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## **700 MHz Picture Becomes Clearer, Murkier**

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Whatever happened to the days when the FCC opened a rulemaking proceeding, got comments from the public, adopted an order, and implemented it? We seem to have entered an Age of Uncertainty when rules continue to be tweaked and adjusted right up to — and sometimes beyond — their effective date. Nothing ever seems to be totally, finally, once-and-for-all settled.

The latest case in point is the FCC's 700 MHz auction rules. It is hard to believe, but the FCC had actually adopted "final" rules for the 700 MHz Upper Band more than two years ago. All that remained was for the service rules and the auction procedures for the band to be announced so that an auction could be held no later than January, 2008, as required by Congress. Instead, once the DTV transition became fixed and the prospect of vast newly virgin spectrum became real, the proceeding became a free-for-all, with virtually every major telecom player trying to nudge the band plan, service rules and auction procedures in its own direction. The result has been a gradual crystallization of the rules as the January deadline has approached, but every new decision elicits new cries for change by the interested parties.

Faithful readers will recall that the FCC issued a massive tome on the 700 MHz rules in April, followed by another massive tome in August, now followed by yet another, slightly less massive, tome in October. The first tome laid out the basic options to reallocate the 700 MHz band.

Then the Google and Frontline proposals to set aside part of the spectrum for their desired uses surfaced and got considerable traction. The FCC therefore re-juggled the spectrum in a way it had not previously proposed in order to create a huge 22 MHz block for potential national providers, but conditioned that block on "open access" to the spectrum, as requested by Google. It also adopted a Frontline-like proposal providing for a 10 MHz nationwide block to be associated with the adjacent public safety spectrum, but it significantly increased the burdens on the licensee of that band. Finally, it established

strict build-out rules which will loom over licensees a few years after the licenses are bought.

The third tome laid out auction procedures and reserve prices for the various blocks (the minimum the FCC must garner for the auction to be valid). This latter issue is critical since the FCC itself has some doubts that it will get the reserve price it wants now that it has impaired the value of its product with fairly onerous conditions. So the FCC also ordained that if the reserve prices are not attained, there will be an immediate “do over” of the auction but with the onerous conditions deleted. Theoretically, the auction could now take place tomorrow with these rules in place. This sort of seems like progress.

On the other hand, the FCC received ten petitions for reconsideration of the August order, some from the very companies who had asked for the rules in the first place, others proposing entirely new conditions for portions of the spectrum. Those petitions have not yet completed their pleading cycle. Even if it works at a frantic pace for the Commission, we cannot expect FCC action on these petitions before Thanksgiving.

At the same time, Verizon and several others filed petitions for review with the U.S. Court of Appeals in Washington. Verizon is especially exercised about the “open access” condition which the FCC imposed on the 22 MHz that Verizon had its heart set on. Verizon asked for expedited consideration of the appeal so that the parties would know where they stood by the time the auction begins in January. The Court denied this request without comment. Then, in a sudden about-face, Verizon decided to drop its appeal, presumably because it did not want the uncertainty caused by its appeal to mar the auction.

CTIA took care of that problem, however, by filing its own appeal. To further complicate matters, Council Tree, who has been haggling with the FCC over Designated Entity eligibility criteria for several years, filed yet a different but related appeal with another Circuit Court, demanding that the FCC resolve its long-pending reconsideration of the previous DE criteria. It also challenged the DE rules as applied to the 700 MHz auction. The resolution of these appeals could also affect DE eligibility in this auction. That means that the auction will proceed with a cloud of judicial appeal hanging over the process.

In the meantime, Google has been publicly vacillating about whether it will or will not participate in the auction since the FCC did not structure the 22 MHz block entirely to its liking either. One part of us suspects that Google really never planned to bid on the spectrum at all — it just wanted to make the spectrum accessible to wholesale service and open access while having it be built out by others.

The public safety community has also been moving forward apace, creating an entity to serve as the licensee of the 24 MHz Public Safety block. It has also named CyrenCall as its advisor for the purpose of negotiating with the winner of the D Block, who will be obligated to reach an agreement with the public safety licensee and build out both its own and the public safety networks. This would appear to take CyrenCall out of the running as a prospective licensee itself of the D Block.

The FCC seems to have recognized the difficult negotiating posture in which the winning D Block bidder will be placed vis-à-vis the public safety licensee. Because the lucky D Block winner could suffer a massive default penalty if it fails to negotiate a post-auction deal with the public safety licensee, the FCC announced that it would reduce the default penalty from 15% to 10%. This tweak will do little to ease the anxiety of D Block bidders worried about negotiating a deal. On the other hand, the public safety community has recognized the problem by trying to make its needs transparent to bidders at the outset so that the negotiation process should hold fewer surprises.

Considering the extremely high value of the 700 MHz spectrum, the situation is more unsettled than we would expect it to be at this stage of the process. Uncertainty creates jitters for the Wall Street types who will have to be footing the bill for the spectrum, so the protraction of the rulemaking process may itself dampen auction values. Stand by for what will surely be yet another massive tome in another month or so, just in time for your holiday gift giving. The deadline for filing short form applications to participate in the auction is **December 3, 2007**.