

FCC to Auction Unassigned 2.5 GHz Spectrum for Commercial Use

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On July 11, 2019, the Federal Communications Commission (FCC or Commission) released a Report and Order implementing significant changes to the regulatory framework governing the 2.5 GHz band (2496-2690 MHz), setting in motion the auction in 2020 of mid-band spectrum to support 5G services in the United States.

The 2.5 GHz band is comprised of 20 channels allocated for Educational Broadband Service (EBS), 13 channels allocated for commercial Broadband Radio Service (BRS), and a number of small guard band channels. Currently, incumbent EBS licenses cover only about one half of the geographic area and 85% of the population of the United States on any given channel. The rest of the area remains unassigned “white spaces.” To ensure that this spectrum is utilized for high-speed broadband service, the Commission takes several steps to update the EBS rules and assign the remaining spectrum in this band. First, the Commission replaces the restrictive regulatory regime for EBS with one of flexible use. Second, the Commission announced it will hold a Tribal priority window to enable Tribal nations an opportunity to obtain licenses to provide service on rural Tribal lands. Lastly, the Commission will assign the remaining white space through competitive bidding.

A. Rationalizing Incumbent 2.5 GHz Band Holdings

1. Eligibility Restrictions

The Commission eliminated eligibility restrictions for EBS licenses, under which only educational entities (*e.g.*, state government agencies, universities, colleges, schools) are eligible to hold EBS licenses. Going forward, incumbent and future EBS licensees will be

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able to assign or transfer their EBS licenses freely. The Commission emphasized that the elimination of this restriction better aligns EBS licenses with the flexible use licensing policies used in similar spectrum bands and is consistent with the historical progression of granting increasing flexibility to EBS licensees. (¶ 15)

The Commission stated that elimination of the eligibility restriction will not result in negative consequences for the educational community. Specifically, it noted that granting incumbent licensees additional flexibility to transfer or assign their licenses will not affect existing leases because the decision about whether to lease or transfer or assign a license remains with the EBS licensee. Furthermore, the Commission stated that nothing in the *Report and Order* affects the validity of existing leases and other contractual arrangements. (¶ 17)

2. Educational Use Requirement

The Commission eliminated the educational use requirement, under which EBS licensees must use their spectrum to further their educational missions. (¶ 26) Since non-educators will now be permitted to hold licenses directly, the Commission stated it would make no sense to retain the educational use requirement. (¶ 27) The Commission also directed its staff to investigate and take appropriate action in response to recent allegations that several national, non-profit licensees have not complied with the existing rules. (fn 44)

The Commission stated that the decision to eliminate the educational use requirement was not intended to affect or change the terms of any private contractual arrangement or any provisions in existing leases that may provide a licensee with airtime, equipment, or capacity. For instance, if a lease negotiated under the old rules provides that a licensee shall receive services or equipment from a lessee, the *Report and Order* does not change or nullify the provisions of that lease. (¶ 30)

3. Leasing Restrictions

The Commission eliminated the restrictions on EBS lease terms, under which EBS licensees are prohibited from leasing their facilities for a term longer than 30 years and lessees are required to provide EBS lessors with the opportunity to revisit their lease terms at years 15, 20, and 25. The Commission found that eliminating these restrictions will make the rules for the 2.5 GHz band consistent with other Wireless Radio Services, incentivize build-out in rural areas, and provide additional flexibility to both EBS licensees and lessees to enter into mutually beneficial arrangements. (¶ 32)

4. Existing License Areas

To ensure that the fallow spectrum in the band is made available for use quickly, the Commission decided to leave incumbent 2.5 GHz license boundaries intact. Initially, the Commission proposed rationalizing the current point-and-radius license areas held by incumbents to a defined geographic area. However, it concluded that going through such a rationalization process for current licenses would delay making the white spaces available in the 2.5 GHz band and would likely not result in the benefits that the FCC had originally anticipated. (¶ 36)

B. Tribal Priority Window

Before auctioning the unlicensed portions of the 2.5 GHz band, the Commission will open a priority filing window for Tribal Nations to obtain access to the band on rural Tribal lands. The priority window will operate as an overlay license, with Tribal priority window applicants obtaining geographic area licenses subject to protecting incumbent operations within the relevant geographic area. (¶ 46) The Commission stated that such a priority window will help Tribal Nations address the communications needs of their communities, including the deployment of advanced wireless services to unserved or underserved areas. (¶ 47)

Eligibility for the Tribal priority window will be limited to federally-recognized American Indian Tribes and Alaska Native Villages on rural Tribal lands. (¶ 49) The Commission will extend eligibility in the Tribal priority window to communications providers and other entities that provide communications and other services, provided that they are owned and controlled by federally-recognized Tribes or a consortium of such Tribes. (¶ 50) To be included in the Tribal priority window, in addition to being designated as Tribal Lands, an area must also be “rural,” as defined by the Commission. (¶¶ 56-58)

The Commission considered but declined to establish a priority filing window for educational institutions, either for educational institutions that do not currently hold EBS licenses or for existing licensees. The Commission stated that adopting such a priority window would be at odds with its other decisions to provide greater flexibility for more providers to make use of the 2.5 GHz band. (¶¶ 66-67)

C. Auction of EBS White Space Licenses

Immediately following the completion of the Tribal priority filing window, the FCC will make any remaining unassigned EBS spectrum available for commercial use via competitive bidding. (¶ 75)

To make the unlicensed EBS spectrum as attractive as possible to potential entrants, the Commission will offer geographic overlay licenses in the markets where white spaces exist. With overlay licenses, the licensees obtain the rights to geographic area licenses “overlaid” on top of the existing incumbent licenses. The overlay licensee may operate anywhere within its geographic area, subject to protecting the operations of incumbent licensees and their lessees (if any). If an incumbent licensee in a county cancels or terminates its license, the overlay licensee obtains the rights to operate in the geographic area and on the channel of the cancelled license. In essence, an overlay licensee purchases primary rights to the vacant and available white space in the geographic area and secondary rights to all incumbent licenses, and it may clear its geographic area by purchasing the incumbent licenses. However, it does not have the exclusive right to negotiate with the incumbent license for its spectrum rights or to purchase an incumbent license in the geographic area in which it has the overlay rights. (¶ 77)

1. Applicability of Part 1 Competitive Bidding Rules

The Commission will conduct any auction of EBS licenses pursuant to the general competitive bidding rules set out in Part 1, Subpart Q of the rules. This will include any modifications that the Commission may adopt for its Part 1 general competitive bidding rules in the future. (¶ 87)

The Commission will adopt bidding credits for EBS. (¶ 88) Specifically, the Commission will adopt the high two of three thresholds in the its standardized schedule of bidding credits for 5G-suited spectrum. As such, an entity whose average annual gross revenues for the past five years are below \$55 million will qualify as a "small business," while an entity whose average annual gross revenues for the past five years are below \$20 million will qualify as a "very small business." (¶ 89) Additionally, the Commission will apply the rural service provider bidding credit. (¶ 90) The Commission will solicit public input on the appropriate amount of the bidding credit cap and will subsequently establish the cap that will apply for that auction, based on an evaluation of the expected capital requirements presented by the particular spectrum being auctioned and the inventory of licenses to be auctioned. (¶ 91)

The Commission emphasized that, considering the unique challenges that tribal entities involved in the telecommunications industry face in participating in spectrum auctions, tribal lands bidding credit will promote further deployment and use of spectrum over tribal lands and will complement the Tribal priority window. As such, a winning bidder for a market will be eligible to receive a credit for serving qualifying Tribal lands within that market, provided that it complies with the applicable competitive bidding rules. (¶ 92)

2. Description of Licenses Being Offered

The Commission adopted counties as the appropriate geographic size for new licenses, finding that a county-based license will afford overlay licensees the flexibility to develop localized services, allow for targeted deployments based on market forces and customer demand, and facilitate access by both smaller and larger providers. (¶ 93)

3. Band Plan

The band plan will include three overlay licenses. The first license will include channels A1-A-3, B1-B3, and C1-C3 (49.5 megahertz); a second license will include channels D1-D3, the J channels, and channels A4-G4 (50.5 megahertz); and the third license will include channels G1-3 and the relevant EBS K channels (16.5 megahertz of contiguous spectrum and 1 megahertz of the K channels associated with the G channel group). (¶ 96)

4. Spectrum Screen

Previously the Commission excluded 16.5% of EBS spectrum from the spectrum screen to account for the fact that commercial providers did not have an opportunity to gain access to EBS white space spectrum. Given that the Commission is now making EBS white space spectrum available for commercial use, the Commission eliminated the EBS white space discount from the spectrum screen. This means that an additional 23.5 MHz of EBS spectrum must be counted for screen purposes. (¶¶ 98-100)

5. Performance Requirements

The Commission replaced the current "substantial service" regime with a series of specific performance requirements for EBS licensees that will depend on the specific service they offer. Specifically, EBS licensees may fulfill their final performance requirements by showing any of the following: (1) 80% population coverage

for mobile or point-to-multipoint service, with a 50% interim benchmark; (2) 40 links per million persons (one link per 25,000) for fixed point-to-point service with a 20 links per million interim benchmark (one link per 50,000); or (3) 80% population coverage for broadcast service with a 50% interim benchmark. No other types of showings or levels of coverage will be accepted, and these benchmarks will apply to licenses regardless of whether they were won at auction or granted through the Tribal priority window. (¶ 101)

The Commission will apply the interim benchmark after four years, and the final benchmark after eight years. The penalty for failure to meet the interim benchmark will be the acceleration of the final benchmark deadline by two years, to six years rather than eight. (¶ 106) A license will automatically terminate if the licensee fails to meet the final construction benchmark. (¶ 107)

The Commission adopted a different timeline for licenses acquired via the Tribal priority window. These licenses must demonstrate compliance with interim build-out levels after two years, and final build-out levels after five years. The penalty for missing the interim deadline will be an acceleration of the final deadline by one year. (¶ 108)

6. Renewal Standards

New EBS licenses, including licenses granted via the Tribal priority window, will be subject to the renewal standards applicable to Wireless Radio Services (WRS). (¶ 110)

The Commission will also apply the WRS framework to existing EBS licensees. The Commission will require compliance with the renewal standard for renewal applications filed after January 1, 2023. (¶ 111) However, the old, substantial-service build-out standard contained in Section 27.14(o) of the rules will continue to apply to existing EBS license renewals unless the Commission alters the WRS build-out standards upon renewal. (¶ 112)

7. Dismissal of Pending Waiver Requests

Upon adoption of the *Report and Order*, the Commission will dismiss, without prejudice, any pending applications for new EBS licenses. In 2003, the Commission instituted a freeze on the filing of new EBS applications. In the past, the FCC granted some waiver requests to permit the filing of applications for new EBS licenses while the freeze remained in place, and some waiver requests are still pending. Because the *Report and Order* institutes a new process for the assignment of EBS spectrum, the Commission stated there is no need to process the pending waiver requests. (¶ 113)

D. Effective Date of Rule Changes

The Report and Order will take effect six months from the date of its publication in the Federal Register. (¶ 117)

For further information on these issues, please contact any of the attorneys listed on this alert.

NOTE: Kyle M. Gutierrez, a 2019 Wiley Rein summer associate contributed to this alert.