

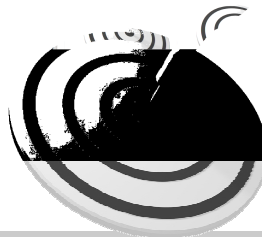


Speaker 12: Julie A. Weston of Davis Wright Tremaine LLP	Page 1
<h2 style="margin: 0;">Buying and Selling Spectrum: Deal-making Trends and Tips for Navigating the Markets</h2> <p style="margin: 10px 0 0 0;">Julie Weston Partner, Davis Wright Tremaine julieweston@dwt.com</p> <p style="margin: 10px 0 0 0;">Law Seminars International   Wireless Telecommunications November 8, 2007 - Seattle, Washington</p>	
<p style="font-size: small;">www.dwt.com</p>	

<h2 style="margin: 0;">Why Spectrum?</h2> <ul style="list-style-type: none"> <li>▪ Between 1993 and 2005, the number of users of mobile wireless telephone increased from 16 million to 213 million.<sup>1</sup></li> <li>▪ Worldwide wireless subscribers for 2007 has been estimated to be 2 billion.<sup>2</sup></li> <li>▪ The average number of minutes per month that users used their mobile wireless telephones increased from 140 minutes per month in 1993 to 740 minutes per month in 2005.<sup>1</sup></li> <li>▪ In the first half of 2007, cellular penetration in the United States reached a high of 80.5 percent (up from 50.9 percent in 2003).<sup>3</sup></li> </ul> <p style="font-size: x-small; margin-top: 10px;"> <sup>1</sup> FCC Report to Congress: 11<sup>th</sup> Annual CMRS Competition Report (September 24, 2006)  <sup>2</sup> IDC 2006  <sup>3</sup> CTIA Statistics Twice, 10/24/07         </p>	
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## Target Issues in Spectrum Acquisitions

- Coverage Areas
- Spectrum Leasing (New and Legacy Leasing)
- Representations and Warranties
- Spectrum Acquisition Terms



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## A Few of the Geographic Acronyms

- **Major Trading Areas (MTAs):** 493 MTA's in the United States.
- **Basic Trading Areas (BTAs):** each MTA is made up of several BTAs.
- **Regional Economic Area Grouping (REGA):** these areas often cover multiple states and can be as large as the size of time zones.
- **Economic Area (EA)**
- **Cellular Market Area (CMA):** consists of both Metropolitan Statistical Area (MSA) and Rural Service Area (RSA) licenses.
- **Protected Service Areas (PSAs):** 35-mile protected area for EBS and BRS licenses.
- **Geographic Service Areas (GSAs):** generally consists of the station's 35-mile PSA. In instances where two stations have overlapping PSAs, the FCC rules use a "splitting a football" approach to divide the overlap area between the licensees.

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## Spectrum Geography



- The size and make-up of the geographic area covered by FCC spectrum licenses differs with each type of license.
- Further partitioning of licenses have changed the covered license area even further.
- Mapping of licenses is necessary to ensure expected coverage area by the license.
- Representations and warranties with respect to covered geographic area of a license are very rare in spectrum transactions.

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## Geographic Licensing Schemes

- PCS Licenses were allocated by the FCC based on BTAs.
- The AWS Band (Auction 66) was offered at 1,122 licenses covering various size regions. The 12 REAGs were the largest, with 36 licenses (12 regions X 3 spectrum blocks). The 352 EAs are closer to the size of multiple county regions and finally the 734 CMA licenses cover metropolitan areas.
- The 700 MHz Band licenses being offered Auction 73 will include a total of 1,099 licenses: 176 Economic Area (EA) licenses in each of the A and E Blocks, 734 Cellular Market Area (CMA) licenses in the B Block, 12 Regional Economic Area Grouping (REAG) licenses in the C Block, and one nationwide license, to be used as part of the 700 MHz Public/Private Partnership, in the D Block.<sup>4</sup>
- EBS and BRS licenses were allocated on a BTA and PSA basis. In 2004, the FCC issued rules creating GSAs, which remedied the overlap of PSAs with "split the football" rules.

<sup>4</sup>FCC Public Notice, October 5, 2007 (AU Docket No. 07-157)  
A list of Geographic Licensing Schemes can be found on the FCC website at <http://wireless.fcc.gov/auctions/default.htm?job=maps>

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## License Disaggregation and Partition

- Certain spectrum licenses may be partitioned into two or more geographic areas.
- Spectrum licenses may also be disaggregated into separate licenses with fewer frequencies.
- Partitioning is used to fill-in geographic areas while disaggregation is used to add incremental spectrum depth in a particular area.
- FCC consent is required for any license partition or disaggregation.

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## Spectrum Leasing

- In 2003 and 2004, the FCC issued rules and reconsiderations with respect to the licensing of spectrum resources.<sup>5</sup> Leasing provides another option for obtaining spectrum rights in a particular geographic area or band when the licensee would not otherwise be willing to part with the spectrum.
- Although some spectrum leasing had been allowed in the EBS bands on a spectrum manager lease basis, the number of *de facto* leasing and leasing of spectrum on other bands has increased since these rules were released.
- Two options for leasing spectrum rights:
  - Spectrum Manager Leases
  - *De Facto* Transfer Leases

<sup>5</sup> For further information see Wireless Telecommunications Bureau: Spectrum Leasing ([http://wireless.fcc.gov/licensing/index.htm?job=spectrum\\_leasing](http://wireless.fcc.gov/licensing/index.htm?job=spectrum_leasing))

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## Spectrum Manager Leases

- In this instance, the licensee retains both *de jure* and *de facto* control over the leased spectrum.
- Terms may be short term (less than one year) or long term (longer than one year through an individual term or series of renewal terms). In no event can the term exceed the term of the license. However, it can be extended on the renewal of the license.
- A notification of the leasing arrangement must be filed with the FCC.

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## *De Facto* Transfer Leases

- Under this leasing scheme, the licensee retains the *de jure* control of the license, but the *de facto* control of the spectrum transfers to the lessee for the term of the lease.
- May be short term (less than 1 year) or long term, however certain spectrum bands, such as EBS have term limits. Term can not exceed the license term, but can be extended upon renewal of the license.
- FCC approval is required prior to the commencement of the operations under the lease.

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## Lease Terms

- Depending on the spectrum band and type of lease, the terms of both Spectrum Manager Leases and *de facto* Transfer Leases vary greatly. In many cases the *de facto* leases are long term with more rights similar to ownership while spectrum manager leases tend to be more fill-in and temporary.
- As industry use of the spectrum changes, the terms of the leases have changed. For example, it was common for a spectrum manager type lease of ITFS (now EBS) spectrum, which was previously used for wireless cable type services and is now being used for wireless broadband and WiMAX services, to include a payment based on the percentage of revenues realized in a market or over the spectrum. Today, with respect to EBS leases, specified monthly payments and service credits are more prevalent.

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## Lease Terms (cont'd)

- If acquiring a legacy lease, or spectrum that is or has been subject to a lease, be aware of the lease terms. Rights of first refusal (ROFR) are very common with respect to the lease or purchase of spectrum in legacy leases. Also, many legacy type leases included certain broadcasting or programming requirements which may not now be required by the FCC. Common terms in these situations include:
  - amendment of the lease agreement prior to the closing;
  - reinstatement of the license;
  - indemnification for any current or previous leases; and
  - extensive representations and warranties regarding the lease terms.

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## Spectrum Agreement Issues

- In addition to standard representations and warranties, attachment A contains two samples from acquisition agreements for FCC license representations. Survival of representations and warranties usually range from 6 months to 3 years depending on the type and condition of the license.
- Indemnification provisions are normally provided for reps and warranties, operation of the license, any leases or other liabilities or obligations relating to the license.
- Closings are usually conditioned on the FCC's decision becoming a "final order;" however, more recently, some sellers are closing prior to a "final order."
- If acquiring multiple licenses, then consider whether agreement should provide on serial closings in which case the purchase price should be determined on a per license basis or a single aggregate closing. This often becomes an issue when licenses and leases are being acquired and consent by the lessor is required for the assignment of the leases.

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