for the spectrum.

[46] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289, 15,560 (Mar. 20, 2008) (statement of Comm'r Michael J. Copps) ("For far too long, our nation's first responders have struggled with the lack of interoperability. The terrible costs of this failure became tragically apparent in the aftermath of 9/11 and again following Hurricane Katrina . . . . Our nation's first responders have struggled for too long without finding the capital necessary to build out a broadband network with the configuration and the features they so desperately need and deserve.").

[47] Cringely, *supra* note 5 ("[T]he 60 MHz of spectrum that's about to be auctioned is the last prime real estate for mobile communications that will be available in the U.S. for decades to come.").

[48] *See* Commc'ns Act of 1934, 47 U.S.C. § 309(h)(3)(C) (1934) (stating the objectives of competitive bidding auctions to include "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."). *But see In re* Auction of 700 MHz

remember to promote increased competition,[49] especially in a market dominated by a mere handful of powerful network operators who hold the keys to consumer price regulation.[50] If the Commission acknowledges that, in this case, all three interests cannot be reconciled neatly, it must take steps to elevate the interest of public safety over others. Consequently, even if the Commission modifies auction requirements to make the D Block more attractive to potential bidders, it should not, at any cost, compromise the standard of operation for the interoperable broadband public-safety network.

Part II of this article gives the background surrounding the emergence of the D Block as the carrot the Commission hoped would entice commercial bidders and ultimately draw one into a nationwide public/private partnership. Part II first describes the historical impetus behind joint public/private partnership, and then outlines the build-up to the auction, including why the auction rules were set as they were and the various proposals the Commission explored prior to the auction. In an effort to arrive at

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Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008) (showing that the aggregate amount of proceeds from all blocks comfortably exceeded Congressionally budgeted estimates).

[49] *Second Report and Order*, 22 F.C.C.R. at 15,564 (statement of Comm'r Adelstein). Specifically, Commissioner Adelstein stated:

> Our job at the FCC is to do whatever we can to promote spectrum-based opportunities in the future . . . . We want to promote flexibility and innovation, but since the spectrum is a finite public resource, we want to see results as well. In our item today, we adopt some of the strongest performance requirements in history to ensure that this wireless frontier truly gets developed. As we did with the homesteaders 150 years ago, we are happy to get this prime real estate in the hands of those that will use it. Just like the government required of homesteaders, we want this fertile soil tilled and put into use, including in rural areas of the country. Out of this development will sprout the fruits of innovative product and service offerings to every corner of America.

Id.

[50] *See* Center for Democracy & Technology, *Airwave Auction a Unique Opportunity to Promote Broadband, Openness* (June 1, 2007), http://www.cdt.org/publications/policyposts/2007/8 (last visited Mar. 20, 2009) (positing that the current state of the telecommunications industry is widely dictated by just a few companies).

the solution most beneficial to the public, Part III analyzes the competing interests and weighs those interests with respect to different avenues available to the Commission. Finally, Part IV concludes that the spectral band would best serve the public if the Commission (1) refuses to lower critical high-performance system requirements for the interoperable broadband public-safety network, (2) gives regional licensing priority, and (3) takes necessary steps to ensure licensing in the upcoming auction.

II. THE EMERGENCE OF, ROAD TO, AND FALLOUT OF THE AUCTION

Over ten years of statutory promulgation and regulatory posturing culminated in the March 2008 auction of the soon-to-be-vacant 700 MHz spectrum.[51] In reality, though, the story began in the mid 1990s with the Commission's forethought into the states of television and the radio frequency spectrum early in the next century.[52]

A. *The Emergence of the D Block as Newly Available Spectrum*

Since the emergence of the television as a household appliance, bulky analog transmission signals have occupied much of the highly-prized 700 MHz-range telecommunications spectrum.[53] The analog-to-digital conversion mandated by the Digital Television Transition Act of 2005, however, will leave a

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[51] *See* Telecommc's Act of 1996, Pub. LA. No. 104–104, 110 Stat. 56 (1996) (encouraging the deployment of broadband services to all Americans); Balanced Budget Act of 1997, Pub. LA. 105–33, 111 Stat. 251 (1997) (setting a 2006, end–of–year deadline for the completion of eighty-five percent of the DTV conversion, but allowing for exceptions in several situations).

[52] *See* Telecommc'ns Act of 1996, *supra* note 51; *see also* Balanced Budget Act of 1997, *supra* note 51. *See generally* Center for Democracy & Technology, *supra* note 50.

[53] *See* Fed. Commc'ns Comm'n, The Digital TV Transition: What You Need to Know About DTV, http://www.dtv.gov/consumercorner.html#faq2 (last visited Mar. 9, 2009) (characterizing analog television signals as less efficient and of lower quality than those of digital).

considerable amount of that spectrum vacant.[54] The next subsection reviews the relevant legislation and discusses the implications of the analog-to-digital conversion and the resulting control the Commission will have over the newly available spectrum.

1. *The Digital Television Transition and Public Safety Act of 2005*

Having anticipated the widespread migration from analog to digital for over a decade, Congress sought to lay out early guidelines for the massive conversion with sections of the Telecommunications Act of 1996 and the Balanced Budget Act of 1997.[55] Those statutes, along with a catalog of other legislation, converged in 2005 with President Bush's signing of the DTV Act.[56]

The combination of the DTV Act and the more recent DTV Delay Act mandated the end of all analog television transmissions by June 2009.[57] Under authority of supporting legislation requiring a competitive auction of the vacated radio frequency spectrum,[58] the Commission ordered that nearly 100 MHz of spectrum was to be auctioned to commercial bidders.[59] Presumably, those bidders would come in two forms: (1) already-established telecommunications industry powers and (2) technology-based software applications companies looking to find a foothold in the telecommunications industry. However, the Commission would

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[54] *See Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 4 (showing bands constituting only 26 MHz total as occupied in the 698–806 MHz range, leaving bands in aggregate of 82 MHz for auction).

[55] *See* Telecommc'ns Act of 1996, *supra* note 51; *see also* Balanced Budget Act of 1997, *supra* note 51. *See generally* Center for Democracy & Technology, *supra* note 50.

[56] 47 U.S.C. § 309 (2006).

[57] *Id.*

[58] Deficit Reduction Act of 2005, 42 U.S.C. § 1305 (2006); Digital Television Transition and Public Safety Act, 47 U.S.C. § 309 (2006) (setting out auction guidelines); *see* Balanced Budget Act of 1997, *supra* note 51.

[59] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 4.

reserve certain sections of the 700 MHz spectrum for use by a nationwide interoperable public safety network.[60]

The need for an interoperable *broadband* network designated for public safety was highlighted first by the lag in response time after 9/11 and subsequently by the sluggish mobilization of first responders during Hurricane Katrina.[61] Mid-1990's legislation had set into motion the public safety spectrum movement by allocating a certain portion of the spectrum to future public safety use through more primitive technologies. The magnitude of the two recent crises, however, led officials to call for the use of newer broadband technologies—only then being perfected—in the implementation of an interoperable public safety network. The return of several bands of spectrum previously occupied by analog signals to the Commission would serve as the impetus to assign dedicated public safety spectrum and to explore how to use it most efficiently and effectively.[62]

2. *The Idea Behind the Public/Private Partnership*

To affect a nationwide deployment of the interoperable broadband public safety network, the Commission would auction both the commercial D Block license and the public safety license, the latter to be held by the Public Safety Broadband Licensee ("PSBL").[63] The D Block licensee would enter into a network sharing agreement jointly with the PSBL.[64]

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[60] 47 U.S.C. § 337(a)(1) (2006) ("[T]he Commission shall allocate . . . 24 megahertz of that spectrum for public safety services . . . .").

[61] *Second Report and Order*, 22 F.C.C.R. at 15,560 (statement of Comm'r Copps) (stating the need not only for an interoperable public–safety network, but also a need for that network to employ the best available technologies, namely broadband).

[62] 47 U.S.C. § 337(a)(1) (2006) ("[T]he Commission shall allocate . . . 24 megahertz of that spectrum for public safety services . . . .").

[63] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 395 ("[E]ffectuat[ing] a public/private partnership between the Commission–selected Public Safety Broadband Licensee and the winning bidder of the Upper 700 MHz Band D Block license would serve the public interest.").

[64] *See id.* The PSBL is a group of fifteen public-safety groups entrusted with control over the public-safety bands. Public Safety Spectrum Trust—About the PSST, http://www.psst.org/memberorgs.jsp (last visited March 6, 2009). Member organizations of the PSBL include the American Association of State

While the PSBL would advance a unified national approach to the use of the public safety spectrum, finally enabling communication among public safety users during times of crisis, the commercial D Block licensee would construct a nationwide broadband network to serve both its portion of the spectrum and the public safety spectrum.[65] By requiring this build-out as a condition on the commercial D Block license, the Commission would use the D Block as a vehicle to ensure the construction of the public-safety network at minimal cost to the government.[66]

B. *The Significance of the D Block to the Commission and the Telecommunications Industry*

At the time of the DTV Act's enactment, the 700 MHz band already had been subdivided into several spectrum parcels.[67] A number of those parcels had previously been licensed to commercial entities broadcasting digital signals, others had been set aside for use by public safety organizations, and the remainder was occupied by analog broadcast signals, namely TV Channels

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Highway and Transportation Officials, the American Hospital Association, the Association of Public–Safety Communications Officials–International, the Forestry Conservation Communications Association, the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International City/County Management Association, the International Municipal Signal Association, the National Association of State Emergency Medical Services Officials, the National Association of State 9–1–1 Administrators, the National Emergency Management Association, the National Emergency Number Association, the National Fraternal Order of Police, the National Governors Association, and the National Sheriffs' Association. *Id.*

[65] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 395; *id.* at 15,557 (statement of Chairman Martin) ("We cannot keep licensing public safety spectrum in the same manner as before and expect a different result. A National Public Safety Broadband Licensee will facilitate a unified national approach to the use of this spectrum, finally enabling all public safety users to talk to each other during a crisis.").

[66] *Id.* ¶ 13 ("As the means for enabling the construction of a nationwide, interoperable broadband public safety network, we provide for the establishment of the 700 MHz Public/Private Partnership between the commercial D Block licensee and the Public Safety Broadband Licensee in the Upper 700 MHz Band.").

[67] *Id.* ¶¶ 4–6.

52–69.[68] Instead of a simpler conceptualization as a monolithic block of spectrum, the 700-MHz range is more accurately described as a contiguous collection of smaller bands, the majority of which were still available at the time of the DTV Act.[69]

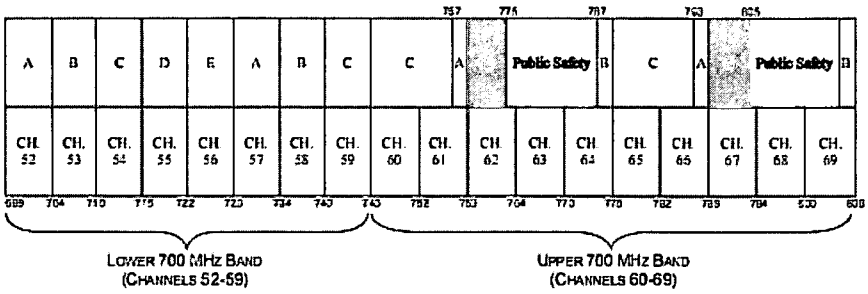

Figure 1. The 700-MHz spectrum, the D Block, and the Public Safety spectrum.[70] Bottom row shows TV channels by number, while top shows corresponding names of spectrum blocks reassigned.

The D Block consists of two distinct frequency bands in the Upper 700-MHz spectrum.[71] Each of these bands shares an upper limit with the lower limit of a Public Safety band.[72] The proximity of the D Block to the Public Safety spectrum means the build-out of a nationwide network of transmission stations—covering both the D Block and the Public Safety spectrum—is both physically and economically efficient.[73] In other words, the spectral proximity of the D Block to the Public Safety spectrum would allow for a network build-out through the construction of stations capable of transmitting and receiving signals in D block and Public

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[68] *Id.* ¶ 1.

[69] *Id.* ¶¶ 4–6.

[70] Matthew Lasar, *First Responders to Commission: Give Up National D Block Pipe Dream*, ARS TECHNICA, July 31, 2008, http://arstechnica.com/old/content/2008/07/first-responders-to-fcc-give-up-national-d-block-pipe-dream.ars (citing generally *Second Report and Order*, 22 F.C.C.R. 15,289).

[71] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 4.

[72] *Id.*

[73] *Id.* ¶ 396 ("[The public/private partnership] will provide the D Block licensee with rights to operate commercial services in the 10 megahertz of public safety broadband spectrum on a secondary, preemptible basis, which will both help to defray the costs of build–out and ensure that the spectrum is used efficiently."). *See* Cringely, *supra* note 5.

Safety frequencies.[74] This doubling-up of facilities would both financially benefit the ultimate commercial D Block licensee[75] and increase the rapidity of the licensee's nationwide deployment,[76] both of which were goals of the Commission.[77]

The spectral blocks in the 700-MHz range are highly coveted by telecommunications service providers companies due to their highly favorable signal propagation characteristics.[78] That range includes the D Block and the Public Safety spectrum, among others, and comprises the last piece of fertile mobile communications spectrum to be available for decades to come.[79]

With respect to mobile communications, lower frequencies provide a more efficient transmission medium than higher frequencies.[80] Signals transmitted at lower frequencies propagate

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[74] *Id.* ¶ 4. *See also* Timothy Lance & Heidi Wachs, *Spectrum Reallocation for Public Safety Broadband: The 700 MHz Auction*, EDUCAUSE REVIEW, Nov./Dec. 2007, at 146, *available at* http://net.educause.edu/ir/library/ pdf/ERM07613.pdf ("[A] public/private partnership with a combined infrastructure built out and usable for commercial purposes but with emergency and public–safety usage always preempting in the designated frequencies could yield a more rapidly deployed, robust infrastructure.").

[75] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 396 ("Providing for a shared infrastructure that uses the D Block and the public safety broadband spectrum will help achieve significant cost efficiencies." (citing APCO *700 MHz Further Notice* Comments at 11; Northrop Grumman *700 MHz Further Notice* Comments at 5; Sprint Nextel *700 MHz Further Notice* Comments at 7-8)).

[76] *Id.* ¶ 4.

[77] *Id.* ¶ 396. In hoping for the most rapid deployment possible with respect to the interoperable nationwide public–safety network, the Commission saw the financial burden on the commercial licensee as a major obstacle to the build–out and thus hoped to alleviate that burden as much as possible. *Id.*

[78] *See* Cringely, *supra* note 5; *accord* Movshin, *supra* note 5, at 98 (recognizing the 700 MHz range of the radio frequency spectrum as the "last great frontier" for wireless telecommunications services."). *See also* Weinschenk, *supra* note 5 (comparing the value of the spectrum to that of "land in the Grand Canyon or Central Park in New York City.").

[79] *See* Cringely, *supra* note 5; Weinschenk, *supra* note 5 (describing the magnitude of the auction as comparable to if "the powers–that–be decided to auction off the land in the Grand Canyon or Central Park.").

[80] *See* Cringely, *supra* note 5 (commenting on the ideal characteristics of the 700 MHz spectrum for voice signal transmissions). *Accord* Cheryl A. Tritt, *Telecommunications Future*, *in* 25TH ANNUAL INSTITUTE ON

farther and more easily penetrate building walls, such that they do not require a clear "line of sight" between any given transmitter and corresponding receiver.[81] These ideal propagation characteristics make the Upper 700-MHz spectrum a far superior medium for mobile communications transmissions than the 1900-MHz bands used by cellular network operators.[82]

In fact, the penetration characteristics in the 700-MHz range would enable wireless services that have higher data rates than those currently provided by cable modems and are two orders of magnitude cheaper than broadband connectivity via fiber.[83] Moreover, the 700-MHz band would serve as a useful tool to extend network access to rural pockets currently out of the reach of broadband signals and to parts of cities still relying on dial-up access.[84]

A network of transmission stations covering the Upper 700-MHz Band also would be economical to deploy. Given the band's ideal propagation characteristics, each transmission station in that band could service a larger area than an equivalent transmission station operating on higher frequencies, such that a fully functional network would require fewer interlocking service areas or "cells."[85] Thus, in theory, the spectrum's properties would allow transmission facilities to be spaced further apart, reducing the total

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TELECOMMUNICATIONS POLICY & REGULATION 133, 142 (2007) ("The radio signals in the 700 MHz band can penetrate walls easily and can carry significant amounts of information at low power, making the 700 MHz band particularly attractive for wireless broadband services.").

[81] *See* Cringely, *supra* note 5; Lance & Wachs, *supra* note 74, at 147 ("Although higher–frequency ranges have somewhat greater data–carriage capacity, the 700 MHz range has extremely desirable propagation characteristics, with high permeability and low absorption. Whether used for wireless broadband, emergency service, or other wireless applications, such permeability/absorption properties significantly reduce the cost of network deployment."). *See generally* Center for Democracy & Technology, *supra* note 50.

[82] *See* Cringely, *supra* note 5.

[83] *See* Lance & Wachs, *supra* note 74, at 147 (expounding on the possible benefits attained from a new network operating in the 700 MHz range).

[84] *Id.*

[85] *See* Cringely, *supra* note 5.

number of such facilities needed to be built.[86] This would result in a total cost savings in the build-out of a nationwide wireless network estimated to be as much as $5 billion.[87]

The historically recent explosion in consumer telecommunications devices and network expansion by providers has spurred a land rush to this "last great frontier"[88] for wireless telecommunications services.[89] Given the spectrum's ideal propagation characteristics and their direct effect on the cost for a nationwide network build-out, it is no wonder parties ranging from the government to both entrenched and aspiring telecommunications service providers have closely watched the fate of the 700-MHz spectrum.[90]

C. *The Road to the Auction*

The March 2008 auction represented an excellent opportunity to reshape the telecommunications landscape in favor of consumers.[91] However, entrenched telephone and cable companies worried that such a change would destroy the comfortable status quo of the existing communications oligopoly.[92] For years, these

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[86] *Id.*

[87] *Id.*

[88] Movshin, *supra* note 5, at 98 (recognizing the Upper 700 MHz spectrum as the "last great frontier" for wireless telecommunications services).

[89] Kate Gerwig, *Telecom Market Heading for Healthy Growth, TIA Projects*, TELECOM NEWS, Feb. 26, 2008, http://searchtelecom.techtarget.com/news/article/0,289142,sid103_gci1302583,00.html ("In the U.S., the telecom market is expected to see 7.2% in compound annual growth rate . . . through 2011.").

[90] Public Knowledge, *700 MHz Spectrum Auction*, http://www.publicknowledge.org/issues/spectrum–reform (last visited Mar. 25, 2009) (listing Verizon, AT&T, Google, the FCC and the Public Interest Spectrum Coalition as entities with stakes in the 700-MHz spectrum and, more specifically, in the D Block).

[91] *See id.* (anticipating that the licensing of the D Block to a new market entrant would create a third broadband service available to the public). *See* Center for Democracy & Technology, *supra* note 50 (noting the potential to tilt internet usage rules now controlled by wealthy service providers back in favor of the average consumer).

[92] *See* Public Knowledge, *supra* note 90 (articulating the resistance of legacy providers to any sort of change, much less the kind that might cause even the most minor shift of power to another service provider).

incumbents had comfortably dominated the telecommunications arena. Their fear was that the upcoming auction could bind them to rules more favorable to consumers, and perhaps even to facilitate the entry of a new competitor.[93]

In order to make sure that consumers benefited regardless of which entities won control of the 700 MHz spectrum, the Commission needed to ensure that auction and service rules bound all parties to provide the best opportunity for new broadband competition.[94] With the auction set for early 2008,[95] the Commission felt significant pressure to finalize the parameters of

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[93] Center for Democracy & Technology, *supra* note 50 ("[T]he auction provides a critical opportunity to foster additional competitive choices in the broadband Internet market. Today, the vast majority of Americans have at most two real options for broadband – DSL from their local telephone provider or cable broadband from their local cable television provider. Wireless could offer a cost-effective way to help spur greater broadband competition, because it does not require the expense of laying new wires to individual homes. But wireless broadband requires spectrum, and most of the potentially suitable spectrum is already licensed for television and radio broadcasting, mobile phone networks, and other uses. The 700 MHz spectrum, which has been carrying analog television broadcasts but is due to be vacated by the broadcasters, represents a rare set of available, high quality, contiguous radio frequencies. New broadband competition could benefit consumers in a variety of ways, as broadband provides a flexible platform that can carry all kinds of services, from voice to video to data. It also could help reduce any risks to the Internet's essential characteristics of openness and low entry barriers for innovators. As [Center for Democracy and Technology] has pointed out in the 'Internet neutrality' debate, recent changes to the legal regime raise the possibility that network operators could seek to exercise more "gatekeeper" control over what online services or applications their customers use. Creation of a viable wireless broadband option could help provide a competitive check against any move in that direction.").

[94] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289, 15,557 (July 31, 2007) (statement of Chairman Kevin Martin) ("[W]e are one step closer to allowing all Americans to enjoy the benefits of broadband competition—availability, high speeds, and low prices.").

[95] Deficit Reduction Act of 2005, 42 U.S.C § 1305 (2006); Digital Television Transition and Public Safety Act, 47 U.S.C.A. § 309 (2005) (setting out auction guidelines).

[95] *In re* Auction of 700 MHz Band Licenses Scheduled for January 16, 2008, *Public Notice*, 22 F.C.C.R. 15,004 ¶ 2 (Aug. 17, 2007).

the auction well in advance so as to allow for all interested parties to develop business plans.[96]

1. *The Establishment of Auction Rules*

In July 2007, the Commission laid out the rules of the auction.[97] First, all bidding would be anonymous.[98] The Commission identified communication and collusion between bidders as major flaws in prior auctions.[99] By such behavior, the Commission reasoned, the larger companies could effectively locked out potential new market entrants while keeping prices low by agreeing upon post-auction division of licenses.[100] Therefore, the Commission found that anonymous bidding would reduce the potential for anticompetitive bidding, thus serving the public's interest of retrieving the value of the spectrum.[101]

Second, the Commission would set reserve prices.[102] Consistent with the statutory goal of obtaining for the public a fair

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[96] Movshin, *supra* note 5, at 98 ("[T]here was a significant amount of pressure placed on the Commission to finalize its rules sufficiently before the January 28, 2008 date to assure that parties had adequate time in advance of any application deadline to develop their business plans and strategies for the auction.").

[97] *See Second Report and Order*, 22 F.C.C.R. 15,289 ¶¶ 274–321.

[98] *Id.* ¶ 280 ("Based on the current record, we conclude that the public interest will be served if the upcoming auction of 700 MHz Band licenses for which we establish service rules today is conducted using anonymous bidding procedures.").

[99] *Id.* ¶ 282 ("Although some potential bidders may find information regarding bidding by other parties useful, on balance this benefit likely is substantially outweighed by the enhanced competitiveness and economic efficiency of the auction that will result from withholding public release of certain information about bids and bidder identities . . . .").

[100] *See id.* ¶¶ 274–284 ("[E]conomists have observed, as a potential drawback to disclosing information, that bidders could use the information revealed over the multiple rounds to signal each other and implement a division of the licenses at lower than market prices, and in some cases, to retaliate against competing bidders.").

[101] *Id.* ¶ 280 ("Based on the current record, we conclude that the public interest will be served if the upcoming auction of 700 MHz Band licenses for which we establish service rules today is conducted using anonymous bidding procedures.").

[102] *Id.* ¶ 298 ("We conclude that we should provide for separate aggregate reserve prices for each block of licenses to promote our statutory objective of

value for the frequency spectrum, which is considered a public resource,[103] the Commission would employ reserve prices so as to leave itself an "out" should it determine that a winning bid less than the reserve would not serve the public interest.[104]

Finally, in conjunction with an unmet reserve price, the Commission could opt to implement a new auction subject to the same or reconsidered rules.[105] The Commission correctly recognized that assigning the D Block license as promptly as possible would further the significant public interest of rapid deployment of new services and timely recovery of the public value of the spectrum. Consequently, the Commission reserved the right to re-auction the spectrum after modification to the auction rules in an attempt to meet the original or a new, lowered reserve.[106]

2. *The Specifications for the Public/Private Partnership*

In addition to establishing the rules for the auction, the Commission set out the proposed plan for the public/private partnership and the responsibilities to be imposed on the

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recovering for the public a portion of the value of the public spectrum resource.").

[103] *See* Commc'ns Act of 1934, 47 U.S.C. § 309(j)(3)(C) (1934) (stating the objectives of competitive bidding auctions to include "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."). *But see In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008) (showing that the aggregate amount of proceeds from all blocks comfortably exceeds the total of reserve prices).

[104] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 298 (July 31, 2007). Per the Balanced Budget Act, the Commission was delegated the responsibility to determine the most effective methods by which to establish reasonable reserve prices or minimum opening bids. "[R]eserve prices for each block of licenses [will] promote our statutory objective of recovering for the public a portion of the value of the public spectrum resource." *Id.*

[105] *Id.* ¶ 299 ("Our rules also provide for the possibility of re-offering the D Block license in a subsequent auction. This will maximize the likelihood that we can recover an appropriate portion of the value of the public spectrum resource . . . .").

[106] *See id.* ¶¶ 297–317.

commercial entity that won the right to participate.[107] It based the plan primarily on two Commission documents from previous years.[108] In 2000, the Commission had established preliminary guidelines for a plan that would govern spectrum allocations made in the planned future auction "Band Plan."[109] In 2006, the Commission revisited the Band Plan when it solicited comments on the six-year-old blueprint.[110] In response, private entities submitted two notable proposals for implementing the public-private partnership that were in tension with the Commission's Band Plan.[111]

The first proposal was from Cyren Call Communications Corporation ("Cyren Call"), a group headed by Morgan O'Brien, an original principal in Nextel.[112] The group's proposal advanced the creation of a Public Safety Spectrum Trust (PSST), which

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[107] *See id.* ¶¶ 386–553.

[108] *See id.* ¶ 2 (setting out the bases for the *Second Report and Order* as including, *inter alia*, the August, 2006 Commercial Services proceeding and the 2000 Public Safety "Band Plan" proceeding).

[109] *See* Press Release, Fed. Commc'ns Comm'n, FCC Adopts Rules for Licensing and Operations in Portion of 700 MHz Band Reallocated from Television Channels 60 Through 69 (Jan. 6, 2000), http://www.fcc.gov/Bureaus/Wireless/News_Releases/2000/nrwl0001.html.

[110] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Section 68.4(a) of the Commission's Rules Governing Hearing Aid–Compatible Telephones, *Notice of Proposed Rulemaking, Fourth Further Notice of Proposed Rulemaking, and Second Further Notice of Proposed Rulemaking*, 71 Fed. Reg. 48506-01 (proposed Aug. 21, 2006).

[111] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 8064 ¶ 30 (April 25, 2007) ("In recent weeks, Frontline has submitted several filings with the Commission regarding its proposed 'Public Safety Broadband Deployment Plan' for a portion of the spectrum in the 700 MHz Band."). *See* Movshin, *supra* note 5, at 99 ("Both proposals hoped to leverage the attractiveness of assuring funding for the build–out and operation of a public–safety oriented advanced broadband network from a commercial licensee to obtain easier (and presumably less expensive, if not free) access to the spectrum so designated.").

[112] *See In re Reallocation of 30 MHz of 700 MHz Spectrum (747–762/777–792) From Commercial Use, Petition for Rule Making of Cyren Call Commc'ns Corp.*, RM-11348 (filed Apr. 27, 2006).

would oversee and control the usage of the entire 30 MHz of public/private partnership spectrum.[113] Thus, contrary to the Band Plan's proposal to create a partnership involving a single private, commercial entity, Cyren Call's plan would allow the PSST to allocate spectrum access to as many private entities as necessary to ensure the timely build-out of the broadband network.[114] In return for the network build-out obligation, the private entities would have access to the excess capacity on PSST-controlled spectrum. Moreover, the relatively high public-safety performance standards discussed in the Band Plan would remain applicable.[115]

Cyren Call's proposed plan had two main strengths: it avoided leaving the spectrum to the chance of a blind auction, and it provided both the PSST and commercial entities ample time to make informed decisions about the spectrum.[116] As such, this plan would have allowed for the controlled, educated assessment of demand for the commercial bands by the PSST and valuation of the commercial bands by interested commercial entities. Furthermore, it also would have allowed for more creative and potentially more accommodating spectrum licensing terms for the commercial entities. On the other hand, the plan required additional legislation since it would necessitate the reallocation of certain portions of the spectrum. Another challenge facing this plan was the need for the PSST to coordinate a nationwide build-out among several different commercial entities—a task some commentators believed to be undoable.[117]

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[113] *Id.* Cyren Call urged the Commission to adopt a public-safety model whereby the PSST would negotiate terms for long-term access to the spectrum with private sector entities that would agree to build and maintain a nationwide, next-generation network for public safety. In exchange, the private sector entities would gain the right to share the network and sell excess capacity for commercial purposes. *Id.*

[114] *Id.*

[115] *Id.*

[116] Movshin, *supra* note 5, at 100.

[117] Donny Jackson, *PSST Considers Regional Approach to D Block, Alters Agreement with Cyren Call*, URGENT COMMUNICATIONS, Aug. 25, 2008, http://urgentcomm.com/policy_and_law/news/psst-regional-d-block-0825/index.html ("[T]here have been concerns that [a regional] model could result in technological incompatibility and make negotiations with the PSST so complex

Meanwhile, Frontline Wireless, LLC ("Frontline"), whose principals included ex-Commission Chairman Reed Hundt,[118] proposed a different plan to meet the stringent build-out requirements for the nationwide public-safety network.[119] Frontline advocated the creation of a nationwide commercial license for 10 MHz of D Block spectrum adjacent to a 10-MHz public safety band.[120] As a condition of the D Block license, the commercial licensee would subject itself to governance by the rules of the public-private partnership.[121] In addition to other obligations, under Frontline's plan the commercial licensee would be required to facilitate the physical build-out of the network, to grant priority access to the public-safety broadband network, and to assure an open-access platform for all commercial users.[122]

3. *Final Industry Pushes for Network Usage Rules*

In April 2007, after hearing the 2006 proposals from Cyren Call and Frontline, and after setting out the concept of a single, nationwide public-safety licensee,[123] the Commission again sought

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that it might be difficult to realize the desired nationwide broadband service for public safety.").

[118] Movshin, *supra* note 5, at 100.

[119] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 8064 ¶ 269 (April 25, 2007) ("[Frontline's filings] propose various conditions on 10 megahertz of the commercial 700 MHz spectrum that we are required to auction, also are related to issues in the 700 MHz Guard Bands proceeding and the 700 MHz Public Safety proceeding.").

[120] *Id.* ¶ 272 ("Frontline proposes that the Commission alter the upper portion of the band plan and service rules in the *700 MHz Commercial Services Notice* in order to auction a single nationwide 10-megahertz license . . . near the 700 MHz Public Safety spectrum that would be subject to specific conditions.").

[121] *Id.* ("The [license] would consist of the paired 757–762 MHz and 787–792 MHz frequencies . . . [and the] licensee would construct and operate a common infrastructure to support a broadband public safety network as well as its own commercial broadband network.").

[122] *Id.*

[123] *See In re* Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, *Ninth Notice of Proposed Rulemaking*, 21 F.C.C.R. 14837 ¶¶ 3-4 (Dec. 20, 2006).

comments.[124] The solicitation elicited lobbying from a host of entities in the telecom industry, including some previously silent commercial interests.[125]

Among the new contestants was Google Inc., which filed an *ex parte* comment committing a conditional bid of $4.6 billion in the upcoming auction.[126] In particular, Google conditioned its proposed bid on the Commission's imposition of several conditions on the spectrum block, including an "open" platform network requirement as well as several other stipulations favoring non-legacy providers.[127] Google's proposal found support in comments filed by the Public Interest Spectrum Coalition, which advocated bringing in new market entrants "interested in

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[124] *See* Sheppard Mullin, *Washinton Update March/April 2007*, May 4, 2007, FCCLAWBLOG, http://www.fcclawblog.com/2007/05/articles/updates/washington-update-marchapril-2007/ (last visited Mar. 6, 2009) ("Disagreements within the Commissioners delayed the meeting for over 8 hours, and even with this added time they were not able to agree upon a specific band plan. Instead, the FCC adopted a FNPRM that seeks comment on several different ideas."); *see also* Movshin, *supra* note 5, at 102 ("[T]he Cyren Call proposal generally ran out of steam during the ongoing debate over the commercial bands.").

[125] Movshin, *supra* note 5, at 99.

[126] Letter from Eric Schmidt, Chief Executive Officer, Google, to Kevin J. Martin, Chairman, Fed. Commc'ns Comm'n (July 20, 2007), *available at* http://www.google.com/intl/en/press/pressrel/20070720_wireless.html ("[T]he Commission's draft order includes a reserve price of $4.6 billion for the 'C' Block, apparently to address unsupported claims about any impact from adopting open platform conditions. We hereby inform you that . . . Google intends to commit a minimum of $4.6 billion to bidding in the upcoming auction.").

[127] *See* Letter from Richard S. Whitt, Washington Telecom and Media Counsel, Google, to Marlene H. Dortch, Office of the Secretary, Fed. Commc'ns Comm'n (July 9, 2007), at 4, *available at* http://209.85.203.104/external_content/services.google.com/blog_resources/ex_part_via_efiling.pdf ("[C]ompetition can be enabled through . . . tailored requirements that a meaningful amount of available commercial spectrum be licensed for "open" broadband platforms. In an environment that fosters open platforms, new facilities-based entrants will be enticed to bid, and do so successfully."); *Comments of the Ad Hoc Public Interest Spectrum Coalition*, WT Dkts. 06–150, 05–211, 96–86 and PS Dkt. 06–229 (May 23, 2007), *available at* http://www.publicknowledge.org/pdf/pisc-fcc-comments-20070523.pdf

challenging the current cozy wireless oligopoly and broadband duopoly."[128]

In a nod to Frontline's position on the public/private partnership[129] and furthering its own with respect to network rules, Google, with support from Frontline and software company Skype,[130] championed an "open access" license requirement as a means to promote new market competition, flexible market arrangements, and innovation.[131] Relying on the Commission's landmark 1968 decision in *In re of use of the Carterfone Device in Message Telephone Service*,[132] Google advocated that the open access requirement should extend to all networks—wired or wireless—as a matter of policy.[133] This open access requirement

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[128] The Public Interest Spectrum Coalition is a consumer-rights-based public-interest group comprised of Public Knowledge, the Consumer Federation of America, the Champaign-Urbana Community Wireless Network, Consumers Union Educause, the Free Press, the Media Access Project, the New America Foundation, the National Hispanic Media Coalition, and the U.S. Public Interest Research Group. http://www.publicknowledge.org/pdf/pisc-700mhz-1pager.pdf (last visited Apr. 28, 2009).

[129] Whitt, *supra* note 127, at 3 ("Frontline's proposed wholesale/open access license requirement, applied to some portion of the available commercial spectrum, would ensure that at least some service providers would operate in an open manner.").

[130] *Id.* at 6 ("As Skype has made clear, there is a growing list of discriminatory and anticompetitive practices occurring in the wireless world, whereby users are denied the opportunity to use desired applications.").

[131] *Id.* at 4 ("New entrants have no legacy business models to promote or protect, and typically are more willing to embrace wholesale arrangements and partnerships. Access to open platforms also allows multi–layer activities from myriad entities, such as software applications providers, content providers, device makers, Web–based entities, simple resellers, and mobile virtual network operators (MVNOs)."); Center for Democracy & Technology, *supra* note 50 ("In comments recently filed with the FCC, [the Center for Democracy & Technology] urged regulators to capitalize on the opportunity presented by the auction to promote neutral broadband Internet choices. CDT recommended that . . . some portion of [the spectrum] be reserved for wholesale use in order to create greater competition and choice.").

[132] 13 F.C.C.2d 420 (1968) (requiring standard wireline telephone networks to be open to all devices),

[133] Whitt, *supra* note 127, at 6 (referring to *In re* of use of the Carterfone Device in Message Telephone Service, 13 F.C.C.2d 420 (June 26, 1968) ("[T]he

meant that the licensee must (1) permit all applications and devices to operate on the network (as opposed to "blocking" of applications or "locking" out of devices from the platform, as would be permitted to service providers not bound by open access rules) and (2) the make available network access to third parties at wholesale rates.[134]

Open access, Google contended, was absolutely necessary to give "a Web-based software applications company [like itself] . . . with little pertinent experience in the wireless market" a fighting chance to procure the nationwide license.[135] More importantly, however, it would be the only possibility to prevent incumbents Verizon and AT&T from snatching up the license, a result that would undoubtedly thwart competition.[136] Due to the built-in advantages afforded to the incumbents by the existing climate in the telecom arena, adopting rules that favor fledgling telecom entrants would be the only way to "level the proverbial playing field."[137]

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bedrock *Carterfone* principles underpin this mandate, with support from the FCC's broadband connectivity principles.").

[134] *See id.* at 5–8 (listing the basic requirements of open access); Public Knowledge, *700 MHz Spectrum Auction*, *supra* note 90 ("[The open access model] has a proven track record – it led to an explosion of competitive Internet Service Providers in the 1990's. It is also the model adopted by countries that are far ahead of the United States in terms of broadband speeds, prices and services.").

[135] Whitt, *supra* note 127, at 4.

[136] *Id.* at 5 ("As rational economic actors, those incumbents will then proceed in a manner that precludes alternative business models and arrangements.").

[137] *Id.* at 4 ("While some argue that Google could simply choose to outbid any single entity in the auction, the notion of 'deep pockets' alone is not the correct measure in this particular instance. Instead, the decisive factors include other significant economic and operational barriers to entry, and the relative value and usefulness of spectrum to the bidders. In particular, Verizon and AT&T are well–established, vertically-integrated incumbent providers of wireless and wireline services . . . [that] have an embedded national network of towers, backhaul, customers, retail outlets, and advertising. The incumbents also have far more ready cash flow at hand, and the willingness to spend it in furtherance of existing business plans. Consequently, the spectrum simply has more economic value and overall usefulness to incumbents like Verizon or AT&T, than to a would–be new entrant like Google.").

On the other hand, AT&T filed its own *ex parte* plea urging against Google's suggestions,[138] which it claimed would encumber licenses and impede broadband deployment.[139] After all, AT&T argued, rapid broadband deployment was at the heart of the underlying statutory framework that set the auction into motion.[140] Furthermore, AT&T claimed that incumbents such as itself valued the spectrum more and were better equipped to make immediate use of it than would-be telecom market entrants without the means to facilitate rapid deployment. Consequently, AT&T asserted that adopting rules that cater to the wishes of smaller companies and create the illusion of competition and innovation would in fact stifle competition and foreclose any possibility of rapid network deployment.[141]

AT&T also attacked Google's open-access requests, claiming that to adopt such rules would contradict the Commission's well-established history of wireless deregulation.[142] Based on various

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[138] Letter from Robert W. Quinn, Jr., Senior Vice President Fed. Regulatory, AT&T, to Marlene H. Dortch, Office of the Sec'y, Fed. Commc'ns Comm'n, (July 12, 2007), *available at* http://www.publicknowledge.org/pdf/att-fcc-letter-20070712.pdf.

[139] *Id.* at 2 ("Even putting aside the misconceived nature of Google's specific proposals . . . Google's approach is fatally at odds with the basic purpose of auctioning spectrum. The Commission's charge here is to identify—and to award spectrum to—precisely those companies that Google seeks to exclude from the auction: the companies that value the spectrum most and that will put it to its most efficient use.").

[140] *Id.* at 2-3 ("Google's bid–rigging approach is particularly misguided, moreover, because it would impede broadband deployment. The Commission is under a statutory mandate in this proceeding to encourage broadband deployment, and each of the Commissioners has expressly emphasized that goal as a primary aim here. There can be no serious dispute that existing wireless providers, having already invested billions in deploying 3G wireless broadband networks, are best situated to utilize the 700 MHz band to further that deployment.").

[141] *Id.* at 6 ("Google's request for 'open access' conditions in the 700 MHz band is nothing less than a request for the Commission to repudiate this history of competition, consumer welfare, and ongoing investment, and to adopt instead highly regulatory, deeply intrusive requirements that would frustrate innovation and inhibit broadband deployment.").

[142] *Id.* at 4 ("Google's proposal also fails because it runs counter to the Commission's and Congress's [sic] deregulatory framework for wireless—an

supporting statistics, AT&T asserted that exclusive-use, geographically-defined licenses had, in fact, catalyzed and perpetuated the thriving growth experienced by the wireless industry since the 1990s.[143] Thus, according to AT&T, adopting Google's proposed rules would constitute a "stunning about-face" in view of the established history of competition and deregulation in the wireless industry.[144]

4. *The Commission Opts for "Open-Access Lite"*

Amidst the squabbling between AT&T and Google, the Commission circulated a final plan it endorsed as "open-access."[145] Although the Commission touted the plan as bona fide, genuine-article "open-access,"[146] critics were not convinced.[147] Calling the

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approach that has been overwhelmingly validated in the marketplace and which continues to lead to unprecedented consumer welfare.").

[143] *Id.* at 6 ("Most importantly for present purposes, the Commission has long embraced a policy of flexible, exclusive-use, geographically defined licenses that—rather than dictate a business plan based on one particular company's untried vision of the marketplace—allow carriers to choose the business model that will enable them to compete in this highly competitive market.").

[144] *Id.* ("[C]onsumer welfare . . . [is] a direct result of the bipartisan consensus in both the Commission and Congress that consumers are best served by market-based spectrum policies and an overall deregulatory environment for wireless.").

[145] Leslie Cauley, *New Rules Could Rock the Wireless World*, USA TODAY, July 10, 2008, at 1A.

[146] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289, 15,564 (July 31, 2007) (statement of Comm'r Jonathan Adelstein) ("I have heard the plea of 250,000 consumers who submitted comments in support of open access. I have heard the concerns of Silicon Valley's best minds expressing frustration with their inability to innovate in the wireless space. I have heard the public safety community's cry for help, and their willingness to join their spectrum with a commercial provider in order to create a unique public-private partnership. And we've responded.")

[147] Richard E. Wiley & Martha E. Heller, *Communications Law 2007*, 25TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION 249, 256 (PLI, 2007) ("In a nod to open access principles, the new regulations require that, subject to certain restrictions, licensees of a portion of this band must allow customer, device manufacturers, third–party application developers, and others to use devices and applications of their choice. The agency declined, however, to require that the spectrum be made available to third parties at wholesale prices, as some parties have strongly advocated.").

Commission's plan "open-access lite,"[148] commentators quickly pointed out that while the Commission's plan would require a certain measure of openness with respect to devices and applications, the plan would have no effect on consumers who obtain wireless service on the existing cellular network operators.[149] True "open access," they contended, would require the licensee to offer some portion of the spectrum on a wholesale basis with no restrictions on devices and applications.[150] According to the critics, the Commission had floated what amounted to a far cry from legitimate open access and dubiously passed it off as genuine.[151]

The Commission also adopted the final band plan for the 700-MHz frequency range.[152] Responding to concepts outlined in the

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[148] Art Brodsky, *FCC Plays Games With Wireless Competition*, PUBLIC KNOWLEDGE POLICY BLOG, July 10, 2007, http://www.publicknowledge.org/node/1080 (repudiating the plan's legitimacy as true open access).

[149] *Id.* ("[The Commission] made it appear as if [it] was about to embark on a new, glorious age for consumers . . . . The new glorious age of cellphone liberation wouldn't apply to the millions of phones operating now on existing networks. It's not clear how a service offered by Verizon in the newly auctioned spectrum would work if it could also connect to the existing spectrum.").

[150] *Id.* ("The public-interest community and the high-tech companies see "open-access" as requiring the winners of the spectrum auction to offer a slice of the space on a wholesale basis with no rules on what types of services or equipment could be offered. That's a far cry even from loosened rules on a new slice of spectrum owned by existing companies."); Center for Democracy & Technology, *supra* note 50 ("[T]he best way to substantially increase users' choice for broadband providers is to allow multiple retail ISPs to pay for access to the licensees' spectrum [on a wholesale basis].").

[151] Brodsky, *supra* note 148 ("In theory, a true "open access" regime could go some way to creating some competition in the wireless world in which there are four or five major companies which each have similar ways of doing business . . . . A true open access regime could allow Google, or satellite companies, or any sort smaller entrepreneur with a great idea the chance to offer something newer and different from what the existing carriers provide. If [the Commission's] plan holds up, they may never get a chance.").

[152] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 314 (July 31, 2007) ("In light of the importance of such a network to the public interest, as well as the difficulty of assessing an appropriate reserve price prior to an initial auction . . . we believe that a D Block–specific aggregate reserve of approximately $1.33

Frontline proposal, a Network Sharing Agreement ("NSA") would govern both the commercial licensee and the Public Safety Broadband Licensee ("PSBL") in their uses of the D Block and the public safety bands respectively.[153] The NSA would also set a relatively high performance standard for operation of the nationwide network.[154] At the core of the NSA would be the operational principle of public safety preemption of commercial use on an as-needed basis.[155] Thus, in times of emergency, the PSBL could override the D Block's commercial transmissions in a temporary public safety takeover.[156]

Despite earlier suggestions by various parties that an open marketplace would work to achieve the goals sought in the partnership without such restrictions on the license,[157] the Commission rejected the notion because it lacked confidence that

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billion is appropriate given our goal of enabling the recovery of a portion of the value of the spectrum while also permitting licensing to proceed as quickly as possible. If, however, the D Block–specific aggregate reserve is not met, we conclude that we should leave open the possibility of re–offering the license on the same terms in a subsequent auction, as well as the possibility of re–evaluating all or some of the applicable license conditions.").

[153] *Id.* (explaining the contractual role the NSA will have in the interplay between the D Block licensee and the PSBL).

[154] *Id.* ¶ 364 ("We find that the development of a nationwide broadband interoperability standard is imperative. Having a common standard will lead to the development of common network and subscriber equipment, and thus enable the economies of scale we envision for the Public Safety Broadband Licensee. Furthermore, once a common standard is adopted, all public safety entities will be required to follow this standard in order to participate in the nationwide broadband network.").

[155] *Id.* ¶ 388 ("The commercial network would have access to the public safety broadband spectrum on a secondary basis, and broadband public safety users would have priority access to the network in times of emergency.").

[156] *Id.*

[157] *In re* Reallocation of 30 MHz of 700 MHz Spectrum (747–762/777–792) From Commercial Use, *Petition for Rule Making*, at 22 (filed by Cyren Call Commc'ns Corp.) (Apr. 27, 2006). Cyren Call claimed that its PSST model would create "self-sustaining financing." The proposal would give private companies incentives to build and maintain a national network and provide the best services to public safety at the best prices. The proposal would not, unlike Frontline's proposal, require a single D Block licensee to enter into a public/private agreement with the public-safety entities. *Id.*

any service provider would agree to such an arrangement on a nationwide basis.[158] Furthermore, the Commission specified parameters for the shared wireless broadband network, including features relating to the technology platform, signal coverage, robustness, reliability, capacity, security, operational capabilities, and control, along with certain equipment specifications.[159] Compliance by the commercial licensee with these specifications would ensure the fluid interoperability and compatibility of the commercial network with standards required by the PSBL.[160]

Additionally, the Commission revisited previous findings on the size of market areas slated for auction, the amount of spectrum in each license, and the possible need to tighten build-out rules.[161] The Commission set forth safeguards governing the establishment, execution, and application of the NSA and provided operational guidelines for the spectrum and contingency measures in case of either party's breach of the NSA.[162] These safeguards would primarily serve to protect the public safety broadband service in

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[158] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 8064 ¶ 12 (Apr. 25, 2007). *See generally In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 397 (July 31, 2007).

The Commission was not persuaded by proposals offered by others, presumably Cyren Call, that suggested alternatives to a public-private partnership would achieve the same public-safety interest result, explaining:

> For example, if we merely provided incentives for carriers voluntarily to enter into equivalent partnerships, we could not be confident that any carrier would actually agree to such an arrangement on a nationwide basis. Such ad hoc partnerships could occur at a local or regional level, leaving large areas of the nation without an interoperable public safety network. Separate, independently-created public/private networks could also operate on different spectrum, making interoperability across the different networks difficult to achieve.

Id; *see also* Movshin, *supra* note 5, at 99 (explaining the Commission's hesitance to adopt a model that would rely so much on private entity build-outs).

[159] *Second Report and Order*, 22 F.C.C.R. 15,289 ¶¶ 140–251.

[160] *Id.* ¶¶ 403–469.

[161] *Id. See generally* Movshin, *supra* note 5, at 99.

[162] *See Second Report and Order*, 22 F.C.C.R. 15,289 ¶¶ 444–454.

the case of a breach of obligation by the commercial licensee.[163] Although few groups appeared completely satisfied with the Commission's rules for usage of the D Block, both the incumbent cellular network operators and several non-traditional, potential competitors continued to show interest in the auction.[164]

D. THE AUCTION AND ITS FALLOUT

The Commission set the D Block's reserve at $1.33 billion for the March auction.[165] The high bid for the license, however, was well below the reserve[166] and left government officials and public safety advocates worried that efforts to build the nationwide, interoperable public-safety network had stalled.[167] Moreover, it appeared as though one of the legacy providers had momentarily nabbed the D Block,[168] leaving the feisty would-be providers out of the fold and quashing any hope of a new market entrant.[169]

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[163] *Id.*; *see* Wiley & Heller, *supra* note 147, at 270 ("Further, the FCC provided means for public safety entities to: (1) obtain an earlier build–out of broadband networks than provided for in the NSA; (2) build their own broadband networks in areas not included in the NSA; and (3) conduct wideband operations via a limited and conditioned waiver process.").

[164] *See* Movshin, *supra* note 5, at 99.

[165] *In re* Auction of 700 MHz Band Licenses Scheduled for January 16, 2008, *Public Notice*, 22 F.C.C.R. 15,004 ¶¶ 51–52 (Aug. 17, 2007) ("[I]n light of the D Block license conditions essential to the public safety purpose of the public/private partnership, it might be appropriate to expect bidders to bid only about 75 percent to 80 percent of such an amount, or about $1.33 billion.").

[166] *See In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008).

[167] *Auction Winners Announce Plans, While D Block Sits*, Multichannel Video Compliance Guide: Broadband Law & Regulation Newsletter 16 NO. 3 Multichannel Video Compliance Guide Newsl. (Thompson Publishing Group, Inc.), May 2008, at 2 (explaining the state of concern for the D block ensuing after the unsuccessful auction).

[168] Silva, *supra* note 26 (citing *Oversight of the Fed. Commc'ns Comm'n—the 700 MHz Auction Before the H. Subcomm. on Telecommc'ns and the Internet* (Apr. 15, 2008) [hereinafter "FCC Oversight Hearing"]) ("At present, it looks like two mega-resorts are going up on the beachfront in the form of Verizon [Wireless] and AT&T [Mobility], solidifying their wireless market and spectrum real estate positions.").

[169] *Id.* ("There is no new national competitor to provoke new broadband competition, innovation, and consumer choice coming out of the auction.").

In response, the Commission sought comment on how to proceed with the re-auction and licensing of the D Block[170] and continued to emphasize the importance of maximizing the public-safety and commercial benefits of the proposed nationwide interoperable public-safety network.[171] However, in a departure from the public/private partnership model, the Commission, at least briefly, mulled dropping the idea of the public/private partnership and turned to the public for alternative ideas to fund the build-out of a public-safety network.[172] Policymakers also presented the idea of a re-auction of the D Block free of conditions as a viable option to recover the value of the spectrum.[173] However the re-auction unfolded, the Commission would proceed *sans* backdoor this time, cautioning that "additional actions by Congress may be necessary to support the cost and build-out of a nationwide, interoperable broadband network for America's first responders."[174]

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[170] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 8047 ¶ 7 (May 14, 2008) ("We invite comment broadly on these principles and goals, as well as the specific subjects discussed herein. While today's item raises a number of specific questions, it should not be seen as providing any limitation on the public safety issues we seek comment upon.").

[171] *Id.* While the Commission opened up discussion to ideas not in line with the public/private partnership, it maintained the public/private partnership, perhaps with some minor rules modifications, as the best option to achieve its public safety goal. *Id.*

[172] *Id.* ¶ 1 ("[W]e . . . consider[] revisions to this partnership as well as alternative rules we should adopt in the event the D Block licensee is no longer required to enter into a mandatory public/private partnership."); *Auction Winners Announce Plans, supra* note 167; Donny Jackson, *House Hearing Focuses on D Block*, URGENT COMMUNICATIONS, Apr. 15, 2008 ("[V]irtually every member of the Subcommittee on Telecommunications and the Internet stated that developing a nationwide broadband network that would enable interoperable public safety communications is a high priority.").

[173] *FCC Oversight Hearing*, *supra* note 168 (statement of Rep. Cliff Stearns (R–Fla.)).

[174] Press Release, Fed. Commc'ns Comm'n, FCC Seeks Comment on How to Proceed with the Reauction of the 700 MHz D Block Spectrum and Creation of a Nationwide, Interoperable Public Safety Broadband Network (May 14, 2008), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-282151A1.pdf.

In September 2008, the Commission resolved to retain the framework for the public-private partnership absent some other type of funding for the nationwide interoperable public-safety network.[175] The Commission followed up on prior proposed rules changes, fine-tuned rules changes proposals[176] and revised the auction plan for assigning licenses.[177] One proposed licensing change of note was the possibility of offering regional licenses, as opposed to the original nationwide license around which the public/private partnership had been designed.[178]

The modified licensing format would require the holding of two auctions in parallel: one for fifty-eight regional licenses and one for a single nationwide license.[179] While the nationwide license would receive priority bidding,[180] the Commission would award regional licenses on a contingency basis if both the nationwide bids did not reach the reserve—now set at $750 million—and successful bids were made for regional licenses

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[175] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 2 (Sept. 25, 2008) ("[W]e tentatively conclude that we should continue to require, as a license condition, that the D Block licensee enter into a public/private partnership with the Public Safety Broadband Licensee for the purpose of constructing a wireless broadband network that will operate over both D Block spectrum and public safety broadband spectrum and provide broadband services to both commercial users and public safety entities (shared wireless broadband network). We find that a public/private partnership condition on the D Block remains the best option to achieve nationwide buildout of an interoperable broadband network for public safety entities, given the current absence of legislative appropriations for this purpose and the limited funding available to the public safety sector.").

[176] *See generally id.* ¶¶ 59–239.

[177] *See generally id.* ¶¶ 240–311.

[178] *Id.* ¶ 3 ("With regard to the appropriate geographic area, we propose to offer the D Block both as a single nationwide license and on a regional basis . . . .").

[179] *Id.* ¶ 242 ("If the provisionally winning bids do not cover at least half of the nation's population, the auction will be cancelled and no D Block licenses will be awarded based on the results of the auction.").

[180] *Id.* ("[T]he high bid on the nationwide, technology platform alternative would be the provisionally winning bid over any aggregate bid(s) covering less population in the two sets of regional licenses . . . .").

covering at least half the U.S. population.[181] Should the Commission adopt the regional licensing scheme, the holders of the licenses would work together to achieve the ultimate goal of interoperability through migration to the technology chosen by the PSBL.[182] Should the nationwide bids not reach the reserve and less than half of the U.S. population be covered by successfully auctioned regional licenses, the auction would be cancelled and the Commission would award no licenses.[183]

Although the notion of a singular nationwide license may no longer apply in the regional contingency, the proposal would still require all licensees to enter into the NSA as part of the now-regional public/private partnerships.[184] In addition to the growing consideration of the regional approach as a possible option, talk also surfaced about the possibility of reducing system design and priority access requirements to make the D Block spectrum more palatable to potential commercial bidders.[185]

III. HOW SHOULD THE COMMISSION PROCEED WITH THE RE-AUCTION OF THE D BLOCK?

In moving forward with the D Block, the Commission must consider several current political and societal issues. The

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[181] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 242 ("[T]he high bid on the nationwide, technology platform alternative would be the provisionally winning bid over any aggregate bid(s) covering less population in the two sets of regional licenses . . . ."); *see id.* ¶ 246 ("[W]e tentatively conclude, as an initial matter, that we will not award any licenses unless the total population covered by licenses with high bids meets or exceeds fifty percent (50%) of the U.S. population."); Cecilia Kang, *FCC Plans New Action for First-Responder Airwaves*, WASHINGTON POST, Sept. 6, 2008, at D2, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/05/AR2008090503500.html.

[182] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 256. In the case that a regional model was, after all, adopted, the Commission would require the individual commercial licensees to submit detailed proposals from the would-be licensees. Those proposals would then be reviewed by the Commission and the PSBL together to determine whether such proposals would meet the needs as prescribed by the public safety network. *Id.*

[183] *Id.*

[184] *See id.* ¶¶ 59–75.

[185] *See generally id.* ¶¶ 81–131.

transition between presidential administrations and the change of guard in political parties signals a change in Commission leadership is around the corner. The need for a presidentially-appointed Democratic Commission chairman to fill the position vacated by Republican Kevin Martin has in effect suspended D Block rulemaking indefinitely.[186] The administration's understandable focus on the sickly economy has left Interim Chairman Michael Copps at the helm for the moment.[187] This current economic climate is uncertain not only for consumers but also for businesses, including those that make up the telecommunications industry.[188]

Moreover, nothing close to a consensus has been reached with respect to the "unified front" the public-safety world had in mind for the usage of the Public Safety spectrum.[189] Exacerbating the matter is the recent departure of Cyren Call as the PSST's technology advisor due to inadequate compensation.[190] Commentators note Cyren Call's technological expertise and

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[186] *But cf.* Amy Schatz & Laura Meckler, *Obama to Tap Tech Advisor as FCC Chief*, WALL ST. J., Jan. 13, 2009, at B7, *available at* http://online.wsj.com/article_email/SB123180775460975639-lMyQjAxMDI5MzExMzgxMDM3Wj.html (noting that reports indicate Julius Genachowski, the Obama campaign's technology advisor, will be Martin's successor, although no official appointment date as been reported).

[187] *Id.* The replacement of the existing administration likely marked the end of the clock for Commission deliberation with respect to the re-auction.

[188] Steve Taylor & Jim Metzler, *Economic Downturn Not Affecting 2009 Telecom Budgets*, NETWORK WORLD, Jan. 22, 2009, http://www.networkworld.com/newsletters/frame/2009/011909wan2.html (noting that while telecommunication company budgets will remain essentially the same despite the economy, some negative impacts will be experienced by those companies as a result of the economy).

[189] *See* Matthew Lasar, *Cyren Call May Quit D Block Role*, ARS TECHNICA, Nov. 10, 2008, http://arstechnica.com/old/content/2008/11/cyren-call-may-quit-d-block-role.ars (noting that the debate over national and regional approaches has not settled, and it appears basic assumptions that were previously unquestioned, such as the need for complete interoperability between different public-safety jurisdictions, might be second-guessed by some).

[190] Press Release, Cyren Call & Public Safety Spectrum Trust, PSST and Cyren Call End Advisory Relationship (Mar. 6, 2009), *available at* http://www.cyrencall.com/media/documents/Joint_Press_Release_030609.pdf.

willingness to accommodate the PSST's compensation terms as reasons no other advisor would be fitting for the position.[191]

After attributing the March auction's floundering to uncertainty, risk, and fear of high network-operation costs by potential bidders,[192] the Commission admitted that it "*still* [did not] have the level of technical and economic data and expertise" it needed to ascertain the most efficient and effective way to implement a nationwide interoperable public-safety network.[193] Going forward, what should the Commission do to safeguard against repeat underbidding and to reinforce commitment to the public/private partnership, whether under a regional model or a nationwide model? To form an educated opinion about the best remedy, one must weigh the idealism of trying to maximize the benefit to the public against the practicalities of legislation and business.[194] Beneath it all lies the impetus of "the public interest."

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[191] Lasar, *supra* note 189.

[192] Letter from Kent R. Nilsson, Inspector General, Fed. Commc'ns Comm'n, to Kevin Martin, Chairman, Fed. Commc'ns Comm'n, at 26 (April 25, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281791A1.pdf ("[W]e conclude that . . . the many layers of uncertainty and risk, and the growing prospect of high network costs . . . were responsible for potential bidders' decisions not to bid."); *see* Brodsky, *supra* note 35 ("The reasons [for the drastic underbidding on the D Block in the March auction] are of the public safety community's own making, along with their allies, Cyren Call. They set conditions before the auction took place which no commercial company in its right mind would even think about meeting . . . . On one hand, public safety had every right to come into a potential negotiation asking for the moon. On the other hand, it wasn't very smart because it scared away the people who could do the most for it and did so in a way that tarnished the reputation of first responders and public safety.").

[193] Fed. Commc'ns Comm'n, *En Banc Hearing on Public Safety Interoperable Communications—The 700 MHz D Block Proceeding* (July 30, 2008), *available at* http://www.fcc.gov/realaudio/presentations/2008/073008/ [hereinafter "FCC En Banc Public Hearing"] (statement of Michael Copps, Senior Comm'r, Fed. Commc'ns Comm'n, at 1).

[194] Lance & Wachs, *supra* note 74 ("To achieve the greatest public benefit, the FCC will need to find common ground and balance among many competing interests and ideas. For example, a public–safety communications network might best be achieved by dedicating some of the bandwidth solely for such use . . . . On the other hand, a public/private partnership with a combined infrastructure built out and usable for commercial purposes but with emergency

A. *Evaluating the Public Interest*

The legislation and Commission rulemaking preceding the March 2008 auction contain numerous references to the "public interest".[195] But rarely do the documents ever scratch further than the surface, usually stating plainly that the public interest can be found in "public safety," "competition," or in retrieving a fair amount for the public resource that is the radio frequency spectrum.[196] If the driving force behind the auction of the D Block was, in fact, the public interest, one must examine the public interest piecemeal.

1. *The Interest of Rapid Deployment to Achieve Public Safety*

Public safety, the most pressing of the public interests bearing on the auction, had been invoked as a foundational cornerstone in developing the model for the public/private partnership.[197] Early on, the Commission identified rapid deployment of the national interoperable public-safety network as the key to achieving the public-safety goal for which the Commission had created the public/private partnership.[198]

If the ultimate goal is to create an interoperable public-safety network, how can the Commission ensure that the network is rapidly deployed and, once deployed, is robust and fully functional? Though speed of deployment and functionality of the end product would both seem to serve the interest of public safety, given the wrong circumstances, the two could work against each other.

For instance, to license the D Block on a national basis to anyone other than one of the existing telecom mainstays, namely

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and public–safety usage always preempting in the designated frequencies could yield a more rapidly deployed, robust infrastructure.").

[195] *See In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶¶ 386–529 (July 31, 2007). *See generally* 47 U.S.C. § 309 (2006).

[196] *See Second Report and Order*, 22 F.C.C.R. 15,289 ¶¶ 386–529.

[197] *Id. See* Alan Pearce, *An Analysis of the Public Safety & Homeland Security Benefits of an Interoperable Nationwide Emergency Communications Network at 700 MHz Built by a Public-Private Partnership*, 16 MEDIA L. & POL'Y 41, 47–48 (2006).

[198] *See generally* 47 U.S.C. § 309 (2006).

Verizon or AT&T, would necessarily risk the compromise of either a quick build-out or the network's functionality.[199] In other words, few service providers outside the telecom duopoly possess the wherewithal to speedily build the network without compromising its functionality.[200]

On the other hand, licensing the D Block on a regional level may not pose precisely the same risk. But such a model would still present its own share of network interoperability and quality assurance issues.[201] And while regional build-outs may provide for quicker regional coverage than that provided for by the nationwide model, attempting to coordinate build-outs and operation among fifty-eight regional licensees would undoubtedly come with its own set of drawbacks.[202]

Although the rollout of a high-quality, functionally robust network should not be expected tomorrow, the interest of public safety in rapid deployment is best protected by putting the D Block in the hands of those service providers with the resources to affect the quickest and most useful network.[203] Because the Commission currently considers both regional and national approaches, the question of which licensee(s) might affect the best balance of rapid deployment and functional end product may vary greatly depending on which approach is adopted.

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[199] Quinn, *supra* note 138, at 2–3 ("The Commission is under a statutory mandate in this proceeding to encourage broadband deployment, and each of the Commissioners has expressly emphasized that goal as a primary aim here. There can be no serious dispute that existing wireless providers, having already invested billions in deploying 3G wireless broadband networks, are best situated to utilize the 700 MHz band to further that deployment. Yet, far from ensuring that the spectrum available here is placed 'in the hands of those who can best put it to work' fulfilling the Commission's objective of widespread broadband deployment, Google's proposal is specifically designed to ensure the opposite result.").

[200] *Id.*

[201] Jackson, *supra* note 172 (citing statement of Rep. Jane Harman, D–Calif).

[202] *Id.*

[203] Quinn, *supra* note 138, at 2–3.

2. *The Interest of Maximizing Use of the Spectrum by Obtaining Fair Value*

In selling or licensing radio frequency spectrum, the Commission must act as a surrogate for the public in striving to attain the best possible value for the resource.[204] Although the March 2008 auction exceeded the aggregate reserve price for all of the licenses offered, the outcome did not serve the specific public interest in the D Block because the reserve price for the D Block was not met.[205] Accordingly, this disparity between the aggregate and specific public interests requires each of them to be examined independently.

On the whole, the auction retrieved over $19 billion when the aggregate reserve was set at just over $10 billion.[206] Thus, accepting the reserve prices as true reflections of the deserved market value at the time, the value received by the public for all spectral bands was almost double the aggregate fair value, an inarguable success.[207]

The high bid in the D Block auction, however, was approximately $900 million less than expected—not even half of its appraised value.[208] When viewed in light of the $9 billion surplus created by the auction of the other blocks, the $900 million

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[204] Communications Act of 1934, 47 U.S.C. § 309(h)(3)(C) (1934) (stating the objectives of competitive bidding auctions).

[205] *In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008).

[206] *Id.*

[207] Letter from Harold Feld, Senior Vice President, MEDIA ACCESS PROJECT, to Kevin Martin, Chairman, Fed. Commc'ns Comm'n, at 3 (Mar. 19, 2008), *available at* http://www.mediaaccess.org/file_download/220/DBlock%20ltr%20to%20Martin%20FWR.pdf ("[T]he Commission can take considerable pride in the successes of Auction 73. Auction 73 attracted 214 qualified bidders, all blocks with the exception of D Block met their reserve prices, and only eight licenses failed to attract a provisional winning bid. In addition, the auction revenue nearly doubled the projection of the Congressional Budget Office (CBO). Compare these statistics with the purportedly 'wildly successful' AWS auction in 2006 (Auction 66), which attracted only 168 qualified bidders, and where large conglomerates won national footprints at—in the words of the cable consortium Spectrum Co.—'attractive prices.'").

[208] *Auction Closing Notice*, 23 F.C.C.R. 4572 ¶ 2.

shortcoming pales in comparison. But when viewed in terms of the specific public interest in the D Block, selling an increasingly scarce resource for only 35% of its $1.33 billion appraised value would have been criminal.

But public interest is a function of time and circumstances. While the public's pre-auction interest may have been to meet the reserves set by the Commission, its interest changed the moment the D Block was conditionally left on the auction block. At that point, the licenses for the other blocks had been auctioned and the only remaining public interest was in obtaining fair value for the D Block. Thus, retrospectively appreciating the great success of the auction on the whole does not change the fact that the public's interest can only be met by successful recovery of the D Block's value, which has yet to be determined.

Following the March 2008 auction, the Commission admitted that balancing the commercial viability of the D Block license with the murky obligations tied to the commercial license was an exercise fraught with difficulty; a first run at which, somewhat understandably, went awry.[209] Now the Commission has proposed an adjusted reserve tag for the D Block of $750 million for the future auction, which is half of the March 2008 reserve.[210] This might show that the original reserve was a misappraisal of value in light of the obligations and that $750 million was a fair return to the public all along. Or it might constitute an open admission by the Commission that it is willing to slash prices to achieve its public-safety goal.

Given the difficulties in valuing something as intangible as a block of spectrum—not to mention trying to adjust its price in contemplation of a return service provided by the buyer—the real meaning of the lowered reserve is unclear. Regardless of whether the future auction results in favor of national or regional licensing, the vague nature of the relation between the D Block's monetary

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[209] *In re* Auction of the D-Block License in the 758–763 and 788–793 MHz Bands, *Order*, 23 F.C.C.R. 5421, 5424 (Mar. 20, 2008) (statement of Comm'r Jonathan Adelstein) ("It is nothing short of a tragedy that the D Block failed to sell.").

[210] *See* Kang, *supra* note 181.

auction value and the return it will provide to the public makes the determination of whether the public is receiving fair value an exercise in futility.[211]

3. *The Interest of Promoting Competition*

Though the public interest in marketplace competition seems to have been relegated to the back burner since September, a close examination still sheds light on an important, albeit less pertinent, aspect of the spectrum auction. Notably, the promotion of competition in the context of the D Block auction flies in the face of the highly prioritized rapid deployment for the interest of public safety.[212]

Here is how the two are at odds: When AT&T argued against open access rules as a means to allow the D Block to naturally fall into the hands of whoever would make best use of it, it discounted the public interest of marketplace competition.[213] AT&T's argument stressed allowing the auction to unfold in a manner that would empower those companies who could make quick, efficient use of the spectrum.[214] While those companies would likely make

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[211] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301, 14508 (Sept. 25, 2008) (statement of Comm'r Jonathan S. Adelstein, concurring in part, dissenting in part) ("[W]e have no way to determine . . . whether such a large upfront minimum bid requirement of $750 million permits a sustainable business model, or dooms this enterprise to failure from the outset. There is no analysis provided in the item to explain this number. We are offering for sale a valuable asset, but not one of unlimited value. And we are expecting major investments to be made by private enterprise to meet the needs of public safety. Despite these hurdles, we have not undertaken to assess whether the costs we are asking the private sector to bear have any relationship to the returns it can expect. I would have preferred to see much of the amount that will go to the minimum bid to go to building out the network rather than paying for the spectrum.").

[212] *See* Quinn, *supra* note 138. Although AT&T claimed to be promoting both rapid deployment and competition, industry critics were not thrown by their characterization of competition, as it differs vastly from the competition envisioned by the technology companies and most consumer advocates. *Id. See generally* Brodsky, *supra* note 148.

[213] Quinn, *supra* note 138, at 2.

[214] *Id.* ("Even putting aside the misconceived nature of Google's specific proposals—a matter discussed in more detail below—Google's approach is

most efficient use of the spectrum, they would also necessarily stymie competition by continuing to hold the limited amount of telecom industry clout above the heads of those would-be providers looking to break into the industry.[215] And although AT&T never explicitly appealed to the Commission's public safety sympathies, the service provider would have been well-advised to ring the public safety chime at least once in its *ex parte* filing.[216] After all, what it referred to as "efficient use"[217] of the spectrum throughout that filing could have, as a logical extension, easily been tied in with the Commission's public safety goal.[218]

On the other hand, when Google advocated competition via open access rules to favor technology-based internet companies, it deprioritized public safety.[219] Those technology-based internet companies, while possibly providing more competition and innovation, could not use the spectrum nearly as efficiently as the larger service providers.[220] Thus, if AT&T's and Google's D Block arguments support one proposition, it is that promoting either public safety or increased competition necessarily comes at the expense of the other.

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fatally at odds with the basic purpose of auctioning spectrum. The Commission's charge here is to identify—and to award spectrum to—precisely those companies that Google seeks to exclude from the auction: the companies that value the spectrum most and that will put it to its most efficient use.").

[215] Quinn, *supra* note 138; Center for Democracy & Technology, *supra* note 50 ("[R]ecent changes to the legal regime raise the possibility that [existing] network operators could seek to exercise more 'gatekeeper' control over what online services or applications their customers use. Creation of a viable wireless broadband option could help provide a competitive check against any efforts to move in that direction.").

[216] Quinn, *supra* note 138.

[217] *Id.* at 2 ("The Commission's charge here is to identify—and to award spectrum to—precisely those companies that Google seeks to exclude from the auction: the companies that value the spectrum most and that will put it to its most *efficient use*.") (emphasis added); *id.* ("Because existing providers value the spectrum more and are better situated to put it to more *efficient use*, Google complains, they are willing to pay more for it.") (emphasis added).

[218] *Id.*

[219] Schmidt, *supra* note 126.

[220] *Id.*

B. *Examining the Commission's Options Through the Lens of the Public Interest*

Since the March auction, commentators have generally taken three distinct positions on the direction in which the Commission should move with the D Block. Having reviewed the competing interests at play, this section discusses how each of those positions either meets or fails to meet those interests. Although strongest immediately following the auction, since then support for the first two positions discussed has deflated considerably. Still, these positions merit review because of their common strands with the third position, which currently carries the most support but contains within it two battleground issues that divide its proponents. As the following shows, each position stresses certain strains of the aforementioned public interests while leaving other aspects unaddressed or under-addressed.

1. *The Commission Should Accept the Auction Results and Focus its Efforts on Assisting the Commercial Licensee with Rapid Deployment of the Nationwide Interoperable Public-Safety Network*

With the Commission taking $9 billion more than expected from the auction in whole, public safety advocates say there may be no need to set a reserve price at all on the D Block upon re-auction.[221] They insist that the Commission should focus its efforts on helping to address the significant network-cost issues for the commercial licensee.[222] Although such a path would not translate immediately into the front-end dollars anticipated in other proposals, the investment by both the Commission and the commercial licensee in the nationwide deployment would manifest itself later.[223]

The U.S. spends over $10 billion annually on recovering from catastrophic events, and the occurrence of such events is predicted to increase considerably over the coming years.[224] Having a robust,

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[221] *Auction Winner Announce Plans, supra* note 167.

[222] *Id.*

[223] Pearce, *supra* note 197, at 48.

[224] *Id.* ("The continued expansion of development in coastal areas, combined with the expansion of major urban areas, is dramatically increasing costs

interoperable public safety network in place would allow for quicker reaction to such occurrences, undoubtedly minimizing unnecessary damage to property and losses of life.[225] Thus, while the Commission may seek to make immediate contributions to the Treasury,[226] the delayed gratification of the savings associated with the nation's quickened disaster reflexes may actually effect a better financial, not to mention public safety, service to the U.S.[227]

Moreover, most public safety advocates contend that the Commission should hold fast to the nationwide concept instead of considering a regional licensing model.[228] Proponents of this view explain that the incompatibility among existing regional public safety networks has resulted from years of such regional efforts despite a more recent push to consolidate regional

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associated with disasters. Major catastrophe loss projections range from $25 billion to nearly $85 billion a year."); *see* Insurance Information Institute, Facts & Statistics, Inflation–Adjusted U.S. Catastrophe Losses by Cause of Loss, 1986–2005, http://www.iii.org/media/facts/statsbyissue/catastrophes/; CONG. BUDGET OFFICE, COST ESTIMATE OF H. R. 230 NATURAL DISASTER PROTECTION AND INSURANCE ACT OF 1997 (Oct. 8, 1997), *available at* http://www.cbo.gov/doc.cfm?index=157.

[225] Pearce, *supra* note 197, at 49.

[226] 47 U.S.C. § 309 (j)(8)(E)(iii) (2006) (setting a firm deadline for transfer of auction proceeds to the U.S. Treasury).

[227] Pearce, *supra* note 197, at 49.

[228] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Robert Gurss, Dir., Legal & Gov't Affairs, Ass'n of Public Safety Commc'ns Officials Int'l, Inc., at 2) [hereinafter "FCC En Banc Public Hearing–Gurss Statement"] ("Public safety communications are usually provided through land mobile radio systems operated by and serving a single agency or jurisdiction. That allows systems to be designed to meet agencies' specific operational and coverage requirements within their unique geographical constraints, while also providing agencies with unfettered control over their communications systems. However, separate radio systems (which can be in any of four different portions of the radio spectrum) have also led to significant problems over time in many cases, including overly specialized radio systems and specifications, expensive radio equipment with a limited number of vendors, duplication of infrastructure, inadequate interoperability, and inefficient use of scarce radio spectrum. Fortunately, there has been a trend in recent years towards consolidation of public safety radio systems to serve larger areas, such as a county, region, or state. However, there continues to be substantial variations in land mobile radio systems across the nation, with critical gaps in interoperability.").

communications.[229] They conclude that it is a regional licensing scheme that created the very problem of existing gaps in interoperability, so a new regional licensing model provides no remedy.[230]

2. *The Commission Should Sever the D Block From the Public Safety Spectrum and Re-Auction With Focus on Promoting Increased Competition*

While the D Block served as a key piece in the proposed deal to affect a nationwide build-out of a public safety network since the plan's inception, some critics argue the plan was doomed to fail due to a lack of funding.[231] Married to the public-private partnership for almost a decade now, critics insist the Commission should consider its mission mandated by the DTV Act to be complete.[232] Statutorily speaking, the DTV Act required only that the Commission commence an auction of licenses for the 700 MHz spectrum by January 28, 2008, and that the Commission deposit the corresponding proceeds in the Treasury by June 30, 2008.[233] Having held the auction in hopes of securing funding for support in the build-out, and having deposited the proceeds from the successfully auctioned blocks in the Treasury, the Commission has satisfied the DTV Act mandate according to some commentators.[234]

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[229] *Id.*

[230] *Id.*

[231] Feld, *supra* note 207, at 2 ("Certainly the same concerns that drove the Commission to adopt the current D Block rules continue to shape the Commission's choices today. Congress ordered construction of a national interoperable broadband safety network without providing sufficient funding to pay for it. But the Commission must consider whether the concept of a public/private partnership is workable—and if so under what terms.").

[232] *Id.* ("The Commission has held the required auction, and will presumably deposit the revenue by the deadline. As some licenses always remain unassigned after an auction, a fact of which Congress must surely be aware after more than ten years of experience with FCC auctions, the statutory command to hold an auction, absent something more, cannot reasonably be interpreted as a requirement to dispose of all the spectrum before June 30.").

[233] *Id.*

[234] *Id.* ("As an initial matter, the Commission should consider that it has fulfilled its obligations under the Digital Transition Act of 2005.").

Further, they contend that instead of beating the unworkable dead horse that is the public-private partnership, it would be wiser to sever the D Block from the public safety spectrum altogether.[235] Once severed, the Commission could use the spectrum to promote increased competition and enhance broadband deployment by auctioning the unencumbered D Block license(s) in essentially the same manner it auctioned the A, B, C, and E Blocks in March.[236] While pre-auction figures by the Congressional Budget Office estimated that, without conditions, the entire 700-MHz spectrum would raise a total $12.5 billion at auction, other studies expected an auction free of conditions to raise $25 to $30 billion.[237]

While advocates of D Block severance endorse a platform of increased auction proceeds and fostering competition, they also criticize the feasibility of the public-private partnership.[238] A 10-MHz public safety band, they claim, may be insufficient to handle the heavy communications traffic certain to occur in the case of a large-scale crisis.[239] Furthermore, the preemptive nature of the

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[235] *Id.* at 3 ("The successes of Auction 73 are the direct result of the Commission conducting several rulemakings to consider a broad range of controversial and unorthodox options. Some of these, such as anonymous bidding, proved wildly successful. Others, such as the attempt to create a public/private partnership, proved unsuccessful. But the Commission must not allow the failure of D Block to reduce it to timidity and investigation of only conventional solutions. Instead, the Commission should transform the failure of the D Block to attract sufficient bidders into an opportunity to investigate how this last piece of unencumbered 'beachfront' spectrum can best serve the public interest.").

[236] *Id.*

[237] Silva, *supra* note 26 (citing *FCC Oversight Hearing, supra* note 168 (statement of Rep. Joe Barton (R–Texas)) ("True, the Congressional Budget Office estimated the auction would raise $12.5 billion. But other studies estimated that, without the conditions, the spectrum would raise $25 to $30 billion. I think that the higher estimates would have been about right, based on the results where the C–Block revenue was about half of what many folks thought, and the D Block did not sell at all.")).

[238] Jackson, *supra* note 172 (citing *FCC Oversight Hearing, supra* note 168 (statement of Harlin McEwen, Chairman, PSST)).

[239] *Id.* (citing *FCC Oversight Hearing, supra* note 168 (statement of Harlin McEwen, Chairman, PSST)); *see* Pearce, *supra* note 197, at 49. *See FCC En Banc Public Hearing*, *supra* note 193 (statement of Richard Taylor, Senior Technologist, Tyco Electronics M/A-Com) ("10 MHz may be insufficient to

public safety transmissions over commercial transmissions would hinder the marketability of the commercial network to prospective advertisers.[240]

The uncertainty involved in the cost estimates of the nationwide build-out, those who recommend D Block severance suggest, casts doubt on the auction proceeds' ability to adequately fund the network without significant complement from the government.[241] Conversely, a regional licensing model for the partnership would open the door to inconsistent reliability among regional carriers, resulting in patchy public safety coverage in some areas of the country and better coverage in others.[242]

3. The Commission Should Modify Rules to Encourage More Competitive Bidding While Re-auctioning the D Block Subject to the Public/Private Partnership

According to the dominant view of the proposed auction, the D Block should remain part of the public-private partnership and the Commission should tailor some of the more rigid license conditions to entice more bidders into the auction.[243] Such adaptations would likely include a lower reserve price[244] and greater clarity regarding network build-out obligations and

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accommodate many of the envisioned uses. Broadband networks are expected to carry surveillance video from fixed surveillance cameras throughout a city to public safety vehicles in the field. As typical [Internet Protocol] surveillance video operates at 500 kbps–1.5 Mbps, the available 5 MHz of public safety uplink spectrum can accommodate only a limited number of cameras per cell before these fixed wireless video applications exhaust the spectrum.").

[240] *FCC Oversight Hearing, supra* note 168 (statement of Coleman Bazelon, Principal, Brattle Group) (speculating that the advertising slogan of such a conditionally profitable network should be "[g]uaranteed *NOT* to work when you need it most.") (emphasis added).

[241] *Id.* (statement of Harlin McEwen, Chairman, PSST).

[242] Jackson, *supra* note 172 (citing statement of Rep. Jane Harman, D-Cal.).

[243] *Id.* (citing *FCC Oversight Hearing*, *supra* note 168).

[244] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 275 (Sept. 25, 2008) ("[W]e . . . tentatively conclude that it is in the public interest to . . . establish initial minimum opening bids for each set of alternative D Block licenses that equal or aggregate approximately $750 million.").

business models for the commercial licensee.[245] Proponents claim this compromise between public safety and broadband competition interests to be the "last, best chance"[246] to bring to life a public safety network without considerable federal appropriations.[247] Within the general proposition, however, there are certain sticking points, one of which is embodied in the ongoing debate between proponents of a regional licensing model and proponents of national licensing.[248]

a. *A Regional Licensing Model*

Of the few changes the Commission mentioned in September, the most drastic one was a plan in which the Commission would offer regional licenses instead of one national license.[249] A regional licensing model favors smaller to mid-sized potential licensees as it would permit participation by providers who may be unable to compete on a nationwide scale but may have the resources to build regional networks that could be leveraged to rapidly deploy a nationwide system.[250]

Some proponents suggest this licensing scheme would provide local public safety agencies with the necessary control to determine the appropriate level of interplay between public safety and commercial entities required to sustain the regional public-

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[245] Jackson, *supra* note 172 (citing *FCC Oversight Hearing*, *supra* note 168).

[246] *FCC Oversight Hearing, supra* note 168 (statement of Michael Copps, Comm'r, Fed. Commc'ns Comm'n) ("I accepted the novel idea of a public-private spectrum partnership because it probably represents the last, best chance to build a network that will work for public safety.").

[247] *Id.*

[248] *See generally Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶¶ 61–72.

[249] *Id.* The Commission's considering of a regional model strayed a great deal from the ideological position of "nationwide or bust" it seemed to espouse before the D Block failed to sell. *Id.*

[250] *Id.* ¶ 61 ("AT&T, Verizon Wireless, and smaller regional service providers, such as MetroPCS, United States Cellular Corporation (US Cellular) and Rural Telecommunications Group (RTG), prefer the multiple, regional license approach for the D Block . . . ."). *See FCC Oversight Hearing*, *supra* note 168 (statement of Robert Irving, General Counsel, Leap Wireless).

private partnership.[251] Moreover, regional licenses would allow those areas with readily available local agencies and commercial licensees to get the network deployment underway leading to earlier maximization of the spectrum[252] as well as allowing commercial licensees to be particularly responsive to the unique needs of state, regional, and local public safety agencies.[253]

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[251] *See FCC En Banc Public Hearing*, *supra* note 193 (statement of William Andrle, Jr., Northrup Grumman Information Technology, at 2) [hereinafter "FCC En Banc Public Hearing—Andrle Statement"] ("This 'network of networks' approach can achieve faster build–out in some areas—and in areas that might not ever be served. It also gives local entities more control over the details of the network design serving their jurisdictions. These networks can be harmonious with the proposed national shared network or—if for whatever reason the public/private partnership does not come to fruition—the continued organic growth of these networks over time can increasingly meet public safety's needs."); *FCC En Banc Public Hearing*, *supra* note 193 (statement of Don Brittingham, Assistant Vice Pres., Public Affairs, Policy and Comm'n, Verizon Corp., at 3) (supporting the regional licensing approach and rationale presented by the New York Police Department (NYPD)); *Interoperability in the Next Administration: Assessing the Derailed 700 MHz D-block Public Safety Spectrum Auction, Hearing Before the Committee on Homeland Security*, 110th Cong. 2–3 (2008) (statement of Charles Dowd, Deputy Chief, NYPD) [hereinafter "Dowd Interoperability Statement"] http://homeland.house.gov/SiteDocuments/ 20080916154150-70229.pdf.

[252] *See* Dowd Interoperability Statement, *supra* note 251, at 2–3; *FCC En Banc Public Hearing*, *supra* note 193 (statement of Stacey Black, Chairman, Executive Director-Market Development, AT&T, Inc.) ("By leveraging a commercial partner's existing facilities, local public safety entities can expedite the deployment of wireless broadband facilities without having to wait for a nationwide 700 MHz network to be constructed or devices to be developed.").

[253] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 71 ("Regional licensees could coordinate with local public safety entities and ensure that public safety communications are tailored to meet unique local needs in particular geographic areas. PSR licensees may, for example, take into account regional differences in terrain and public safety needs in determining how to set up and operate the system, which could be more cost effective in certain respects and better suited to regional needs than a one-size fits-all system."); *FCC En Banc Public Hearing*, *supra* note 193 (statement of Charles Dowd, Deputy Chief, NYPD) ("Both Philadelphia and San Francisco filed comments in support of local or regional public safety broadband networks as opposed to the proposed national network. We are also seeing manufacturers publicly expressing interest in developing broadband mission critical voice and data networks for public safety."); *see id.* (statement of Stacey Black, Chairman,

Additionally, the model for licensing should reflect the needs on a regional basis as the effects of emergency situations are more often than not felt regionally, with local and regional agencies first to assign responders.[254] According to regional licensing advocates, sticking to the national license scheme will result in deployment completion in 2012—at the earliest.[255]

Technologically speaking, endorsers of the regional licensing model insist that the Commission should allow regional licenses so long as the systems employed meet or exceed the technical requirements of the national network.[256] The much maligned issues arising from the mesh of the different regional networks, they emphasize, do not prohibit interoperability and can be overcome

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Executive Dir.-Market Dev., AT&T, Inc.) ("The use of regional [licenses] . . . would facilitate the development of partnerships between public safety and private entities to build regionally-based networks using the PSBL-developed national interoperability standards and requirements.").

[254] *FCC En Banc Public Hearing*, *supra* note 193 (statement of John Farmer, Jr., Former Attorney Gen., New Jersey; Senior Counsel, 9/11 Comm'n) ("These common elements [in our most recent emergencies] suggest an approach to reallocating bandwidth that builds interoperability from the ground up, rather than from the top down. In other words, because emergencies are lived at the local and regional levels in the first instance, it is critical that interoperability be assured at those levels first. As reflected in the submissions of New York, Washington, and other cities, substantial progress has been and can be made at those levels in the near-term. Allocation of D-Block bandwidth to these efforts will accelerate their progress.").

[255] *See* Dowd Interoperability Statement, *supra* note 251, at 4 ("Even if the FCC's proposed public private partnership auction plan is successful—and there is significant uncertainty on this point given the failure of the last auction to generate even a single qualifying bid—it is unlikely that the commercial partner would be prepared to provide services to public safety before 2012 at the earliest.").

[256] *FCC En Banc Public Hearing—Andrle Statement*, *supra* note 251, at 2 ("As we and others have suggested in comments, the Commission should allow local and regional public safety entities to construct their own mission-critical broadband mobile systems on the Public Safety broadband spectrum, so long as those systems meet or exceed the interoperability and other technical requirements of the national network, or are capable of migrating to the technology chosen by the D Block licensee."); *see FCC En Banc Public Hearing*, *supra* note 193 (statement of Stacey Black, Chairman, Executive Dir.-Market Dev., AT&T, Inc.) (agreeing with the notion that the spectrum should be auctioned on a regional basis).

given the use of the proper internet protocols and appropriately geared equipment.[257] The use of an end-to-end network model, which is currently in design, would not only cure gaps in interoperability currently experienced by responding agencies, but it would also provide for the continued use of public safety equipment without replacement.[258]

On the other hand, nationwide license advocates object to regional licensing on grounds that some—or even many—regions might go unsold at auction, resulting in checkerboard coverage.[259] They confute claims that the aforementioned gaps of interoperability can so deftly be smoothed over, arguing alternatively that the technical integration of regional networks in creating a fluid, interoperable network could take years to fix.[260]

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[257] *FCC En Banc Public Hearing—Andrle Statement*, *supra* note 251, at 2 ("[I]nteroperability among local and regional networks can be achieved by the remarkable inherent flexibility of [Internet Protocol]-based networks and, for the air interface, by imbedded interoperability in the latest broadband wireless user equipment, with software–defined characteristics and multi-mode capabilities. There is no need to dictate a single air interface technology. As with commercial wireless networks, interoperable 'roaming' can be achieved among multiple air interface technologies (and frequencies) using the latest handset technologies. The most important task is to work out the accessibility and interoperability of applications and functions—above the RF level in the rest of the network.").

[258] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Richard Taylor, Senior Technologist, Tyco Electronics M/A-Com) ("The power of IP is that it permits public safety to keep using their legacy equipment for interoperable communications, while laying a path for broadband data, video and more efficient voice.").

[259] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 60 (Sept. 25, 2008) (pointing to comments filed by the Association of Public-Safety Communications Officials (APCO), which highlight the potential for technical problems arising from region-based auction disparity).

[260] *Id.* (considering comments filed by the National Public Safety Telecommunications Counsel (NPSTC)). *But see FCC En Banc Public Hearing*, *supra* note 193 (statement of Stacey Black, Chairman, Executive Director-Market Development, AT&T, Inc.) (refuting the contention of nationwide proponents that network integration and patchy coverage would pose problems).

b. *A Nationwide License Model*

While some more progressive public safety advocates consider the regional licensing model, staunch public safety purists cling to the nationwide licensing concept.[261] Although the Commission maintains a slight tilt toward nationwide licensing,[262] it continues to stress the importance of a public-private partnership in achieving the public safety goal of the deployment of a cost-effective, spectrally efficient, flexible public safety network.[263] Other benefits of a nationwide license, according to the Commission, include a much more straightforward coordination between the D Block licensee, the PSBL, and the public safety agencies that would use the network.[264] Public safety proponents second the notion on financial grounds, remaining firm on the stance that a nationwide license provides the most viable means for funding a

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[261] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 65 (citing comments filed by, *inter alia*, the Association of Public-Safety Communications Officials (APCO), the International Municipal Signal Association (IMSA), and the National Association of Telecommunications Officers and Advisors (NATOA), the Commission noted "the majority of public safety agencies assert that a single, nationwide license is the best way to achieve an interoperable network."). *FCC En Banc Public Hearing—Gurss Statement*, *supra* note 228, at 2 ("APCO strongly supports the formation of a national, interoperable, broadband public safety communications network.").

[262] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 242. The Commission's most recent NPRM states the Commission's intention to give priority to a nationwide licensing scheme. A regional scheme is to be employed only in the case that the nationwide reserve is not met. *Id.*

[263] *Id.* ¶ 66 ("A single, nationwide license may provide opportunities for cost savings through elimination of redundant equipment (*e.g.*, mobile base station deployments in the event of natural disasters), processes (billing, etc.) or staff (*e.g.*, public safety support), and greater economies of scale for network equipment or handsets. These cost savings might enhance the ability of the D Block licensee to rapidly build the public safety broadband network in rural, expensive-to-serve, less populated areas. We therefore tentatively conclude that the economies of scale that a commercial entity could achieve through a single, nationwide license could promote the rapid deployment of an advanced nationwide public safety broadband network.").

[264] *Id.* ¶ 67 ("The coordination scheme envisioned for the D Block could be particularly efficient if there were only one licensee required to coordinate and negotiate with the Public Safety Broadband Licensee and local public safety agencies.").

nationwide broadband network which would use the spectrum efficiently. [265] While regional licensing may provide a more feasible route to financial viability of regional partnerships—which, in itself, constitutes a desirable outcome—advocates point out that the regional approach would not touch on the goal of a *nationwide* deployment to serve the entire public equally. [266]

These advocates advise that a nationwide network would ensure that all public safety agencies—regardless of their size, location, expertise, or financial resources—would have the same opportunities to take advantage of broadband communications.[267] On the other hand, regional licensing would allow only a few agencies with substantial resources and expertise to provide their first responders with state-of-the-art communications technologies.[268] Moreover, a single technology standard employed in a nationwide scheme would allow users to acquire commercially available technologies at lower costs than currently used custom equipment, and would cut down on redundant costs incurred by the construction of overlapping, duplicative broadband infrastructure.[269]

Mindful of the benefits of nationwide ideals, dissenting wireless providers, nevertheless, argue that no commercial entity will find a nationwide license commercially viable with requirements on par with those proposed in the Commission's *Second Report and Order*. [270] Note that some commentators take

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[265] *FCC En Banc Public Hearing—Gurss Statement*, *supra* note 228, at 2 (reminding of the importance of funding of the nationwide broadband interoperable public-safety network and that its most likely path to being accomplished, is through a network-sharing agreement between the PSBL and the winner of the D Block license).

[266] *Id.*

[267] *Id.* at 3 (extolling the benefits of a nationwide licensing model).

[268] *Id.* (forecasting the inequities to result from the Commission's adoption of a regional licensing model, describing the outcome as "islands of robust, and probably incompatible, public safety broadband networks, surrounded by vast unserved areas.").

[269] *Id.* (analyzing the cost benefits to both the government and the commercial entity associated with a nationwide license).

[270] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14,301 ¶ 68 (Sept.

neither side, seemingly indifferent about whether a regional approach or a nationwide approach will prevail.[271] In spite of other creative licensing proposals offered up for the Commission's consideration,[272] however, the Commission has chosen to move ahead with the regional versus national approach—at least for the moment.[273]

25, 2008) (citing comments filed by both AT&T and Verizon Wireless). The *Second Report and Order* set out goals and benchmarks to be met by a nationwide commercial licensee that many, including service providers, considered to be wholly unrealistic. While endorsing regional licensing in general, they note that for a nationwide build-out to ever take place, the Commission would need to take away several of the expectations they set forth before the March auction. *Id.*

[271] *Id.* ¶ 62 ("TeleCommUnity, a national association of local governments, and Charlotte, North Carolina, Houston, Texas, and Montgomery County, Maryland (TeleCommUnity), contends [sic] that there are strong arguments for allocating regional licenses, for the D Block, as well as the single, nationwide license approach.").

[272] *Id.* ("Coverage Co. and Space Data Corp. ask the Commission to adopt an approach that assigns one license for urban or more populated areas and another license for rural or less populated areas. Other entities, such as Google and Qualcomm, do not appear to favor a single, nationwide license or a multiple regional license approach. They are more concerned that the Commission establishes a public safety broadband network that is interoperable as soon as practicable.").

[273] *Id.* ¶ 74 ("We tentatively conclude that it would not serve the public interest to split the D Block into one license for a high-population density area and a second license covering low-population density, rural areas, as Coverage Co. and Space Data request. Coverage Co. and Space Data's proposals do not specify the boundaries of the geographic areas that the two licenses would cover, which could present uncertainties for potential bidders and lead to disputes. In addition, there is a substantial question about the commercial viability of these two-license approaches. Coverage Co. and Space Data do not appear to argue, and the arguments they make do not demonstrate, that their two-license proposals are more commercially viable than the regional approach we propose. Also, the record does not indicate that commenters, other than Coverage Co. and Space Data, support these specific two-license proposals. Based on the record and the unique characteristics of this proceeding, such as the important obligations of the public/private partnership licensees, the Commission would need a stronger record, before deciding that it should adopt a geographic area licensing scheme that is significantly different from the schemes the Commission has employed in the past.").

c. *The Risks and Rewards of Lowering Operational Standards*

Although public-safety factions differ in their views on the benefits of a regional licensing model as opposed to the original national model and vice versa,[274] most public-safety proponents agree in their opposition[275] to the other proposition set forth in September: the reduction of system design and priority access requirements for the commercial licensees.[276] In this view, for every bit of slack in loosening the requirements for the commercial licensees, the Commission lowers the standard for the public safety network, making the hypothetical network less robust and less useful to first responders.[277] Ultimately, this will drive users completely away from the public safety network.[278] While the intention of creating a fully functional public-safety network appears to meet policy goals, a network based on anything but the

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[274] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Michael Copps, Senior Comm'r, Fed. Commc'ns Comm'n, at 1–2) ("I am concerned that the public safety community is of many different minds—too many—when it comes to approaching this great challenge. And I am concerned that too many of the people involved in this entire process are spending too much time jockeying for position and placing blame, with too little spent doing the hard work of information gathering, analysis, reaching out, compromise, and developing new ideas.").

[275] *See* Dowd Interoperability Statement, *supra* note 251, at 4 ("Weakening of the standards, priority or coverage requirements will only serve to drive Public Safety away from the system altogether. Public Safety needs to maintain it's more stringent requirements which cops and firefighters need and will expect.").

[276] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 56 (Sept. 25, 2008) ("[W]e find that certain reductions or modifications of the requirements in the existing rules . . . will significantly improve the commercial viability of the 700 MHz Public/Private Partnership requirements in the existing rules are consistent with the Commission's fundamental public safety objectives, and will significantly improve the commercial viability of the 700 MHz Public/Private Partnership . . . .").

[277] *See* Dowd Interoperability Statement, *supra* note 251, at 3–4.

[278] *Id.*; *see FCC En Banc Public Hearing*, *supra* note 193 (statement of Paul Cosgrave, Comm'r, City of New York, Dep't of Info. Tech. & Telecommc'ns) ("It is the City of New York's opinion that the nation's cities will not willingly move their critical first responder wireless voice or data communications to a nationwide network with 'degraded' security, reliability and redundancy characteristics.").

most rigid performance requirements and priority access loses its purpose quickly as the standard drops.[279]

On the other hand, potential commercial bidders argue such loosened rules would not necessarily preclude the build-out and operation of an interoperable public safety network to the desired specifications of the public safety contingent.[280] Some proponents of this view insist that even with modified requirements that favor commercial viability, the Commission could achieve both its goals of public safety and commercial viability through other means.

One such proposal suggests that the Commission could achieve a high-standard public safety network through the use of targeted bidding credits. [281] Under this proposal, the one or more commercial licensees would be credited financially for meeting extra public safety specifications above and beyond an agreed-upon base standard of operation.[282] Consequently, although the high standards of public safety would not be imposed upon these commercial licensees via the NSA, the commercial incentives provided to the licensees would work to achieve the high standards

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[279] *See* Dowd Interoperability Statement, *supra* note 251, at 4 ("[The PSST has] proposed reducing the system design and priority access requirements to make the D Block spectrum more palatable to the commercial wireless industry. Public safety can not allow that to happen. Weakening of the standards, priority or coverage requirements will only serve to drive Public Safety away from the system altogether. Public Safety needs to maintain it's [sic] more stringent requirements which cops and firefighters need and will expect.").

[280] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Lawrence R. Krevor, Vice President Governmental Affairs, Sprint Nextel Corp., at 2–3) ("In revising its rules for the re-auction of the D Block, the Commission should use targeted bidding credits to create the commercial incentives that will ensure the construction of a nationwide, interoperable, broadband wireless network . . . . To make the D Block commercially viable, and to promote widespread participation in the auction, the Commission should adopt a series of targeted bidding credits to encourage carriers to offer specific features or characteristics desired by public safety users.").

[281] *Id.*

[282] *Id*; *see FCC En Banc Public Hearing*, *supra* note 193 (statement of Leonard Fatica, Senior Dir. of Public Safety, Alcatel-Lucent) (supporting the idea of a more attainable "baseline service" requirements as a nationwide standard).

in a more agreeable, less forceful way. [283] Nonetheless, public safety advocates see these creative market arrangements as missing the point and prone to risk, as such arrangements do not offer the certainty offered by pre-set standards.[284]

C. *The Commission Should Resist Reducing Standards While Ensuring that Licensing Will Occur as a Result of the Upcoming Auction*

The Commission's most recent proposal contains three notable determinations that require comment.[285] First, the Commission's proposed investigation into the possibility of reducing standards to make an interoperable, broadband public safety network more viable,[286] and thus more palatable, to commercial licensees ignores the reason why the licenses are being auctioned.[287] Second, while

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[283] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Lawrence R. Krevor, Vice President Governmental Affairs, Sprint Nextel Corporation, at 2-3) ("In revising its rules for the re-auction of the D Block, the Commission should use targeted bidding credits to create the commercial incentives that will ensure the construction of a nationwide, interoperable, broadband wireless network .... To make the D Block commercially viable, and to promote widespread participation in the auction, the Commission should adopt a series of targeted bidding credits to encourage carriers to offer specific features or characteristics desired by public safety users.").

[284] *Id.* (statement of Stagg Newman, Principal, Pigsah Comm Consulting) ("I submit that priority one is building the broadband wireless network capabilities needed for first responders. The FCC should not be diverted from that focus by, for example, the 'pipe dream' of creating a third wireless broadband alternative to wireline DSL and cable, which would take well in excess of 100 MHz of prime low frequency spectrum to be viable.").

[285] *See generally In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 (Sept. 25, 2008).

[286] *Id.* ¶ 56 ("[W]e find that certain reductions or modifications of the requirements in the existing rules . . . will significantly improve the commercial viability of the 700 MHz Public/Private Partnership requirements in the existing rules are consistent with the Commission's fundamental public safety objectives, and will significantly improve the commercial viability of the 700 MHz Public/Private Partnership . . . .").

[287] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Second Report and Order*, 22 F.C.C.R. 15,289 ¶ 395 (July 31, 2007). In its *Second Report and Order*, the Commission highlighted the goal of promoting public safety through a fully functional, high-standard, interoperable public-

the Commission's parallel auction suggestion is logically sound, the Commission should reconsider its reasoning with respect to what should trigger the failsafe mechanism of regional licensing.[288] Lastly, in the event that neither a national auction nor a regional auction succeeds, the Commission's willingness to permit a situation in which no licenses would change hands[289] deserves questioning.

1. *The Commission Should Reject Proposals Reducing the System Standards*

While considering possible modifications to existing rules and requirements to govern D Block usage, the Commission should not allow per se reductions in the standards to which commercial licensees will adhere. In its assessment, the Commission should commit to trading time and costs for quality and reliability, maintaining its original position that only a fully functional and robust network—as determined by public safety—will suffice.

The Commission should act expeditiously but thoroughly in attaining the level of expertise necessary to properly evaluate the feasibility issues involved with the public safety vision.[290] In doing so, the Commission must weigh the functionality and utility of the nationwide interoperable public-safety network against the speed

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safety network as the driving force behind the concept of the public/private partnership(s) into which the future licensee(s) will enter. *Id.*

[288] *See Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14,301 ¶ 246. The Commission has planned to adopt regional licensing, essentially, in the event that first nationwide licensing fails, and then regional licensing shows, by an unconvincing standard, that it offers the promise of one day allowing interoperable public-safety communications.

[289] *Id.* ¶ 242 ("If the provisionally winning bids do not cover at least half of the nation's population, the auction will be cancelled and no D Block licenses will be awarded based on the results of the auction.").

[290] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Michael Copps, Senior Comm'r, Fed. Commc'ns Comm'n, at 2) ("Only after public safety demonstrates what it really requires and explains who and what it brings to the table. Only after the private sector has waded into what works and doesn't and laid out a clear path that holds the probability of attracting a viable commercial partner to build a viable public safety network. Only after the FCC builds its expertise and exercises the leadership it must in order to shepherd this through to success.").

with which it is deployed. In other words, how much utility would be gained by an extra three years in deployment time? How much functionality would be lost by advancing the deployment deadline by three years? Nevertheless, the Commission should avoid at all costs the mindset that "something is better than nothing."[291]

Taking the time and incurring the costs to build a fully functional, interoperable public safety network will benefit the public in ways that will be felt for decades to come.[292] Thus, while delayed deployment and slower implementation of the network might prompt doomsday predictions from some,[293] the time and effort invested in the network will reap rewards far beyond those offered by a cheaper, quicker deployment.[294]

Of course, it is naïve to believe that commercial viability for any entity, no matter how financially equipped, is achievable with public-safety standards that put off all otherwise interested parties. Thus, in espousing the view that standards should not be loosened at the expense of public safety, public safety agencies should remain realistic with respect to their expectations of operating protocols.

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[291] *FCC En Banc Public Hearing—Andrle Statement*, *supra* note 251, at 2 ("The goal of establishing mission-critical mobile broadband wireless service, however, should not be dependent on the commercial priorities of a D Block licensee. The Commission and the public safety community must be careful to resist a 'something is better than nothing' mentality if that *something* falls short of this goal. To do otherwise defeats the whole purpose here.").

[292] *Second Report and Order*, 22 F.C.C.R. at 15,560 (statement of Comm'r Copps) ("[The interoperable broadband public-safety network] will be constructed to the standards that public safety demands and expects. And it will harness the astonishing technological advances of the commercial wireless sector. If it works—and that's a big if—the American people will be appreciably safer.").

[293] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Harlin McEwen, Chairman, Public Safety Spectrum Trust Corporation, at 2) ("What we do not have is the luxury of time.").

[294] *Second Report and Order*, 22 F.C.C.R. at 15,560 (statement of Comm'r Copps) ("[The interoperable broadband public-safety network] will be constructed to the standards that public safety demands and expects. And it will harness the astonishing technological advances of the commercial wireless sector. If it works—and that's a big if—the American people will be appreciably safer.").

The Commission has taken a wise first step by pushing the deadline to build-out and deploy the network for operation from ten to fifteen years.[295] Extending the deadline will attract more bidders with more realistic construction milestones without compromising the performance of the network.[296] And while it should be lauded for its action, the Commission must continue to push forward with rulemaking that both encourages the deployment of a nationwide interoperable public-safety network and reinforces the message that the operational standards of the network will not be lowered if public safety is compromised by doing so. Keeping public safety at the fore of its decisions regarding the D Block, the Commission should resist proposed modifications coming at the expense of public safety.[297]

2. *The Commission Should Give the Regional Licensing Approach Priority*

The Commission stated its intention to retain the national licensing model as the priority model, with regional licensing coming into play only if the nationwide license does not meet its reserve. However, the Commission should base the licensing scheme it adopts not on meeting the reserve for the national license,[298] but instead on the regional approach showing—by worthy margin—that it will benefit public safety more.

The Commission has proven that it is willing to adjust the reserve price for the D Block by nearly halving the reserve in its

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[295] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301, 14464 (Sept. 25, 2008) (noting the fifteen-year construction requirement in proposed rule 27.14(m)).

[296] *Id.* ¶ 150.

[297] *FCC En Banc Public Hearing*, *supra* note 193 (statement of Harlin McEwen, Chairman, Public Safety Spectrum Trust Corporation, at 2) ("The technical standards the PSST proposed in its last filing represented our best thinking at that time, but we remain open to discussion about the right balance of technical, operational and, yes, economic elements for public safety and for commercial users.").

[298] *See Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14301 ¶ 246. The Commission plans to use the reserve price for the national license as a test to determine whether or not to move on to a consideration of regional licensing.

most recent proposal[299] and seeking comment on whether it should be reduced further.[300] This shows that the D Block's reserve price is an artificial construct, the raising or lowering of which dictates the "success" or "failure" of a particular auction. Acknowledging this fact as the extent of its own second-guessable discretion, the Commission should not constrain its decision between regional and national licensing to be based purely on a single, arbitrarily established reserve price.

Instead, the Commission's first order of business after the upcoming auction should be to determine whether a certain amount of the country will obtain coverage through regional licensing. In other words, the Commission should set pre-auction goals outlining the desired amount of coverage by regional licensing. If those goals are met, the Commission should give way to the individual licensees to begin broadband deployment.

Using a more concrete and telling guideline in its assessment of whether a regional or a national scheme should be adopted, the Commission will not bind itself by adhering to such an arbitrary reserve value, but it will instead assure itself that an educated and coverage-based model will be adopted. Of course, one cannot forget that the Commission's stated preference, as well as that of much of the public safety world,[301] is to award a nationwide license to the D Block.[302] Assuming, *arguendo*, that a nationwide license is truly in the best interest of public safety, the proponents of the regional licensing approach should bear the burden of proving that it is a better option than a nationwide license. If a nationwide

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[299] *Id.* ¶ 275 ("[W]e also tentatively conclude that it is in the public interest to direct the Wireless Telecommunications Bureau to establish initial minimum opening bids for each set of alternative D Block licenses that equal or aggregate approximately $750 million.").

[300] *Id.* ("We seek comment on . . . whether the proposed aggregate [$750 million in] minimum opening bids should be lowered.").

[301] *FCC En Banc Public Hearing—Gurss Statement*, *supra* note 228, at 2–3 (noting the significant problems over recent years in trying to mend the gaps between regional networks).

[302] *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14,301 ¶ 242 ("[T]he high bid on the nationwide, technology platform alternative would be the provisionally winning bid over any aggregate bid(s) covering less population in the two sets of regional licenses . . . .").

license is presumptively more beneficial to the interest of public safety,[303] shouldn't the regional scheme bear the burden of proving its superiority to the nationwide scheme on the basis of public safety?

Unfortunately, despite the presumptive superiority of the nationwide license,[304] the Commission cannot allow for a white flag scenario[305] in which regional licensing is adopted simply because a highly questionable price tag goes unmet and a mere half of the U.S. population is guaranteed the benefits of a public safety network.[306] Such a scenario demonstrates just the "something is better than nothing" mentality the Commission should avoid.[307]

Instead, the Commission should weigh the technological, financial, and logistical benefits and shortcomings of both regional and national approaches before establishing auction rules for the next auction. Because attaining a working, financially feasible nationwide license model has proven elusive,[308] the Commission should elevate the regional model to priority. In its establishment

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[303] *Id.* Given that (1) the Commission continues to give priority to a nationwide approach and (2) the interest seeking the most satisfaction through the auction is public safety, the Commission could presume a nationwide licensing model to be in the best interest of public safety. *Id.*

[304] *Id.* ("[T]he high bid on the nationwide, technology platform alternative would be the provisionally winning bid over any aggregate bid(s) covering less population in the two sets of regional licenses . . . .").

[305] *Id.* The Commission's proposal offers a bailout scenario in which regional licensing is triggered only as a failsafe to mitigate poor participation in both national and regional auctions. *See id.* ¶ 246 ("[W]e tentatively conclude, as an initial matter, that we will not award any licenses unless the total population covered by licenses with high bids meets or exceeds fifty percent (50%) of the U.S. population.").

[306] *Id.* ¶ 246 ("[W]e tentatively conclude, as an initial matter, that we will not award any licenses unless the total population covered by licenses with high bids meets or exceeds fifty percent (50%) of the U.S. population.").

[307] *FCC En Banc Public Hearing—Andrle Statement*, *supra* note 251, at 2 ("The goal of establishing mission-critical mobile broadband wireless service, however, should not be dependent on the commercial priorities of a D Block licensee. The Commission and the public safety community must be careful to resist a 'something is better than nothing' mentality if that *something* falls short of this goal. To do otherwise defeats the whole purpose here.").

[308] *See In re* Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 F.C.C.R. 4572 ¶ 2 (Mar. 20, 2008).

of rules for the upcoming auction, the Commission will have the opportunity to set a coverage goal greater than the 50% regional population coverage suggested in Commission's September proposal. If the Commission can set financially productive regional reserves without reducing system requirements—if the regional approach is truly feasible from all angles, as its proponents argue—it should prevail, and it should prevail more convincingly than a nationwide winning bid that might exceed a single moveable metric.

Further, the Commission should take a hard look at what it hopes to retrieve monetarily in return for the D Block. While expecting a considerable deposit to the U.S. Treasury may have been reasonable at the time of the March 2008 auction, times have changed. Regardless of the D Block spectrum's desirable characteristics and considerable commercial value, potential bidders are far less likely now than they were in 2008 to spend impressive amounts for the D Block with the specter of a suffering economy looming. Because the costs associated with the build-out of a public-private partnership-type network are quite substantial in themselves,[309] the Commission may want to consider awarding the D Block at no cost to a commercial entity with the means to fund such a built-out.[310] Notwithstanding any commitments[311] already made for the non-D Block revenue from the 700 MHz auction, the

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[309] Ryan Hallahan & Jon M. Peha, *Quantifying the Costs of a Nationwide Broadband Public Safety Wireless Network*, PROCEEDINGS OF 36TH TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE (Carnegie Mellon Univ., Sept. 2008) (estimating the buildout to cost around $10 billion).

[310] About Auctions, *supra* note 31. Prior to 1994, the Commission primarily disposed of spectrum licenses through comparative hearings and lotteries. Comparative hearings entailed the presentation of several applicants' cases to the Commission after which the Commission would evaluate those cases and ultimately decide which applicant would make best use of the spectrum. The 1994 adoption of the auction format was seen as a step in the direction of efficiency and fairness. However, in light of the purpose-specific D Block license, and the public's somewhat more weighted stake in the efficient usage of that portion of the spectrum, comparative hearings might offer a better way to maximize the usage of that spectrum quickly and efficiently. *Id.*

[311] 47 U.S.C. § 309(j)(8)(E)(iii) (2006). The proceeds from the 700 MHz auction were to be deposited in the U.S. Treasury by June 30, 2008. *Id.*

Commission might also consider using some of this revenue to assist in a build-out.

3. *The Commission Should Take Measures to Eliminate the Possibility That the Auction Fails*

The Commission's most recent position also mentions the possibility of retaining all licenses subject to unsuccessful auctions for both nationwide and regional licenses. [312] Such a measure not only would impede maximization of the spectrum and broadband deployment, but would suspend indefinitely any minimally productive efforts to affect the improvement of public-safety communications. While obtaining fair value for the spectrum through auction requires proper planning and preparation, the Commission should assure itself that a third auction will not be necessary after the upcoming one.

In light of the Commission's current opportunity to reshape the rules of the public/private partnership, further regulatory delays following an unsatisfactory auction would offend the public interest. The Commission should not allow itself to burn more opportunities at getting the auction right. Although undesirable, the delays in nationwide deployment cited by both regional and national proponents in attacking the positions of one another would work toward the ultimate interest of public safety. Since these delays are most likely to occur during construction and development of a public safety network, they ultimately would further efforts to implement the system. Additional regulatory delays, on the other hand, would accomplish very little. Such delays result from lack of forethought, a lack that, especially at this stage, cannot be afforded. The Commission's need for planning and coordination through public safety and industry feedback is not unappreciated. To rush an auction for the sole purpose of timing would offend the public interest greatly. However, the Commission must adopt at least soft rules and procedures to

[312] *In re* Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14,301 ¶ 242 (Sept. 25, 2008) ("If the provisionally winning bids do not cover at least half of the nation's population, the auction will be cancelled and no D Block licenses will be awarded based on the results of the auction.").

guarantee itself, and more importantly the public, that the spectrum's development and usage come about sooner rather than later.

IV. CONCLUSION

In the implementation of an interoperable broadband public-safety network, the Commission should resist its own urges, as well those made by commercial entities, to placate interests other than public safety. While promoting commercial broadband deployment and competition and obtaining maximum value for the 700 MHz spectrum are in the public's interest, these objectives doe not necessarily serve the public's *best* interest. Because the public will be better served by investments made in a network to provide first responders with the tools they need to respond quickly and accordingly to life-threatening national and regional calamities, the Commission should resist lowering standards and loosening requirements it had originally envisioned for the interoperable public safety network. Further, while the Commission's current logic on parallel auctions is sound, its assertion that regional licenses should be adopted as a failsafe for an unmet nationwide license reserve price is flawed. The Commission should give priority to a regional licensing model in the upcoming auction. Moreover, the Commission should avoid any possibility of an unsuccessful auction by putting in place safeguards that will work to facilitate the licensing no matter what.