INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session: Tuesday, October 30, 2007
NCC 209-210 -- Telecommunications III

Title: The FCC's New Public-Private Partnership for Use of Public Safety Spectrum in the 700 MHz Band: Opportunities for Local Governments

by

Presenter: Matthew Ames

Presenter's Title: Partner

Presenter's Office: Miller & Van Eaton, P.L.L.C.

© 2007 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2007 Annual Conference, held October 28-31, 2007 in Nashville, Tennessee. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

M I L L E R & V A N E A T O N

P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
GAIL A. KARISH*
WILLIAM L. LOWERY
NICHOLAS P. MILLER
MATTHEW K. SCHETTENHELM
JOSEPH VAN EATON

*Admitted to Practice in California Only

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
580 CALIFORNIA STREET
SUITE 1600
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:
JAMES R. HOBSON
GERARD L. LEDERER
WILLIAM R. MALONE
NANNETTE M. WINTER†

†Admitted to Practice in New Mexico Only

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

2007 ANNUAL MEETING
Nashville, Tennessee

The FCC's New Public-Private Partnership for Use of Public Safety Spectrum in the 700 MHz Band: Opportunities for Local Governments

by

Matthew C. Ames

Introduction: Why the FCC's 700 MHz Proceeding Matters.

Local government attorneys who handle communications and technology issues will in recent years have become familiar with the FCC's rules governing the use of certain portions of the radio frequency spectrum set aside for public safety use, in the form of the ongoing 800 MHz rebanding effort. That process, while critical for ensuring the effectiveness of state and local state public safety communications systems, is a remedial effort that merely preserves the technological status quo. The 800 MHz frequencies are designated for traditional "narrowband" uses, which means essentially voice communications. On August 10, 2007, however, the FCC released an order that promises to make a whole new range of services and capabilities available to public safety entities and other users through the development of a nationwide broadband wireless network.[1] Direct local government participation in that process will be difficult, for the reasons described below – but local governments must engage themselves in the process if the new national network is to meets its full potential.

[1] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, Second Report and Order, FCC 07-132 (re. Aug. 10, 2007) (the "Order").

There is one fundamental reason local governments need to be involved in the process laid out by the FCC: the terms and conditions of access to the new broadband network will be established in a single, national Network Sharing Agreement. Not only will those terms help determine whether the network as a whole is successful, but they will be critical to ensuring that local government users are able to take full advantage of the network. Furthermore, as important as the financial and technical terms of access are, so is one key point that is often overlooked: the governing statute, 47 U.S.C. § 337(f), does not limit users of public safety spectrum to fire, police, rescue, and other agencies that the words "public safety" commonly bring to mind. The statute provides that the "sole or principal purpose" of a public safety service must be "to protect the safety of life, health, or property," 47 U.S.C. § 337(f)(1)(A), which can be interpreted to include a broader range of users and uses.

Because the FCC has adopted a public-private partnership model as a way of funding constriction and deployment of the new network there will be tension between the need of the private sector partner to make money and the needs of public sector users for an effective broadband network. The FCC's Order tries to address this issue in various ways – but local government attention and involvement will be critical to preserving local rights.

Background and Summary of the FCC Order.

The roots of the FCC's Order lie in the Balanced Budget Act of 1997, which added Section 337 to the Communications Act. 47 U.S. C. § 337(a) directs the FCC to set aside 24 MHz of spectrum in the 700 MHz band for public safety services, as well as 36 MHz for commercial use. This spectrum is currently occupied by television broadcasters using channels 52-69, but the spectrum will be available for other purposes as a result of the pending digital television transition, which is scheduled to be completed by Feb. 17, 2009. In recent years, the FCC has gone through a series of rulemakings addressing the 700 MHz band.

The physical characteristics of the 700 MHz band make it extremely valuable for advanced services. Signals using these frequencies penetrate buildings and foliage, and fill in around terrain features and other obstacles very effectively. They also travel farther at low power. This means fewer cell sites are needed to reach a desired level of coverage: basically, a 700 MHz system can do more with less. All of these characteristics suggest that 700 MHz technology may be a better solution for many municipal needs than the Wi-Fi networks many communities have been pursuing.

In the course of one of the FCC proceedings, Frontline Wireless, LLC submitted a proposal for a nationwide commercial license that would have the right to use 10 MHz of commercial spectrum, as well as a portion of public safety spectrum. In return for the right to use the public safety spectrum, Frontline proposed that the eventual licensee would make the network available to public safety users. A similar plan was proposed in Congress, although legislation was never adopted. The Frontline proposal was attractive for several reasons. First, it created the possibility that a competitor would arise to the traditional wireless carriers. Second, because spectrum is scarce and public safety channels often carry relatively little traffic

compared to commercial spectrum (except in emergencies), it offered a means of expanding commercial uses without allocating more spectrum to them. And third, it offered a way of using private sector capital to help pay for deployment of a national public safety network – something of much greater priority after 9-11 and Katrina. In the end, the FCC adopted an approach very similar to Frontline's proposal.

In summary, the Order creates a block of commercial frequencies, known as the "D Block," which will be auctioned to a private sector provider. The D Block licensee will have the right to use 10 MHz of commercial spectrum. Twelve MHz of public safety spectrum will be licensed to an entity designated the "Public Safety Broadband Licensee."[2] The Public Safety Broadband Licensee will enter into a spectrum leasing agreement, called the "Network Sharing Agreement," with the winner of the D Block. The D Block licensee will have the right to use the 12 MHz of public safety spectrum together with its 10 MHz to create a single nationwide broadband network. Construction of facilities to support the network will be the responsibility of the D Block licensee. Public safety users would have priority rights to use the 12 MHz at all times, and in the event of an emergency would have priority rights over the entire 22 MHz. The Network Sharing Agreement would specify, among many other matters, the fees to be paid by public users for access to the national network.

The Order also addresses licensing of the other 26 MHz of commercial spectrum set aside by 47 U.S.C. § 337. One aspect of the Order that has gathered a great deal of attention was the offer by Google to bid $4.6 billion for the "C Block," if the FCC imposed "open access" conditions on that spectrum. The Order in fact does provide that the licensee must allows customers, equipment manufacturers and application developers to use devices and applications of their choice on the new 22 MHz of spectrum in the C Block. The existing wireless carrier have objected to this provision, since they operate proprietary networks, and the FCC is already under pressure to remove this restriction. The open nature of the C Block, if it survives, may offer local governments a range of opportunities for meeting local needs. Those possibilities are not the subject of this article, but local governments should pay close attention to developments regarding the C Block.

The process established by the Order is on a very tight schedule. Negotiations on the Network Sharing Agreement are to be completed within six months after the selection of the D Block Licensee. Applications for the auction were due October 10, 2007, and the auction is scheduled to begin January 16, 2008, with selection soon thereafter. By statute, proceeds from the auction must be received no later than June 30, 2008. Consequently, local governments interested in this matter must become engaged immediately.

[2] The remainder of the 24 MHz set aside for public safety use by 47 U.S.C. § 337 is designated for traditional narrowband voice uses.

The Public Safety Broadband Licensee.

The FCC intends to issue a single nationwide license to a non-profit organization representative of the public safety radio user community. The Public Safety Broadband Licensee will be governed by a board consisting of 15 members.[3] The FCC has designated the following 11 organizations as members of the board: the American Association of State Highway and Transportation Officials; the Association of Public Safety Communications Officials; the Forestry Conservation Communications Association; the International Association of Chiefs of Police; the International Association of Fire Chiefs; the International City/County Management Association; the International Municipal Signal Association; the National Association of State Emergency Medical Service Officials; the National Emergency Number Association; the National Governor's Association; and the National Sheriff's Association. The remaining four members are to be selected by the FCC's Wireless Bureau and Public Safety and Homeland Security Bureau.

The best opportunity for local governments to influence the management of the national broadband network and the terms of access to the network will be through the membership of the board of the Public Safety Broadband Licensee. Individual local governments will have the right to use the network, but they will not be able to obtain individual licenses to use the spectrum, nor are they likely to be able to negotiate their own terms of access to the network.

The FCC's Order specifies in detail the provisions of the Articles of Incorporation and by-laws of the Public Safety Broadband Licensee. The Order also assigns certain responsibilities to the licensee. These include, among others: negotiating the Network Sharing Agreement, administering access to the public safety network, including assessing usage fees; dealing with equipment vendors, with the potential of passing on benefits of scale and increasing the number of potential equipment vendors; and facilitating negotiation between the D Block licensee and state and local entities for use of public property for placement of facilities.

The 700 MHz Public-Private Partnership.

The Order mandates the creation of a public-private partnership between the Public Safety Broadband Licensee and the D Block licensee. The Order identifies the essential characteristics of the public-private partnership:

1. The broad technical parameters of the network. Broadly speaking, these are intended to provide public safety users with access to state-of-the-art technologies throughout the license term.
2. The requirement that the Public Safety Broadband Licensee must lease the public safety spectrum to the D Block licensee for commercial use, subject to preemption for public safety use.

[3] The Order called for 11 members, but the FCC subsequently expanded the size of the board.

3. The requirement that the Public Safety Broadband Licensee must have access to the D Block commercial spectrum during emergencies.

4. The performance requirements for the network; chief among these is that the network must serve 99.3% of the population of the United States within 10 years.

5. The mandatory terms of the Network Sharing Agreement to be entered into between the two licensees. These will include all of the rights and obligations set out in the Order, such as network specifications. Two critical issues for local governments will be the service fees to be paid by public safety users for access to the network, both on an emergency and non-emergency basis, and what limitations, if any, will apply on the nature or identity of particular local government users.

6. The term of the D Block license, and of the partnership, which is to be 10 years. The license and the Network Sharing Agreement may be renewed, subject to compliance with the other license conditions.

7. Finally, the exclusive right of the D Block licensee to build out the shared network, subject to some limited exceptions. The key exception is that local governments that want to accelerate deployment of the national network in their area may construct facilities themselves, provided that they agree to turn over the facilities to the D Block licensee, after negotiating suitable reimbursement or other compensation. Local governments may also negotiate agreements for the D Block licensee to build the network in their areas ahead of the D Block licensee's planned schedule, if they are prepared to pay for construction.

The Network Sharing Agreement.

The Order sets out the essential terms of the Network Sharing Agreement, the process for negotiating the agreement, and conditions related to implementation of the agreement.

The key terms of the Network Sharing Agreement were outlined above. The importance of this Agreement and its terms cannot be overstated, since it will specify the terms of access to the national network. The Order, however, says essentially nothing about who will be allowed to use the network, beyond "public safety users." This could inadvertently lead to a narrower reading of the eligible services and users than the governing statute would permit. The statute permits the spectrum to be used for "public safety services," and 47 U.S.C. § 337(f)(1) defines such services as services:

> (A) the sole or principal purpose of which is to protect the safety of life, health, or property;
>
> (B) that are provided – (i) by state or local government entities; or (ii) by nongovernmental organizations that are authorized by a government entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public.

What is meant by "safety of life, health, or property" is not defined – but a whole range of users can easily be imagined beyond traditional police, fire, and rescue services. Furthermore, the public safety use need only be the principal purpose of a service. The danger posed by the Order, since it does to address this issue in any detail, is that the potential breadth of services and users will be forgotten or allowed to become a low priority.

The FCC has recognized in other proceedings that the statute permits a broader range of potential users. For example, the agency has stated that utilities and pipelines might be eligible for licenses to use public safety spectrum.[4] The FCC has also ruled that the a state department of transportation provides public safety services, because its function is to maintain safe roadways.[5] Consequently, there is precedent for a broader interpretation of Section 337.

In addition, the services needed by police, fire, and rescue personnel are also valuable for other purposes. For example, to receive and view the blueprints of a burning building on site, in real time, would certainly benefit fire officials -- but the same capability would improve the accuracy and efficiency of building inspectors in non-emergency situations. Similarly, one of the anticipated uses of the network is transmission of high-bandwidth video from the scene of an incident to a hospital where medial specialists could observe a patient and assist on-scene rescue personnel. The same video capability would be useful to public works personnel in non-emergency situations, seeking the advice of engineering experts, for example. Consequently, there is no reason under the terms of that statute that a transportation, building inspection, city utility or public works department should not have access to the network for its routine purposes. If attention is not paid to this issue in the formulation of the Network Sharing Agreement, however, careless or ill-informed drafting could foreclose such opportunities.

The FCC is sensitive to the need for the Network Sharing Agreement to be negotiated in a timely manner, and has established a number of conditions for that process:

- Approval of the Network Sharing Agreement is a pre-condition of final granting of the D Block license.
- Negotiations are to begin as soon as the winning bidder for the D Block files its final application, and to be completed within six months.
- Parties are to negotiate in good faith, and the FCC will oversee negotiations.
- Parties are to submit progress reports during negotiations.

---

[4] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503 (2004), at ¶ 54.

[5] *New Hampshire Department of Transportation; Application and Waiver Request for Use of Certain Public Land Mobile Service Channels*, Memorandum Opinion and Order, 14 FCC Rcd 19438 (1999) at ¶ 7 (waiver denied on other grounds).

- The chiefs of the Wireless Telecommunications Bureau and the Public Safety and Homeland Security Bureau have been give authority to resolve disputes.
- The FCC will have final authority to review an approve the Network Sharing Agreement.

The FCC has also established a number of conditions for addressing problems that may arise in the implementation of the Network Sharing Agreement:

- The D Block Licensee will be required to establish a corporate structure designed to insulate the D Block license from bankruptcy proceedings, in the event that operations run into financial difficulties.
- The FCC retains the authority to cancel and reassign the D Block license or the license issued to the Public Safety Broadband Licensee for failure to comply with the Network Sharing Agreement.
- The FCC retains the authority to adjudicate disputes between the parties itself, or to direct the parties to seek settlement or resolve the dispute through litigation.
- The parties will have to file quarterly reports with the FCC addressing a number of areas.

Key Issues for Local Governments.

The development and implementation of the new nationwide network will raise many issues, including the following:

- **Governance:** Who will be the four at-large members of the board of the Public Safety Broadband Licensee? How will the members of the board receive input from interested communities?
- **Terms of Use**: Who will get to use the new network? Will the Network Sharing Agreement address use by non-traditional agencies?
- **Financial Terms**: Fees for use of the network will obviously be a critical issue.
- **Negotiations with Equipment Providers.** The Order anticipates that the Public Safety Broadband Licensee will have the ability to negotiate with equipment providers to acquire end-user equipment for use on the network. This may be a long-term opportunity to widen the range of suppliers and lower prices for end-user agencies.
- **Negotiations for Use of State and Local Property.** The Order anticipates that the Public Safety Broadband Licensee will work to expedite the deployment of the network by helping the D Block Licensee obtain access to public property. To be effective, such an effort will require considerable work at the staff level,

presumably cooperation with the national local government associations, and possibly a formal structure of some kind.

***Conclusion*.**

If it succeeds, the FCC's public-private partnership will offer local governments a rare opportunity to apply state-of-the-art technology to public sector needs at a reasonable cost. It will be essential, however, for local governments to pay close attention to the process, especially the negotiation of the Network Sharing Agreement. While the members of the board of the Public Safety Broadband Licensee will certainly do their best to ensure that the critical goals of Congress and the FCC are met, some of the broader possibilities may be lost if narrow views of the purposes of public safety spectrum prevail.

8691\04\00132301.DOC