

FCC Adopts Broadcast Relocation Further Notice

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The FCC has announced adoption of its long-expected effort to try to facilitate the early removal of incumbent broadcasters from the 700 MHz band. In its further rulemaking, the agency seeks comment on several proposals designed to expedite the relocation process. In the meantime, however, Senate Communications Subcommittee Chairman Conrad Burns has introduced a bill, S. 2454, that would authorize low power broadcast stations to provide digital data services. Critics of the bill say that it gives low-power licensees primary status in the band, thus complicating digital broadcast relocation.

According to a news release issued by the FCC, its decision affirms the agency's prior finding supporting voluntary – but not mandatory – band clearing agreements and creates a rebuttable presumption that, in specified circumstances, such voluntary arrangements are in the public interest. The decision also generally affirms the service rules adopted for this portion of the band, including the paired spectrum band plan and out-of-band emission limits, but revises certain technical rules to promote enhanced flexibility and permit a wider range of wireless technologies. In particular, the decision:

- Allows base and mobile transmissions in the lower and upper 700 MHz bands, which will allow deployment of Time Division Duplex ("TDD") technologies; and
- Affirms the Commission's prior determination that the applicable service rules should promote intensive and efficient commercial wireless use, including certain types of broadcast services able to meet applicable technical specifications;

The Commission has also adopted a further rulemaking to explore additional relocation efforts. In doing so, the Commission has tentatively concluded that cost-sharing arrangements should be left to negotiations between winning bidders. In addition, the agency seeks comment on a number of related issues, including (1) whether cost-sharing rules would assist in the band-clearing process; and (2) if such rules are adopted, how the costs should be paid by benefiting licensees.

The rulemaking solicits commenters' views on other mechanisms to promote voluntary clearing of the band and accelerate the transition to DTV. These include:

- Possible three-way voluntary relocation agreements between new 700 MHz licensees, incumbent broadcasters on channels 59-69, and broadcasters operating on lower channels;
- Use of "secondary auctions" in which broadcasters operating on channels 59-69 would agree to clear the band in exchange for compensation determined by the auction; and
- Sharing arrangements – *i.e.*, arrangements permitting the sharing of spectrum in terms of time and/or bits – between broadcasters and 700 MHz service providers.

Commissioner Susan Ness issued a separate statement supporting the Commission's action while Commissioners Harold Furchtgott-Roth and Gloria Tristani issued separate statements approving in part and dissenting in part. For his part, Commissioner Furchtgott-Roth expressed support for those aspects of the item designed to promote regulatory certainty to new wireless operators by eliminating regulatory impediments to privately negotiated agreements. He expressed concern, however, that the item crossed this line by seeking to create a "potential host of new rules" designed to facilitate FCC intervention in the marketplace. In this connection, Commissioner Furchtgott-Roth expressed "serious doubts" about the FCC's statutory authority to conduct an auction of options to relocate incumbent broadcasters and questioned the rationale for FCC intervention in such a process. Commissioner Tristani dissented from that portion of the decision creating a presumption in favor of requests to clear existing broadcasters from the band. Commissioner Tristani "would have preferred to reaffirm [the Commission's] policy to review such requests on a case-by-case basis."

As of press time, the auctions of both the 30 MHz of "commercial" spectrum in the 700 MHz band and the "guard band" spectrum remain on schedule for September 6. There seems to be no internal impetus to try to delay the auctions further. In fact, Commissioner Furchtgott-Roth noted in his separate statement that "nothing in this Order should form the basis of a delay in the 700 MHz auction."

Meanwhile on Capitol Hill, S. 2454 could thwart the FCC's and the wireless industry's efforts to expedite 700 MHz band clearing. Under existing policies, auction winners will be responsible for the relocation of incumbent TV stations on channels 59-69, if they wish to make use of the spectrum prior to the ultimate relocation of these broadcasters pursuant to section 309 (j)(14) but they are not required to relocate low-power TV stations operating on those channels. S. 4254 would appear to confer primary status on low-power TV broadcasters if they offer subscription based "digital data services" to the public. The legislation also would appear to exempt these operators from the recapture requirements of section 309 (j)(14), which requires the return to the FCC of NTSC broadcast licenses in 2006.

Last week, the Senate Communications Subcommittee, which Senator Burns chairs, held a hearing on his bill, and broadcast industry representatives as well as government witnesses highlighted the problems associated with this proposal. Senator Burns indicated he would be modifying his proposal, and he postponed the markup of the bill until Monday, July 10. For further information about the Burns bill, contact Mary Jo Manning.