

# FHH Telecom Law

Current Issues in Telecommunications Law and Regulation

March 2007

*2 good 2B true?*



## M2Z 2 FCC: Let's Make A Deal

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In the mid-to-late 1800's the U.S. government gave away swaths of land across the county, land that had been considered public commons, to railroad companies ostensibly in order to spur the development of a trans-continental railroad. The railroad industry didn't just get the land they needed to physically build the tracks; they also got the adjacent land that they could sell to settlers once the tracks were laid. Depending on your view of history this was either a corrupt land grab, or a boon to the national economy by connecting the East and West Coasts.

As Mark Twain may or may not have remarked, "History doesn't repeat itself, but it rhymes." On February 1, the FCC placed on public notice an application by M2Z Networks to acquire an exclusive nationwide license in the 2155-2175 MHz band. M2Z proposes to use this spectrum to offer a free nationwide broadband Internet service. M2Z will also offer a higher speed pay service. Any device that operates on this network would have to be certified by M2Z.

To be clear, M2Z is proposing that the FCC circumvent the normal auction approach to granting wireless licenses, and that the Commission grant this license to M2Z on terms proposed by M2Z. The proposed conditions would require M2Z to:

- Provide broadband services nationwide with no recurring costs to consumers who purchase an M2Z certified device;
- Within 10 years have network coverage to 95% of the

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## When is a 700 MHz Public Safety License NOT a 700 MHz Public Safety License?

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The FCC recently took a fresh and untested approach to licensing the new 700 MHz public safety band which will be vacated by broadcasters no later than 2009. As veteran watchers of this band know, Congress has mandated that 24 MHz of the UHF band now being cleared of broadcasters be allocated for public safety services. The FCC complied by devising a combination of narrowband, wideband and reserve allocations which would be open only to public safety entities in the 764-776/794-806 band. Now, however, in a Ninth Notice of Proposed Rulemaking, the FCC has proposed a radical departure from the usual licensing scheme.

What the Commission has in mind is to allocate 12 of the original 24 MHz to broadband uses (now defined as at least 1 MHz of spectrum). This reflects the perception that broadband communications capacity is of growing importance to the public safety community. The novel element, however, is that the spectrum would be licensed to a nationwide, non-profit, non-commercial entity. This would ensure nationwide compatibility of the network. Individual public safety entities would pay fees to the national entity for usage of the network. At the same time, commercial entities would be allowed to use the spectrum on an unconditionally preemptible basis for a fee. This commercial usage would help to offset the costs to the public safety community of supporting the network.

While the Commission should be credited with a willingness to consider new licensing structures, there are some key elements of the plan which remain unresolved. Is this proposed usage consistent with the legal mandate that the spectrum be used "solely or principally" for pub-

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*Natura et senatores abhorrent a vacuo*

## Two Bills Would Jump-Start White Space Operation

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**A**fter the Commission released its Notice of Proposed Rulemaking and developed a timeline for the development of rules authorizing the use of unused television spectrum for unlicensed wireless use (*see* our coverage in the March, 2006, and September, 2006 *Memo to Clients*), it was assumed that Congress would wait until the Commission completed its comprehensive review of the issue. However, in January, new legislation was introduced to expedite the unlicensed use of the spectrum.

Specifically, Senator John Kerry (D-Mass) and Senator John Sununu (R-N.H.) have introduced separate pieces of legislation which would require the FCC to permit unlicensed use without regard to the Commission's previously-adopted timeline. Both would require the FCC to complete its rulemaking proceeding and issue a final order no later than October 1, 2007, and permit unlicensed usage of the television spectrum no later than February 18, 2009 (the date of the end of the DTV Transition). Both bills would require the Commission to establish technical requirements that would protect incumbent primary television licensees, and require the Commission to initially accept applications for the certification of unlicensed devices no later than December 1, 2007.

The bills would permit the Commission to conduct field testing in a "limited number of markets", the testing to be completed before the initiation of the equipment certification process, *i.e.*, before December 1, 2007. Senator Kerry's proposal would permit the Commission to solicit public comment on the field testing results, but only if the comment period could be completed within 180 days of enactment, or October 1, 2007. Senator Sununu's version also leaves open the possibility that a portion of the spectrum could be licensed, and, if so, would require that spectrum to be distributed via auction.

At this point, neither bill has been voted out of the Senate Commerce Committee, and no hearings have been scheduled. However, the reintroduction of the legislation on a subject that the FCC thought resolved must be sending shivers down the spines of the FCC scientists, and leaves them with questions such as: (1) how can we do field tests in 180 days on equipment that has yet to be produced; (2) how can we determine which spectrum should be licensed, and which should be unlicensed; and (3) how can we start certifying products that have yet to be produced, especially if the technical parameters have yet to be developed?

The first round of comments were filed in the FCC's rulemaking on January 31, 2007. Once the reply comments are filed, we will give a summary of the proceedings.

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Sweet deal



### Unauthorized Operation at 68 Sites for Five Years Nets \$20K Fine

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The Enforcement Bureau recently levied a forfeiture against Neptuno Networks, Inc. (Neptuno), for operating unlicensed radio transmitters in Puerto Rico. The Bureau discovered that Neptuno had been using unlicensed 5 GHz spectrum set aside for indoor use at 68 separate sites over a five-year period. Despite these pervasive violations of the Commission's rules, the Enforcement Bureau levied a \$20,000 forfeiture.

According to the Notice of Apparent Liability, the FCC's resident agent in Puerto Rico followed up on a complaint relating to Neptuno's unauthorized operations, and traveled to three different sites on separate occasions. Then the resident agent traveled to one site with the Vice President of Operations of Neptuno. In the course of three separate sets of communications between Neptuno and the FCC, Neptuno disclosed that it had been using the unlicensed spectrum for over five years at 68 different sites in Puerto Rico. The resident agent determined that Neptuno must have altered the equipment power settings to increase the equipment's power levels to far exceed the limits set for indoor use. He concluded that Neptuno was not authorized to operate from these sites without a license.

The FCC stated that, in reaching the forfeiture amount, it took into account the number of active sites (68), the duration of the violations (5 years), and the fact that Neptuno was using the unlicensed frequencies for commercial purposes. However, while the base forfeiture for operating without an authorization is \$10,000, the Commission levied a forfeiture of only \$20,000, rather than imposing a \$10,000 for-

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Still on the FCC's radar screen

### Reflective Detectors Detected, Rejected

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Drivers who use radar detectors agree they have a defect - if you don't slow down when they go off, a ticket is very likely. Much better would be a gizmo that not only alerts you, but also disables the radar. With one of those on the dashboard, you could sail past the officer with a wave and a smile.

A company called Rocky Mountain Radar (RMR) liked the idea, too - so much that they put it on the market.

Police radar bounces a high-frequency radio signal off your car back to the radar gun. The speed of the car alters the received frequency in a mathematically predictable way. The radar gun does the math and displays your speed. To prevent that, the RMR device, on detecting the radar signal, sends out a similar signal and deliberately varies the frequency in a way that confuses

the radar gun. The officer sees nonsense on the display.

The FCC objected to the RMR device. Not because the people there disapprove of speeding, although perhaps they do, but because RMR had violated the FCC's rules by unlawfully marketing a radio-frequency device. The FCC requires that most portable transmitters be certified for compliance with its technical standards. The standards bar a device that intentionally emits in certain "restricted bands." And those include the frequencies used by the RMR device. The RMR device thus was not only uncertified, but it could not have been certified. To make matters worse, its emissions exceeded the very low levels permitted for unintentional emissions in a restricted band. And, in any event, the device was in-

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*(Radar Forfeitures - Continued from page 3)*

eligible for certification because it deliberately caused malicious interference. The FCC fined RMR \$25,000.

RMR had an answer. The product, it said, is not really a transmitter, and hence not subject to the FCC rules, because it does not generate a radio signal of its own. Instead, it merely sends back an altered version of the signal coming in from the police radar gun. That might be a pretty good argument, were it not for one drawback: The FCC rejected the same argument from the same company back in 1997. Could the FCC have been wrong? RMR thought so, and challenged the decision in the U.S. Court of Appeals. But the court upheld the FCC's reading of its own rules.

In an area where the law is sometimes murky, this case is about as clear as it gets: A device that re-emits an incoming signal is a transmitter subject to FCC jurisdiction – and, in this case, potentially exposes its manufacturer to a fine.

The FCC simultaneously issued “official citations” to nine companies charged with marketing the offending RMR products. The citations do not themselves carry a fine, but expose the recipients to a fine if they commit the same violation again.

*This case is about as clear as it gets: A device that re-emits an incoming signal is a transmitter subject to FCC jurisdiction.*

Just two weeks earlier, the FCC cited its 1997 decision against RMR in fining San Jose Navigation \$75,000 for marketing GPS “re-radiators.” These receive, amplify, and retransmit incoming signals from GPS satellites to improve reception in areas where the signals would otherwise be too weak, such as inside buildings.

Like RMR, this company committed the offense of marketing a product that required but did not have FCC certification. And, like RMR's, the San Jose product was ineligible for authorization because it operates in a restricted band. Some of the federal agencies that use GPS signals complained to the FCC that the product could interfere with their operations (although none reported actual interference). The FCC investigated, and subsequently imposed the fine.

Unlike the RMR device, however, San Jose's actually served a useful purpose not otherwise addressed. And there was no claim of deliberate malicious interference. Moreover, although offenses within the statute of limitations would have justified a fine of \$28,000, the FCC took into account prior violations – outside the statute of limitations – in raising the fine to \$75,000. The very high levy probably reflects the great importance the FCC and the rest of the federal government attach to GPS operations.



*(700 MHz licenses - Continued from page 1)*

lic safety services? How would the non-profit nationwide licensee raise the funds to construct a billion-dollar national system, particularly with no commercial involvement? Is 12 MHz of broadband enough for public safety? Will there be any “excess capacity” to lay off to commercial users and, if so, will they be willing to take it on an “unconditionally preemptible” basis? On what basis will multiple competing commercial carriers be able to use whatever excess capacity there is?

Initial comments are due at the FCC on February 28. These may help to sort out whether this is a viable plan in its current form or whether some other public safety/commercial carrier partnership might better facilitate a rapid deployment of 700 MHz spectrum to the benefit of both.



*(Neptuno Forfeiture - Continued from page 3)*

feiture for each separate site. Also, the Commission apparently did not consider the unauthorized modification of the equipment as a separate basis for forfeiture, even though the Commission's rules set forth a separate \$4,000 fine per occasion for such actions.

It is not clear whether the failure to consider each transmit point as a separate violation reflects a change in policy at the Enforcement Bureau. Typically, the Commission is faced with an isolated incident of a violation, rather than the apparently systematic use described in the Commission's order. However, considering that the frequencies were used as part of a commercial operation, the impact of the forfeiture on Neptuno's bottom line will likely be negligible.



(M2Z Proposal - Continued from page 1)

country, with benchmarks of 33% coverage in 3 years and 66% in 5 years;

- Block access to indecent content transmitted over the “family-friendly” free service;
- Provide interoperable service to public safety officials; and
- Pay 5% of gross revenues from the paid subscription service to the U.S. Treasury.

The statutory basis that M2Z cites for circumventing the auction process and substituting its own proposal is found in 47 U.S.C. §309(j)(6)(E), which states that the competitive bidding language in the Communications Act should not “be construed to relieve the Commission of the obligation in the public interest to continue to use . . . other means in order to avoid mutual exclusivity in application and licensing proceedings.” The Commission has rejected reliance on this statutory provision in other contexts, and it noted that it may yet dismiss the M2Z application “as defective under existing rules or under future rules.”

Among many issues that could crop up with M2Z’s application are First Amendment concerns raised by an applicant proposing to condition its non-broadcast license on regulating the flow of indecent (not obscene) content. Can the FCC accept an offer to condition such a license in a way that would be unconstitutional if the FCC itself were to demand it?

M2Z proposes that if it misses any of its deployment benchmarks the FCC can revoke the license, thereby obviating any spectrum warehousing concerns. But if people become reliant on a free service – one that they paid money for a device to connect to – would the FCC realistically step in and revoke the license? M2Z probably realizes that this is not very likely, so its offer to have its license revoked sounds somewhat hollow. Revocation would be especially unlikely if public safety officials became major users of the M2Z service, as M2Z proposes.

The Commission will also have to address whether it actually has authority to grant this proposed application on the 309(j) grounds cited by M2Z. The Congressional mandate to the FCC is clear that competing ap-

plications for licenses should ordinarily be granted by auction. Here M2Z would circumvent the problem of competing applications by having the FCC simply grant its own application without allowing others to apply. Instead, the FCC has opened a window for competing applications to be filed. The filing of even one competing application could present M2Z with an insurmountable obstacle since mutually exclusive initial applications must be awarded by auction.

And the biggest and most fundamental question for the Commission: is the public interest really being served by foregoing the auction process, as M2Z suggests? Why is this proposal better for the public than an auction for a national license in this band? Such an auction would likely be worth billions of dollars to taxpayers. There is no telling how many years it would take for the 5% revenue sharing proposal by M2Z to match the amount raised at auction (although they make some speculative claim that 5% is more, relying on PCS auction numbers).

Speaking of history repeating itself, the M2Z plan echoes the plan of Cyren Call to have a big chunk of free spectrum allocated to a new entity in exchange for free or reduced cost service to public safety entities. M2Z’s plan would use a different frequency block, but the basic concept (gimme a lot of free spectrum and I’ll take care of public safety communications for ya) seems to be this season’s bright idea *du jour*.

The soonest the FCC could grant the application would be March 5. Any time prior to a grant by the Commission a party may file a Petition to Deny or its own competing application to use spectrum in the proposed band.

## Jabs in the Ribs

**Form 477** (Broadband and Mobile Subscriber Report) is due on **March 1**.

**Form 499-A** is due on **April 1**.

The **Ides of March** are on the 15<sup>th</sup> (What *are* ides, anyway? And do other months have them?)



*New wireless honcho takes care of business*

## Wireless Bureau Gets Down To It

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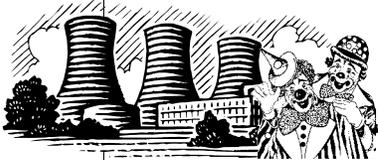
**S**o often we complain about inaction at the FCC that it's nice for a change to be able to report on a welcome spate of new activity. As veteran FCC watchers know, the full Commission tends to focus on great policy issues and rulemakings while the nitty-gritty, ground-level, day-to-day aspect of FCC activity – the part that is usually of most pressing concern to companies who need a particular authorization in order to conduct business -- is taken care of at the Bureau level. The FCC's Wireless Telecommunications Bureau had been drifting without a chief since April of 2005. Though the Bureau had a very capable "acting chief" in place, observers had noted that many routine petitions, waivers, applications with some quirk, and contested proceedings had simply been sitting in limbo. Presumably, the acting chief was awaiting appointment of a permanent chief to act on any

non-routine matters. At the end of December, Chairman Martin finally appointed a new permanent Bureau Chief, Fred Campbell, who had been serving as his personal advisor on wireless issues. Fred moved immediately to clear out the backlog of pending cases. In January there was a flood of orders resolving reconsideration petitions, assessing fines, granting or denying applications, and otherwise meting out FCC justice. Applicants who have spent a long time in limbo can attest that it is a subtle but nevertheless painful form of torture. Indeed, sometimes it's even better to have an application or petition be denied than to simply be left hanging indefinitely without knowing where you stand. It has been a great relief to see things moving again at the Wireless Bureau, and we hope that the energy and activity level remains high.

*Taking a page from the Homer Simpson procedure manual?*

## Risk of "Spurious Actuations" at Nuclear Power Plants? FCC Will Get Right On It, Real Soon, Really . . .

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Americans, jittery after September 11 and Hurricane Katrina, can now rest assured that crack troops from the FCC's new Bureau of Homeland Security will tackle any issue threatening immediate, instantaneous catastrophic loss of life and property in no more than a couple of years. As columnist Dave Barry would say, we're not making this up.

In December of 2004, a nuclear power plant applied to the FCC seeking authority to operate a 900 MHz mobile system (a walkie-talkie system) as part of its safety regime. The request was submitted in response to a series of orders from the Nuclear Regulatory Commission directing power plants nationwide to increase security and safety at nuclear power facilities. While the slow processing of applications is hardly a noteworthy occurrence, the potential side effects associated with

the FCC's slow action in this instance are illuminating. The nuclear power plant needed a license for a new walkie-talkie system because its current walkie-talkies had the potential for "spurious actuations" at nuclear reactors.

The Nuclear Regulatory Agency has warned power plants that several events "have caused concern in the NRC staff" about the use of walkie-talkies at plants. More specifically, operations at 451-456 MHz seem to be the most troublesome. The NRC high-lighted instances where walkie-talkie systems caused the shut down of cooling loops, spuriously activated a pressurizer, and tripped a differential relay. At Three Mile Island, the use of walkie-talkies triggered a false alarm warning of combustible gasses. The NRC surmises

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Mayday payday?

## FCC ISO “Outdoor Alerting”

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**C**ongress has laid the groundwork for a ten million dollar program that requires three federal agencies to cooperatively establish grants for “outdoor alerting technologies in remote communities.” The program is part of the SAFE Port Act, passed during October 2006, and is ostensibly directed at ensuring that emergency alerts can be issued to rural communities that lack mobile phone service.

The FCC must take the first crack at the program by defining what qualifies as: (1) a remote community; (2) an underserved community; and (3) a commercial mobile service. Perhaps because ten million dollars in funding will not go very far toward remotely alerting vast areas of the United States to impending danger, only two companies commented on the FCC’s definitions. Both companies generally supported the FCC proposals.

The FCC has suggested that a rural community is the same as a “rural area.” FCC rules define a rural area as those counties with a population density of 100 persons per square mile or fewer. Similarly, the FCC relies upon its pre-existing definition of “commercial

mobile service” which defines the service as any interconnected mobile service that is operated for profit and available to the public. Finally, the FCC leaves open the definition of an “underserved” area.

*Congress envisions that the Commerce Department will work with the Homeland Security Department to dole out up to \$10,000,000 for outdoor alerting technologies – a technology which remains undefined.*

Once the FCC has defined all of the terms, it will turn the matter over to the Commerce Department. Congress envisions that the Commerce Department will work with the Homeland Security Department to dole out up to \$10,000,000 for outdoor alerting technologies – a technology which remains undefined. Readers with interests in rural areas may wish to follow the program as it develops and may

also want to seek funding from the Commerce Department to deploy such system. However, other than the grant funds, it is unclear what revenue would be generated by an outdoor alerting technology. More interestingly, while outdoor alerting generally is considered civil defense sirens and loud speakers for populated areas, uncertainty exists how residents of rural areas would receive emergency alerts from such systems.



*(Spurious Actuations - Continued from page 6)*

that solid state devices are picking up and amplifying walkie-talkie signals which then actuate the nuclear power equipment. Although this sounds suspiciously like the plot line for an episode of “The Simpsons” (imagine Homer playing around on a walkie-talkie that keeps turning the nuclear meltdown button on and off), it’s not.

In its application to the FCC, the nuclear power plant notified the agency of the potential problems with the

old frequencies and the security upgrade ordered by the NRC. In response, the FCC sent the power plant a form letter. The plant responded to the FCC form letter immediately and the FCC replied with another form letter. Finally, unfazed even by the potential problems that “spurious actuations” at a nuclear power facility could cause, the FCC eventually approved the application after two years. The reactors’ struggle with the FCC paperwork reminds us of the observation once made by famed rocket scientist Werner von Braun: we can lick gravity, but sometimes the paperwork is overwhelming.

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*Do you prefer this . . .*

*. . . or this?*

