

## **FHH Telecom Law September 2006**

### **What Must DE's Report? Concentrate and ask again later**

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Medieval theologians are said to have spent a lot of billable hours arguing about how many angels could dance on the head of a pin – a dispute that seems to have revolved more around the ethereal nature of angels' substance than the specifics of their terpsichorean preferences. Modern communications carriers find themselves in a similar head-scratching quandary when considering the mysterious and ethereal nature of Reportable Eligibility Events.

As we have reported, the FCC in April took steps to tighten up eligibility for discounts in auctions by policing more rigorously the various relationships that putative Designated Entities were entering into. Among other things, the FCC will prospectively deny DE status to entities that have "material relationships" with bigger companies such that the bigger companies' revenues should really be attributable to the putative DE. A prohibited material relationship consists of a lease or resale arrangement whereby 50% of a DE's spectrum capacity is effectively committed to the larger entity. Where such an arrangement results in a 25% commitment of spectrum to the bigger entity, the bigger entity's revenues will be attributed to the applicant or licensee entity. Fair enough going forward.

However, the FCC took several other steps. It now requires DE's to report on the anniversary of their license any Reportable Eligibility Events (REEs) which have occurred. Unfortunately, the definition of an REE is elusive. The rules define it with perfect circularity: an REE is (1) a lease or resale arrangement which would cause the licensee to lose DE benefits under the FCC's affiliation rules or (2) any other event that would lead to a change in eligibility of a DE. The first criterion is straightforward enough since there are actual rule sections that one can use as points of reference. More problematical is the second criterion. What other events are they talking about?

The FCC's order tries to be helpful but actually muddies the water further. Certainly entering into a material relationship would be one such event, but also covered are events "which *might* affect [a DE's] ongoing eligibility." *Might* affect? What does that mean? In a footnote, the FCC helpfully supplies a non-exhaustive list of examples of events which might affect DE status: changes in ownership, and agreements between DE's and third parties such as "management, credit, trademark, marketing and facilities agreements." Does that mean that entering into a standard financing agreement is an REE? Entering into a standard trademark licensing agreement? Having a switching arrangement with another carrier? Opening an account with an advertising agency? All

of these would normally be considered run-of-the-mill arrangements for an operating company which would not call into question its bona fides as a DE. And what about other types of arrangements that aren't included in this list but which "might" affect your DE status if somebody chose to so find?

To complicate matters further, not only do REEs have to be reported once a year, but a DE licensee must now seek approval to engage in the REE before doing it. In other words, if a DE thinks that something it's thinking about doing – like entering, let's say, into a preferred roaming agreement – might affect its status, it must first file an application with the FCC and get the activity approved. Presumably the FCC will indicate at that time whether or not it agrees with the applicant's assessment as to whether the REE will result in the loss of the DE's benefits and whether unjust enrichment penalties will be applied.

We quite frankly don't see how the new rules can be strictly enforced because they are so vague that nobody can be sure what is covered – even some of the cited examples do not seem to qualify as events which might affect your DE status. At the same time, the rules hang ominously over the heads of DE's and must be dealt with in some way. Where is a medieval theologian when you need one?