

ALERT

FCC Releases Highly Anticipated 3.5 GHz Order

October 25, 2018

On October 24, 2018, the Federal Communications Commission (FCC) released a Report and Order (R&O) revising the licensing and technical rules governing Priority Access Licenses (PALs) in the 3550-3700 MHz band (3.5 GHz band).

Among other things, the R&O's changes to the PAL regime include (1) increasing the size of PAL license areas from census tracts to counties; (2) increasing license terms from three years to 10 years and making the licenses renewable; (3) adopting PAL performance requirements; (4) clarifying bidding procedures for PALs; (5) utilizing small business, rural, and Tribal bidding credits for PAL auctions; (6) allowing the partitioning and disaggregation of PALs on the secondary market; (7) setting a PAL spectrum aggregation limit; (8) prohibiting the disclosure of disaggregated Citizens Broadband Radio Service Device (CBSD) registration data to the public; and (9) relaxing the out-of-band emissions (OOBE) limits for end-user devices.

A. PAL Licensing Rules

1. Geographic Licensing Area

The FCC increased the size of PAL license areas from census tracts to counties. (¶¶ 19–20). The FCC gave seven reasons for doing so:

(1) census tract licenses would cause significant technical difficulties for mobile 5G use

(¶¶ 21–25);

(2) county-based licensing will allow PAL licensees to take advantage of economies of scale, reducing deployment costs (¶ 26);

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(3) county-based licensing will service the needs of rural communities and allow new and innovative services to reach underserved and unserved communities (§ 27);

(4) counties will serve a variety of innovative use cases for urban, suburban, and rural deployments, including IoT developments and uses by new entrants (§§ 28–29);

(5) by reducing the number of license areas, counties will decrease administrative burdens and reduce auction complexity (§§ 30–33);

(6) encouraging investment will ensure the United States stays an international leader in 5G development (§ 34);

(7) counties will serve as an appropriate middle ground to best satisfy the interests of stakeholders who have raised concerns about both smaller and larger license areas (§§ 35–41).

The FCC will seek comment in the pre-auction process on allowing package bids to facilitate bidding for the counties that comprise a complete Metropolitan Statistical Area (MSA) in the top 305 markets in order to provide greater flexibility to PAL applicants interested in serving larger areas. (§ 40).

2. License Term and Renewal

The FCC increased PAL license terms from three years to 10 years and made the licenses renewable. (§ 46). The FCC gave five reasons for doing so:

(1) longer, renewable license terms will provide PAL licensees with the level of certainty needed to promote robust investment and widespread deployment (§§ 47–48);

(2) 10-year, renewable licenses have proven effective in many other bands (§ 49);

(3) because county-based licensing will draw larger investments, a 10-year, renewable term will better complement the anticipated investments in the 3.5 GHz band (§ 50);

(4) 10-year, renewable terms are suited for a wide variety of entrants in both rural and urban areas (§§ 51–53);

(5) shorter license terms with limited or no renewability would not encourage investment as effectively and efficiently as 10-year renewable license terms (§ 54).

PAL license renewals will be governed by the FCC’s unified renewal framework for Wireless Radio Services (WRS). Accordingly, to qualify for renewal, PAL licensees must demonstrate that they either (1) provided and continue to provide service to the public, or (2) operated and continue to operate the license to meet the licensee’s private, internal communications needs. Additionally, PAL licensees may avail themselves of appropriate safe harbors and make renewal showings consistent with the unified renewal framework. (§ 55).

3. Performance Requirements

The FCC adopted PAL performance requirements. Specifically, PAL licensees must provide a bona fide communications service that meets a “substantial service” standard of performance. “Substantial service” may be demonstrated by one of two service-specific safe harbors or an individualized showing:

- (1) PAL licensees providing mobile or point-to-multipoint services may demonstrate substantial service by showing that they provide reliable signal coverage and offer service over at least 50% of the population in the license area.
- (2) PAL licensees deploying a point-to-point service may demonstrate substantial service by showing that they have constructed and operated, using Category B CBSDs, at least four links in license areas with 134,000 population or less, and at least one link per 33,500 population (rounded up) in license areas with greater population.
- (3) PAL licensees may make an individualized showing of substantial service by relying, for example, on a combination of different services for which there is a safe harbor or on services for which there is no defined safe harbor. (¶ 60).

The FCC believes that these requirements will promote the most productive use of spectrum, greater regulatory certainty, and more flexibility than in other bands to allow for greater innovation. (¶¶ 61–71).

The FCC will require PAL licensees to demonstrate their compliance with the performance requirements pursuant to the procedures in 47 CFR § 1.946. Thus, licensees will have to notify the Commission of compliance with the performance requirements within 15 days of the relevant deadline by submitting and certifying a description of the service and documentation of the extent of the service. (¶ 72). Authorization under the relevant license will terminate automatically if a licensee fails to meet the substantial service requirement. (¶ 73). Operations pursuant to lease arrangements, other than short-term *de facto* leasing arrangements, may be counted toward meeting the substantial service requirement. (¶ 74).

B. Competitive Bidding Procedures for PALs

1. Applicability of Part 1 Competitive Bidding Rules

The FCC eliminated its rule that made available one less PAL than the total number of PALs for which all applicants had applied in a given geographic license area. The FCC found that eliminating the rule would facilitate more efficient and intensive use of the spectrum. (¶ 76).

The FCC will use its standard approach in determining whether accepted applications with respect to initial geographic licenses are mutually exclusive applications subject to competitive bidding. Applicants will only be able to bid on the geographic area(s) they indicate, on their short form application, they are interested in bidding for PALs. If the FCC accepts more than one application to bid on generic PALs in a geographic area, the PALs will be assigned by competitive bidding. (¶ 77).

PALs will be assigned even if there is only one application, so long as the applicant is otherwise qualified. The FCC declined to address whether a PAL application is mutually exclusive with an application for General Authorized Access (GAA) use in the same area. (§ 78). The FCC will conduct PAL auctions pursuant to the FCC's general competitive bidding rules. Those rules allow for the determination of specific final auction procedures during the pre-auction process. (§ 79).

Bidders will not be allowed to bid on specific channel assignments through competitive bidding. Rather, the Spectrum Access System (SAS) will assign the channels and modify the exact frequencies of specific assigned channels, if necessary to facilitate sharing between the three tiers of authorized users. (§ 82).

2. Bidding Credits for PALs

The FCC maintained bidding credits for small businesses to ensure their meaningful participation in PAL auctions. (§ 86). The FCC adopted the same small business size standards and bidding credits that it adopted in the 600 MHz and Upper Microsoft Flexible Use Service (UMFUS) bands. (§ 88). Accordingly, an entity with average annual gross revenues for the preceding three years not exceeding \$55 million will qualify as a "small business" for a bidding credit of 15%. An entity with average annual gross revenues for the preceding three years not exceeding \$20 million will qualify as a "very small business" for a bidding credit of 25%. (§ 89).

The FCC will offer rural service provider (RSP) bidding credits of 15% to eligible entities that predominantly serve rural areas and have fewer than 250,000 subscribers. (§ 90). The FCC will also award tribal land bidding credits for winning bidders that serve qualifying Tribal lands. (§ 91). The FCC rejected all other bidding preferences, including for applicants intending to use a PAL to meet Connect America Fund (CAF) obligations. (§ 92).

C. Partitioning and Disaggregation of PALs on the Secondary Market

The FCC will allow partitioning and disaggregation of PALs in the 3.5 GHz band to allow for flexible and efficient use of spectrum in the secondary market. Such partitioning and disaggregation must comply with 47 CFR § 1.950. Accordingly, each party to a partition or disaggregation agreement must have a clear construction and operation requirement or face license termination. (§ 97).

D. PAL Spectrum Aggregation Limit

The FCC retained its PAL aggregation limit in order to facilitate competition, innovation, and efficient use of spectrum. Accordingly, licensees and lessees will be subject to an in-band spectrum aggregation limit of 40 megahertz (i.e., four PALs) of the possible 70 megahertz per license area at any given point in time. (§§ 105–07).

E. Confidentiality of CBSD Registration Information

The FCC will now prohibit SAS Administrators from disclosing disaggregated CBSD registration data to the public except where authorized by the registrant. The FCC will also require SAS Administrators to make aggregated spectrum usage data, for any particular area of interest, available to the public using graphical “heat maps” or other appropriate formats. (¶ 112).

The FCC found that the old approach of disclosing obfuscated data did not adequately protect licensees’ sensitive business information but that there is still a need to disclose sufficient information to assess the overall spectrum environment in an area. (¶¶ 113–15).

F. Emissions Limits for CBSDs and End User Devices

The FCC made no changes to (1) its out-of-band emissions (OOBE) limits outside the 3.5 GHz band; or (2) its emission limits for CBSDs. (¶¶ 133–36).

However, the FCC adopted the Qualcomm Mask and an adjacent channel leakage requirement of -30 dBc for End User Devices, as the FCC believed there was justification for relaxing the OOBE limits within the 3.5 GHz band for End User Devices to accommodate bandwidths wider than ten megahertz. (¶ 137).

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