

FHH TELECOM LAW

Current Issues in Telecommunications Law and Regulation



Broadband Stimulus Update

Long Lines Form As Cash Hand-out Process Starts

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The farmers down at NTIA and RUS called "Sooney!" last month, and thousands of hungry applicants vied to get their place at the federal trough. There's nothing like the prospect of billions of dollars in "free" money to get folks' juices flowing, and, despite the many strings that will be attached to the grants, there was no shortage of potential takers.

In the first round of funding for broadband packages, 2,200 applicants showed up and asked for \$28 billion dollars. Unfortunately for them, the federal government is doling out only \$4 billion this round. It is now up to government decision makers to give the thumbs-up or thumbs-down on which projects and which citizens will be funded.

Applicants from across the world beat a path to the money as the applications included projects for all U.S. states, districts and territories. More than a dozen applications for projects in Puerto Rico were submitted, and the variations reached across the hemisphere to more than a half-dozen applications for services in the U.S. Territories of Guam and Saipan.

The types of applicants also varied greatly. There were plenty of governments asking for federal money, with state, county, local and tribal governments sending in funding requests. Other government institutions also were not shy about asking for money, with universities, libraries, hospitals and public safety agencies filling out applications. Also holding their hand out (sometimes both hands!) were corporations and non-profit organizations; the ACORN non-profit group asked the administration for \$7 million dollars to fund empowerment initiatives. Seven million dollars will buy you a lot of empowerment.

The types of projects which were proposed included ba-

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Better late than never

FCC Struggles To Define "Broadband"

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The American Recovery and Reinvestment Act of 2009 (the "ARRA" or "Stimulus Bill") requires that by February 17, 2010, the FCC must deliver to Congress a National Broadband Plan (NBP) that seeks to ensure that every American has access to broadband capability, and establishes clear benchmarks for meeting that goal. The FCC has worked diligently towards this goal, releasing a Notice of Inquiry (NOI) for comments, and holding numerous workshops with various stakeholders in order to discuss issues and seek data in different ways. Indeed, it appears so far that working on the NBP is the new FCC's highest priority.

One of the most difficult issues, however, is one of the most basic: what is the definition of "broadband"? The matter is not trivial or academic, as any plan with benchmarks for "broadband" development must first define that term in order for the plan to be meaningful. It is widely believed that the impact of defining the term "broadband" will be huge, primarily because that definition may be used in funding the construction and development of new services, and evaluating the status of the service providers. Yet, the process of defining that term is strewn with difficult technological, economic and political questions: Should the term describe the current state of technology, or should it set a target for the future, since the definition should not be one that is quickly outdated? Should the term be defined so that achieving the goal of universal broadband is easily and quickly achieved at a lower level of technology (and lower cost), or is that counter-productive? Should the definition recognize the current lower data through-put capabilities of wireless carriers, or would that be unfair to wireline carriers and subscribers? Should the definition be set to encourage the same level of high-speed service in rural areas as in urban, or would that be unrealistic and wasteful? Should the term be defined solely by data through-put speed (e.g., 1 Mb of data per sec-

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What's New?

FCC Seeks Innovative Ideas on Innovation

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The FCC is bracing itself for an onslaught of comments under the heading “Fostering Innovation and Investment in the Wireless Communications Market”, following the recent Notice of Inquiry (NOI) on that subject.

The NOI praises innovation (as do we all), and points to wireless technology as an important driver of innovation. No argument there – just count the people on the street hunched over their BlackBerrys. But that is innovation of the past, while the FCC very much looks to the future.

The NOI casts a wide net, seemingly asking every question that anyone at the FCC could think of relating to the terms “wireless” or “innovation”. A complete list would run almost as long as the NOI itself. Below we provide just a sampling to convey the flavor.

But before we go there, we must observe that the fundamental problem facing the FCC does not require a 35-page NOI. It's Economics 101: the demand for radio-based services is increasing fast, while the supply of spectrum suitable for most of these services is not. Industry has found clever ways of packing more users into the same amount of spectrum: narrow-banding, spectrum leases, various spread spectrum technologies, ultra-wideband, cognitive radio, and more. The FCC wants to encourage these techniques and, indeed, addresses many of them among the specific questions in the NOI.

High on the FCC's list – and we heartily commend them for raising it – is the issue of regulatory delay as an obstacle to innovation. Perhaps this is an idea whose time has finally come. (We ourselves wrote on it just recently in the September issue of *IEEE Spectrum* magazine, an article titled “Radio's Regulatory Roadblocks.”) The NOI frankly acknowledges that FCC processes can hinder the progress of innovation. “At times,” it says, “we have seen innovators subjected to lengthy regulatory processes . . . that can be an obstacle to progress in the wireless arena.” No kidding. Nowadays most rulemakings take at least three or four years, and even a simple technical waiver takes a year or two. A company has to think hard before investing resources in a new radio-based technology, knowing the first revenue dollars will be a long way off.

To its credit, though, the FCC now seeks a dialogue with interested parties on how to remove unnecessary impediments. In our own experience, regulatory delays have three common sources. One is court-imposed, in the form of legal due-process requirements that make sense for rulemakings that have large social consequences, but just get in the way of the technical adjustments often needed for innovation. A second results from opening rulemakings to the public via the Internet – a noble idea in principle, but one that in practice often draws tens of thousands of largely clueless contributions. A third source of delay is the FCC's internal procedure designed to address the first two: every contribution is evenhandedly weighed, considered, and responded to, including the ones seemingly emailed in from Mars.

After regulatory delay, which takes up just a few sentences, these are some of the issues raised in the NOI:

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D Block roadblock?

700 MHz Public Safety Band Still In State of Flux

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The FCC continues to struggle with how to address the 700 MHz public safety broadband spectrum. Congress long ago mandated an allocation of 24 MHz of spectrum in that band for public safety, most of which has been designated for narrowband voice systems licensed to state and local governments. However, 10 MHz of that spectrum has been designated for a national public safety broadband network and assigned to a national licensee, the Public Safety Spectrum Trust (PSST). Current FCC rules provide for the adjacent “D Block” of commercial spectrum to be auctioned, and for the winner to enter into a network sharing agreement with the PSST. The result would have been a shared, public-private network spanning 20 MHz and built to meet public safety requirements, but serving both commercial and public safety customers.

However, the first attempt to auction the D Block failed last year, in part due to worsening economic conditions, but primarily due to the uncertainty surrounding the obligations that would be imposed on the auction winner. That failure, and delays resulting from the long post-election transition at the FCC, have left the door open for other options to surface.

The most immediate issue now facing the FCC is how to address the dozen or so petitions for waiver filed by cities, states, and some regional consortia seeking to construct their own broadband networks in spectrum licensed to the PSST. On August 14, 2009, the Commission released a Public Notice seeking comments on the petitions, and included a detailed set of questions. Responses are due by October 16.

One of the Commission’s biggest concerns is how to ensure interoperability among these various local systems and the yet-to-be-defined national public

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The FCC thinks so

Truth-in-Billing: Can Consumers Handle It?

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A decade after the first truth-in-billing rules were adopted, the FCC in late August opened an inquiry to examine whether those rules are working, what more might need to be done to address consumer confusion, and whether, in the age of bundled “triple-play” voice, video and broadband services, cable and Internet service providers should be required to meet truth-in-billing requirements as well as telecommunications providers. But this inquiry is not limited to billing concerns alone – now the Commission is seeking to examine information disclosure and availability at *all* stages of the purchasing process to determine whether consumers get enough useful information to make informed choices about buying and using communications services.

In 1999, the FCC adopted the First Truth-in-Billing Order in an effort to address widespread consumer confusion, as well as to combat slamming and cramming. The 2005 Second Truth-in-Billing Order eliminated earlier exemptions for wireless providers. The rules offer broad principles, rather than detailed mandates, to guide providers in billing practices. Generally, these rules required that customer bills: “(1) be clearly organized, clearly identify the service provider, and highlight any new providers; (2) contain full and non-misleading descriptions of charges that appear therein; and (3) contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or to contest charges on the bill.” Noting that it continues to receive thousands of complaints about billing and rates for wireline and wireless services, the FCC, unsurprisingly, wants to know about the effectiveness of these rules and whether more should be done. Additionally, in response to the blurring of the lines – for consumers, at least – between information services, subscription video services, wireless phone services and old-fashioned telephony, the FCC asks whether the reach of the rules should be expanded to these other services.

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Meet the NKOTB

Now in Place: The Genachowski Commission

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It has been a good many moons since the Obama administration swept into office, and the FCC was not immune from the complaint leveled against the administration generally – that it has been inordinately slow about filling senior slots at the federal agencies. But with Fall in the air, the FCC, like college campuses welcoming hordes of beanie-wearing, fresh-faced frosh, is experiencing its own influx of new blood.

This summer, the Senate finally reviewed and passed on 80% of the Eighth Floor, confirming two new Commissioners, re-confirming one, and putting its imprimatur on the new Chairman. At the same time, we bade a hearty farewell to the harmonica-jamming Jonathan Adelstein, who had been itching for some months to take his show on the road over to the Rural Utility Services at the USDA.

Here's a quick program to help you recognize the new players.



Chairman Julius Genachowski

First and most obviously, we have the new Chairman, Julius Genachowski. No stranger to the FCC, he served as Chief Counsel to Chairman Reed Hundt and Special Counsel to then General Counsel (but soon-to-be Chairman) Bill Kennard back in the mid-1990s. A Harvard Law classmate of President Obama – he served as the Chairman of then-candidate Obama's Technology, Media and Telecommunications Working Group, which helped shape the President's telecommunications policies during the campaign – he clerked for two Supreme Court Justices (and a D.C. Circuit judge, to boot), spent some time on Capitol Hill and, after leaving the Commission in 1997, worked in the technology sector as an executive and entrepreneur. While the Big Guy has historically skewed toward the new tech end of things, broadcasters will appreciate that he has roots in their backyard: his résumé includes a stint as a writer and researcher for Fred Friendly. He's also a certified emergency medical technician and former CPR instructor, so you know who to call if you have a coronary incident while visiting the Commission.

His Chief of Staff is Edward Lazarus, an attorney who

had been co-head of the "global litigation practice" of a world-wide firm with more than 800 lawyers. Genachowski's two senior advisors – Colin Crowell and Bruce Liang Gottlieb – have considerable experience on the Hill and at the FCC, respectively. Sherrese Smith will be Genachowski's go-to Legal Advisor for media matters. She was most recently Vice President and General Counsel for Washington Post Digital, and has deep roots in the area of intellectual property. Finally, long-time Commission veteran Mary Beth Richards is back from a three-year tour in the FTC's Bureau of Consumer Protection. Prior to that, she had spent 23 years in a number of positions throughout the FCC. Richards will head up the FCC Reform initiative "to provide openness and transparency".



Commissioner Robert McDowell

Next up, Commissioner Robert McDowell, returning for a new term. Filling one of the Republican seats, McDowell has served on the Commission since 2006. A lawyer by training, he was an executive for an association representing competitive facilities-based telecommunications service providers and their supplier partners before joining the FCC.



Commissioner Mignon Clyburn

One of two new faces at the Portals is Commissioner Mignon Clyburn. Clyburn knows about government regulations, having served the past 11 years on the Public Services Commission of South Carolina. (She was Chair of the PSC for two of those years.) Prior to that, she was the publisher and general manager of the *Coastal Times*, a weekly newspaper in Charleston, South Carolina. Her father, House Majority Whip James Clyburn, is the highest-ranking African-American member of Congress. Commissioner Mignon promises to bring a decidedly outside-the-beltway perspective to her job.

The second new face is that of Meredith Attwell Baker. You probably heard of her back when the DTV Transition was all over the news: she was then acting head of the National Telecommunications and Information Administration (NTIA), which (among

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Build-out dates, lease term limits clarified

Progress On the EBS/BRS Front ... At Last!

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August 18 was the filing deadline for prospective participants in the October BRS Auction. Though the spectrum pickin's in this one had looked mighty slim, 24 prospective applicants submitted short form applications. The FCC staff has alerted 14 applicants to their remediable deficiencies, while awarding ten others the merit badge of acceptance. Corrections to the defective applications, as well as upfront payments, are due no later than September 24.

Meanwhile, the FCC has issued a "Fifth Memorandum Opinion and Order and Third Notice of Proposed Rulemaking" (Order) addressing the substantial service requirements in this service, particularly as these requirements apply to winners of the auction. The new proposal, which had been leaked just before the deadline for filing short forms, would extend the "build-out date" for auction winners to four years from the grant date; the current build-out date is May 1, 2011. Concern about the May 1, 2011 deadline, which the Commission had expressly adhered to in setting its Auction 86 procedures, may have dampened enthusiasm for the auction, since it would have left auction winners with only about a year to build out entire systems that in some cases had not been fully built out in 20 or 25 years. The proposed change is therefore welcome to prospective auction bidders, but its timing is curious. Like the secret Domsday Machine in "Dr. Strangelove", it makes no sense to propose a rule to encourage greater participation in an auction – but only to propose it *after* participation in the auction was closed.

The FCC Order also deals with EBS leases. The status of hoary Educational Broadband Service leases has been up in the air ever since the FCC made EBS leases subject to the secondary market rules that govern most other spectrum leasing arrangements. The issue has been: how long can these leases extend? Originally such leases were limited to ten years, then 15, then there was no limit, then in 2008 the Commission re-imposed the 15 year limit, grandfathering pre-existing leases from the date of execution of the

leases.

It was that latter point that raised the dander of many EBS lessees whose leases may have been "executed" many years ago but which have not gone into effect because the start date on the leases was triggered by some other event. The FCC's casual 2008 ruling – perhaps inadvertently – served to severely limit the term of some such leases.

The new proposal would extend the "build-out date" for auction winners to four years from the grant date.

Reconsideration petitions were duly filed and opposed, but eventually the commercial industry group (WCAI) and the educational industry group (NEBSA) jointly offered a compromise solution: the 15 years could run from the execution date if the lease had in fact commenced prior to March 20, 2008 (the date of the 2008 Order that caused all the hubbub) or if both parties to the lease agreed to its treatment as grandfathered. The joint proposal also provided that leases entered into between January 24, 1999 and January 5, 2005 that provided for deferred start dates on the leases would be grandfathered for up to 15 years from the agreed start date (rather than from the execution date). The FCC gladly accepted this compromise proposal (which to our mind leans heavily in favor of the commercial lessees) as meeting most of the interests of both parties.

In addition, the FCC clarified that licensees of old channels 1, 2 and 2A can simultaneously operate on both their old channels and their new channels pending migration of all of their subscribers to the new band plan. So theoretically, if an AWS licensee does not evict the incumbent BRS licensee from the old band, it could continue to operate on those 6 - 10/12 MHz of spectrum indefinitely by keeping subscribers on the bands. Not that anyone would ever do such a thing.

Finally, in a related footnote to history, some readers will recall that when Sprint and Nextel merged, the

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Avoiding pitfalls and pratfalls for the unwary

How to Be Smart in Technology Procurement Transactions

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If you're the person in your organization responsible for buying sophisticated software-controlled products – for example, corporate phone systems, advanced medical devices, supply chain management systems or call center technology – you routinely face a host of complex considerations. In most such cases (which I refer to as “technology procurement transactions”), the products are not purchased off the shelf; rather, they tend to be built from the bottom up from separate software, firmware and equipment that is integrated and programmed to address the buyer's peculiar needs.

But no matter what unique customization features any particular acquisition entails, it is important to recognize that certain issues and concerns tend to apply to virtually all of these transactions.

When you negotiate the acquisition of virtually *any* sophisticated software-controlled product or system, you should keep in mind the following issues which tend to be common across a vast range of such deals:

Scope Creep The buyer has to do more or buy more or different support systems than the buyer expected in order to install and operate the vendor's equipment and software.

System Warranties The vendor warrants the performance of individual system components but *not* the performance of the system as a whole. For example, imagine the server is performing in accordance with its specifications and the software is performing in accordance with its specifications but the system does not work. Warranties as to the performance of just the server and the software, alone, do nothing to help you in this circumstance. This problem also arises in maintenance agreements.

Incomplete Performance Warranties The vendor warranties do not warrant all features and functions desired by the buyer.

Certain issues and concerns tend to apply to the acquisition of virtually any sophisticated software-controlled product or system.

Software Warranties and Remedies Vendors often resist warranting their rights to license the software to the buyer. What if a third party alleges that the vendor's software infringes the third party's copyright or a court enjoins further use of the software?

Does It Work? The vendor does not propose to acceptance test the completed system before turning it over to the buyer. The only thing that is worse than not having an agreement as to how the system is to perform is to go live with the system without testing it to

see if it functions as contemplated. And do not rely on warranties and maintenance agreements in lieu of acceptance testing. If I am not convincing you of the importance of acceptance testing, read about what happened to Qwest when it activated a supply chain management system that did not work: <http://www.computerweekly.com/Articles/2002/08/02/188824/supply-chain-failure-dents-ici-profits.htm>.

Software Updates, Patches and New Releases The vendor does not agree to provide software updates and patches for free, or to make new (and backwardly compatible) software releases available to the buyer at a pre-agreed price.

Long Term Software Maintenance The vendor does not agree to maintain software beyond any one-year rolling warranty term.

Availability of Spares and Peripheral Units The vendor does not agree to continue to make spares and peripheral units (like CPE) available for a set number of years at stabilized or benchmarked prices.

Long-Term Dependability of the Small Vendor Often buyers contract to use an important piece of software or equipment provided exclusively by a small vendor. Well, what if that vendor goes out of business? In this circumstance, the buyer may want to consider procuring rights of access to the software source code

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30% subscriber limit = toast

Court Kiboshes Cable Cap

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The subscriber cap which the Commission adopted in 2007 to keep cable companies from acquiring too much control of program delivery mechanisms is officially toast. The U.S. Court of Appeals for the D.C. Circuit declared the cap arbitrary and capricious and vacated it on August 28. Since the same Court had sent the same cap back to the agency for further consideration in 2001, this should be no big surprise – especially since the Commission’s 2007 attempt to explain and justify the cap failed to address questions which the Court had told the Commission to consider.

Way back in 1992, Congress directed the Commission to fashion rules that would prevent any cable operator (or group of cable operators) from unfairly impeding the flow of programming to the consumer. In response, the Commission reached into its magic hat, intoned a couple of cryptic mathematic incantations, and – *presto* – announced that it had concluded that no single cable operator should be permitted to serve more than 30% of all subscribers. That was in 1993.

Since then, the Commission has twice changed the mystical mathematic formula supposedly used to calculate the subscriber cap, but both times the new formulae have miraculously led back to the same 30% cap. What a coincidence!

The Court had occasion to review the FCC’s first revised approach back in 2001, at which point the Court expressed concern that the Commission hadn’t adequately addressed all relevant considerations – including, in particular, the increase in direct satellite broadcast (DBS) subscribership. (The Court at that point also questioned the constitutionality of the cap, but since the matter was being shipped back to the FCC for further deliberation, no final determination was made on that score.) In 1992, DBS had accounted for a minuscule share of video subscribers (in the Court’s words, DBS providers were “bit players” then). In the intervening years DBS has expanded considerably –

today, it accounts for one-third of all subscribers. Unsatisfied with the FCC’s initial revised approach, in 2001 the Court shipped the matter back to the Commission for further consideration. The Court specifically directed the agency to consider the effect of DBS on the ability of cable operators to “determine the economic fate” of programming networks.

The Commission dutifully took the case back. In 2008, after several years of proceedings, the Commission again reached into its magic hat, again intoned some mathematical incantations, and, lo and behold, again came up with a 30% cap!

The Court vacated the 30% cap, declaring it to be arbitrary and capricious.

Representatives of the cable industry again brought the matter back to the Court. And again the Court wasn’t satisfied with the Commission’s analysis. So much so, in fact, that in its August 28 opinion, the Court vacated the 30% cap, declaring it to be arbitrary and capricious. As a result, for all practical purposes, the cap no longer exists.

The Commission tried to justify its failure to figure in the competitive impact of DBS by observing that it would be difficult to do so. That argument went nowhere with the Court. Referring to the Commission’s “dereliction” as “particularly egregious”, the Court concluded that the FCC “either cannot or will not fully incorporate the competitive impact of DBS and fiber optic companies” into its calculations. Since the Court had specifically instructed the Commission, back in 2001, to consider DBS impact, the agency’s failure to do so appears to have been especially galling to the Court.

The FCC 2007 decision to cling, rigor mortis-like, to the 30% cap was reached on a 3-2 vote, with the two then-Republican Commissioners (McDowell and Tate) dissenting. It will be very interesting to see how the new Democratic Commission reacts to the Court’s stinging rebuke.



Junk faxing going mobile?

“Club Texting” Seeks Ruling On “Text Broadcasters”

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Club Texting, Inc., has filed a Petition requesting a Declaratory Ruling from the FCC that “text broadcasters”, like “fax broadcasters”, are not “senders”. They define “text broadcasters” as persons or entities transmitting SMS text messages to mobile telephones on behalf of another person or entity for a fee. “Senders” are the originators of the message being sent to a large audience. Club Texting provides a platform that enables message senders to transmit mass text messages through its conduit service, such as weather emergency updates, school closing notifications, etc.

The Commission has previously ruled that “fax broadcasters” are not senders and therefore are not liable for the content of communications sent on their networks as long as there is no “high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmission.” (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C.R. 8752, 8780 (1992), quoting *Use of Common Carriers*, 2 F.C.C.R. 2819, 2820 (1987)). Club Texting asks the Commission to apply the same standards to text broadcasters. Like fax broadcasters, text broadcasters would not be held liable for the content sent via their conduit unless the text broadcasters supply “the [text] numbers used,” “determine the content” or are engaged in “any other close involvement” (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14131 (2003)).

This ruling is requested by Club Texting in light of the growing popularity of mass texting among businesses and consumers, to resolve the growing uncertainty about who is liable for unsolicited advertisements. Essentially, Club Texting appears to be looking for a “Get Out of FCC Jail FREE” card to be used against potential claims down the line.

What claims? The “fax broadcaster” analogy, to which Club Texting repeatedly (but only partially) alludes in its petition, is instructive. Recall back in the 1980s and

1990s – fax machines became ubiquitous as the then-high-tech way of document transmission. But the spread of fax hardware opened the way for entrepreneurial types who saw fax machines as a cheap and easy way to reach potential consumers with targeted (or maybe not-so-targeted) advertising. And thus was born the “junk fax” industry. The result has been a near-constant barrage of unsolicited ads – for toner cartridges, travel services, investment advice, drugs, home-siding, etc., etc. – into home and office fax machines everywhere at all times of the day and night.

The ruling is requested in light of the growing popularity of mass texting among businesses and consumers.

While fax advertising may provide some benefits, the public in relatively short order came to view it as a nuisance, and Congress responded by imposing very severe restrictions on the practice in the Telephone Consumer Protection Act (TCPA).

Club Texting’s petition suggests that unsolicited text messaging may be the Next Big Thing in creative advertising approaches, a direct descendant of fax broadcasting (or junk faxing). Pitched as a benign and desirable means of communicating important and useful information to the public, mass text message advertising sounds great, and it may indeed be great – until your shoe phone starts accumulating a gazillion messages offering INCREDIBLE SAVINGS!!! and MIRACLE CURES!!! and all manner of other tantalizing opportunities.

That’s when you can look for the public backlash – and in apparent anticipation of that day, Club Texting seems to be trying to protect itself preemptively.

Of course, Club Texting’s basic point should not be controversial: if Club Texting merely provides a technical conduit for text messaging, it should not be held responsible for entities which choose to abuse that conduit for their own purposes. No argument there.

But check out what happened in the fax broadcasting context. Entities were eager to promote the use of fax

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Jammin' with the cell boys

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We have previously reported on the various aborted efforts of a company called CellAntenna to conduct tests of cell phone jamming technology around the country, including here in Washington, D.C. CellAntenna seems to have gotten the support of many state correctional officials to test its method of jamming cell phone calls made from prisons. Such calls are a continuing headache to the corrections communities, who would dearly love to jam them. The problem is that the technology interferes with spectrum licensed to cellular and PCS carriers who are gravely concerned that other legitimate cell phone calls in the vicinity of prisons will be interrupted. More broadly, the cellular community is worried that this jamming technology could spread like the swine flu to concert halls, schools, libraries, etc., resulting in general disruption of cell phone traffic over their networks. So they have vigorously opposed real world testing of the CellAntenna equipment, even when the FCC has been somewhat willing to accommodate the tests.

Now a company called Telcore Networks seems to have gotten all parties on board. The FCC gave Telcore an experimental authorization to test its jamming technology at the Maryland State Correctional Facility in Jessup, Maryland, in early September. Telcore's device apparently jams only the *bad* calls (those from prisoners) while letting the good, legitimate calls go through. Telcore worked with the prevailing cellular carriers in the vicinity to ensure that no interference to normal traffic would occur, and their consent and cooperation with the test was no doubt key in getting FCC approval. It was not clear from publicly available material how the good will be separated from the bad (this side of Judgment Day, anyway), but the technology – if it works – may provide a means of dealing with a problem weighty enough to earn Congressional hand-wringing and proposed legislation. The frequencies on which the experiment are authorized include 824 -829 MHz, 869-894 MHz, 1850-1910 MHz, and 1930-1990 MHz. The test was conducted on September 3.



(Club Texting - Continued from page 8)

technology as an advertising mechanism, much like Club Texting is obviously bullish on text messaging. But a number of successful fax broadcasters found that their success was, at most, a mixed blessing. As the fax broadcasting industry swelled, so did adverse public reaction. So much so that at least one such fax broadcaster was fined more than \$5 million by the FCC for TCPA violations. (Club Texting's petition is curiously silent about this and other similar seven-digit fines doled out to fax broadcasters who provided services, in the fax context, at least somewhat similar to those that Club Texting seems to be offering in the text messaging context.)

Certainly, Club Texting would prefer to avoid a similar fate. Asking for the FCC to provide something in the nature of a blessing at this stage of the game is a good start. But in light of the history of fax broadcasting, it is probably unlikely that the FCC will be enthusiastic about providing Club Texting with total prospective immunity.

(BRS/EBS - Continued from page 5)

FCC conditioned its approval of the merger on the company reaching some pretty hefty BRS service goals by August, 2009: service to at least 15 million Americans, including at least nine of the most populous BTAs and one of the least populous. On August 4, 2009, Clearwire Corporation (now a Sprint subsidiary) tersely reported to the Commission that it had more than met the service requirements established by the merger order. It provided no particulars on which BTAs, or exactly how many people, it is serving. Clearwire needs to be serving another 15 million people by August 7, 2011, a goal it says it is well on its way to achieving. In an industry in which unmet promises, excuses, lost financing, and endless requests for extension of time have been the rule rather than the exception, kudos are due to Clearwire for reaching at least one benchmark on time.

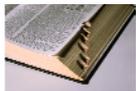
XM Sirius Granted P.R. Repeaters

Over the objections of the Radio Broadcasters Association of Puerto Rico, XM Sirius has been granted special temporary authority (STA) to construct and operate twenty Satellite Digital Audio Radio Service (SDARS) terrestrial repeaters in the Commonwealth of Puerto Rico. As part of its merger commitments, XM and Sirius had pledged to provide SDARS terrestrial repeater service in Puerto Rico. The FCC found that satellite SDARS service is provided in Puerto Rico, albeit at a signal level lower than in the contiguous lower 48 States. The terrestrial repeaters will allow XM Sirius to overcome the holes in its coverage in Puerto Rico due to terrain, dense foliage and tall buildings.

Vehicle-Mounted Earth Station (VMES) Rules Adopted

On July 31, 2009, the FCC released a *Report and Order*

establishing allocation, technical and licensing rules to permit the domestic, U.S. licensing of Vehicle-Mounted Earth Stations (VMES) in the “conventional” Ku-band frequencies of 11.7-12.2 GHz (downlink) and 14.0-14.5 GHz (uplink) and the extended Ku-band frequencies in the 10.95-11.2 GHz and 11.45-11.7 GHz (downlink) bands. Excluded from VMES are the “extended” Ku-band frequencies at the 10.7-10.95 GHz, 11.2-11.45 GHz, 12.75-13.25 GHz and 13.75-14.0 GHz bands. The *Report and Order* defines VMES as an earth station operating from a motorized vehicle that travels primarily on land, receives from and transmits to geostationary satellite orbit (GSO) fixed satellite service (FSS) space stations. The FCC determined that these rule changes will promote innovative and flexible use of satellite technology. They will help facilitate the potential for broadband service for various emergency preparedness and commercial purposes. The technical rules are designed to ensure that VMES operations avoid interference to existing and future FSS services.



(Broadband defined - Continued from page 1)
ond), or should other criteria such as latency, jitter and mobility be part of the definition?

In response to the NOI, the FCC received a lot of responses, but most of the comments were at a very high level policy level, with little hard data or technical rationale for the positions taken. As a result, FCC Broadband “Czar” Blair Levin complained publicly that the commenters were not taking the question “seriously”, and the FCC issued a subsequent Public Notice asking for more detailed responses on the matter of defining “broadband”.

The comments filed in response to the FCC’s Public Notice were a bit more detailed, and while there were some interesting arguments made, they likely will not provide the strong and clear record that the FCC is seeking. The answers varied widely, with advocated minimum data through-put levels of 768 kbps to 100 Mbps. Some commenters suggested use of only a single definition, while others suggested use of multiple definitions for wireline vs. wireless provision, or for tracking of current status of provision vs. future aspirational goals. Some commenters thought that the definition should include criteria of latency and jitter, while others argued that use of such criteria was improper since they are of-

ten caused by factors outside of the control of the broadband provider.

Most incumbent providers supported the status quo or a very low “bar” in terms of the level of service necessary to meet the definition of broadband. Perhaps the strategic or tactical goal of these commenters is to ensure that their current service is not classified out of the category of broadband, for the purposes of marketing or receiving funding. On the other hand, some think tanks, academics, and other industry elements focused more on setting rigorous targets. One interesting argument made in support of such an approach is that the only current federal definition of broadband is in or is based on Section 706 of the Communications Act, and that statutory definition’s emphasis on high-speed, two-way video capabilities provides a basis for a pretty advanced definition of broadband.

At this point, it is hard to predict how the FCC will come out in defining the term broadband. We can predict that their answer will reveal how forward-looking and ambitious the new FCC wants to be in its first major task. We can also predict, of course, that many stakeholders will be dissatisfied with the definition. The breadth and level of that dissatisfaction may determine, at least in part, the utility of the entire NBP. Stay tuned.



(Innovation inquiry - Continued from page 2)

In general

- ? Metrics for evaluating innovation and investment in the wireless sector
- ? The FCC's role in supporting and encouraging innovation and investment
- ? High-level trends driving innovation and investment in the "wireless ecosystem"
- ? How wireless services are used in innovative ways (as in health care, energy conservation, education, and public safety)

Managing spectrum

- ? "Repurposing" spectrum for innovative uses
- ? Mechanisms for access to spectrum (licensing procedures, unlicensed use, etc.)
- ? Alternative auction schemes for spectrum
- ? Mechanisms for secondary markets in spectrum
- ? How to assess "harmful interference" in protecting one service from another
- ? Alternative dispute resolution techniques or negotiated rulemaking for speeding interference disputes over new technologies
- ? Whether the FCC should regulate receiver performance
- ? Measurements of spectrum efficiency

Spectrum sharing

- ? Whether the FCC should issue secondary/underlay licenses
- ? Promoting dynamic spectrum sharing

- ? "Cap and trade" for rights to cause interference (up to some limit)
- ? Whether a publicly accessible database should give technical details of a licensee's operations to facilitate sharing
- ? Whether impending technical advances can promote spectrum sharing
- ? Whether the FCC should try to reduce the noise floor and, if so, how

Networks and devices

- ? Whether new network architectures can spur innovation
- ? Whether different procedures for tower siting could speed deployment
- ? Whether distributed antenna systems can make innovation easier
- ? Whether new kinds of devices will cause unexpected regulatory problems
- ? Whether the FCC should alter the equipment certification process to promote innovation
- ? How technical standards affect innovation

The NOI is an ambitious undertaking. It remains to be seen whether the proponents of "business as usual", who are both numerous and well-funded, will try to derail these ideas into the yawning pit of needed reforms that just never happen.

Comments are due on September 30 and reply comments on October 15.

(The new Commission - Continued from page 4)



Commissioner Meredith Attwell Baker

other things) was in charge of the DTV converter box coupon program. Prior to her stint in the government, Baker spent several years in the telecom industry. She also has a prominent relative: her father-in-law is James Baker, former Secretary of State. Both of the new Commissioners have announced their slates of aides-de-camp, most of whom are seasoned veterans wise in the ways of the Commission.

There are a few new faces as well in Commissioner Copps's office. Copps is the longest serving member of the Commission at this point, and not surprisingly there has been some turn over in his staff as folks defect to private industry or other duties.

Down at the Bureau level, William "Bill" Lake is the new permanent chief of the Media Bureau. He is a communications lawyer who served as head of the

Commission's DTV task force in the march-up to the transition. Bob Ratcliff, who had been serving as acting chief, will now become a Deputy Chief in the Media Bureau, as will Kris Monteith, formerly Chief of the Enforcement Bureau.

Other new appointments include: Chief, Enforcement Bureau – P. Michele Ellison; Chief, Wireless Bureau – Ruth Milkman; Chief, Public Safety and Homeland Security Bureau – Rear Admiral (ret.) Jamie Barnett); Managing Director – Steven VanRoekel; General Counsel – Austin Schlick; Chief, Office of Strategic Planning and Policy Analysis – Paul de Sa; Director, Office of Legislative Affairs – Terri Glaze; and Chief Economist – Jonathan Baker.

So there you have it. From all appearances, the newbies have hit the ground running and are already delivering speeches, holding meetings, and getting immersed in the myriad of matters which have languished while the Commission was in transition.



(Technology transactions - Continued from page 6)
through a two-party or three-party escrow, a trust agreement or a source code license.

Ownership of Custom Software If any of the software is made to the buyer's order in whole or in part, who will own that part that is made to order – the vendor, the buyer or both?

These are just a sampling of some of the more important considerations underlying the process of entering into a technology procurement transaction. How can you be sure that none of these common considerations is overlooked in the acquisition process?

Generally, buyers have an easier time addressing these issues if the issues are specifically identified in the buyer's request for proposal (RFP). Typically, the procurement process starts with an RFP which: (1) provides prospective vendors with knowledge of the buyer's requirements; (2) better enables prospective vendors to suggest alternatives that may better suit the buyer's needs; and (3) allows the buyer to better understand its needs and requirements for the procurement. An RFP process may seem like an unnecessary step, but a well-developed RFP can avoid misunderstandings and allow the buyer to negotiate key points early when the vendor is motivated to give concessions in order to win the project. Moreover, the process of preparing the RFP, while seemingly tedious, is a very valuable exercise in discovering the features, functions and capabilities you want. The process of preparing the RFP better assures that you have considered and will view the procurement with a top-down approach, which is essential to a successful procurement.

Buyers who choose not to use an RFP setting forth their proposed material terms and conditions often find that the vendor expects the buyer to use the vendor's documentation. In this event, the buyer can expect the vendor to provide a stack of brochures, tables and charts describing the discrete pieces of software, firmware and equipment and their individual performance characteristics, along with one or more proposed standard-form agreements for the purchase and maintenance of the product. The vendor normally urges the use of its own standardized documents, often claiming that using those standard agreements will speed the process of concluding the transaction and reduce transactional costs.

Generally, buyers have an easier time if issues are specifically identified in an RFP.

From the buyer's perspective, relying on the vendor's standardized documentation is almost always a mistake. Agreements prepared by the vendor will tend almost without fail to include issues of importance to the vendor (and treat those issues, not surprisingly, in a vendor-friendly manner), while omitting legitimate concerns of the purchaser. This is not to say that the vendor is necessarily trying to put one over on the buyer. Rather, it's an inherent limitation of vendor-supplied contracts, since the vendor knows itself and knows little about the buyer. In addition, it is in the vendor's interest to warrant the individual items of software, hardware and firmware, and not the performance of the system as a whole; in short, the vendor would prefer to take a bottom-up approach that avoids system integration issues and their costs. For this reason, vendor documentation will tend to sell and warrant individual items of software, firmware and equipment, avoiding system warranties.

By contrast, when specific contractual terms and conditions are required by the buyer in an RFP, the vendor expects the buyer to demand a custom contract. And even if the vendor responds to the RFP with standard, vendor-created contract forms, the RFP can provide the buyer with a convenient checklist against which to analyze those forms. In that way the buyer can more easily determine when the vendor's form contract does not cover all terms and conditions that the buyer regards as material (or does not cover them in an even-handed manner). In any event, buyers should not be shy about asking for custom documentation addressing the buyer's concerns.

Some readers may now be wondering how they can address these issues and follow these suggested processes, yet stay within budget and the timeframe for the project. The answer is that competent counsel familiar with technology procurement transactions should be able to work with the buyer to focus on what is critical to the buyer. That counsel can also manage the process in a manner and at a cost consistent with the size of the project and the importance of the procurement to the organization.

[Ed. note: The author has written extensively on practical and legal issues confronting telecom industry players, most recently in the September issue of "Units", the National Apartment Association's trade magazine: "Raise the Roof - Tips on Renting Roof Top Tower Access."]



(700 MHz public safety band - Continued from page 3)

safety broadband network. All of the major public safety organizations have endorsed LTE as the technology standard for broadband communications, though that leaves open the question of whether the FCC itself should mandate the standard, or defer to the PSST or some other body to make that determination. Beyond LTE, there are a host of other technical and operational issues that need to be resolved to ensure interoperability.

Other questions raised in the Public Notice include: the timing of the waivers relative to the ongoing proceeding to determine whether and how to re-auction the D Block; what type of authority would be given to local entities vis a vis the PSST; how to reconcile overlapping waiver requests from cities and states; and what types of entities should be allowed to use the public safety broadband systems.

Concurrent with this discussion is a movement by many public safety organizations to urge Congress to reallocate the D Block for public safety, thus creating a

20 MHz block. Public-private partnerships are still likely to be needed to construct and operate the systems, but the license would be in the PSST's hands.

Absent legislation, it will be up to the FCC to decide how to address public safety broadband requirements in conjunction with a D Block auction. Many alternatives are reportedly on the table, including: a new auction with more defined obligations; an unrestricted D Block auction with an expectation that the PSST would seek private partners through requests for proposals; breaking up the national public safety license into smaller pieces; and even a proposal to give back the public safety spectrum in exchange for lower cost service on commercial networks.

In any event, the next six months are likely to be critical for state and local governments, wireless carriers, service providers, equipment manufacturers, consultants, and others with a direct or indirect interest in the deployment of broadband spectrum in the U.S.



(Truth-in-billing - Continued from page 3)

But the FCC didn't stop at the monthly bill. Following through on Chairman Genachowski's promise that his Commission will be focused on competition and consumers, the bulk of the inquiry focuses on whether sufficient information is available to consumers in useful formats to ensure a well-functioning communications services marketplace. Specifically, the FCC wants to know if it needs to intervene to ensure that information is provided consistently to allow consumers to compare options when they: (1) choose a provider; (2) choose a service plan; (3) manage use of that plan; and (4) decide whether to switch to another provider or plan as their needs change. In these areas, the FCC asks whether "consumer information-related" rules should be imposed, and if so, what they should look like. The inquiry suggests that other areas of information disclosure regulated by the government, such as food product nutrition labeling, credit card bill "Schumer Box" information, and prescription drug inserts, might offer a model for ensuring that consumers have the information necessary to make informed choices in buying and utilizing communications

services.

Anticipating the murky legality of such efforts, the FCC also asks commentators to help it out on whether (1) imposing restrictions on speech in non-common carrier billing would pass the *Central Hudson* commercial speech test; and (2) the FCC even has jurisdiction to impose rules on non-Title II providers. The FCC, of course, has its own thoughts about these concerns, noting that it believes truth-in-billing rules, even if expanded, limit regulations to purely factual and uncontroversial commercial speech, which is compatible with the First Amendment under *Central Hudson*. As for the jurisdictional issue, while the basis for truth-in-billing is found in Title II of the Communications Act, the Commission posits that its overarching consumer protection obligations provide a predicate for exercising Title I, or ancillary, jurisdiction over non-Title II services, such as cable and Internet service providers, to ensure just and reasonable practices.

Comments are due October 13; reply comments are due October 28.

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First Class



(Broadband stimulus update - Continued from page 1) sic infrastructure projects to extend broadband service to areas that are currently unserved or underserved. Projects proposing to build or expand access at public computer centers totalled nearly \$2 billion of the requests. There were also \$2.5 billion in requests for projects that would provide broadband education, awareness, training, access, and equipment to vulnerable population groups. (This is the type of project for which funding was sought by ACORN.)

Using some creative math, the government declared that there was an extensive interest in expanding broadband across the country. The government accountants started with the applications that totaled \$28 billion in total funding sought. To that they added another \$10.5 billion for what applicants claimed they could produce in matching funding. The government then announced that this indicated more than \$38 billion in proposed

broadband projects were ready to stimulate the economy.

The government has provided public access to the application database at broadbandusa.gov and has promised to “move quickly but carefully” to distribute the money. Industry speculation is that the funding will begin to flow this November – one year prior to the 2010 federal elections.

After this \$4 billion is exhausted, there will be an additional \$3 billion that will be distributed in the next round of funding. A third round which had originally been projected seems to have been dropped, though nothing is certain at this point. No dates have yet to be announced for the second round of funding. However, in light of the timetable for the initial round, a December of January filing date can be anticipated, with the funds to be issued in the summer or autumn of 2010, prior to the November general elections.