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FHH Telecom Law

Current Issues in Telecommunications Law and Regulation August 2005

Supremes Affirm FCC in Brand X Decision

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In one of its final acts of the 2004-2005 term, the Supreme Court released its decision in the *Brand X* case upholding a 2002 Declaratory Ruling by the FCC classifying cable modem services as an "information service" under the Communications Act, rather than as a "telecommunications service." The implications of those possible classifications are huge in terms of regulatory obligations and market dynamics. If cable modem service were classified as a "telecommunications service," then it would be 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 of cable modem service. By classifying cable modem as an "information service," the FCC attempted to remove those regulatory barriers to development, while maintaining the discretion to lightly regulate cable modem service in the future under Title I, if necessary. Of course, the *Brand X* decision will also likely have a significant impact on the regulation of DSL and VOIP.

The Supreme Court's decision will, when all of the procedural steps are fulfilled, very likely result in the FCC finalizing its deregulation of cable modem services. While the FCC declared cable modem to be an information service, the FCC also attached to that ruling an extensive Notice of Proposed Rulemaking seeking comments on whether it should enact rules under Title I of the Act for open access requirements, payment of federal USF, etc. That proceeding was put on hold once the declaratory ruling was appealed, and will now be re-opened. Chairman Martin will likely favor not imposing open access on cable modem, and Commissioner Abernathy will likely support that position, though we do not know how much longer she will be on the Commission. Commis-

(Continued on page 2)

E911 Mandated for Interconnected VoIP Providers

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In the FCC's first major action with Kevin Martin as Chairman, the FCC required that certain providers of voice over Internet protocol (VoIP) phone service provide enhanced 911 (E911) emergency calling capabilities to their customers as a mandatory feature of their service by November 28, 2005. E911 service permits an emergency dispatcher to know the location of an E911 caller. The requirement will apply only to VoIP providers interconnected with the public switched telephone network. Peer-to-peer (P2P) VoIP services, like Skype, will be exempt.

The FCC's Order mandates interconnected VoIP providers to deliver all 911 calls to the customer's local emergency operator as a standard, rather than optional, feature of the VoIP service. The difficulty, of course, is that the network cannot automatically know the physical location of a customer who could be signing on from anywhere in the world. Emergency operators must therefore be provided with the customer's call back number and location information by the VoIP provider. While the customer will provide the location information, the VoIP provider must provide the customer the capability of updating this information, whether the customer is at home or away.

The FCC also reminded ILECs that they have a statutory obligation to provide access to any requesting telecommunications carrier to the ILECs' E911 networks. ILECs must continue to provide competing carriers with access to their trunks, selective routers and E911 databases. The FCC stated that it would monitor the situation to ensure that E911 access is not being withheld.

Interconnected VoIP providers will have to inform new and existing customers of the E911 features and limitations of their VoIP service by July 29, 2005. The FCC's Enforcement Bureau announced that it would not seek

(Continued on page 2)

Brand X *(Continued from page 1)*

sioner Copps dissented from the 2002 Declaratory Ruling, so he is not likely to be a supporter of deregulation, though changes in the market and technology may have mellowed his opposition. Commissioner Adelstein likely shares the views of Copps. So while "light-touch" regulation or deregulation of cable modem is the likely wave of the future, any action may have to wait until new Republican commissioners are seated at the FCC.

The Supreme Court's decision will also likely impact the regulation of DSL. At the same time that the FCC issued its Declaratory Ruling on cable modem, it issued an NPRM tentatively concluding that DSL was also an information service. That proceeding was put on hold when Brand X filed its appeal. The FCC could, if it wanted, move quickly to issue a Declaratory Ruling on the status of DSL. Much of the Court's analysis that cable modem is the offering of a fully integrated service, rather than the offering of a telecommunications service along with an information service, appears to apply equally well to DSL.

The FCC's 2002 Ruling had been appealed to the U.S. Court of Appeals for the Ninth Circuit, which vacated the FCC's decision in October of 2003. The Ninth Circuit held that it was bound by a prior decision of its own from 2000, when the Circuit Court held that cable modem service was at least partly a telecommunications service. In that earlier case, the FCC had not placed its views in front of the Circuit Court, and the Court drew its own conclusions as to the proper regulatory classification. In other words, the Ninth Circuit felt itself bound by its previous ruling even though the FCC had subsequently taken a contrary view.

The Supreme Court held that the Ninth Circuit erred in not deferring to the FCC's decision. In doing so, the Court dug deeply into the substance of the issue. It analyzed in detail the complex question of whether cable modem services "offer" telecommunications to the end user or merely "use" telecommunications services to offer an integrated service where access to the Internet and e-mail etc. is the primary benefit from the end-user's point of view (as the FCC held). This is pretty metaphysical stuff, but the majority strongly supported the FCC views. We will keep you informed as this matter progresses, but contact us if you have any questions.

E911 and VoIP *(Continued from page 1)*

enforcement until August 29, 2005, of the requirement that interconnected VoIP providers obtain affirmative acknowledgements by July 29, 2005, from 100% of their subscribers that they have read and understood an advisory concerning the limitations of their E911 service. To be eligible for this extension, providers must meet certain reporting requirements by August 10, 2005. Interconnected VoIP providers must file with the FCC a letter byNovember 28, 2005, detailing their timely compliance.

The Order also includes a *Further Notice of Proposed Rule Making* (FNPRM) which seeks a method for determining the customer's location without the customer having to self-report this information. The FNPRM questions whether P2P VoIP providers, such as Skype, should have any E911 obligations. Comments are due August 15, 2005, with Reply Comments due September 12, 2005.

Legislation has been introduced in both the House and the Senate to ensure all VoIP providers non-discriminatory access to the 911 infrastructure and to require that E911 services are delivered to all VoIP users. The Senate version led by Sen. Burns (R-Mont.) is expected to provide the model for E911 provisions in draft Telecom Act rewrite bills in both the House and the Senate.

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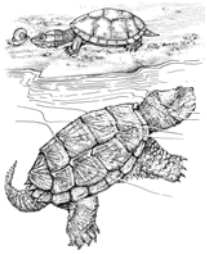
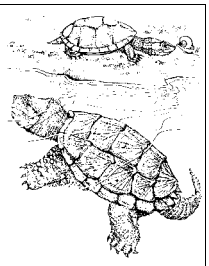


You expected it when?

"Immediate" Processing Reaches the Starting Gate, Slowly



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Last year, the FCC adopted procedures and expanded eligibility for certain wireless licensees to obtain "immediate" approval of certain lease agreements and transfer of control and assignment of license applications. The implementation of these new procedures, though, has been less than immediate.

The Commission has yet to provide guidance as to the regulatory meaning of the term "geographic overlap".

Specifically, while the Commission had adopted the rules in September, 2004, the Commission has only now revised the Form 603 to permit the filing of applications eligible for immediate grant. To be eligible to use it, the parties to the application must certify that their leasing arrangements do not raise public interest concerns relating to eligibility, foreign ownership, designated entity/entrepreneur matters, or competition. If the parties can correctly certify compliance with the Commission's rules with respect to these four issues, the application will be processed overnight, and granted the next day.

While the Commission will grant the application "immediately", such grant does not eliminate the risk of possible reconsideration of the grant. Third parties will be able to seek reconsideration, and the FCC may also reconsider the grant on its own motion. Moreover, the Commission has not provided clear advice thus far with respect to their consideration of competition issues. The 2004 Report and Order indicated that the immediate processing rules would ***not*** apply if the services to be provided under the lease include interconnected mobile voice and/or data ***and*** there is a "geographic overlap" with other spectrum controlled by the lessee. However, the Commission has yet to provide guidance as to the term "geographic overlap", and thus it is possible that a lease agreement that otherwise complies with the Commission's rules and policies will still be deemed to not be eligible for immediate approval due to competition concerns. The FCC's staff has indicated that there will be future guidance on this matter.

Thus, in negotiating lease agreements, licensees and their lessees should include provisions that will contemplate the possibility that the transaction may need to be unwound, or at least delayed until the FCC can properly address the issues raised in objections to the lease. Of special concern would be the return of control of the spectrum to the licensee after the lessee has built its system and is already serving customers.

Recently, the FCC held a public seminar to introduce the new filing process for Form 603, and the new rules taking effect on August 1, 2005. If you have any questions regarding the preparation of the new Form 603, or would like to discuss the integration of the preventative measures discussed above, contact the attorney with whom you normally work, or Lee G. Petro at 703-812-0453.

Western Wireless/ALLTEL Merger OK'd

FCC Looking Into Roaming Abuses

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The FCC approved, over objections, the proposed merger of CMRS carriers Western Wireless and ALLTEL on July 19. In the course of a thorough analysis of the potential ill effects on competition of this merger, the FCC examined allegations raised by several rural carriers that the ability of small carriers to roam on the Western and ALLTEL systems would be impaired. Small, and even large, regional carriers have lodged increasingly frequent complaints in recent years that the Big Five and other large carriers are using their nationwide footprints and relationships with other large carriers to squeeze their smaller brethren on roaming rates and automatic roaming availability. In a practical sense, national carriers who have spectrum in most markets or a roaming agreement with another large

(Continued on page 5)

Light at the end of the tunnel?

Congressional Action On Deadline for Eviction of Broadcasters from 700 MHz Band In the Works

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Licensees or prospective licensees of 700 MHz band spectrum could take some comfort in some movement towards a hard DTV transition deadline. As we have previously reported, under current law, broadcasters do not have to vacate their existing 700 MHz analog channels until at least 85% of the people in their market are capable of receiving DTV signals. That little clause in the law has essentially embedded the broadcasters on their channels indefinitely, even while they begin transmitting on a second DTV-only channel. Now, however, Congress is knee-deep in negotiations of overarching legislation that will direct the final stages of the DTV transition. One critical obstacle was removed when, in recent hearings, the National Association of Broadcasters agreed to a hard deadline of December 31, 2008 for the return of analog channels. Recent news reports indicate that the legislation will be "marked up" (or finalized) in September, 2006, and will likely be attached to a larger budget reconciliation bill that will help ease its passage through Congress and signature by the President.

One critical obstacle was removed when the NAB agreed to a hard deadline of December 31, 2008 for the return of analog channels.

Two proposals that might be included with the legislation relate to a DTV set-top box subsidy and carriage of DTV signals on cable and satellite systems. First, several members of Congress have supported a plan by which the federal government will provide vouchers or reduced cost set-top digital converter boxes that will make the accessible to those who can't afford to purchase new DTV television sets. The NAB and the Consumers Electronics Association have gone toe-to-toe over the number of persons that will likely not own a DTV set at the end of 2008, but one can assume that it will be between 13 and 20 million persons. Under the proposed legislation, persons with analog sets that meet certain criteria will be able to obtain a set-top box for approximately $50, and will be able to continue watching "American Idol", the further adventures of Paris Hilton, and the like.

It is also possible that Congress will include language that providing television licensees must-carry rights with respect to cable and satellite carriage of both their digital ***and*** analog signals. This issue will eventually become moot after the final conversion (as noted, current projected date for final conversion: December 31, 2008), at which point there will be no more analog signals, so dual analog-and-digital carriage will no longer be an issue. Still, the next round of cable and satellite must-carry/retransmission consent elections are due on October 1, 2005. Those elections will cover the ensuing three-year period, *i.e.*, to the end of the dual-mode operation period. Legislation mandating dual-carriage must-carry rights during that final interim period could be interpreted as payback to broadcasters for the their acceptance of a mutually agreeable hard deadline for the return of the analog spectrum.

On the Auction Block

Auction 63 (December 7, 2005)

500 MHz blocks in the 12.2 – 12.7 GHz band

May be used for any fixed, digital one-way communication. Mint condition – these are unsold blocks from an earlier auction. Filing deadline not yet established

Upsurge of protest against the chattering class

In-Flight Cell Phone Service: Still Awaiting Take-Off Clearance

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Late last year the FCC opened a proceeding (WT Docket 04-435) to consider whether to allow cell phone use by passengers in flight. It will be recalled that the ostensible reasons for the existing ban were the possibility of interference with the aircraft's communications systems and the problem of broadcasting cellular transmissions over such wide areas that the ground-based control networks would become confused. Technology being what it is, solutions to these concerns appeared to be at hand, so the FCC wanted to consider whether to drop the ban on in-flight phone calls.

The idea has some facial merit. Assuming it's technically possible, why shouldn't people be able to transact business or engage in conversation rather than being artificially cut off from the outside world for hours at a time? To some observers' surprise, the proposal aroused a firestorm of opposition. Thousands of individual flyers wrote in to object, as did the Flight Attendants union and most major cellular carriers. It seems that while everyone believes that they themselves are respectful and courteous users of cell phones, everyone believes that their neighbor is not. Anyone who has been seated next to someone speaking loudly on his phone at a restaurant can apprehend the abject horror of being trapped next to such an individual – or, worse yet, being surrounded by a coven of such individuals all trying to talk over each other – for the duration of a long flight.

It looks like the wild blue yonder is safe from the blight of cellular chitchat for at least a couple of years.

The FCC is still desultorily sifting through the comments, but the FAA and the Department of Homeland Security have recently ridden to the rescue. In comments filed with the FCC, DHS, along with the FBI and the Justice Department, warned that in-flight cell phones could be used by terrorists to coordinate attacks. Any such usage would therefore have to be subject, in their view, to strict monitoring controls to identify particular passengers immediately, a technology that does not presently exist. At the same time, the FAA has announced that it has no intention of lifting the ban – regardless of what the FCC does – until it completes a study on the interference potential of all handheld devices on planes. So, though the FCC has yet to rule, it looks like the wild blue yonder is safe from the blight of cellular chitchat for at least a couple of years.

Roaming Inquiry *(Continued from page 3)*

carrier can essentially meet all of their roaming needs through those means; they no longer have any need for comity-based, reciprocal automatic agreements with local carriers. This leaves the Big Guys with no incentive to offer automatic roaming and the economic power to impose harsh roaming arrangements on the small carriers who have no corresponding leverage. (The FCC's rules require carriers to permit roaming, but this obligation is satisfied by the offer of "manual" roaming arrangements whereby a customer must call into the visited carrier's office and make specialized roaming arrangements. Few customers are willing to undertake such a time-consuming process.) The FCC seems at last to have heard the cries of the small carriers.

The FCC opted not to impose any automatic roaming obligations on ALLTEL or Western in connection with this specific transaction (other than, curiously, forbidding ALLTEL from blocking its own customers from attempting to roam on other carriers – this had not seemed to be a problem). However, the Commission did promise to open a proceeding in the near future to consider whether current market conditions and technology warrant changes in the FCC's roaming rules. This will be an opportunity for aggrieved carriers who have lost roaming access or been subjected to high rates to state their case.

NOTES FROM THE LUNATIC FRINGE

(Editor's note: With this issue of FHH Telcom Law, we are inaugurating an occasional feature in which we offer wry commentary on developments in the telecommunications world. We welcome feedback on this and our other articles to ensure that we're providing useful and entertaining content.)

There is a long and venerable tradition of crackpot filings at the FCC. You know the type: folks who think their local TV station is beaming pornography into their teeth, blue-haired ladies who think the phone company is listening in on their conversations and telling their friends about them, and rabid fanatics who insist that the Ten Commandments supersede the Code of Federal Regulations. While all of these individuals may turn out to be right in the end, their fevered pleadings rarely find favor with the FCC. Jaded communications lawyers such as ourselves can spot a transmission from the Lunatic Fringe (LF) at first glance. The pleading is usually directed not only to the wrong bureau at the FCC but also to the Chairman of the FCC, the President of the United States, the Secretary General of the UN, and, occasionally, the Pope. The typefaces tend to be in large letters, with plenty of **bold**, CAPITALIZED, and underlined words to emphasize the merits and ardor of their cause. Exclamation points and conspiracy theories loom large in many of their pleadings. Often the FCC complaint is part of a larger barrage of pleadings directed simultaneously to Congress, the Chief Justice of the Supreme Court, and sundry other courts which are invariably quick to punt the matter safely back to the FCC's jurisdiction. Pleadings filed by the LF always lose, but sometimes you find yourself secretly pulling for the little lunatic who dares to tilt his lance at the mighty powers.

We salute the tradition of free speech, original thinking, pluck, and fearlessness in the face of ridicule which the Lunatic Fringe so proudly exemplifies. We just wish they would go bother someone else.

SELECTED SHORT SUBJECTS

- Northpoint Technology lost its bid to have the DC Circuit Court of Appeals overturn the scheme established by the FCC to assign spectrum in the 12 GHz DBS band for terrestrial use. Northpoint had argued that it should be allowed to use the spectrum without having to participate in an auction. The Court also rejected challenges by DBS licensees to the proposed terrestrial usage.

- Speaking of the DC Circuit, Judge John Roberts will be leaving that court after a relatively brief stay if his nomination to the Supreme Court is confirmed by the Senate. The DC Circuit reviews all FCC licensing actions and many of its rulemaking proceedings. Judge Roberts was not at the court long enough to develop an identifiable attitude toward regulated industries.

- And let's have a big FHH Telecom Law "roger–10-4" to Joe Di Scipio and Sima Chowdhury, both of whom have joined the FHH team. Joe is a Special Counsel to the Firm, Sima is an Associate.

Book him, Dan-O - Improper marketing one

Big Fine for Equipment Violation

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A manufacturer of Wi-Fi equipment faces an unprecedented $22,000 fine for violating its equipment authorization, even though the product as manufactured complies in full with the FCC's technical rules. The offense? -- improper marketing.

The device is a radio-frequency power amplifier that attaches to an "access point" -- *i.e.*, a transmitter-receiver commonly used for home and office wireless networking. The amplifier gives the access point greater range and reliability.

FCC rules permit the manufacturer of a power amplifier to market it for use only in conjunction with specifically approved transmitters. To hinder other uses, the power amplifier must be made incapable of connection to other transmitters, through the use of a non-standard antenna connector or electronic system ID. Otherwise, an unfortunate combination of transmitter and power amplifier could exceed the FCC's power limits and potentially cause interference to other communications.

Here, the power amplifier was authorized for use with a single make and model of access point. But the product brochure stated the device "attaches to any wireless device (Access Points, Routers, Bridges, Network Adaptors, etc.) with a removable antenna," and "comes with connector adaptors compatible with all major wireless brands." The manufacturer's website said the device "works with all major 80211b and g wireless brands" and "is the only range-boosting product on the market with support for all major wireless brands and networks." It added that "connector adaptors are available for multiple brand support." The offering of these adaptors effectively circumvented the exclusive compatibility feature which had made the device lawful in the first place.

> *The offering of the adaptors effectively circumvented the exclusive compatibility feature which had made the device lawful in the first place.*

The FCC found that this language constituted marketing in violation of its rules, and imposed a $22,000 fine. The penalty is surprisingly large, considering that this appears to be the manufacturer's first reported offense, and that no actual interference occurred. Manufacturers might take the case as an indication of the FCC's determination to step up enforcement of its equipment rules.

It's August, 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.

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