PUBLIC NOTICE

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WIRELESS TELECOMMUNICATIONS BUREAU'S BROADBAND DIVISION AND PUBLIC SAFETY AND HOMELAND SECURITY BUREAU'S POLICY AND LICENSING DIVISION ISSUE DECLARATORY RULING ON MICROWAVE FREQUENCY COORDINATION AND SEEK COMMENT ON PORTION OF PETITION FOR DECLARATORY RULING FILED BY THE FIXED WIRELESS COMMUNICATIONS COALITION, INC.

GN Docket No. 15-20

Comment Date: **February 25, 2015**
Reply Comment Date: March 12, 2015

On October 23, 2014, the Fixed Wireless Communications Coalition, Inc. (FWCC) filed a petition for declaratory ruling[1] asking the Commission to answer "questions as to the interpretation of certain Part 101 rules, particularly as to frequency coordination."[2] With this *Public Notice*, we grant FWCC's Request for Declaratory Ruling in part, answer certain of the questions asked by FWCC, clarify the Commission's existing rules on several aspects of the frequency coordination process, and seek comment on the process for reserving growth channels in the microwave services.

The Commission's Part 101 rules provide access to non-auctioned spectrum "on a first come, first served, interference-free basis."[3] Part 101 includes the Private Operational Fixed Service (POFS) and the Common Carrier Operational Fixed Service.[4] The Commission's licensing regime for these two services requires frequency coordination and filing of an application for each microwave link or path containing detailed information concerning the proposed operation.[5] In order to complete frequency coordination, an applicant must give prior notice of the proposed applicant's operations to nearby licensees and prior applicants whose facilities could affect or be affected by the new proposal, make reasonable efforts to avoid interference and resolve conflicts, and certify to the Commission that the proposed operation has been coordinated.[6] Once the applicant has completed frequency coordination, the applicant must file an application for authorization with the Commission.

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[1] Fixed Wireless Communications Coalition, Request for Declaratory Ruling (filed Oct. 23, 2014) (FWCC Request for Declaratory Ruling).

[2] FWCC Request for Declaratory Ruling at 1.

[3] *See* FWCC Request for Declaratory Ruling at 2.

[4] *See* Part 101, Subpart I.

[5] *See* 47 C.F.R. §101.21(f), 101.103.

[6] *See* 47 C.F.R. § 101.21(f).

On September 3, 2014, the Broadband Division (Division) of the Wireless Telecommunications Bureau (Bureau) issued an order resolving a frequency coordination dispute between Auburn Data Systems, LLC and Geodesic Networks, LLC.[7] FWCC alleges that the *Geodesic Order* caused "uncertainty and concern among fixed wireless interests" as to the proper interpretation of the Commission's rules on the following issues:

1. When a party requests an expedited frequency coordination, and receives no response within the requested response period, is frequency coordination then complete, or must the party obtain affirmative responses from potentially affected licensees and prior applicants?

2. Similarly, when a party modifies a prior coordination notice (PCN), do potentially affected parties have a duty to make a timely response, so that their silence connotes assent, or does the party that issued the PCN have a duty to obtain affirmative responses?

3. What are the procedures for challenging an application as having been improperly filed, both before and after the grant of the license?[8]

In addition, FWCC raises an additional issue:

4. When a party has coordinated growth channels, and another party seeks to license those channels, which party has the burden of showing need for the channels? What are the elements of a successful showing? Is there a fixed time limit for holding growth channels?[9]

Initially, it is important to note that neither party in the *Geodesic Order* fully complied with our coordination rules. Geodesic requested expedited coordination but failed to affirmatively contact each licensee and applicant prior to filing.[10] Auburn, on the other hand, failed to respond to Geodesic's request for expedited coordination.[11] The Division's decision not to set aside the grant of Geodesic's applications should not be read as a holding that Geodesic fully complied with our rules.

Question 1: Responses to Frequency Coordination Requests

With respect to FWCC's first question, the response requirements under the Commission's frequency coordination rules are different depending upon whether a party files a PCN with a regular 30-day notification period or an expedited PCN, with a notification period of fewer than 30 days. The Commission's rule for PCNs with a 30-day notification period states as follows:

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[7] Geodesic Networks, LLC, *Memorandum Opinion and Order and Order on Reconsideration*, 29 FCC Rcd 10429 (WTB BD 2014) (*Geodesic Order*).

[8] FWCC Request for Declaratory Ruling at 2.

[9] *Id.*

[10] *Geodesic Order*, 29 FCC Rcd at 10433 ¶ 13.

[11] *Geodesic Order*, 29 FCC Rcd at 10433 ¶ 13.

> Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Any response to notification indicating potential interference must specify the technical details and must be provided to the applicant, in writing, within the 30-day notification period. Every reasonable effort should be made by all applicants, permittees and licensees to eliminate all problems and conflicts. *If no response to notification is received within 30 days, the applicant will be deemed to have made reasonable efforts to coordinate and may file its application without a response*… (Emphasis added).[12]

In other words, with regular 30-day coordination, silence means assent. In contrast, for expedited PCNs, the requesting party must receive written concurrence (or verbal concurrence, with written concurrence to follow) from affected parties."[13] Section 101.103(d)(2)(vi) of the Commission's rules fully states:

> An expedited coordination period (less than 30 days) may be requested when deemed necessary by a notifying party. The coordination notice should be identified as "expedited" and the requested response date should be clearly indicated. However, circumstances preventing a timely response from the receiving party should be accommodated accordingly. *It is the responsibility of the notifying party to receive written concurrence (or verbal, with written to follow) from affected parties or their coordination representatives.* (Emphasis added).[14]

As the Division noted in the *Geodesic Order*, however, an applicant or licensee who receives a PCN with a request for expedited response also has a duty to promptly respond to that request. Section 101.103(d)(2)(iv) of the Commission's rules states:

> Response to notification should be made as quickly as possible, even if no technical problems are anticipated.[15]

Accordingly, an applicant or licensee who receives a request for expedited coordination should make a good faith attempt to comply with the request. If the applicant or licensee is unable to timely respond to the request for expedited coordination, it should inform the other party that additional time is required. Absent extraordinary circumstances, the party submitting the PCN must accommodate that request for additional time.[16] Once 30 days passes, however, the party submitting the PCN is entitled to assume that it has completed coordination with the responding party unless the responding party provides a specific objection.[17]

All applicants and licensees have a fundamental duty to work with each other in the frequency coordination process. As the rules state, "Every reasonable effort should be made by all applicants,

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[12] 47 C.F.R. § 101.103(d)(2)(iv).

[13] *See* 47 C.F.R. § 101.103(d)(2)(vi).

[14] 47 C.F.R. § 101.103(d)(2)(vi).

[15] 47 C.F.R. § 101.103(d)(2)(iv).

[16] *See Geodesic Order*, 29 FCC Rcd at 10433 ¶ 13.

[17] *See* 47 C.F.R. § 101.103(d)(2)(iv).

permittees and licensees to eliminate all problems and conflicts."[18] Such reasonable efforts shall include reasonable and prompt efforts to communicate with each other.

Question 2: Modifying Prior Coordination Notices

Section 101.103(d)(2)(viii) of the Commission's rules applies to situations where the notifying party makes technical changes to a system before the coordination process is complete.[19] The rule states as follows:

> Where a number of technical changes become necessary for a system during the course of coordination, an attempt should be made to minimize the number of separate notifications for these changes. Where the changes are incorporated into a completely revised notice, the items that were changed from the previous notice should be identified. When changes are not numerous or complex, the party receiving the changed notification should make an effort to respond in less than 30 days. When the notifying party believes a shorter response time is reasonable and appropriate, it may be helpful for that party to so indicate in the notice and perhaps suggest a response date…[20]

First, we point out that modifying a PCN does not limit a responding party's rights under the other frequency coordination rules. Thus, if an applicant submits a regular PCN but then modifies that PCN before the 30-day response period has run, the responding licensee or applicant still has, at a minimum, 30 days from the date of the original PCN to respond. Similarly, if an applicant originally requested expedited coordination, and then modifies its PCN, it must still comply with the expedited coordination provisions of Section 101.103(d)(2)(vi) of the Commission's rules, including the requirement to affirmatively contact other licensees and applicants prior to filing its application with the Commission.

If an applicant modifies its PCN, and the changes are not numerous or complex, the rule contemplates that the party receiving the changed notification should respond in fewer than 30 days (from the date of notification of the modification). The rule also allows a notifying party to suggest a deadline for responding.[21] Provided that the changes are not numerous or complex and the suggested date does not shorten the original 30 day response time, if the receiving party does not reply within the time frame suggested by the notifying party, silence generally means assent to the request.

Further, Section 101.103(d)(2)(ix) of the Commission's rules states, "[i]f, after coordination is successfully completed, it is determined that a subsequent change could have no impact on some parties receiving the original notification, these parties must be notified of the change and of the coordinator's opinion that no response is required."[22] This post-coordination rule does not require a 30 day response period, nor does it require the applicant to receive an affirmative response from the other licensees. To our knowledge, this rule appears to be working effectively.

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[18] 47 C.F.R. § 101.103(d)(2)(iv).

[19] 47 C.F.R. § 101.103(d)(2)(viii).

[20] 47 C.F.R. § 101.103(d)(2)(viii).

[21] 47 C.F.R. § 101.103(d)(2)(viii).

[22] 47 C.F.R. § 101.103(d)(2)(ix).

We note that in any case where a responding party has previously objected to a PCN and an applicant modifies the PCN in an attempt to respond to the objection, the applicant should affirmatively contact the objecting party to determine if the modification addresses the objection.[23]

Question 3 – Procedures for Challenging Applications

The procedure for challenging an application as improperly filed depends on whether the application is filed in the Common Carrier Operational Fixed Service or the Private Operational Fixed Service (POFS). Applications in the Common Carrier Operational Fixed Service are subject to a mandatory 30-day public notice period and to petitions to deny.[24]

In contrast, as we stated in the *Geodesic Order*, applications for POFS licenses are not subject to the public notice requirement or to petitions to deny as set forth in Section 309(b) and 309(d)(1) of the Communications Act of 1934, as amended.[25] The only option for a party who wishes to challenge a POFS application prior to action on that application is to file an informal objection.[26] We will receive and may consider informal objections filed before an application for a private microwave license is granted. This is the approach the Wireless Telecommunications Bureau took in the *Geodesic Order*, where it treated Geodesic's improperly filed petition to deny as an informal objection and ruled on the informal objection on the merits.[27] Unlike petitions to deny, the Commission has discretion whether or not to consider informal objections.[28]

After an application is granted, Section 1.106(b)(1) of the Commission's rules states in pertinent part:

> [A]ny party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding. [29]

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[23] We view the requirement to affirmatively contact an objecting party as implicit in the rule's requirement to make every reasonable effort to eliminate all problems and conflicts. *See* 47 C.F.R. § 101.103(d)(2)(iv).

[24] *See* 47 C.F.R. §§ 1.907 (including Common Carrier Operational Fixed Service in the definition of Wireless Telecommunications Services), 1.933(c)(1) (applications in the Wireless Telecommunications Services must be placed on public notice prior to grant), 1.939(a)(2).

[25] *See Geodesic Order* at 11, *citing* 47 C.F.R. § 1.933(d)(9).

[26] *See* 47 C.F.R. § 1.41. Informal objections may also be filed against applications in the Common Carrier Operational Fixed Service.

[27] *Geodesic Order*, 29 FCC Rcd at 10432 n.35.

[28] *See, e.g.,* Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14021 n.335 (2005) ("*Sprint-Nextel*") (*citing* Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21547 n.196 (2004)).

[29] 47 C.F.R. § 1.106(b)(1).

In those cases where a POFS application is granted shortly after the application is placed on an informational public notice, an adversely affected party may be able to demonstrate that it was not possible "to participate in the earlier stages of the proceeding."[30] For example, in the *Geodesic Order*, we exercised our discretion to consider Auburn's pleading as a petition for reconsideration and denied that petition on the merits.

Question 4 – Growth Channels – Request for Comment

Unlike the other questions addressed above, we believe it would be appropriate to seek comment on one of FWCC's questions concerning growth channels – frequencies that a party coordinates not for immediate use, but as part of its plans for future expansion.[31] FWCC's questions are, "When a party has coordinated growth channels, and another party seeks to license those channels, which party has the burden of showing need for the channels? What are the elements of a successful showing? Is there a fixed time limit for holding growth channels?" The relevant rules are Section 101.103(d)(2)(xi) and (xii) of the Commission's rules, which state:

> (xi) Parties should keep other parties with whom they are coordinating advised of changes in plans for facilities previously coordinated. If applications have not been filed 6 months after coordination was initiated, parties may assume that such frequency use is no longer desired unless a second notification has been received within 10 days of the end of the 6 month period. Renewal notifications are to be sent to all originally notified parties, even if coordination has not been successfully completed with those parties; and
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> (xii) Any frequency reserved by a license for future use in the bands subject to this part must be released for use by another licensee, permittee or applicant upon a showing by the latter that it requires an additional frequency and cannot coordinate one that is not reserved for future use.[32]

FWCC's first two questions regarding growth channels concern what is needed to make a showing that an applicant "requires an additional frequency and cannot coordinate one that is not reserved for future use."[33] In the *Geodesic Order*, the Wireless Telecommunications Bureau's Broadband Division interpreted Geodesic's filing of an application for a frequency as a demonstration of its need, stating: "If one party is willing to file an application and start the clock ticking on the construction requirement, and another party has not, then the former has shown a greater need for the frequency."[34] FWCC argues that this statement is inconsistent with the language of the rule because it puts the burden of a showing on the party holding the growth channel, whereas FWCC believes the rule puts the burden on the incoming user.[35] We disagree with FWCC's interpretation. The Broadband Division's decision in Geodesic was not intended to create a burden on the party holding the growth channel to make a demonstration that it should be allowed to keep the channel, and the rule does not contemplate comparative evaluation of each

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[30] *Id*.

[31] *See* FWCC Request for Declaratory Ruling at 7.

[32] 47 C.F.R. § 101.103(d)(2)(xii).

[33] 47 C.F.R. § 101.103(d)(2)(xii).

[34] *See Geodesic Order*, 29 FCC Rcd at 10434 ¶ 16.

[35] FWCC Request for Declaratory Ruling at 8.

party's need for a particular frequency. The decision in Geodesic simply articulated that filing an application in and of itself is sufficient to show that the applicant requires an additional frequency, which satisfies the first prong in Section 101.013(d)(2)(xii). In order to demonstrate that an applicant cannot coordinate a channel that is not reserved for future use, which is the second prong of the test in Section 101.103(d)(2)(xii), the Broadband Division of the Wireless Telecommunications Bureau has required an applicant to provide a statement from a frequency coordinator stating that it was not possible to coordinate a non-reserved channel. If the applicant shows that the applicant cannot coordinate a channel that is not reserved for future use and is prepared to file an application we believe that the rule requires that the party holding the growth channel must release it.

The second issue FWCC raises with respect to growth channels is whether there is a fixed time limit for holding growth channels. Previously, the Commission has interpreted Section 101.013(d)(2)(xii) of the Commission's rules to indicate that growth channels may be held for "months," "not years."[36] Further, the Commission has stated that "any party needing to hold growth channels for longer than six months must demonstrate a need for them in the event another entity is unable to clear another channel."[37] In 1999, in *Asia Skylink*, the Wireless Telecommunications Bureau's former Public Safety and Private Wireless Division found that a party could not hold growth channels for more than six years without offering a justification for its need for them.[38] In the *Geodesic Order*, the Wireless Telecommunications Bureau's Broadband Division required Auburn to relinquish its growth channels, which it had been holding for 2.5 years without building out the frequencies.[39]

FWCC suggests that the Commission's statements in the *Part 101 Report and Order* are inconsistent with the text of the rules because the rule does not contain any specific time limit on growth channels.[40] We disagree. While FWCC is correct that there is no specific fixed time limit in the rule, the rules clearly contemplate that there are limits to an applicant's ability to hold on to growth channels.

We ask commenters whether the Commission should contemplate commencing a rulemaking proceeding to establish a fixed time limit for how long parties may hold growth channels. Is there a widespread problem with applicants reserving growth channels that a fixed time limit would address? Would a fixed time limit place a burden on applicants who have a legitimate need to build large systems? Alternatively, what rule changes would commenters recommend that the Commission consider to modify its treatment of growth channels?

ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, that the Request for Declaratory Ruling filed by the Fixed Wireless Communications Coalition on October 23, 2014 IS GRANTED to the extent indicated above.

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[36] Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, 11 FCC Rcd 13449, 13473 n.102 (1996) (*Part 101 Report & Order*).

[37] *Part 101 Report & Order*, 11 FCC Rcd at 13474 ¶ 66.

[38] Asia Skylink, Inc., *Memorandum Opinion and Order*, DA 99-2965 (WTB PS&PWD rel. Dec. 23, 1999) (*Asia Skylink*) at ¶ 14.

[39] *See Geodesic Order*, 29 FCC Rcd at 10435 ¶ 18.

[40] FWCC Request for Declaratory Ruling at 8.

Procedural Matters

Pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, interested parties may file comments and reply comments on or before the dates indicated above. Comments may be filed by paper or by using the Commission's Electronic Comment Filing System (ECFS).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[41] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission

[41] 47 C.F.R. §§ 1.1200 *et seq*.

staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: Stephen C. Buenzow, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission, (717) 338-2647, Stephen.Buenzow@fcc.gov, or Brian Marenco, Policy and Licensing Division, Public Safety and Homeland Security Bureau, at (202) 418-0838 or Brian.Marenco@fcc.gov.

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