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Progress On the EBS/BRS Front . . . At Last!

Donald Evans
evans@fhhlaw.com
703-812-0430

August 18 was the filing deadline for prospective participants in the October BRS Auction. Though the spectrum pickin's in this one had looked mighty slim, 24 prospective applicants submitted short form applications. The FCC staff has alerted 14 applicants to their remediable deficiencies, while awarding ten others the merit badge of acceptance. Corrections to the defective applications, as well as upfront payments, are due no later than September 24.

Meanwhile, the FCC has issued a “Fifth Memorandum Opinion and Order and Third Notice of Proposed Rulemaking” (Order) addressing the substantial service requirements in this service, particularly as these requirements apply to winners of the auction. The new proposal, which had been leaked just before the deadline for filing short forms, would extend the “build-out date” for auction winners to four years from the grant date; the current build-out date is May 1, 2011. Concern about the May 1, 2011 deadline, which the Commission had expressly adhered to in setting its Auction 86 procedures, may have dampened enthusiasm for the auction, since it would have left auction winners with only about a year to build out entire systems that in some cases had not been fully built out in 20 or 25 years. The proposed change is therefore welcome to prospective auction bidders, but its timing is curious. Like the secret Domsday Machine in “Dr. Strangelove”, it makes no sense to propose a rule to encourage greater participation in an auction – but only to propose it *after* participation in the auction was closed.

The FCC Order also deals with EBS leases. The status of hoary Educational Broadband Service leases has been up in the air ever since the FCC made EBS leases subject to the secondary market rules that govern most other spectrum leasing arrangements. The issue has been: how long can these leases extend? Originally such leases were limited to ten years, then 15, then there was no limit, then in 2008 the Commission re-imposed the 15 year limit, grandfathering pre-existing leases from the date of execution of the leases.

It was that latter point that raised the dander of many EBS lessees whose leases may have been “executed” many years ago but which have not gone into effect because the start date on the leases was triggered by some other event. The FCC’s casual 2008 ruling –

perhaps inadvertently – served to severely limit the term of some such leases.

Reconsideration petitions were duly filed and opposed, but eventually the commercial industry group (WCAI) and the educational industry group (NEBSA) jointly offered a compromise solution: the 15 years could run from the execution date if the lease had in fact commenced prior to March 20, 2008 (the date of the 2008 Order that caused all the hubbub) or if both parties to the lease agreed to its treatment as grandfathered. The joint proposal also provided that leases entered into between January 24, 1999 and January 5, 2005 that provided for deferred start dates on the leases would be grandfathered for up to 15 years from the agreed start date (rather than from the execution date). The FCC gladly accepted this compromise proposal (which to our mind leans heavily in favor of the commercial lessees) as meeting most of the interests of both parties.

In addition, the FCC clarified that licensees of old channels 1, 2 and 2A can simultaneously operate on both their old channels and their new channels pending migration of all of their subscribers to the new band plan. So theoretically, if an AWS licensee does not evict the incumbent BRS licensee from the old band, it could continue to operate on those 6 - 10/12 MHz of spectrum indefinitely by keeping subscribers on the bands. Not that anyone would ever do such a thing.

Finally, in a related footnote to history, some readers will recall that when Sprint and Nextel merged, the FCC conditioned its approval of the merger on the company reaching some pretty hefty BRS service goals by August, 2009: service to at least 15 million Americans, including at least nine of the most populous BTAs and one of the least populous. On August 4, 2009, Clearwire Corporation (now a Sprint subsidiary) tersely reported to the Commission that it had more than met the service requirements established by the merger order. It provided no particulars on which BTAs, or exactly how many people, it is serving. Clearwire needs to be serving another 15 million people by August 7, 2011, a goal it says it is well on its way to achieving. In an industry in which unmet promises, excuses, lost financing, and endless requests for extension of time have been the rule rather than the exception, kudos are due to Clearwire for reaching at least one benchmark on time.