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FHH Telecom Law

Current Issues in Telecommunications Law and Regulation January 2005

Patience prevails

Ultra-Wideband Rules Survive

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The FCC's third visit to the rules governing unlicensed ultra-wideband (UWB) devices made only minor changes. Now in its seventh year, the proceeding has been fueled throughout by the continuing opposition of PCS and other spectrum licensees to the FCC's allowing low-level UWB signals in their spectrum. The new order once again brushes off their concerns, and also permits two new types of operation.

First, the FCC allowed devices having less than the minimum bandwidth of 500 MHz to operate under the UWB rules, but only in the range 6925-7250 MHz. Second, the FCC will now allow UWB vehicle back-up radars at 16.2-17.7 GHz and frequency-hopping vehicular radars 23.12-29.0 GHz.

Even now, the proceeding is not over. The FCC has indicated it will issue yet another Notice of Proposed Rulemaking, this one potentially to expand the range of modulations that UWB devices are permitted to employ.

It's 2005 - Do you know where your proceedings are?

Due dates for filings in FCC proceedings are subject to last-minute change. Call us any time for current information.

FCC Cracks Down on Equipment Violations

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Recent decisions show the FCC is getting serious about enforcing the rules on equipment authorization. Typical fines in the past rarely exceeded a few thousand dollars, but those days are over.

After a three-year investigation, including the issuance of nine citations, Pilot Travel Centers was assessed $125,000 for marketing and selling unauthorized radio equipment. The offending product was a transmitter ostensibly marketed for amateur radio use, but which the user could easily modify to transmit in the CB band at powers far higher than CB radios are allowed. In addition to fining the company $7,000 for each of 13 violations, for a total of $91,000, the FCC added an "upward adjustment" of $34,000 because Pilot had continued to market the device even after receiving FCC citations.

ACR Electronics, Inc. incurred a $75,000 forfeiture for displaying and advertising a "Personal Beacon Locator" at trade and industry shows prior to receiving FCC certification, and without posting the FCC-required disclaimer. And Samson Technologies, Inc. agreed to pay $27,500 in connection with a consent decree. Samson sold digital music recording devices which it treated as Class A equipment, a category limited to products for use solely in commercial and industrial environments. But the FCC noted the devices were also marketed for residential use, and therefore are regulated as Class B, which is subject to stricter emissions limitations and more stringent procedures. Samson now markets the equipment as Class B.

Some equipment violations are honest mistakes, and some reflect a company's misguided efforts to treat FCC fines as a cost of doing business. Either way, the FCC is determined to make violations more expensive.

Regulatory status on the docket

Supremes to Review FCC Handling of Cable Modem Service

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The Supreme Court agreed to rule on the regulatory status of high-speed Internet access offered by cable TV operators (cable modem service). Its decision may shape the application of current regulatory classifications, not only as to Internet service via cable, but also as to similar services provided on telephone networks and other technology platforms.

A March 2002 decision by the FCC originally classified cable modem service as an "information service" under the Communications Act, rather than as a "telecommunications service" or a "cable service." Had it been deemed a telecommunications service, cable modem service would have become subject to the obligations of traditional telecom carriers, including the obligation to make the cable modem networks available for use by competing ISPs, and possible federal regulation of rates and terms. Had it been called a cable service, not only would it come under numerous other federal regulations, but would also be subject to franchise fees (typically 5 percent of revenues) payable to local governments across the country. Many observers, including the chairman of the FCC, believe that either of these classifications would stifle the growth of cable broadband and hinder investment in the networks. By classifying cable modem as an information service, the FCC attempted to remove regulatory barriers to development, while maintaining the discretion to lightly regulate the service in the future, if necessary.

The U.S. Court of Appeals for the Ninth Circuit vacated the FCC's decision in October 2003. The court held that it was bound by a prior decision of its own from 2000, when it decided that cable modem service was at least partly a telecommunications service. In that earlier case, the FCC had not placed its views before the court, which drew its own conclusions as to the proper regulatory classification.

The current appeal turns in part on a question of administrative law: whether the Ninth Circuit was correct in following its own precedent, or whether it wrongly ignored the FCC's subsequent findings. If the Supreme Court holds that the Ninth Circuit's precedent was a proper basis for decision, then the Ninth Circuit's substantive ruling that cable modem is in part a telecommunications service will probably stand. On the other hand, should the Supreme Court find that the Ninth Circuit should have considered or followed the views of the FCC, then the Court could either remand the case back to the Ninth Circuit for further hearings, or make its own definitive ruling on the proper regulatory status. In the latter situation, the Supreme Court is not likely to find that cable modem service is a cable service as defined in the statute. When it accepted appeals from the FCC and the cable TV trade association, both seeking information service status for cable modem service, the Court rejected parallel appeals by local governments, who wanted a holding that cable modem service is a cable service and thus subject to franchise fees. Still, if cable modem service is ultimately classed as a telecommunications service, it may be subject to fees and taxes that localities impose on other telecommunications services.

(Continued on page 3)

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Meanwhile, across the street in the Capitol . . .

Congress Takes 11th Hour Actions On Communications

Spectrum Auctions, E-911, Universal Service Funding Addressed

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The outgoing Congress enacted last-minute legislation on the funding of E-911 service, spectrum relocation by federal government users, and accounting issues for the federal universal service fund.

One portion of H.R. 5149 creates a Spectrum Relocation Fund to help pay the costs of transitioning federal government agencies from 216-220, 1432-1435, 1710-1755, and 2385-2390 MHz. These bands have been re-allocated for a variety of fixed and mobile commercial uses, including advanced broadband services. The FCC will have to give NTIA 18 months advance notice of any future spectrum auctions in these bands, so that NTIA can work with the federal agencies to provide the FCC with an estimate of the relocation costs. The FCC must then operate the auctions so as to recover at least 110 percent of the estimate, with the auction proceeds to be deposited into the Spectrum Relocation Fund. If the auction falls short of the goal, the FCC must cancel the results and return bidders' deposits. The 18-month notice period may slow down some auctions, including that for the 1710-55 MHz band, which was expected in 2005.

The new legislation prohibits access to matching grants by states that use E-911 fees improperly.

Other provisions address E-911 service, which allows the 911 answering operator to automatically identify a wireless caller's location. While the technology has existed for a few years, many communities have failed to install it due to lack of funding. The statute establishes a $250 million annual matching grant program for states to use in funding E-911 facilities. Another provision addresses the "dirty little secret" behind the lack of E-911 funding: although many states require wireless carriers to collect a monthly fee for support of E-911 operations, in fact the money is often treated as general revenue and spent on other state requirements. The new legislation prohibits access to the matching grants by states that use the E-911 fees improperly, and requires the GAO to keep track of those fees and how they are spent.

The remaining provisions, on universal service (USF) funding, may have the most immediate impact. The GAO recently decided that collection and allocation of federal universal service funds must satisfy the fed-

(Continued on page 7)

***(Cable Modem Review -** continued from page 2)*

While cable TV operators and their subscribers will be most directly affected by the decision, ISPs are also watching the case. Classification of cable modem service as a telecommunications service would likely facilitate the chances of independent ISPs to access the cable networks, yet could also impose serious regulatory obligations on their own networks. Traditional telephone companies have a stake as well: they want regulatory parity with cable TV operators for their own DSL service, especially if that means deregulation. Should the Supreme Court rule that cable modem service is an information service, then the FCC will likely follow with a similar ruling on DSL. The case could also affect the regulation of VOIP services. Although the FCC has been leaning toward a broad classification of VOIP as an information service, a holding by the Supreme Court that cable modem service is a telecommunications service could upset that view. Lastly, Congress and all the industries involved will be viewing this case in the context of much-discussed proposals to rewrite the statutory definitions. Many parties, including the FCC, believe that technology has rendered the current definitions unworkable, and that the Communications Act must be revised if broadband services are to flourish. A Supreme Court decision that cable modem is a telecommunications service would likely increase the calls for new legislation.

Oral argument at the Supreme Court is expected in March, with a decision likely by June.

FCC Considers Raising In-Flight Irritation Levels

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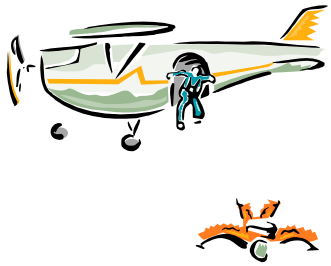
The flying public has long been divided on the FCC's prohibition of cell phone use by passengers on commercial airline flights. Some want to make calls; some enjoy the peace and quiet. The seatback air-to-ground service provided by monopoly carrier Verizon is not universally available, and costs several dollars per minute. (See article at right.)



Desperate passengers head for the door marked "Cell-Free Section" (artist's depiction)

The rules against regular cell phone use during flight stems from two concerns. The FAA fears that cellular transmissions might interfere with an aircraft's communications and navigation systems, although the FAA is now reconsidering that view through an advisory organization and may drop its objections. The FCC's concerns stem from the fact that cellular emissions from an aircraft would reach numerous base stations on the ground, and would thereby create interference and complicate handoff and other call set-up functions. It now appears that this problem may be solved by the use of a mini "pico" cell on the aircraft which would organize cell calls and prevent interference with terrestrial systems. The FCC has requested comment on whether use of such a device would eliminate the perceived problems and whether airborne use should be permitted for PCS users as well as traditional 800 MHz cell phone users. Any FCC decision will be subject to the FAA's parallel proceeding.

The FCC commissioners were sensitive to the likelihood that expanded cell phone use will increase annoyance to seat mates. The prospect of a cabin full of self-important execs and lawyers holding forth at top volume is not a pretty one. The FAA may rightly conclude that the resulting in-flight violence is likely to reach unacceptable levels. The flight attendants' union has already lodged its opposition.

800 MHz spectrum on the auction block

FCC Encourages Competition in Aircraft-Based Phone Service

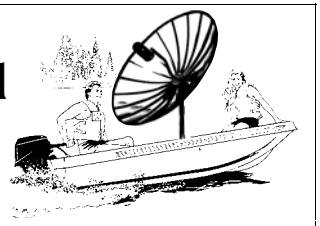
While proposing to ease the restrictions on personal cell phones during commercial flights, the FCC has also proposed a new structure for 800 MHz aircraft-based phone service, presently offered only by Verizon. Many airlines were initially interested in the service, but the phones were difficult and expensive to install, and the high per minute charges have deterred use. The FCC now wants to restructure the band by auctioning the 4 MHz of air-ground spectrum in an unusual flexible-use configuration. Bidders will be able to bid on either overlapping, cross-polarized 3 MHz licenses or two different exclusive 1 MHz and 3 MHz licenses. To encourage competition, no single entity would be allowed to hold all 4 MHz. Meanwhile, Verizon will be allowed to retain its current 1 MHz license for a non-renewable 5 year term. Of course, demand for this spectrum may drop off if the FCC allows flyers to use their regular cell phones.

FCC Proposes to Expand Secondary Markets for Spectrum

The FCC seeks comment on expansion of its secondary market rules on spectrum leasing and other sharing arrangements. Proposals include an expanded "private commons" model, in which users can access spectrum licensed to others for *ad hoc* peer-to-peer communications; and an open-ended call for other ideas that aid in the efficient use of spectrum by non-licensees. Comments are due on January 18; reply comments are due on February 17.

Cruising on the Internet

Earth Stations Weigh Anchor, Set Sail



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The FCC has announced service and licensing rules for satellite earth stations on vessels (ESVs) in the C and Ku bands. For many years ESVs have operated under a succession of waivers and temporary authorizations. The new rules should provide regulatory certainty to ESV providers, while offering some protection to other spectrum users.

ESV operators will share the C-band (3700-4200 MHz and 5925-6425 MHz) with fixed terrestrial and fixed satellite services. The rules subject ESVs to coordination requirements, as well as power limits. A vessel that leaves its coordinated route will have to shut down operation. The amount of spectrum available to an ESV operator is limited, and ESVs will not be permitted on vessels below a certain gross tonnage. (Details are not yet available as we go to press.)

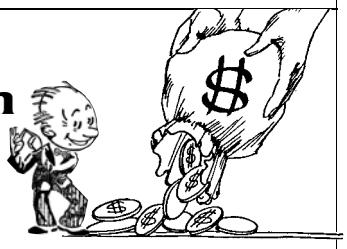
The rules subject ESVs to coordination requirements, as well as power limits. A vessel that leaves its coordinated route will have to shut down operation.

ESVs in Ku-band (14.0-14.5 GHz and 11.7-12.2 GHz) will not have to coordinate with fixed terrestrial services, whose operations there are limited. At 14.0-14.5 GHz, however, ESV coordination is required near certain federal government earth stations. As in C-band, power limitations will apply.

The rules require applicants for ESV licenses to demonstrate that they are capable of controlling all aspects of their ESV network and able to comply with the applicable technical parameters. The license term is fifteen years. Applications will include Internet services to cruise ships.

Nextel gets half-billion dollar Christmas bonus

800 MHz Band Plan Resolved -- Yet Again



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Last summer we reported how the FCC had resolved (for the time being) the controversy over whether and how to simplify the 800 MHz band plan. It offered to give Nextel the 1.9 GHz spectrum it wanted in exchange for some of Nextel's existing 800 MHz spectrum, plus Nextel's commitment to pay for relocating incumbent licensees out of the band, and also Nextel's payment of roughly $2.35 billion to the treasury. That last item caused Nextel some heartburn, since it had expressed a willingness to pay only about $850 million.

In an unusual procedural move, the FCC entertained *ex parte* submissions from Nextel suggesting that it be credited with a much higher dollar amount for the 800 MHz spectrum it was turning in, based on a more accurate population count. December 23 then brought Nextel an early Christmas gift: a 67-page reconsideration order that increased Nextel's credit for loss of its existing spectrum by $452 million. In addition, the FCC clarified a host of smaller points which had confused the parties to the massive 800 MHz migration. Significantly, non-Nextel licensees are now allowed to have wide-area cellular systems if they so elect.

Nextel has a month to decide whether to accept the new version of the deal. Verizon and Cingular have dropped their opposition, after having fighting the plan for years. Though challenges by smaller disgruntled parties have already been filed with the Court of Appeals, acquiescence of the major carriers increases the likelihood that the plan will pass its remaining legal hurdles.

If at first (or second or third) you don't succeed . . .

Unbundling Network Elements, IV

FCC Tries, Tries Again to Satisfy Court Ruling

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The FCC has adopted yet another set of rules regarding the obligations of incumbent local exchange carriers (ILECs) to make elements of their networks available to competing carriers. This action responds to a March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit, which overturned portions of the Commission's Unbundled Network Element (UNE) rules enacted in its Triennial Review Order (TRO). The court decision reversed or remanded most of the rules adopted in the TRO -- the third time an appellate court has upset the FCC's unbundling rules. A majority of the commissioners emphasized the need to craft rules that will pass judicial review, regardless of other policy preferences. The unbundling obligations on ILECs are significantly reduced as a result. Still, ILECs reacted with frustration that the FCC did not go far enough, while CLECs, consumer groups, and a minority of FCC commissioners predicted the end of competition as we know it.

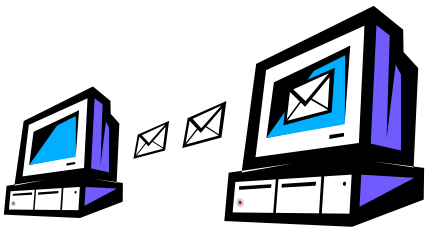
ILECs reacted with frustration that the FCC did not go far enough, while CLECs, consumer groups, and a minority of FCC commissioners predicted the end of competition as we know it.

The FCC's actions include the following:

- *Mass Market Local Switching.* ILECs have no further obligation to provide CLECs with unbundled access to mass market local circuit switching. A 12-month period will enable competing carriers to transition the embedded customer base, but does not permit CLECs to request switching UNEs for new customers. During the transition, competitive carriers will retain access to the UNE platform (UNE-P) -- *i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport -- at a preset rate.

- *High-Capacity Loops.* CLECs will lose unbundled access to DS3-capacity loops in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators, and similarly will lose access to unbundled DS1-capacity loops in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. These changes should affect only a very limited number of end-users, primarily businesses in dense urban areas where competition is flourishing. Here, too, there will be a transition period at preset rates for the embedded customer base.

If history is any predictor, it is likely that these new rules will also be appealed. In the meantime, while the new rules will have a negative impact on competitors who largely rely on the UNE-P, competitors such as Covad are entering into agreements with ILECs to purchase network elements at negotiated prices that make commercial sense to both the ILEC and the CLEC. Many other facilities-based competitors, including cable TV companies, do not lease much from ILECs, and thus are not significantly affected by the new rules. Furthermore, the growth of VOIP and the increasing consumer substitution of cellular phones for wireline will likely provide more competition to ILECs than UNE-P ever could. The ride to local telecom competition will continue, but watch out for the bumps.



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FCC Limits Licensing Requirement To Interfering Devices

Unlicensed Operation Deemed Legal

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Whew! Garage door openers, Wi-Fi, and all the rest are safe. The FCC has decided that unlicensed operation under Part 15 of its rules does not violate the Communications Act.

The claim of unlawfulness was brought by Cingular Wireless as part of its multi-pronged effort to eliminate unlicensed ultra-wideband from the airwaves. Cingular pointed to Section 301 of the Communications Act, which says anyone using a radio transmitter must have an FCC license. Cingular argued that none of the exceptions listed in the statute covers cordless phones, remote control toys, and the countless other unlicensed products approved by the FCC. (Cingular is an odd company to have brought the claim, considering that at least seven of its wireless phone models sport unlicensed Bluetooth devices.)

According to the FCC, the licensing requirement of Section 301 should be read as being limited to devices that have the potential to cause harmful interference -- which compliant Part 15 devices do not.

The FCC disagreed with Cingular on two grounds. First, in the FCC's view, Cingular's reading of the statute would bar even devices that emit minuscule amounts of radio-frequency energy, and even if they are not used for communication. A better reading, according to the FCC, would limit the licensing requirement of Section 301 to devices that have the potential to cause harmful interference -- which compliant Part 15 devices do not. Second, the FCC found several instances in which Congress formally acknowledged the FCC's authorization of unlicensed devices. If Congress thought the FCC had misconstrued the statute, it had plenty of opportunity to say so.

Keyless entry to your car is safe for now. But the this issue is not likely to go away for good until the Court of Appeals finally speaks -- or until Congress adds a few words to the statute.

***(Congress Acts on FCC Matters** - continued from page 3)* eral Anti-Deficiency Act (ADA), which requires funds actually to be in an agency's coffers before the agency commits to spending them. Citing the ADA, the Universal Service Administration Company froze disbursements of funds for support of Internet service in schools and libraries, and threatened to cause the FCC to raise the USF contribution factor paid by carriers to over 12 percent of interstate revenues. The new legislation waives the ADA obligation for 2005, which should allow at least temporary continued support. Congress will have to work on a more permanent solution next year, perhaps as part of the much-discussed Telecom Act reform proposals. But enacting any such broad reform may not be easy. Even though H.R. 5149 had broad support from the affected parties and a majority of legislators, it was only at the last minute that Congress overcame delays imposed by Senator McCain, who sought legislation to create a national commission to regulate boxing.