

## Utilities Must Track FCC Licensing, Spectrum Issues

By **Jacqueline Java** and **Catherine McCarthy** (October 25, 2019, 3:16 PM EDT)

Even though utilities are recognized as being subject to significant government regulation, when you think about federal regulation that affects power, gas and water companies, Federal Communications Commission regulation does not instinctively come to mind.

However, many energy and water companies rely on FCC licenses for critical communications needs, such as remotely monitoring and/or controlling equipment, gathering data related to services or operations, and coordinating the activities of workers and machines on location. These licenses create ongoing compliance concerns for all FCC licensees, including utilities.

It is important for FCC licensees to monitor FCC proceedings on an ongoing basis, to ensure that any proposed changes to FCC requirements will not interfere with a company's use of their FCC licenses in their day-to-day business activities. Changes could result in a material disruption to a utility's operations.

As an example of ongoing FCC licensee compliance issues, this article examines FCC authorization requirements that arise in many utility merger and acquisition transactions. Additionally, it examines an emerging issue that could affect utility operations that rely on FCC licenses in the 6 gigahertz band of spectrum, where utilities operate microwave communications systems to ensure grid stability and reliability.

As FCC licensees, one ongoing regulatory compliance responsibility for many power and gas utilities is the requirement to seek and obtain FCC consent prior to assigning or transferring control of an FCC license. This is typically triggered by a merger or acquisition. Although the process is generally straightforward, the requirement is often overlooked until the last hour, and in some cases, is not discovered until after the transaction has closed. Another time these mandatory prior authorizations may be overlooked is during internal corporate reorganizations.

For certain FCC licenses, the entire prior approval application process for an assignment or transfer of control may take only a few days, but in some instances, this process can take several weeks or more, depending on the types of licenses involved or if the licenses are not up to date. For example, licensees are subject to certain construction, notification and renewal requirements on an ongoing basis.



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Failure to obtain FCC consent for a proposed transaction can result in hefty fines. And no utility company should risk the reputational damage from news reports of an FCC civil penalty related to a violation of the Communications Act if it can be easily avoided by keeping up with FCC requirements.

Further, FCC license issues have the potential to cause difficulties and delay for future transactions, if the parties are required to obtain approval for a past transfer or assignment before proceeding with a proposed transaction. That is because the old overlooked transaction needs to be authorized first, before the FCC will grant consent to a new proposed transaction. Also, in the merger and acquisition context, missed prior approvals could signal to counterparties that there might be a larger issue with the company's culture of compliance (i.e., is this noncompliance event evidence of a pattern that the counterparty should be concerned about?).

In some cases, transacting parties may consider cancelling an FCC license in lieu of filing for a transfer or assignment (particularly where a license is not up to date, or in the case of missed approvals for past transactions). However, in our experience, the typical energy company quickly realizes how critical the licenses are to their day-to-day operations — there is usually no easy workaround.

Thus, it is imperative for energy companies to consider, in the early stages of a proposed merger or acquisition, whether the assets or entities to be acquired utilize FCC licenses, and if so, confirm whether those licenses are up-to-date (i.e., all buildout and notification requirements have been satisfied, and prior assignments or transfers were properly authorized). This will help to ensure the FCC approval process does not become a gating item for closing a deal.

In addition to continuing to satisfy current FCC requirements, utility companies should track ongoing FCC proceedings to ensure that FCC proposals do not threaten a utility's ability to continue to rely on its FCC licenses. A good example of such an emerging issue arises in the context of developments related to licensing of the 6 GHz spectrum band.

The criticality of spectrum, particularly for energy and water companies, has become a front and center issue recently due to an October 2018 FCC proposal to make up to 1200 megahertz of spectrum in the 6 GHz band (5.925–7.125 GHz) available for use by unlicensed devices to enhance U.S. WiFi capabilities. Currently, the 6 GHz band is reserved for licensed use only, including by many critical infrastructure industry players.

Utilities operate extensive microwave communications systems in the 6 GHz band to ensure grid stability and reliability. Two critical applications include teleprotection — which monitors the health of transmission lines between substations — and SCADA telemetry — which monitors power flow across the grid and enables control of transmission and distribution switchgear to maintain grid equilibrium. Similar communications systems are also used to continuously monitor the safety and reliability of gas and water pipelines.

According to the FCC, the proposed rules are designed to allow unlicensed devices to operate in the 6 GHz band without interfering with the operations of licensed services. Unlicensed users would mitigate interference through the use of an automated frequency coordination system. The FCC has publicly indicated a desire to move quickly with this rulemaking, to further its goal of making broadband connectivity available to all Americans.

Entities such as the Edison Electric Institute, or EEI; the National Rural Electric Cooperative Association,

or NRECA; and the Utilities Technology Council, or UTC — among many others representing current 6 GHz licensees — have weighed in on this issue extensively, filing comments and initiating ex parte communications with the FCC. These commenters are concerned with the potential interference from unlicensed operations, and the threat presented to the performance of critical systems — and have stressed that as providers of vitally important services to the public, utilities cannot tolerate even the slightest risk that their communications systems could be degraded.

UTC is particularly well situated to weigh in on these issues. UTC was founded in 1948 to “advocate for the allocation of additional radio spectrum for power utilities.” Among others, UTC currently represents electric, gas and water utilities and natural gas pipelines.

On June 27, the Federal Energy Regulatory Commission convened a technical conference to discuss issues related to the reliability of the bulk power system. Panelists, including Joy Ditto, president and CEO of UTC (soon to be president and CEO of the American Public Power Association), and J.P. Brummond, vice president of business planning at Alliant Energy, speaking on behalf of EEI, explained the importance of mission-critical communications to the bulk power system, and expressed concern that the FCC’s proposed automated frequency coordination system intended to mitigate interference in the 6 GHz band remains untested and unproven.

Ditto stressed that, if the band would not be reserved solely for licensed use, interference-mitigation measures must be fully tested in the field — not just in a lab — and proven to work before the implementation the new rule, which would require an extension of the FCC’s timeline for this matter.

Following the technical conference, EEI, NRECA and UTC jointly filed comments with FERC, requesting that FERC coordinate directly with the FCC on this critical issue, and also sent a letter to the U.S. Department of Energy asking for DOE to weigh in. Shortly thereafter, Bruce Walker, Assistant Secretary of the Office of Electricity at DOE, sent a letter to FCC Chairman Ajit Pai, stressing that it is imperative that adequate testing of automated frequency coordination be done and other safeguards be put in place before changes to the 6 GHz band occur, and offering DOE resources to aid in the process.

DOE also requested that the FCC consider spectrum bands outside of 6 GHz to increase WiFi capabilities, and not risk the reliability of the U.S. power, natural gas and water industries. The final decision on the FCC’s 6 GHz proposal is not expected until later this year at the earliest, and it is unknown if the FCC will respond to utility concerns in its rollout.

The two issues discussed in this article illustrate the need for utilities to focus on FCC regulation, even if other state and federal regulatory issues, such as rate regulation, are more critical from the company’s standpoint. FCC license issues could delay a merger, raise concerns during due diligence and/or result in an FCC penalty for failing to seek approval, potentially causing reputational issues. It is also important for companies to recognize that its licenses are likely essential for day-to-day operations. Thus, in addition to continuing to comply with ongoing FCC requirements, it is critical to track FCC developments to ensure that use of the licenses is not disrupted.

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