

Landmark Spectrum Legislation Passes

As part of the Middle Class Tax Relief and Job Creation Act of 2012 (the Act), Congress has passed landmark spectrum legislation that is intended to provide spectrum for generations of new wireless services and products to come. The Act authorizes the Federal Communications Commission (FCC) to conduct “incentive auctions” of spectrum held by broadcasters and other licensees and provides spectrum and funding for a nationwide First Responder Network. The Act also provides funding for grants to set up Next Generation 9-1-1 networks and public safety research. In addition, it allows the use of spectrum for new unlicensed wireless services and devices, such as Super Wi-Fi, and identifies potential new spectrum bands for such unlicensed devices. Finally, the Act establishes for the first time a market-based framework by which other future repurposing and rebanding of spectrum bands may be accomplished in response to rapidly emerging technologies and innovations. President Obama signed the legislation on February 22, 2012.

Spectrum Auctions

Under the Act, the FCC is authorized to hold incentive auctions to reallocate TV broadcast as well as other spectrum. The Act directs the government to reallocate and auction up to 120 MHz of broadcast spectrum within 10 years. By using incentive auctions, TV broadcasters will be able to put their spectrum on the auction block to be sold to the highest bidder. While the government will realize a portion of the auction funds, broadcasters would also share in the proceeds. Most parties expect the reclaimed spectrum to be highly prized by both existing commercial wireless carriers and new entrants alike. Following the auction of broadcast spectrum, the Act contemplates that the remaining broadcasters will have their operations “rebanding” or “repacked” in accordance with procedures established in the Act and by the FCC.

In addition to the broadcast spectrum to be made available via incentive auction, the Act specifies that the FCC shall allocate for commercial use and auction licenses in the 1915-1920 MHz band (microwave spectrum), the 1995-2000 MHz band (Broadcast Auxiliary Service spectrum), the 2155-2180 MHz band (Advanced Wireless Service-3 spectrum), the 1675-1710 MHz band, which is currently used by the federal government, and 15 MHz of contiguous spectrum to be identified by the FCC. Auction of the 1915-1920 MHz and 1995-2000 MHz bands is subject to a finding that operations in those bands would not cause interference to PCS networks currently operating in the adjacent bands.

One key issue of dispute in drafting the Act was the ability of the FCC to impose spectrum caps that would effectively preclude the largest carriers from participating in the auction. The Act provides that the FCC cannot prevent carriers from participating in the auction if they otherwise meet the technical, financial, character and citizenship qualifications. However, it also provides that the FCC can adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition. As a result, any decision to exclude the largest carriers would have to go through a separate public rulemaking process, which one of the largest carriers has already noted would be subject to “procedural safeguards, and also an opportunity for a court challenge.” The practical result is that if the FCC wants to auction spectrum in the near future, it will have to have the cooperation of the largest carriers or any restrictions would be subject to a lengthy appeal process.

Public Safety

The Act addresses the need for a nationwide interoperable Public Safety Communications broadband network, identified by the 9-11 Commission among others. The Act allocates for the First Responder Network 10 MHz of new spectrum coupled with 10 MHz of spectrum already allocated to public safety. In addition, the Act reserves \$7 billion from the auction of broadcast spectrum to fund construction and maintenance of the network. The network would be overseen by a new First Responder Network Authority, which would operate under the authority of the National Telecommunications and Information Administration (NTIA) of the Department of Commerce. The FCC would establish a technical advisory committee to develop interoperability standards. The Act requires public safety agencies to return spectrum in the 470-512 MHz frequency band (the T Band) no later than 2023. The cost of relocating the T Band operations will be paid from auction proceeds. The Act also provides funding of \$115 million in grants to set up a Next Generation 9-1-1 network system capable of improvements such as receiving emergency 911 communications by text message, and \$300 million for public safety research.

Unlicensed Devices

Developers of unlicensed services and devices have long sought access to additional spectrum for their products. The Act addresses these concerns by providing the FCC authority to set aside additional spectrum for unlicensed use. The Act also allows the FCC to permit unlicensed use in guard bands in the TV broadcast spectrum otherwise known as “white spaces.” The Act also orders a study on the feasibility of unlicensed use, such as Super Wi-Fi, in the 5350-5470 MHz and 5850-5925 MHz bands.

With its passage, and through completion of its requirements by the FCC and NTIA, the Act will usher in a new era of spectrum policy in the US, with the hope that spectrum availability will no longer serve as a significant obstacle to the rapid development and deployment of technologically innovative products and services and, ultimately, to job creation. There are numerous rulemakings and studies required in the coming months by the FCC and NTIA.

For more information on the new legislation and ramifications for the communications industry, contact one of the Squire Sanders lawyers listed below.

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