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Spectrum Aggregation

The Federal Communications Commission's *Spectrum Screen Order*, while helping to bring some closure to the issue of spectrum holdings, may raise more questions for companies seeking to merge, writes Angela E. Giancarlo, a Government & Global Trade partner in Mayer Brown's Washington office.

FCC Action on Mobile Spectrum Holdings: A New Analysis for Proposed Mergers?

BY ANGELA E. GIANCARLO

Last month, the Federal Communications Commission released an order setting forth new policies for mobile spectrum holdings.[1] The commission concluded ultimately that the new policies ''are necessary to preserve and promote consumer choice and competition among multiple service providers, promote the efficient and intensive use of spectrum, maximize economic opportunity, and foster the deployment of innovative technologies.''[2]

Despite bringing some closure to the issue, one question still lingers: What if companies merge?

[1] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, FCC 14-63, Report & Order, __ FCC Rcd __ (rel. June 2, 2014) (*Spectrum Screen Order* or *Order*).

[2] *Spectrum Screen Order*, ¶ 21.

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Three New Rules. In the months leading up the FCC's action, the commission had considered current market trends (notably, the high demand for mobile services and market consolidation), as well as the current spectrum holdings of the four nationwide carriers. In the end, the agency decided that policy changes were necessary to ''facilitate the robust competition that leads to'' lower prices, improved quality, and greater innovation.[3] The commission established new rules in three interrelated areas as follows:

1. Regarding review of proposed transactions, the commission added and removed spectrum to its analysis to better reflect spectrum that is currently suitable and available for mobile broadband. If a proposed transaction would result in a provider holding approximately one-third or more of available spectrum licenses in a given market, that transaction will continue to trigger a more detailed, case-by-case competitive analysis by the commission.

2. For transactions involving low-band (sub-1 gigahertz) spectrum, the commission will continue to undertake a case-by-case review and will consider holdings of approximately one-third or more of available low-band spectrum an ''enhanced factor'' in its analysis.

3. Regarding auctions: First, for AWS-3 (Advanced Wireless Services-3), the commission set no auction-specific spectrum aggregation limits for qualified bidders, regardless of their existing spectrum holdings. Second, for the forward auction of 600 MHz spectrum recovered from television broadcasters, the commission

[3] *Id.*, ¶ 26.

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set an *ex ante* eligibility requirement: In order to qualify to bid on reserved licenses in a market area, an entity must not hold an attributable interest in 45 megahertz or more of sub-1-GHz spectrum in that market area, or must be a non-nationwide provider.

In the *Spectrum Screen Order*, the commission balances its goal to maintain a competitive wireless market environment without adopting the extreme restrictions advocated by some stakeholders. In modernizing the screen, the commission concluded that the new policy is ''necessary to preserve and promote consumer choice and competition among multiple service providers, promote the efficient and intensive use of spectrum, maximize economic opportunity, and foster the deployment of innovative technologies.''[4] This test is similar, if not identical, to its analysis for proposed transactions.

In the transaction context, the commission will consider whether the proposed transaction will serve the public interest, convenience, and necessity. In other words, if consummated, will the transaction frustrate or harm the objectives of the Communications Act or the public interest? For instance, will consumer prices rise? Will investment incentives be stifled? Will consumers have fewer wireless providers and innovations from which to choose?

Given the striking similarities between the analyses, it is worth exploring how the commission may apply the new tests set forth in the *Spectrum Screen Order* to future proposed transactions.

As a preliminary matter, the commission did not modify its general approach to evaluating spectrum holdings—the policy remains a ''screen,'' rather than a bright-line cap. As noted earlier, the order reaffirms the current case-by-case review of proposed transactions, with continued use of a spectrum screen triggered at aggregations of approximately one third or more of the spectrum suitable and available for mobile telephony/broadband.''[5] The agency has relied upon a screen for more than ten years—the previous ''cap'' was eliminated on Jan. 1, 2003. In practical terms, the screen affords flexibility for both proponents of increased holdings and the commission itself. Proponents have leeway to describe new innovations and why they require greater amounts of spectrum, for example. For its part, the commission has maintained the flexibility to consider unique circumstances to either approve or deny spectrum aggregations that impinge the screen.

Also in the order, the commission opines on the value of spectrum located below 1 GHz for the first time. Noting that it ''cannot rely on price differentials alone'' to address competitive concerns, the agency thus relies on three rationales to justify its new policies.[6] First, the commission finds that low-band spectrum is relatively scarce and that a service provider ''holding a mix of low- and high-band spectrum licenses would have greater flexibility and would be better able to optimize its network costs for a given quality level[.]''[7] Second, the commission opines that consumers benefit ''when multiple providers have access to a mix of spectrum bands.''[8] Third, relying on input from the Department of Justice, the agency concludes that there is a ''substantial likelihood of competitive harm if'' providers that currently lack access to low-band spectrum cannot acquire it.''[9] Assessing value to low-band spectrum is unprecedented and thus noteworthy.

By adding the Broadband Radio Services/Educational Broadband Services (BRS/EBS) to the screen equation, the commission resolves a longstanding debate on whether those bands are suitable and available for mobile telephony and broadband service. In 2008, the commission decided to include in the spectrum screen 55.5 megahertz of BRS spectrum and declined to add any EBS spectrum. The commission has since maintained this measurement for these bands. In the *Spectrum Screen Order*, however, the agency reasoned that ''high-band spectrum can be important for providers to increase capacity to meet consumers' demand for mobile broadband'' and thus concluded that the ''majority'' of the band is suitable and available for mobile telephony/broadband services.[10]

Transactions Could Change Rules. Throughout the 18-month comment period leading up to the release of the FCC's order, many parties advocated for restricting participation in the forward auction of 600 MHz spectrum recovered from broadcasters. As mentioned earlier, the commission will establish an *ex ante* limit on the number of licenses any single entity can acquire in this as-yet unscheduled auction. At the same time, the commission states the following:

''We note that our decision to adopt a 600 MHz Band spectrum reserve and to establish the amounts of reserved spectrum specified below is based on the current marketplace structure of the mobile wireless service industry. If significant changes in the marketplace structure occur or a proposed transaction is filed with the Commission in the future affecting the top four nationwide providers and their spectrum holdings, we will revisit our decisions here regarding the reserved spectrum provisions for the 600 MHz Band that we adopt today. We will review as well whether changes should be made to any other decisions in this Report and Order.''

As a whole, these sentences suggest that in the event of changes to the wireless marketplace, including a proposed transaction, the commission will reconsider not only the *ex ante* rule, but also the entire *Spectrum Screen Order*. In other words, entities proposing to merge would face restrictions in the 600 MHz forward auction. Or, alternatively, the commission may consider rescinding entirely the bidding restrictions established by the order.

Finally, by adding 101 megahertz of 2.5 GHz spectrum to the screen, the commission raises the specter for significant and potentially unsolvable issues in the event it receives a transaction application involving this band.

[4] *Id.*, ¶ 21.
[5] *Id.*, ¶ 44.
[6] *Id.*, ¶ 65.
[7] *Id.*, ¶ 59.
[8] *Id.*
[9] *Id.*, ¶ 60.
[10] *Id.*, ¶ 118.

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