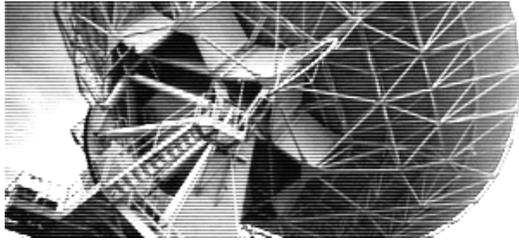


FHH TELECOM LAW

Current Issues in Telecommunications Law and Regulation



Let the Jousting Begin!

FCC Releases Net Neutrality NPRM

Paul J. Feldman
feldman@fhhlaw.com
703-812-0403

FCC Chairman Genchowski had made it very clear that net neutrality was very high on his priority list when he took the helm of the FCC. True to his word, on October 22 the FCC issued a Notice of Proposed Rule-making (NPRM) that opened a far-ranging inquiry into this highly contentious issue.

In 61 pages of detailed legal, economic, technical and policy analysis, the FCC proposes to:

- ☑ codify the four principles the Commission previously articulated in its 2005 Internet Policy Statement;
- ☑ codify a fifth principle that would require a broadband Internet access service provider (IASP) to treat lawful content, applications, and services in a nondiscriminatory manner;
- ☑ codify a sixth principle that would require an IASP to disclose information concerning network management and other practices reasonably required for users and providers of content, applications and services to enjoy the protections specified in this rulemaking; and
- ☑ make clear that the principles are subject to reasonable network management, and would not limit an IASP in delivering emergency communications or addressing the needs of law enforcement, public safety, or national or homeland security.

The NPRM also requests comments on:

- ? a category of “managed” or “specialized” services, how to define them, and what principles or rules, if any, should apply;
- ? how the new rules should govern non-wireline forms of Internet access, such as mobile wireless (an especially fertile ground for dispute), unlicensed wireless, licensed fixed wireless, and satellite; and

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Give ISPs a choice about giving customers a choice?

How to Solve the Net Neutrality Problem

Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440



As we have reported (*see* Paul Feldman’s article on this page), the FCC has proposed rules to mandate “network neutrality.” Those rules would bar a broadband Internet service provider (ISP) from, among other things, discriminating for or against a provider’s content.

The big ISPs are implacably opposed to all such rules. We own the networks, they say, and we can run them any way we want. On the other side, in favor of the rules, are content providers who fear discrimination by the ISPs. The big providers in particular, like Google, not only want to compete with the cable and telephone companies, but they want to do it through the cable and telephone companies’ own ISPs.

Ironically, the problem that network neutrality would solve is one of the FCC’s own making.

In the dial-up days, there were two kinds of ISPs: (a) the ones run by the phone companies, and (b) all the others. The phone company ISPs had an enormous potential advantage in easy access to the innards of the phone system. Other things being equal, they could have outperformed and undersold everyone else and had the industry to themselves. But the FCC wanted a competitive market. In the 1985 *Computer III* proceeding, it required the phone companies to offer to all ISPs the same functional network access available to the phone companies’ own ISPs. (This oversimplifies a very complex ruling.)

The result of *Computer III* was a lot of ISPs. Customers in many areas could choose from hundreds. Eager to preserve clientele in such an intensely competitive environment, no ISP would dare tamper with any customer’s content. What we now call network neutrality was such a pervasive fact of life as to not even need a name.

With the advent of broadband, the FCC changed course. Phone-company DSL, in the early days of broad-

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Net Neutrality Debate? Qu'est-ce Que C'est Que Ça?

Donald Evans
evans@fhhlaw.com
703-812-0430

You remember the scene from old movies: throngs of ragged peasants storm the Bastille, they batter down the huge doors, they release all the political prisoners of the Old Regime, and a zealous young man waves the tri-colored flag from the battlements crying out “Liberté! Egalité! Unfettered and Non-discriminatory Internet Access!” Yes, one of the lasting legacies of the French Revolution was the famous “Declaration of the Rights of Man and Citizen” – surely one of the most stirring proclamations ever issued, and one whose Enlightenment principles were strongly informed by our own Declaration of Independence. Not to be outdone in issuing declarations, however, the European Union has now adopted a comprehensive framework for Internet regulation which declares that end users’ access to and use of Internet services applications is a fundamental right of man.

Wow. Now if you oppose Net Neutrality, you may as well be suggesting that we tear up the Constitution. Who knew that among the inalienable rights consumers were endowed with by their Creator were not only life, liberty, and the pursuit of happiness, but also the right to log onto the Internet with devices of their choice?

Give the Europeans some credit. They have been studying the issue of broadband Internet access for years while the FCC has been keeping its head buried deeply in the sand, desperately avoiding deciding how to regulate – or not regulate – the Internet, even as the Internet has continued to explode in growth and importance. Now that the Genachowski Commission has plunged into the Internet waters headfirst, maybe there is something to be learned from our brethren across the pond.

The European Parliament and its Council of Ministers reached an agreement this month which, when formally ratified by the Parliament and enacted into law by the member states, will establish a comprehensive framework for Internet regulation across the continent. The agreement was the product of years of discussion, with the last hold-up being the question of how to enforce copyright infringement against violators. In addition to entitlement to Internet access, here are some of the other highlights:

- Net neutrality is assured by EU fiat. National telecom authorities will be authorized to set minimum quality levels for network transmission services so as to promote net neutrality and “net freedom”. As in the current proposal by the FCC, European consumers must be informed about the nature of the Internet service to which they are subscribing, including traffic management techniques and their impact on service quality, as well as any other limitations (such as bandwidth caps or available connection speed).
- National authorities may require “functional separation” to ensure competition. This appears to be a throwback to our own Computer II regime under which the FCC required network service providers to be structurally separate from their own Internet service provider arms. The Europeans see this arrangement as encouraging both greater competition among ISPs and more investment in infrastructure by the network owners. In the U.K, structural separation is credited with increasing the number of unbundled internet access lines by about 550% over three years.
- New governmental arrangements are established which permit greater inde-

Fletcher, Heald & Hildreth

A Professional Limited
Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209

Tel: (703) 812-0400

Fax: (703) 812-0486

E-Mail: editor@fhhlaw.com

Web Site: fhhlaw.com

Editor

Donald J. Evans

Design

Harry F. Cole

Contributing Writers

Paul Feldman, Mitchell Lazarus,
Michelle McClure, Lee G. Petro,
R.J. Quianzon, Davina Sashkin
and Peter Tannenwald

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Google Voice: fish or fowl?



Google to FCC: Your Call Cannot Be Completed at This Time . . .

Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440

Nowadays even the FCC has trouble keeping track of who the phone companies are.

It used to be easy. You could always tell by the helpful operators and the bell symbol on the trucks. The companies did one thing: carry voice calls. They did it very well. And they were closely regulated by the FCC.

Now matters are a little more complicated. The FCC still regulates some phone company services, but not all. The regulated category is called “telecommunications service”: namely, anything that is offered to the public, for a fee, to carry the customer’s information to a destination chosen by the customer without a change in content. This includes traditional voice phone service. But it leaves out most Internet services, which accordingly are not regulated.

The definitional boundary picked up a few dents and kinks over the years. One anomaly is VoIP, offered over the unregulated Internet, but as a substitute for regulated voice service. The FCC regulates it in certain respects, not in others. Another quirk is access to the Internet over phone-company DSL. Although DSL includes a component that looks a lot like telecommunications service, the FCC opted nonetheless to deregulate the service entirely.

Then came Google Voice. As readers of *commlaw-blog.com* know, a GV subscriber gets a new phone number, local in a region of the subscriber’s choosing. Calling that number rings all the customer’s phones, wherever they are: office, home, cell, etc. Different callers can be automatically routed to different phones, or forwarded selectively to still other phones, or fed different voice mail greetings, or given different rings, or blocked altogether. All the voice mails from all the phones end up in one place, where they can be read in printed form, like emails, or listened to online from anywhere. There are provisions for setting up conference calls, and for recording phone conversations for online storage. And all this is free.

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One small step for antennas . . .

FCC Takes Baby Steps To Expedite Tower Siting

Davina Sashkin
sashkin@fhhlaw.com
703-812-0458



In a Declaratory Ruling released November 18, the Commission has thrown a couple of (small) bones to wireless facility siting applicants by specifying what constitutes a “reasonable time” for state and local zoning authorities to act on applications, and by clarifying that zoning authorities are prohibited from denying an application solely based on the existence of comparable service by a competing provider. The Commission declined, however, to force automatic grant of siting applications that are not acted on within a specified timeframe, and did not find a need to preempt state and local regulations requiring zoning variance for wireless facilities tower sites.

The ruling was issued in response to a petition for declaratory ruling filed by CTIA – The Wireless Association® requesting that the Commission clarify certain provisions of Sections 253 and 332(c)(7) of the Communications Act regarding state and local review of wireless facility siting applications. In its Petition, CTIA argued that ambiguity in the Act permitted zoning authorities to subject applicants to burdensome requirements and unreasonably long application processing timeframes, frustrating the goals of the Act and delaying the deployment of new wireless infrastructure to the people. As a remedy, CTIA asked for: (i) establishment of definitive timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites; (ii) clarification that the denial of applications based on the existence of a provider already serving the area is an illegal restriction on competition; and (iii) alleviation of burdensome state and local ordinances, such as requiring all wireless service providers to obtain zoning variances.

As you might expect, industry commenters supported the Petition; state and local governments as well as airport authorities resoundingly opposed. The Commission seems to have come down somewhere in the middle. This “half a loaf” approach is probably unsatisfying to both camps, but at least the FCC acted ever so slightly to improve the siting process. While treat-

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Dishes hit the road

Rules Adopted for Vehicle-Mounted Earth Stations

Michelle A. McClure
 mcclure@fhhlaw.com
 703-812-0484



The FCC recently issued a Report and Order in which it adopted allocation, technical and licensing rules to permit the domestic, U.S. licensing of Vehicle-Mounted Earth Stations (VMES). VMES will be a primary service in the Fixed Satellite Service (FSS) and in the Ku-band frequencies. The FCC defines VMES as an earth station operating from a motorized vehicle that travels primarily on land, receives from and transmits to Ku-band geostationary satellite orbit (GSO) FSS space stations, and operates in the U.S.

The new rules provide opportunities for a variety of uses, including U.S. military training, emergency preparedness and certain commercial purposes where high-bandwidth and advanced mobile communications are beneficial. At this point, because of the cost and size of reception equipment and the required professional installation, the commercial applications of this service remain unclear. Consumer applications are unlikely, but use in trucks may be a possibility since independent truckers could use the service for broadband internet access while on the move.

The technical rules adopted by the FCC ensure that VMES operations will not interfere with existing and future FSS operators and their customers. The rules promote coordination with space research service and radio astronomy service (RAS) facilities, to ensure that these facilities are protected from harmful interference while also protecting terrestrially-based Fixed Service (FS) operators and their customers in the relevant extended Ku-band frequencies.

Currently, mobile earth stations, with the exception of earth stations on vessels (ESV), are not treated as a primary service in the conventional Ku-band. Licensees operating mobile earth terminals (METs) mounted on vehicles and used while in motion within the U.S. currently operate in the land mobile-satellite service (LMSS) on a secondary and non-protected basis. By providing primary status to VMES, VMES licensees can expect the same level of interference protection from adjacent satellite system operations as other primary FSS operators receive.

In adopting the technical and licensing requirements for VMES systems, the FCC relied heavily on the rules adopted in the ESV proceeding, adopting many of the same requirements and rules for VMES systems as apply to ESV terminals. (In 2005 the FCC had designated ESVs in communication with FSS space stations as a primary application of the FSS.) Due to the similarities between VMES and ESV, the FCC used the ESV rules as a model for VMES as well. The overriding concern in both cases was to protect other FSS satellites from the mobile service's potentially harmful interference.

The FCC determined that VMES can operate compatibly within the two-degree Ku-band satellite spacing environment without causing harm to other FSS operations in the U.S. Likewise, the FCC determined that no harm would be caused to FS operations in the extended Ku-band, as VMES operators, like ESVs, would be required to accept interference from all current and future FS operations in the band. Additionally, VMES would use the 10.95-11.2 GHz and 11.45 -11.7 GHz bands used by FS only for reception; these receive-only operations should not interfere with or restrict other authorized operations in the band.

VMES operations will not interfere with existing and future FSS operators and their customers.

VMES licensees proposing to operate in the 14.0-14.2 GHz band within 125 kilometers of space research tracking and data relay satellite system (TDRSS) facilities will be required to coordinate through the National Telecommunications and Information Administration (NTIA) before beginning operations. This procedure mirrors that established for ESVs. VMES licensees must also coordinate with the National Science Foundation for operations in the 14.47-14.5 GHz band within certain distances of RAS facilities. Finally, the FCC imposed (a) a 50-kilometer coordination zone around each of St. Croix, Mauna Kea, and the entire island of Puerto Rico for Arecibo; and (b) a 160-kilometer coordination zones around other highly sensitive antenna installations. For the remaining RAS sites, a maximum coordination zone of 50 kilometers was established.

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Stimulus Czars Provide Environmental Guidance, Seek Input on Next Funding Round

Donald Evans
 evans@fhhlaw.com
 703-812-0430



It is hard (or maybe not so hard) to believe that back in February when the American Recovery and Reinvestment Act was enacted, the administrators at the Departments of Agriculture and Commerce were promising that grants would start to be made in May, with most of the first round funds awarded in June. Here we are fast approaching December and nary a grant for infrastructure projects has been made. To be sure, wizened and calloused observers of the bureaucratic process predicted that it would take considerably longer than the original estimates, but the same wizened and calloused observers also expected that, having later committed to an autumn award date, the BIP and BTOP folks would have been driven to get something out by September, October or even November, if for no other reason than to keep their street cred. The difficulty seems to be that they made the application process so cumbersome, but nevertheless got so many applicants, that it's taking months to sift through all the requests. Surprisingly, when millions of dollars in free money are put up for grabs, lots of people ask for it.

Surprisingly, when millions of dollars in free money are put up for grabs, lots of people ask for it.

BIP and BTOP are now moving seriously into Phase II of the first round. Phase II is like that part of the Miss America pageant where the field is reduced to ten swimsuit clad lovelies with preternaturally gleaming smiles, only here no Miss Congeniality points are awarded. At the same time, the administrators are thinking ahead toward the next round of applications. It had already been widely reported that the number of rounds would be reduced from three to two. The next round is supposed to be opened early in 2010, which means that the rules and procedures governing that round need to be established pronto. The folks in charge have therefore released a "Request for Information" with a very abbreviated comment date seeking input on both the procedures that should apply to the next round and what funding criteria should be substantively applied. Would-be applicants should take heed, since changes in both of these categories could have a serious impact on their chances of obtaining funding.

Procedures Applicants in Round I lodged numerous complaints about the volume of unnecessary and burdensome information that was demanded. The administrators seem to have realized that a lot of information was required of newly-created applicant entities which was worthless. The requirement that service areas be defined at the micro-level of census blocks also struck many applicants as needlessly burdensome. Much of the information required in Phase I might be more appropriate to either Phase II or even the point of closing on funding rather than in the initial application. This category of information would include legal opinions, lien searches, boilerplate certifications, and other information irrelevant to the selection process.

Importantly, the administrators released on October 30 a guidance sheet clarifying how the environmental and historical preservation rules apply to these applications. There had been some question about whether applicants proposing construction projects in connection with their applications had to show compliance with these rules in Phase I, Phase II, or some later Phase. It seemed, frankly, absurd to require 2,200 applicants to undertake expensive and time-consuming environmental review projects for thousands of sites that would never be built if the stimulus money was not awarded. BIP and BTOP have now clarified that the Environmental Questionnaire covering sites where significant construction is to be undertaken need not be submitted until Phase 2. But even then applicants have only 10-30 days to get the information in. Since environmental and historical review projects usually take a minimum of 60 days to complete, the administrators have left a window open for applicants to explain why they don't have environmental sign off on all sites within the 30 days. Again, though, because it only makes sense to undertake these onerous procedures for sites that are really going to be built, it might make more sense for this review process to be deferred to the pre-closing period.

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Feeding the broadband beast

FCC On The Hunt For Spectrum Sources On the table: Re-purposing of spectrum

*Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404*

On September 23, 2009, the FCC invited comments on the adequacy of available spectrum for broadband deployment. The invitation came in the sixth in what is probably already a record-setting number of invitations to comment in one proceeding (we reached #20 on November 17), looking toward the development of a National Broadband Plan. NBP Public Notice #6 asked for comments on the adequacy of spectrum for broadband deployment.

What an invitation to sound off! The wireless industry had already been agitating for more spectrum, because they were on the street in a flash. CTIA – The Wireless Association®, backed by the large wireless carriers, launched a campaign bemoaning how the future development of our society will be stifled, and our intellectual growth stunted, if not everyone can carry a mobile device which allows everything from banking to ordering a pizza to watching TV programs any time and anywhere they like. Citing the enormous growth of traffic on mobile networks after introduction of the iPhone and other smartphones, they declared that the public demand is clear, and it is time to find spectrum to accommodate anticipated future explosions in demand. Every MHz is fair game, especially anything used by the government, which allegedly specializes in last-century technology.

But what about that juicy block of spectrum still used by the boob tube, even after the TV spectrum was cut down as part of the digital transition? You bet, they said – go after it. After all, some 90% of the public watches TV on a wire or satellite connection. Why do we need to transmit any programming on the air-waves?

It took only an instant for the campaign to catch the FCC's attention. Chairman Julius Genachowski, speaking to a sympathetic audience at an international CTIA meeting on October 7, 2009, declared: "In fact, I believe that that the biggest threat to the future of mobile in America is the looming spectrum crisis." And senior FCC staff members have cited the mounds

of money paid at spectrum auctions as evidence of the value of spectrum for wireless.

The Consumer Electronics Association, having just enjoyed a resurgence in TV sales due to the digital transition, has nevertheless taken sides with CTIA. They wrote a letter to the FCC on November 17, urging the FCC to get cracking to comply with its obligation under Section 336(g) of the Communications Act to conduct a study to determine whether TV really needs all of its spectrum. That statute specifies the following:

(g) Evaluation

Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program.

Such evaluation shall include –

- 1) an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services;
- 2) an assessment of alternative uses, including public safety use, of the frequencies used for such broadcasts; and
- 3) the extent to which the Commission has been or will be able to reduce the amount of spectrum assigned to licensees.

The broadcasting industry wasted no time responding, emerging from their huddle with a strong campaign, teaming with Maximum Service Television, large group station owners, public broadcasters, minorities, and anyone else interested in helping. Holy smoke, the broadcasters said, we just spent billions transitioning to high quality digital television. The public has spent and is continuing to spend mega-bucks on new TV sets. What are you going to do – throw all that stuff on the recycling pile just a few years after everyone bought it? And don't forget how valuable broadcast-

*In the search for
spectrum for broadband
deployment, every MHz
is fair game.*

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When does “discontinuance” become “permanent”?

Ruling Raises Specter Of Unannounced PCS License Cancellations

Donald Evans
evans@fhhlaw.com
703-812-0430



Late last month the FCC’s Wireless Bureau issued a disturbing order in connection with a defaulting licensee’s attempt to effect a work-out of its problems. The hapless licensee, Northstar Technology, LLC, had defaulted on an unpaid auction debt owed to the FCC in the early 2000’s – the license was cancelled by the FCC in 2004 when the FCC found itself stiffed for \$996,588 plus accrued interest. Northstar apparently had other licenses, though, and it managed to secure financing from the Rural Utilities Service, the Federal Financing Bank and the Rural Telephone Bank. Northstar went into default on these obligations as well. One might imagine that Northstar had by now worn out its welcome at the federal trough, but Northstar negotiated a settlement with the Justice Department whereby some of the more than \$10 million dollars it owed to the various federal entities (including the FCC) would be repaid by the sale of the licenses and assignment of the proceeds to the United States.

A new and surprising take on what constitutes “permanent discontinuance” of a PCS license

However, a technical problem arose when Northstar finally went to file assignment applications and associated renewal applications for two of the licenses. It seems that the FCC’s “red light” system automatically barred the applications from proceeding since the licensee was in debt to the FCC. This is the way the red light system is supposed to work, but in this case the process was preventing the Commission and its brethren agencies from getting their hands on the proceeds of the proposed sale that could not go through until the applications were accepted and processed. Take a guess as to whether the FCC granted a waiver of the red light rule so that the deal could go forward. So the renewals and the assignments were allowed to proceed, but the relief seems to apply only to this particular transaction and these particular licenses. The red light should come back on the next time Northstar files an FCC application.

Almost tangential to the main thrust of the Bureau’s Order, however, was a new and surprising take on what constitutes “permanent discontinuance” of a

license. One of the fundamental presumptions of radio licenseeship is that a licensee must either use its licensed spectrum or lose it. The operative rule codifying this principle just says that if you permanently discontinue service – a determination that is made by reference to the definition of permanent discontinuance set forth in the rules of each specific service – your license will automatically be cancelled. For that reason, in virtually every other radio service that we can think of, the FCC specifies strict time frames regarding discontinuance, abandonment, or permanent cessation of service. A licensee that fails to use its spectrum for some specified period of time will normally be deemed to have permanently discontinued operation, and it must either turn in its license or have it cancelled by operation of law. The licenses involved here, however, were Personal Communications Service (PCS) licenses. By an odd quirk, there is no such definition applicable to PCS licensees.

(We assume this was just an oversight by the Commission when the PCS service was established, as with several other common rules which apply to everyone else but, inexplicably, do not apply to PCS licensees.)

So until now, PCS licensees have taken the perfectly reasonable position that a licensee has not “permanently discontinued” operations until it has in fact ceased operations with no intent or possibility of ever resuming them. In the absence of a legal presumption established by a rule, the actual intent of the licensee to resume operations at a later point would seem to easily and satisfactorily rebut any contention that it had permanently discontinued operations. The situation might be likened to that treadmill down in your basement which has acquired a thick coating of dust since it was last used in 1989. If asked, you would truthfully insist that you have every intention of getting on that treadmill and getting back into shape. In fact, you seriously think about firing it up every couple of weeks, but some other annoying factor al-

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FCC asks: “What’s the scoop?”

FCC Seeks To Be Educated About Educational Uses of Broadband

Lee Petro
petro@fhhlaw.com
703-812-0453

As part of its ongoing efforts to get a handle on All Things Broadband before the FCC’s homework (*i.e.*, the National Broadband Plan, a/k/a the NBP) is due in February, the Commission has released yet another Public Notice, this time seeking comments on issues relating to the educational use of broadband.

To ensure that the information is thoughtfully prepared and presented in a manner that will maximally assist the Commission to draft the NBP in the next three months, the FCC generously gave parties 17 days to prepare their submissions. Initial comments were due to be filed by November 20, enabling folks to get that project off their desks before Thanksgiving. No such luck with reply comments: they’re due by December 11. (Given the abbreviated timeframe afforded on this, the Commission will presumably be amenable to late-filed *ex parte* comments which cast light on the issues.)

The latest Public Notice invites comments on virtually every aspect of the educational use of broadband technology. By “educational”, it means everything from pre-K to grad school, including both institutions and students. The kind of input it’s looking for? Pretty much anything and everything, including “implementation strategies, budgets/expenses, financing strategies, programmatic goals, measured outcomes, and other detailed operational and strategic information about the programs using broadband for educational purposes.” Again, this information was to be collected, organized and presented to the Commission by November 20, a brief 17 days after the invitation for comments went out.

As far as nitty-gritty factual information goes, the Commission is interested in the current availability and implementation of broadband services within schools and school districts. Where broadband services have been implemented, how are they being used for online learning systems, backroom data reporting systems and the like? Have various communications systems (instant messaging, online video conferencing and such) assisted in the introduction of new learning opportunities that were not otherwise available?

On a more conceptual level, the Commission is asking about the role of government in supporting the introduction and development of broadband use in schools and school districts, and what specific steps the Commission could or should be taking along those lines (including the setting of technology standards and the support of technology literacy programs).

The E-Rate program is yet another focus of the FCC’s interest: what modifications to that program might “stimulate the adoption of broadband throughout communities”? How do current participants use the program, and should the program be expanded (through Congressional action, of course) to include additional educational programs such as Head Start? Also, how about maybe modifying the distribution of E-Rate funds – would that assist broadband deployment? And might changes to the E-Rate program affect the expansion of broadband deployment, and what might the impact of such expansion be on the level of E-Rate Funding? (The Commission is particularly concerned that the current limit on funding – \$2.25 billion – may prevent further expansion of broadband deployment. But if that limit were to be upped, what types of services could be provided?)

It’s not exactly clear how such a vast amount of information covering such a vast number of subjects might be compiled and usefully presented in a mere 17 days – let alone thoughtfully digested and analyzed by the Commission in the next three months. Why the FCC waited as long as it did to initiate a soup-to-nuts review of the use of “broadband for educational purposes” is unclear, but it reminds us of a frantic midnight call to a fellow student for their notes to prepare for the big calculus test the next day. While the goals of the Commission are obviously worthwhile and could lead to the development of important policies, the rushed nature of the agency’s efforts does nothing to dampen skepticism as to whether a tsunami of information submitted on incredibly short notice can or will be put to good use. Only time will tell.

Comments on virtually every aspect of the educational use of broadband technology are invited.



(VMES - Continued from page 4)

As part of the proceeding, the FCC adopted technical and licensing rules for VMES. Once again, many of these rules are based on the model adopted in the ESV proceeding. In addition to detailed power requirements and other technical specifications, the rules provide:

-  Licensees must collect and retain operational data. The data are to be used to assist in identifying and resolving sources of interference. The information must be retained for one year by VMES licensees and must be made available to coordinators, system operators, NTIA and the FCC within 24 hours of request.
-  A point of contact in the U.S. with authority and ability to cease all emissions from their VMES terminals must be maintained.
-  Blanket licensing of VMES will be issued. The application will require a narrative describing the overall system as well as specific information on the antennas, power density and emission characteristics of each class of earth station comprising the network.
-  Individual licenses will also be issued, *but* the FCC encourages networks of technically identical antennas to be licensed under blanket authority rather than individually.
-  Ku-band VMES will be able to operate with any

*VMES
licenses will be
issued for a period
of 15 years.*

U.S. licensed satellite and non-U.S. satellite on the Permitted Space Station List as long as the application meets the off-axis E.I.R.P.-density and antenna pointing requirements.

-  Licenses will be issued for a period of 15 years.
-  Licenses for this service are available on a non-exclusive, non-interfering basis after full coordination with other spectrum users over the range of proposed operations.
-  Routine environmental evaluations for radio frequency (RF) exposure must be submitted. Applicants must submit a RF exposure evaluation demonstrating whether VMES terminals, or classes of VMES terminals, will result in power densities that would exceed the FCC's RF exposure criteria. Those VMES terminals not complying with the RF exposure limits must submit an environmental assessment and a plan for mitigation of radiation exposure.
-  Installation of VMES terminals on vehicles must be by qualified installers who have an understanding of the antenna's radiation environment and the measures best suited to maximize protection of the general public and persons within the vehicle.

Many more detailed technical and licensing rules were adopted and discussed. Review of the rules, the Report and Order, and discussion with an engineer or attorney would help clarify the additional details.



(Spectrum Re-purposing? - Continued from page 6)

ing is, in terms of both entertainment and information. Without national television, our society would lose its thread of common daily experience, fractionalizing our nation as everyone ends up watching channels matching only their niche interests. Our democracy will perish from the earth as critical sources of news and information are extinguished, and our nation will be left to founder in emergencies when all the wired systems collapse from flood, fire, and earthquakes.

Public broadcasters noted multi-channel digital TV broadcasting is providing much more bang for the buck, allowing their stations to double and re-double the educational offerings delivered to the public. Hispanic broadcasters noted the growth of their service, including new networks. Low power stations, which no longer have their own organization to petition the FCC, cannot believe that their local and niche services might be silenced.

In other words, lobbyists are having an absolute feeding frenzy.

FH&H filed comments for one client noting that the entrenched interests might be framing the discussion in 20th century instead of 21st century terms, because each side is promoting its own interests, leaving the argument to be framed as "either/or." Someone has to win, and someone has to lose. The FCC ends up as a referee, a role it should be reluctant to assume, given its past speckled track record. Its decisions usually end up in a judicial quagmire, with rules tailored better to the prior decade, when the rulemaking started, than to the current decade, when the rules must be applied.

In a digital world, all signals are made up of bits and bytes, so why can't we do almost anything we want with any spectrum? Perhaps a better approach would be to see how much spectrum can be used for "everything,"

(Continued on page 11)



(Google Voice - Continued from page 3)

But GV refuses to connect its customers to certain rural areas that impose high access charges for terminating calls. If GV is a telecommunications service, that refusal is illegal.

Out went a letter from the FCC to Google. Does GV offer service to the public? For a fee? Does GV indeed block calls to some destinations? In other words: is GV a telecommunications service that breaks the law?

- ☎ Google answered. To no one's surprise, the company is adamant that GV is not a telecommunications service. It musters the evidence:
- ☎ GV users must subscribe to at least one telecommunications service before they can sign up. That makes GV just an add-on, rather than a telecommunications service itself.
- ☎ GV partners with CLECs – local phone companies other than big incumbents – to provide calling features. (Implication: GV is not the phone company here; the CLECs are.)
- ☎ GV is a free service, except for outbound international calls. (Implication: With no fee, GV cannot be a telecommunications service.)
- ☎ GV is offered only by invitation to avoid overloads as the system expands. But anyone can request an invitation. And GV intends eventually to make the

service available without one. (Google did *not* attempt the argument that GV, not being offered to the public, for that reason cannot be a telecommunications service.)

- ☎ GV is a web-based software application that qualifies as an “information service,” a category mutually exclusive with telecommunications service. (Implication: Being one, GV cannot also be the other.)
- ☎ GV does not connect calls to certain high-cost U.S. destinations. (But if GV is not a telecommunications service, it is free to pick and choose which calls to complete.)

The smart money says the FCC will go along with Google's view, and leave GV alone.

But that opens a different problem. As phone-like services draw more of their functionality from the Internet, the old distinction between regulated telecommunications services and everything else becomes harder to maintain. No one wants to impede new Internet offerings, like GV, that improve communications. But neither do we want to wake up one morning and find the core telephone system is gone. (Especially in those rural areas that lack other options.) It will take some serious regulatory work to re-align the old rules with the newly emerging reality. The sooner the FCC begins, the less disruptive that process will be.

COMING NEXT YEAR: The *FHH Telecom Law* Digital Transition

Following the FCC's example in herding the television viewing public into a digital universe, we at *FHH Telecom Law* are planning to do the same in 2010. In an effort to reduce our carbon footprint and bring the news to our readers as quickly as possible (and in color!), we are going to stop distributing *FTL* in a paper edition. Instead, we will distribute it electronically. No firm date has been set yet, but we expect we will stop the paper edition sometime in the first quarter, 2010.

We already have an e-mailing list of several hundred subscribers. If you are among them, you need do nothing – your continued receipt of *FTL* is taken care of.



If, on the other hand, you are one of our several hundred “hard copy” subscribers who receive their monthly *FTL* fix on paper via snail mail, and if you wish to continue to receive *FTL* (and who wouldn't?), you will need to send us the email address(es) through which we can alert you to each month's edition. Just specify your preferred email address(es) in an email to cole@sbhlaw.com; it will be helpful if the subject line reads “**FTL email address change**”.

As the FCC did in the DTV Transition, we will provide further warnings as the Big Day approaches – but we encourage you to act sooner rather than later to avoid any possible delivery interruption.



(Stimulus Guidance - Continued from page 5)

On the other hand, the administrators realized that in some cases they need more information. For example, where applicants are comprised of multiple participants, it had been unclear how much information was required regarding the non-lead participants. Similarly, the process whereby incumbents could challenge the showings of applicants without any opportunity for rejoinder seemed unfair. The cloak of secrecy over the applications also seemed unnecessary, except in the rare case where proprietary information was involved. Changes in all of these areas have been proposed.

Another big area for improvement would be answering “frequently asked questions”. In Round I, the government released a list of FAQ and the answers to those questions. But over the next few weeks numerous other questions arose which were answered by the staff in e-mails but not made available to all other applicants. It seems that it would not only have ensured consistency but cut down on the multitude of questions posed to the staff to update the FAQ responses more frequently.

Substantive Issues BIP and BTOP also did some soul-searching about how the money should be distributed. There had been considerable flack about their definition of “remote” areas (50 miles from any urbanized area) as being too restrictive, and a revision of that definition certainly seems to be in the offing. More broadly, they are looking at whether funding should be prioritized for (1) “comprehensive community” projects where broadband services are integrated with anchor institutions like

community colleges, libraries, public safety institutions, and health care facilities, (2) regional development projects where broadband services are part of larger economic development plans for job creation and infrastructure build-out, and (3) projects targeted at specifically needy populations like the elderly or Indian tribes.

In addition, they heard considerable criticism of the definitions used for “unserved”, “underserved”, and “broadband” – all fundamental concepts in this process.

Changes in any of these categories could dramatically alter areas of eligibility. The degree to which proposals are “cost effective” is also under review, occasioned by the realization that projects for the most remote and underserved areas are often the least “cost effective” yet are still worthy of funding in furtherance of the objectives of the Act.

The deadline is November 30, so prospective commenters must act fast.

Finally, they are re-visiting the issue of whether or when facilities built with stimulus money may later be sold. The original rules severely constrained post-grant sales. BIP and BTOP are now open to making those restrictions more flexible, provided awardees are not “unjustly enriched.”

Deadline No one disputes that there is plenty of room for improvement in this process, but the time to get your suggestions in is short. The deadline is **November 30**, with the Thanksgiving holiday falling right in the middle – so prospective applicants must act fast if they want to have a role in shaping the direction of the final funding round.



(Spectrum Re-purposing? - Continued from page 9)

not “something.” If the FCC is guided by the public interest, it should strive to maximize the benefit obtained from every bit of spectrum capacity rather than making judgments based on who will pay the most for the opportunity, not only to provide service but also to block out competing service providers.

Increased access to broadband will undoubtedly spread education and access to information, with great value to our society, even though accompanied by scams and porn on the side. But broadcasting also plays a critical and highly valuable role in our society and is a more efficient way to deliver common content to a large number of people than transmitting the same content to multiple users each of whom uses spectrum to access a server.

Why can't we do it all at the same time?

Will the FCC be able to envision the potential of developing technologies rather than the limitations of existing technologies, so that it can truly realize maximum efficiency by letting spectrum multi-task instead of single-task? The lobbying crowd is not likely to help the FCC along that path, and, unfortunately, those with the most money can afford to pay people to visit the FCC day after day after day, pounding home the message that what they want is surely most beneficial and important. If the FCC hears a half-way decent argument often enough, it is difficult for them to avoid starting to believe it. But in a digital world, the entire framework is different, because it is so much easier to mix and match. Can and will the FCC step up to the 21st century plate? Stay tuned.



(*Net Neutrality NPRM - Continued from page 1*)

? enforcement procedures that the Commission should use to ensure compliance.

Some noteworthy details:

While the proposed rules would apply to broadband Internet access, they would not apply to dial-up Internet access, or to private “intranets.” The exemption for dial-up may offer some comfort to small and rural Internet service providers.

Unlike the FCC’s existing Internet Principles – which state what “consumers are entitled to” – the proposed rules are phrased as obligations imposed on IASPs. But this raises the issue of what sorts of entities the rules should apply to. AT&T has called on the FCC to apply Net Neutrality rules to application service providers such as Google, as well IASPs. While the NPRM seeks comments on that idea, the rules as proposed would apply only to IASPs.

The proposed Non-Discrimination Rule would prohibit IASPs from charging content, application, and service providers for enhanced or prioritized access to subscribers, but makes no mention of charges to the end users. This might allow, for example, the end user to subscribe to a service that increases throughput (and hence quality) for a video channel, even if it reduces throughput to the same user’s other applications. The Chairman did say at the meeting that users should have the final say on their own Internet experience.

The NPRM tees up the issue of whether so-called “managed services” should be exempt from some or all of the Net Neutrality rules. Examples include IP-enabled cable television-like services (AT&T’s U-verse, Verizon’s FIOS video), facilities-based VoIP services, and telemedicine applications. These are delivered over the same network facilities as Internet access, but are not themselves traditional Internet services. This issue will almost certainly be hotly contested.

The NPRM asks whether only “unreasonable” discrimination should be prohibited. Such a limitation would allow forms of discrimination that may be desirable for end users (e.g., to promote quality of service for a particular application). While the IASPs can be expected to support that approach, there may be a catch: the concept of prohibiting “unreasonable discrimination” has traditionally been a fundamental component of common carrier

regulation, and IASPs do not want to be treated as common carriers. Additionally, drawing the line that defines “unreasonable” will be a contentious task.

In exploring the “transparency” rule, the NPRM seeks comment on the proper balance between giving consumers the information that they need and overwhelming them with detail. The NPRM also asks whether the transparency rule should require IASPs to give details of network management to content/application/service providers and/or to the FCC. While the IASPs may have limited concerns about providing this information to consumers, they will likely fight this extension of the concept.

There will be numerous FCC “workshops” in this proceeding, and more importantly, a formal process of technical outreach led by the FCC’s Office of Engineering and Technology. The latter seeks details on what is reasonable network management, what is workable in terms of transparency, and how the FCC can prevent the rules from having detrimental impact.

Commissioners McDowell and Baker dissented in part, laying down their “markers” as to how they would oppose the Chairman’s proposal with the “factual and legal predicates” of the NPRM. Commissioner McDowell agreed on the need to preserve an open Internet, but wanted it done through non-government management entities such as ICANN and other voluntary entities – a “bottom up” rather than a “top down” approach. He argued that countries that regulate the Internet more than the U.S. tend to be less free than the U.S., and are waiting for the U.S. to enact more regulation in order to justify their own more intrusive and political regimes. And while the Chairman has stated that a goal of Net Neutrality is to protect innovation at the “edge” of the network, McDowell noted an unprecedented overlap between “edge” applications and “core” ISPs. He also suggested that any anti-competitive conduct by IASPs could be addressed by anti-trust laws.

The NPRM asks whether only “unreasonable” discrimination should be prohibited.

Comments on the NPRM are due to be filed by **January 14, 2010**. Reply comments are due **March 5, 2010**.

Recent history suggests that the proceeding will be a titanic battleground. Time to strap on your armor, grab your lance, and head to the field of combat. Let the tilting begin!



(How To Solve Net Neutrality - Continued from page 1)
band, still implicitly came under the *Computer III* rules, and thus had to be shared with competing ISPs. But cable TV companies, which had never been subject to *Computer III*, had no such obligations. Non-cable ISPs clamored for access; the cable companies fought back. The FCC settled the issue in 2002: cable TV is not like telephone service and need not share its facilities. A cable company could require its broadband subscribers to use the cable company's ISP.

That decision outraged the phone companies, who still had to share their broadband channels. But in 2005, the FCC extended the same ISP exclusivity to the phone companies. The Commission decided that DSL is a lot like cable after all, and so abolished the DSL sharing rules. If you wanted DSL, you took the local phone company as your ISP.

Now, having let the broadband ISPs lock in their customers with nowhere else to go, the FCC is shocked to learn that some of those same ISPs are blocking or slowing content that might compete with their parent companies' offerings. How can the Commission protect broadband customers from the undesirable circumstances which the Commission's own regulatory decisions have unintentionally fostered?

It is too late for the FCC to re-apply *Computer III* to broadband Internet. That opportunity has passed. And so the FCC goes to Plan B: duct-tape network neutrality rules over the problem and make discrimination victims run the gauntlet of lengthy and possibly expensive enforcement proceedings.

There may be another way. The ISPs cannot easily be forced into giving access to competing ISPs. But perhaps they might be persuaded to give that access volun-

tarily.

Here is how it might work.

The FCC lays out a set of detailed, no-nonsense network neutrality rules that specify clearly what ISP behavior is banned. (Not like the newly proposed rules – see article on Page 1 – which are vague and general.) The FCC also sets up a swift and certain enforcement procedure that penalizes violations. But it gives each broadband ISP a choice: (a) the ISP can opt to abide by the network neutrality rules; or (b) it can offer competing ISPs access to the broadband channel, equivalent to its own. If an ISP chooses network neutrality, it keeps the entire customer base for itself, but must be neutral as to content. If it opts to open its network, it can block or favor content as it chooses, although it risks losing customers who dislike the discrimination.

Perhaps ISPs might be persuaded to give access to their competitors voluntarily

Many details remain to be worked out. Could a cable or telephone company use its relationships with subscribers to market ISP services? Could an ISP reject network neutrality, yet still hold in customers with optional long-term contracts and early termination fees? How would the rules operate in a rural area with no competing ISPs?

But the principle is simple enough. A provider that chooses to abide by network neutrality must live up to that commitment, in exchange for its role as the exclusive ISP. Another that chooses to open its network will have to work with competitors as promised, in exchange for the right to play favorites with customer content.

In short, a broadband provider can have all the customers, or it can manipulate their content. It just can't do both.



(Net Neutrality Debate? - Continued from page 2)
pendence of operation at the individual nation telecom level while assuring uniformity of principle and competitive approach across the whole Union.

- The type of CPNI protections that we here have imposed on telecom carriers are now applied to ISPs, so that e-mail, bank account information, and other Internet transactions are strongly protected from disclosure.
- Porting of phone numbers must be accomplished in one day. Mobile communications contracts may

not bind consumers to more than one year.

- Finally, the regulators voted down a proposal to allow copyright violators to be summarily banned from the Internet after three "strikes". Instead, violators will have the right to a "prior, fair and impartial" hearing. Clearly, deprivation of Internet access is deemed cruel and unusual punishment. What is not clear is whether alleged copyright violators are entitled to appointed legal counsel, a jury trial, and Miranda warnings before their service is terminated.



(Permanent Discontinuance - Continued from page 7)
ways prevents you from doing so. No way have you “permanently discontinued” use of that treadmill.

But the FCC would take your treadmill away. For in *Northstar*, the licensee acknowledged in its application that it had not been operating the system for at least two years. The FCC rather breezily noted that in its other services it deems permanent discontinuance to have occurred if a licensee ceases operations anywhere “from 90 days to up to one year or more.” Given the two- year inactivity period, the *Northstar* licenses were deemed to have cancelled automatically. This unsupported and unprecedented declaration is flabbergasting on several levels.

First and foremost – when did the automatic cancellation occur? There is absolutely no way that any licensee would have known that a secret alarm clock with a silent alarm was ticking. And if there was such an alarm clock, did it silently go off at 90 days, 180 days, one year, or “more” – all of which would be potential yardsticks to measure PCS against. The FCC does not say. All we know is that at the two-year point the alarm clock had definitely gone off unbeknownst to anyone, and the license had been cancelled without the FCC, the licensee or anyone else doing or saying anything. This is scary, since the law normally demands that people have some kind of notice before punitive sanctions are imposed.

A dark cloud of uncertainty has been cast over a whole service.

Second, PCS licensees who are planning to sell their silent stations now face a quandary. If the station has been silent for any length of time (we assume you’re safe if you were silent for less than 90 days, but who knows?), your buyer has no assurance that the license has not been automatically cancelled by operation of a law that is unstated. Communications lawyers called upon to opine to the “good standing” of PCS licenses will be hard put to issue such opinions. A dark cloud of uncertainty has been cast over a whole service.

Unfortunately, the applicants involved in the *Northstar* case are unlikely to seek review; the Commission waived the “permanent discontinuance” rule for them in order to facilitate the effectuation of the license sales. So they will suffer not at all from the novel application of the permanent discontinuance rule and would be foolish to challenge the ruling. Under ordinary principles, no other party has standing to seek review of the Bureau’s decision. So even though the decision seems to this observer grossly, unequivocally and manifestly erroneous, it will sit there for a while until it can be revisited. (One avenue might be the periodic review of non-controversial rules that the FCC undertakes every few years. Such a proceeding is now open, and the Commission could remedy the effect of this decision by simply adopting a firm standard for measuring permanent discontinuance of service, prospectively applied.) In the meantime, forget about your treadmill and get that PCS system running.



(Tower Siting - Continued from page 3)
ing the issue of delays in siting approvals as a potentially major roadblock to the national broadband plan the FCC is drafting, the

Commission nonetheless found itself constrained by the Act to tread lighter than its pro-broadband agenda might otherwise have dictated. The Commission determined that Section 332(c)(7) of the Act grants it interpretive authority as to the limits imposed by Congress on state and local governments with regard to wireless facility siting, but nothing in the Act or the legislative history gives the FCC the go-ahead to override state and local governments outright on the matter.

Finding ample evidence of widespread unnecessary delays, the Commission determined that it *could* specify as “reasonable” certain time periods in which a zoning authority must act on an application and that it could clarify that applicants may seek relief from the courts upon a “failure to act” – the expiration of the applicable

timeframe in that jurisdiction. The timeframes selected – 90 days for the review of collocation applications and 150 days for the review of other siting applications – do not preempt shorter timeframes adopted by state and local government. The FCC’s timeframes are substantially longer than CTIA requested, but, says the Commission, they will give applicants greater certainty while providing sufficient flexibility to the governmental authorities to process applications and affording both sides the right to redress in the court system, as envisioned by Congress. Also in light of evidence of Congressional intent that the courts, not the FCC, fashion remedies for failures to act on applications, the Commission declined CTIA’s request to automatically deem an application granted immediately upon expiration of the processing timeframe.

While wriggling into the middle ground on the issue of application action timeframes, the Commission decided

(Continued on page 15)

“Clearly on a fast track”

After One-Year Engagement, AT&T, Centennial Allowed To Tie The Knot

Raymond Quianzon
quianzon@fhhlaw.com
703-812-0424



After taking a year to analyze the state of the communications industry in the Midwest, Southeast and Puerto Rico, the FCC finally determined that competition exists in wireless markets and allowed AT&T to acquire Centennial Communications. The FCC offered no explanation for why its review required 12 months, but the two companies wasted no time: they merged the day after the government gave the go-ahead. Remarkably, one of the FCC Commissioners described the government’s pace as “clearly on a fast track.”

The companies asked the FCC for permission to merge in November, 2008. The following month, the FCC issued a public notice inviting the public to comment on the merger. Members of the public were given a month and a half, until February, 2009, to submit comments to the FCC. AT&T then embarked on a half year of requests to the government asking them to expedite its deliberations; numerous meetings were convened with FCC staff and more than a dozen letters were submitted asking for action. Finally, one year after the applications were submitted, the FCC consented to the transaction.

During the previous administration, the FCC had a policy of trying to complete its review of business transactions within 180 days so that businesses were not hindered by inaction. During the past few years the FCC

went so far as to disclose informal timeline guidelines on its website; it also posted a clock for each transaction so that both the public and FCC staff were aware of how long the process had taken. The new administration kept the clock on the FCC’s website for this transaction and tauntingly indicated that the government took 323 days to review the transaction – nearly twice as long as previous reviews.

*Yet another
Tier 2 carrier has
been swallowed up
by one of the
Big Two.*

AT&T, with \$128 billion in 2008 revenues, touts itself as the world’s largest communications company. AT&T will now increase its size with the acquisition of Centennial Communications, which it valued at \$2.8 billion. Centennial was a regional provider of communications services with more than a million wireless subscribers and three quarters of a million telephone access lines. Centennial’s operations were concentrated in three regions of the country. Its Midwest operations covered portions of Michigan, Indiana and Ohio and its Southeast operations provided service in Mississippi, Louisiana, and Texas. In addition to the continental U.S., Centennial also operated in Puerto Rico and the U.S. Virgin Islands with wireless phone service, wireless internet service, fiber service, and telephone service.

Both the FCC and the U.S. Department of Justice re-

(Continued on page 16)



(Tower Siting - Continued from page 14)

to stay clear of a requested blanket preemption of state and local requirements that all wireless services facility siting applications necessitate a zoning variance. Interestingly, the Commission shied away not because it found limited authority in the Act for such intervention, but rather because CITA neither (a) actually asked for blanket preemption, nor (b) provided enough evidence of a controversy in need of resolution.

One area in which the Commission did not find itself constrained was in its determination that state and local governments have been unlawfully denying applications on the basis of preexisting service by competing providers. This sort of barrier to the deployment of ad-

vanced technologies rightfully gives the pro-competition Genachowski FCC conniptions. The Commission managed to find authority embedded in the Act’s pro-competitive purpose to render a ruling explicitly prohibiting it.

In all, the Commission played it very safe, offering a modicum of relief for wireless providers and the potential for much speedier wireless service facility siting approvals by state and local authorities. The Declaratory Ruling nevertheless also affirmed the power that state and local governments can exert in the deployment and delivery of advanced wireless services, a hard pill to swallow by a Commission nearly 100% focused on promoting deployment of broadband and advanced services.

Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Arlington, Virginia 22209

First Class



(AT&T/Centennial - Continued from page 15)

viewed the transaction and found that competition exists in most of the areas served by Centennial. The merger involved 27 markets and the government determined that in 20 of those markets there were four or more providers of wireless phone service. In seven Louisiana and Mississippi markets the FCC determined that the merger would adversely impact competition. Therefore, the FCC ordered AT&T to divest its interests in the seven markets in order for the acquisition to move forward. Verizon seemed pleased to lend a hand and quickly snapped up five of the divested markets from AT&T.

As additional competitive safeguards, the FCC required AT&T to maintain Centennial's CDMA network in Puerto Rico and the Virgin Islands for 18 months (as AT&T had offered to do). In addition, the FCC conditioned its approval on AT&T's commitment that any carrier with fewer than 10 million subscribers that has an effective roaming agreement with Centennial as of the closing of the merger will have the option to continue to obtain roaming ser-

vices, pursuant to the rates, terms and conditions of that agreement, in those areas where the carrier was obtaining roaming services on the Centennial network on the closing date, for the later of (i) a period of 48 months after the closing, or (ii) the full term of such carrier's agreement with Centennial (again, as volunteered by AT&T). Both of these conditions were intended to ensure that carriers needing a CDMA roaming partner would have access to such a partner in the areas formerly served by Centennial.

On the other hand, the FCC refused to require AT&T to provide interoperability functionality for its roaming partners, to eschew the "primary carrier" clause contained in its roaming agreements, or to renounce handset exclusivity deals. All of these were deemed to be beyond the limited scope of this merger proceeding.

So in the end, despite the Commission's oft-expressed concerns about consolidation within the industry, yet another Tier 2 carrier has been swallowed up by one of the Big Two.