

# FHH Telecom Law

Current Issues in Telecommunications Law and Regulation

March 2003



## Telephone Unbundling: The FCC Splits the Baby

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



**T**he FCC has revised its rules on the obligations of incumbent local exchange carriers (ILECs) to unbundle and lease elements of their networks to competitive providers of local service (CLECs). The new rules relieve ILECs of the requirement to lease new broadband facilities to their competitors, while leaving in place their obligation to lease the network elements used to provide traditional telephone and narrowband services. The action also addresses a May 2002 decision by the U.S. Court of Appeals that overturned the FCC's previous rules on Unbundled Network Elements (UNE). And it seeks comment on whether the FCC should modify the "pick-and-choose" rule letting competitive carriers opt into individual portions of existing ILEC interconnection agreements, while rejecting others.

**Broadband.** The ILECs won threefold relief with regard to broadband facilities: (1) ILECs no longer need unbundle and make available to their competitors fiber-to-the-home loops; (2) ILECs no longer need unbundle and lease out bandwidth over hybrid fiber-copper loops (but competing carriers now providing broadband services over such facilities will continue to receive the same access); and (3) the requirement that ILECs make "line-sharing" available as an unbundled element will be phased out over a three year period. And ILECs need not unbundle packet switching, including

routers and DSLAMs, as a stand-alone network element.

The most immediate impact on consumers will likely come from the line sharing action. Many parties have asserted that the majority of competitive carriers providing DSL services do so via line sharing -- specifically, by leasing the high frequency portion of the ILEC loop that serves the subscriber. Some FCC commissioners expressed concern that phasing out line sharing will significantly reduce competition in the provision of broadband services. In response, the ILECs point out that cable TV and satellite operators are larger providers of broadband

services, yet are not required to lease their facilities to competitors. The ILECs, and much of the high tech industry, have also asserted that dropping the obligation to lease out new broadband facilities at below-cost prices will increase ILECs' incentive to build out more such facilities.

*The decision was the result of a "palace coup" largely driven by CLEC interests and state regulatory commissions, clothed in the dress of protecting "states rights."*

**UNE-P.** The other major battleground was the "UNE-P": the

"platform" of unbundled network elements that competitors can use as a turn-key network to provide services. The legal standard for whether an ILEC must provide a particular network element is whether the CLEC would be "impaired" without access to it. The FCC concluded that a CLEC is impaired when lack of access to the element makes entry into a market uneconomic owing to operational and economic barriers such as scale economies, sunk costs, and first-mover advantages. This is a standard much broader than the ILECs wanted or expected. It suggests that the previously rejected idea of local telephony as a natural monopoly may be coming back into vogue at the FCC.

Building on its new definition of impairment, the FCC

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**Due dates for filings in  
FCC proceedings are subject to last-minute change.  
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information.**

# Ultra-Wideband Affirmed

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

The FCC has affirmed its year-old rules permitting operation of ultra-wideband (UWB) communications systems, vehicular radar devices, and "imaging systems," a category that includes ground-penetrating radar and in-the-wall and through-the-wall radars.

Unlike most radio technologies, whose signals are confined within pre-established frequency bands, UWB spreads its energy over other people's spectrum. The FCC requires a *minimum* bandwidth of either 500 MHz or 1/5 the center frequency. One communications implementation takes up fully 7.5 GHz. Because there are no vacant frequency bands nearly this wide, UWB necessarily shares spectrum, albeit at very low power levels. The maximum UWB power at any frequency is the same level permitted for stray radio-frequency emissions from a laptop or other digital device: 75 *billionths* of a watt. At some frequencies the UWB maximum is thousands of times lower -- indeed, barely measurable.

Opposition to last year's authorization of UWB came from a variety of spectrum incumbents, including the GPS industry, the wireless telephone industry, the satellite industry, the amateur radio community, satellite radio providers, and elements of the United States Government, including Department of Defense, FAA, and NASA. After the FCC adopted rules over their objections, many of the non-Government parties formally requested reconsideration. The FCC's recent action denied all such requests, holding that UWB at the permitted power levels will not interfere with

any other service.

Some pro-UWB interests also challenged the rules, and they generally fared better. At their request the FCC eliminated certain technical rules that had hindered development of ground-penetrating radars, and clarified the operating rules for ground-penetrating radars and other imaging devices. The FCC also clarified a technical rule on the digital chips that support UWB operation. Those chips are permitted "laptop level" emissions even at frequencies where the intentional UWB emissions must be far lower. This means a UWB applicant may have to show whether a particular emission is digital or UWB. Spectrum incumbents argued that one early UWB applicant had mishandled this issue. The FCC has now dismissed the challenge and clarified the requirement.

Finally, the FCC requested comment on suggested rule changes applicable primarily to vehicular radars, and proposed to alter or drop the minimum bandwidth now required of devices that operate under UWB rules.

## Expanded Wi-Fi Advances

then, the FCC and the federal Government, including the Department of Defense and NASA, have reached agreement on private, unlicensed use of the frequencies in question. Commercial devices will presumably be required to incorporate a "listen-before-transmit" mechanism to avoid interfering with Government equipment. The agreement covers the technical details of that mechanism, and the frequencies involved. Thanks to the agreement, the U.S. will be able to put forward a consistent position at the World Radio Conference that convenes in Geneva in June.

Our last issue reported that efforts to triple the size of the unlicensed Wi-Fi band at 5.8 GHz had met stiff opposition from the U.S. military. Since

### Fletcher, Heald & Hildreth A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor  
Arlington, Virginia 22209  
Tel: (703) 812-0400  
Fax: (703) 812-0486  
E-Mail: editor@fhhlaw.com  
Web Site: fhhlaw.com

#### Editor

Mitchell Lazarus

#### Design

Harry F. Cole

#### Contributing Writers

Donald J. Evans, Paul J. Feldman,  
R.J. Quianzon, Lee G. Petro,  
Alison J. Shapiro and Jennifer D. Wagner

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## Duct Tape for the Network

By: Jennifer Wagner  
703-812-0511  
wagner@fhhlaw.com



While the country debates whether plastic sheeting and duct tape will protect us against biological warfare, the communications industry is developing behind-the-scenes measures to secure the nation's communications infrastructure against terrorist attack.

The Network Reliability and Interoperability Council has long striven to develop means for sustaining public telecommunications networks in the event of terrorist attack or national disaster. Its work has taken on a greater sense of urgency in our current state of alert. Some of the 300 "best practices" being considered by the 56-member Council are already in use, including ways to increase physical security at communications facilities and to protect the confidentiality of proprietary information. The Council hopes those practices and others will be adopted and implemented across the industry.

The Council is looking at ways to secure both the physical network and the cyber network. Items under consideration for the physical network include the application of new technologies to better miti-

gate the effects of an attack, access control methods, personnel security procedures, network and facility design and construction methods to help secure critical infrastructure, management of critical inventory to hasten restoration of service, and physical inspection of equipment. Protecting the cyber network may entail securing cyber technologies and architecture as well as network information and operations support systems, securing access control methods, identifying, reporting, surviving, and responding to attacks, and protecting public communications networks against attacks from end-user networks.

The Council has not yet announced a date by which its "best practices" report will be complete and available to the industry.

The Council also supports a trial, set to run from January 1 to December 31 this year, during which cable, wireless, data, and ISP service providers offer voluntary outage reports. The trial is expected to provide valuable information to improve the reliability of these networks.



(Continued from page 1)

created a presumption of no impairment for switching -- a key UNE-P element -- for business customers served by high-capacity loops such as DS-1. This presumption would spare ILECs the need to provide business market switching to CLECs. But the FCC's decision gave the states a substantial role in applying the impairment standard, and accordingly in deciding whether specific elements must be unbundled. Each state will have 90 days to rebut the national presumption of no impairment in the business switching market, and hence order that this element be made available to CLECs. The FCC made no comparable presumption for mass market customers, but rather set out criteria for the states to apply in determining whether economic and operational impairment exists in a particular market. State commissions must wrap up these proceedings up within nine months. Any state that makes a finding of no impairment will have a three year period for competitive carriers to transition from UNE-P. But few observers expect

many states to make such a finding.

As widely reported in the press, the decision not to eliminate the UNE-P was the result of a "palace coup" by Commissioner Martin against his two fellow Republicans, including Chairman Powell. This development was largely driven by CLEC interests and state regulatory commissions, clothed in the dress of protecting "states rights." One broad result may be a weakening of Chairman Powell's ability to achieve his other policy goals, though he still controls the FCC's agenda. The Chairman's dissent provided a stinging rebuke of the majority decision, and essentially offered a blueprint for court challenges to the FCC's action. While it was likely that any UNE-P decision would be challenged in court, there is no doubt now that years of litigation will be forthcoming. One of the Bells announced its intention to file suit even before the FCC had released the text of its order. Sadly, the continuing uncertainty over the state of regulation will further delay the bumpy ride to growth in this sector.



## AirCell Waiver Granted

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

The FCC has reaffirmed its decision granting AirCell, Inc. a waiver of the rules that otherwise prohibit the use of mobile phones in aircraft, thus allowing the company to launch an air-to-ground communications system. The FCC also provided a more detailed explanation for its conclusion that AirCell's network is not likely to cause harmful interference to terrestrial operations.

AirTouch Communications, Inc. (now Verizon Wireless) had challenged the AirCell application in the U.S. Court of Appeals, arguing (among other things) that air-to-ground use of cellular frequencies was likely to cause harmful interference to terrestrial wireless systems more than 30% of the time. In November 2001, the court upheld the FCC's authorization of AirCell, but ordered the agency to explain why it disregarded Airtouch's interference showing.

Responding to that remand, the FCC stated that it disagreed with AirTouch's approach because AirTouch made overly conservative assumptions, did not adequately justify the "certain amount" by which it asserted AirCell should not be allowed to raise the noise floor, did not take into account the power level of typical cellular calls, and made a significant mathematical error. It also questioned AirTouch's assumed "interference tolerance level," and found the analysis was based on unrealistic assumptions.

In short, the FCC found Airtouch had failed to show that AirCell's system would cause harmful interference.

Commissioner Kevin J. Martin concurred in the Order, but complained that the FCC

used an "ad hoc approach" in analyzing harmful interference. "Not only does this approach cause a great deal of uncertainty for spectrum users and markets alike, it also creates another problem: the appearance of result-oriented decision-making," he said. "Too often, a person reading a Commission

order could be left with the impression that the Commission first makes a decision on whether to license new technology and then creates a justification post hoc by manipulating the way it judges harmful interference." He wasn't suggesting that the Commission had manipulated the methodology in the AirCell proceeding, he said, but noted that the interference

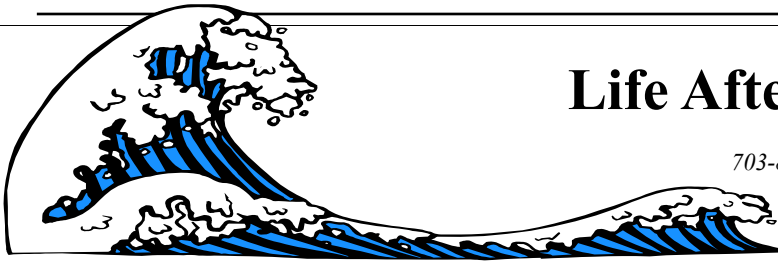
threshold adopted by the Commission "just happened to work perfectly when applied to the limited set of test data that the Commission retained."

Commissioner Martin noted that the issue had arisen in other proceedings. In considering Ku-band sharing between terrestrial and satellite operators, he suggested, the FCC had adopted completely arbitrary interference standards that allowed it to license a new multichannel video distribution and data service. "At the very least, we should develop a consistent framework for judging harmful interference," Mr. Martin said. "In particular, we should adopt a policy of identifying what degree of interference will be considered harmful prior to conducting engineering tests of how much interference a new service causes."

In another proceeding, the FCC proposes to address techniques for assessing harmful interference in response to recommendations from its Spectrum Policy Task Force. That panel suggested the establishment of an "interference temperature" metric.

*Commissioner Kevin J. Martin complained that the FCC used an "ad hoc approach" in analyzing harmful interference.*





## Life After NextWave

By: Lee G. Petro  
703-812-0453  
petro@fhhlaw.com

The U.S. Supreme Court put an end to the long-running battle over the ownership of 90 PCS licenses that NextWave bought at auction in 1997. Having failed to make its installment payments, NextWave filed for bankruptcy -- and that, said the Court, prevented the FCC from canceling, recovering, and re-auctioning the licenses. The decision not only has an immediate impact on the wireless communications industry, but prompts the FCC to determine whether any modifications are needed to its auction process to protect the public interest.

The case required the Court to resolve a perceived conflict between the federal Bankruptcy Code (the "Code") and the Communications Act (the "Act"). The FCC had argued that the Act trumped the Code, so that the licenses automatically cancelled when NextWave failed to make its installment payments, even though NextWave had filed for bankruptcy protection under the Code. But the Court determined that provisions within the Code prohibit the revocation of licenses held by a licensee under bankruptcy protection. NextWave's failure to make installment payments after it filed for Chapter 11 protection could not serve as the basis for revoking the license.

In short, the Court found no conflict between the Code and the Act, since nothing in the Act required the FCC to issue licenses on credit. Instead, the Court noted, the Commission could merely require full payment of licenses at the close of the auction, or just accept the fact that it was a creditor that had to stand in line with the others. Since NextWave had prepared a plan of reorganization, which included the payment of its debts, the FCC could not revoke the licenses.

The most significant result of the case is the FCC's lack of any special position with respect to licensees making installment payments. The FCC is merely another creditor that runs the risk the licensee will not be able to meet its obligations.

Additionally, NextWave will now be able to implement its reorganization plan. That may involve the payment of debt to the FCC, or the sale of the licenses to a third party to satisfy creditors, including the FCC. If NextWave chooses to sell, many parties will be interested. Estimates put the total value somewhere between the \$4 billion bid by NextWave in the auction, and the \$17 billion previously bid by Verizon, Cingular and other

*(Continued on page 6)*

### *Victor Victorious*

## *Lingerie and Domain Names*

A recent decision of the U.S. Supreme Court should make it more difficult for trademark owners to challenge similar-sounding Internet domain names.

Federal law permits the owner of a "distinctive and famous" trademark to challenge similar marks on the ground that the similar mark "dilutes" the effect of the famous mark. But the Court rejected a challenge by the owners of the "Victoria's Secret" mark for lingerie against a sex shop called "Victor's Little Secret," holding

that a mere similarity of names did not violate the statute. Rather, the lingerie chain must show that the sex shop actually reduced the capacity of the "Victoria's Secret" mark to identify and distinguish the goods sold in that company's stores and catalogs.

The same principle should help to protect domain names that might earlier have been subject to challenge on dilution grounds merely because they resemble a trademark.

## Ruling Sought On Voice Via Internet

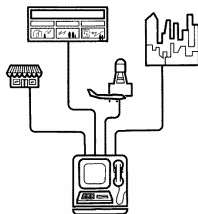
By: Paul J. Feldman  
703-812-0403  
feldman@fhhlaw.com

**P**ulver.com, which recently introduced an Internet-based phone service that is free to users, asked the FCC to rule that its Free World Dial-up ("FWD") service is not a telecommunications service, which is potentially subject to regulation, but rather an unregulated information service. FWD allows users with a cable-modem or DSL connection to make local, long distance, and international phone calls at no cost, after buying a \$125 telephone adapter (made by Cisco) and obtaining an ID number from Pulver. The FWD caller can use the service only to connect only with another FWD customer, and both must be on-line to communicate.

Pulver argues that its FWD service should be unregulated because Pulver is not a carrier and neither owns facilities nor charges a fee. Rather, Pulver claims, FWD is an Internet application "riding over" the transport capabilities purchased by its end users.

The regulatory status of voice-over-Internet-protocol ("VOIP") is likely to become a major regulatory battleground in the near future. Apart from the Pulver petition, companies such as AT&T want VOIP exempted from access charges, a decision that could significantly impact not only the economics of local telephony, but of universal service funding.

Comments on the Pulver.com Petition are due March 14, 2003, and reply comments on April 2.



## The call of the wild



## Phone Home on the Range

By: Donald J. Evans  
703-812-0430  
evans@fhhlaw.com

The FCC has opened a Notice of Inquiry seeking ways to expand wireless services to rural areas. Recognizing that the deployment of wireless services has been concentrated in and near the cities, the FCC seeks ideas as to how it can better promote service in other areas. Several Commissioners emphasize the need for input and creative ideas from the affected communities.

The NOI focuses primarily on tinkering with the auction process to stimulate rural development, but other ideas are welcome. So far commenters have mentioned setting relatively small geographic areas for auction, increasing auction discounts to small businesses, policing "build-outs" of rural areas more closely, encouraging partitioning by granting "reverse discounts" to companies parting with rural territories, reducing minimum auction bids in areas where there is likely to be only one real bidder, and ensuring the continued availability of automatic roaming to rural carriers.



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parties in the subsequent 2001 auction for the same spectrum, which was later invalidated.

Finally, the Commission recently granted additional time for NextWave to complete construction of the system, acknowledging that the construction period should be tolled during the long appellate process. The first set of facilities now must be completed by December 2003, with the final phase being constructed by May 2004. By extending the construction period, the Commission also extended the limitations that restrict the NextWave licenses to small businesses.

## Feds Shift Spectrum from Satellite Operators

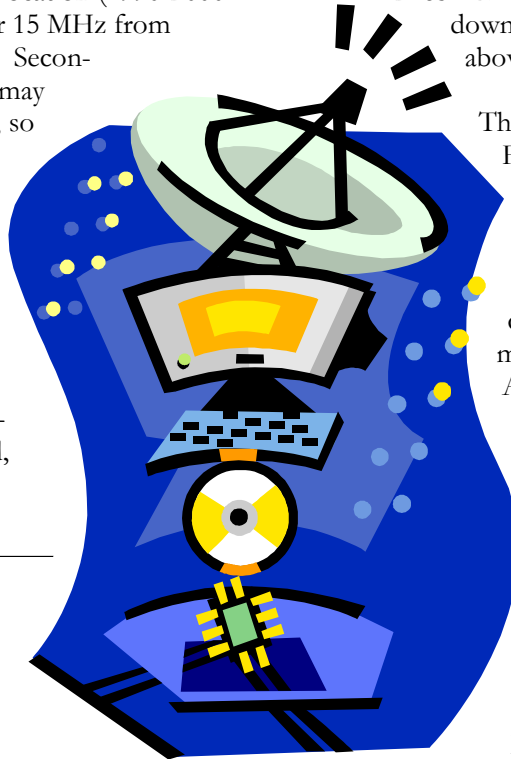
By: *R. J. Quianzon*  
703-812-0424  
quianzon@fhhlaw.com

Citing substantially higher growth in cell phone and PCS subscribers than in mobile satellite service, the FCC has re-assigned 30 MHz of satellite spectrum for terrestrial wireless use. The change takes 15 MHz from the mobile satellite uplink allocation (1990-2000 and 2020-2025 MHz) and another 15 MHz from the downlink (2165-2180 MHz). Secondary broadcast auxiliary licensees may continue to use these frequencies, so long as they do not interfere with proposed wireless services.

As part of the same proceeding, the FCC set its sights on harvesting other spectrum for the benefit of terrestrial wireless operators. It proposes to hand over unlicensed PCS spectrum at 1910-1920, which appears to be unused, and asks if it should do the same with 1920-1930 MHz. These

bands are particularly attractive to wireless operators because they are adjacent to currently licensed PCS frequencies. Another 10 MHz might come from MDS and emerging technologies at 2155-2160 and 2160-2165 MHz to complement the satellite downlink frequencies referenced above.

These latest actions continue the FCC's efforts to satisfy competing uses for spectrum. No doubt they also reflect the financial difficulties of major players in the mobile satellite industry, compared with the insatiable demand for wireless phone service. Auctioning 30 MHz of spectrum to wireless phone carriers would also provide short-term revenue for the government.



### Satellite Service on the Ground

By: *Alison J. Shapiro*  
703-812-0478  
shapiro@fhhlaw.com

In a vigorously contested proceeding, the FCC permitted certain mobile satellite service (MSS) providers in three frequency bands to provide an ancillary terrestrial component (ATC) to their satellite systems. The ruling allows MSS operators to integrate ATC into their networks for the purpose of enhancing high-quality, affordable mobile services using only MSS spectrum. The FCC decided that ATC authority will (1) increase spectrum efficiency through MSS network integration and terrestrial reuse; (2) permit better coverage in areas that MSS providers could not otherwise serve; (3) provide additional communications that may

enhance public protection; and (4) provide new services in the markets served by MSS. In the FCC's view, making ATC available to licensed MSS operators better serves the public interest than would efforts

to share MSS spectrum with terrestrial providers.

MSS providers sought ATC authority because MSS service as originally planned has not drawn enough customers to support the expensive infrastructure it requires. But wireless phone companies, among others, had opposed idea. Having paid billions for their spectrum, they said, they should not have to compete with MSS providers that obtained their spectrum for free. In response, the FCC imposed conditions on MSS intended to ensure the integrity of the underlying MSS offering, and to prevent those services from becoming a stand-alone terrestrial service.



## Clarification from the Court

By: Jennifer Wagner  
703-812-0511  
wagner@fhhlaw.com

**F**ederal court to FCC: don't change your rules without giving the public advance notice.

In *Sprint Corp. v. FCC*, the U.S. Court of Appeals for the D.C. Circuit helped to draw the line between clarifying rules and altering them. The Administrative Procedure Act, dating from 1946, requires the FCC to change a previously established rule first by publishing a Notice of Proposed Rulemaking in the Federal Register, then receiving public comment, and finally issuing an explanatory Report and Order. But the FCC can "clarify" a rule without any of these procedures. Indeed, the FCC clarifies rules every working day, often in obscure letter decisions or public notices that fail to make the Federal Register.

The substance of the *Sprint* case turned on a payphone question: if multiple interexchange carriers handle a call, which one(s) must compensate the payphone owner? The FCC made a change in those ar-

rangements, but did so in a public notice rather a rulemaking proceeding. The court held that was error, and sent the matter back for another try.

In brief, the court decision requires a public rulemaking before a party can be subjected to new obligations, such as payment or reporting responsibilities. Advance notice and public comment are needed to ensure fairness to the affected parties. On the other hand, a clarification that merely illustrates the original intent of a rule -- for example, defining a term used in the rule -- needs only a public notice. In *Sprint*, the FCC had crossed the line by changing the payment and reporting obligations of the interexchange carriers.

The decision should help to guide the FCC staff in determining when to provide the public an opportunity to comment on their proposals.

## Spectrum Cooperation Updated

By: R. J. Quianson  
703-812-0424  
quianzon@fhhlaw.com

**T**he FCC and the Commerce Department have updated their arrangements for coordinating spectrum policy that had been in place since prior to the Second World War. FCC Chairman Powell admitted they had been operating in a "policy time warp."

Under the Communications Act, the FCC is assigned the task of spectrum management for the public, and for state and local governments. Spectrum use by the federal agencies is handled by the National Telecommunications Information Administration (NTIA), an office of the Commerce Department. Close collaboration



between the two is required because much of the spectrum is allocated jointly to federal and non-federal users. Moreover, some non-federal services (such as ultra-wideband) stray into spectrum allocated exclusively for federal use, and some federal users remain in bands otherwise allocated to commercial use.

The new agreement between the FCC and NTIA establishes a broad framework for coordination between the two agencies, including regular communication and information exchange, and in-person meetings at least twice a year.