

# The Race to the 5G Auction Is on: Something for Almost Everybody in the Schedule

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On March 3, 2020, the Federal Communications Commission (“FCC” or “Commission”) released its [Report and Order and Order of Proposed Modification \(FCC 20-22\)](#) (respectively, the “C-Band Order” and the “Proposed License Modification”) realigning the 3.7-4.2 GHz Band in the contiguous United States and proposing to modify most of the satellite, earth station, and fixed service licenses in the Band. Adopted by a 3-2 vote along party lines at the FCC’s February 28 Open Meeting, the *C-Band Order* provides a regulatory framework to make 280 megahertz of spectrum available for auction to flexible terrestrial use. While there long had been no doubt that clearing and making available for auction hundreds of megahertz of mid-band satellite spectrum generally thought as ideal for 5G deployments would be the outcome, the two Democrats took the Commission’s Republican majority to task on legal, economic, and policy grounds over the decision. Commissioners Rosenworcel and Starks focused on the decision to require mandatory payments by auction winners to fixed satellite service (“FSS”) licenses that clear the spectrum early. In so doing, through lengthy and argumentative dissenting statements, the Commissioners outlined potential arguments for review of the *C-Band Order*.

Instead of focusing on the nuts and bolts of the new regulatory framework *per se*, this advisory looks at the *C-Band Order* and the *Proposed License Modification* from the standpoint of the aggressive schedule set up by the Commission. From this perspective, it is plain that there is a lot of heavy lifting remaining before the Commission can commence the auction of the 280 megahertz on the target date of **December 8, 2020**. And that assumes everything goes smoothly. Congress is still looking at the C-Band, although its attention has been heavily diverted these past few weeks, and only two weeks ago held hearings with strong questions for the FCC leadership. There remain prospects they will send the Commission back to revise what they have done. Further, various stakeholders might seek reconsideration or judicial review of the *C-Band Order*; there has been talk for several months that the satellite operators could challenge the Commission’s actions in court and might even seek a stay of the *C-Band Order* or the *Proposed License Modification*. And, of course, with all that remains to be done by spectrum users themselves in the coming eight-plus months before the auction can commence, which is reviewed below, there is the potential for the coronavirus to play a part in the schedule – no predictions there, but the prospects cannot be ignored, especially as the 3.5 GHz auction has been postponed by at least one month as of yesterday, as covered in a [Kelley Drye CommLaw Monitor post](#) of March 25, 2020.

## Clearing Deadlines

*Deadlines for Most Satellite Operations to Relocate Outside the 3700-4000 MHz Range*

To enable access by the eventual auction winners to the 3700-3980 MHz Band within CONUS, the Commission adopted a number of complex procedures governing the transition of virtually all incumbent space station and earth station operations in CONUS outside of the band, and an additional twenty megahertz guard band spanning 3980-4000 MHz. (See discussion regarding TT&C earth stations below.) Consequently, there is no transition for space station and earth station operations outside of CONUS. Affected incumbent space station operators, as defined in paragraph 116 of the *C-Band Order*, have **until December 5, 2025, at the outside** to clear the band.

However, the Commission adopted two Accelerated Relocation Deadlines in the *C-Band Order*, combined with guaranteed payments by auction winners to satellite operators who voluntarily elect to clear the band on a more rapid schedule, in order to create incentives for an even faster clearing of the band. (Satellite operators that do not elect to clear the band early will only be entitled to recover actual, documented relocation costs.) If enough of the five eligible satellite operators – Intelsat, SES, Eutelsat, Telesat, and Star One – make an election to clear within these elevated timelines, representing, 80 % of the total potential payments as set forth in the *C-Band Order*, then they will be eligible for accelerated payment as much as \$9.7 billion (assuming all Accelerated Relocation Payment conditions are satisfied). Given the math, the 80% condition is met only if both Intelsat and SES elect accelerated payments; the other three operators do not change the calculus.

In brief, if the 80% threshold is satisfied, eligible space station operators electing to receive the accelerated payments will have to meet the following schedule:

1. Phase I: in 46 of the top 50 Principal Economic Areas (“PEAs”), repack existing satellite service, and relocate incumbent earth stations throughout CONUS in that frequency range, from the 3700-3820 MHz Band into the upper 380 megahertz and provide earth station operators now operating in that range with passband filters to block signals from 3700-3820 MHz by **December 5, 2021**, and
2. Phase II: repack any existing satellite service and relocate associated incumbent earth stations throughout the CONUS from the 3820-4000 MHz range into the upper 200 megahertz of the C-band (4.0-4.2 GHz), and provide passband filters to block signals from the 3700-4000 MHz band to all associated incumbent earth stations in the contiguous United States by **December 5, 2023**.

Space station operators that elect to receive Accelerated Relocation Payments will, with limited exceptions, be solely responsible for relocating the satellite services out of the band on a timely basis, as summarized above, including responsibility for relocating its associated incumbent earth stations by the same deadlines. Failure to meet the deadlines will result in a partial or full loss of the full Accelerated Relocation payments for the space station operator, *e.g.*, a satellite operator meeting the Phase II deadline only will result in a reduced Accelerate Relocation Payment (the Phase II payments for each eligible space station operator that elects acceleration will be 75% of the total), although some of the Phase I payment may be salvaged if the Phase I clearing target occurs within six months of the Phase I deadline. The *C-Band Order* provides for incremental reductions of the Accelerated Relocation Payments if the deadlines above are missed but the required clearing and earth filter provision activity occurs **within 180 days of the deadlines**.

The *C-Band Order* provides that only transition delays that are beyond the control of an incumbent space station operator will not impact its ongoing eligibility for the accelerated relocation payment provided that it submits a notice and exception request with supporting documentation of any

incumbent earth station transition delays outside of its control to the Wireless Telecommunications Bureau (“WTB of “the Bureau”) **within seven (7) days** of discovering an inability to accomplish the earth station transition activity. The Bureau will then decide the request.

#### *Sunset Date for Incumbent Fixed Wireless Services in the Entire 3.7-4.2 GHz Band*

Incumbent Fixed Service point-to-point licenses through the entire 3.7-4.2 GHz Band will sunset as of **December 5, 2023**, limited to CONUS. This applies only to existing licenses as of April 18, 2018, as the Commission froze the granting of new licenses after that date. The *C-Band Order* provides that no new license applications will be accepted over the next 45 months within CONUS. Incumbent point-to-point fixed service links that transition to other bands will be entitled to reimbursement for “comparable facilities” in such other band, provided they relocate **by December 5, 2023**.

#### *TT&C Stations within the 3700-4000 MHz Range to Receive Extended Protection*

The *C-Band Order* provides particularized treatment for the fourteen unique locations used for TT&C (telemetry, tracking, and control) satellite functions in the 3.7-4.2 GHz Band. The Commission will require space station operators to identify four locations where these functions will be consolidated **as soon as possible** but in any event **no later than June 12, 2020**, either by consensus or, failing that, by Intelsat and SES each identifying two sites.

The *C-Band Order* states that such consolidation must occur **by December 5, 2021**, although operation after that date may be permitted by waiver or by contract with potentially affected flexible use licensees. **Until December 5, 2030**, operation of TT&C functions at the four consolidated locations will be permitted and will be protected from harmful interference from flexible use licensee operations. (At other TT&C locations, operations (both TT&C functions and other earth station functions) on a secondary, unprotected basis will be permitted after December 5, 2021, for another nine years.)

\* \* \*

Setting the long-term clearing regular and accelerated schedules aside, here are the important dates for the remainder of the year (excluding the auction related dates which will be in a forthcoming FCC release) as triggered by *Federal Register* of the C-Band Order and as otherwise set out by the Commission, in rough chronological order. Publication of the *C-Band Order* hasn’t occurred yet, but likely will happen in the near term – many of the filings discussed below, if made, will result in additional procedures and deadlines by which they will be resolved. In addition, the advisory addressees the deadline to be set by an upcoming Commission notice for earth station operators to select either lump sum payments for relocation reimbursement or to indicate they will document their relocation costs for reimbursement. Finally, the last section covers the complete lack of deadlines for the multi-stakeholder group discussed in the *C-Band Order* to consist of incumbent earth station and space station operators, wireless network operators, equipment manufacturers, and aeronautical and aviation interests to work cooperatively on spectrum coexistence issues.

## Dates Triggered by the Federal Register Publication

#### *Reconsideration and Judicial Review Opportunities*

All interested parties, whether FSS licensees, potential bidders, earth station operators, tech companies interested in point-to-multipoint (Microsoft, Google, and WISPA lost their bid for fixed-to-multipoint operators to access the spectrum not being auctioned on a shared basis), aeronautical interests, or others can seek reconsideration by the FCC of the *C-Band Order* and the new rules by the Commission **within thirty (30) days of its publication in the Federal Register** and can

petition for judicial review of the *C-Band Order* to a U.S. Court of Appeals **within sixty (60) days of the Federal Register publication**. If a party wishes to seek a stay of the *C-Band Order*, that will need to occur before it becomes effective, which occurs **thirty (30) days after publication in the Federal Register**.

#### *Protest of Proposed C-Band License Modifications*

The *C-Band Order* did not formally modify any existing spectrum licenses. In the *Proposed License Modification*, ¶ 409 of FCC 20-22, “the Commission proposes that the licenses and authorizations of all 3.7-4.2 GHz FSS licensees and market access holders; all transmit-receive earth station licenses [in the lower 300 MHz, presumably]; and all Fixed Service licenses [in the entire 500 megahertz] will be modified pursuant to the conditions specified in [FCC 20-22] at paragraphs 123-125, 321, 323, 325.”

The proposed modification would only apply to the contiguous U.S. (“CONUS”), and so would **exclude** Honolulu, Anchorage, Kodiak, Fairbanks, Juneau, Puerto Rico, Guam-Northern Mariana Islands, U.S. Virgin Islands, American Samoa, and the Gulf of Mexico. There will be no auction in these locations.

Further, only transmit-receive earth stations are mentioned because the Commission concluded in the *C-Band Order* that registered receive-only earth stations were not “licensees,” and thus they are excluded from the *Proposed License Modification*. However, registered earth station operations in CONUS must relocate out of the 3700-4000 MHz band as part of the preparation for access by flexible use licensees.

The license modification can, under the statute, only be made after notice and opportunity to protest is given. Consequently, the *Proposed License Modification* provides that “any FSS licensee, Fixed Service licensee, transmit-receive earth station licensee, or any other licensee or permittee who believes that its license or permit would be modified by [the *Proposed License Modification*]” will have **thirty (30) days after the Federal Register** publication to protest the proposed modification. Any proposed modification for which a timely protest is lodged will not become final unless and until the Commission orders otherwise.

If no protest is filed with respect to a given permit or license the FCC proposes to modify, the modification becomes effective **sixty (60) days after Federal Register publication**.

#### *Deadlines for Relocation Payment Clearinghouse Selection Committee Formation*

The *C-Band Order* directed that a single, independent Relocation Payment Clearinghouse will oversee, in a “transparent” manner, the cost-related aspects of the satellite services transition out of the 3700-4000 MHz Band. The FCC concluded that a search committee of nine members will select a Clearinghouse, ideally by consensus, but by vote if needed. The stakeholders each entitled to designate a search committee member will be Intelsat, SES, and Eutelsat; NAB, NCTA, and ACA; CTIA, CCA, and WISPA, to represent, with three members each, the satellite operators, incumbent earth stations, and prospective flexible-use licensees, respectively.

While the Commission recommended in the *C-Band Order* that the search committee convene by March 31, 2020, it requires that it convenes **within 60 days after publication of the C-Band Order in the Federal Register**.

#### *Effective Date of Rules – Some Will Be Delayed Pending OMB Review*

While it is too early to suggest that the coronavirus pandemic will have an impact on the timing of

the 3.7-4.2 GHz auction, there is still something of a race against time. Generally, the *C-Band Order* provides that the Commission's new rules for the 3.7-4.2 GHz Band will be **effective 60 days after publication in the Federal Register**. However, the ordering clauses make clear that there will be numerous exceptions – many of the rules affecting key dates above contain new or modified information collection requirements, mandating Office Management and Budget (“OMB”) review under the Paperwork Reduction Act (“PRA”). Comment on these rules for PRA review purposes is sought through **Federal Register notice that sets comment deadline**. Rules requiring OMB review are effective only after OMB approval and a subsequent notice is published in the Federal Register by the Commission.

The rules whose effectiveness is delayed are spelled out in paragraph 407 of the *C-Band Order*. They include the rules setting many of the near-term deadlines discussed below, including those concerning the filing of Accelerated Relocation Elections by space station operators (May 29), the filing of Transition Plans (June 12), certain aspects of the Relocation Coordinator selection, earth station operators' election whether to accept the lump sum reimbursement amount per earth station.

On March 26, 2020, in the [Federal Register](#) its notice seeking comment on several rules for purposes of OMB review. The comment date is **Monday, April 27, 2020**. The select rules for which the Commission seeks emergency review require “eligible space station operators” that elect to commit to clear satellite operations in the 3700-4000 MHz band on the accelerated schedule set out in the *C-Band Order* in exchange for accelerated relocation payments to make their written election with the Commission by **May 29, 2020**. Further, all space station operators with operations in the 3.7-4.2 GHz Band must submit their transition plans by which they would clear the band, whether on the accelerated or regular schedule, by **June 12, 2020**. The Commission hopes for expedited OMB review to permit these rules to become effective in a timely fashion and keep the rest of the schedule, which we describe in detail in a companion post, intact.

## Deadlines with Specific Dates

### *Competitive Bidding Procedures and Dates*

In a March 3, 2020, [Public Notice](#), adopted as a companion item to FCC 20-22 at the February 28 Open Meeting, the FCC sought comment on proposed competitive bidding procedures, wherein up-front payments from bidders, minimum opening bids, and other procedures will be finalized. The Commission set deadlines of **May 1 and May 15, 2020**, for comments and reply comments on the *Public Notice*.

### *Qualifying for Accelerated Relocation Payments*

In order to be eligible for Accelerated Relocation Payments, Intelsat, SES, Eutelsat, Telesat, and Star One must file in Docket No. 18-122 an Accelerated Relocation Election. By **May 12, 2020**, the WTB will prescribe the “precise form” of an Accelerated Relocation Election.

A satellite operator's Accelerate Relocation Election, if it chooses to make one, will be public and irrevocable and is due **by May 29, 2020**. (Note that the Commission is seeking to expedite Office of Management and Budget review of the rule setting this date to keep the entire schedule on track leading up the December 2020 auction. The Notice seeking comment on the rule under the Paperwork reduction Act was just published on March 26, 2020, with a comment date of April 27, 2020.)

By **June 5, 2020**, the WTB is to issue a Public Notice announcing whether sufficient elections have

been made to trigger early relocation or not – as a practical matter, both Intelsat and SES must elect to relocate early if the threshold of 80% of Accelerated Relocation Payments is to be met. These two space station operators account for almost 90% of the total early relocation payments provided for in the *C-Band Order*.

#### *Deadlines for Relocation Payment Clearinghouse Selection Committee Action*

The Relocation Payment Clearinghouse selection committee (*see above*) must notify the FCC of the detailed selection criteria the committee will use for the position of Clearinghouse **no later than June 1, 2020**, although the *C-Band Order* provides considerable guidance on what the criteria should cover.

By **July 31, 2020**, the search committee must notify the Commission of its consensus choice for the Clearinghouse or it will be reformed by the Commission, after two of the nine members are dropped from the committee by lot, and the seven remaining members will be required to choose a Clearinghouse **by majority vote by August 14, 2020**.

#### *Deadlines for All Space Station Operator Transition Plans and Comments*

Each space station operator, whether electing early relocation payments or not, must file **by June 12, 2020**, a Transition Plan describing necessary steps and estimated transition costs to clear 3700-4000 MHz Band by the Accelerated Relocation Deadlines or the December 2025 relocation deadline, based upon its elections. Each Transition Plans will be made publicly available and interested parties, including incumbent earth station operators, will have an opportunity to comment on them **by July 13, 2020**, following a WTB Public Notice to be issued detailing the comment process.

#### *Relocation Coordinator Selection*

The *C-Band Order* provides for a Relocation Coordinator to ensure relocation activity is occurring in a timely manner per the deadlines adopted by the Commission, whether under the accelerated or regular deadlines. Where sufficient space station operators elect relocation in an accelerated time frame, a search committee made up of the electing operators will be convened. (Earth station operators will not be represented on the search committee.).

While the *C-Band Order* provides for no deadline for this search committee to convene, the committee is to notify the Commission of its choice of Relocation Coordinator **by July 31, 2020**, after which the WTB will issue a Public Notice seeking comment on whether the committee's choice meets the criteria for the Coordinator set out in the *C-Band Order*. If the Bureau finds that the committee's choice does not meet the criteria, the committee will be sent back to the drawing board by the Bureau, apparently with a new deadline set by the Bureau, although the *C-Band Order* is not entirely clear on this point. Specifically the Commission provides that a failure by the committee to make a selection by July 31, or if there are an insufficient number of space station operators electing accelerated relocation payments, the Commission itself will procure the Relocation Coordinator through a process to be established by the Office of Managing Director of the FCC and to be executed by the WTB.

#### *Auction Commencement*

The Commission expects the bidding for twenty-megahertz-wide licenses in the 3.7-4.2 GHz Band (Auction 107) to commence on **December 8, 2020**. The Commission proposes that, acting through the Office of Economics and Analytics ("OEA"), in conjunction with the WTB, it retains the discretion to delay, suspend, or cancel the auction "in the event of a natural disaster, technical obstacle, network interruption, administrative or weather necessity, evidence of an auction security breach or

unlawful bidding activity, or for any other reason that affects the fair and efficient conduct of competitive bidding.” While the proposed auction start date is more than eight months away, the first test of whether the coronavirus will have an impact on the Commission’s auctions will come in less than three months, as the Commission’s auction of the 3.55-3.65 GHz Band (Auction 105) is slated to begin June 25, 2020.

#### *Space Station Operator and Relocation Coordinator Status Reports*

Beginning on **December 31, 2020**, and continuing until the transitions are complete, space station operators and the Relocation Coordinator are each required to file quarterly reports on progress of the transition. The *C-Band Order* encourages the filing of joint reports by the space station operators, but it is not required. The WTB is to issue a Public Notice specifying the form and format of the quarterly reports.

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## Deadlines to Be Triggered by FCC Notice

#### *Deadline for Earth Station Operators to Elect Either per Station Relocation Cost Reimbursement Versus Lump Sum Payments*

Earth station operators of registered stations in the 3700-4000 MHz Band are entitled to reimbursement for relocation, but the *C-Band Order* imposed a number of conditions. Such operators face a choice: they can accept reimbursement for the actual documented reasonable relocation costs of each earth station that maintains satellite reception and is relocated to the 4000-4200 MHz range, or they can accept a reimbursement for *all* of their incumbent earth stations (within CONUS) based on a per station amount (i.e., lump sum) to be established by the WTB for various classes of earth stations—e.g., MVPDs, non- MVPDs, gateway sites—as the Bureau deems appropriate.

The Commission imposed no deadline on the Bureau to announce the per earth station lump sum (and the process for electing lump sum payments), provided that earth station operators interested in the lump sum will have to make that election **within 30 days after release of the WTB’s announcements**. The *C-Band Order* also provides that their election will have to indicate which earth stations will be transitioned to the upper 200 megahertz in order to maintain C-band services or will discontinue C-band services.

## Tasks without Clear Deadlines

#### *Multi-Stakeholder Technical Group Formation and Completion of Work*

There are none. The *C-Band Order* reflects a “belief” that a multi-stakeholder group consisting of “incumbent earth stations (including MVPDs and broadcasters), incumbent space station operators, wireless network operators, network equipment manufacturers, and aeronautical radionavigation equipment manufacturers” would have the ability to “provide valuable insight into the complex coexistence issues in [the 3.7-4.2 GHz Band] and provide a forum for the industry to work cooperatively towards efficient technical solutions to these issues.” But while “encouraging” and even expressing an “expectation” that such a group would form, the Commission declined to convene such a group, in sharp contrast with the [draft Report and Order](#) (FCC-CIRC2002-01) made public just three weeks before which, in paragraph 296 of the draft, would have had the WTB and the Office of Engineering and Technology (“OET”) convene and oversee the activities of such a group, make findings, and issue reports on “a framework for interference prevention, detection, mitigation, and enforcement in the 3.7-4.2 GHz band.” This mandate was replaced with mere encouragement

and a “direction” to OET to act as liaison for the Commission with any such multi-stakeholder group and provide guidance on those “topics on which it would be most helpful for the Commission to receive input and a sense of the time frames in which such input would be helpful.”