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FHH Telecom Law

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Brand X fall-out

DSL Classified as "Information Service"

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Earlier this year, we reported to you that the Supreme Court released its decision in the *Brand X* case, wherein it upheld a March 2002 Declaratory Ruling by the FCC classifying cable modem services as an "information service" under the Communications Act, rather than as a "telecommunications service." Many observers predicted that this ruling would result in another ruling by the FCC applying similar deregulatory treatment to DSL services offered by telephone companies. In August, the FCC dropped the other shoe and issued such an Order.

The Order adopted by the Commission determined that wireline broadband Internet access services (DSL) are defined as "information services" that are functionally integrated with a telecommunications component. In the past, the Commission required facilities-based telephone companies to offer that wireline broadband transmission component separately from their Internet service, as a stand-alone service on a common-carrier basis, and thus classified that component as a telecommunications service. This meant that wireline broadband providers, unlike their cable television brethren, had to make their broadband offerings available to everyone, including competitors. Wireline companies balked at making the necessary investment in these facilities if others could simply piggyback on their networks. In its August Order, the Commission eliminated this transmission component sharing requirement, created over the past three decades under very different technological and market conditions, finding it caused vendors to delay development and deployment of innovations to consumers.

To ensure a smooth transition, the Order required that facilities-based broadband Internet access service provid-

(Continued on page 2)

E pluribus, unum?

And Then There Were Four…

Sprint/Nextel Merger Reduces Ranks of Nation-Wide Carriers

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The club of Tier I carriers became more exclusive last month when the FCC and the Justice Department approved the merger of Nextel and Sprint. The Big Six became the Big Five earlier this year when Cingular acquired AT&T, and the big fish/bigger fish consolidation continued with Sprint and Nextel. Regulators found that the reduction in nation-wide carriers would have little impact on competition because there would still be at least four competitors in most markets, and there is sufficient excess capacity to ensure that the merged Nextel-Sprint entity would not have unilateral market power. The FCC also thought that the merged entity would be better positioned to roll out 3G offerings across the country earlier than either of the two separate entities could.

Interestingly, both the Commission and the Justice Department gave considerable scrutiny to a relatively inconsequential part of the overall deal – the 2.5 GHz holdings of the two companies. Nextel and Sprint had each gathered up fairly extensive holdings in the BRS (formerly MDS) and EBS (formerly ITFS) bands. Together, they will now hold significant spectrum in about 470 BTA's representing 85% of the population in the top 100 markets. Because the 2.5 GHz band is viewed as prime real estate for the delivery of broadband wireless, this concentration of ownership raised eyebrows at Justice. Industry participants were consulted by DoJ officials to determine whether competitive harm would likely result.

Ultimately, and somewhat surprisingly, both DoJ and the FCC decided that there was no problem. Most of the two companies' holdings had been largely complementary (i. e., they each held their spectrum in different markets) so the combination of the two did not result in any loss of competition. Moreover, the FCC reasoned that considerable new spectrum in the 700 MHz and AWS bands

(Continued on page 2)

DSL Reclassification *(Continued from page 1)*

ers continue to provide existing wireline broadband Internet access transmission offerings, on a grandfathered basis, to unaffiliated ISPs for one year. The Order also requires facilities-based providers to contribute to existing universal service mechanisms based on their current levels of reported revenues for the DSL transmission for a 270-day period after the effective date of the Order or until the Commission adopts new contribution rules, whichever occurs earlier. If the Commission is unable to complete new contribution rules within the 270-day period, the Commission will take whatever action is necessary to preserve existing funding levels, including extending the 270-day period or expanding the contribution base.

The Order also allows wireline providers the options to offer the transmission component of the wireline broadband Internet access service to affiliated or unaffiliated ISPs on a common-carrier basis, on a non-common carrier basis, or by some combination of both. Some rural incumbent local exchange carriers have indicated that they may choose to offer broadband Internet access transmission on a common carrier basis.

While we have seen the broad outlines in the Public Notice of the FCC's action, the Commission still has not released the text of the Order, over five weeks later. As the old saying goes, "the devil is in the details," and industry and consumers eagerly await the details in the text, which will likely trigger as many questions as it answers. The Order will not actually become effective until it is released and published in the Federal Register.

Many observers, including FCC Commissioners Adelstein and Copps, have expressed concern that this action will harm competition and openness in the broadband services consumer market. Perhaps in order to salve such concerns, the Commission also adopted a "policy statement" that outlines four principles "to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet": (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers. Although the Commission did not adopt rules in this regard, it stated that it will incorporate these principles into its ongoing policymaking activities. We shall see.

Sprint-Nextel Merger *(Continued from page 1)*

would be coming onto the market by auctions in the near term, thus making possible additional competition in the wireless broadband delivery field. Perhaps because MDS/ITFS had never in the past lived up to its promise as a medium for broadband, the regulators saw little to worry about in the consolidation of the two largest spectrum holders. Still, it's difficult to believe that there will not be some loss of initiative in the band since both Sprint and Nextel had separately been pursuing development plans. This loss is partly offset, however, by the Commission's imposition of a condition on the merger: Sprint and Nextel must meet their commitment to offer broadband service to at least 15 million people within four years and an additional fifteen million within six years.

While we expect further mergers and consolidations to occur at the Tier II level of cellular/PCS carriers (large regional carriers), we would also expect that any further consolidation among the remaining Big Four would generate consternation in the hearts of antitrust regulators. So the cast of familiar characters now on our programs is likely to remain constant for at least a few years.

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Weeding out the wireless rules

More Regulatory Underbrush Carted Off

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Taking the lead from our vacationing President, last month the FCC took several swipes to chop down the underbrush of unneeded wireless regulations. Many of these regulations became irrelevant or inconsistent with new wireless rules that have been adopted in the past three years. While none of these changes are earth-shattering by their own nature, the combined effect of the changes will likely lead to less hoops to jump through, and more clarity with respect to the regulations affecting wireless carriers.

The combined effect of the changes will likely lead to less hoops to jump through and more clarity with respect to the regulations affecting wireless carriers.

For example, the Commission eliminated the PCS base station transmitter output power (TPO) limits, which is expected to permit more efficient use of the spectrum. The Commission agreed with many other parties that the rule's limitation on the power of base stations was irrelevant if the Commission maintained the maximum EIRP limits currently in place. On the other hand, the limits placed on the PCS base station's TPO limited the use of multi-carrier power amplifiers, which enable operators to use one transmitter across a wide frequency range.

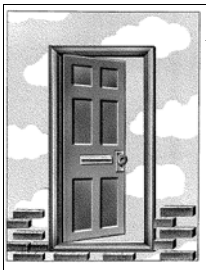
The Commission also made several changes to the rules that regulate Part 90 licensees. For example, the Commission deleted the rule that previously required Part 90 operators to conduct frequency coordination studies when it sought to delete a frequency or site from its license. The Commission agreed with those parties that argued that since an operator could delete its entire license without first completing a frequency coordination study, there is no reason to conduct such a study when the licensee is deleting a portion of that license.

Also, the Commission eliminated the requirement that certain 800 MHz General Category frequencies must continue to conduct frequency coordination studies prior to filing new or modification applications. Additionally, the Commission eliminated requirements that 800 MHz and 900 MHz SMR licensees provide detailed information, including system designs and loading requirements.

Finally, one action in this Order did rise to the level of requiring a separate statement by Commissioner Copps. The Commission decided to eliminate the maximum power and antenna height limits for conventional 800 MHz and 900 MHz that distinguished between systems to be used in urban and suburban areas. Commissioner Copps believes that the elimination of this distinction was in error since the Commission failed to consider the environmental impact of the possible growth of large (1,000 foot) towers in suburban areas.

The Commission is also seeking further comment on four matters raised in an *ex parte* filing by CTIA. The Commission is seeking further comment on proposals to "craft a clear and workable radiated power rule" that would affect PCS operators. Generally, the Commission is seeking comment on whether (1) it should implement a spectral density model to its radiated power rules; (2) it should further increase the radiated power limits; (3) radiated power should be specified in the rules based on an average, rather the peak; and (4) the changes it has proposed should be applied to other wireless services.

There were other various and sundry regulations that were revised and changed. If you have an interest in this proceeding, we urge you to contact the attorney with whom you normally work, or Lee G. Petro.



Next stop - the Twilight Zone?

Virtual "Areas" Get Their Own Area Codes

FCC authorizes technology-specific area codes

By Mitchell Lazarus
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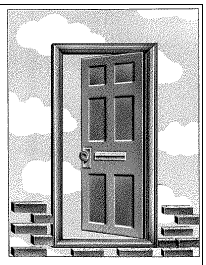


The FCC has allowed a state to implement the first permanent technology-specific area codes.

New area codes are needed when the old ones fill up, but assigning them is a problem. The FCC has relied on two methods in the past. One splits the old area code geographically, so that half the subscribers have to change their numbers. The other approach, called an "overlay," assigns the new area code over the same territory as the old one. No numbers have to change, but everyone must dial ten digits for every local call, even to the same area code next door. Both methods meet a lot of public resistance.

Much of the demand for new phone numbers comes from wireless users, data services, and other technologies other than traditional voice service. One potential approach is to set up separate area codes for these users, and leave the traditional customers alone. For many years the FCC resisted that solution, insisting instead that area codes be "technology neutral." To encourage the day when people would use landline and wireless phones interchangeably, the FCC required area codes to be assigned without discrimination as to technology. Thus, a caller dialing a U.S. phone number cannot tell whether he will reach a landline phone, wireless phone, fax, computer modem, or anything else.

In late 2001, the FCC announced it would consider relaxing this policy on a case-by-case policy, and has since done so, albeit on a temporary basis. Now the FCC has given California permanent authority to implement two technology-specific area codes -- covering the northern and southern parts of the state -- for services and technologies such as vehicle response systems, E-Fax, automated teller machines, point-of-sales machines, multi-line fax machines, and Voice over Internet Protocol services. But wireless services are excluded, and still must be given the same area codes as landline phones. So Californians can still blame the FCC when they reach a wrong number in a movie theater.

Lilliputians, Munchkins and other . . .

SHORT SUBJECTS

- ***MVPD EEO Reports due soon*** - MVPDs out there should be aware that their EEO reports are due no later than **September 30**. The FCC has eliminated many periodic reports for broadband television distributors, but not the annual employment report for Multichannel Video Program Distributors – you know who you are!

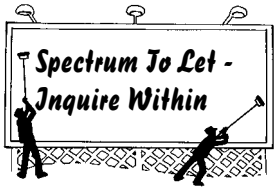
- ***Forewarned is Foregone*** - The FCC is cracking down on sales of illegal Citizens Band equipment, which need FCC certification prior to sale. One Oregon store was fined $7,000 for offering eleven models of CB transceivers that proved not to be certified. The store had received an FCC warning a few years earlier for the same offense. And a Florida store was fined $7,000 for selling amateur radio transmitters, which do not have to be certified -- but these units could easily be converted to CB transmitters, which do. Here, too, the store had previously received a warning. Let's be careful out there!

On the Auction Block

Auction 63 (December 7, 2005)

500 MHz blocks in the 12.2-12.7 GHz band (MVDDS)

***Short form applications** to participate in this auction of 500 MHz blocks in the 12.2-12.7 MHz band in about twenty markets are **due no later than October 7.** Auction begins December 7. The spectrum can be used for fixed, one-way transmissions.*



The lease you can do

Tips for Spectrum Renters

By Raymond Quianzon
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In a previous issue of this newsletter (Aug. 2005, p. 3) we provided a discussion of the FCC's streamlined transfer of control and assignment procedures for wireless services. However, many clients are finding that they would rather lease spectrum than engage in a sale transaction. The FCC's latest decisions to promote secondary markets encourage wireless licensees and other users to enter into spectrum leasing agreements with a minimum of regulatory limitations.

The decision whether to purchase or sell spectrum rather than leasing the spectrum ultimately remains with the user of the spectrum. For example, in the instance where an operator knows that it only requires the spectrum for a limited amount of time, a leasing arrangement may be ideal. Under a lease, the operator may have access to the spectrum licensed to another person, without the responsibilities associated with being a licensee. As another example, an operator may want to use a license for an extended period of time and may want a long term lease which provides more control over the spectrum. Both types of leases are permitted under the new FCC leasing rules.

With the implementation of instant approval, licensees and lessees find that they are free to negotiate more broadly with regard to one another's licenses, and to get creative in their business arrangements.

The first type of lease is a spectrum manager lease which is subject to less scrutiny by the FCC because the license holder maintains significant control over the spectrum. The FCC envisions that these leases will be employed by active licensees who will monitor use more closely. The second type of lease referred to by the FCC is a *de facto control* lease. As the name implies, the FCC anticipates that these leases will, in fact, significantly transfer many responsibilities from the licensee to the lessee/operator. The *de facto* leases are subject to more public and FCC review in light of the rights being transferred. Indeed, certain limitations and restrictions such as auction bidding credit repayments are triggered under a *de facto* lease as opposed to a spectrum manager lease, so the bureaucratic paperwork associated with this type of lease is equivalent to that associated with a traditional assignment application.

Below, are examples of general considerations which clients (as either the lessor or lessee) should bear in mind when negotiating leases. Some of these consideration will vary depending upon the service and the exact terms of negotiations. As with all legal matters, the advice of counsel is recommended for specific contracts.

Instant Government Action Recognizing that its bureaucratic pace can sometimes unnecessarily burden a free-market transaction, the FCC has all but eliminated that element. Under new procedures for spectrum leases, all that an applicant needs to do in order to get FCC approval of a lease is to file the application and pay the fee. The FCC has decided that an application is immediately approved upon its filing with the FCC. Therefore, a licensee who finds someone to lease its spectrum - - or a user who finds a licensee willing to lease the spectrum to it - - in the morning, can have the leasing agreement authorized and be operating the next day. The FCC authorization is subject to standard administrative review procedures under which an interested party, the Wireless Bureau or the full Commission may later seek reconsideration of the grant. The reconsideration period can stretch up to 40 days from the release of an FCC notice announcing the immediate grant.

Make Sure the Lessor is Eligible The FCC requires that a lessee be properly qualified and eligible in order to lease spectrum. As part of any lease agreement, the parties should enumerate FCC requirements and restrictions (*e.g.*, foreign ownership, non-felons, anti-

(Continued on page 6)

Spectrum Renters *(Continued from page 5)*

drug abuse certifications) and obtain warranties and representations regarding the same. Having this information as part of the leasing agreement is useful, as the information must be provided as part of the FCC application process. In the same vein, and as a caution for operators who intend to lease spectrum, one should ensure that protections exist in the event that a licensee develops financial or other qualification problems. Lessors will want to specify some type of specific performance criteria as part of the lease. In addition, *de facto* leases and, under some still ambiguous circumstances, spectrum manager leases, will be scrutinized to see if the parties are using the lease as a subterfuge to avoid paying unjust enrichment penalties. If the licensee/lessor got its license as a small-business Designated Entity in an auction, you must be very sure that unjust enrichment penalties are not triggered by the lease.

Make Sure that the Transaction is Typical Although a licensee or lessee may want to seek a waiver or declaratory ruling in order to enter into a spectrum lease, doing so will preclude instant approval. The FCC will not immediately grant an application for approval of a spectrum lease that contains a request for waiver or declaratory ruling about the Commission's Rules.

Make Sure that the Government gets its Fee Paramount among the FCC Rules is the prerequisite that an application fee must be received by the FCC prior to the automatic approval. Parties to a spectrum leasing agreement should specify which party will be responsible for payment of the FCC fee. Notably, although the FCC's automatic approval involves a computer responding to an applicant's data input, the FCC still charges full fare for the application processing fee. The fee for a lease approval is the same as what the fee would be if the license were simply assigned between the parties.

Short Term versus Long Term The FCC differentiates between short term and long term leases. If a lease lasts no longer than a year, it will be treated as a short term lease; any longer than a year and it is classified as long term. In either case, the lease cannot extend beyond the length of the underlying license term. The difference in lease length also affects the terms which parties will negotiate into a spectrum lease agreement. In the instance of long term leases, a lessee must meet the same eligibility and qualification requirements as the licensee, the service cannot be for interconnected mobile or voice services that overlap with certain other areas and any assignment of the lease by a lessee must follow the same procedures as the initial lease approval.

The FCC's spectrum leasing procedures provide licensee with far greater flexibility in using their licenses. As the telecom industry becomes more familiar with the process and the groundrules become more established, it is not inconceivable that firms could become spectrum brokers (this is already happening) or even spectrum warehousers B buying spectrum at wholesale and then renting it out to people who need it on a short term basis. With the implementation of instant approval, licensees and lessees find that they are free to negotiate more broadly with regard to one another's licenses, and to get creative in their business arrangements. With such broadened rights comes the caveat that parties should be certain their agreements are both beneficial to the parties and permitted under the FCC rules.

Wilkommen, Bienvenu, Welcome

Joe Di Scipio Joins FHH

Joseph M. ("Joe") Di Scipio has joined FHH as Special Counsel. Joe's practice areas include mass media, wireless, and common carrier, with a developing specialty in digital/internet regulation. On the mass media side, he specializes in FCC aspects of complex transactional matters and credit facility placements.

Joe is a 1995 graduate of Syracuse University College of Law. (In September he is being honored with the Distinguished Young Alumni Award from 'Cuse.) He also holds a masters degree in public administration from the Maxwell School of Citizenship at Syracuse, and a B.A. (*magna cum laude*, thank you very much) from the University of Denver. Before law school, Joe was an FCC field agent and, after law school, he served as an attorney in the FCC's Compliance and Information Bureau and the Common Carrier Bureau. He has also worked in private practice for several years after leaving the FCC.

Joe and his family reside in Falls Church, Virginia.

AWSome, dude

Advanced Wireless Services Take Another Step Forward

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Why is it that advanced wireless services (AWS) seem to take so long to "advance" to the point of actual deployment? In 2003, having already spent a few years deciding what bands would be included in the AWS category, the Commission finally issued an Order establishing the service rules for AWS in the 1.7 GHz and 2.1 GHz bands. The Order also adopted the band-plan for these services. However, as with most major actions taken by the Commission (and many minor ones!), reconsideration was sought by many parties.

REVISED BAND-PLAN

Block	No./Size	Market Type	No. of Licenses
A Block	2x10 MHz	RSA/MSA	734
B Block	2x10 MHz	EA	176
C Block	2x5 MHz	EA	176
D Block	2x5 MHz	REAG	12
E Block	2x5 MHz	REAG	12
F Block	2x10 MHz	REAG	12

In August, the FCC released its revised service rules, and an altered band-plan. The original band plan had two paired 10 MHz blocks, two paired 5 MHz blocks, and one paired 15 MHz block. In the revised band plan, the Commission created additional paired 5 & 10 MHz blocks, and eliminated the paired 15 MHz block. (*See* accompanying box for band-plan summary.)

By reducing the size of the 15 MHz block to 10 MHz, and creating an addition 5 MHz block, the Commission reasoned that new and smaller bidders will be able to actively participate in the auction, while larger participants would still be able to aggregate the blocks to fit their existing needs. The Commission also stated that it will use the same technical standards for AWS equipment that is currently in place for PCS licenses, and eliminated the transmitter output power limits for AWS base and fixed stations.

With the resolution of these matters, the Commission declared that it will be moving forward to plan for an auction of this spectrum in 2006, perhaps as early as June 2006. We will let you know as soon as the auction is announced, but we are not holding our breath.

Megabits - musings hot off the press

FCC DOES NOTHING!!!

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A roommate of ours in college had a poster that quoted an old Mississippi bluesman sitting on a stool. "Sometimes I sits and thinks," the quote went, "and sometimes I just sits." Of late, constant readers of this publication may have noticed a relative dearth of activity on the part of the FCC, suggesting that perhaps the agency has adopted the credo of the old bluesman as its guiding principle. To be sure, it is a common mistake for legislators and administrative agencies alike to confuse activity with progress. "Let's do something!" may not be the best course of action if doing something just makes matters worse – yet "doing something" has the virtue of justifying the jobs of the people doing it. This is one of the reasons the Code of Federal Regulations and the United States Code always get bigger, never smaller. Was it John Locke (or Ronald Reagan) who said: "that government governs best which governs least?" So we are certainly sympathetic to the argument that inaction is often the wisest course. That

(Continued on page 8)

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First Class

Megabits *(Continued from page 7)*

may not be true, however, at the present moment in telecommunications history.

The FCC has had major policy decisions on its plate for some years now. These include reform of the intercarrier compensation scheme, restructuring of the broadcast ownership rules, and devising a regulatory framework for the internet age. The FCC has been punting on these issues for years, and it continues to do so. Meanwhile, contested cases sit for years, placing a cloud on the licenses involved. New administrations in government often sweep into office with a burst of energy before settling into the familiar torpor. By contrast, the Martin administration at the FCC crept into office cautiously. The Chairman's first act was to stop all activity whatsoever for a few weeks until he got his arms around the agency. While routine application processing eventually resumed, the pace of action at the Commission has been slow indeed. Open meetings of the Commissioners are brief and deal with non-controversial items, while the big issues languish. Maybe this means that the Chairman plans to reverse the usual course and pick up speed as he progresses into his term.

Chairman Martin is clearly hampered by the lack of a clear majority on the Commission – since the departure of Michael Powell, the Commission has been short a member and its four members may be deadlocked on some issues. In addition, it is reliably rumored that the Chairman is contemplating a major reorganization of the agency. While that is being pondered, however, key Bureau chiefdoms remain unfilled or manned by acting personnel, which affects processing of everything down the line. Surely a professor of management somewhere has done a thesis on the reorganization cycle: every few years a bureaucracy (or business) is reorganized so as to run more efficiently, and then a few years later it is reorganized back to roughly the way it was before, also so as to run more efficiently. This cycle repeats endlessly as new management always believes that shifting the pieces around on the board will improve things. In any event, the FCC is biding its time, and we can only hope that while it is sitting, it is also thinking.