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FHH Telecom Law

April, 2011 — Current Issues in Telecommunications Law and Regulation — No. 11-02

FCC Launches Massive Overhaul of USF and Intercarrier Compensation Regimes

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A wise man once said that a journey of a thousand miles begins with a child saying "Are we there yet?" The FCC has begun its own thousand-mile journey to the Promised Land of USF/ICC reform by issuing a massive 239-page tome that promises to revisit, reassess, restructure and revitalize virtually every aspect of universal service support and intercarrier compensation as we know it. The task is a daunting one. Perhaps for that reason, the Commission has been putting it off for more than a decade, tweaking this or that and putting out small brushfires as they've arisen, but never tackling the fundamental reform that virtually everyone agrees is desperately needed. Complicating the task is the fact that USF reform and ICC reform are inextricably related – you can't reform one without reforming the other. So the FCC has correctly chosen to attack the two behemoths – each of which has proven remarkably impervious to reform – in a single charge. This multiplies the complexity and size of the proceeding exponentially, but is the intellectually honest way to approach the matter.

In truth, just *reading* the Notice of Proposed Rulemaking was a major undertaking. The document inquires into literally scores of existing policy issues, from questions as fundamental as the FCC's jurisdiction to regulate VoIP to details as granular as benchmark rate levels. So far-reaching is the inquiry that we estimate that more than a *thousand* distinct questions or issues were posed for industry input. Recognizing the logistical problem of arranging the myriad number of meetings necessary to garner the expected input from all parties, the Commission has taken the unusual step of establishing formal procedures for scheduling meetings with the staff. On the other hand, the Commission has somewhat unrealistically allocated only 45 days for initial comments on the ma-

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Wireless to Broadcasters: Vamoose!

Range War 2011: Showdown at Channel 51

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In the Old West, even the vast wide open spaces were not vast enough and wide enough for everybody. Farmers and cattle ranchers fought over scarce resources, like water and grazing rights. These conflicts were known as range wars.

The tradition lives on, but the turf in dispute today is spectrum, particularly TV channel 51. The wireless companies want to ease out the TV broadcasters, who may want to stay put. Better hunker down; the legal papers are going to fly.

The dispute is a by-product of the digital TV transition a few years ago. Digital technology allowed the geographic repacking of TV stations into fewer channels than before. That freed up 108 MHz of spectrum in the 700 MHz band, part of which the FCC auctioned off to wireless broadband providers for almost $20 billion. Even here in Washington, that counts as real money. The government got the cash; the broadcasters got to quadruple their video capacity; and the wireless companies got more bandwidth, over which customers could download vital, time-sensitive information such as videos of cats riding on vacuum cleaners.

Now the happy honeymoon is over. Reality has settled in. The domestic-bickering phase has begun.

The immediate issue is TV channel 51, which (after the transition) is the highest TV channel at the highest frequency. Just above it in the spectrum, where channel 52 used to be, is the lower portion of the wireless 700 MHz band, known to the cognoscenti as A Block. But channel 51 and A Block are on different frequencies, right? So there should be no conflict.

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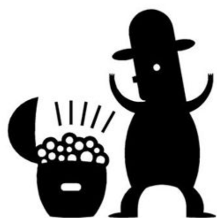

Come 'n' get it

Another RUS "Funds Availability" Opportunity

$700 Million in Loans Offered for Broadband Service Providers

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Following on the heels of the controversial stimulus initiative under which the Department of Agriculture's Rural Utility Service (RUS) disbursed several billion dollars in loans and grants for broadband build outs, RUS has begun soliciting new applications for up to $700 million dollars in low interest loans for broadband under provisions of the 2008 Farm Act. The purpose of the funding, as with the BIP stimulus program of 2009 and 2010, is to subsidize the construction of broadband facilities in parts of rural America that are currently unserved or underserved in that regard. RUS is accepting applications now even though the actual appropriation for the program remains uncertain due to the inability of Congress to pass a final budget for 2011. RUS finds itself in a bit of a bind since the funds, if they do become available, must be committed by the end of this fiscal year (*i.e.*, by September 30, 2011), so it has relatively little time remaining to solicit, receive and process applications. While RUS makes no guarantee that the funds will actually be in the cookie jar after applications are submitted, it obviously feels confident enough about the survival of the program to solicit applications. With the most recent (and likely last) Federal budget "continuing resolution" expiring on April 8, RUS should know by then whether it in fact has any money to lend.

Jaded veterans of the stimulus program application process will find this program somewhat simplified. As before, the funds may be used for the construction but not the operation of broadband facilities. Acquisition of such facilities (apparently including spectrum for wireless broadband) is now a permitted use, whereas the stimulus program declared that taboo. Underserved areas are now defined as areas with fewer than two carriers providing broadband at a total speed of 3 Mbps (upload and download combined). Unfortunately, prospective applicants are once again left to their own devices in trying to figure out whether any particular area has service providers that meet that definition. New loans are also forbidden in areas where RUS loans or grants for broadband have already been made or where an application is currently pending. (If two applications come in for the same area, a decision must be made on the first one received before the second one will be considered.) Thankfully, they are planning to make an online map available to prospective applicants so that this latter bit of information can be readily ascertained.

Loans may be requested in amounts of between $100 thousand and $100 million, with interest rates set at either 4% or the government's cost of borrowing. Loan guarantees are also available.

Other highlights of the program:

- ☑ Applicants must show availability of equity totaling at least 10% of the capital necessary to fund the project from sources other than the RUS loan.
- ☑ Detailed financial information for the applicant's past three years must be provided, as well as projections of revenue over the next five years showing that the project is sustainable without further capital input.
- ☑ A detailed network design must be supplied demonstrating proposed construction adequate to provide the projected broadband service threshold, the applicant's ability to provide these services, the costs of construction and operation, and a timetable.
- ☑ Broadband must be provided at speeds of at least 5 Mbps (total of upload and

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The march toward spectrum re-purposing

Three Incentive Auction Bills Introduced In Congress

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It's no secret that: (a) the FCC would like to re-purpose already-occupied broadcast TV spectrum for broadband use; (b) many (if not most) of the folks who currently occupy that spectrum are not particularly keen on the idea; and (c) the FCC figures that any broadcaster resistance to spectrum re-purposing might be softened by the siren song of a big payday, with the cash coming out of the proceeds of an auction of the re-purposed spectrum.

The FCC's problem (also not a secret) is that the Commission doesn't have the statutory authority to promise any auction proceeds to licensees who relinquish their spectrum.

With apologies to Stephen Sondheim, it's obviously time to send in the legislators!

The bills would give the FCC a carrot (size and deliciousness unspecified) with which to induce broadcasters' cooperation.

Already, three bills have been introduced this year that would allow the Commission to spread the spectrum wealth around; reports of still more bills in the works continue to surface. (This is in addition to several bills introduced last year.)

First into the mix this year was S.415 (a/k/a the Spectrum Optimization Act). A short and sweet four-page bill from Sen. Mark Warner (D-VA), it would give the FCC the authority to conduct auctions of spectrum that is "voluntarily relinquished by a licensee," with "a portion" of the proceeds being shared with relinquishing licensees.

Exactly what portion, you ask? The bill would simply leave it to the Commission to "establish a maximum revenue sharing threshold applicable to all licensees within any auction, unless the establishment of such threshold would increase the amount of spectrum cleared or would increase the net revenue from the auction of such spectrum." Say what? The bill would also order the Commission to "minimize the cost to the taxpayer of the transition of the spectrum to be auctioned." That provision could complicate the workability of a suggestion advanced recently by Media Bureau Chief William Lake that the government might also pay for the costs of repacking the spectrum.

So the Warner bill would give the FCC a carrot (*i.e.*, auction proceeds sharing) with which to induce broadcaster cooperation, even if the size and deliciousness of that carrot are still up in the air. By contrast, it has no provision for a stick with which broadcasters might be threatened into cooperating. Some of last year's bills would have created a spectrum tax that could have done just that – but the Warner bill says nothing about such a tax.

On the House side, we have H.R.911 (dubbed the Spectrum Inventory and Auction Act of 2011) introduced by Rep. John Barrow (D-GA). This, too, would give the FCC the authority to conduct incentive auctions. But before such auctions could be conducted, the FCC and the NTIA would first have to complete an exhaustive broadband spectrum inventory report which would have to be made public and updated semi-annually. The report would be no walk in the park: it would have to detail federal and non-federal uses of the spectrum and describe (among other things) the types of receivers in use, the geographic distribution of the various uses, and the frequency of use.

Only after this initial report is completed could the FCC move forward with incentive auctions. As with S.415, H.R.911 would leave the to-be-shared amount of auction proceeds up to the FCC's discretion. The only guidance on that score is that the sharing should be "in an amount or percentage that the Commission considers appropriate and that is more than de minimis."

Importantly, the bill would expressly prohibit the Commission from reclaiming spectrum "directly or indirectly on an involuntary basis." The bill is silent as to what would qualify as an "indirect" involuntary measure. Nevertheless, the fact that that language is included may comfort some skeptics who expect that the FCC might otherwise opt for non-voluntary strong-arm measures to persuade licensees to give up their spectrum. (Note: no reference to any spectrum tax here, either.)

Back on the Senate side, we have S.455, the Reforming Airwaves by Developing Incentives and Opportunistic Sharing Act – or "RADIOS Act" – co-sponsored by Sens. John Kerry (D-MA) and Olympia Snowe (R-ME). This bad boy weighs in at a much heftier 51 pages. It follows up on a similar bill these two senators co-sponsored last year. According to Kerry's website, this year's edition is "comprehensive spectrum reform legislation to modernize our nation's radio spectrum planning, management, and coordination activities."

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Extreme Makeover - USF: Looking At Lifeline/Link Up

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As part of its ongoing effort to modernize (and rationalize) the various elements of the Universal Service Fund (USF), the FCC has now turned its attention to Lifeline and Link Up. These two programs make up USF's Low Income component, which seeks to make telecommunications accessible to those with low incomes. In a 98-page Notice of Proposed Rulemaking (NPRM) released March 4, the FCC has set out a number of proposals for possibly significant changes to its current approach. Many of those proposals implement recommendations from the Federal-State Joint Board on Universal Service (which we reported in the November, 2010 edition of *FHH Telecom Law*), the Government Accountability Office, and the National Broadband Plan.

To get a better feel for the nature and extent of the proposed changes, it may be useful first to get a sense of the way the Lifeline and Link Up programs work.

The goal of the programs is to insure that "quality telecommunications services" are available to low-income customers at "reasonable and affordable" rates. To that end, the government does not reimburse the low-income customers directly; rather, it reimburses eligible telecommunications carriers (ETCs) who provide service to low-income customers. The ETCs submit quarterly forms reflecting the extent of low income support they have provided. In 2010, the cost of the Lifeline/Link Up programs was $1.3 billion (roughly five times its 2007 size) – in other words, there's a serious pot of cash to dip into.

There is no uniform, nation-wide set of standards and procedures by which ETCs identify eligible "low-income" customers. Standards and procedures vary among the various states. In many instances, verifying documentation is not required. The potential for innocent error or less innocent fraud is not insubstantial.

The focal points of the FCC's Lifeline/Link Up reform efforts described in the NPRM are:

- eliminating fraud, waste and abuse;
- capping the Low Income Fund;
- improving program administration; and
- modernizing Lifeline and Link Up (including reimbursement for broadband, of course).

Out of the hundreds of discrete issues teed up for comment, we have selected a few highlights below.

> *The FCC is confident that it can reduce fraud, waste, and abuse in the programs.*

Fraud, waste and abuse. The FCC is confident that it can reduce fraud, waste, and abuse in the Lifeline and Link Up programs. (It's so confident, in fact, that it's already planning a broadband adoption pilot program on which it can spend the money it's going to save. See below for more details). To do that, it proposes to eliminate a number of problem areas in the way the programs are implemented. For example, the following would be axed by the Commission:

- Link Up (activation) reimbursement for carriers that do not routinely impose activation charges on *all* customers within a state;
- Duplicate discounts going to the same household (under the rules, each household may only receive one telephone line, either wireline or wireless). To prevent duplication, the FCC proposes to require carriers to obtain a certification from consumers that there is only one Lifeline service per address;
- Self-certifying for eligibility by consumers (instead, the FCC proposes to require carriers to demand documentation);
- Inadequate verification sampling (the FCC may require larger sample groups or a census of *all* customers if an initial sample group reveals too many ineligible customers);
- Reimbursement for services unused for 60 days (a particular concern for prepaid services);
- Complete – as opposed to *pro rata* – reimbursement for subscribers who enroll or disconnect

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If you've got a website, you've (probably) got a problem

Should Your Company's Website Have a Privacy Policy?

(Spoiler alert: You bet!)

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(Editor's note: This is the first in a series of articles exploring the rapidly developing area of privacy law – an aspect of online (and even off-line) communications which affects everyone, often in unexpected ways)

You've probably noticed that most websites have a link to a privacy notice or policy, a statement that describes how the website collects and uses personally identifiable information about its visitors. You may wonder whether your company's website needs a privacy policy. And if you already have one, is it adequate? In a series of articles in the *FHH Telecom Law* we will consider those questions and more. In this issue, we explore the question of whether your company's website needs a privacy policy.

Before you can know whether your website needs a privacy policy regarding the collection of personally identifiable information (PII), you need to know what PII is, and how it is collected.

The legal requirements to have a clear and accurate privacy policy for your website are growing.

PII is any information that relates to an *identified* or *identifiable* individual. PII is defined differently for different legal purposes, but generally includes: name, address, phone number, gender, date of birth, citizenship, Social Security number, driver's license number, race/ethnicity, as well as criminal record, health or financial information. PII also includes information that alone does not directly identify an individual, but when combined with other PII, could be used to identify an individual. This includes information obtained from the computer of a visitor to your website, including IP addresses, e-mail addresses, browser information, web search history and other information associated with visitor's computer.

Websites can collect data from visitors either actively or passively. *Active* methods of data collection include requiring website users to affirmatively fill out forms, profiles, or account settings. But even if your website does not obtain user PII in that manner, almost every website engages in *passive* data collection, where information is gathered automatically as the user logs in, enters, and moves from page to page on your website. Typically, such passive collection obtains user IP addresses, e-mail addresses, browser information, and web search history information that can be combined to create PII. In addition, your website may insert "cookies" on the visitor's computer, or read cookies inserted by another website. Cookies are programs that store information on the visitor's computer associated with web use by that computer, and are used to facilitate logging into websites, purchasing products or services, and tracking the visitor's web search history. The information your website collects from cookies usually includes PII.

Now, back to the question, "should your company's website have a privacy policy"? The answer is: every commercial web site should have a clear and accurate privacy policy. The reasons are practical, contractual and legal:

1. ***Your customers, and other users of your website, expect you to protect their private data***. It's no secret that users of the web are increasingly concerned about the security and privacy of the data that is collected about them on the web. While high profile law suits and criticism have to this point been primarily directed at search engines like Google or social network operators like Facebook, consumer expectations have been raised for all website operators. So competition and customer retention provide strong incentive for you not only to protect user personal information, but also to let them ***know*** that you are protecting it.

2. ***Third parties may require your website to have a privacy policy.*** Certain web advertising agreements require the website operator to have a posted privacy policy. In addition, if you engage in commerce on your website and want to boost consumer confidence in use of your site, it is helpful to obtain and post third-party certifications. Major third-party certifications, such as those provided by BBB Online, and TRUSTe, require the website to have a clear and effective website privacy policy.

3. ***Legal Requirements***. The legal requirements to have a clear and accurate privacy policy for your website are growing. While there currently are no substantive federal rules that apply to all website operators, broad federal legislation is pending in this area. In the meantime, there are significant federal requirements already in place.

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State of Connecticut vs. the wireless industry

State Tries Back Door Path To Re-Regulation Of CMRS

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The Wireless Bureau has asked for comment on a Petition for Declaratory Ruling filed by CTIA-The Wireless Association® (CTIA) which is requesting clarification of "the scope of Section 332(c)(3)(A)'s ban on state and local entry regulation." CTIA filed its Petition in response to a decision by the Connecticut PUC which ordered that wireless providers must apply for and obtain a Certificate of Public Convenience and Necessity (CPCN) from the Connecticut PUC before public rights of way can be accessed in the state. CTIA has asked the Commission to declare that the Connecticut PUC's requirement is a form of entry regulation that is prohibited by Section 332(c)(3)(A).

CTIA's Petition goes into great detail regarding the history of entry regulation and how the Connecticut PUC's position is prohibited by the Communications Act, the FCC's wireless policies, Congressional intent, and also the National Broadband Plan – not to mention the Bill of Rights, the Bible and the Geneva Convention. As background, the Petition explains that when Congress passed the Omnibus Budget Reconciliation Act of 1993, it added Section 332(c)(3)(A) which prohibited State or local government regulation of the entry of, or the rates charged by, any commercial mobile service. Congress at that time stripped states of the power to bar or delay entry into the then fast-growing field of mobile communications, something which a number of states had accomplished by erecting costly and time-consuming certification procedures.

Eighteen years later, Connecticut has decided to test the regulatory waters to see if anybody still remembers Section 332(c). The Connecticut PUC is requiring new CMRS providers to submit an application including technical information on their proposed wireless offerings and their technical qualifications in order to demonstrate that grant of a CPCN would further Connecticut's policy goals. A wireless provider may not apply for permission to access the public rights-of-way until after obtaining a CPCN. CTIA also points out that there are numerous reporting requirements after the CPCN is obtained. CTIA maintains this all constitutes prohibited entry regulation and such state regulation is preempted by Federal law.

CTIA argues that Connecticut's requirement runs counter to the National Broadband Plan.

CTIA also maintains that the CPCN requirement runs counter to the National Broadband Plan. The National Broadband Plan recognizes that access to public rights-of-way is critical to achieving our nation's broadband goals. Limitations on access to conduits, ducts, poles and rights-of way would increase the cost generally and slow the pace of broadband network deployment.

The request for comments on the Petition for Declaratory Ruling was released on February 25, 2011 and comments are due ***June 10, 2011*** with reply comments due ***July 11, 2011***.

*(**Privacy Policies -** Continued from page 5)*

For example, the federal Children's Online Privacy Protection Act (COPPA) restricts the online collection of data and marketing of services to children younger than 13. If you operate a commercial website directed to that age group, or if you know that your website is in fact collecting personal information from kids that age, then the COPPA-based rules of the Federal Trade Commission (FTC) require you to post a clear and comprehensive privacy policy on your website describing your company's information practices for children's personal information.

More generally, the FTC also uses enforcement actions to prevent *all* website operators from failing to fulfill the terms or their website privacy policies, which the FTC has ruled constitutes an "unfair" and/or "deceptive" trade practice. In addition to various federal requirements, many states have laws that directly or indirectly require website operators to have accurate and complete privacy policies. For example, California requires operators of commercial websites or online services that collect personal information on California residents to conspicuously post a privacy policy on the site and to comply with that policy. The law has specific categories of information that must be included in the privacy policy.

So, the bottom line is that your company's website should have an accurate and complete privacy policy. In future articles in the Privacy Law Corner, we will explore what should be included in a good privacy policy. Stay tuned.

FCC Moves Forward With Communications Plan for Native American Tribal Areas

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(Editor's note: FHH Telecom Law is pleased to welcome Rob Schill, a new member of the FHH team, to the ranks of our contributing writers. This is Rob's maiden FTL offering.)

In a day dedicated to further opening the lines of communication with Native Nations, the FCC held a Native Nations Day to unveil a series of steps to improve communications access in some of our least-connected communities. On March 3, the Commission consulted with representatives of Native Nations, announced an FCC-Native Nations Broadband Task Force, and adopted three items to expand broadband and communications services in Native American tribal areas.

The new FCC-Native Nations Broadband Task Force will work to optimize efforts amongst the Commission and Native Nations and to ensure these newly adopted items come to fruition. The Chairman named 30 members. Co-Chairs will be Geoffrey Blackwell, Chief of the FCC's Office of Native Affairs and Policy, and an individual to be elected from among the Native Nation representatives on the Task Force. Per Chairman Genachowski: "The Task Force will help guide the Commission as it works to create a regulatory environment that helps Native Nations develop the infrastructure necessary for providing broadband and other telecommunications services."

Statistics indicate a broadband deployment rate on Tribal lands of less than 10 percent.

The Task Force and the three adopted items begin to address longstanding communications needs in Indian Country. Commissioner Baker noted this history, citing a 2000 Policy Statement addressing this concern and the "Bringing Broadband to Rural America" report of 2009 in which the FCC identified the particular need for communications access and broadband deployment in tribal areas. The Commission's most recent steps further the process of realizing 21st Century communications amongst some of our most vulnerable communities.

Native American leaders had worked extensively to ensure that the FCC takes into account the critical communications needs of tribal areas as it implements the National Broadband Plan. Statistics indicate a broadband deployment rate on Tribal lands of less than 10 percent. Chairman Genachowski stated: "Our actions will further empower Native Nations to access and use the latest technologies to grow their businesses, increase their access to quality health care and education, reach 9-1-1 during emergencies, and receive public alerts and warnings."

The Commission adopted the following:

- A Notice of Inquiry (NOI) seeking comment on issues including greater broadband deployment, a uniform definition of Tribal lands to be used in rulemakings, and strengthening the FCC's consultation process with Native Nations.
- A Notice of Proposed Rulemaking (NPRM) on ways to improve the use of mobile wireless spectrum over Tribal lands.
- A Second Report and Order, First Order on Reconsideration, and a Further Notice of Proposed Rulemaking (FNPRM) to expand broadcast radio opportunities for Tribal entities serving Native communities.

The NOI invites comments on many issues relevant to the particularly low rates of phone and broadband penetration on Tribal lands. Among the issues identified:

- ***Native Nations Priority*** – The Commission seeks comment on extending a Native Nations priority to communications services, such as wireless, wireline, or satellite services. Are there other FCC rules that directly or indirectly create barriers to entry for Native Nations?
- ***Native Nations Broadband Fund*** – Regarding the Native Nations Broadband Fund as described in the National Broadband Plan. Is it needed? How would it be developed? Any lessons learned from the BIP and BTOP programs of the Recovery Act?
- ***Native Nations Business Models for Deployment*** – What were the lessons learned during buildout of existing Native Nations' telecommunications and broadcast services? Are there unique issues due to distance from infrastructure or high cost of serving Tribal Lands? Is there a "Tribal-centric" approach that works best?
- ***Native Nations Adoption and Utilization*** – What role should anchor institutions play? How have universal

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(**RUS Program -** *Continued from page 2*)
download speeds) subject to later adjustment if broadband speeds increase.

☑ Areas eligible for funding must be:

rural (outside a city of 20K or more and not in an urbanized area next to a town with a population of 50K or more).

underserved (at least 25% of the service area is served by one or fewer broadband providers and no part of the service area is served by three or more broadband providers).

have no overlap with previous RUS beneficiaries or with a currently pending RUS loan application.

☑ Special consideration will be given to applications to serve Indian communities. Communities declared to be "substantially underserved trust areas" (lands held for Native Americans) qualify for waiver of many of the rules such as reduced equity requirements and longer term loan repayment (up to 35 years).

There is no specific filing deadline for these applications, but since applications are generally processed first come, there is an advantage to filing early. Once the money is gone, it's gone. And if someone else files for your area first, that application will be processed before yours.

Those wanting more information about this opportunity should contact the lawyer at FHH with whom you usually work or the author to get more information about the program.

(***Tribal Area Initiatives -*** *Continued from page 7*)
service and E-Rate impacted adoption and utilization? Are there data available on adoption and utilization within particular Native Nations?

? ***Defining Tribal Lands*** – Should there be one definition? Should such definition be narrowly defined (*e.g.*, reservations) or include tribes without significant land holdings?

? ***Eligible Telecommunications Carrier Designations on Tribal Lands*** – Need there be a particular designation process for participating in high cost or low income programs? How should carriers be required to engage with Native Nations when seeking ETC designation?

? ***Public Safety and Homeland Security*** – Are Native Nations receiving adequate public safety communications? Under whose jurisdiction: federal, state/local, tribal? What is the level of infrastructure and equipment availability?

The *Spectrum over Tribal Lands* NPRM seeks comment on:

? Expanding the Tribal Priority that currently applies to broadcast radio to cover commercial wireless services.

? Creating a secondary market negotiation process for Native Nations to negotiate in good faith with incumbent wireless licensees for service to unserved and underserved lands.

? An innovative process to free up fallow spectrum through a build-or-divest approach.

? Incentivizing deployment on Tribal lands through licensee construction requirements.

? Improvements to the Tribal lands bidding credit program.

Commissioners Copps and Clyburn both highlighted the build-or-divest proposal, which should urge more licensees to deploy wireless networks on Tribal lands.

The FNPRM addresses measures designed to increase the ability of Tribal entities to provide broadcast radio to their communities and to adjust allotment procedures for broadcast radio channels to ensure an equitable distribution that includes rural and smaller Native communities in addition to urban areas.

The Commission encourages tribes without significant landholdings to seek waivers of the existing Tribal Priority when seeking to provide radio service to their intended communities. The Tribal Priority specifically covers service to reservations and other Tribal lands which is directly helpful to 312 of the 564 federally-recognized Tribes, and less so for the remaining Native Nations without an easily defined territory.

Additionally, the Commission seeks comment on the use of the Tribal Priority regarding commercial FM channels and seeks comment on the Tribal Bidding Credit – the objective being to increase opportunities for Tribal entities to own FM broadcast stations to serve their communities.

Comments on the NOI are due ***May 20, 2011*** and reply comments are due ***July 5, 2011***. Comments on the NPRM are due by ***May 19, 2011*** and reply comments are due ***June 20, 2011***. Comments on the FNPRM are due ***April 15, 2011*** and reply comments are due ***May 16, 2011***.

Attention VoIP Providers:

Warning - Steep (Regulatory) Incline Ahead

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The FCC's release of two Notices of Proposed Rulemaking (NPRMs) on March 3 will give VoIP providers a familiar sinking feeling – that is, the feeling of sinking ever deeper into the quicksand of FCC regulation. At Congress's direction, the FCC is looking both to expand TRS contribution obligations and to impose additional accessibility rules on *all* VoIP providers. As we describe below, the new accessibility standard for VoIP (as well as email and video conferencing) will be even higher than that already imposed on most telecommunications services.

The NPRMs (along with the video description NPRM about which we've already reported at www.CommLawBlog.com) are some of the first regulatory offspring of the 21st Century Communications and Video Accessibility Act of 2010 (CVAA). Because the CVAA is clear in its mandate, the Commission has little choice with respect to the major points on the table – but it does have discretion relative to a number of the ancillary and administrative aspects. (And, given the scope of CVAA's ambition to modernize the nation's accessibility laws, we expect more NPRMs to follow in the months to come.)

Because the CVAA is clear in its mandate, the Commission has little choice with respect to the major points on the table.

TRS contributions. Section 103(b) of the CVAA requires that all VoIP providers contribute to the Telecommunications Relay Service (TRS) Fund. (The TRS Fund supports services that allow deaf people or people with speech disabilities to communicate by phone.) Of course, interconnected VoIP providers are *already* contributing (as our readers should be aware). One of the two NPRMs addresses the Section 103(b) mandate by proposing to expand that requirement to non-interconnected VoIP providers, that is, VoIP that doesn't interconnect with the regular telephone network. We're looking at you, Skype *et al.*

While the CVAA requires all VoIP providers to contribute to TRS, it leaves the FCC some discretion as to details. Accordingly, the Commission asks for comment on specific issues such as:

- **?** Should the VoIP safe harbor apply to non-interconnected VoIP? (The "safe harbor" allows carriers to report a specified fixed percentage of revenue as interstate if they are unable or unwilling to measure interstate and intrastate traffic separately.)
- **?** What revenues should be included in calculating TRS contributions (just revenues from interstate end-user calls, or revenues from *all* sources)?
- **?** Should providers of free services, that have no end-user revenues, be required to make any contributions to the TRS fund?

Clearly the FCC is focused on how to treat free, non-interconnected Internet voice services (again, that's Skype-to-Skype *et al.*). Some such services are supported by advertising, and the FCC suggests that it might require TRS contributions based on those revenues, in place of or in addition to subscriber revenues. The answers to these questions will have a significant impact on contribution amounts; affected companies will want to express their viewpoints when the docket is open for comments.

Accessibility. As required by Section 104 of the CVAA, the FCC proposes to make VoIP, electronic messaging (emails, IMs, etc), and video conferencing "accessible to and usable by" persons with disabilities. Naturally, a new rule needs a new acronym – we must learn to call these types of services "advanced communications services" (ACS).

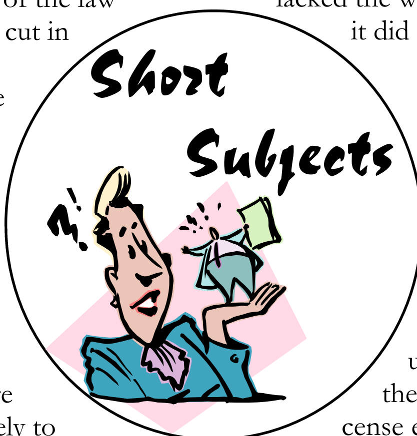
ACS will be subject to a higher standard of achievement than "telecommunications services" under the existing Section 255 of the Communications Act. Section 255 requires telecommunications manufacturers and providers (including interconnected VoIP but *not* including *non*-interconnected VoIP) to provide accessibility *if* ***readily*** *achievable*. For ACS manufacturers and providers, on the other hand, the presumption is reversed; they must make their services and products accessible to people with disabilities, *unless it is not achievable (whether or not "readily") to do so*. (According to the CVAA, "achievable" means "with reasonable effort or expense, as determined by the Commission" taking into account a list of certain factors.)

Further, ACS providers may not install network features, functions, or capabilities that impede accessibility or

(Continued on page 11)

Revolving Door Turns Both Ways. The federal government's revolving door took another rotation recently when it was announced that former Chairman Michael Powell had been anointed as the head of NCTA, one of the major groups he oversaw during his regulatory days in the late '90s and early aughts. Mr. Powell's strong Republican credentials (and his outspoken support for President Obama's opponent) obviously did not deter the cable folks from making him their spokesperson before the FCC. Commissioner Copps is the only remaining commissioner from Mr. Powell's tenure.

FCC Collaboration Act is Introduced. It has long been a crusade of Commissioner Copps that the so-called "sunshine" provisions of the Administrative Procedure Act preclude three or more FCC's commissioners from meeting privately to discuss anything. The purpose of the law was originally to ensure that deals were not cut in back rooms but rather in the light of day at open meetings. Instead, deals must now be cut by *surrogates* of commissioners meeting in back rooms, while open meetings are reduced to platforms for reading canned statements on the items under "consideration." A bill has now been introduced to permit greater informal collaboration among commissioners, but the bill reflects some residual distrust of those back rooms. Under the proposed law, more than two commissioners could meet privately to discuss agency business, provided (i) they don't actually vote on anything, (ii) at least one commissioner representing each political party on the Commission is present, (iii) a representative of the FCC General Counsel is present, and (iv) a summary of the matters discussed is published on the FCC's website after the meeting. So much for chatting about official matters at the water cooler or in the mens' or ladies' room. Still, this seems like a step forward in intelligent policy-making, and one that Commissioner Copps should be applauded for championing.



Ex Parte Rules Tightened. Speaking of sunshine, the FCC has tightened up its rules on disclosing the substance of *ex parte* meetings with the Commissioners or staff. Proponents of such meetings had theoretically been required to report the fact of the meeting and the substance of the content conveyed so that other adverse parties could have a chance to rebut that content. Lately, though, the summaries of content had often gotten so opaque that no one could tell what was really talked about. Now the Commission has ordained that, at minimum, *ex parte* disclosures must summarize the arguments made in the meeting or cite to the pages or paragraphs of any prior filings where the information can be found.
Notices for all *ex parte* presentations must now include the name of the person(s) who made the ex parte presentation as well as a list of all persons attending (both FCC staff *and* outside attendees). Parties must send copies of *ex parte* notices to each meeting participant (copies sent to FCC staff and Commissioners present at the meeting must be sent electronically). All notices must be filed electronically, which expedites searches of such activity. Procedures for ex parte presentations made on the eve of the "sunshine" deadline have also been revised to ensure fairness to all parties.

Government Shut Down Highly Possible. After much hand-wringing in February about a possible shut down of the government due to an inability by Congress to pass a federal budget, the union has been saved by a series of stopgap spending measures. The most recent one expires on April 8. While it appeared a couple of weeks ago that Congress lacked the will to actually shut the government down as it did during the Clinton administration, it is now looking more and more that no compromise is in the immediate offing. While life as most licensees know it will be unaffected, it is very important that licensees with expiring licenses get their renewal applications in *before* the close of business on April 8. This is important because as long as a timely renewal application is on file, a licensee's operating authority continues past the license expiration date. But if the government is shut down when your license expires and you haven't yet filed your renewal application, you can't file it and your operating authority ceases. Don't paint yourself into that corner.

Update: EBS Licensees Get Six-Month Extension Of Substantial Service Deadline. Licensees in the Educational Broadband Service can breathe easier now. Their deadline for demonstrating substantial service has been extended six months, to ***November 1, 2011***.

As we reported in February, the Catholic Television Network (CTN) and the National EBS Association (NEBSA) asked the Commission for an extension of the original May 1, 2011 substantial service deadline. Their request was made on behalf of ***all*** EBS licensees – ***BUT*** it did ***not*** include any Broadband Radio Service (BRS) licensees. Acting with impressive speed, the Commission sought public comment on the request and has now issued a Memorandum Opinion and Order granting the CTN/NEBSA petition. (The fact that a total of only 18 responsive comments were filed probably helped move things along, particularly since none of the commenters opposed the extension.)

Bottom line: EBS licensees now face a ***November 1, 2011***

(Continued on page 11)

(*VoIP Accessibility -Continued from page 9*)

usability. Finally, all equipment and networks used to provide ACS services must allow information content that has already been made accessible to pass through in accessible form. The NPRM seeks comment on definitions of relevant terms (*e.g.,* what is "achievable"?) as well as input regarding matters such as:

- the standards that would apply to requests for waivers for equipment designed for non-ACS purposes but having incidental ACS capability
- whether any exemption(s) for small entities might be warranted
- obligations for applications or services accessed over service provider networks rather than based on user hardware features
- recordkeeping and enforcement.

Mobile web access. The ACS NPRM also gets a head start on assuring that Internet browsers built into mobile phones will be accessible to those with visual impairments. As with ACS services, mobile Internet browsers must be "accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable." The statutory requirements do not take effect for three years, but the FCC seeks input now on how best to get everyone up to speed before then.

Some ramp-up time may be needed, because ACS and browser accessibility raise practical difficulties. Accessibility functions will work only if they are supported by each component or layer of the device: *i.e.*, the hardware, the operating system, the user interface, the application, and the network. This practical reality has at least two major consequences: (1) a broad array of entities will be affected, some of whom may not have previously fallen under FCC jurisdiction and may not be habituated to regulatory compliance matters; and (2) various entities will have to cooperate with each other on technical standards, without much market motivation to do so.

So the FCC will have to get in the business of compelling information-sharing: mandating industry standards, setting up industry forums and working groups, and so on. Yes, even Apple may have to share information about iPhone design, which is certainly not their custom. This process inevitably raises hard questions. For example: Who will develop and enforce compatibility standards? What is the appropriate balance between the necessary sharing and protecting proprietary, confidential technical information? Will components have to be compatible only with existing fellow components, or also with potential future components? At what stage of development should accessibility be considered?

The FCC will have to delve into technical minutiae generally outside its usual expertise (such as software).

The FCC has tackled tough inter-industry compatibility issues before, with some success. Doing so in this case, however, will certainly require the agency to delve into technical minutiae generally outside its usual expertise (such as software). It will also require constant calibration to keep things running smoothly in the future.

The bottom line here is that Congress, through the CVAA, is determined to impose new and substantial burdens on VoIP providers in order to ensure technological access for people who are deaf, blind or subject to other disabilities or impairments. That means that the FCC has little discretion going forward with these two NPRMs, at least with respect to the Big Picture aspects. Congress did, however, give the Commission some leeway in working out the operational details, and it's there that affected parties (including, particularly, VoIP providers) may have their best chance to ease the ultimate burden. Given that, VoIP providers should give serious thought to submitting helpful comments in these proceedings.

(*Short Subjects - Continued from page 10*)

deadline for demonstrating substantial service. (The bad news for BRS licensees is that they remain subject to the original May 1 date.)

Time Flies When You're Having Fun. The hilariously named "Paperwork Reduction Act" (PRA) requires the FCC, like other agencies, to publish estimates every three years about the information it collects, and to invite comments on their accuracy. A PRA notice typically estimates how many people have to fill out a form, how long it takes them, and the total cost to the economy.
According to a recent PRA notice, if you apply for a low-power FM construction permit, filling out the required form (that would be Form 318) will take you between 0.0025 minutes and 12 hours – anywhere from ***one-seventh of a second*** to ***half a day***.

That's quite a range. We are pretty good with FCC forms – we do a lot of them – but one-seventh of a second is remarkable even by our standards. Assuming this is not a typo (the Federal Government never makes mistakes), we can think of only one possible explanation. The FCC must have a secret short-cut for filling out these forms in a flash. We wish they'd let the rest of us in on it.

*(**Lifeline/Link Up -** Continued from page 4)*

during the month; and

- Toll limitation service reimbursement (obsolete and susceptible to over-reimbursement).

To ensure that eligible telecommunications carriers (ETCs) providing Lifeline are on board with these goals, the FCC proposes a "more rigorous" approach – including more, and more expanded, audits – to the management of the program.

Capping the Low Income Fund. The NPRM seeks comment on various issues relating to capping the size of the Low Income Fund, for example at the 2010 disbursement level. It recognizes that the Fund already has an ultimate cap in the sense that only a defined population of eligible households may participate, and monthly support is limited to $10 per month per household (plus a limit of $30 for activation).

Program administration. The NRPM suggests various ways to improve program administration, such as:

- Adopting a one-per-residence (*i.e.*, U.S. Postal Service address) eligibility rule;
- Clarifying the eligibility rules for residents of Tribal lands and proposing eligibility through participation in federal Tribal low income programs;
- Imposing federal baseline eligibility criteria, including perhaps raising the cutoff from 135% of the Federal Poverty Guidelines to 150%;
- Coordinating enrollment with other social service assistance programs;
- Developing a national database to prevent duplicate claims and verify eligibility (anyone who has worked with the FCC's CORES database will likely be amused at the idea of the FCC creating a database intended to eliminate duplication); and
- Imposing mandatory outreach requirements.

Broadband. In keeping with its conviction that broadband service should be universally available, the FCC also proposes to extend the Lifeline program to include broadband. It seeks comment on whether a Lifeline discount should be available for any plan that includes a local voice component, including bundled voice and broadband. It queries further whether broadband itself should be eligible for Lifeline support (note that this is a separate query from whether broadband should be a required supported service) – and, if so, how can broadband costs be integrated into the program in a way that minimizes (if not avoids) additional waste, fraud or inefficiencies?

Demonstrating that even imaginary money can burn a real hole in a governmental pocket, the FCC already has plans for how to spend the cash that it will save. Of course, any actual savings will require, first, that the proposals be adopted and implemented and, second, that those proposals in fact be effective. Apparently taking for granted that all those pieces will fall happily into place, the Commission has its heart set on indulging its compulsion to pocket funds to feed its broadband habit: it plans to set aside its savings to create a pilot broadband program. The pilot program will test different approaches to providing support for broadband to low-income consumers across different geographic areas and demographics. In particular, the Commission is looking to test how much of a factor hardware is in broadband adoption.

Demonstrating that even imaginary money can burn a real hole in a governmental pocket, the FCC already has plans for how to spend the cash it hopes to save.

Of particular interest to Lifeline carriers. Carriers considering the daunting prospect of applying for Lifeline-only ETC designation through the forbearance process will be cheered that the FCC is considering doing away with the own-facilities and rural areas redefinition requirements. These requirements are designed to prevent cream-skimming in a High Cost context and don't make sense in a Low Income-only situation. The Commission is considering codifying the conditions that it has been applying to forbearance grants instead. Even more radical, but strangely sensible, is the Commission's apparent interest in AT&T's proposal to allow *any carrier* to provide Lifeline discounts at a flat rate.

However, the Commission somewhat grimly notes that the fact that "numerous carriers are seeking designation as Lifeline-only ETCs . . . suggests that the current structure of the program may present an attractive business opportunity for firms that employ different business models than traditional wireline carriers." To prevent funds going to carriers rather consumers, the FCC seeks comment on whether there is a more appropriate reimbursement framework than the current four-tier system based on an ILEC's subscriber line charge. Furthermore, to protect Low Income consumers from receiving less-than-adequate service, the FCC asks if there should be minimum service requirements for prepaid ETCs (or for other carriers), such as a minimum number of

(Continued on page 13)

(***Incentive Auction Bills*** *- Continued from page 3)*

Much like Barrow's bill, the RADIOS Act would permit the sharing of auction proceeds while requiring the FCC to complete a spectrum inventory and other similar exercises. However, here completion of the inventory does not appear to be a condition precedent to the incentive auction. The amount of auction proceeds available for sharing would be left to the Commission ("an amount or percentage determined in the discretion of the Commission"), and broadcaster participation would be strictly voluntary. And as with the two bills described above, the RADIOS Act says nothing about spectrum taxes. Interestingly, in the section about incentive auctions, the RADIOS Act requires that the Commission assure that there will be "adequate opportunity nationwide for unlicensed access to any spectrum that is the subject of such an auction." This is intended to protect the continued availability of spectrum for white spaces devices.

The fact that none of the bills threatens imposition of a spectrum tax is a hopeful sign.

(The RADIOS Act sprawls well beyond these narrow limits, but the description above should answer the immediate questions of folks concerned about the possibility of incentive auctions.)

The RADIOS Act, Warner's Spectrum Optimization Act, and Barrow's "Spectrum Inventory and Auction Act of 2011" are the first, but almost certainly *not* the last, pieces of legislation that have come out of the chute this year. Word is that several other legislators will likely get in the act over the next few months. We understand that at least one of bills will specifically direct that a portion of incentive auction proceeds should be set aside to assist broadcasters relocate to different channels as part of a repacking process.

None of these three bills provides any clear indication – or even basis for speculation – about the amount of auction proceeds that participating broadcasters might expect to get their hands on. Indeed, other than the impenetrably obfuscatory language in the Warner bill, the bills would give the FCC nearly unfettered discretion to make that call. That's not necessarily good news, but it might be unrealistic to expect Congress to micromanage such things. On the other hand, the fact that none of the bills threatens imposition of a spectrum tax is a hopeful sign, since such a tax could easily be wielded as a threatening economic cudgel to encourage "voluntary" participation in the spectrum re-purposing process.

Of course, Congress's seeming interest, just right now, in spectrum auction legislation must be counter-balanced against the undeniable fact that, by the end of this year, posturing for the 2012 elections will have begun. As a result, by then prospects for movement on most legislation of any sort will likely be slim. So if we're going to see the enactment of any new legislation dealing with the overhaul of spectrum regulation, including incentive auctions, it will likely be sooner rather than later.

(***Lifeline/Link Up*** *- Continued from page 12)*

monthly minutes.

The design and implementation of modified Lifeline/Link Up programs present problems of immense complexity for the Commission. Besides the enormity of the project – the raw numbers of eligible customers, the multiple mechanisms for determining eligibility, the detailed auditing process already in place – the Commission must also deal with the concept of grafting a new service (broadband) onto the system. Additionally, the underlying business of delivering telecommunications services is itself developing rapidly, creating new and different business models that may or may not be easily integrated into the Commission's approach either now or in the future. The preferences of the consuming public also come into play. And don't forget that we're talking about a pool of funds that already exceeds one billion dollars, a tempting target for less-than-scrupulous entities.

The scope of the NPRM suggests that the Commission recognizes the daunting nature of the challenge it is undertaking. Whether – and if so, when – the Commission will ever be able to claim that it has met that challenge remains to be seen. But at least the FCC has made the first move in its quest.

The NPRM was published in the Federal Register on March 23. Comments on the proposals in the NPRM are currently due to be submitted by ***April 21, 2011***; reply comments on Sections IV, V (Subsection A) and VII (Subsections B and D) are due by ***May10, 2011***. Reply comments on the remaining sections are due by ***May 25, 2011.***

(USF/ICC Overhaul - Continued from page 1)

jority of the NPRM and 35 days thereafter for replies. (Note: a separate abbreviated comment period was established for the part of the NPRM addressing pressing abuses of the existing system such as traffic pumping and phantom traffic.) Given the breadth of the inquiry and the years it took to bring this NPRM to term, the comment period strikes us as a bit stingy. The FCC supposedly has this on a fast track, but there are simply too many moving parts in this vast proceeding for everyone to get their two cents' worth in in this timeframe. Expect these dates to be extended.

The Commission declared (i) modernization of the USF and ICC for broadband, (ii) fiscal responsibility, (iii) accountability, and (iv) market driven policies as its bellwethers in approaching the reform effort. Turning these noble principles into concrete regulations is the hard part. As we've indicated, the scope of the proceeding is too all-encompassing to permit detailed treatment of every aspect of it here, but the highlights are outlined below.

> *Turning noble principles into concrete regulations is the hard part.*

Short Term/Long Term Solutions: Recognizing that billions of dollars have been invested in, and depend on, the existing regulatory regime, the FCC proposes to adopt remedial measures for the most obvious abuses and inefficiencies in the short term, while putting in place long term permanent reforms that come into play gradually over a period of years. While it is understandable that the Commission might not want to upset settled investment expectations (particularly of ILECs), the Commission demonstrated precious little solicitude to CLECs in 2008 when it abruptly capped their access to USF funds in a single stroke, leaving them well short of the support presumptively necessary to meet their ETC obligations. Be that as it may, the FCC contemplates comfortable "glidepaths" and phased transitions to ease the pain of companies accustomed to feeding at the USF and ICC troughs.

Short Term Universal Service Solutions: In the short term, the FCC proposes to

- circumscribe or eliminate several high cost support programs which may have outlived or outspent their usefulness, including high cost loop support, local switching support, interstate common line support, and interstate access support. The FCC asserts that these programs as currently structured reward inefficiency and actually *discourage* movement to more advanced technologies.
- not only develop benchmarks for capital and operating expenses fundable under the high cost programs, but also cap the amount of support per line that can be received by any one carrier at $250. (There are horror stories of carriers receiving as much as *$2,000* per month per line in support!)
- change its procedures to encourage rational consolidation of service areas eligible for support in order to reflect operational efficiencies rather than USF gaming.
- eliminate the identical support rule. This rule, which somewhat nonsensically ascribes the same high cost reimbursement to a CLEC as to the ILEC in the same market, has long been due for change.
- stimulate broadband build-out by a one-time disbursement of $500 million to a billion dollars based on a reverse auction. The funds recipient in each area would be the carrier willing to build broadband facilities in unserved parts of the country at the lowest cost. Broadband service under this proposal could be provided by either wireline or wireless technology or even by satellite (on an ancillary basis) if that proved most efficient for remote areas. This program is apparently a complement to the Mobility Fund proposed last year to disburse $500 million via a reverse auction to construct mobile broadband facilities in needy areas.

Long Term Universal Service Solutions. The Commission's long term vision for USF involves phasing out all of the existing support mechanisms entirely and replacing them with the Connect America Fund (CAF), a mechanism for supporting broadband in areas of the country where broadband is not economically sustainable without such support. Voice service would simply be a component of the larger broadband service. Support under the CAF regime would be determined in one of two ways.

Under Plan A, there would be a reverse auction in which any carrier using any technology (wireline, wireless or satellite) could bid on the right to provide broadband (or voice only) service in given regions. A single low bidder would receive the funding and have the obligation to provide supported basic services. The Commission envisions satellite service as being a part of the mix since some areas are so remote as to be most economically servable only by satellite, while other areas are more conducive to terrestrial coverage. The most efficient plan would incorporate both technologies to reach everyone at the lowest overall price. The reverse bidding process should ensure that the level of support provided is directly related to the actual costs associated with providing service without the need

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(*USF/ICC Overhaul - Continued from page 14*)

for bureaucratic review of cost components to determine if the costs are justified or reasonable. This plan has immediate appeal since on its face it ensures that the basic telecom service needed by people in high cost areas is delivered at the lowest price without redundancy.

No doubt to mollify ILECs concerned about the possible loss of support through such a process, the Commission also floated Plan B. Under this option, current carriers of last resort would have a right of first refusal to take on the obligation of providing broadband/voice service throughout their area. While this would ensure that such carriers (invariably ILECs) continue to receive not just some but *all* of the subsidies available for their areas, it would also require the Commission to establish and administer a detailed cost recovery model and continuing oversight to preclude padding of expenses. In a highly competitive carrier environment, such cost recovery models seem antiquated. Moreover, this option seems like a step *backward* to what was essentially the monopoly subsidization system that existed prior to the introduction of competition into the USF scheme. So it is hard to see this as a meaningful reform in any sense.

Finally, the Commission mentions a third option for rate of return carriers only: maintaining the current system but capping elements such as ICLS in order to incentivize the carriers to reduce costs. It is unclear why this is even part of the long term reform vision since a reform like this could be imposed on rate of return carriers in the near term to good effect.

Short Term ICC Reform. The FCC's immediate reform of the Intercarrier Compensation regime would deal with what are recurring abuses of the system. The current regulatory scheme creates opportunities for arbitrage that have resulted in unnatural schemes of a different nature – phantom traffic, access stimulation, traffic pumping. When millions of dollars are to be had by simply structuring a phone call in one way rather than another, the human capacity for innovation and ingenuity is marvelous indeed. The Commission proposes to forestall the access stimulation device by requiring rate of return carriers who enter into "revenue sharing" arrangements such as chat lines to modify their tariffs to account for the new traffic. Competitive carriers would have to benchmark their rates to the largest ILEC in the state, thus ensuring a more normal rate. The problem of phantom traffic (traffic which is passed on to a connecting carrier without sufficient information to identify the party to be billed) would addressed by requiring all calls, including VoIP calls to carry the necessary identifying info.

Long Term ICC Reform. The deeper problem of how to handle VoIP traffic (which now sometimes goes unbilled) is part of the FCC's long term solution. Clearly all traffic will eventually be IP and the current regulatory distinction between IP traffic and circuit switched traffic will have to be erased. For more than a decade, the FCC has danced around the issue of whether VoIP should constitute a telecom service or an information service – a distinction that has enormous consequences for the regulatory treatment which it gets. The FCC has so far handled the problem by using its non-Title II authority (*i.e.*, sources of jurisdiction not based on telecommunications carrier status) to make VoIP carriers comply with many of the same obligations as regular carriers. This evasion of the issue continues, with the Commission concocting new ways of regulating broadband or IP traffic without actually denominating such traffic as telecommunications. Ultimately, this dance will have to come to an end, and certainly in the context of this overall reform effort, the Commission should have teed up the issue for resolution. Its failure to do so (the Commission devotes a single paragraph out of 703 paragraphs to this fundamental question) unfortunately casts a shadow on all of its other more specific proposals to rationalize the treatment of VoIP traffic by treating such traffic the same as circuit-switched traffic. Until the Commission bites the bullet and reclassifies VoIP, it *can't* be treated exactly the same as other traffic since it falls into a different regulatory peg hole.

The problem of how to handle VoIP traffic is part of the FCC's long term solution.

Long term ICC reform also presents other fundamental jurisdictional problems, the foremost being the historical division of regulatory authority between interstate and intrastate traffic. Those distinctions (which made sense back in 1934) make no sense at all today. Without a single nationwide regulatory framework, possibilities for arbitrage and discriminatory intrastate rates continue. The FCC struggles with this problem by proposing different hooks on which it can hang a pre-emptive hat (such as its plenary authority over CMRS rates) but it also suggests ways in which it can induce states to toe the federal line by moving up subsidies or other means. Ultimately, this division of regulatory authority is an obstacle to a consistent nationwide regulatory framework that requires a fundamental change in the Act; in the meantime, the Commission can do only what its limited authority allows.

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(***Range War 2011*** *- Continued from page 1)*

That sounds logical, but it's wrong.

The problem lies in receiver design. Channel 51 covers 692-698 MHz. Ideally a TV set tuned to channel 51 would receive everything in that range, and nothing above or below. Sadly, though, that is not possible. You can build a receiver that comes pretty close, but it would add more cost to the TV than a consumer wants to pay. A real-world TV receives some signal above and below the channel it is tuned to. In particular, a TV tuned to channel 51 will pick up some signal from above channel 51, in wireless A Block. The TV does not show the cat on the vacuum cleaner, but the wireless signal can degrade or even block the TV reception. The reverse is likewise true: reception on an A Block mobile wireless mobile device can be impaired by a nearby TV station on channel 51.

Of course, that last irks the wireless companies. Even worse, from their standpoint, is their legal obligation to protect channel 51 TV reception. The strength of the wireless signal must not exceed that of the TV signal by more than a certain amount within the station's service contour, which for this purpose is anything within 55 miles of the station.

Two factors make compliance difficult. First, some Block A devices are mobile handsets that can inadvertently stray into the 55-mile zone and put out more power than is allowed. This is hard to prevent. Second, although the viewing public thinks of TV stations as being relatively permanent, in fact they come and go and change their channels (all subject to FCC consent). So even if an A block wireless company can work around all the stations currently operating on channel 51, another one can pop up at any time.

The wireless company trade associations have filed a petition with the FCC to complain about these problems and request relief. The petition opens with several pages on the importance of wireless broadband (no mention of the cats). Then come three requests:

- ☑ change the rules to foreclose all future TV licensing on channel 51;
- ☑ in the meantime, freeze all future and pending TV applications to operate in channel 51; and
- ☑ streamline procedures for facilitating "voluntary efforts" to relocate existing channel 51 licensees to other channels.

To be sure, the problems facing A Block licensees should not be a surprise. The companies that bid on that spectrum knew they would have to protect channel 51 TV stations, including later arrivals, and they knew the risk of incoming interference from TV operations. They bought the spectrum anyway, "as is." Yet now they want the FCC to control the number of channel 51s they must deal with. They also hint that people might seek channel 51 licenses "to exploit opportunities for personal gain" at the expense of an A Block licensee – in other words, to deliberately make trouble for a wireless company, with an offer to go away if paid enough money. On the other hand, the "voluntary efforts" mentioned in item 3 above appear to involve payoffs to existing channel 51 licensees from willing wireless A Block licensees.

The wireless companies could have solved their problem, in principle, by leaving the lower part of A Block vacant as a guard band. That would cost a lot of money. Instead, despite not having paid for it, they want the 6 MHz of channel 51 to be vacant.

The FCC has established ***April 27, 2011*** as the deadline for comments, and ***May 12*** as the deadline for replies.

(***USF/ICC Overhaul*** *- Continued from page 15)*

If it can find the jurisdictional ground to stand on, the FCC proposes to reduce access charges across the board by getting away from per minute charges. It could do so by simply mandating a bill-and-keep approach where neither connecting carrier charges the other, or flat-rate connection not based on volume. It could also, either on an interim basis or permanently, establish rate benchmarks which would keep the size of access charges within reasonable bounds while also permitting carriers' costs to be recovered. Shortfalls arising in high cost areas would be dealt with through explicit subsidies from the CAF rather than through invisible overcharges for access.

Given the combination of jurisdictional hurdles and billions of dollars that will move from one company's pocket to another's as a result of ICC reform, the likelihood of paralysis on this issue is high. Yet it is here that reform is most needed because the current market for telecommunications traffic is artificially distorted by the feudal system that still prevails.

We will be providing more targeted thoughts on some of the Commission's specific proposals in the weeks ahead. Interested parties are encouraged to weigh in at the Commission to make it aware of particular problems and abuses and to suggest possible alternatives.

So, are we there yet? No, but at least we're on the way.

The bird is the word

Tower Registration Rules, Routine Revised

Proposed changes, and consequent delays, may stick in some craws

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As we reported previously, back in 2008 the U.S. Court of Appeals for the D.C. Circuit ordered the FCC to conduct a Programmatic Environmental Assessment (PEA) of its Antenna Structure Registration (ASR) program. The Court held that the FCC had to conduct a multi-step process to first determine whether its ASR program had a significant impact on migratory birds. (More details on the history of the case and the Court's decision can be found at www.CommLawBlog.com.) And if the Commission were to determine there *is* a significant impact, then the FCC would have to prepare an additional report detailing a number of alternatives for achieving its regulatory goals while considering the environmental impact of the program.

Last December, the FCC kicked off its PEA by holding a series of public meetings and requesting written comments. Although the Commission is still a long way from completing the whole process, late last month it took an important step: it released a public notice setting out some proposed changes to its rules and "interim" procedures regarding the processing of ASRs and applications proposing new communications towers. The proposals are designed (1) to address the Court's finding that the Commission's existing ASR approval process fails to provide an opportunity for public comment; and (2) to implement certain provisions of a private compromise agreement reached last year by a number of tower-related and environmental groups. Comments on the proposed rules are due by Thursday, May 5, 2011. (There will be no opportunity to file reply comments.)

This process will significantly complicate things for anyone thinking about a project involving a new or modified tower requiring registration.

Under the proposed rules, obtaining approval to construct any new tower subject to registration in the ASR system would become more complicated, particularly for towers over 450 feet. (Most towers under 200 feet and not in the glide slope of an airport can be built without an ASR. While the public notice does not say so expressly, we understand from folks close to the FCC process that the new rules are ***not*** intended to change this important exception.)

The proposed new rules would require a period for public comment on *any* proposal for new tower construction or major modification requiring ASR *before* the proposal itself is filed with the FCC. After the comment period, the FCC will determine whether an Environmental Assessment (EA) is required before approving the tower. At least until the Commission completes its own PEA of the entire ASR program, individual EAs would presumptively be required for any proposed tower or modification over 450 feet.

Under the new public notice provisions, anyone intending to register a new or substantially changed tower subject to ASR requirements would commence the process by providing the Commission with the details of the construction which the proponent intends to propose. The public notice does not set forth precisely how that information is to be submitted, although it does suggest that proponents might file a "partially completed" Form 854 ASR form. However the information is submitted, it must include, "at a minimum," all of the information required by Form 854 related to ownership and contact information, geographic location, height, type of structure, and anticipated lighting. You may want to take a look at the Form 854 to see what information is required. (When we reviewed the Form 854, we had a hard time figuring how the proposed initial information collection is going to differ from what is needed to ultimately file a Form 854, and we wondered why it wouldn't be easier to just require applicants to file the form to begin with.)

In any event, the proposed rules and public notice make clear that prospective tower proponents are *not* to initiate the process by filing a Form 854 ASR application. Instead, they must file all the information requested by that application with the Commission – in some as-yet unspecified format – and must also provide local public notice of the proposed tower construction, either in a local newspaper or through "other appropriate means." This local notice must provide the details of the to-be-proposed construction as well as instructions on how to file comments about the proposal with the Commission.

Meanwhile, the Commission will post on its website a national notice of the to-be-proposed tower construction. That national notice will include the information filed by the prospective proponent, together with the date of the local public notice. If the tower proponent has already determined that the tower requires an EA (based on the Commission's existing rules, or the 450-foot requirement discussed below), that EA is also to be submitted to the FCC

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at this time.

The proposed rules do not make any promises as to when the national notice will appear on the FCC's website – only that it will be "on or after" the date of the local public notice. Once the national notice does appear, interested parties will have 30 days to file a "Request for Environmental Processing" asking the Commission to require the prospective applicant to prepare an EA. The party making that request would have to explain why the to-be-proposed construction would have such a significant environmental impact that an EA should be required (or, if an EA has already been submitted, why that EA is insufficient). The prospective tower proponent would then have ten days to oppose the Request, and the requestor an additional five days to reply.

Once the pleading cycle has ended, the FCC will determine whether an EA is required; if an EA was submitted initially, the Commission will evaluate it and determine whether the to-be-proposed tower will have a significant environmental impact. If the Commission determines that it will not have such an impact (either after evaluating an EA or determining that none is required), it will advise the prospective proponent, who can than finally file the ASR registration Form 854.

In addition to these public notice and comment provisions, the proposed rules also would incorporate "interim" processing guidelines. Those guidelines would require submission of an EA by any party proposing a new tower, or substantial modification to an existing tower, over 450 feet in height. The public notice procedures set out above would continue to apply to such proposals, but the EA would need to be submitted with the initial information for these taller towers.

Obviously, this whole process will significantly complicate things for anyone contemplating the submission of an application proposing a new tower or substantial modification of an existing tower. Historically, applicants have been able to file a "service-specific" application while awaiting approval of their ASR application. The new rules do provide for filing service-specific applications before antenna registration has been granted, but *only after* the local and national public notices have been provided *and* the full Form 854 ASR has been filed.

The trouble with that is that the full Form 854 can't be filed until *after* the Commission has determined whether an EA will be required and, if an EA *is* required, after the FCC has considered it – and we have no idea how long that will take. So it's not at all clear when exactly a service-specific application can be filed. This could wreak havoc on applications that are time-sensitive or that would attempt to take advantage of the Commission's first-in-time interference protection and processing rules. (Hint: This apparent problem would be an ideal topic for anyone interested in filing comments in response to the public notice; ideally it will be addressed in any final rules.)

While the Commission is awaiting comment on these new procedures, it also continues to conduct its own PEA assessing the entire ASR program. As part of that PEA, the FCC held a workshop on April 1, in which it discussed the "data sources, assumptions, and methodologies" it is using to conduct the PEA. At the workshop, the Commission provided some interesting insight on the information it has gathered about the current impact of registered towers on migratory birds, as well as its projections for future trends in tower construction and impact on birds.

Overall, the Commission determined that while communications towers – especially taller towers, towers using guy wires, and towers using steady, non-flashing, lighting – do contribute to bird deaths, their impact is "incremental." Interestingly, at least one study cited by the Commission found that less than 1% of bird deaths could be attributed to communications towers, compared to more than 10% attributed to cats, and almost 60% attributed to buildings and windows.

The Commission expects to release its draft PEA for public comment in June. The PEA will likely address three alternative courses of action. First, it would consider a "no action" alternative. This alternative would involve adopting on a permanent basis the procedures outlined above. It seems that "no action" might be a bit of a misnomer, as this option would clearly involve a reasonably significant change in existing rules and policies. Calling this the "no action" option might also suggest that the Commission's action on the proposed rules set out in the recent public notice described above is somewhat preordained.

The second and third alternatives the Commission is considering both include further changes to the ASR program. One alternative would simply require EAs from all ASR applicants; the other would require EAs from some ASR applicants, such as applicants proposing tall towers, use of guys wires or steady, non-flashing lighting, and/or location in an "environmentally sensitive" area.

Once the Commission has completed its draft PEA, it will be released for a public comment period of at least 30 days. In the meantime, the proposed rules and procedures outlined in the March 25 Public Notice are open for comment now, so if you have concerns about those proposals, you will want to let the FCC know by May 5.