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700 MHz Band: Still “Open” for Business
FCC to provide “reminder”, but no clarification,
For C-Block users

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Two developments in the 700 MHz industry have bolstered the survival of the FCC’s Open Access rules. However, two FCC Commissioners lament that the agency has missed an opportunity to clarify the meaning of the Open Access rules.

In late 2007, the FCC adopted service rules for the new 700 MHz band. The FCC rules permitted the frequency to be used for flexible fixed, mobile and broadcast uses. In addition, for a certain slice of spectrum – the C Block at 746-757 and 776-787 MHz – the FCC adopted a rule requiring licensees to allow their customers to use devices and applications of the customer’s choice on the network. This rule became known as the Open Access rule and it was championed by internet-based companies such as Google and Skype.

Shortly after the rules were adopted, the cellular industry trade group appealed the FCC’s decision to adopt the Open Access rules. The auction nevertheless started in January and brought billions of dollars into the treasury. By the end of the auction in March, Verizon had won most of the C-Block licenses.

With the trade group’s lawsuit pending at court, Google also chimed in on the Open Access rules. Google filed an application at the FCC demanding that the FCC “clarify” its open access rules and print such clarification on every C-Block license that Verizon had won.

The drama drew to a close this November as the trade group dropped its lawsuit and the FCC issued the licenses to Verizon. The trade group filed a voluntary motion to dismiss its court case on Monday, November 10. Three days later, the FCC released an Order declaring that it would not clarify the existing Open Access rule but that it would print a sentence on every C-Block licenses to remind winning bidders that their operations must be according to the FCC Rules.

As part of the Order granting the licenses, the FCC dedicated a few paragraphs to

reminding the industry about the agency's competition analysis. The FCC's decision to do a competition analysis for new licenses follows the same procedures that it uses when it does mergers and acquisitions – a two-part initial screen followed by a market-by-market analysis, if needed.

The first part of the initial screen involves a comparison of subscriber concentration before and after the license (or merger) is approved. The second part of the screen entails a review of the raw number of megahertz controlled in a market. The threshold varies depending upon the transaction, but the FCC chose 95 megahertz in the analysis of the 700 MHz licenses.

The FCC continued to a market-by-market analysis and determined that its six factor determination permitted the grant of all of the 700 MHz licenses under consideration. The FCC reviewed the following six factors:

- ? the total spectrum available for mobile telephony use;
- ? the particular applicant's portion of available spectrum;
- ? licensees in the market and their spectrum holdings;
- ? licensees currently providing service in the market;
- ? whether current service providers, who may be capacity-constrained in the near-term, can access additional spectrum in the market either through auction or on the secondary market; and
- ? licensees currently holding spectrum that could enter the market to provide service.

Readers who are considering acquiring licenses, either through direct acquisition of new licenses from the FCC, acquisition of licenses from other licensees, or the acquisition of other licensees themselves, should bear the FCC's analysis in mind. Due to the 95 MHz threshold selected by the FCC for these 700 MHz licenses, Verizon clearly was subjected to the competition analysis. However, the application of the formula cast a net that dragged in Union Telephone Company and a single rural license in Lincoln, Wyoming. Eventually, the FCC granted both companies their licenses and demonstrated why bidders and acquiring companies should conduct a full market analysis before undertaking expansions.