

BMJ&D Telecom Update

Published by the Law Offices of Blooston, Mordkofsky, Jackson & Dickens

Vol. 3, No. 46

November 22, 2000

Reallocated Government Frequencies Could Open New Business Opportunities

Commission Adopts NPRM to Examine Possible Uses for 27 MHz in Bands Below 3 GHz

The FCC is beginning the complex task of deciding how to reallocate a total of 27 MHz of spectrum for commercial purposes. The spectrum is part of an ongoing process of transfers of channels held by the federal government. The reallocated spectrum is to be drawn from seven different bands located in the prime regions below 3 GHz, where spectrum is scarce and valuable. Based on the FCC's proposal (see below), it does not appear that these fragmented bands will support vast new high-capacity services, such as third generation personal communications services or high-speed mobile data. However, they could lead to a number of business opportunities.

For example, some companies have proposed using parts of the spectrum for a new generation of mobile personal location technologies. Another petition calls for assignment of some bands to gas and electric utilities for automatic meter reading. The satellite, land mobile radio and public safety sectors also have interest in the bands as possible means for reducing their own current spectrum crunches. In large part, equipment manufacturers may decide how this spectrum can be used, by supporting the development of equipment that will operate on one or more of the bands. The FCC has adopted a Notice of Proposed Rulemaking (NPRM) listing each of the available bands and examining the current expectations of how they might be used (ET Docket No. 00-221). Comment dates have not been announced. Initial com-

ments will be due 30 days after the item is published in the Federal Register and reply comments will be due 60 days after publication.

Most of the focus in comments is likely to be on 13 MHz of spectrum the military is transferring in the 1400 MHz -- 1390-1395 MHz; 1427-1429 MHz; 1429-1432 MHz, and 1432-1435 MHz. Incumbent government users must be protected through 2004 in some cases and through 2009 in the case of the 1390-1395 MHz band. Because these bands are in some cases adjacent and in all cases in close proximity to each other, the FCC suggests that it might combine some of them into a single service, which could be used to create channel pairs for land mobile communications. Low Earth Orbiting (LEO) satellite interests and Itron Inc., a wireless telemetry company, have emerged as the leading advocates for conflicting uses of the 1400 MHz spectrum.

The FCC offers three options. The first option calls for the 1390-1392 MHz band to be paired with the 1427-1429 MHz band for traditional site-by-site licensing to land mobile licensees. A 1392-1394 MHz and 1432-1435 MHz pair would be auctioned. Commercial and private mobile radio service providers as well as band managers would be eligible to participate in the auction. The remaining bands would be allocated to satellite users on a primary basis. The second option varies from the first by allocating 1427-1429 MHz exclusively to telemetry providers and allowing utility telemetry users to share 1429-1432 MHz with medical telemetry users. Under the third option, a 1390-1392 MHz/1430-1432 MHz pair would be shared by LEO and private mobile radio licensees.

The other bands covered in the NPRM include:

- **214-220 MHz** -- The government is scheduled to transfer the band to FCC control in January 2002. Licensees will be required to protect incumbent government users as well as licensees on the adjacent VHF-TV channel 13, which will restrict the applications the band can support. The FCC proposes allocating them on a primary basis to fixed and mobile satellite carriers as feeder links.
- **1670-1675 MHz**-- Eventual licensees in this band will be required to protect incumbent radio astronomy operations. The FCC proposes service rules that could apply to land or satellite-based location services. A company named MicroTrax Inc. has peti-

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tioned to establish a ground-based Personal Location and Monitoring Service (PLMS), which could locate small objects or packages by attaching very small one-way transmitters that are tracked through a ground network. Another company, AeroAstro, has developed a similar two-way "Satellite Enabled Notification System" (SENS), which also could provide Internet-based short messaging service. The FCC suggests that this band would be best assigned through auctions.

- **2385-2390 MHz** -- There is still a great deal of uncertainty about the future use of this band, which will not be transferred from the government until 2005. After that date, government aeronautical telemetry users will retain a co-primary allocation. The FCC asks commenters to suggest possible services that could be applied to the band, keeping in mind that the level of sharing with aeronautical telemetry users remains an open question. MicroTrax has identified this band as one of the options for PLMS. The 2 GHz band has traditionally been prime spectrum for long microwave hops (15 to 25 mile paths), and more recently for Internet access/high-speed data. However, the proposed allocation only includes 5 MHz.

The significant amount of incumbent government usage of the bands will require close FCC coordination with the National Telecommunications and Information Administration, the agency that manages government-controlled spectrum. The Commission asks for comments on different frequency coordination approaches that could be applied to various bands. "We doubt that a single solution will be the best method for ensuring maximum flexibility and utility of the bands, while at the same time providing the necessary protection for government operations," the FCC said.

BMJ&D contacts: Hal Mordkofsky and John Prendergast.

LAW & REGULATION

FCC Sets Procedures for Challenges to State and Local RF Regulations

Wireless Carriers Advised to Petition for Declaratory Rulings if Local Regulations Conflict With Federal Guidelines

In a Report and Order adopted last week, the FCC has set the formal procedure for wireless carriers to petition for declaratory rulings in cases when they believe state and local governments have exceeded their authority to

regulate radio frequency (RF) emissions. Section 704 of the Telecommunications Act of 1996 prohibits state and local authorities from denying a use permit or other authority to a wireless carrier on the basis of state RF radiation regulations, if the carrier is in compliance with the FCC RF regulations. However, both the FCC and the wireless industry have found that local authorities often are not aware of the law.

Carriers can now file challenges if they are aggrieved by a local action, the order says. The request will be handled according to normal FCC procedure, except the comment period, normally 10 days for such a petition, is expanded to 30 days. State and local governments responding to the FCC's Notice of Proposed Rulemaking (NPRM) on the RF challenge procedures said that 10 days was not enough time for them to respond. Carriers will have 15 days to reply to oppositions by the local authorities.

The Commission declined to adopt features to its procedures that would speed the process. For example, some wireless commenters to the NPRM suggested that resolution of declaratory ruling applications should be within a 30-day deadline. Some also asked the FCC to impose summary judgements against state and local authorities that do not respond to petition requests within the prescribed time period. "We understand the need to facilitate the build-out process and the need for carriers to have fast resolution of siting disputes," the FCC said. However, the Commission said that it must have the flexibility to consider all of the available issues on a case-by-case basis.

The FCC agreed with wireless commenters who opposed requirements that carriers demonstrate their compliance with FCC RF standards to state and local officials. Those requirements would be "unnecessarily burdensome on carriers," the FCC said. Instead, the Commission suggested that local governments could ascertain whether carriers are in compliance with the rules by referring to a recent FCC publication entitled "A Local Government Official's Guide to RF Emission Antenna Safety Rules."

The guide is the FCC's attempt at providing a "plain-English" explanation of RF radiation regulation and a better understanding of the actual dangers connected to RF exposure. It is designed to be a user-friendly source of information for local government officials that find themselves in the unfamiliar role of interpreting FCC technical rules. It was published earlier this year in cooperation with the Environmental Protection Agency, the Food and Drug Administration and a number of local governments. (Electronic copies of the guide are at www.fcc.gov/oet/rfsafety and www.fcc.gov/statelocal.)

"Although the Local Official's Guide is not legally binding, we expect it will help produce a framework for state and local governments and wireless service providers to work cooperatively on this issue," the FCC said.

Our clients who encounter adverse state or local regulation of RF radiation from wireless services should contact us promptly. It may be possible to avoid a lengthy delay by providing the local government officials with an explanation of the FCC's rules. If this is not successful, we can assist our clients in petitioning the FCC for relief.

BMJ&D contacts: Hal Mordkofsky and John Prendergast.

Sixth Circuit Affirms Structural Separation Rules

Large ILECs Must Continue to Operate Mobile Phone Subsidiaries as Separate Affiliates, Expanding Upon Original FCC Rules

The FCC's Commercial Mobile Radio Service (CMRS) structural separation rules, which require incumbent local exchange carriers (ILECs) to operate commercial mobile phone services through separate affiliates, were affirmed last week by the U.S. Court of Appeals for the Sixth Circuit. The decision appears to end a four-year fight led by BellSouth and GTE to reverse the FCC's 1997 decision to expand upon those rules.

In the early 1990s, the FCC adopted structural separation rules that allowed ILECs to be licensed in the new personal communications service (PCS), but retained a pre-existing rule requiring Bell operating companies (BOCs) to operate their cellular services through separate affiliates. The Sixth Circuit found those rules to be arbitrary and remanded them to the FCC in the 1995 *Cincinnati Bell* case. The FCC responded with rules requiring separate affiliates for large ILECs operating all forms of CMRS. **The rules include two exceptions. Rural telcos and ILECs with fewer than 2 percent of the nation's subscriber lines are not required to operate separate affiliates.**

The court last week knocked down BOC claims that the new rules also are arbitrary. "We are convinced that the Commission reasonably concluded that it could not rely exclusively on non-structural safeguards given the monopoly power of the LECs that stems from their bottleneck control over local landline infrastructure," the Sixth Circuit said. The court did not dispute ILEC claims that the FCC had not produced "specific instances of anti-competitive behavior," but based its judgement on "problems with [ILEC] interconnection in other areas."

The court also rejected ILEC claims that the Telecommunications Act of 1996 negated current FCC rules prohibiting joint marketing with co-owned wireless entities. The Commission's interpretation of vague language in the Act was permissible, the court said.

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Law & Regulation in Brief

LIBERTY SET FREE: AT&T has decided to spin off its subsidiary, Liberty Media Inc. It plans to convert Liberty Media into an independently traded public stock by mid -2001. The company, which AT&T acquired as part of its 1999 merger with TeleCommunications Inc., holds interests in several cable TV programming services and various Hollywood companies, including Time Warner and News Corp. **The Liberty Media spin-off is one of a series of moves AT&T is likely to make in coming months to comply with the FCC's cable TV attribution rules, which restrict individual cable operators' reach to 30 percent of all pay-TV subscribers nationwide.** The attribution formula factors both direct services to TV programming subscribers as well as ownership of program services. AT&T is estimated to reach about 40 percent. Under the terms of the FCC's approval of AT&T's merger with MediaOne Group earlier this year, it faces a December 2000 deadline to complete part of the divestitures to come into compliance. AT&T attempts to gain Congressional relief from the attribution rules have so far been unsuccessful (BMJ&D Telecom Update, Oct. 25). AT&T hopes to win a ruling from the Justice Department that would allow it to structure the Liberty Media spin-off as a tax-free transaction. Shares of AT&T stock dropped below \$20 on Monday (Nov. 20) in a decline of about 60 percent over the past 12 months. BMJ&D contacts: Ben Dickens and Gerry Duffy.

3.6/4.9 GHZ COMMENTS: The text of the FCC's recent Notice of Proposed Rulemaking (NPRM) to establish a new fixed broadband Internet service in the 3650-3700 MHz and 4940-4990 MHz bands was published late last week in the Federal Register. **The NPRM proposes to auction the two bands together to allow bidders to aggregate as much as 100 MHz to provide high-speed data services, especially in rural areas** (BMJ&D Telecom Update, Oct. 18). Comments are due **Dec. 18** (ET Docket No. 98-237/WT Docket No. 00-32). Reply comments are due **Jan. 16, 2001**. BMJ&D contacts: Hal Mordkofsky and John Prendergast.

KANSAS CLASH: Independent telephone companies in Kansas are **asking the FCC to declare that local telephone service provided by Western Wireless Corp. in their state is not a Commercial Mobile Radio Service (CMRS).** In a petition filed earlier this month, the State Independent Alliance and the Independent Telecommu-

nications Group urges that Western Wireless should be subject to the same state universal service regulations that apply to wireline carriers. Kansas is one of only a handful of states that has designated Western Wireless as an eligible telecommunications carrier (ETC) in order to receive high-cost universal service support in non-rural areas. The Kansas Corporation Commission (KCC) is soon expected to make a similar ruling regarding rural areas. Courts and regulators in other states that have addressed similar issues have consistently found that Western Wireless, while providing a fixed service, was a CMRS carrier and, therefore, regulated by the federal government only. **The independent telcos' petition asks the FCC to directly address whether federal law preempts the KCC from requiring Western Wireless compliance with state universal service regulations.** Yesterday (Nov. 21), the FCC released a public notice seeking comment on the Kansas independents' petition by **Dec. 21** (WT Docket No. 00-239). Reply comments are due **Jan. 8, 2001**. BMJ&D contacts: Ben Dickens and Gerry Duffy.

C/F-BLOCK AUCTION PREPARATIONS: Several big names in the wireless industry were put on the FCC's list of "incomplete" Form 175 applications for approval to participate in the FCC's C/F-block auction (Auction No. 35), which is scheduled to begin **Dec. 12**. AT&T Wireless, Cingular, Leap Wireless, Nextel, Sprint PCS and VoiceStream were among 66 applicants that purportedly filed invalid attachments. **The reasons given by the FCC for returning most of the applications appear to be minor, and the majority should be approved for auction participation after amending applications by a Nov. 28 deadline.** A total of 44 companies were accepted after their initial applications, including several

regional carriers and rural telcos that have applied to bid on "closed" licenses that are restricted to bids from entrepreneurial companies. Only two of the 112 applications were rejected outright. **In spite of a lingering effort by NextWave Telecom to have the U.S. Court of Appeals for the District of Columbia Circuit to stay Auction 35, it currently appears that the auction will go forward as scheduled.** But the Commission is still hearing protests from rural telco critics. Last week, the Small Business Administration (SBA) and several organizations representing rural telcos sent a last-minute letter to FCC Chairman William Kennard seeking additional changes to the rules for Auction 35. They asked the FCC to switch the 10 MHz F-block licenses in the auction from the "open" to closed bidding category and to increase the bidding credit for small companies bidding on open licenses. "The record simply does not support the Commission's decision to scale back this opportunity for smaller companies and rural telephone companies to acquire valuable spectrum," the SBA and the associations said. BMJ&D contacts: Hal Mordkofsky, John Prendergast, Gerry Duffy and Cary Mitchell.

OPEN ACCESS RECOUNT: Broward County, Fla., the land that made the term "pregnant chad" world famous, has also been in the middle of another raging issue of the day -- cable TV open access. **The U.S. District Court for the Southern District of Florida last week overturned a Broward County ordinance requiring AT&T to provide unaffiliated Internet service providers with access to its cable modem facilities.** The court found that Broward's open access ordinance violated the First Amendment. The FCC recently adopted a Notice of Inquiry to investigate the open access issue. At the same time, the Federal Trade Commission review of the pro-

FCC Clarifies Private Radio Auction Rules, Avoids Auctioning Shared Channels

The FCC has clarified its plans for possible future auctions of spectrum currently used by various classes of private radio licensees. A recent Report and Order (R&O) reaffirms that under the current law certain private radio licenses are subject to competitive bidding when those licenses are challenged by mutually exclusive applications, but that it is in the public interest for the FCC to seek ways to avoid mutual exclusivity. **Significantly, the FCC declined to adopt an auction scheme for the majority of private radio channels which our clients use, especially shared channels. However, the FCC will explore adoption of an auction scheme for future private radio spectrum allocations.** The R&O also reclassifies a number of private radio classes as "public safety radio services," thus exempting those bands from future auctions. The new classification extends "to non-commercial services used by entities such as utilities, railroads, and transit systems." The FCC did not address all requests for safety status but instead laid out the guidelines it will use in addressing such requests.

The FCC also adopted a Further Notice of Proposed Rulemaking (FNPRM) exploring whether to extend the same CMRS conversion rules to Business and Industrial/Land Transportation licenses in the 900 MHz band. The FCC also seeks comment on a petition for rules requiring Part 90 licensees to use certain new spectrum-efficient technologies. Comments will be due 60 days after the FNPRM is published in the Federal Register and reply comments will be due 90 days after publication.

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posed America Online/Time Warner merger is at an impasse over Time Warner's timetable for allowing open access to its facilities (BMJ&D Telecom Update, Nov. 15). BMJ&D contacts: Ben Dickens and Gerry Duffy.

CALEA LIST: The FCC has released a list of more than 1,000 local exchange carriers that have filed petitions for extension of the deadline for compliance with the capability requirements under the Commission's Communications Assistance for Law Enforcement Act (CALEA) regulations. Carriers had been required to deploy call interception capability according to the IEEE J-STD-025 standard as of June 1, 2000. However, because the software needed to complete the deployments was not available at the time of the deadline, the FCC and FBI agreed upon a waiver procedure to delay the capability deadline for most carriers until at least **March 31, 2001**. By that time, the FCC

is expected to have acted on several petitions to further extended the deadline for individual carriers up to as long as **June 30, 2002**. The Commission required each of the carriers to apply individually rather than granting a blanket extension. The LECs included on the FCC list have satisfied the requirements for the waiver and are deemed to be in compliance until March 31, unless the FCC takes action to revoke waivers for individual companies. The FCC has set up a comment cycle for those seeking to raise issues connected to the list or the FCC's waiver procedures. Local law enforcement entities are the most likely entities to file initial comments, which are due **Dec. 20** (CC Docket No. 97-213/File No. NSD-L-00-234). If initial comments affect individual carriers' waivers, they should be prepared to file reply comments, which are due **Jan. 4, 2001**. BMJ&D contact: Gerry Duffy.

FCC Meetings and Deadlines

Nov. 24 – Deadline for comments on Western Wireless petition for federal designation as ETC for universal support to provide service to Crow Reservation in Montana. Reply comments due Dec. 11 (CC Docket No. 96-45).

Nov. 24 – Deadline for comments on recommendations for separations reform filed by Federal-State Joint Board on Jurisdictional Separations. Reply comments due Dec. 4 (CC Docket No. 80-286). (Extended from Sept. 25.)

Nov. 27 – Bidders must submit upfront payments for C/F-block PCS auction scheduled to begin Dec. 12 (Auction No. 35).

Nov. 27 – Deadline for reply comments on proposals to change "small business" definition and attribution rules for future spectrum auctions (WT Docket No. 97-82).

Nov. 29 – Deadline for comments on whether information services should be considered "interLATA services" for Section 271 reviews. Reply comments due Dec. 11 (CC Docket No. 96-149).

Nov. 30 – **Deadline for reply comments on Rural Task Force Recommendations for universal service high-cost rural support mechanism (CC Docket No. 96-45).**

Dec. 1 – Deadline for comments on Notice of Inquiry into open access to cable modem facilities for ISPs not affiliated with the cable TV industry. Reply comments due Jan. 10, 2001 (GN Docket No. 00-185). In the same docket, the FCC seeks comments on petition for declaratory ruling that cable operators offering telephone service are required to contribute to universal service.

Dec. 1 – FCC to hold public forum to discuss procedures to improve preparation for the World Radiocommunication Conference (WRC), 3-5 p.m. (EST) at the FCC meeting room. The next WRC is scheduled for 2003.

Dec. 1 – Deadline for reply comments on possible reinstatement of CALEA "punch list" items remanded by D.C. Circuit (CC Docket No. 97-213).

Dec. 4 – Deadline for reply comments on proposed detariffing of international interexchange services (IB Docket No. 00-202).

Dec. 6 – Deadline for reply comments on NECA's proposed modifications to average scheduled universal service formulas for calendar year 2001 (File No. ASD 00-42).

Dec. 8 – Deadline for comments on petition to reopen consideration of lifting hearing aid compatibility for broadband PCS handsets. Reply comments due Jan. 8, 2001 (RM 8658).

INDUSTRY TRENDS

'Dot CO-OP' Is Among Seven New Internet Domains

Rural Telco and Electrical Cooperatives Have New Marketing Option for Web Pages

Rural cooperatives that did not have the chance to get the "dot com" web address of choice when they began marketing their services or providing customer/owner service information over the Internet, have just been given another opportunity. The Internet Corporation for Assigned Names and Numbers (ICANN), the international standards body that governs the rules for assigning web addresses, has created seven new domains, including ".co-op." Commercial telcos that were not able to get the web address they wanted also will have another chance. The domain ".biz" will soon be available as well.

TOP-LEVEL DOMAIN NAMES AFTER RECENT ICANN ADDITIONS

.aero	New domain for aviation companies.
.biz	New domain for commercial entities.
.com	Unrestricted domain for commercial entities.
.co-op	New domain for cooperatives.
.edu	Domain restricted to four-year colleges and universities
.gov	Domain restricted to U.S. federal agencies.
.info	New domain for general online information services.
.int	Domain restricted to international database access.
.mil	Domain restricted to the U.S. military.
.museum	New domain to distribute information about museum displays.
.name	New domain for personal web sites.
.net	Unrestricted domain for online network service providers.
.org	Unrestricted domain used mainly by non-profit groups.
.pro	New domain for doctors, lawyers and other professions.

With the rapid growth of the Internet and the World Wide Web throughout the 1990s, many businesses have found the URL -- the user resource locator -- of their web sites to be extremely valuable branding tools. Many new entities, such as Amazon.com or Priceline.com, have chosen to make their URLs their company names. But those that were slow to pick up on the trend were not able to use the '.com' they desired. The domains ".net" and even the less often-used ".org" and ".edu" also have felt the pressure of high demand for particular names. A new term,

"cybersquatting," was coined to describe entrepreneurs that signed up for valuable terms and potential brand names in the dot com domain and later sold them to corporations at high prices. In some cases, cybersquatters were taken to court in copyright disputes.

The addition of the new domains to the current choices is meant to solve some of that conflict. Under the current system, dozens of companies in the United States and abroad are licensed to distribute web addresses according to the current domains, which also include hundreds of domains for various nations around the world (such as ".uk" for the United Kingdom and ".jp" for Japan).

ICANN maintains a list of those registrars on its web site (<http://www.icann.org/registrars/accredited-list.html>). So far, web addresses using the new domains are not available. ICANN says it expects the new URLs to begin appearing in mid-2001.

Dot co-op and the other new domains won out over stiff competition. ICANN accepted only seven out of 47 proposals. Among those that did not make the cut were ".geo" for geographical location-based services; ".health" for healthcare sites; ".iii" for individuals (which would have been an alternative for the ultimately chosen ".name"); ".kids" for children's sites, and ".xxx" for sites that are not for children.

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