

Reader Comments

Schools with Wireless Licenses Can Support Wi-Max Systems

John W. Kuzin

Wiley Rein LLP

Educational institutions holding 2.5 GHz wireless spectrum licenses may be sitting on a small pot of gold. Educators may be unaware that spectrum leases they may have signed in the 1990s may be expiring soon. And, when they do expire, educators can enter into a new lease arrangement with increased payments.

The Federal Communications Commission ("FCC") has reinvigorated educational licensees' ability to lease their 2.5 GHz spectrum licenses to commercial wireless broadband service providers via three decisions released over the past several years. The new Educational Broadband Service ("EBS") is intended to support state-of-the-art wireless broadband, or Wi-Max, services. The EBS is the new name for the Instructional Television Fixed Service ("ITFS"), which had supported broadcast video services since the 1960s. While this spectrum was used to support wireless cable systems and first-generation wireless Internet systems, they were less successful than the FCC had hoped.

FCC Leasing Opportunities

Commercial wireless service providers are taking advantage of the FCC's new frequency band plan that makes the spectrum more amenable to Wi-Max deployments and gives the providers greater usage flexibility. Commercial providers have been moving swiftly to secure the rights to use EBS spectrum in many regions of the country. Providers such as the new Clearwire, which recently merged its 2.5 GHz spectrum operations with Sprint Nextel, and Xanadoo Communications, are offering EBS licensees increased monthly rents and up-front payments in exchange for leasing their spectrum rights for a 30-year term.

The "Form Lease"

Once a commercial provider identifies a viable spectrum

John W. Kuzin is a member of Wiley Rein's Communications Practice. He represents clients in a broad range of Federal Communications Commission (FCC) matters, including rulemakings, spectrum transactions, enforcement proceedings, and equipment authorization issues. Mr. Kuzin has negotiated spectrum leases on behalf of many large and small EBS license holders (e-mail: jkuzin@wileyrein.com). Established in Washington, DC in 1983, Wiley Rein LLP is home to more than 275 attorneys practicing in almost two-dozen areas of the law. The firm's Communications Practice, with more than 80 attorneys and engineers engaged full time, encompasses virtually all aspects of federal, state, and international laws governing the media and telecommunications industries.

leasing opportunity, it typically presents a "form lease" agreement to the EBS licensee that, not surprisingly, contains provisions that favor the provider. Some of these provisions are discussed below.

The ROFR Provision. A Right-Of-First-Refusal ("ROFR") provision commonly appears in spectrum leases. The ROFR gives the provider the right to match any offer to purchase or lease the spectrum at the end of the lease term should the EBS licensee receive a "bona fide" offer from a third party to purchase or lease the license. Licensees need to understand how a ROFR provision can impact their ability to secure third party offers to lease and sell their spectrum rights both during and after the termination of the contract.

The FCC's Substantial Service and Educational Use Requirements. EBS licensees must comply with the FCC's substantial service and educational use requirements in order to maintain their licenses. Substantial service requirements ensure that the spectrum is used to provide services in the license's coverage area, and educational use requirements ensure that licensees are using the spectrum to further their educational mission. Service providers often attempt to place the burden for complying with these requirements upon the licensee, but the service providers often hold the key to ensuring compliance with both requirements.

Undeniably, commercial service providers are leasing the licensee's EBS spectrum to build a wireless system. Once that system is built and operational, it can be used to provide substantial service within the license's service area and allow the licensee to use the provider's services to comply with the educational use requirements. Therefore, lease provisions that require the provider to build a system in a timely manner are critically important to the EBS licensee's ability to maintain the license.

Spectrum Value

The amount that providers will pay to lease EBS spectrum depends upon the location of and population coverage within the license's service area. Like typical real estate transactions, EBS spectrum located in and around highly populated metropolitan areas will court much higher rents and up-front payments than will spectrum in less-populated rural areas. Other factors that are important to determining value are the number of other 2.5 GHz licenses available for lease and wireless broadband competition in the service area.

History of the 2.5 GHz ITFS/EBS Band and the Transition

The FCC established the ITFS in 1963 to provide educational and cultural programming to students in U.S. accredited educational institutions. In the early 1970s, the FCC created an exclusive allocation for ITFS consisting of 28 television channels in the 2.5 GHz band. About the same time, the FCC also created the Multipoint Distribution Service ("MDS") in the upper portion of the 2.5 GHz band, which was intended to support wireless cable systems. In 1998, the FCC adopted technical rules giving MDS and ITFS licensees the ability to deliver two-way Internet access services via cellularized systems.

These early two-way systems experienced interference from high-power broadcast television operations, which led

the FCC to restructure the band. In its band restructuring order, which was issued in July 2004, the FCC acknowledged that the regulatory history of the 2.5 GHz band has been marked by changing policy goals that have suppressed investment and innovation in the band. Given the frenzy of leasing activity in the EBS band in response to the FCC's new rules enacted in 2004, 2006, and 2008, the latest actions appear to be a success. Indeed, transition to the new band plan has been proceeding rapidly, with well over half of the transition areas already completed. □
