

FHH Telecom Law

September, 2007

700 MHz: Chopped, Channeled, On The Block

*By Donald J. Evans
evans@fhhlaw.com
703-812-0430*

In case you just got back from a vacation in Timbuktu, we are happy to inform you that the much-ballyhooed 700 MHz auction rules took a big step toward their final form last month.

It's been said that a camel is a horse built by a committee. If that's true, the 700 MHz rules are a herd of camels. The subject of intense lobbying by some of the biggest corporations in America, these rules seem to have been calculated to disappoint almost everyone. But by giving everyone only about 35% of what they asked for, the FCC may have made the spectrum sufficiently unattractive to prospective bidders to dampen enthusiasm considerably. Interestingly, the ostensible biggest winner, public safety users, may end up as the biggest loser. Let's look at some of the highlights with our usual jaundiced eye.

Smaller carriers had urged the FCC to restructure the geographic size of the areas to be licensed because, as originally proposed, the license territories were so vast as to be affordable only by the hugest companies. The FCC sort of complied by making one additional paired (2 x 6 Mhz) CMA-sized block available right next to another CMA-sized block which had been auctioned several years ago. But this is the *only* CMA-sized block they authorized.

They also authorized one paired (2 x 6 MHz) and one unpaired (6 MHz) block in EA size. (There are about three EAs to a state.) This development should have pleased small carriers, except that the FCC then went on to encumber the large territorial blocks so much that the big carriers may find the CMA blocks much more attractive objects of desire than they otherwise would have.

The FCC did this by creating a huge block of 22 MHz (2 x 11) and allotting it to REAGs – vast areas that cover seven or eight states each, plus assorted territorial regions. These blocks would normally have been most highly coveted by the Verizons and AT&T's of the world because they are in the small club of folks who can afford a few billion dollars to purchase them. Unfortunately, the FCC did two things to dampen their appeal.

First, it imposed an "open access" requirement on this one block, as requested by newcomer Google. This runs contrary to everything that common carriers hold dear – their God-given right to control who and what gets onto their networks. Open access translates directly into less revenue for carriers from equipment and content deals. In addition, the FCC imposed strict "use or lose" build-out requirements which would entail the construction of facilities in non-urban parts of the REAGs on a timetable not necessarily of the licensee's own choosing. If you're going to pay a few billion dollars for a license, you want to be pretty happy with what you get for your money – not vaguely ambivalent.

The remaining 10 MHz was allotted by the FCC to a nationwide license which would operate in conjunction with the adjacent public safety band. This arose out of a proposal by former FCC Chairman Reed Hundt's and former NTIA Director Janice Obuchowski's company, Frontline, to piggyback a nationwide commercial operation on the national public safety infrastructure. The mutated, Frankenstein version of the proposal which emerged from the FCC, however, requires that this nationwide licensee: (a) pay for the relocation of all existing narrowband public safety users in the band (up to \$10 million);

(b) build out almost the entire national public safety network in seven years; (c) give priority access to its own spectrum to public safety people in emergency situations while getting secondary access to the public safety spectrum at other times; and (d) pay at least \$1.33 billion for this privilege. It also has to pay the \$1.33 billion with no assurance that it will be able to negotiate a satisfactory sharing agreement with the public safety licensee, something it must do in order to avoid forfeiture of the money. Talk about a weak negotiating position! It is difficult to imagine anyone considering this license a viable risk.

Combinatorial or package bidding will be permitted on the big 22 MHz. This was done to permit Google or some other billionaire to be able to buy the entire nationwide set of licenses. In package bidding, you bid on a whole set of licenses together. If your bid for the whole set is larger than the total of the high bids for individual licenses in the set, then you get all the licenses. This feature lets someone who must have a certain group of licenses in order to go into business bid on that group without the fear of being stuck with a useless subset. Again, the FCC seems to have bent over backwards to accommodate Google as a new entrant. Some observers are concerned that package bidding is too complicated for the Commission's system to handle, so the FCC actually authorized the staff to go without package bidding if they can't figure out how to make it work by the auction date.

Another quirk to this auction is anonymous bidding. Until recently, the FCC believed that the auction process worked best when it worked transparently – with all bidders knowing who they were bidding against. Now the Commission seems to believe that open bidding somehow dampens bids or permits collusion, so it is keeping the identity of bidders secret until after the auction is over. The problem is that the anti-collusion rules prohibit certain contacts between bidders in the auction – if you don't know who the other bidders are, how do you know who not to talk to? The Order suggests that bidders will be told in some way who the other bidders for the licenses are so that they can comply with the rule, but if that's the case, then what's the point of the initial secrecy?

On the surface, the public safety community should be elated since the Order provides for: (i) a broadband allocation in the 24 MHz band allotted to public safety; (ii) a single, nationwide license owned by a non-profit entity governed by the major public safety organizations; (iii) build-out of the national public safety network by the commercial licensee of the adjacent commercial block; (iv) relocation of existing public safety narrowband users by the adjacent commercial licensee; and (v) emergency access to an additional 10 MHz of spectrum owned by the adjacent commercial licensee.

This sounds great – public safety gets a multi-billion dollar network managed solely by them but built entirely at the expense of someone else. As suggested above, however, it may be that the FCC has been *too* generous to public safety. The enormous obligations incurred by the hapless adjacent channel commercial licensee and the uncertain rewards may make that license a rather scary proposition.

The checkered result of the FCC's decision-making process here has made the auction process both complicated and uneven, since different spectrum blocks have been cut and tailored to the needs of different industry proponents – but in a way that is unsatisfactory to the proponent supposedly being served. This will almost certainly diminish the prospective returns from the auction as it has dampened the enthusiasm of many participants. Given the enormous promise and potential of this desirable and newly virgin spectrum, this outcome must be viewed as a disappointment.