



FCC's New Rules Overlook Industry Realities

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The Federal Communications Commission (FCC) recently completed the most sweeping reform of its space station licensing process in more than two decades. New rules were adopted with the intent of enabling the agency to act on license applications faster than before.

Licensing reform is certainly welcome, as no one disagrees that it takes too long to acquire a satellite authorization. And in truth, the newly adopted rules should help to speed up the licensing process. However, in its quest for expediency, the FCC has overlooked satellite industry realities and unwittingly created new regulatory uncertainties, which likely will lead investors to think twice before backing future satellite ventures – a troubling development for an industry marked by inherent risk and several recent high profile market failures.

The FCC's reforms are numerous and, in many respects, sensible. The central procedural change involves the establishment of a single processing queue for satellite applications, with applications to be reviewed in the order that they are filed. Only applications for new satellites will form the queue, however, because the FCC wisely decided to exempt replacement satellite applications. These latter applications, if unopposed and requesting technically consistent replacement satellites, will

be simply "grant-stamped" and returned to the applicant in a process similar to that used for unopposed earth station applications. The streamlined replacement satellite procedure represents perhaps the best example of how the FCC's reforms can be expected to benefit the industry, as licensees seeking replacement satellites will quickly and easily receive assurance that their existing operations can continue.

Applicants of so-called "GSO-like" systems also figure to benefit from the new licensing rules. GSO [geostationary]-like applications (i.e., applications for satellites using earth stations with non-omni-directional antennas) now will be treated on a "first-come, first-served" basis. In general terms, this means that once at the head of the processing queue, a GSO-like application will be granted if the applicant meets the necessary qualifications and the proposed operations will not cause harmful interference to existing licensees. The first-come, first-serve approach is straightforward, fair, and comparable to the procedure used in the early years of satellite licensing. In addition, the approach will likely expedite licensing simply by avoiding the typically dilatory processing round procedure.

Cracks In The Reforms

Unfortunately, the benefits of first-come, first-served will not extend to "NGSO-like" systems. Unlike GSO-like systems, NGSO [nongeostationary]-like

systems may require band segmentation or other interference mitigation techniques to avoid interference resulting from their use of earth stations with omni-directional antennas. The FCC believes that, under a first-come, first-served approach, an NGSO-like applicant at the head of the processing queue could request so much spectrum that market entry by others would be precluded. To avoid that scenario, the FCC decided that it will act on NGSO-like applications through a modified processing round using pre-set band-splitting mechanisms based on the method used in the 2 GHz band.

This is where the limitations of the FCC's licensing reforms begin to be felt. Under the new rules, if there is not enough NGSO spectrum to accommodate all qualified applicants, spectrum will be divided equally among those applicants. In cases where there are fewer than three applicants, such applicants will receive only one-third of the available spectrum, with the remaining spectrum to be made available in a subsequent processing round. While the FCC's mechanistic approach offers administrative ease and avoids the difficulties associated with evaluating each applicant's individual spectrum needs, it fails to account for variables that affect the satellite industry. Rigidly limiting an NGSO-like licensee to at most one-third of available spectrum runs the risk of eliminating the possibility of developing potential future applications that may

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require more spectrum, either due to the nature of the application or in response to customer demand.

The FCC believes that market mechanisms, such as spectrum rights purchases and spectrum-sharing arrangements, will satisfy an operator's need for spectrum. Reliance on the marketplace is generally a wise policy, and certainly the related elimination of the anti-trafficking rule as part of the FCC's package of licensing reforms is good news. But the secondary market carries with it significant risk. In the face of strict construction milestones, spectrum-acquisition negotiations will need to be completed in short order if a licensee is to avoid losing its license. Yet, the often drawn-out nature of complicated negotiations may preclude timely milestone compliance. Investors reasonably will expect some form of guarantee that a satellite venture's key asset – spectrum access – will be available in amounts sufficient to allow that venture to go forward. A spectrum-allocation model relying heavily on the secondary market will likely not provide the level of certainty necessary to assuage the concerns of the financial community already skittish about the satellite industry.

Significantly exacerbating this sense of risk and uncertainty is the FCC's new bonding requirement. In lieu of the now-defunct financial qualification requirement, licensees of new satellites (but not replacement satellites) must post a multi-

million-dollar bond within 30 days of license grant. If a milestone deadline is not met, or if the license is simply surrendered, the bond becomes payable to the U.S. Treasury. The severity of this punishment will make it difficult for companies of any size to find investors willing to assume the risk associated with financing a proposed satellite venture. Risk aside, securing financing in the wake of the new bonding requirement may be unfeasible, as a practical matter, for proponents of innovative, entrepreneurial satellite ventures. Typically, these proponents must wait until their license is in hand before securing capital. The 30-day window from license grant to bond posting will be, in many cases, an inadequate amount of time to pursue financing in the capital markets.

Another potential trouble spot involves the construction milestones themselves, which under the new rules will apply immediately to a service link license, regardless of whether associated feeder link or inter-satellite link spectrum has been assigned. The prospect of different time frames for the processing of different link requests creates real doubt over a licensee's ability to complete a system as planned, within milestone deadlines. Simply put, it is unrealistic to expect a licensee to proceed with procurement of a satellite system without action on critical elements of its required authority – especially where forfeiture of a multi-million dollar bond is the penalty for failing to do so on a timely basis.

Fallout from the new rules has already begun. **PanAmSat** [Nasdaq:

SPOT] recently withdrew its application for authority to launch and operate a constellation of 12 fixed satellite service (FSS) satellites in the V-band. In its letter to the FCC requesting an application fee refund, PanAmSat indicated that it based its decision to withdraw, in part, on the new bonding and milestone requirements, which would subject the company "to financial, business, and regulatory risks that did not exist when PanAmSat filed its application." The costly loss associated with the failure to meet milestone requirements also has been cited by industry officials as a likely reason for the recent requests for dismissal of **Loral's** V-band and **Hughes'** V- and Ku-band applications, and the surrender of **Teledesic's** Ka-band licenses.

Revamping twenty years of licensing procedures is no small task. The FCC has made significant progress in bringing its space station licensing process up to date. But today's satellite industry requires more than just expedited licensing. It needs a process that accounts for the realities of the satellite industry and that advances regulatory certainty. The FCC's new rules fail that test. Unless changed, these rules will discourage satellite procurement and launches, thereby diminishing the provision of advanced telecommunications services to the American public. ☹

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