

FHH Telecom Law

May 2006

BRS/EBS One Step Closer to Reality

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In a much anticipated Order, the FCC corrected, clarified and revised most of the miscues which had marred its 2004 decision re-vamping the MDS/ITFS band to make it more commercially viable. The 2500 – 2690 MHz band had been mired for decades in a mélange of channels interleaved for educational service (now EBS) and commercial multipoint distribution service (now BRS). At the same time, legacy rules and procedures strangled the ability of operators to assemble viable bandwidth.

Although the FCC commissioners proudly proclaimed in June, 2004 that they had finally “gotten it right,” it quickly became apparent that the plan for transitioning to the new band plan was wholly unworkable. Under the new band plan, the channels assigned to licensees would be shuffled around to create a small core of high power 6 MHz mid-band channels useable for wide-area video transmissions, and two bands of low power 5.5 MHz channels suitable for cellular type operations. Replacement spectrum for old MDS Channels 1 and 2 and largely unused MDS return channels were also thrown into the mix to create a large swath of prime spectrum in the 2496-2690 MHz band ideally suited for fixed and portable 3G applications.

The problem was that the FCC ordained that the transition from the old band plan to the new one would be initiated and orchestrated in each market by individual licensees or spectrum lessees. The markets were defined as MEA’s – Major Economic Areas – which were so vast in size that no one was willing to undertake the financial burden of transitioning a market. Not a single market had actually been transitioned in the 19 months since the re-structuring was adopted. Plus, the original transition rules left many unanswered questions about who was to pay for what and when.

The latest Order adopts the industry’s near unanimous recommendation that transitions occur on a BTA-by-BTA basis which will be much more manageable for all concerned. In addition, the Order clarified the following key points:

The procedures applicable to initiating and implementing a market transition were detailed. Parties have 30 months from the effective date of the new rules to initiate a transition, and the transition must then be completed within 18 months.

A transition “proponent” may demand reimbursement from the other commercial licensees, commercial lessees of both EBS and BRS spectrum in the market, and (somewhat surprisingly) from non-commercial EBS licensees who use their spectrum

for commercial services. The latter provision is curious since the rules had previously been structured to exempt non-commercial entities from having to bear any of the cost of transitioning.

Reimbursement of the proponent is due as soon as the transition is complete. However, the FCC established no mechanism for enforcing the payment obligation.

Perhaps the most contested issue was whether leases by educators for commercial purposes should be limited in their length. Some educators had expressed concern that educators would be pressured into what amounted to lifetime leases so there needed to be a term limit on leases to protect them from themselves. After much soul-searching, the FCC agreed to a maximum 30-year term, subject to license renewals during the lease term and subject also to the educator being able to re-evaluate its educational needs for the service every five years after the 15th year. So much for prioritizing education.

Build-out requirements were clarified to provide “safe harbors” of service provision levels which will assure renewal if attained. The service levels were somewhat higher than the levels established by the Commission in other comparable services (*e.g.*, 30% of the population must be covered if you provide fixed or mobile service). If these build-out and service levels are not reached by May 1, 2011, the licensee will have to be adjudged on a case-by-case basis – the last thing a licensee wants to go through.

Although there was considerable comment in the Docket about the implementation of an auction to clear the band and assign vacant spectrum, the FCC tabled any decisions about this until the transition process is closer to completion. That unfortunately means that vacant ITFS spectrum which has lain fallow since 1995 must remain fallow for at least three more years.

Regulatory fees were made more sensible. Now the fees will be assessed on the basis of market size (in three graduated tiers) and the amount of spectrum assigned rather than on a call sign by call sign basis.

The FCC confirmed its belief that unlicensed low power operations, a handful of legacy point-to-point links, and certain MSS operations can coexist in the same band as BRS/EBS without interference.

While the new Order is itself far from perfect in many respects, it does seem to make it realistically possible for operators to proceed with the transition process. Low power cellularization will permit the intense re-usage of the spectrum necessary to maximize the number of simultaneous users. Perhaps this time they did get it right.