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GEORGE MASON UNIVERSITY

Regulatory Studies Program

**Public Interest Comment on
Implementing a Broadband Interoperable
Public Safety Network in the 700 MHz Band¹**

WT Docket No. 06-150 and PS Docket No. 06-229

June 20, 2008

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking on public safety communications interoperability does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Commission's proposals on overall consumer welfare.

In its Second Report and Order in the current proceeding, the Commission adopted rules requiring the winning bidder of the commercial license in the 700 MHz D Block to enter into a partnership with a Public Safety Broadband Licensee (PSBL)—a non-profit composed of representatives of the public safety community—to develop a national interoperable public safety network spanning both the commercial and public safety spectrum held by each.² The terms of that partnership would be governed by a Network Sharing Agreement (NSA) to be negotiated by the winning bidder and the PSBL.³ The value of winning the D Block license, therefore, depends completely on the terms of the NSA, which is negotiated *after* the auction. This arrangement created a crippling amount of uncertainty. In essence, interested parties were

¹ Prepared by Jerry Brito, senior research fellow, Mercatus Center at George Mason University. This comment is one in a series of Public Interest Comments from Mercatus Center's Regulatory Studies Program and does not represent an official position of George Mason University.

² See Second Report and Order, 22 FCC Rcd 15289 (2007) ("Second Report and Order"). Earlier in this proceeding we filed comments counseling against the type of public-private partnership approach that was ultimately adopted. See Comments of the Mercatus Center at George Mason University in the *Ninth Notice of Proposed Rulemaking*, 21 FCC Rcd 14837 (2006), available at <http://tinyurl.com/4d3sry>. We continue to believe that such an approach unwisely creates a monopoly network. The instant comment, however, aims to suggest how, given a commitment to a public-private partnership, such an approach can be improved.

³ *Id.* at ¶¶ 399-400 & ¶ 444-54.

being asked to bid on a pig in a poke. As a result, there ultimately was no winning bidder in the auction for the commercial license.

Not only did potential bidders not know the terms of the Agreement to which they would be bound, but they could not be sure that they would be able to negotiate terms that would justify their investment. Under the Commission's rules, if the winning bidder and the PSBL reached an impasse on any terms, FCC officials "could take a variety of actions to resolve any disputes, including but not limited to issuing a decision on the disputed issue and requiring the submission of a draft agreement consistent with their decision."⁴ The rules also required the Agreement to be negotiated in less than six months and be approved by the Commission.⁵ Finally, failure to reach an agreement would result in severe penalties—potentially tens of millions of dollars—for the winning bidder.⁶ The PSBL, however, would not face any penalties if an agreement could not be reached, a state of affairs that arguably creates uneven bargaining positions.

In this Second Further Notice of Proposed Rulemaking, the Commission now asks how the rules can be altered to make a future auction for the commercial D Block spectrum succeed. Understanding that the lack of certainty doomed the first auction, the Commission asks for advice on dozens of potential tweaks to make the winning bidder's obligations more clear. These include;

- more specificity in the technical requirements included in the Commission rules governing the partnership in order to narrow what must be negotiated in the NSA;
- more specificity on what the D Block licensee may charge public safety users; and
- whether the winning bidder could be excused from penalties if it is determined that it is not at fault for failure to reach an agreement with the PSBL.

Even with these tweaks, the fact remains that the winning bidder will be on the hook for an agreement the terms of which it cannot know before the auction. The more specific the Commission can make the service rules, the less the parties will have to negotiate in the NSA, and the more likely it will be that a winning bidder will emerge in an auction. However, given that some uncertainty will always remain as to the terms of the agreement, and given the serious consequences for the winning bidder if the parties fail to reach an agreement, attracting a winning bidder may continue to be unfeasible. Additionally, while the FCC can set precise technical requirements in its rules in order to reduce uncertainty, doing so through a top-down notice-and-comment rulemaking will sacrifice the advantages of a bilateral negotiation.

⁴ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Further Notice of Proposed Rulemaking, at ¶ 12 ("Second Further NPRM").

⁵ Second Report and Order at ¶ 447.

⁶ Office of Inspector General Report, from Kent R. Nilsson, Inspector General, to Chairman Kevin J. Martin (OIG rel. Apr. 25, 2008), at 23 ("The FCC had reserved any decision concerning potential application of this rule. One possibility, though, was imposition of a penalty and holding Frontline liable for the difference between its bid and a subsequent lower winning bid. This could translate to a penalty of many millions of dollars.")

With this in mind, we can see that the ideal solution would be to *first* negotiate the Agreement in detail, and *then* auction the license. If the Commission is willing to make an investment of time and attention in the matter, it might be possible to do just that through a negotiated rulemaking.⁷ In fact, the rulemaking form created by the Negotiated Rulemaking Act is perfectly suited for the type of challenge that the Commission confronts. There are a “limited number of identifiable interests that will be significantly affected by the rule,”⁸ and representatives of these interests can be convened to negotiate in good faith.⁹ Bringing them together in a negotiated rulemaking setting could produce the same desired effect of a negotiated agreement between the PSBL and D Block commercial licensee, except the agreement could be hammered out before the auction.

The Commission could establish a negotiation committee composed of the current members of the PSBL and the representatives from potential bidders in the auction.¹⁰ The Commission would also have representation on the committee. Once the parties have negotiated in detail the terms of the public-private partnership (what would have been the NSA), the agreement would be reported to the Commission. If it is satisfied with the proposal, the Commission could then adopt it—with detailed specificity about the rights and responsibilities of the PSBL and the commercial D Block licensee—as part of new rules governing the D Block licenses. The commercial D Block license could then be auctioned with the understanding that the winning bidder would be subject to the negotiated agreement.

Such an approach could potentially produce rules with enough clarity and specificity to elicit a winning bidder while retaining the flexibility of a negotiated agreement. The rules incorporating the negotiated agreement would be the baseline obligations of the parties. To the extent the actual winning bidder and the PSBL would like to amend any terms after the auction, they should be free to renegotiate any part of the agreement.

The Commission has invited broad comment on how it might be able to achieve its goal of fostering a public-private partnership between the commercial D Block licensee and the PSBL to produce a nationwide interoperable public safety network. While negotiated rulemakings are uncommon, there is nothing radical or novel about them, and we hope the Commission will give the notion serious consideration. Such an approach would no doubt require a greater investment of time and effort from all affected parties than a unilateral definition of terms by the Commission. However, the result would be a clear negotiated agreement that would give certainty to potential bidders, thus maximizing the chances that a winning bidder will emerge.

⁷ 5 U.S.C. § 561 et seq.

⁸ 5 U.S.C. § 563(a)(2).

⁹ 5 U.S.C. § 563(a)(3).

¹⁰ The potential bidders in the auction could self-identify. The Negotiated Rulemaking Act includes a provision to allow parties to apply for membership in the advisory committee. *See* 5 U.S.C. § 564(b).