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FHH Telecom Law

Current Issues in Telecommunications Law and Regulation November 2007

Concentrate and ask again later

700 MHz Picture Becomes Clearer, Murkier

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Whatever happened to the days when the FCC opened a rulemaking proceeding, got comments from the public, adopted an order, and implemented it? We seem to have entered an Age of Uncertainty when rules continue to be tweaked and adjusted right up to – and sometimes beyond – their effective date. Nothing ever seems to be totally, finally, once-and-for-all settled.

The latest case in point is the FCC's 700 MHz auction rules. It is hard to believe, but the FCC had actually adopted "final" rules for the 700 MHz Upper Band more than two years ago. All that remained was for the service rules and the auction procedures for the band to be announced so that an auction could be held no later than January, 2008, as required by Congress. Instead, once the DTV transition became fixed and the prospect of vast newly virgin spectrum became real, the proceeding became a free-for-all, with virtually every major telecom player trying to nudge the band plan, service rules and auction procedures in its own direction. The result has been a gradual crystallization of the rules as the January deadline has approached, but every new decision elicits new cries for change by the interested parties.

Faithful readers will recall that the FCC issued a massive tome on the 700 MHz rules in April, followed by another massive tome in August, now followed by yet another, slightly less massive, tome in October. The first tome laid out the basic options to reallocate the 700 MHz band.

Then the Google and Frontline proposals to set aside part of the spectrum for their desired uses surfaced and got considerable traction. The FCC therefore re-

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Comments invited

2155-2175 MHz: Up For Grabs, But How?

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On the heels of rejecting M2Z Networks' (M2Z's) proposal to develop a nationwide broadband network in exchange for free spectrum, the Commission took the next step in deciding how to distribute the prime real estate located in the 2155-2175 MHz band. The Commission issued a Notice of Proposed Rulemaking (*NPRM*) on September 19, 2007, seeking comment on several possible options. An M2Z appeal to the U.S. Court of Appeals did not slow the Commission's momentum in moving forward with alternate proposals.

The offer by M2Z to provide a free, nationwide, wireless network using the 2155-2175 MHz band was undoubtedly a unique one. The Silicon Valley outfit headed by former Wireless Telecommunications Bureau Chief John Muleta drew considerable attention and led to a bevy of lobbying in the Commission offices upon the filing of its application.

The FCC Commissioners recognized that the 2155-2175 MHz band holds a vast array of opportunities as an avenue to provide free broadband service nationwide. What is uncertain is what method of distributing the spectrum is most sound from a legal and policy standpoint.

The M2Z proposal, along with similar pitches by NetfreeUS and five others, generated a steady buzz within the communications industry because of their novelty and the interesting issues they raised. But ultimately, the proposals were struck down by the Commission as being counter to the Communications Act, which requires an auction to select among competing applicants.

Rather than giving the spectrum away for free, it ap-

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Car 54, where are you?

E-911 Benchmarks Ratcheted Up

Phase II compliance to be based on PSAP levels

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The FCC has set new Enhanced 911 (E-911) compliance benchmarks for wireless cellular carriers that require full implementation by September, 2012. These new requirements are designed to spur further implementation of phase II E-911. The new compliance metrics have predictably been criticized by wireless carriers and cheered by public safety interests.

The Commission's latest order significantly tightens carriers' E-911 obligations. In phase I of E-911 implementation, carriers would provide public safety answering points (PSAPs) a subscriber's callback number and the cell from which the call originated. Phase II of the E-911 implementation plan called for cellular carriers to provide PSAPs with the specific geographic location of a 911 caller within several hundred meters. For providers employing a GPS-based solution, the required accuracy was within 50 meters for 65% of their customers and 150-300 meters for 95% of their customers. For providers employing a network-based (*i.e.*, triangulation) approach, the required accuracy was 100 meters for 65% of their customers and 300 meters for 95% of their customers.

The catch was that, prior to the FCC's latest order, compliance with phase II could be measured over a geographic region of the carrier's own selection. This would permit a carrier with virtually 100% accuracy in urban areas to average that performance against poorer accuracy in rural areas, thus still meeting the 95% accuracy benchmarks. But as Chairman Martin observed, a carrier's E-911 performance in Manhattan is of little use to public safety officials in Buffalo.

Under the new rule, carriers will not be able to boost their averages to meet the phase II benchmarks for compliance by aggregating areas with low-percentage results and areas with high-percentage results. Carriers must now demonstrate phase II compliance by meeting the accuracy standards at the PSAP level, as opposed to averaging over a state or region.

The Commission also instituted a timeline for compliance and reporting requirements. By September 11, 2010 carriers must meet their accuracy requirements for at least 75% of the phase II-ready PSAPs within the carriers' coverage areas, and 100% of the PSAPs within their coverage areas by September 11, 2012. Additionally, carriers must file annual progress reports beginning September 11, 2008.

The Commission did not mandate a specific new technological approach, as requested by some commenters. Further, the FCC limited the phase II reporting to areas served by phase II-ready PSAPs. Some PSAPs are struggling to find funding to upgrade their systems to receive phase II data and, therefore, would not be included.

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Email addresses to go?

Address Portability Pondered

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The FCC wants to know if Internet service providers (ISPs) should have to offer "email address portability," thus allowing a subscriber to keep the same email address when changing ISPs – say, from AOL to Verizon. The old ISP would have to forward incoming email to the subscriber-chosen new address.

The idea comes to the FCC in a petition for rulemaking, whose author tells a sad story. She ran a small business from her home, using an AOL account opened by her then-teenage son and paid for on her own credit card. AOL closed the account suddenly and without notice, she says, allegedly on the ground that it had been opened by a minor, even though the petitioner's son had since turned 18. The closure resulted in loss of the petitioner's stored emails, contact information, saved documents, stored websites, etc., associated with her AOL screen name. Clients were unable to reach her, and she was unable to reach them to pass on a new email address.

The petitioner likens her request to the FCC's imposition of telephone number portability, which lets customers change phone companies and keep the same number. But the analogy goes only so far. After a change in telephone numbers, the old phone company is completely out of the loop. Email forwarding, in contrast, would require the old ISP to continue providing service to non-paying former customers.

ISPs may question whether the FCC has the legal authority to provide the requested relief. And they may note that the petitioner could have avoided the problem altogether by registering her own domain name (like our fhhlaw.com) and using that for her email address. While most domains must be serviced by an ISP, they are easily moved from one ISP to another, leaving the email address unchanged.

Reply comments are due on November 26.

No roamin' holiday

FCC Mandates Automatic Roaming By CMRS Carriers

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Smaller CMRS carriers were able to breathe a sigh of relief this summer when the FCC at long last concluded that roaming is indeed a common carrier service. As we have noted several times in recent issues, the status of roaming has been in regulatory limbo for two decades, and it was therefore unclear whether a small carrier could charge a larger carrier with a violation of the Communications Act if the larger carrier failed to offer automatic roaming at reasonable and non-discriminatory rates. After mulling over the issue for about eight years, the FCC finally responded to complaints from small and regional carriers that they were getting the back of the hand from the majors when they asked for automatic roaming agreements. Because the majors now have such large nationwide footprints of their own, they have had little incentive to reach roaming agreements with small carriers who may be their competitors in some markets. By ruling that roaming is a common carrier offering, the FCC brought this service squarely within the ancient obligation familiar to common carriers of a certain age: rates must be just, reasonable and non-discriminatory.

That and 25 cents (or a buck fifty at Starbucks) will get you a cup of coffee. The obligation to provide automatic roaming now will get you in the door with a big carrier, but the FCC declined to provide any guidance on the rates that can be charged once you're in there. It refused to require roaming rates to be disclosed, so it may be tough to tell whether the rate you are being offered is worse than the rate being offered to your similarly situated but more favored neighbor. In the Golden Age of rate regulation, rates had to be filed in things called tariffs, so everybody knew what rates were being offered. A complaining carrier not only has to show that he was offered a discriminatory rate, but he must also show that the

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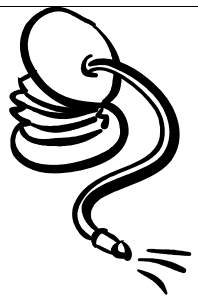

"Traffic pumping" scrutinized

FCC Acts On An Allegation Of LEC Self-Stimulation

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Recently, the FCC released an Order (*Order*) and Notice of Proposed Rulemaking (*NPRM*) regarding the on-going battle over alleged "access stimulation" or "traffic pumping" schemes by certain local exchange carriers (LECs), and complaints by their interexchange carrier (IXC) access customers that such schemes lead to improper LEC overearnings. A number of LECs have engaged in this practice, and it is our understanding that there are a number of complaints regarding the practice pending at the FCC.

In the *Order*, the FCC addressed a complaint filed by Qwest against Farmers and Merchants Mutual Telephone Co. (FMMT) in Iowa. FMMT had entered into agreements with call conferencing companies to place a conference bridge at the FMMT switch, and pay compensation to the conference calling companies in return for their sending conference call interexchange traffic to FMMT, which traffic FMMT would "terminate" and then bill access charges to the IXC that brought the traffic to FMMT. While FMMT calls this arrangement legitimate, Qwest calls it traffic pumping, since the amount of traffic greatly exceeded the historical traffic patterns used to calculate FMMT's access rates, leading to extraordinarily large earnings by FMMT. FMMT made things look worse by leaving NECA's Traffic Sensitive access pool and filing their own tariffed rates just before entering into the agreements with the conference calling companies. Once Qwest saw what was happening, they reacted by engaging in self-help (refusing to pay for the access charges) and filing a complaint with the FCC. The FCC ruled as follows:

FMMT calls its arrangement legitimate, but Qwest calls it traffic pumping, since the amount of traffic greatly exceeded historical traffic patterns.

☎ FMMT earned an unlawful rate of return (though the Order does not say what that return was).

☎ Nevertheless, Qwest is not entitled to damages resulting from FMMT's overearnings, because the FMMT tariff was "deemed lawful" under Section 204 of the Act, once it went into effect without initial suspension and investigation.

☎ FMMT's use of historical data to set tariff rates, in light of its future plans to increase traffic, did ***not*** constitute the "improper accounting techniques" that would negate the deemed lawful status, even though the Commission states that such an approach constituted a "manipulation of the rules" to "achieve a result unintended by the rules." The Commission warns in footnote 97 of the Order, though, that it may rule differently in future cases on this. It seems like the Commission is conceding that the rules as currently and ambiguously drafted allow this, but that such ambiguity may be eliminated by this *Order* (as well as by proposed rule changes in the *NPRM* attached to the *Order*).

☎ It is not a violation of Section 203 or 201 of the Communications Act for a LEC to charge terminating access on conference call traffic. Qwest tried to argue that in this situation, the ILEC is not terminating the traffic, but merely transporting it to the other participants on the conference bridge, and thus cannot charge terminating access. The Commission rejected this approach, finding that the calls terminate at the conference bridge located at the ILEC's switch, and that all conference call participants are calling into and terminating at the bridge.

☎ The Commission refused to find that Qwest's self-help (refusal to pay) is an unlawful violation

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(Traffic Pumping - Continued from page 4)

of the Act. This is very surprising – the Commission has stated in a number of cases in the past that this sort of self-help is unlawful, though they have refused to be the forum in which carrier service providers can seek remuneration from their carrier customers. In any case, in order for FMMT to recover the unpaid access charges, it will have to sue Qwest in court.

Having essentially given FMMT a pass on a retrospective basis, the Commission then balanced the scales a bit on a prospective basis by issuing an *NPRM* which tentatively concludes that tariffing rules should be changed to eliminate this sort of access stimulation practice. The primary findings and proposals are as follows:

1. ***Payments for Access Stimulation, and Recovering the Costs of Such Payments.*** The Commission tentatively concludes that an ILEC that includes the cost of compensation it pays to the access stimulation/ conference call company in its revenue requirement, or directly provides the stimulating activity and bundles those costs with access, is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard. The Commission nevertheless asks for comments on the lawfulness of the practice from a number of different angles.

2. ***Proposed Tariff Language Requiring Revised Rates if Demand "Significantly" Increases.*** In light of the fact that the "deemed lawful" provisions of Section 204 protect a carrier once its tariff goes into effect without suspension, even after large increases in demand for service undercut the possible "reasonableness" of the rates, the Commission tentatively concludes that the it should have the opportunity to review the relationship between rates and average costs through the filing of a revised tariff when a section 61.38 or 61.39 carrier experiences "significant" increases in traffic, in order to ensure that just and reasonable rates are maintained. The *NPRM* also invites comments on what an appropriate growth rate would be to trigger a carrier's having to make a new tariff filing and over what period the growth should be measured.

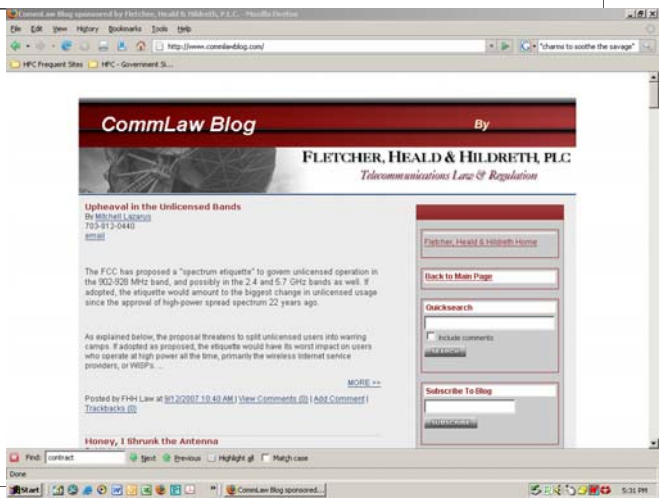
3. ***FCC Forbearance From Enforcing the "Deemed Lawful" Provisions of Section 204.*** Under section 10 of the Act, the Commission can forbear from applying "any regulation or any provision of this Act to a telecommunications carrier." In light of the possible difficulty of determining whether access rates are just and reasonable when demand radically increases, the *NPRM* seeks comments as to whether it would be appropriate for the Commission, on its own motion, to forbear from enforcing the deemed lawful provision of the Act for the remainder of the two-year tariff period if a mid-course tariff filing is triggered by a "sufficient increase in demand." This proposal raises significant questions as to whether the Commission can use its section 10 forbearance authority in a manner that would appear to ***increase*** regulation of carriers, rather than in the ***de***regulatory manner that section 10 appears to mandate.

The FCC's proposals may significantly impact the profits and practices of both LECs and IXCs, and we will keep you up to date as the Commission moves forward in this proceeding.

Late Breaking News???

If you're looking for information and insight about late-breaking developments, check out our commentary on the Fletcher Heald blog at **www.CommLawBlog.com**. (See the screen grab at right for a sample view.) We cover the gamut of communications issues – plus, if you feel so moved, you can submit your own views for posting.

We've had more than 10,000 visits to our site already – you can come to the party, too!!!.



(700 MHz -Continued from page 1)
juggled the spectrum in a way it had not previously proposed in order to create a huge 22 MHz block for potential national providers, but conditioned that block on "open access" to the spectrum, as requested by Google. It also adopted a Frontline-like proposal providing for a 10 MHz nationwide block to be associated with the adjacent public safety spectrum, but it significantly increased the burdens on the licensee of that band. Finally, it established strict build-out rules which will loom over licensees a few years after the licenses are bought.

The third tome laid out auction procedures and reserve prices for the various blocks (the minimum the FCC must garner for the auction to be valid). This latter issue is critical since the FCC itself has some doubts that it will get the reserve price it wants now that it has impaired the value of its product with fairly onerous conditions. So the FCC also ordained that if the reserve prices are not attained, there will be an immediate "do over" of the auction but with the onerous conditions deleted. Theoretically, the auction could now take place tomorrow with these rules in place. This sort of seems like progress.

Uncertainty creates jitters for the Wall Street types who will have to be footing the bill for the spectrum.

On the other hand, the FCC received ten petitions for reconsideration of the August order, some from the very companies who had asked for the rules in the first place, others proposing entirely new conditions for portions of the spectrum. Those petitions have not yet completed their pleading cycle. Even if it works at a frantic pace for the Commission, we cannot expect FCC action on these petitions before Thanksgiving.

At the same time, Verizon and several others filed petitions for review with the U.S. Court of Appeals in Washington. Verizon is especially exercised about the "open access" condition which the FCC imposed on the 22 MHz that Verizon had its heart set on. Verizon asked for expedited consideration of the appeal so that the parties would know where they stood by the time the auction begins in January. The Court denied this request without comment. Then, in a sudden about-face, Verizon decided to drop its appeal, presumably because it did not want the uncertainty caused by its appeal to mar the auction.

CTIA took care of that problem, however, by filing its own appeal. To further complicate matters, Council Tree, who has been haggling with the FCC over Designated Entity eligibility criteria for several years, filed yet a different but related appeal with another Circuit Court, demanding that the FCC resolve its long-pending reconsideration of the previous DE criteria. It also challenged the DE rules as applied to the 700 MHz auction. The resolution of these appeals could also affect DE eligibility in this auction. That means that the auction will proceed with a cloud of judicial appeal hanging over the process.

In the meantime, Google has been publicly vacillating about whether it will or will not participate in the auction since the FCC did not structure the 22 MHz block entirely to its liking either. One part of us suspects that Google really never planned to bid on the spectrum at all – it just wanted to make the spectrum accessible to wholesale service and open access while having it be built out by others.

The public safety community has also been moving forward apace, creating an entity to serve as the licensee of the 24 MHz Public Safety block. It has also named CyrenCall as its advisor for the purpose of negotiating with the winner of the D Block, who will be obligated to reach an agreement with the public safety licensee and build out both its own and the public safety networks. This would appear to take CyrenCall out of the running as a prospective licensee itself of the D Block.

The FCC seems to have recognized the difficult negotiating posture in which the winning D Block bidder will be placed vis-à-vis the public safety licensee. Because the lucky D Block winner could suffer a massive default penalty if it fails to negotiate a post-auction deal with the public safety licensee, the FCC announced that it would reduce the default penalty from 15% to 10%. This tweak will do little to ease the anxi-

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Orbital offsets OK'd

FCC Reconsiders Reverse DBS Band Orbital Spacing

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In an *Order on Reconsideration* (*Reconsideration Order*), the FCC has provided additional flexibility to space station operators in the 17/24 GHz Broadcasting-Satellite Service (BSS), also known as the reverse DBS band, which can be used for HDTV and satellite broadcast services. In its initial 17/24 GHz *Report and Order*, the FCC established that 17/24 GHz BSS space stations must operate at specified orbital locations at four degree intervals. In the *Reconsideration Order*, the FCC allows these operators to request orbital locations that are offset from the specified orbital locations by up to one degree, without having to reduce power or accept additional interference, provided there are no licensed or prior-applied for applications less than four degrees away from the proposed offset space station.

Future 17/24 GHz BSS applications will be considered on a first-come, first-served basis.

Following release of the initial *Report and Order*, the FCC received a number of *ex parte* filings commenting on the four degree orbital spacing framework. EchoStar, for example, requested the ability to operate at offset 17/24 GHz BSS locations in order to facilitate the provision of both DBS service and 17/24 GHz BSS service to subscribers using a single small antenna.

To implement this decision, the FCC's International Bureau will release a Public Notice directing the current applicants in the band (EchoStar, DirecTV, Intelsat and Pegasus) to amend their applications consistent with the new rules. Any applicant proposing a full power offset orbital location in conflict with an applicant at one of the specified orbital locations can amend again to specify the orbital location from which it was offset or to remain at the offset location at reduced power and with reduced interference protection. In the event two or more applications specify the same specified orbital location or the associated offset locations, the applications will be considered together and, if the applicants are qualified, licensed to operate in an equal portion of the spectrum.

Future 17/24 GHz BSS applications will be considered on a first-come, first-served basis. The FCC imposed a freeze on new applications in the initial *Report and Order*. The FCC will lift the freeze at some point in the future, presumably after the current applicants have had their opportunity to amend their applications. The FCC observed that the *Reconsideration Order* will allow for an orbital assignment framework that is better aligned with applicants' business plans and existing infrastructure and will thus afford operators the greatest opportunity to provide expanded direct-to-home (DTH) satellite services using a single multiple feed antenna.

***(700 Mhz** - Continued from page 6)*

ety of D Block bidders worried about negotiating a deal. On the other hand, the public safety community has recognized the problem by trying to make its needs transparent to bidders at the outset so that the negotiation process should hold fewer surprises.

Considering the extremely high value of the 700 MHz spectrum, the situation is more unsettled than we would expect it to be at this stage of the process. Uncertainty creates jitters for the Wall Street types who will have to be footing the bill for the spectrum, so the protraction of the rulemaking process may itself dampen auction values. Stand by for what will surely be yet another massive tome in another month or so, just in time for your holiday gift giving. The deadline for filing short form applications to participate in the auction is **December 3, 2007**.

Raising debar to lower the boom

FCC Targets USF-Related Waste, Fraud and Abuse

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Following an extensive review of the Commission's rules concerning the Universal Service Fund (USF) program and the prevention of waste, fraud and abuse, the agency introduced a handful of new rules in a *Report and Order* that will stiffen the consequences for those who seek to abuse the system, and increase penalties for those late in paying fees and fines.

Prior to the Commission's August 29 Order, the penalty of "debarment" from participation in the USF program was limited to those who were found guilty or civilly liable for defrauding the schools and libraries program. Under the new rules, this penalty is expanded to include all of USF, including High-Cost, Low-Income and Rural Health Care programs. The Commission also introduced new procedures that will enable the Universal Service Administrative Company (USAC), which operates the USF program, to more effectively identify wrongdoers through its random and targeted auditing programs.

Under the new rules, the prospect of debarment is expanded to include all of USF, including High-Cost, Low-Income and Rural Health Care programs.

"Debarment of applicants, service providers, consultants, or others who have defrauded the USF is necessary to protect the integrity of the universal service programs," the Commission wrote. "In addition, we also agree with the commenters proposing that the debarred entities should be listed on the Commission's and the USAC website."

The new rules are not limited to the deterrence of potential wrongdoers. Those who have previously abused the program will face considerably higher payments for interest and penalties. The new rules impose an interest rate of 3.5 percent above the prime lending rate.

In addition to strengthening penalties and increasing fines, the Order set forth a series of steps that will enable USAC to keep better tabs on USF participants. A five-year document retention requirement was imposed, requiring all participants to maintain records demonstrating compliance with FCC rules and regulations for at least five years following the receipt of USF support. The only exception to this new requirement was the retention of the current three-year record retention program for Low-Income participants.

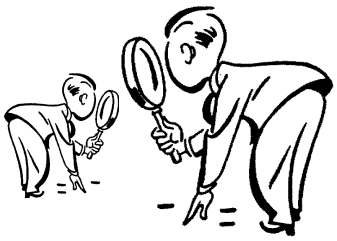
"Recordkeeping requirements not only prevent waste, fraud, and abuse, but also protect applicants and service providers in the event of vendor disputes," the Commission wrote.

Another method of monitoring participants was the adoption of performance measures, which will require that USAC report performance data of participants to the FCC. The specifics on the performance measures were not provided in the Order, but will be forthcoming.

There are also additional USF rules on the way, as the August Order resulted from a proceeding initiated by the Office of Managing Director following a June, 2005, rulemaking. A separate proceeding launched by the Wireline Bureau will result in additional changes.

FCC under the microscope

Government Investigates Itself, Finds Itself OK!!!



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Two different investigations of the FCC were made public in October and both determined that overall the FCC was behaving appropriately. However, one of the investigations did determine that the FCC has been leaking advanced information to in-the-know stakeholders who were given an unfair advantage.

In September 2006, three U.S. Senators asked the FCC's Inspector General to investigate whether the Commission or its staff was suppressing or destroying reports. In particular, the Senators were concerned about allegations raised by a former FCC employee that the agency was ordering staff to destroy a TV localism report and another radio industry report. Concerned about these allegations, the Chairman of the FCC also asked the Inspector General to investigate the situation.

The GAO interviewed a dozen organizations and found a problem with the FCC's leaks of information.

The Inspector General conducted a yearlong investigation into the matter. The results of the investigation indicated that the allegations regarding orders to deliberately destroy a TV localism report were unfounded. Although the former employee readily alleged in numerous media interviews that the FCC misbehaved, he refused to be interviewed for the resulting investigation. The FCC interviewed 35 employees and reviewed more than 100,000 documents and a terabyte of electronic data and determined that there was no support for the former employee's allegation.

The Inspector General also determined that the FCC did not deliberately conceal the results of a report on the radio industry. After his interviews and review of the record, the Inspector General reported that the failure to issue a final version of the report was not improper. In addition, there were no reported incidents of the FCC or its staff intentionally suppressing or otherwise delaying unfavorable reports.

In a separate request, Congress asked the Government Accountability Office (GAO) to investigate how well the FCC conducted its rule making proceedings. The GAO found that overall the FCC was obeying the law but that the agency was giving advantages to "inside the Beltway" organizations.

The GAO looked at four different FCC proceedings and determined that the agency "generally followed the rule making process." However, in conducting its investigation, the GAO interviewed a dozen organizations and groups – no law firms were interviewed – and found a problem with the FCC's leaks of information. When the GAO spoke with FCC officials, the officials claimed that they do not give special advance notice about items up for a vote to anyone outside of the FCC. In contrast, when the GAO spoke to 12 organizations outside of the FCC, nine of the 12 admitted that FCC staff and officials leak information about which items will be voted upon. One organization admitted that the FCC actually called them and listed what items would be vote upon.

The GAO asserts that the problem with this leaked information is that those in the know get an advantage. In general, the FCC notifies the public one week before it votes on proposed rules. During that week, nobody is permitted to discuss the matter with the FCC; the GAO found that the FCC followed this law. However, the GAO alleges that to get around this limitation, the FCC alerts interested parties to the possible vote more than one week prior to the vote. As a result, those "in the know" can lobby the FCC before the one week prohibition begins. The GAO noted that this FCC tactic gives an unfair advantage to the organizations that have the last minute opportunity to get the last word in while leaving others in the cold.

Although the overall tenor of the report was that the FCC was following the law, Congressmen immediately issued statements denouncing the insider atmosphere at the FCC and the Washington lobbying set. The FCC had no official response to the report.

Sprint? More like crawl . . .

New Deadlines Adopted To Spur 800 MHz Rebanding Process

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The FCC is trying to speed up the painfully slow 800 MHz rebanding process. Rebanding is intended to separate 800 MHz band public safety land mobile channels from those used by Sprint Nextel, due to dangerous interference problems that had developed between the two incompatible network architectures. Set in place in 2005, the massive frequency shift will be paid for by Sprint Nextel through negotiated agreements with public safety licensees, and is scheduled to be completed by June, 2008. That deadline will not be met, however, for a variety of reasons, including protracted negotiations and mediations up to now, vendor backlogs, Canadian and Mexican border issues, and the sheer complexity of the task.

The new procedures are unlikely to expedite the actual physical rebanding process.

Frustrated by the slow pace, the FCC recently adopted new deadlines intended to get as much completed by June, 2008, as possible. Public safety licensees were given an abbreviated scheduled to complete necessary planning work (most of which is to be performed by Motorola, M/A-COM, and various contractors). Fortunately, the Commission seems to be open to extensions where the licensees demonstrate that the necessary tasks cannot be completed despite their best efforts.

The FCC also shrunk the time period for negotiating a Frequency Reconfiguration Agreement with Sprint Nextel (which occurs after the planning process) to just 30 days. Thereafter, there will be a brief 20-day mediation period and, if there is still no agreement, the matter will be submitted to the Commission for resolution. That is a significant compression of the periods that have applied up to now and that often dragged out the negotiation, mediation, and FCC resolution process for many months.

While these new procedures may force parties into faster agreements, they are unlikely to expedite the actual physical rebanding process, which often involves "touching" all mobile and portable radios (sometimes twice) and modifying base stations, all the while maintaining interoperability with other public safety licensees. That process is likely to stretch well into 2009 for many areas.

(2155-2175 MHz - Continued from page 1)

pears that the FCC is headed for another auction for advanced wireless services (AWS). The 2155-2175 MHz band, which currently hosts microwave services, was left untouched when an earlier proceeding cleared surrounding spectrum for AWS services. That proceeding resulted in new rules governing how incoming AWS licensees must move out the incumbents who will be forced to relocate to other frequencies.

One of the most significant issues which the Commission must address is the absence of paired frequencies in the band. Two-way communication (FDD) can work in a single band (one for each direction), but this works best when the respective members of the pair are spaced well apart, which is not possible in this band.

The FCC suggested alternative methods to address this issue in the *NPRM*, such as having the transmitter and receiver alternate using the same or nearby frequencies, using separate sections of the band for communications in different directions, or using the band only for base-to-handset transmissions, leaving communications in the opposite direction to a different band.

There is a laundry list of additional issues which remain to be resolved in the proceeding, including the amount of spectrum each licensee should be given, bidding procedures, eligibility restrictions and technical rules.

As of press time, the proceeding had not appeared in the Federal Register, which will trigger a 30-day deadline for the submission of comments (and 60-day deadline for reply comments). Let us know if you have questions about the *NPRM* and/or would like to get involved.

Fixed looks good, portable not so much

Questions Of Reliability Color White Space Debate

By Mitchell Lazarus
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Two new developments add fuel to the ongoing controversy over whether unlicensed devices should be able to operate on vacant TV channels – often called "white space" spectrum.

Personal/Portable Use

Much of the dispute centers on the wisdom of allowing handset-type units that a consumer can carry around, sometimes called personal/portable devices, that use TV frequencies. Unless these can be made smart enough to identify and avoid occupied TV channels when taken from one place to another, they will threaten interference to viewers' off-the-air reception. Designing in adequate protection is difficult because a large outdoor TV antenna can receive signals too weak for detection by a hand-held device. Proponents have yet to satisfy the FCC that non-interfering personal/portable devices are feasible.

Early depiction of white space (from the FTL archives)

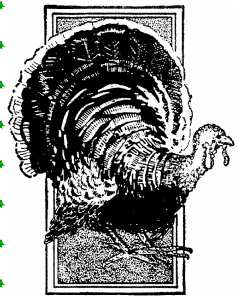
Motorola, which hopes to make money selling the handsets, recently proposed to simplify the problem by dividing the personal/portables into two categories. The more common consumer units would use relatively simple technologies for avoiding occupied TV channels: they would monitor directly for TV signals, and also receive a local beacon signal that identifies vacant channels in the area. To minimize any residual risk of interference, these would operate only at low power, below that of typical Wi-Fi units. Higher-powered units, intended for rural areas and commercial or enterprise use, would have to add a GPS receiver and a look-up table for determining the vacant frequencies at any location. They would operate at maximum Wi-Fi power.

As we go to press, the broadcasters have not yet responded to this proposal.

Fixed Use

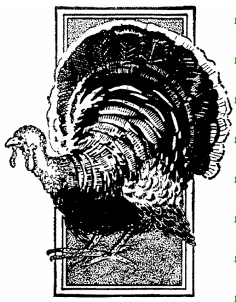
Less controversial is the use of unlicensed white space spectrum for communicating among fixed points, as for broadband Internet delivery to homes and businesses. An industry standards group has proposed technical guidelines that even the broadcasters concede would adequately protect off-the-air viewers. The FCC has already approved fixed use in principle, and is widely expected to adopt these standards or something similar.

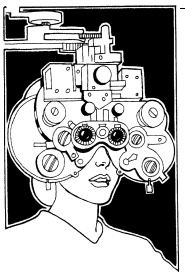
Recently two entities – FiberTower Corporation and the Rural Telecommunications Group, Inc. – urged the FCC to put fixed white space use on a *licensed* basis, either by auction or by charging fees for individual links. The broadcasters generally like this idea. Entities that had looked forward to accessing free spectrum do not. The opinions of those who matter most, the five FCC Commissioners, are not yet known.



Holiday Schedule Reminder

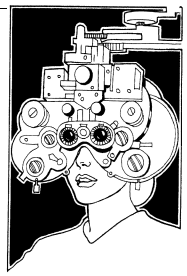
Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 22-23 (Thanksgiving weekend),
December 24-25 and January 1.
We will be open on Monday, November 12
(the federal holiday in honor of Veterans' Day).





Dual-ing carriage requirements

Post-Transition Must-Carry Picture Coming Into Focus



By Jeffrey J. Gee
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The FCC has adopted long-awaited rules dictating how cable systems will carry over-the-air television signals after the February 17, 2009, transition to digital is complete. The new rules will require cable operators to provide the digital signal of local television stations to their analog subscribers in analog format. In the alternative, the signals may be provided in digital format only – ***if*** all subscribers have the necessary equipment to view digital signals. The FCC refused to adopt a blanket exception for small cable operators but signaled a willingness to consider waiver requests from small operators. The FCC also affirmed that (a) cable operators must carry high definition broadcast signals in HD format without material degradation, but (b) cable operators do not need to "carry all the bits" of a digital broadcast to satisfy the prohibition against material degradation.

Cable operators deliver local broadcast signals in a manner that is viewable by all subscribers.

February 17, 2009, marks the end of the digital television transition. On that date, all U.S. television stations are expected to cease broadcasting in analog and commence digital-only operations. For those viewers with either a subscription to a digital cable service or a television set with digital tuner, this change-over should not be a problem. The estimated 40 million households that subscribe to analog-only cable service and lack the necessary equipment to decode over-the-air DTV signals, however, faced the prospect of losing access to broadcast television. While most cable operators argued that they would take steps to protect these viewers, there were no clear-cut rules mandating how digital format broadcast signals would be provided to analog-only subscribers. The FCC's new rules seem to address this gap.

The complete text of the new rules has not been made available as of the time of this writing. The news release issued by the FCC, however, indicates that the new rules do not actually mandate "dual carriage" as many broadcasters have urged for many years now. Rather, the new rules are based on the Communications Act's requirement that cable operators deliver local broadcast signals in a manner that is viewable by all subscribers.

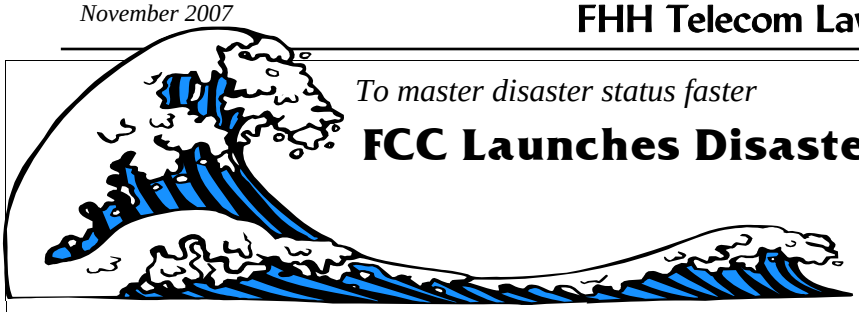
To meet this "viewability" requirement, cable operators have a choice: Either they must ensure that all of their subscribers have the necessary equipment to view digital signals (presumably through digital set-top boxes), or they must downconvert broadcasters' digital signals and provide those signals in analog format for their analog subscribers. Digital subscribers, of course, would receive the digital signal. The FCC did not adopt an exception for small cable operators, as some in the cable industry wanted. Rather, systems with channel capacities of 552 MHz or less may request waivers of the new rules (presumably based on an economic hardship standard).

The new rules affect only those stations being carried pursuant to the FCC's must carry rules. Stations that elected to negotiate for retransmission consent will continue to operate under the terms of their retransmission consent agreements. In addition, the new rules have an expiration date of three years after the transition date, with the expectation that the FCC will revisit the continued need for the rules by 2011.

At the same time, FCC reaffirmed that cable systems must carry HDTV signals in HDTV format, consistent with the current standards prohibiting "material degradation" of broadcast signals. The FCC did not, however, adopt a "carry all the bits" requirement sought by some broadcasters. Rather, cable operators may use compression technology to preserve bandwidth so long as it does not materially degrade the broadcast signal and the picture quality of such signals remains at least as good as the quality of any other programming carried on the system.

The FCC's decisions drew a relatively muted response from the National Cable & Telecommunications Asso-

(Continued on page 13)



To master disaster status faster

FCC Launches Disaster Reporting System

By: Patrick Murck
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The FCC recently launched a new Disaster Information Reporting System (DIRS) through its Public Safety and Homeland Security Bureau. The web-based system is available for communications providers serving areas affected by a disaster to voluntarily provide information about network infrastructure and outages.

The DIRS program is not to be confused with the Network Outage Reporting System (NORS), which is also administered by the Public Safety and Homeland Security Bureau. The information provided through DIRS is meant to be used by the government to help coordinate disaster response and recovery efforts. Carriers are being asked to report disaster-related outages through DIRS as opposed to the non-disaster-related service interruptions typically reported through NORS.

DIRS was created following the recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks and to help support the Department of Homeland Security's National Communications System. Communications providers of all stripes are asked to participate, be they cellular, landline or broadcasters. Any information that is submitted through DIRS is presumptively considered confidential information and won't be released to the public.

Providers are asked to provide a point of contact within their organization and to report, using the DIRS system, on the status of their networks, restoration efforts, if the network has power and whether there is access to fuel if a generator is in use. The FCC's manual for using DIRS is available here: http://www.fcc.gov/pshs/disaster/disaster_manual.pdf.

***(Automatic Roaming** - Continued from page 3)*
discriminatory rate is not based on some reasonable distinction. Having spent a brief period of my life dreaming up reasonable distinctions to justify rate differentials, I can tell you that it's not that hard.
So we shall see whether, having won the war, the small carriers will win the little skirmishes to secure the benefit that the war was all about.

Left open was the question of whether the FCC should apply the automatic roaming obligation to data. Although the FCC did extend the mandate to SMS and push-to-talk services, it otherwise limited the new rule to two-way switched voice or data services connected with the public switched network. There had been some thought that data and broadband applications should also be covered, but since these are deemed "information services," the FCC chose not to extend the rule that far at this time. However, as mobile broadband becomes more and more a part of the typical mobile communications package, customers will expect to be able to roam with their computers or computer-like devices. The FCC therefore sought comments (due October 29) on whether the roaming mandate should cover these applications as well, and, if so, on what basis. The latter point is of more than passing conceptual interest since information services do not fall under the "just, reasonable and non-discriminatory" regime applicable to common carriage, so what metric would one use to find a rate charged for such a service unlawful? We shall see.

***(Digital Must Carry** - Continued from page 12)*
ciation. The NCTA, which represents many of the largest cable operators, had previously announced a voluntary plan for dual carriage that largely tracked the FCC's new rules. The American Cable Association, which represents small cable operators, was more hostile to the measure, predicting that some small operators would have no choice but to shut down in the face of such a burdensome requirement. Indeed, while generally supporting the item, the NCTA nevertheless urged the FCC to "act quickly" to provide relief to "very small systems."

We are still waiting on the final text of the FCC's decision. Watch this space and – and our blog at http://commlawblog.com – for updates as they happen.

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First Class

Get along, little digits

Yee Haw !!! FCC Sets VoIP Phone Numbers Free

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For a century, every telephone had a pair of copper wires coming out the back that ran through the house, up onto the poles, and along the street to the telephone company building. A telephone number specified not just a telephone, but a location. The advent of cell phones broke the link between number and location. Suddenly a person could call a number and have no idea where on the continent it might ring. Still, some numbers were assigned to cell phones and others to wired phones. The numbers looked the same (at least in the U.S.), but a given number was either one or the other.

Interconnected VoIP phones -- those that send calls over the Internet to and from ordinary telephones -- made those numbers truly global. Now a call to a local number might reach any point on the planet.

Adding to the potential confusion, the FCC four years ago allowed consumers to carry the same phone number from wireline to wireless service, so that a previously fixed number could overnight become mobile.

Last week the FCC brought the process of uncertainty to its logical conclusion, announcing that wireline and wireless phone numbers can be transferred to and from interconnected VoIP service. Think about this. A person can move from New York City to Dubai, say, and keep his old phone number with the old 212 area code. And still be a free local call to his friends back in New York.

VoIP started out like most other Internet offerings, as an "information service" free of regulation. Because it is largely interchangeable with conventional voice service, however, the FCC has been regulating it as such, one step at a time. The new portability requirements add to earlier rules on TRS (for access by disabled users), CALEA (for law enforcement wiretaps), E-911 (to locate emergency callers), Customer Proprietary Network Information (for privacy), and the Universal Service Fund.