

12-1994

# FCC Licensing: From Comparative Hearings to Auctions

Jonathan Blake  
*Covington & Burling*

Follow this and additional works at: <http://www.repository.law.indiana.edu/fclj>

 Part of the [Antitrust and Trade Regulation Commons](#), and the [Communications Law Commons](#)

## Recommended Citation

Blake, Jonathan (1994) "FCC Licensing: From Comparative Hearings to Auctions," *Federal Communications Law Journal*: Vol. 47: Iss. 2, Article 7.

Available at: <http://www.repository.law.indiana.edu/fclj/vol47/iss2/7>

This Essay is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Federal Communications Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# FCC Licensing: From Comparative Hearings to Auctions

Jonathan Blake\*

The way in which the Federal Communications Commission (FCC or Commission) determines who, among competing applicants, will receive licenses for radio frequencies has a profound impact on how spectrum-based businesses and services are regulated. The FCC's choice of a licensing mechanism not only permeates the entire regulatory fabric of our communications industries, arguably the most important of the twenty-first century; it also reflects our society's priorities. A survey of how other countries award licenses, which is beyond the scope of this essay, reinforces this view.

Auctions are the latest licensing mechanism of choice, but they have not altogether replaced the earlier licensing mechanisms of comparative hearings and lotteries, which continue to be available when the FCC is required to use them or believes it is appropriate to use them.

Much ballyhooed, the new auction process is, legally, much less extensive in scope than some believe. For example, Blair Levin, Chief of Staff to FCC Chairman Reed Hundt, at the opening of the first-ever FCC auction process on July 25, 1994, stated that auctions inaugurate a new era in which the government no longer will tell prospective users of spectrum how they can use it; users will decide for themselves. In fact, however, the auction mechanism applies only to the third step in the three-phase process that Congress has entrusted to the FCC and does not permit licensees to decide how they will use spectrum. Still, there is pressure to break down this barrier, and in recent years, the FCC has drafted its use requirements

---

\* The Author is a partner at Covington & Burling where he has practiced communications law for 30 years. He was President of the Federal Communications Bar Association in 1984-85 and is currently Chair of the ABA International Telecommunications Committee. He is a graduate of Yale Law School, where he was on the *Yale Law Journal*, and of Oxford University, where he received degrees in jurisprudence and was a Rhodes Scholar.

more and more broadly, thereby giving licensees more flexibility to respond to consumer preferences.

The first step is the decision as to what generic uses specific frequency bands can be put. In this first, or "allocation," phase the FCC continues to decide that a certain amount of megahertz located in a certain portion of the spectrum can be used for cellular telephone service or radio broadcasting or taxi dispatch service. As new uses for the spectrum are discovered or invented, spectrum has to be found to accommodate them. Fortunately, scientific advances also are allowing the use of spectrum that could not previously have been used or allow it to be used more intensively than in the past. Both kinds of breakthroughs make room for new spectrum uses and generate new allocation decisions.

A second step which is needed only in some services, most notably broadcasting, is the allotment process. Thus, if the FCC has decided to allocate some 400 MHz of spectrum for television use nationwide, it must still decide whether Channel 9 will be used in Baltimore, Washington, or Richmond.

The last step, the assignment or licensing process, occurs only after the frequencies have been allocated and allotted. Then, it is necessary to license them to the public. It is at this stage that the FCC uses comparative hearings, lotteries, or auctions to choose among competing applicants.

The premise of the comparative hearing process was that because the airwaves are public property, the government should license them so as to most benefit the public. Using the public interest as its touchstone, the FCC should decide how they should be used (allocations), where they should be used (allotments), and who should be licensed to use them (assignments).

Eventually cracks in that model began to appear. When the FCC made clear how it would choose among competing applicants, applicants naturally structured themselves to earn high scores under these criteria. Applicants made promises about programming and ownership that they did not live up to at all, or not for long. It also meant that all applicants began to look alike; they all received high marks. So, the FCC stretched to make distinctions based on tenuous, insignificant grounds, such as the famous case where one applicant for a broadcast station received a hearing advantage because it promised more restroom facilities than its adversary.

Another problem was time and expense. With three rounds of agency decision making—before an FCC administrative law judge, the Review Board, and the Commissioners themselves—plus review by the court of appeals, the comparative hearing process often required more than a decade and a ton of money.

Judge Leventhal, in a noted case, observed that the comparative hearing approach might be suited to achieving a pool of high-quality applicants, but perhaps a lottery process would be just as effective and less expensive and time-consuming where the differences between the best two or three applicants were insignificant.

It is not clear whether this was intended as a legislative proposal, but certainly it was the rationale for many congressmen, particularly those who had a lingering faith in government's role, who voted for lotteries as a tie-breaking mechanism to be used by the FCC where two or more applicants were equally qualified. This pragmatic approach to lotteries was also expressed by commissioners confronting the task of picking between equally well-qualified cellular applicants.

But pragmatism was not the rationale of others who supported lotteries as a licensing mechanism. President Reagan, his first FCC Chairman, Mark Fowler, and his successor, Dennis Patrick, profoundly distrusted government's ability to make licensing decisions. When Chairman Fowler spoke of television as a toaster with pictures, he meant many things. But one of them was that the government should have no greater regulatory role with respect to television than with respect to toasters, except as required by technical considerations. In fact, the FCC used lotteries not for a tie-breaking function but to pick among scores of applicants, with only the winners having to be found minimally qualified.

As with comparative hearings, but at a much quicker pace, serious shortcomings with the lotteries emerged, first and foremost in the cellular lotteries. It became almost immediately apparent that they encouraged speculation. Applications were filed by those who did not wish to construct and operate cellular systems and probably could not have done so. Schemes to "game" the lotteries mushroomed. Rules to prevent this were devised, but the gaming was often one step ahead of the regulations. The process of resolving disputes about whether improprieties had occurred posed its own adjudicatory headaches and delays, and generated its own abuses. Thus, at one point, a third of the rural cellular licenses were being held up because of disputes. Lotteries had not turned out to be so much faster or cheaper than comparative hearings.

Moreover, because lotteries were every person's chance for a big payoff and winners routinely sold their licenses as soon as possible to real operators, it was soon observed that lotteries led to private auctions. In turn, this led to the question: why shouldn't the government conduct the auctions? Under such a system, the government, not lucky lottery winners, would reap the value of the spectrum on behalf of the public to whom it

belonged, and the delays and controversy surrounding lotteries would be avoided.

Furthermore, this was the policy goal that Chairman Fowler had really been after all along, not so much to raise money for the government, but because he believed that, according to the laws of the marketplace, the highest bidder would best use the spectrum in the public interest. This repudiated the principle of government as decision maker on which the comparative hearing mechanism had been based.

Reluctantly and because of fiscal needs, Congress authorized auctions on a permissive basis, only for five years, and not for broadcast frequencies. But even Congress was thrilled by the first auction results, and the momentum toward making auctions permanent and expanding their scope was palpable and immediate.

Within two days of the second set of auctions, however, some of their potential for abuse emerged. Winning bidders balked at making payments, and the FCC soon announced that it was investigating the possibility of collusion and other bidding abuses.

Another defect had been apparent from the outset and had been addressed somewhat by the auction legislation. Auctions could turn spectrum-based businesses into a bastion of the most well-financed, often incumbent companies—companies that might even be willing to make premium bids to acquire spectrum that otherwise might be used for innovative new services competitive with the services the established players were already operating.

With the seeming blessing (though not unmixed or specific) of Congress, the FCC addressed this problem by constructing various advantages in the broadband personal communication services (PCS) auctions for small businesses, rural telcos, minorities, and women. Some argue that these advantages are not sufficient; others argue they go too far; still others claim that they will lead to shams, with powerful incumbents controlling these so-called designated entities through various investment mechanisms. The debate recalls the effort in broadcast comparative hearings to give hearing merits to applicants that included minority owners/managers. The policy worked in the sense that many winners of comparative hearings contained minority owners/managers. But early ownership shifts by winning applicants were common. The result was that meaningful, long-term minority participation was not greatly enhanced.

Another problem with lotteries and auctions is that they provide no assurance that the best service will be rendered to the public. Arguably, a local or national PCS system, to take one example, is important to the

public and should not be entrusted to a blind choice determined only by the size of the competitors' bids.

The auction apologists would argue that the government *should* set high qualifying standards and tough performance requirements to ensure that good systems and service will result, whoever is the highest bidder. But the FCC has not and probably will not do so. The emphasis on raising money is too single-minded, notwithstanding Congress's express direction to the FCC that only public interest factors, not monetary considerations, should direct the FCC's implementation of its auctioning authority.

However, the FCC's modest standards for applying for, constructing, and operating new spectrum-based services like PCS will be invoked in petitions to deny the applications of winning bidders. Once again litigation expense, delay, and abuse will be introduced into the process.

Shams, collusion, trafficking, nonperformance, delays, litigation expense, and poor quality service will, therefore, be part of the auction experience. Excessive bidding will add its own peculiar pressures to these tendencies. Requests for delays in meeting payment obligations have already been made. Winning applicants that have overbid may ask to be excused temporarily or indefinitely from construction deadlines or coverage or other service requirements. They may ask permission to dilute their minority or female ownership because the total financial burden is greater than they expected, and new nonminority and nonfemale funding will be needed to survive. Winning applicants may also seek to use their frequencies for different purposes than those for which they were allocated.

Auctions, in short, will breed their own problems, and though the solutions proposed for these problems may in some circumstances be market-based, still the government must select, craft, and implement them. No solution is problem-free: all licensing mechanisms contain the potential for abuse. The search for a risk-free mechanism is illusionary. Better to knuckle down to the difficult responsibilities of implementing an imperfect process than to proclaim the arrival of the millennium.

Undoubtedly, the choice of auctions will have ramifications well beyond licensing. The comparative hearing process led to an absurd preoccupation with licensee performance—counting the seconds of program material devoted to public affairs topics, interviewing leaders in sixteen categories of public life, etc. The lottery heyday was characterized by nihilism. Even those few regulations that remained on the books were enforced only grudgingly, if at all. For example, the FCC took thirteen months after a decision to impose must-carry rules on cable television systems to craft that decision, and the forty-page decision mentioned the

public interest only once. Many speculated that even that was an oversight. Not surprisingly, the decision was overturned by the courts.

In the auction era, where dollars are equated with public worth and maximizing dollars will be the most important criterion, there will be strong pressure to also base allocation and allotment decisions on this standard. Public television, which received one-third of the station channels allotted in the 1950s and 1960s, would not be so fortunate today. Police and fire departments still have enough political clout to gain access to spectrum. But others who propose new services will have to produce dollars quickly if they expect to gain entry to radio frequencies. The whole notion of public service and the public interest will be eroded, except in the case of broadcasting where specific provisions have been legislated—indecentcy, equal employment opportunity (EEO), drug convictions, alien ownership, children's programming, and political material.

Auctions, in other words, will generate their own serious problems which should not be underestimated or denied. It seems that the task of government has become so daunting that we anoint a few constituencies with very pressing needs, give them special leverage, and throw everything else back on the market. Perhaps this is the way to go, but a better guess is that auctions are only the latest step in the ongoing dialectic and that we will continue to struggle toward a balance between private initiative and public oversight.