

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands)	WT Docket No. 06-150
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	

JOINT COMMENTS OF THE AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS, THE CONGRESSIONAL FIRE SERVICES INSTITUTE, THE FORESTRY CONSERVATION COMMUNICATIONS ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF FIRE CHIEFS AND THE INTERNATIONAL MUNICIPAL SIGNAL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
SUMMARY	iii
I. Introduction	2
II. Comments	5
A. Retention of Public/Private Partnership Condition	5
B. Service Rules for D Block Licensee and the Public/Private Partnership	6
1. Geographic Area for D Block License	6
2. Requirements for the Shared Wireless Broadband Network	7
a. Combined Spectrum Use	7
b. Priority Public Safety Access to Commercial Spectrum During Emergencies	8
c. Technical Requirements	10
3. Performance Requirements, License Term and Renewal	15
4. D Block and PSBL Role and Responsibilities in the Management, Operations and Use of the Network	17
5. Post-Auction Processing for Establishing an NSA	18
6. Auction Issues	20
7. Safeguards for Protection of Public Safety Service	21
8. Local Build Out Options	21
C. Public Safety Issues	22
1. Eligible Users of Public Safety Spectrum	22
2. Provisions Relating to the Public Safety Licensee	27
a. Nonprofit Status	27
b. Funding	29
c. Fees for Services Provided to Public Safety Entities	31
d. Other Matters	32
i. Governance of the PSBL	32
ii. Role of State Governments	37
iii. Rescinding the Current PSBL License	37
3. Narrowband Relocation	38
III. Conclusion	39
EXHIBIT A AASHTO POLICY RESOLUTION	41

SUMMARY

The American Association of State Highway and Transportation Officials (“AASHTO”), the Congressional Fire Services Institute (“CFSI”), the Forestry Conservation Communications Association (“FCCA”), the International Association of Fire Chiefs (“IAFC”) and the International Municipal Signal Association (“IMSA,” and collectively, the “Joint Public Safety Commenters,” or “JPSC”) are pleased to have this opportunity to participate in the Federal Communications Commission’s (“FCC’s” or “Commission’s”) proceeding designed to regulate the so-called 700 MHz D Block, designated for use in a public/private partnership. The proceeding is also intended to modify the FCC’s regulations governing the 700 MHz Public Safety Broadband Licensee (“PSBL”). Each member of the PSBL represents entities that are charged with critical public safety obligations.

The JPSC supports the FCC’s tentative conclusion to require potential D Block licensees to enter into a public/private partnership with the PSBL in order to construct a shared wireless broadband network. There is no funding for public safety entities to construct a nationwide system on their own. Requiring D Block licensees to work with the PSBL would avoid the balkanized patch-work of vacant spectrum throughout the country that would ensue if local and state entities were tasked with creating a broadband network. The JPSC strongly opposes the use of a Request for Proposal (“RFP”) to award the D Block license because it would inject delay, uncertainty and subjectivity, a negative result for the public safety community and the country.

The optimal licensing of the D Block would result in one entity holding the D Block license, permitting that entity to negotiate a single Network Sharing Agreement (“NSA”) for the shared network. However, issuing licenses based on the 58 public safety regions (“PSRs”) is the next best alternative. However, if there are multiple D Block licensees, the FCC must mandate

the creation of a single entity representative of the D Block licensees that would be authorized to negotiate an NSA with the PSBL. The D Block winners should be permitted to depart, if they choose, from the original Long Term Evolution (“LTE”) or WiMAX designation of the D Block spectrum.

Although the JPSC supports the Commission’s proposal to permit the PSBL access to additional D Block spectrum in the event of an emergency, the definition of emergency is too narrow and should be changed so that it does not require presidential or gubernatorial action.

While the JPSC supports the ability of public safety entities that do not use 700 MHz spectrum to access the system through a “gateway,” it believes, however that the D Block licensee should not be permitted to charge \$7.50 for that service. Public safety entities should also be permitted access to out-of-region 700 MHz systems at no additional charge.

D Block licensees should offer traditional voice handsets, personal digital assistants and laptop cards that operate on terrestrial and satellite based systems. The D Block licensee should also be required to have a cache of deployable 700 MHz fixed infrastructure equipment that can be moved into a remote location, directly communicate with satellites and permit the use of non-satellite enabled handsets.

The JPSC proposes that the FCC modify its build-out obligations to add another performance benchmark at the 7 year mark. The FCC should ensure that the PSBL has an adequate role in the management and operation of the public/private systems, so that public safety entities have the ability to provide an immediate response in emergency situations. While the JPSC recognizes that local entities may wish to build out the public safety broadband spectrum in advance of the D Block licensee, such build-out must be authorized by the PSBL and be compatible with the public/private network when constructed.

The JPSC strongly objects to the conflicting definitions for public safety spectrum access eligibility. The Commission appears to endorse an overly narrow definition of “public safety services” that would restrict countless governmental and non-governmental entities that play a vital role in our nation’s public safety infrastructure from the 700 MHz broadband network. Section 90.20 of the FCC’s rules uses a more reasoned approach that includes additional groups that directly impact emergency and disaster responses. To eliminate ambiguity and further the policy behind the creation of a nationwide interoperable broadband network, the JPSC believes that the Commission should use its interpretation of Section 90.20 as the basis for eligibility. Critical Infrastructure Industry (“CII”) licensees that are otherwise customers of the D Block licensee should be permitted to use the network for the duration of an emergency at the request of the PSBL at no additional charge.

The JPSC supports the Commission’s proposal that the PSBL be a nonprofit entity with strict conflict-of-interest rules. However, the \$5 million cap on funding of the PSBL is insufficient to support the PSBL’s operations. Moreover, the FCC must permit the PSBL to fund itself (through a bridge loan) before the D Block licensee is authorized and an NSA is in place.

The JPSC strongly disagrees with the FCC’s plan to mandate a \$48.50 fee for use of the public/private network. The FCC’s proposal does not track commercial practices and the pricing tiers for services should be left to the PSBL and the D Block licensee.

The JPSC also strongly disagrees with the Commission’s proposals to inject itself in the management of the PSBL. The Commission’s attempts to micro-manage the PSBL’s operations are without authority, unprecedented and contrary to public policy. As just one example, the FCC has proposed that the PSBL act with a three-quarter supermajority vote, a level of consensus reserved for such decisions as amending the United States Constitution.

Finally, the JPSC agrees with the FCC's proposal to extend the narrowband relocation deadline. However, it believes that the level of funding necessary to accomplish that relocation process is unrealistically low.

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The American Association of State Highway and Transportation Officials (“AASHTO”), the Congressional Fire Services Institute (“CFSI”), the Forestry Conservation Communications Association (“FCCA”), the International Association of Fire Chiefs (“IAFC”) and the International Municipal Signal Association (“IMSA,” and collectively, the “Joint Public Safety Commenters”, or “JPSC”), pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”)^{1/} and the invitation extended by the FCC in its *Third Further Notice of Proposed Rulemaking* in the above referenced proceeding,^{2/} hereby submits its comments regarding the 700 MHz spectrum designated for use in a public/private partnership.

^{1/} 47 C.F.R. 1.414 (2007).

^{2/} In the Matter of Service Rules for the 698-746, 747-762 and 777-792 Bands: Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229 (rel. Sept. 25, 2008) (“*Third Further Notice*”).

I. Introduction

The *Third Further Notice* has two principal purposes. First, it proposes rules designed to govern the licensing and use of the band 758-763/788-793 MHz (the so-called “D Block”), spectrum designated for use in a public/private partnership. Second, the *Third Further Notice* proposes changes to the rules governing the band 763-768/793-798 MHz spectrum allocated for a nationwide, interoperable public safety broadband network and licensed today to the Public Safety Spectrum Trust (“PSST”), the FCC designated Public Safety Broadband Licensee (“PSBL”).

Each of the Petitioners plays a critical role in public safety communications. AASHTO is a nonprofit trade association representing highway and transportation departments in the 50 states, the District of Columbia and Puerto Rico. AASHTO’s membership represents over 500,000 state government employees and officials. It represents all five transportation modes: air, surface, public transportation, rail and water and the associated police, fire, and emergency medical services supporting these functions. Its primary goal is to foster the development, operation, protection, and maintenance of an integrated national transportation system upon which the American economy rests. Its membership is composed of the state agencies or departments in which the official highway responsibility for that state is housed. AASHTO is responsible for coordinating frequencies designated in Section 90.20 of the FCC’s rules for which coordination by the Highway Maintenance coordinator is required, and is also authorized to coordinate the Public Safety Pool channels.^{3/}

Established in 1989, CFSI is a nonprofit, nonpartisan policy institute designed to educate Congress about issues that impact the readiness and response capabilities of our nation’s fire and

^{3/} 47 C.F.R. § 90.20(c)(2)(i) (2007).

emergency services. The strength of CFSI is its National Advisory Committee, comprised of 41 national fire and emergency organizations that work together in establishing the agenda that CFSI advocates on Capitol Hill.

FCCA is a nonprofit national trade organization that has, for over four decades, coordinated the use of frequency assignments within the Forestry Conservation spectrum. It makes available a full range of radio communications services for forestry and conservation agencies, including related police, fire, and emergency medical functions of these agencies, operating in all 50 states. FCCA is responsible for coordinating frequencies designated in Section 90.20 of the FCC's rules for which coordination by the Forestry-Conservation coordinator is required, and is also authorized to coordinate the Public Safety Pool channels.^{4/}

The 13,000 member IAFC is a professional association representing the leaders and managers of America's fire and emergency service. America's fire and emergency service reaches every community across the nation, protecting urban, suburban, and rural neighborhoods. The IAFC represents the leadership of over 1.2 million firefighters and emergency responders. IAFC members are the world's leading experts in firefighting, emergency medical services, terrorism response, hazardous materials spills, natural disasters, search and rescue, and public safety legislation. Since 1873, the IAFC has provided a forum for its members to exchange ideas and uncover the latest products and services available to first responders.

IMSA is a nonprofit organization dedicated to the development and use of electric signaling and communication systems in furtherance of public safety. IMSA's 11,600 members include representatives of federal, state, county, city, township and borough governmental

^{4/} 47 C.F.R. § 90.20(c)(2)(i) (2007).

bodies. IMSA offers educational and certification programs in a variety of public safety disciplines including Public Safety Telecommunications, Traffic Control, Work Zone Safety and Fire Detection and Reporting Systems. Along with the International Association of Fire Chiefs, Inc., IMSA is responsible for coordinating frequencies designated in Section 90.20 of the FCC's rules for which coordination by the Fire Coordinator and Emergency Medical Coordinator is required, and is also authorized to coordinate the Public Safety Pool channels.^{5/} IMSA directs and manages the frequency coordination and related spectrum management functions.

Several members of the JPSC are founding members of the National Public Safety Telecommunications Council ("NPSTC"), an umbrella organization that was formed principally to ensure that the broad interests of the public safety community are represented in major telecommunications policy matters. As the Commission is aware, NPSTC has taken a leading role in developing policies for the use of public safety spectrum. Representatives of FCCA and IMSA are Chair and Vice-Chair, respectively, of NPSTC. Except for the CFSI, each of the members of the JPSC are also on the Board of Directors of the PSST, the PSBL.

The 700 MHz band holds great promise as the home for nationwide interoperable communications services for public safety entities. The JPSC applauds the Commission's efforts to ensure that the D Block is licensed quickly and put to use to create a nationwide interoperable broadband network, along with the public safety broadband spectrum. It also appreciates the Commission's efforts to adjust its rules governing the PSBL, to ensure that the PSBL operates efficiently and is representative of the public safety community. Because the JPSC's members will be directly affected by the rules governing the 700 MHz spectrum -- both the D Block and the public safety broadband spectrum -- they are pleased to have the opportunity to submit the

^{5/} 47 C.F.R. § 90.20(c)(2)(i) (2007).

following comments.

II. Comments

A. Retention of Public/Private Partnership Condition

The Commission tentatively concludes that it should continue to require, as a license condition, that the D Block licensee enter into a public/private partnership with the PSBL for the purpose of constructing a shared wireless broadband network that will provide interoperable broadband service to public safety entities.

The JPSC strongly supports the FCC's tentative conclusion. The public/private partnership is the best option to achieve a nationwide, interoperable network. There is no funding available for public safety entities to build a nationwide network on their own; requiring the D Block licensee to fund the construction and operation of the public safety network will ensure that a public safety broadband network will be constructed and operated. Because the D Block licensee will construct the public safety system in connection with its own commercial network, public safety entities will be assured the benefits of cutting edge technology and network management.

The Commission notes that it is “not persuaded to rely solely on local and state entities to build out their own networks in the 700 MHz public safety broadband spectrum as a substitute for construction by mandatory public/private partnerships.”^{6/} The JPSC strongly agrees. Allowing individual public safety agencies or localities to proceed on their own would defeat the principal purpose of the 700 MHz broadband allocation -- the creation of a network designed to support interoperable communications. Moreover, because there is no assurance that most public safety entities would obtain funding to construct facilities using the 700 MHz band, relying on

^{6/} *Third Further Notice*, at ¶ 54.

local and state entities would, at best, produce a patch-work quilt of 700 MHz use, leaving the spectrum vacant throughout much of the country. As the Commission observed, such a result would create a series of “balkanized networks incapable of even minimum interoperability.”^{7/}

Although it tentatively concludes that it should retain the public/private partnership and assign commercial licenses for the D Block by competitive bidding, the Commission also seeks comment on whether assigning licenses through a Request for Proposal (“RFP”) would increase the likelihood of successfully deploying a nationwide interoperable broadband network usable by public safety entities.^{8/} The JPSC strongly opposes the use of the RFP process. Use of an RFP would inject delay, uncertainty and subjectivity to the licensing of the D Block -- all results that the public safety community can ill-afford. Moreover, in the event that D Block licenses are awarded on a regional, rather than nationwide basis, the process of potentially evaluating multiple RFP responses for each region would doom the selection process from the outset -- even before the parties were required to negotiate a Network Sharing Agreement (“NSA”). Finally, there is no process for funding the PSBL through the time consuming process of preparing an RFP and evaluating one or more responses.

B. Service Rules for D Block Licensee and the Public/Private Partnership

1. Geographic Area for D Block License

The Commission proposes to offer the D Block at auction as both a single, nationwide license and as 58 regional licenses. Ideally, one entity would hold the D Block license. That entity could negotiate a single NSA and would be best able to ensure the creation and operation of an interoperable broadband network. However, the JPSC believes that issuing authorizations for each of the 58 public safety regions (“PSRs”) is the next best alternative. The FCC cannot

^{7/} *Id.*

^{8/} *Third Further Notice*, at ¶ 58.

risk another failed D Block auction. Although the JPSC prefers that the interoperable broadband public safety network be constructed on a nationwide basis, it certainly prefers some build-out to no build out at all. Moreover, D Block licensees of PSRs could be particularly responsive to local public safety requirements, many of which are conducted on a state basis in any case.

However, if the licenses are issued on a regional basis, the JPSC is concerned that the PSBL will be required to negotiate NSAs with each D Block licensee. In order to avoid that outcome, the Commission should require, as discussed more completely below, the creation of a single entity representative of the D Block licensees that would be authorized to negotiate an NSA with the PSBL on behalf of all D Block licensees. That entity would also be charged with ensuring that there is full roaming capability between the 58 different PSR licenses.

The Commission tentatively concludes that it would not serve the public interest to change the current rule governing D Block partitioning and disaggregation, and proposes to continue to prohibit any disaggregation and partitioning of a D Block license.^{9/} The JPSC agrees. Partitioning and disaggregation of the D Block license is inconsistent with the Commission's goal of promoting a single interoperable network. Moreover, if the Commission's rules permit a disaggregatee or partitionee to assume some of the D Block licensee's build-out obligation, the chances that some areas will not be constructed will be increased (by increasing the number of entities responsible for construction).

2. Requirements for the Shared Wireless Broadband Network

a. Combined Spectrum Use

The FCC proposes that a D Block licensee may construct and operate the shared wireless broadband network using the entire 20 megahertz (of D Block and public safety broadband

^{9/} *Third Further Notice*, at ¶ 73.

spectrum).^{10/} The 20 megahertz could be assigned to users without regard to whether a public safety entity is assigned spectrum in the D Block or a commercial user is assigned spectrum in the public safety spectrum, so long as fifty percent of the combined 20 megahertz is assigned to public safety users and fifty percent is assigned to commercial users. The JPSC supports this approach, which will permit the D Block licensee full access to the 20 megahertz of spectrum, as long as a public safety entity always has access to no less than 10 megahertz of spectrum, giving the D Block Licensee more freedom to make the network commercially viable while also assuring public safety entities sufficient spectrum for normal day-to-day operations.

b. Priority Public Safety Access to Commercial Spectrum During Emergencies

The Commission proposes that emergency access to the D Block spectrum would only be mandated in the event of an “emergency,” which would be defined as seven (7) discrete circumstances:

- The declaration of a state of emergency by the President or a state governor.
- The issuance of an evacuation order by the President or a state governor impacting areas of significant scope.
- The issuance by the National Weather Service of a hurricane or flood warning likely to impact a significant area.
- The occurrence of other major natural disasters, such as tornado strikes, tsunamis, earthquakes, or pandemics.
- The occurrence of manmade disasters or acts of terrorism of a substantial nature.
- The occurrence of power outages of significant duration and scope.
- The elevation of the national threat level to either orange or red for any portion of the United States, or the elevation of the threat level in the airline sector or any portion thereof, to red.^{11/}

The Commission tentatively concludes that for the first two conditions, and when the national or airline sector threat is set to red, the D Block licensee would be required to provide public safety

^{10/} *Third Further Notice*, at ¶ 77.

^{11/} *Third Further Notice*, at ¶ 86.

users priority access to, but not preemptive use of, up to 40 percent of the D Block spectrum capacity (*i.e.*, 2 megahertz in each of the uplink and downlink blocks), *if* the full capacity of the public safety broadband block spectrum capacity is being used.^{12/} For all other emergencies the D Block licensee would be required to provide priority access to, but not preemptive use of, up to 20 percent of the D Block spectrum capacity (*i.e.*, 1 megahertz in each of the uplink and downlink blocks).

The JPSC supports the FCC's proposal to permit the PSBL access to additional D Block spectrum in the event of an emergency. Even in the event of an emergency, the D Block licensee will continue to have access to six megahertz of spectrum in the location where an emergency occurs to support its commercial customers' important needs.^{13/} Nevertheless, the JPSC believes that the Commission's definition of the type of emergency in which public safety entities are entitled to use an additional four megahertz is unnecessarily narrow and will restrict access to the D Block spectrum when that access is required. The Commission should amend the proposed rules so that it does not require a presidential or gubernatorial action for the PSBL to secure access to an additional four megahertz of spectrum. An emergency is not always a national or regional event. Emergencies can be very localized, to a city or community, and public safety entities should have access to additional spectrum under those circumstances if necessary.

Moreover, the triggers for securing access to an additional four megahertz of spectrum -- the declaration of a state of emergency by the President or a governor or the issuance of an evacuation order by the President or governor -- are unrealistic. By the time the President or a

^{12/} *Third Further Notice*, at ¶ 87.

^{13/} The Commission should clarify that in the event of an emergency, the additional D Block capacity that the PSBL may access is limited to the geographic location of the emergency, as defined by the PSBL and not the entire geographic area of the D Block licensee. The Commission has already similarly proposed that the duration of the use of the additional D Block capacity will be limited.

governor declares a state of emergency, the need for four megahertz of increased communications capacity has likely already existed for hours or days. With few exceptions, such declarations are generally made after an event, not in anticipation of one. There must be a mechanism, other than the Presidential or gubernatorial declaration, through which spectrum can be made available nearly instantaneously. The mechanism by which the PSBL may request additional spectrum access should be addressed in the NSA. The FCC could mediate disputes in real time through the Watch Office on Duty for the Enforcement Bureau, in conjunction with the Chief, Public Safety and Homeland Security Bureau.

c. Technical Requirements

The Commission proposes that the combined public/private network be required to support fixed and mobile voice, video and data capability.^{14/} The JPSC agrees. Although real time video may not be needed on a routine basis, the network should be designed to accommodate it when it is necessary. To preclude any such services would degrade the value of the network to public safety. Moreover, the D Block licensee's network, designed to support fourth generation ("4G") services for commercial customers, will certainly feature voice, video and data applications. The combined network should be equal in all respects.

While the FCC envisions that the PSBL and the D Block licensee will negotiate the particular network configuration through an NSA, it proposes that there must be a common air interface to ensure nationwide interoperability.^{15/} Therefore, if the D Block licenses are issued on a regional basis, the winning bidders would be required to commit to using either LTE or WiMAX technology. If the D Block license is issued on a nationwide basis, the licensee would have the discretion to select the network technology. While the JPSC agrees that a common air

^{14/} *Third Further Notice*, at ¶ 95.

^{15/} *Third Further Notice*, at ¶ 108.

interface is critical, it believes that the D Block license winners (if the licenses are issued on a regional basis) should have the flexibility to depart from LTE or WiMAX technology, upon agreement among the D Block licensees and the PSBL. It is possible that there may be only several D Block winners who could easily agree to choose another air interface. It is contrary to Commission policy to impose technological requirements on licensees.^{16/} While the JPSC understands the reason for departing from that policy here, the Commission should allow the D Block licensees the flexibility to follow the FCC's usual policy if they wish (and the proposed technological platform supports the PSBL's requirements).^{17/} Of course, if there is no agreement among D Block winners, they would be required to adopt the technological platform on which their bid was based.

The Commission proposes that the D Block network provide voice, data and video capabilities that are interoperable across agencies, jurisdictions and geographic areas.^{18/} The

^{16/} See, e.g., *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 23 FCC Rcd 2241, 2298, at ¶ 125 (Feb. 4, 2008) (“...because of the Commission’s market-oriented approach to managing spectrum...[it] has adopted flexible licensing policies instead of mandating any particular technology or network standard.”); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 15289, 15378, at ¶ 239 (Aug. 10, 2007) (“As for whether the Commission should mandate the use of ‘dynamic spectrum management techniques’ in some or all of the 700 MHz Band, the majority of commenters...argue that, irrespective of whether...proposed uses are permissible under the Commission’s rules, mandating licensees to employ particular spectrum management techniques...would run counter to the Commission pro-competitive, technology neutral, and flexible use policies.”); see also 47 C.F.R. §§ 24.229-24.238 (2007) (setting forth minimal technical standards to prevent interference to other services, with no requirements for channelization, bandwidth or transmission format).

^{17/} *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, Comments of AT&T Inc. in response to Google *Ex Parte*, at 8 (June 6, 2007) (“The adoption of rules designed to promote particular technologies or services is inconsistent with the Commission’s long-standing policies of maintaining technical and service neutrality in its rules and allowing flexible spectrum use by licensees.”).

^{18/} *Third Further Notice*, at ¶ 110.

JPSC agrees with the Commission that in order to achieve that result, there cannot be multi-mode handsets with various air interfaces or software defined radios. Instead, a single air interface must be required.

The JPSC also agrees with the Commission that, in addition to a common air interface, multiple D Block licensees must provide automatic roaming, at no cost, to out of region public safety entities.^{19/} It is critical that there be roaming agreements in place between multiple D Block licensees as a condition of licensing. Those roaming arrangements should be one of the functions of the FCC-mandated consortium of D Block licensees.

The Commission proposes that the D Block licensees be required to publish IP-based specifications enabling public safety operations in other frequency bands to access the shared broadband network(s) via bridges and/or gateways. The Commission proposes to require that the 700 D Block licensee offer access to these licensees for a standard charge per user (meaning per public safety officer/individual) of \$7.50 per month.^{20/} The JPSC opposes this proposal. Public safety licensees will already bear the burden of purchasing hardware necessary to provide a gateway between their existing facilities and the 700 MHz broadband network. It is contrary to the public interest to then require them to also pay \$7.50 per month, per user to use the gateway. The extra charge may impede a public safety agency's willingness to use the gateway, contrary to the Commission's goal of promoting interoperability. Gateways will be used primarily during emergencies, not on a day-to-day basis. Public safety entities that have their own systems today will continue to use them as stand-alone systems, except when interoperability is needed with another agency in a emergency. The JPSC does not object to a usage fee (a per minute charge,

^{19/} *Third Further Notice*, at ¶ 111.

^{20/} *Third Further Notice*, at ¶ 114.

for example) when the gateway is employed. However, a monthly charge not associated with use of the gateway will simply discourage entities from installing gateways.

Under the Commission's proposal, the D Block licensee would be required to designate up to 35% of the shared wireless broadband sites as "critical"^{21/} and would be required to use commercially reasonable efforts to operate as critical up to 50% of the sites.^{22/} Additionally, the PSBL could not request that more than 50 percent of the D Block licensee's sites be designated as critical. However, the FCC would permit the D Block licensee and the PSBL to agree on other methods to improve network resiliency in lieu of designating sites as critical. Although the JPSC agrees with the FCC's approach, the Commission should clarify that the PSBL and the D Block licensee(s) may agree to designate more than 50% of sites as critical, as local conditions dictate. The JPSC also agrees that non-terrestrial capabilities may be used to provide reliability in lieu of having fixed sites meet the test as "critical." However, if a D Block licensee wishes to take advantage of such an alternative, such non-terrestrial assets must be capable of being deployed within four (4) hours in the event of an emergency. Further, to the extent that a D Block licensee seeks to rely on cells-on-wheels ("COWs") or similar temporary facilities, those mobile base stations should be capable of being transported *by air* to where they are needed.

The FCC proposes that the D Block licensee: (1) comply with U.S. Federal government standards, guidelines and models that are commercial best practices for wireless broadband networks; (2) implement controls to ensure that public safety priority and secure network access are limited to authorized public safety users and devices, and utilize an open standard protocol

^{21/} *Third Further Notice*, at ¶ 117.

^{22/} Sites designated as critical would be required to have battery backup power of 8 hours, and have generators with a fuel supply sufficient to operate the generators for at least 48 hours. The D Block licensee would be required to provide a fuel supply at critical sites above this requirement for a minimum of five days. *Id.*

for authentication; and (3) allow for public safety network authentication, authorization, automatic logoff, transmission security and integrity, audit control capabilities, and other unique attributes.^{23/} The JPSC concurs with these important requirements.

The FCC continues to propose that the D Block licensee make available at least one handset that includes an integrated satellite solution.^{24/} Although the JPSC agrees with the FCC's proposal, they believe it does not go far enough. The Commission should specify that the handsets must be available at costs no higher than non-satellite enabled handsets. Moreover, there should be no additional cost to access the satellite capabilities incorporated in those handsets. Therefore, D Block licensees must be required to negotiate service agreements with satellite providers that are cost-neutral for public safety users. Agencies that operate in areas where the D block licensee has elected not to build the 700 MHz broadband system should not be penalized when they need access to communications.

In addition to requiring that D Block licensees offer one handset with satellite capability, the FCC should also specify additional equipment capabilities. First, the D block licensee(s) should be required to have a cache of deployable 700 MHz fixed infrastructure equipment that can be moved into a remote location, directly communicate with satellites, and permit the use of non-satellite enabled handsets. This type of operation would be particularly important when communications are needed at a wildfire or other emergencies in remote locations. Second, the Commission should specify that in addition to traditional voice devices, the D Block licensee must offer personal digital assistants ("PDAs") or similar devices and laptop cards that will permit the use of wireless Internet access. Each of these devices should be capable of operating

^{23/} *Third Further Notice*, at ¶ 125.

^{24/} *Third Further Notice*, at ¶ 131.

on the terrestrial and satellite segments of the D Block network (with each containing a terrestrial and satellite chipset), so that all three types of devices may be used under all operating conditions.

3. Performance Requirements, License Term and Renewal

The FCC proposes that the D Block licensee be required to offer service to at least 40 percent of the population in each PSR by the end of the fourth year, and 75 percent by the end of the tenth year.^{25/} It proposes to adopt a “tiered” approach after 15 years for the final benchmark, applying one of three benchmarks depending on the population density of the PSR (the FCC proposes to extend the license term to 15 years): (1) for PSRs with a population density less than 100 people per square mile, the licensee would be required to provide signal coverage and offer service to at least 90 percent of the population by the end of the fifteenth year; (2) for PSRs with a population density equal to or greater than 100 people per square mile and less than 500 people per square mile, the licensee would be required to provide signal coverage and offer service to at least 94 percent of the population by the end of the fifteenth year; and (3) for PSRs with a population density equal to or greater than 500 people per square mile, the licensee would be required to provide signal coverage and offer service to at least 98 percent of the population by the end of the fifteenth year. The D Block licensee would not be permitted to satisfy its performance benchmarks through the provision of non-terrestrial services, such as mobile satellite services (“MSS”).^{26/}

In addition to these coverage requirements, the Commission proposes to require that the D Block licensee extend coverage to major highways and interstates. Any coverage necessary to

^{25/} *Third Further Notice*, at ¶ 132.

^{26/} *Third Further Notice*, at ¶¶ 152-53.

provide complete service to major highways, interstates, and incorporated communities with populations greater than 3,000 beyond the network coverage required by the population benchmarks would be satisfied by no later than the end of the D Block license term. In addition, the Commission proposes that to the extent that coverage of major highways, interstates and incorporated communities with populations in excess of 3,000 requires the D Block licensee to extend coverage beyond what is required to meet its population benchmarks, it would permit that coverage to be met through non-terrestrial means, such as MSS or other such technologies.^{27/}

The JPSC supports a modified approach. In particular, it recommends that the Commission create another mid-term benchmark at 7 years from license grant. The additional benchmark will ensure that 6 years do not pass (between years 4 and 10) with little or no progress beyond the satisfaction of the 40% coverage requirement. For all but the least densely populated areas, the coverage requirement at the 7 year mark would be 75%. The JPSC recognizes that it may not be possible for licensees of less densely populated PSRs to satisfy both the interim and final coverage requirements. Therefore, in order to promote interest in these areas, it recommends a reduced coverage requirement for these areas. In particular, in these less densely populated areas (less than ten people per square mile) the JPSC proposes 30% coverage at year 4, 55% coverage at year 7, 70% coverage at year 10 and 75% coverage at year 15. A chart depicting the recommended coverage requirements (adding the 7 year benchmark and the additional tier for less densely populated areas) is below.

^{27/} *Third Further Notice*, at ¶ 155.

Density Category	Population Density (pops/ sq mi)	Year 4	Year 7	Year 10	Year 15
A	>300	40%	75%	90%	98%
B	100-299	40%	75%	90%	96%
C	10-99	40%	75%	90%	94%
D	<10	30%	55%	70%	75%

4. D Block and PSBL Role and Responsibilities in the Management, Operations and Use of the Network

The Commission proposes that the D Block licensee have exclusive responsibility for all network service provider operations, including network monitoring and management, operational support and billing systems, and customer care in connection with services provided to public safety users.^{28/} The Commission proposes that the PSBL continue to be responsible for such activities as administration of access to the nationwide public safety broadband network, representation of the public safety community in negotiating the NSA with the D Block licensee, interaction with equipment vendors and approval of equipment and applications, and administration of the narrowband relocation process.^{29/} The FCC proposes that the D Block licensee build into the shared network infrastructure a capability to provide monthly usage reports so that the PSBL can monitor network usage and carry out its role in administering access to the shared network.^{30/}

The Commission's proposal unnecessarily restricts the PSBL's role in the operation of the shared network. While the JPSC recognizes that the D Block licensee must have sufficient

^{28/} *Third Further Notice*, at ¶ 165.

^{29/} *Third Further Notice*, at ¶ 196.

^{30/} *Third Further Notice*, at ¶ 200.

operational control to ensure that its commercial operations are successful and (except in emergencies) unfettered by public safety involvement, the PSBL must be fully aware of network health at all times and must be able to direct the D Block licensee to make changes that affect the provision of services to public safety entities where required. Monthly reporting to the PSBL by the D block licensee(s), as the Commission proposes, is not sufficient. Instead, the PSBL must be represented at all times in the D Block licensee's Network Operations Center(s) ("NOCs") and must be part of the management team for the network. Just as the D block licensee can and should be responsible for site installation, network design such as backhaul options, and general management and billing for services. The PSBL must be involved in hour-to-hour decisions that can affect the public safety subscribers. Public safety needs its representative to be directly engaged with network management so that there may be an immediate response in emergency situations.

The Commission asks whether, if it licenses the D Block spectrum on a regional basis, it should require the regional licensees to form a national governance structure and, if so, what role and responsibilities the national entity would have in the establishment of the NSAs, the construction and operation of the regional networks, or any other matter.^{31/} The JPSC strongly agrees that there must be a national governance structure that would permit the PSBL to work with a single point of contact, instead of 58 separate entities. Even if each regional licensee has its own NOC, there must be a nationwide NOC as well, so that interoperability, roaming and other functions can be facilitated on a nationwide basis.

5. Post-Auction Processing for Establishing an NSA

The JPSC generally agrees with the Commission's proposals concerning the

^{31/} *Third Further Notice*, at ¶ 173.

establishment of an NSA. However, as noted above, the JPSC believes that it would not be in the public interest for the PSBL to negotiate 58 separate NSAs. Accordingly, if there are regional D Block licensees, they should be required to create a governance structure to negotiate a single NSA with the PSBL. Therefore, the Commission should not accept NSAs that are negotiated between the PSBL and a subset of winning bidders -- there would be only one NSA covering all winning bidders. Because of one D Block licensee's ability to prevent the successful negotiation of an NSA, the Commission should require that the PSBL and the representatives of the D Block licensee submit to Commission resolution of any disagreements in the event no agreement is reached within 60 days of the close of the D Block auction. Any D Block licensees unwilling to agree to the FCC-imposed NSA would be subject to an auction default payment.

The Commission proposes that the PSBL attempt to accommodate the wishes of local entities in the negotiations to the extent the licenses are issued on a regional basis. However, the Commission proposes no role for local entities in the negotiation process.^{32/} The JPSC strongly agrees with this approach. If the PSBL is required to attempt to accommodate the individual needs of particular - even significant - public safety entities, it will simply never be able to negotiate an NSA. The PSBL must have the freedom to negotiate terms that it believes are in the best interests of public safety entities generally.

The Commission finds that the RFP proposals submitted in this proceeding are not as likely to sustain the Commission's commitment to achieving a nationwide interoperable broadband network as the detailed public/private partnership the FCC outlines.^{33/} The JPSC

^{32/} *Third Further Notice*, at ¶ 228.

^{33/} *Third Further Notice*, at ¶ 234.

strongly agrees. As described above, use of RFPs would inject delay, uncertainty and subjectivity to the licensing of the D Block. Moreover, requiring the PSBL to potentially evaluate multiple RFP responses for each region would not be in the public interest.

6. Auction Issues

The JPSC generally agrees with the FCC's proposed rules governing the D Block auction. The rules should be structured so that as many well-qualified applicants as possible are encouraged to bid. Similarly, the Commission should ensure that all licenses are issued. Therefore, the JPSC agrees with the Commission's proposal to reduce the minimum opening bid for regional D Block license.^{34/} However, the Commission's proposal does not go far enough. The Commission proposes that it lower the minimum opening bid when: (1) there is a bid for the nationwide license, neither alternative set of regional licenses has received bids on all 58 licenses, and the sum of the provisionally winning bids for either set of regional licenses is greater than the amount of the nationwide license bid, or (2) there is not a bid for the nationwide license and there are bids in either set of regional licenses that cover at least half the nation's population. The JPSC proposes that the Commission lower the minimum opening bid for any regional license for which there has been no bid placed after two rounds of the D Block auction. In this manner, the Commission can create more opportunity for all of the regional licenses to be auctioned, while continuing the bidding on more contested regional licenses.

Although the Commission must ensure that D Block licensees are capable of building the public/private network, it would not be in the public interest to require them to use their capital to meet an artificially high minimum opening bid, as opposed to using that same capital to build

^{34/} *Third Further Notice*, at ¶ 250.

the network.^{35/} If the Commission continues to reduce the minimum bid price during the auction (while retaining standards for assuring that D Block licensees can perform), it need not later use the RFP process to issue left-over D Block licenses.

The Commission asks whether it should offer bidding credits to entities that offer to satisfy a higher level of performance mandates.^{36/} The JPSC agrees with this approach. The goal of this proceeding should be the development of an interoperable public safety network. The Commission should certainly trade treasury payments in exchange for a bidder's willingness to provide more public safety network than is otherwise required by the rules.

7. Safeguards for Protection of Public Safety Service

The FCC also asks whether it should require the D Block licensee to post a letter of credit ("LOC") or other financial instrument (such as a performance bond) to ensure its performance in building out the shared network.^{37/} The JPSC strongly supports this approach. LOCs and financial instruments are more important than the Commission receiving the reserve prices for the D Block spectrum. It is more important for the D Block spectrum to be licensed to qualified entities, who can use their capital to build the network, than it is for the Commission to achieve artificially established reserve prices.

8. Local Build Out Options

Although the FCC recognizes that some public safety entities may wish to build out systems in advance of the D Block licensee doing so (and to be compensated by the D Block

^{35/} The Commission can ensure that bidders are qualified by requiring them to post an irrevocable letter of credit or bond covering some portion of their build out obligations. The Commission should be more concerned with a bidder's ability to meet its post auction obligations than achieving an artificially specified minimum opening bid.

^{36/} *Third Further Notice*, at ¶ 284.

^{37/} *Third Further Notice*, at ¶ 290.

licensee when they do), it asks about the extent to which it should permit public safety entities to engage in such early build-out.^{38/} The JPSC recognizes the tension between achieving interoperability by having one entity (on a national or regional basis) construct a system on the one hand and thwarting efforts to implement the early use of 700 MHz spectrum on the other. The JPSC therefore supports local jurisdictions being permitted to build out the public safety spectrum ahead of the D Block licensee. However, local entities cannot proceed unfettered. Instead, if a local public safety entity wishes to proceed to build out the public safety broadband spectrum, it must request such authority from the PSBL. It must demonstrate to the PSBL the need to proceed in advance of the D Block licensee. It must also commit that its system will be compatible with the D Block licensee’s system and that it may only seek reimbursement for its implementation of the elements of its system that are compatible. It must also agree that it will not seek reimbursement for elements of its system that exceed the requirements of a nationwide broadband system. Lastly, it must further agree to take out of service any elements of the system that are ultimately incompatible with or disruptive to the nationwide interoperable network.

C. Public Safety Issues

1. Eligible Users of Public Safety Spectrum

The Commission proposes to limit use of the shared public/private network to entities that provide “public safety services” under Section 337(f) of the Communications Act, as amended.^{39/} The Commission concludes that so-called critical infrastructure industries (“CII”)

^{38/} *Third Further Notice*, at ¶¶ 294-95.

^{39/} 7 U.S.C. § 337(f) (2006) reads as follows:

(1) Public safety services. The term “public safety services” means services—
(A) the sole or principal purpose of which is to protect the safety of life, health, or property;
(B) that are provided—
(i) by State or local government entities; or

are not covered by Section 337 of the Act and, therefore, are not eligible users of the public/private broadband spectrum.^{40/} The JPSC generally agrees with the Commission's conclusion but believes that further clarification of the Commission's proposed rules are required in two respects.

First, the Commission should acknowledge that Section 337 encompasses all of the entities that may be licensed under Section 90.20 of the FCC's rules and in the manner prescribed by Section 90.20.^{41/} This section of the Commission's rules generally provides that government entities may be licensed in the Public Safety Radio Pool and that a variety of non-government organizations ("NGOs") may be licensed if their applications are "accompanied by a statement from the governmental entity having legal jurisdiction over the area to be served, supporting the request." Section 90.523 also provides for licensing of government entities, but only for NGOs whose "sole or principal purpose...is to protect the safety of life, health, or property." As discussed further below, there are many NGOs eligible for licensing under Section 90.20 (with appropriate approval by a local government entity) whose sole or principal purpose is not necessarily to protect the safety of life, health or property. Yet, these entities should be eligible for licensing in the 700 MHz band on a regular basis because of the critical role that they play in our nation's public safety infrastructure.

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
(C) that are not made commercially available to the public by the provider.

^{40/} *Third Further Notice*, at ¶¶ 312-18.

^{41/} These include persons and organizations (other than governmental entities) charged with specific fire protection activities, forestry conservation, associations of physicians or oral surgeons, rescue squads, persons with hearing, vision, and mobility disabilities, veterinarians, school bus operators, beach control operators, and persons and organizations in isolated areas where public communications facilities are not available. *See* 47 C.F.R. 90.20(a)(2)(i-xi) (2007).

There is no reason to have two sections of the FCC's rules that govern eligibility for public safety spectrum, particularly with contrasting and unreconciled definitions of eligibility. The Commission has, by including all of the entities in Section 90.20, already determined that they should be eligible for licensing of public safety spectrum. The Commission should therefore clarify that, as Section 90.20 provides, *any* governmental entity without further qualification, and not merely traditional first responders, is eligible to use the 700 MHz PSBL. In addition, the FCC should clarify that those NGOs which provide services meriting inclusion under Section 90.20 also merit inclusion in the 47 U.S.C. § 337 definition of Public Safety Services. Although limiting access to the 700 MHz band is predicated on the commendable goal of preserving the band's finite capacity, in addition to striving not to allow ancillary industries to dwarf the relatively smaller public safety industry, a restrictive definition of Section 337 undermines the overall goal in creating the 700 MHz public/private system: namely, interoperability to facilitate effective emergency response and disaster management.^{42/}

Using the Section 90.20 definition of entities eligible for licensing in the 700 MHz band would have a two-fold benefit. First, it would encourage and be consistent with the goal of facilitating interoperability for which the 700 MHz band was allocated. Second, it would eliminate the paradoxical result of a group being eligible for access under Section 90.20, but not eligible under Section 90.523,^{43/} which incorporates by reference Section 337(f) of the

^{42/} The JPSC strongly supports AASHTO's October 8, 2008, Policy Resolution, a copy of which is attached as **Exhibit A**.

^{43/} 47 C.F.R. § 90.523 (2007) ("This section implements the definition of public safety services contained in 47 U.S.C. § 337(f)(1). The following are eligible to hold Commission authorizations for systems operating in the 764-776 MHz and 794-806 MHz frequency bands: (a) *State or local government entities*... (b) *Nongovernmental organizations*... that provide services, the sole or principal purpose of which is to protect the safety of life, health, or property.").

Communications Act. The inherent ambiguities within the FCC's own rules underscore the need to look beyond the narrow definition of "public safety services," in favor of a system that considers the efficacy of including entities that are required to interoperate in emergency situations.

Employing an eligibility test outside the FCC's prescribed parameters in Section 90.20 also would potentially produce the curious result of having members of the PSBL board whose members could not use the 700 MHz spectrum. **Indeed, if the FCC takes a view more restrictive than that which Section 90.20 clearly sets forth with respect to governmental public safety entities eligible to use the 700 MHz spectrum, it is possible that the membership of up to 50% of the FCC-mandated PSBL board members would not be eligible to use the spectrum.**

Each of the entities specified in Section 90.20 --government and non-government entities alike -- play a significant role in the protection of life, safety and property and their inclusion in a system of interoperable communications is critical. For example, NGOs under contract with highway maintenance and transportation officials are responsible for snow and ice removal, rapid clearance and recovery of accident vehicles, and provide privately owned and sponsored traffic patrols along roads and highways. These services are absolutely essential to the safety and well being of the public, which is why they are included in Section 90.20 and why they should be included in Section 90.523 as well.

The purpose of the 700 MHz broadband spectrum is to allow all critical functions to interoperate with each other and to provide critical data, such as maps or building floor plans. Although traditional state and local government first responders play a major role in providing public safety services, they do not play the only role. Section 90.20 provides the appropriate

balance. Under that provision of the rules, any governmentally operated activity would be eligible to use the 700 MHz network.^{44/} Non-governmental entities would be eligible with a governmental sponsor. The JPSC urges the Commission to use Section 90.20 as a model for eligibility in 700 MHz broadband.

Such an approach would be consistent with the Commission's initial definition of the entities eligible for licensing in the 700 MHz public safety spectrum. In the *First Report and Order and Third Notice of Proposed Rule Making* in its Docket No. 96-86 proceeding,^{45/} the Commission opted for "a more inclusive interpretation... because, as suggested by many commenters, the more inclusive definition better reflects the statutory intent."^{46/} Because the Commission has already promulgated rules -- Section 90.20 -- designed to determine entities eligible to use public safety spectrum, it should take this opportunity to clarify that the "more inclusive definition" it sought to adopt in 1998 should be identical to eligibility under Section 90.20.

In addition to clarifying that all NGOs eligible under Section 90.20 of the rules should be permitted to use the 700 MHz network, the Commission should also clarify the potential use of the network by CII entities. The JPSC agrees that CII entities should generally be commercial customers of the D Block licensee and need not, like NGOs eligible under Section 90.20, be licensed for 700 MHz spectrum. However, in times of emergency (as determined by the rule provisions discussed above) the PSBL should be permitted to direct the D Block licensee to permit CII entities that are already D Block subscribers to access the network at no additional

^{44/} See 47 C.F.R. § 90.20(a)(1) (2007).

^{45/} In the Matter of the Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, 14 FCC Rcd 152, 180 at ¶ 54 (Sept. 29, 1998).

^{46/} *Id.*

charge, and only for purposes of communicating with public safety personnel for only as long as the emergency lasts.

The Commission proposes to leave to the discretion of the PSBL whether Federal entities may use the public safety broadband spectrum.^{47/} The JPSC agrees and expects that the PSBL, in order to promote interoperability between Federal, state and local officials, will permit Federal government access to the 700 MHz broadband spectrum. The JPSC also agrees that use of the 700 MHz network should not be mandatory for public safety entities (although the JPSC hopes that the rules adopted and the network itself will make it attractive for all public safety entities to be part of the interoperable system).

2. Provisions Relating to the Public Safety Licensee

a. Nonprofit Status

The FCC proposes that the PSBL must be a nonprofit entity. The FCC proposes to adopt conflict of interest requirements making entities that are serving as advisors, agents, or managers (or their related entities, including affiliates and those controlled by any officer or director of such an entity) of the PSBL ineligible to become a D Block licensee unless such an applicant completely severs its business relationship with the PSBL no later than 30 days following the release date of an order adopting D Block rules.^{48/} It also proposes to adopt conflict of interest requirements requiring entities that are serving as advisors, agents, or managers (or their related entities, including affiliates and those controlled by any officer or director of such an entity) of the PSBL from establishing business relationships or otherwise being affiliated with, or holding a controlling interest in, equipment vendors, service providers, or other entities that have a direct

^{47/} *Third Further Notice*, at ¶ 332.

^{48/} *Third Further Notice*, at ¶¶ 350-51.

financial interest in the decisions of the PSBL.^{49/}

The JPSC strongly supports the Commission's proposal that the PSBL be a nonprofit entity. The PSBL is comprised of nonprofit, public safety entities and the umbrella organization itself should also be driven by one goal -- to serve the public interest by implementing and operating a nationwide public safety broadband network. The JPSC also agrees that the FCC should adopt strong conflict of interest rules regarding the D Block licensee, the PSBL and its equipment vendors, service providers or other entities. Such provisions are necessary to assure that the PSBL continues to act only on behalf of its constituent public safety members and, ultimately, the American public. The conflict of interest rules should be adopted from those currently applicable to Federal employees.^{50/} The applicable provisions of the United States Code and the Commission's rules are well suited to provide clear guidance on acceptable behavior and avoidance of even the appearance of impropriety. Because these rules are recognized by Federal employees and overseen by the United States Office of Government Ethics,^{51/} they can serve as reliable bright line standards of conduct for D Block licensees, the PSBL, and the affiliated organizations with which they interact.

^{49/} *Id.*

^{50/} See 47 C.F.R. § 2635 (detailing the standards of ethical conduct for employees of the Executive branch) and § 2637 (listing of regulations concerning post-employment conflicts of interest); see also 18 U.S.C. § 201(b) (2006) (prohibiting public officials from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty) and § 203 (prohibiting payment to and receipt by present or former government employees of compensation derived from services rendered by such an employee or anyone else in representing someone before the government).

^{51/} For additional details, as well as a compilation of Federal ethics laws, see the United States Office of Government Ethics website, http://www.usoge.gov/laws_regs/compilation.aspx.

b. Funding

The Commission proposes that the D Block licensee cover the PSBL's administrative and operating expenses. Under the Commission's plan, the PSBL will be required to prepare an annual budget and present it for approval to the FCC.^{52/} The PSBL would also be required to have its operations audited on an annual basis. In order to fund the operations of the PSBL, the Commission proposes that the D Block licensee pay the PSBL one percent of the gross winning bid of the license, up to \$5 million per year.^{53/} If regional D Block licenses are awarded, the \$5M would be divided among the regional licensees based on population. If there are excess funds at the end of any year, the FCC proposes that those excess funds be applied towards the PSBL's funding of administrative or operational expenses for the following fiscal year, or to fund secondary activities, such as the purchase of equipment for the benefit of individual public safety agencies. The PSBL would not be permitted to charge a separate fee to the D Block licensee, on top of the \$5 million annual payment. The FCC proposes that the PSBL may not obtain debt or equity financing from any source.^{54/}

The Commission's proposals are unrealistic. As an initial matter, they do not address how the PSBL will operate prior to the issuance of the D Block license(s). The PSBL is already engaged in significant and important activities related to the planning and implementation of the public safety broadband network. Before the D Block license is issued, the PSBL will be required to negotiate one or more NSAs. Even if the PSBL chose not to have any paid staff (which may not be in the best interest of the PSBL) its unpaid board and officers have travel and

^{52/} *Third Further Notice*, at ¶ 359.

^{53/} *Third Further Notice*, at ¶ 374.

^{54/} *Third Further Notice*, at ¶¶ 341, 371.

related administrative expenses that cannot necessarily be reimbursed by their membership organizations or their ultimate employer (often a cash-strapped state or local government entity). The Commission must therefore permit the PSBL to secure a bridge loan for interim funding until it begins to receive money from the D Block licensee. The JPSC proposes that the bridge loan come from an independent third party who would otherwise be able to satisfy the conflict of interest rules adopted in this proceeding. The amount of the bridge loan should be publicly available so potential D Block licensees are aware of the PSBL's outstanding obligations (which the D Block licensee would be required to satisfy).

Second, the JPSC believes that the \$5 million cap on funding of the PSBL will not be sufficient to support the PSBL's operations -- particularly in its early years. As noted above, the PSBL will likely incur startup costs that should be covered by a bridge loan, which may require repayment early in the term of the NSA. In addition, in its early years, the PSBL will have other non-recurring startup costs which may push its budget -- in those early years -- to twice what the FCC has proposed. Instead of establishing, in advance, a cap on payment of the PSBL's expenses, the Commission should make public the outstanding obligations of the PSBL at the time of auction, as well as the anticipated expenses of the PSBL, so that the D Block licensee may take those costs into consideration in the bidding process. Any negotiation of budgets on a going forward basis should be subject to the same procedures as NSA negotiations (and a budget and related payment to the PSBL should be part of the NSA itself).

The JPSC agrees with the FCC that the PSBL should not be permitted to charge a separate fee to the D Block licensee to access the public safety 700 MHz spectrum. The only payment from the D Block licensee to the PSBL should cover the PSBL's operating expenses and projected in the PSBL's budget. The JPSC also agrees that it is unrealistic to expect Federal

government sources of funding for the PSBL. All the PSBL's funding must come from the D Block licensee.

c. Fees for Services Provided to Public Safety Entities

The FCC proposes to establish a fixed nationwide service fee of \$48.50 per month that the D Block licensee may charge to public safety users. The rate would sunset coterminous with the expiration of the fourth year build out requirement. In the fifth year of operation, the FCC expects that the commercial market for D Block spectrum and services will have sufficiently developed so that the General Services Administration ("GSA") likely will have developed a fee schedule for government users of the commercial spectrum. At that time, it proposes to use that schedule as the basis for adjusting public safety fees for use of the network.^{55/}

The Commission's plan to permit the D Block licensee to charge \$48.50/month is ill conceived and may actually discourage use of the broadband network. Commercial service providers do not have a single rate that all users are charged. Customers pay based on the type and quantity of services they use. There is no reason that public safety users should be treated differently. Some entities may wish to use the broadband network on nearly an exclusive basis and have the funds to be heavy users of the system. Other entities may wish to simply have the capability to use the system on a periodic or backup basis. If those entities are required to pay \$48.50/month for limited use of the system, they may opt not to use the system at all, a result that is contrary to the public interest. An entity's use should dictate what they pay the D Block licensee. Entities should be permitted to pay for devices with 700 MHz broadband capable and pay a minimum "standby" fee, with other fees tied to actual system use. The fee schedule, like the PSBL budget, should be part of the NSA negotiations.

^{55/} *Third Further Notice*, at ¶¶ 392-93.

d. Other Matters

i. Governance of the PSBL

PSBL Board of Directors. The FCC proposes to retain the current composition of the PSST board, except that it proposes to replace the National Emergency Management Association (“NEMA”) with the National Regional Planning Council (“NRPC”).^{56/} The JPSC agrees that the current board composition should be retained. If the Commission believes any member of the board should be replaced, the substitute entity must be a representative of the public safety community, whose members would be users of the public safety broadband network (in the manner in which the JPSC has recommended those eligibility provisions be clarified).

Chief Executive Officer. The Commission proposes that the position of Chairman of the board of directors be separated from the position of Chief Executive Officer. Its proposal would require that the PSST implement such separation within 30 days of adoption of an order issuing final rules in this proceeding. Further, the Commission proposes that the PSST may not hire a new individual to fill the CEO position until the D Block licensee makes funding available for the PSBL’s administrative and operational costs. It also proposes that any individual appointed as CEO cannot have served on the PSBL executive committee during the period three years prior to his or her appointment as CEO.^{57/}

The Commission’s proposals regarding the CEO position, the officers and board voting are unnecessary and conflict with the laws under which the PSST is formed. The proposed rules insinuate that the current PSST leadership, which has dedicated thousands of hours of time to fostering a nationwide broadband public safety system, is unqualified or worse. Those

^{56/} *Third Further Notice*, at ¶ 408.

^{57/} *Third Further Notice*, at ¶ 411.

insinuations are unjustified and insulting. The Commission's attempt to meddle in the internal affairs of the PSST are beyond its statutory authority and unprecedented. While the Commission has authority to regulate its licensees *in the activities for which it is licensed*, the FCC has no authority to regulate a licensee's internal governance structure.

The FCC's proposed rules directly conflict with D.C. Code § 29-803, which states that a nonprofit corporation's bylaws may specify how it elects its trustees, directors, and managers (who shall have control and management of the affairs and funds of the entity), and additionally sets forth how a quorum is determined, how board vacancies are filled, and how voting may proceed.^{58/} Further, Sections 29-301.18 through 301.22 state that a nonprofit corporation may specify, in its articles of incorporation, the number, election, appointment, classification, removal, vacancies, requisite quorum, authority, committees and qualifications required for members of a board of directors.^{59/} Board of directors' composition, structure, size, and organizational make-up are governed by Sections 29-301.24 and 301.25.^{60/} The Commission provides no reason why it should be permitted to substitute its judgment for the judgment of the District of Columbia City Council, which reserved to the entity the very decisions that the FCC wishes to make itself.

Moreover, proposed Commission micro-management of the PSBL is inconsistent with its treatment of other Commission licensees, public safety or otherwise. While the 700 MHz broadband license is important, so are licenses issued to the thousands of public safety entities across the country. The Commission imposes no obligations on those licensees -- or any other

^{58/} D.C. CODE § 29-803 (2001).

^{59/} *Id.* §§ 301.18 - 301.22.

^{60/} *Id.* §§ 301.24-301.25.

Commission licensees -- that are similar to the obligations it proposes for the PSBL. The PSBL will hold 10 megahertz of spectrum. Entities that are licensed for two or three times that amount of spectrum are not subject to anywhere near the level of Commission oversight as the PSBL would be.. Instead, the Commission has the ultimate tool against licensee mismanagement and violation of its rules based on corporate mismanagement -- it can initiate revocation or forfeiture proceedings against a licensee.^{61/}

Officers. The FCC proposes that the PSST board elect a new executive committee – a new Chairman, Vice-Chairman, and Secretary/Treasurer --within 30 days of adoption of an order in this proceeding. It proposes that these executive committee members: (i) must be limited to a term of 2 years; and (ii) may not serve consecutive terms in the same position. It also proposes that no current executive committee member may be re-elected to the same position on the committee. The FCC proposes to prohibit the PSBL from expanding its executive committee beyond these three offices.

As noted above, the JPSC believes that these proposed rules exceed the Commission's scope of authority, unnecessarily burden the PSBL, are inconsistent with the FCC's treatment of other licensees and are completely without foundation. The Commission's proposal infers that the current PSST executive committee is unfit, or worse, has taken actions that merit their removal from office. That suggestion is baseless. The PSST board and its executive committee have been elected by the public safety community and entrusted with management of a critical asset. There is no justification for the Commission to substitute its judgment for that of the

^{61/} See 47 C.F.R. § 1.80 (2007) (a forfeiture penalty may be assessed against any person found to have willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission).

public safety community by dictating the PSST board and executive committee membership. Moreover, the Commission's proposal fails to recognize the significant benefit of having current executive committee and board members continue in their current positions. Existing board and executive committee members have worked tirelessly toward the implementation of a public safety broadband network and no one has more knowledge of the relevant issues than they do. It would be contrary to the public interest, and potentially delay the introduction of broadband services to public safety entities, to require that newly designated individuals fill roles in which current board members have served in an exemplary fashion. If there is a need for an executive committee or board member to be removed because of poor performance of his/her responsibilities, the removal should be a matter for the PSBL and its members, not the FCC, consistent with the rules that govern any other nonprofit corporation. If the conduct of an executive committee or board member affects the eligibility of the PSBL, the FCC has tools to address the continued licensing of the PSBL.

Supermajority Voting. The FCC proposes to require three-fourths supermajority voting on all major decisions by the board of directors.^{62/} Like the Commission's other proposals for governance of the PSBL, this proposal also overreaches, and is unnecessary, and beyond the scope of the Commission's authority. Moreover, a requirement for three-fourths supermajority is simply inconsistent with other supermajority requirements and may prevent the PSBL from taking any action, even when a standard supermajority -- two-thirds of the members -- wish to proceed.^{63/} Under the District of Columbia Official Code, amendments to a nonprofit

^{62/} *Third Further Notice*, at ¶ 413.

^{63/} For instance, under the corporate laws of Delaware, a simple majority of the outstanding voting shares is sufficient to amend a corporation's articles of incorporation. *See* DEL. CODE ANN. tit. 8, § 242(b)(1) (2007) ("If a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been

corporation's articles may be made with a two-thirds vote of entitled voting members.^{64/}

Meeting a three-fourths majority is a remarkably high standard, reserved for extraordinary measures such as ratifying amendments to the United States Constitution.^{65/} Even in the legislative context, a three-fourths supermajority is irregular. A recent survey conducted by the National Conference of State Legislatures found that of the nine states that require a supermajority to pass general appropriations bills for state operations, only one state required a three-fourths majority.^{66/}

Public Board Meetings. The Commission proposes that PSBL board meetings be open to the public, except that the board would have a right to meet in closed session to discuss sensitive matters. It also proposes that the PSBL must make the minutes of each board meeting publicly available and that the PSBL must provide the public with no less than 30 days advance notice of meetings. It would be required to present its annual, independently audited financial report in an

voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted...”).

^{64/} D.C. CODE § 29-301.35 (2001) (“Amendments to the articles of incorporation shall be made in the following manner...(3) The proposed amendment shall be adopted upon receiving the affirmative vote of at least two-thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.”).

^{65/} See U.S. CONST. art V (describing ratification by three-fourths of state legislatures or three-fourths of state conventions as a means of amending the Constitution). Indeed, a three-fourths majority is even too high a burden to meet for the College of Cardinals, which requires a two-thirds vote to select a new Pope. See Paul McLachlan, *Electing a Pope*, available at <http://www.catholic-pages.com/pope/election.asp> (last visited Oct. 24, 2008).

^{66/} See National Conference of State Legislatures: Supermajority Vote Requirements to Pass the Budget, <http://www.ncsl.org/programs/fiscal/supmjbud.htm> (updated Oct. 2008). Arkansas, the one state to require a three-fourths supermajority for appropriations bills, has an exception for bills relating to education, highways, and paying down the state debt, requiring a simple majority to pass these measures.

open meeting.^{67/} The PSBL is comprised of entities that are themselves generally subject to sunshine regulations. Accordingly, the JPSC agrees that quarterly meetings of the full PSST board and special meetings of the full PSST board be open to the public with 30 and 7 day notice, respectively. It is at these meetings that any future actions or policies of the PSBL are decided. The JPSC believes that PSST executive committee, subcommittee and task group meetings and update briefings to the board need not be open to the public. At these latter category of meetings, no board decisions are made. Although the JPSC generally concurs with the FCC's proposal regarding board meetings it believes that similar to the other proposals relating to the operation of the PSBL, they are unnecessary and overreaching.

ii. Role of State Governments

The Commission states that it would not be efficient or beneficial to carve out a specific role for the states in coordinating their public safety providers' participation in the public safety network.^{68/} The JPSC agrees. The Commission correctly observes that the National Governors Association is already on the PSBL board.^{69/}

iii. Rescinding the Current PSBL License

While the FCC does not propose to rescind the license issued to the PSST, it asks whether it should issue licenses for the 700 MHz broadband public safety spectrum on a regional basis.^{70/} The JPSC agrees that there is no reason to rescind the license issued to the PSST in general and no basis for assigning the licenses on a regional basis in particular. The goal of

^{67/} *Third Further Notice*, at ¶ 414.

^{68/} *Third Further Notice*, at ¶ 423.

^{69/} *Id.*

^{70/} *Third Further Notice*, at ¶ 426.

licensing the 700 MHz band -- as far as public safety communications is concerned -- is to create a nationwide interoperable network. Although the FCC may, in order to attract qualified bidders, license the commercial spectrum on a regional basis, there is no similar reason to license the public safety spectrum on a regional basis. To the contrary, the more entities that are involved in the coordination, construction and operation of a public/private network, the more opportunities there will be for that network to fail.

3. Narrowband Relocation

The FCC proposes to extend the narrowband relocation deadline to twelve months from the date on which the narrowband relocation funding is available.^{71/} The JPSC supports this approach. Relocation will be disruptive for current licensees and there is no reason for them to engage in relocation before it is necessary.

The FCC also proposes to raise the cap on the amount of reimbursement available for narrowband relocation to \$27 million.^{72/} While the JPSC has not engaged in an independent analysis of the sufficiency of these funds to accomplish narrowband relocation, it notes that the PSST has conducted such an analysis. That analysis shows that relocation will cost \$75 million, not the \$10 million originally contemplated or the \$27 million now proposed. The JPSC supports the PSST's analysis of this issue and urges the Commission to adopt the PSST's recommendations.

The Commission proposes imposing reimbursement caps on a region-by-region basis.^{73/} The JPSC does not object to this approach, so long as the obligations are adjusted to reflect the

^{71/} *Third Further Notice*, at ¶ 434.

^{72/} *Third Further Notice*, at ¶ 445.

^{73/} *Id.*

PSST's data. The Commission also proposes that if one or more D Block license is unsold on a regional basis, the cost of relocation would be prorated among the remaining regional licensees.^{74/} The JPSC agrees with this approach as well.

The FCC does not propose to change the August 30, 2007, cut-off date for reimbursement of systems entitled to reimbursement for relocation of narrowband operations. The JPSC agrees. Although the D Block licensee is obligated to pay the relocation costs, the Commission proposes that administration of those expenses will be the responsibility of the PSBL and that the PSBL's cost of administering the reimbursement scheme may be part of its FCC-approved budget.^{75/} The JPSC agrees that the PSBL should interface with public safety licensees on narrowband relocation and all other issues regarding the 700 MHz band.

III Conclusion

The American Association of State Highway and Transportation Officials, the Congressional Fire Services Institute, the Forestry Conservation Communications Association, the International Association of Fire Chiefs, and the International Municipal Signal Association hereby submit the foregoing comments and ask the FCC to act in accordance with the views expressed herein.

^{74/} *Id.*

^{75/} *Third Further Notice*, at ¶¶ 447, 449.

Respectfully submitted,

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Dated: November 3, 2008

EXHIBIT A

AASHTO POLICY RESOLUTION

SPECIAL COMMITTEE ON WIRELESS COMMUNICATIONS TECHNOLOGY (SCOWCoT)

POLICY RESOLUTION PR-08AM-1

Use of 700 MHz Radio Frequencies

Approved by SCOWCoT on October 8, 2008

WHEREAS, On September 25, 2008, the Federal Communications Commission (FCC) adopted and released a Notice of Further Proposed Rulemaking regarding the 700 MHz radio spectrum and published in the Federal Register October 3, 2008; and

WHEREAS, The FCC proposes restricting eligibility to the Broadband voice, data, and video network (the Public Safety Broadband Network [PSBN]) that will be created “to entities that provide ‘public safety services,’ as defined in Section 337 of the [Telecommunications] Act [of 1934 as amended]; and

WHEREAS, The FCC has repeatedly defined “public safety service providers” as law enforcement, local fire service agencies, and emergency medical services. All other eligible entities, including the departments of transportation, are classified by the current Commission members as State or local government entities or nongovernmental organizations that do not provide for the safety of life, health or property; and

WHEREAS, Using this definition, the Commission has concluded no other governmental organizations provide “public safety services;” and

WHEREAS, Section 337(f) of the Telecommunications act defines “public safety services” as follows:

(f) Definitions – For purposes of this section:

(1) Public Safety Services – The term “public safety services” means services –

(A) the sole or principal purpose of which is to protect the safety of life, health, or property;

(B) that are provided -

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider; and

WHEREAS, The American Association of State Highway and Transportations Officials emphatically asserts that many governmental agencies provide critical services in the protection of life, health and property. State Departments of Transportation and their employees, equipment, and expertise along with their contract employees are required for the protection of life, health, and property in the planning, preparation, response, and recovery from a disaster or emergency on and adjacent to federal, state and local roads. State Departments of Transportation play a critical role to assist other emergency response agencies in accessing crash scenes, diverting or otherwise managing traffic in emergency situations, responding to all manner of weather emergencies, removing obstructions and conducting joint training exercises to practice a variety of emergency plans such as those related to hurricane evacuations and security threats. Without assistance from the Departments of Transportation, police, fire, and emergency medical units would not be able to respond; and

WHEREAS, on February 28, 2003, President Bush issued Homeland Security Presidential Directive-5. HSPD-5 directed the Secretary of Homeland Security to develop and administer a National Incident Management System (NIMS). NIMS provides a consistent nationwide template to enable all government, private-sector, and nongovernmental organizations to work together during domestic incidents. State Departments of Transportation are integral partners in the NIMS “All-Hazards approach to incident management, and

WHEREAS, it is important to remember why we have the NIMS and why Integrated Command Systems are a critical piece of the incident management system. Most incidents are local, but when faced with the worst-case scenario, such as Sept.11, 2001, all responding agencies must be able to interface and work together. The NIMS, and in particular, the ICS component, allow that to happen, but only if the foundation has been laid at the local level. If any governmental entity adopts a restriction on integrated communications, that affects the ICS, the critical interface between responding agencies and jurisdictions cannot occur, and

WHEREAS, ICS Management Characteristics are based on proven management tools that contribute to the strength and efficiency of the overall emergency response system. The ICS management characteristics as taught by DHS in its ICS training programs highlights the importance of comprehensive resource management, **integrated communications** and information and intelligence management as key requirements, and

WHEREAS, The FCC has rightly concluded that while “entities, such as utility companies, may play an important role on occasion supporting public safety entities to carry out their mission of protecting the safety of life, health, or property, this role is ancillary to the entities’ principal purposes, such as providing electricity”; and

WHEREAS, The Commission has extended this prohibition on access even further by stating “Because CII [Critical Infrastructure Industry] entities would not be eligible to access the 700 MHz public safety spectrum under Section 337, they also would not be eligible to gain access to this spectrum through the Public Safety Broadband Licensee”; and

WHEREAS, “Even if authorized by a governmental entity pursuant to Section 337(f) (1) (B) (ii) of the Act, since the sole or principal purpose of the communications of CII entities are not to protect the safety of life, health, or property, granting such access to otherwise ineligible CII entities through a bona fide eligible entity merely bypasses the separate requirement contained in Section 337(f) (1) (A) of the Act”; and

WHEREAS, The strict interpretation of Section 337 (f) (1) (A) used by the Commission prohibits a State Department of Transportation from authorizing public safety broadband network access to towing and recovery units involved in quick clearance, privately funded safety patrols, contract snow and ice removal, and mass transit service providers used in the preparation, response, and recovery phases of any incident as required for incidents involving the safety of life, health, or property; and

WHEREAS, for those state DOTs, their employees, and their essential contractors classified as critical infrastructure or a critical infrastructure industry at some point by the Commission, no direct communication will be allowed on these frequencies with police, fire, or EMS units and state DOT communications on these frequencies may be either curtailed or severely restricted should an emergency be declared. Thus, the State Departments of Transportation may be severely limited in their ability to respond to a disaster; and

WHEREAS, This impact is even more severe when viewed in the “all hazards” context of prepare, respond, and recover. An on-scene incident commander or an emergency operations center will not be able to direct critical infrastructure units to the point of need, and it is possible that police or fire departments within the DOT may not be able to communicate directly with their parent organizations or incident management centers; and now therefore be it

RESOLVED, That in the sense of this meeting the AASHTO Board of Directors urgently requests the FCC revise their interpretation of Section 337 of the Communications Act of 1934 as amended, or a revision to the Communications Act of 1934 as amended be enacted to classify State Departments of Transportation as protectors of life, health or property as per Section 337 (f)(1)(A); and further be it

RESOLVED, That the revision allows the Public Safety Broadband Licensee, a non-governmental agency, the ability to authorize critical infrastructure industry users access to the public safety broadband network on a case-by-case basis.