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Protecting broadband from TV Ch. 51

Wireless vs. Broadcast: Chalk One Up for Wireless

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Perhaps frustrated at the slow pace of Congressional cooperation in passing incentive auction legislation to allow it to take a meat cleaver to the TV spectrum and serve up a chunk to wireless operators, the FCC is starting to chip away at TV with an ice pick. The first move is to put Channel 51, currently the uppermost TV channel, on ice, imposing an immediate freeze on applications for new stations and improvements in existing stations on that channel.

As we have previously reported, Channel 51 is immediately adjacent to the 698-746 MHz band (formerly TV Channels 52-59), which have been reallocated to wireless services. Channel 52 has been auctioned, and the winning bidders don't like the idea that the high power used by TV stations might blast their smaller wireless devices into oblivion. They asked the FCC to, in effect, create a guard band on the TV side of the border rather than the wireless side by stopping any growth on Channel 51.

The FCC has obliged, with a combination of steps that freeze and thaw, apparently intended both to stop growth on – and encourage abandonment of – TV Channel 51.

Remember that while the FCC is considering how much of the TV band it can chop off for wireless use, it has already frozen growth in the entire TV band. No new applications or channel changes are allowed for full power stations, and no new applications are being accepted for low power TV stations on any channel. All of this is to ensure a fixed database when the FCC is ready to use the cleaver.

But clearing Channel 51 has risen to a higher priority than having a fixed database, so the scramble is on.
Full power TV stations on Channel 51 are invited to get out

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For fallacious fees, fine print

FCC Levies Large Fines on Prepaid Calling Card Providers

By Paul J. Feldman
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The Federal Communications Commission recently proposed forfeitures totaling $20 million from four providers of prepaid calling cards, for apparently violating the Communications Act by using deceptive marketing practices to sell the cards. In these cases, the Commission found that the companies apparently marketed the calling cards, primarily to immigrants, with claims that an inexpensive card would allow the buyer to make hundreds or even thousands of minutes of calls to foreign countries. It appears, however, that because the companies assessed multiple fees and surcharges, consumers likely received only a small fraction of the advertised minutes. The proposed fines of $5 million per company are among the highest in the FCC's history, and this action suggests that the Commission is likely to take aggressive steps against other prepaid card providers who engage in similar practices.

Under Commission precedent, unfair and deceptive marketing is an unjust and unreasonable practice that violates section 201(b) of the Communications Act. In these recent cases, the Commission found that the apparent violations were particularly egregious. In one case, the FCC's investigation revealed that a consumer would have to make a single 13-hour-long call in order to receive the number of advertised minutes. If the consumer made shorter calls, then the consumer would begin to receive smaller and smaller fractions of the card value. In other cases, a card that purported to offer 1,000 minutes was exhausted after a single 60-minute call. And another card that was advertised for 400 minutes of talk time could be exhausted after a single 15-minute call. As a result, consumers were bilked out of millions of dollars. The FCC found that the companies' disclosures about fees that limited the value of the cards

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No green card? No problem!

FCC Unclutters the Path to Alien License Ownership

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With the issuance of an extensive Notice of Proposed Rulemaking (*NPRM*), the FCC has proposed to liberalize its approach to permitting alien ownership of certain licenses. While it's not exactly a re-opening of Ellis Island, the plan should significantly expand opportunities for aliens to acquire and expand license ownership. The FCC correctly recognized that its current policies are burdensome to prospective foreign investors, unnecessarily impeding, delaying and obstructing the ability of aliens to buy, or buy into, FCC licensees.

The problem dates back to a relic of the original 1934 Communications Act: Section 310(b). In an era when foreign Fascists and Communists had to be prevented from acquiring control of our communications media, the law strictly prohibited aliens from directly owning a broadcast, common carrier, or aeronautical radio license or even from owning more than 20% of a company that holds such a license. However, having erected a seemingly impenetrable fortress against evil foreign influences, Congress proceeded to leave the back door wide open. Section 310(b)(4) of the Act permits an alien or alien-controlled company to own more than 25% of a company that holds an FCC license as long as the Commission does not find that the public interest would be served by denying the license. In other words, direct ownership of a broadcast or common carrier license is unspeakably taboo, but indirect ownership is hunky-dory. The statute makes little sense, but the FCC is stuck with administering it.

The Commission's approach for the last 15 years has been to permit indirect alien ownership of common carrier licenses at levels greater than 25% so long as the alien's country was not a threat to the United States and there were equivalent reciprocal opportunities for U.S. telecommunications companies to operate in the alien's country. The idea is that we have little to worry about from friendly aliens like the British or the French (other than bad food or haughty attitudes, respectively), so there is no need to keep the ramparts up so high. The principle of open entry into competition in the telecommunications arena was adopted by the World Trade Organization in 1997. The Commission therefore routinely approves alien ownership by aliens from countries that are in the WTO. The world being a happier place than it was in the old days, WTO countries now account for 94% of the world's gross domestic product, which officially makes just about everyone our friend. The FCC also approves ownership by aliens from non-WTO countries but only if they can show that their country provides "ECO" (effective competitive opportunities) to U.S. nationals. This still leaves out a few large countries (notably Russia) and outlaw states like Iran, Libya and North Korea, but by and large aliens are welcome to indirectly own common carrier licenses, as long as they jump through the necessary hoops.

Notice that we said ***common carrier*** licenses. Even though the statute does not distinguish between alien ownership of common carrier licenses and broadcast licenses, the Commission has steadfastly refused to permit indirect alien ownership of *broadcast* licenses to exceed 25%, no matter how friendly the foreign nation might be. Control of broadcast content is deemed so crucial to national security that aliens cannot be trusted with it. The FCC's NPRM does not propose to change this bifurcated approach to the statute, but one could certainly argue that the media landscape has become so diversified and fragmented that aliens can now safely own broadcast stations without peril. One might even argue from

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Capitol Beat

Congress: The Next Session

Telecom issues are on the agenda, but what can we expect from the Hill?

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(Editor's Note: Our new colleague, Capitol Hill insider, and contributor, Rob Schill, offers his perspective on what Congress is up to these days.)

With nearly 14 months to go until the November 2012 elections, the political environment in Washington, D.C. continues to be one of mistrust and jockeying for position as the Presidency, the House of Representatives and one-third of the Senate are to be decided. The Congress and President, by circumstance or design, continue to struggle to come to any meaningful policy accord. The Congress has been slow in its legislative pace with remaining legislative initiatives competing for dwindling calendar space. There is little to suggest an abrupt shift in this pattern, so the question for the near future is what is likely to pass legislatively and what action might we expect from Congress through its oversight capacity – both publicly and behind the scenes.

The political environment in Washington continues to be one of mistrust and jockeying for position.

AT&T/T-Mobile Merger

After this spring and summer's initial round of House and Senate hearings, expect the Hill to mostly keep its powder dry as the Justice Department and Sprint lawsuits are considered in the U.S. District Court for the District of Columbia. Rather than public hearings, expect more behind the scenes work. For example, in a September 8 letter, House Energy and Commerce Committee Chairman Fred Upton, Communications Subcommittee Chairman Greg Walden, and Rep. Joe Barton, requested a briefing from Attorney General Eric Holder and FCC Chairman Julius Genachowski on how the DoJ came to file suit against the AT&T/T-Mobile merger. The Republican members of the Committee would like to ensure that any merger-related conditions are "narrowly tailored to remedy transaction-specific harms."

Similarly, on September 12, Rep. John Yarmuth (D-KY) wrote to Chairman Genachowski to ask the Commission to cease its own review until after consideration of the DoJ lawsuit. Wrote Yarmuth, "While I do not believe it is the appropriate role of a Member of Congress to encourage the approval or disapproval of a particular merger, I believe it is in the interest of our economy to allow the Department of Justice and AT&T time to reach a possible settlement that balances the concerns about competition in the wireless market with the potential benefits of job creation and capital investment."

On September 21, the two sides will appear before the court. Judge Huvell has asked both sides to come prepared to discuss the potential of a settlement.

Privacy

The evolving expectations of user/consumer/citizen privacy in the telecommunications space have been, and increasingly will be, an issue of legislative concern. Congress has already addressed on several occasions privacy concerns, including consumer data theft and location privacy. In the near term these issues will continue to be discussed as the Congress attempts to coalesce around broadly understood boundaries of individual privacy and business practices.

Among other events, in July the House Energy and Commerce, Subcommittee on Commerce, Manufacturing, and Trade, and the Subcommittee on Communications and Technology held a joint hearing on internet privacy. They heard testimony from the FCC, FTC and NTIA. Commerce Subcommittee Chair Mary Bono Mack also held hearings on consumer data theft and the Commerce Subcommittee reported out H.R. 2577, the SAFE Data Act, which would establish uniform national standards for data security and data breach notification.

On September 14 the discussion continued as Rep. Marsha Blackburn, vice chair of the House Energy and Commerce, Commerce Subcommittee hosts a privacy roundtable. On September 15, Subcommittee Chair Bono Mack continued the discussion with a hearing on "Internet Privacy: The Impact and Burden of EU Regulation."

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*(**Capitol Beat** - Continued from page 3)*

Public Safety Spectrum

Congress has been, and continues to be, divided over whether to allocate the D Block spectrum to create a standalone public-safety network or to auction off the D Block and create a network shared with commercial airwaves. On a substantive level there continue to be genuine issues regarding the funding paths for allocation vs. shared public/private use, as well as practical concerns over how a public/private approach would be implemented. On a political level, there is the question of whether members of the opposition wish to give the President a high profile victory on public safety prior to the elections.

One might have thought the tenth anniversary of the 9/11 attacks would have created sufficient pressure to come to a solution. However, now that that moment has passed perhaps including this measure in a larger legislative vehicle will be the solution. With the Joint Select Committee on Deficit Reduction (a/k/a the "Supercommittee") tasked to report out a bill by Thanksgiving and President Obama's inclusion of incentive auction/public-safety reallocation legislation in his most recent jobs plan, we have two possible pathways toward resolution.

Will the appeal of building a public safety network and paying down a portion of the deficit through "voluntary" auctions of broadcast spectrum be the endgame?

Sen. John Kerry, a member of the Supercommittee as well as Chairman of the Senate Commerce Communications Subcommittee, has said that he expects spectrum auctions to be discussed in the Supercommittee. Public safety advocates have already begun meeting with members of the Supercommittee to ensure inclusion of a nationwide public safety network in final legislative proposal.

A key member to watch is Supercommittee member and House Energy and Commerce Committee Chair Fred Upton. With the Democrats in the Administration, House and Senate – along with Senate Commerce Ranking Member Kay Bailey Hutchison – lining up to support a dedicated public safety network, how long can House Republicans such as Upton and Communications Subcommittee Chair Greg Walden – supported by the broadcast industry – hold the line on the previously noncontroversial commercial auction of the D-block?

The Supercommittee has begun holding public meetings. They are tasked by statute with finding up to $1.5 trillion dollars in savings (and now, thanks to the President's latest jobs proposal, with even more). Will the appeal of building a public safety network and paying down a small portion of the deficit through "voluntary" auctions of broadcast spectrum be the endgame? Many are questioning whether the Supercommittee – consisting of allies of the same leadership that nearly failed to raise the debt ceiling – can come to any agreement at all.

LightSquared

The folks at LightSquared continue to run into opposition and questions on the Hill. As has been widely reported, LightSquared hopes to provide nationwide high-speed broadband service through a network of satellites and land-based towers. Unfortunately, the proposed network would interfere with GPS devices and has run into opposition from both the commercial GPS industry and federal agencies that rely upon the GPS. Among other concerns, GPS interference could harm commercial aviation, the military, hurricane predictions and other scientific efforts.

In light of these concerns, LightSquared continues to tweak their proposed network plan in order to ensure operation consistent with the needs of the GPS community. The company previously had offered to limit itself to the portion of the spectrum furthest from GPS devices and last week submitted a new proposal to the FCC committing to reduce base-station transmission power.

On September 9, NTIA Administrator Larry Strickling wrote to the Defense and the Transportation Departments to have them prepare for further testing to evaluate this latest LightSquared proposal. This request comes on the heels of a House Science, Space and Technology Committee hearing on September 8 where members continued to express concerns regarding the potential interference with GPS devices.

According to House Science Committee Chairman Ralph Hall, we must "find a way to open up more spectrum for broadband, but not at the expense of GPS." Jeffrey Carlisle of LightSquared testified that LightSquared and GPS can coexist and that this is an issue of engineering. Carlisle testified that LightSquared is not bleeding into the GPS spectrum but rather that some GPS devices actually pick up LightSquared's signal as they operate within LightSquared's own slice of spectrum and that these GPS receivers can and should be modified.

LightSquared has repeatedly demonstrated the willingness to modify its proposed network to address the concerns of all parties. Whether these engineering issues and solutions continue to present hurdles to operation will have to play out over the course of months and the outlook for LightSquared remains unknown.

The Birds: They're Baaack!

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For years now, environmentalists have been battling with the FCC over the extent to which "migratory bird mortality" should be a factor in the Commission's Antenna Structure Registration (ASR) program. Some studies have shown that certain tower lighting (otherwise required by the FAA) attracts migratory birds that can then collide with the tower structures. Under prodding from environmental rights organizations, a Federal court held in 2008 that the FCC must give greater consideration to that problem in its ASR process.

The latest installment in the battle is a set of FCC proposals known as the "Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program" (Draft PEA) that was released on August 26, 2011. The Draft PEA acknowledges that any increase in towers would probably increase migratory bird mortality, though it also places those bird kills in perspective, noting that collisions with communications towers constitute just 0.2% percent of all human-related bird mortalities in the U.S. (ranking way below collisions with buildings/ windows and attacks by domesticated cats).

The Draft PEA proposes a new requirement that an applicant for any new tower provide public notice and an opportunity for public comment regarding potential environmental impacts of the tower. Fortunately, the public notice and comment period could be initiated before the applicant receives FAA approval, an existing step in the ASR process that already leads to significant delays in some cases. However, if the FAA imposes additional lighting requirements on an applicant, a new notice and comment period may be required.

The Draft PEA also sets forth a number of additional options, including one alternative that involves no further changes to existing ASR requirements (other than the new notice and comment requirement). Another option involves the FAA modifying its lighting requirements to limit the use of certain types of lights that pose particular dangers to migratory birds.

Of greater concern are alternatives in the Draft PEA that could lead to substantial further expense to applicants, and potentially delay tower approvals. For example, there is a

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FCC Eliminates Non-existent Burdens by Abolishing Obsolete and Ineffective Rules

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On August 24, the FCC moved aggressively to attack bloat, inefficiency and waste – in its own rules. With considerable fanfare, FCC Chairman Genachowski announced that the agency is eliminating 83 outdated and obsolete media rules as part of its effort to "clear the path for greater competition, investment and job creation." The rule weeding effort began last spring, but seems to be part of the Obama administration's call for all federal administrative agencies to seek out and destroy regulations that impose unnecessary burdens on businesses and thus impede competitiveness.

That sounds like a worthwhile initiative on its face, but we have to question whether deleting regulations that no longer have any effect is what the Obama administration had in mind. Wouldn't it be more useful to eliminate rules that actually create burdens, rules that businesses are actually required to obey? Rather than "grow[ing] our economy, creat[ing] jobs, and benefit[ing] all Americans," as ballyhooed by the Chairman, the FCC's action actually does none of those things. In fact, we note that the 83 banished rules take up, by our estimate, roughly ten pages of printed text in the Code of Federal Regulations. Assuming no new regulations are adopted by the Commission before the next printing of the Code, the only tangible effect of the rule deletion might be to *eliminate* the job of the hapless lumberjack who would have cut down the tree necessary to print those pages.

The now excised rules fall into three rough categories: (i) those that refer to the Fairness Doctrine and its corollaries, a policy which was abolished more than 20 years ago but which still lurked as an "unnecessary distraction" in the FCC's regs; (ii) the "broadcast flag" rules which were outlawed by the Court of Appeals in 2003; and (iii) the complaint process for cable service tiers, which the FCC lost the authority to regulate in 1999. As explained by the Commission, some of the rules had been left in by simple oversight – hardly a comforting thought given that FCC regulations have the force of law and their violation is punishable by fines.

Being relieved of obligations that no longer exist was hardly cause for rejoicing in the broadcast or cable industry, and few members of the industry were able to match

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Backhaul Overhaul Update: New Rules Adopted, More on the Way

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We reported last summer about how the proliferation of wireless devices has created a corresponding need for wireless backhaul capacity – "backhaul" being a term that refers generally to the "middle mile" links that move end-user traffic between cell towers and the core network. Traditionally, backhaul was carried on copper wires or fiber, but that 20th Century approach isn't necessarily the most practical, particularly in rural and remote locations. In those situations, a wireless approach, using point-to-point links on microwave frequencies allocated by the FCC for "fixed service", does the trick better. The FCC has now adopted the proposals it put forth a year ago to facilitate the use of fixed service spectrum for wireless backhaul. In a concurrent notice of proposed rulemaking (NPRM), the Commission seeks comment on additional wireless backhaul matters.

During the meeting at which the Commission adopted the new rules, Chairman Genachowski admitted that when he first heard about the proposals to change the fixed service rules, his eyes "glazed over." Now, however, the subject is generating a lot of enthusiasm at the FCC. At the meeting, Genachowski and the other Commissioners rhapsodized that more flexible fixed service rules will increase rural buildout, spur 4G deployment, create jobs, and stimulate technical innovation.

According to the FCC, greater flexibility will increase rural buildout, spur 4G deployment, create jobs, and stimulate technical innovation.

Specifically, the new rules will:

- Allow fixed service wireless into the 7 and 13 GHz bands currently occupied by broadcast auxiliary services (BAS) and cable TV relay service (CARS). Broadcasters and cable operators use BAS and CARS to transmit video programming, both over fixed links (*e.g.*, from TV studio to transmitter) and through TV pickup operations (those news vans with telescoping antennas on top). While sharing among fixed users is feasible, mobile and fixed operations don't mix as well. News gathering vehicles must respond to breaking news quickly, without stopping to formally coordinate with other spectrum users, while fixed service systems need protection from interference to assure a high level of reliability.

- The FCC divided the baby along demographic lines: it authorized fixed service operations in the BAS and CARS bands *only* in areas that have no TV pickup licenses. That's half of the nation's land mass, but only 10% of its people. Allowing sharing in these areas may encourage rural buildout, as the FCC hopes, but will not go far to ease the congestion in urban areas caused by millions of data-hungry smartphones and tablets. The fixed wireless industry is therefore likely to continue exploring other workable spectrum arrangements, such as sharing with government spectrum at 7125-8500 MHz.

**** NOTE: If you're a BAS or CARS licensee, make sure your information in ULS is correct, so that the Commission does not authorize an overlapping fixed service link. We have provided information on how to do that at www.CommLawBlog.com. The new rules also require registration of TV pickup receive stations. ****

- Permit adaptive modulation. The Part 101 rules governing fixed service operation require a minimum payload capacity (in megabits per second) for fixed links. Sometimes, though, passing atmospheric conditions interrupt a signal at this data rate, a condition called a "fade." The connection is lost and the system has to be resynchronized, which can take several minutes. The Fixed Wireless Communications Coalition (FWCC) asked the FCC to allow "adaptive modulation", a process which temporarily slows the data rate during a fade so as to keep the connection intact. The FCC agreed, but with a catch: for efficiency, a fixed link using adaptive modulation must maintain the minimum payload capacity 99.95 percent of the time, or all but four hours of the year. This is a design requirement, not a performance requirement: links must be designed to comply, but the FCC will not require reporting of actual adaptive modulation use.

- Eliminate the "final link" rule. Broadcasters have generally been permitted to use fixed Part 101 fixed service stations as part of the process of delivering programming to their transmitters – provided, that is, that fixed service stations *not* be used as the final RF link in that process. The Commission has now re-thought that rule, concluding that there may be significant benefits to be realized from eliminating it, with no associated

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***(Backhaul Overhaul** - Continued from page 6)*
costs. Result: the "final link" rule is now history.

The FCC rejected a proposal to allow fixed service licensees to deploy smaller "auxiliary" transmitters, all sharing the same spectrum as the primary station and all located within that primary station's coordinated service contour. Proponents claimed that this would lead to more efficient use, or re-use, of the spectrum. Not so fast, said the Commission, which wasn't convinced that primaries and auxiliaries could really co-exist without causing interference . . . or that the spectrum isn't already extensively re-used, and re-useable, under existing rules. Plus, the "auxiliary" proposal would create a "perverse" – that's the Commission's word, not ours – incentive for applicants to propose excessive power for their primary stations, since the bigger the primary contour, the more auxiliaries could be crammed into it. And anyway, a variety of other bands (think LMDS, 24 GHz and 39 GHz) already available could be used for the types of operations contemplated for "auxiliary" stations. Bottom line: a big negatory on the auxiliary proposal.

Finally, in the concurrent NPRM, the Commission has requested comment on:

> Allowing smaller Category B antennas in the 6, 18, and 23 GHz bands (three-foot, one-foot, and eight-inch antennas, respectively). Smaller antennas potentially cause more interference because they disperse energy more broadly, but are cheaper to manufacture, install, and maintain, and typically generate fewer zoning objections. There are no proposed changes to the more stringent Category A antennas, which are required wherever Category B antennas would cause interference.
>
> Exempting licensees from payload and loading requirements in non-congested (mostly rural) areas – specifically, in areas where Category B antennas are allowed. The goal is to lower costs and increase investment in rural broadband deployment. In congested areas, the Commission proposes exempting licensees that can make a special showing that: (a) the efficiency standard is preventing deployment; (b) there are no reasonable alternatives; and (c) relaxing the standard would result in tangible and specific public interest benefits.
>
> Allowing wider channels, or channel "stacking," in the lower 6 and 11 GHz bands, as proposed by the FWCC. Where traffic demand is high, wider channels would result in lower costs, improved reliability, elimination of intermodulation issues, and increased spectrum utilization. The Commission seeks comment on allowing 60 MHz channels in the lower 6 GHz band and 80 MHz channels in the 11 GHz band.
>
> Revising waiver standards for microwave stations that point near the geostationary arc to conform to International Telecommunications Union (ITU) regulations.
>
> Defining the term "minimum payload capacity" as used in the efficiency standard rule. To accommodate application of the rule to Internet protocol radios, the Commission proposes rules, put forward by Comsearch, defining the term to include only capacity that is available to carry traffic, excluding overhead data used by the network itself, such as error correction and routing information.

The newly adopted rules will become effective 30 days after publication in the Federal Register. Check back with CommLawBlog for updates on that front. Comments on the issues teed up in the NPRM are due on ***October 4, 2011***, and reply comments on ***October 25***.

***(The Birds** - Continued from page 5)*
proposal that an Environmental Assessment (EA) be prepared for *all* new towers, regardless of size, location, *etc.*, and even for some tower modifications. A less severe option would limit the EA requirement to certain new and modified towers depending upon the nature of the tower, its lighting, and proximity to certain types of bird habitats and migratory paths. A final alternative would not impose any new requirements (other than notice and comment) for towers under 450 feet.

The Commission's Public Notice regarding the Draft PEA invites public comments to be filed by October 3.

***(Non-existent Burdens Eliminated** - Continued from page 5)*
the Chairman's enthusiasm about the "reform" effort. A simple reform like eliminating the public file rule, on the other hand, would actually spare businesses hundreds of thousands of hours of needless paperwork – perhaps that could be next up on the reform agenda.

Babelthuap is the largest island in the Pacific nation of Palau. It is not far from the island of Yap.

AT&T Acquisition of T-Mobile Hits the Rocks

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Last spring, AT&T and T-Mobile announced an agreement whereby AT&T would purchase T-Mobile for $39 billion, creating the largest wireless carrier in the United States. This transaction requires FCC consent prior to the transfer of T-Mobile's various wireless and other licenses to AT&T. In addition, because of the size of the transaction, the parties are required to make filings with the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) under the pre-merger notification and waiting period provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The FCC's role is to examine whether the acquisition would be in the public interest. In that examination, the competitive effects of the proposed transaction are the predominant focus. The DOJ and the FTC look at whether the "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . . in any line of commerce or in any activity affecting commerce in any section of the country . . . ." The FCC's consent is an absolute requirement for the acquisition to proceed. If either DOJ or the FTC believe that the adverse economic effects of the proposed acquisition are of sufficient severity that it should be blocked, their sole recourse is to head to federal district court for a trial on the merits in which the government will seek an injunction blocking the merger.

So far, it looks like AT&T's lobbying campaign is failing.

Communications company mergers of this large size and high profile tend to involve FCC consent proceedings that may last a year or more, and most often end in the grant of consent subject to conditions intended to promote competition or achieve other social goals. AT&T and T-Mobile no doubt anticipated such an outcome, including the requirement to spin off cellular and PCS frequencies in selected cellular markets to lessen concentration.

The parties surely recognized that they were pushing the envelope with a proposed merger that would reduce the number of mature nationwide wireless companies from four to three, and would make AT&T the largest wireless carrier in the United States by subscribership, followed closely by Verizon Wireless, with Sprint taking a distant third place. Consumers are not happy about this merger. An unscientific Wall Street Journal poll found that 78% of respondents think the merger will be bad for consumers. Since the acquisition was announced, T-Mobile has been losing customers who don't want to be AT&T customers. AT&T and T-Mobile have sought to limit opposition by launching a furious public relations campaign, which has included the unusual step of convincing members of President Obama's core constituency (groups who normally couldn't care less about wireless competition) to actively support the proposed deal. Most recently, AT&T made the unusual offer to bring home jobs that it had placed offshore if the government would allow this merger to proceed. All along AT&T has argued that T-Mobile is not its competition and that the acquisition of T-Mobile will have many positive effects, such as allowing AT&T to expand the reach of its 4G LTE services from 80 percent of the United States population to 97 percent of that population.

So far, it looks like this lobbying campaign is failing. In a rare move, the DOJ filed a complaint in the federal court in D.C. asking for an injunction prohibiting AT&T and T-Mobile from consummating the merger. In antitrust cases involving allegations of anticompetitive effect, the relevant product and geographic markets must be defined and the definition of one or the other generally is the crux of the fight between the parties. From press reports, it appears that AT&T and T-Mobile have attempted to define the relevant geographic market not as the entire United States, but as a number of discrete metropolitan markets. Thus, Washington, DC would be one market and Richmond, VA would be an entirely different market. This is how the DOJ defined the geographic markets when it reviewed the merger of Cingular into AT&T in 2005. Under this analysis, in any city market where the merged company would have too much spectrum or too many subscribers, the merged company could be required to make divestitures limited to that market.

The DOJ is taking a different view of this merger. Here the DOJ sees the merger as substantially decreasing nationwide competition for wireless services. It claims that "AT&T's acquisition of T-Mobile will have nationwide competitive effects across local markets." Complaint at ¶ 14. While AT&T has said that T-Mobile is not its competition, the DOJ alleges that AT&T in fact reacts to T-Mobile. It is not unusual in merger cases for the acquiror to state publically that the acquisition of a competing

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*(**AT&T Merger** - Continued from page 8)*
company will produce competitive and other benefits, yet, when the acquiror's internal documents are discovered, these reveal that the purpose of the acquisition is to reduce competition. The DOJ cites to an internal AT&T document penned in January of this year which recites that "the more immediate threat to AT&T is T-Mobile…." Complaint at ¶ 30. The DOJ also points to an AT&T employee's recent statement that AT&T added certain higher speed mobile phone capability in response to T-Mobile's addition of such capacity. Complaint at ¶ 30. Similarly, T-Mobile's announced market strategy has been to offer "Disruptive Pricing" plans. Complaint at ¶ 32. This strategy was plainly set forth in a 2010 document entitled "T-Mobile USA Challenger Strategy: The Path Forward". As quoted in the complaint, T-Mobile

> will attack incumbents and find innovative ways to overcome scale advantages. [T-Mobile] will be faster, more agile, and scrappy . . . . [T-Mobile] will champion the consumer and break down industry barriers with innovations . . . . (Complaint at ¶ 31)

But if all this is true, why wouldn't this reduction in competition invite new post-merger competitors who would foil AT&T's alleged strategy of reducing competition by acquisition? The DOJ says the barriers to entry by new companies are just too great. Complaint at ¶ 45. And what about the efficiencies touted to arise from this transaction, such as an increase in AT&T's 4G footprint from 80 to 97 percent of the US population? Recently, it was revealed that a mere $3.8 billion would be required for AT&T to reach the 97% coverage level, which is a lot less than the $39 billion AT&T would pay for T-Mobile.

Often proposed mergers are abandoned when the agencies go to court to block them. But not this time. AT&T and T-Mobile have vowed to fight the DOJ with cage fighting intensity to convince the court to deny the injunction and allow the merger to proceed. AT&T's central response to the DOJ allegations is that T-Mobile is too weak to be an effective competitor and that it could be removed as a competitor without harming consumers. AT&T claims that T-Mobile's assets are better used as a part of a healthy competitor, like AT&T.

The DOJ has presented a strong case that the merger will indeed significantly reduce competition in mass market wireless services. We cannot declare this patient dead just yet, but AT&T certainly faces a daunting struggle. The press reports that AT&T is preparing a set of merger conditions to present to the DOJ in the hope that they will be enough to allay DOJ's concerns. Such conditions are the standard palliative for anti-competitive issues, but we have seen no economist offer any realistic merger conditions that could replicate the competitive pressures created by an innovative competitor struggling for market share. On the other hand, AT&T could propose conditions that sweeten the pot (such as creating new domestic jobs) that may convince the DOJ to give less weight to the anti-competitive effects of the deal.

So what happens next? If the merger dies, then T-Mobile's parent's announced plans to use the net proceeds of the $39 billion price tag to bolster its wireless operations in Europe are dashed. That parent, Deutsche Telecom, has stated that it does not want to continue to devote resources to T-Mobile and it will undoubtedly be interested in seeking a deal with a wireless carrier. But who? Verizon Wireless is already larger than AT&T Wireless, so it could not step up to buy T-Mobile without confronting the same antitrust hurdles of the present merger. One of the regional wireless carriers, such as USA Mobile? Not likely, as their business case is not national. That leaves Sprint. But where is Sprint going to get $39 billion or the lesser amount it would have to pay when it is the only suitor left standing? Sprint's market cap is only $10.3 billion, so swallowing T-Mobile would create serious esophageal distress, especially when Sprint is still in the process of digesting its acquisition of Nextel. Sprint also has a lot of debt on its books as it is, and a need to continue to fund Clearwire.

Perhaps the only way a merger like this would work is if Deutsche Telecom took Sprint shares in exchange for T-Mobile. Those shares could be registered for public sale. But would Wall Street support that merger? And would taking shares give Deutsche Telecom the minimum liquidity it is willing to accept in exchange for T-Mobile? To be sure, $30 billion dollars in Sprint stock cannot be used like $30 billion in cash. Sprint's stock trading volume is only about $200,000,000 per trading day, meaning that it would take quite a long time for Deutsche Telecom to liquidate the number of shares of Sprint it would receive in such a merger through public stock sales (as opposed to a private sale to a very, very large investor). Finally, Deutsche Telecom could attempt to spin off T-Mobile to the public through a public offering of shares. But in the current climate for common stocks, it is hard to imagine that the public would be attracted to such an investment even if the investment bankers could see their way past the hurdles a publicly-owned T-Mobile without the support of Deutsche Telecom would face. In short, Deutsche Telecom may be in for the long haul with T-Mobile whether it likes it or not.

Commentary

Do Smart Phones Make Stupid People?

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It began with cell phones. You'd be walking down the street behind someone chatting inanely away on her phone and you'd realize that the only reason that conversation was taking place was because it *could* take place. In the absence of a cell phone, that woman might have been appreciating nature, enjoying the fine air, or maybe even thinking. Then, with the advent of smart phones a few years ago, the possibilities for constant, instant, ubiquitous communications multiplied. You could not only talk, text, and e-mail, but you could be instantly connected to the entire world through the Internet. This magic little box in your hands gave you the unbelievable power to telecommunicate with anyone on the planet at any time and in any place. And that, we are beginning to understand, is not a good thing. In fact, it is a grave threat to civilization as we know it.

The peril should have been obvious even in the era of walkie-talkies. Give two eight-year-olds a set of walkie-talkies and they will initiate an interaction for no other reason than to listen to their own voices. "I'm in the closet. Where are you? Over." "I'm in the laundry room. Over." Same thing with security guards in malls. "I'm proceeding down the north concourse to investigate some litter outside the Radio Shack. Over." "Two juveniles observed smoking cigarettes in the no-smoking zone. May need back-up. Over." On the other hand, give someone a paper and a pen, and he may put them in his pocket till he needs them, or he may possibly throw them away, but he will feel no compulsion whatsoever to use them just because they are in his possession. Not so with electronic media. Give someone a device with a receiver and a transmitter and he *must* use it. He cannot stop himself.

Give someone a device with a receiver and a transmitter and he must use it. He cannot stop himself.

Item: Two 20-something friends are having dinner together at a restaurant. For a full 20 minutes they have no interaction with each other whatsoever as they check their e-mail, respond to texts, review messages, and get news updates. They do this completely unapologetically, as though it is understood that their physical presence together does not involve any obligation to converse or engage. It is not inconceivable that in the course of their frantic texting, they are actually texting *each other*.

Item: A man on a plane maintains a loud conversation with a friend as the plane prepares for departure. The subject of the conversation is utterly inconsequential; it's mere chatter. But the man must be chided by the flight attendant to turn off his phone. The plane takes off for a 45-minute flight and, literally the instant the plane touches down and begins taxiing, the man powers up his phone, reports his arrival to someone on the other end who was no doubt breathlessly awaiting this news, and resumes the chatter. The 45 minutes of imposed silence must have been torture for him. It is for this reason that the FCC will not allow cell phone use on aircraft. It has nothing to do with radio interference or navigation. It's because violence would certainly break out if captive passengers were forced to endure phone calls like this by their seatmates for more than 5 or 10 minutes.

Item: A wife lies in bed playing Angry Birds on her smart phone while her husband tries to secure her attention and affection. Eventually he falls asleep. Can divorce be far away?

Item: Celebrities now have Twitter accounts that permit their fans to follow their activities. "Going to the gym now. Gotta work those abs." "Having lunch with my agent. He'll probably eat 10% of my salad. LOL" The Twitter phenomenon raises two important questions. First, how can Paris Hilton have "fans"? – she doesn't actually *do* anything. Second, why would anyone care that a celebrity is going to the dry cleaner or broke a fingernail? The very name "Twitter" implies both insubstantiality and trivialization, which is exactly what it delivers.

Item: A man does not know his wife's office phone number, despite the fact that he calls it several times per day. "It's on my speed dial," he explains. "I don't need to know or remember anything that's stored in my phone."

Item: A teenager announces that of all the things she owns, including her car, her iPhone is her favorite *thing*. It is the one thing in the world that gives her the greatest pleasure and rewards. She loves her iPhone.

This is the monster we have unwittingly created. Like the mad scientist in a '50's movie, in our efforts to improve the lot of mankind, we have instead unleashed upon the earth a scourge. Normally we conceptualize communica-

(Continued on page 11)

***(Smart Phones/Stupid People?**- Continued from page 10)*
tions as bringing us closer. Eye contact, a handshake, a hug, exchanged greetings, the back and forth of conversation, gesture, intonation, facial and body expression – the sheer immediacy and connotative power of all of these signals that we send when we communicate personally are why we have meetings, do lunch, fly across the continent, or stop by someone's house or cubicle. We communicate best when we communicate directly, in physical proximity, within touching distance, like primates.

The ability to telecommunicate – to communicate from afar – is undoubtedly a benefit in myriad ways, especially when we use that ability as intended – to actually communicate from afar. But I have seen a member of my own household text a person *in the next room* rather than walk ten feet. Telecommunication is killing communication.

Through some curious law of social thermodynamics, the ability to communicate is inversely proportional to the ability to telecommunicate. The more powerful the tools we have to communicate from afar, the less frequently, less intimately and less directly we communicate with each other up close. What we have gained in access to people who are most remote, we have lost in connection to those who are most present. *Viz.*:

Telecommunications, it turns out, is a false god.

- Our capacity to pay attention is finite. Previously our attention range was limited to what we could see, hear and touch. With the entire world and our entire body of acquaintances now constantly telepresent, we literally can't focus on the people at hand.

- Our capacity to care is finite. Recently I heard a lengthy story on NPR about the plight of autistic children in a village in Uganda. I suddenly realized that my caring limit had been reached. There are so many other worthy people and causes that I care about that it was impossible for me to start worrying about this small, unfortunate group of people in Uganda who I could do nothing to help. I just couldn't bring myself to do it. Yet the radio was demanding that I care.

- In the same way, I now find myself skipping over news articles about political unrest in, say, Azerbaijan. Developments in Azerbaijan are no doubt important to someone. And as one who considers himself an informed citizen, I perhaps should keep abreast of doings in Azerbaijan. But the fact is, I can hardly keep up with what's happening in *my own neighborhood*, much less Azerbaijan. Those folks are just going to have to get along without me. But telecommunications keeps pressing Azerbaijan's nose up against my window.

- And that doesn't even account for Twitter. I can't pay attention to Azerbaijan *and* monitor Paris Hilton's spats with her hairdresser. Something's gotta give. And what's worse, in the broadband world, Paris Hilton is equally as important as Azerbaijan. In fact, I'd bet serious money that more Americans know the name of Paris Hilton's chihuahua than the name of Azerbaijan's prime minister.

- Apart from *what* we care about, telecommunications limits *how long* we care about it. Broadcasters have long lamented the power of the TV remote control device. It permits – indeed, it encourages – us to skip blithely from channel to channel, from program to program, escaping the commercials that are our chief reason for being there. Remotes break the sacred compact between us and commercial television: the broadcasters' job is to present shows and our job is to watch their commercials. Old timers (of whom I must now, reluctantly, count myself one) can remember when TV commercials were a full sixty seconds long. Now a minute on TV is an eternity. I myself chafe at any Internet ad that demands my attention for more than ten seconds. And people like Anthony Weiner who were monumentally important yesterday, are already a footnote, if that. Andy Warhol's 15 minutes of fame have been reduced to 15 *seconds*.

- Telecommunicating impedes our judgment. Would Anthony Weiner have given risqué photos of himself to his next door neighbor? Would he have talked dirty to someone standing next to him on the subway? Of course not. (Well, maybe Weiner would have, but not most people.) The distance between ourselves and the computer at the other end of the e-mail network is so great that we lose our sense of propriety. People feel it's OK to behave on the Internet as they never would in real life. Having lost the primal see-hear-touch connection, we seem to have lost with it a sense of the basic ground rules for civilized behavior.

So telecommunications numbs us, distances us, makes us stupider, blurs moral boundaries, and leaves us less satisfied, less connected, and less caring human beings. Telecommunications, it turns out, is a false god. We need to stop tweeting and reach out and touch – really touch – someone.

(**Prepaid Calling Cards** - *Continued from page 1)*
contradicted the much more prominent claims in the marketing materials as to how many calling minutes were available on the cards. In addition, according to the Commission, the companies' explanations of the range of fees and other terms and conditions were apparently so vague that it was difficult for a consumer to know, when purchasing the cards, what fees would apply or how the fees would impact the number of calling minutes actually received.

While the Commission has previously fined prepaid calling card providers for other sorts of violations (e.g., failure to make required regulatory filings, contribute to the Universal Service Fund, and obtain Section 214 authority), this may be the first time that the Commission has fined such providers for deceptive fees and marketing practices. In light of the fact that such problems have existed for many years, the Commission's sudden action and large fines suggest that prepaid calling card providers would be well advised to clean up the discrepancies in their marketing and fee policies, and pay close attention to other FCC regulatory requirements.

(**Alien Ownership** - *Continued from page 2)*
a marketplace-of-ideas perspective that broadcasting a non-U.S. point of view would be a useful balance to the perspective we're usually presented with.

Be that as it may, the FCC now has to carefully review requests for approval of alien ownership, usually in the form of a request for declaratory ruling that the ownership is not contrary not the public interest. As indicated above, if the alien is from a WTO country, the approval is a no-brainer. The Commission will permit an identified friendly alien or aliens to indirectly own 100% of a common carrier licensee. It will also permit unidentified and unapproved aliens to indirectly own large chunks of the parent of the licensee, as long as no more than 25% of such unapproved alien ownership is non-WTO or a single person or entity. The hardest part in this process is often just determining who owns what and where.

Often in today's transnational business environment, companies are owned by other companies owned by other companies, some of whom are foreign-owned and some of whom may be publicly traded. Sometimes the companies themselves do not know who their smaller owners are, much less what nationality they are, because the stock is held in street names or is registered to addresses that do not necessarily correspond to the nationality of their owners. Yet the would-be alien licensee owner must somehow precisely lay out the national origin of its direct and indirect owners, sometimes to the second decimal point, to ensure that the 25% threshold is not transgressed. And this exercise must be gone through for each different affiliate of the licensee, as well as each time the company enters a new FCC service category or expands into a different geographic area. Clearly, there is an enormous waste of time, money and energy here with virtually no concomitant pay-off in national security or anything else. It's just a dated statutory requirement.

The FCC is proposing to simplify things and thus reduce the number of annual filings by an astounding 70%. While the basic regulatory framework will remain in place, the FCC plans to: (1) permit alien ownership approvals to apply to entire families of companies, as long as there is no substantive change to the original parent company; (2) permit approved aliens to increase their ownership up to 49.99% non-controlling interests without additional approval; and (3) not require approval of specific aliens unless they are to own more than 25% of the parent company. The company would still have to carefully monitor its alien ownership to determine when the 25% threshold is reached. A proposal that would help hugely in that regard is ignoring non-WTO alien interests of 5% or less. That single reform would take much of the pain out of trying to identify and add up non-qualifying alien interests. The Commission also proposes to require disclosure of all persons holding 10% or greater interests in the entity for which approval is being sought.

The Commission hastens to remind everyone that all of these reforms are subject to the normal rules that require approval of transfers of control of licenses – those rules continue to apply regardless of whether the owners are alien or not. And, of course, the Department of Homeland Security, the Department of Justice, and other federal agencies continue to have input into alien ownership issues from a national security perspective.

Comments on the NPRM are due 45 days after Federal Register publication, with replies 30 days later.

Net neutrality – on the move!

OMB: Thumbs Up for Net Neutrality Provisions

The net neutrality rules have cruised past another hurdle: the Office of Management and Budget (OMB) has approved the two "information collection" aspects of the "open Internet" rules that the FCC shipped over there last July (as required by the Paperwork Reduction Act). While OMB approved those aspects almost two weeks ago (on September 9), the official announcement of the approval didn't make it into the Federal Register until September 21.

OMB approval often marks the end of the rulemaking process in many instances; not so here. New rules generally cannot take effect until their full text has been published in the Federal Register. In many other rulemakings, the Commission takes care of that full-text publication first, and then follows up with getting OMB approval for any incidental "information collections" that may be involved. As a result, OMB approval of such collections is often the last development in the rulemaking process.

But with net neutrality, the FCC instead went first to OMB to get preliminary clearance for the "information collection" components of the rules. Meanwhile, the FCC has held tight onto the full text of the rules. While that approach has prevented the net neutrality rules from taking effect, it has also prevented any would-be challengers from seeking judicial review of the rules. Federal Register publication of new rules is the starting gun for the appellate process. Until that publication happens, the courts don't get involved. (Verizon was reminded of that when its initial appeal was tossed by the D.C. Circuit as premature.)

Once the rules are published, we can expect a stampede of appellate litigators heading toward their preferred U.S. Court of Appeals. The smart money figures that petitions for review will be filed with a number of circuits. When that happens, the courts draw straws to decide which court gets it.

In any event, after months of quiescence, it looks like net neutrality is on the move. Check back on our blog (www.CommLawBlog.com) for updates.

***(Channel 51** - Continued from page 1)*

of Dodge right now and move to any lower channel they can find. Their rulemaking petitions to amend the TV Table of Allotments and their applications for construction permits to change channel will get the warm fuzzy treatment. On the other hand, pending applications for new LPTV stations on Channel 51, most of which were filed in 2009 and 2010 and were being processed up to now, have been given the liquid nitrogen treatment and flash frozen – although before the freezer door is shut and locked, they, too, can avail themselves of a temporary thaw in the form of a 60-day window to change channels. Channel-change amendments are normally major changes that were previously forbidden, but they will now be classified as permissible minor changes for those who can find a lower channel.

Existing full and low power stations authorized on Channel 51 may continue to operate undisturbed – undisturbed, that is, except for the long, dark shadow now cast on their long-term future. They will be permitted to file minor change applications, but only if they do not propose to cover any new area they did not cover before. That will place a considerable damper on LPTV stations that are used to hopping round and inching toward larger markets.

The new dance floor is strictly limited to Channel 51 stations and applicants. Anyone on any other channel remains subject to all the old processing rules: full power stations may not change channels, LPTV applications will be processed but no new applications will be accepted, and any station may file for a minor change even with an expanded service area.

There are some things we still don't know. One is whether any priority will be given to Channel 51 abandoners. Obviously, full power stations may move to new channels and exterminate secondary LPTV stations in their way, both incumbents and applicants. But what about existing LPTV stations that do not have to abandon Channel 51 but want to skeedaddle while the skeedaddling is good? Will they be allowed to claim that they are effectively subject to displacement and, thus, eligible to move now? If so, will their applications take priority over ungranted earlier-filed applications for new LPTV stations or changes in existing stations, the way that displacements from Channels 52-69 do? Will Class A stations be treated any differently from LPTV stations? Will amendments to pending Channel 51 LPTV applications take priority over pending applications on lower channels? And what about granted but unbuilt construction permits for new LPTV stations on Channel 51? May they build on 51? If they prefer to move, may they do so as a minor change the way pending applicants may do?

And you thought that the TV database was going to be held in place pending further notice. It looks more like the hopscotch game has begun.