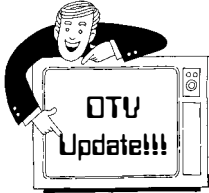


FHH Telecom Law



2005—A Great Leap Forward?

DTV: Toward The Verge of Convergence

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Long-time followers of the progress toward the brave new world of Digital Television may be noticing what we may cautiously refer to as gathering momentum in that direction. Two developments have occurred: the resolution of the DTV tuner deadlines for digital television receivers, and the adoption of a Notice of Proposed Rulemaking relating to the distributed transmission system technology for DTV television stations.

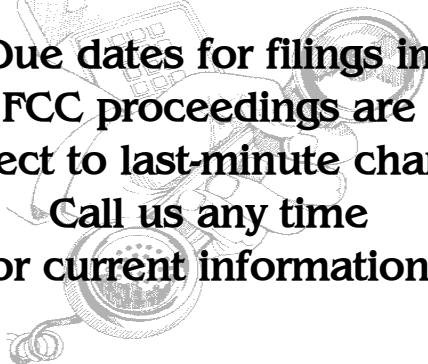
It may be recalled that the Consumer Electronic Association (“CEA”) had requested that the Commission eliminate a mid-term July 1, 2005 deadline for television receivers with 25 - 36 inch screens. In response, the Commission not only declined to eliminate the deadline, but also *moved up* the DTV Tuner deadline for all 25 - 36 inch television sets by four months. Adding insult to injury, the Commission sought comment on whether it should move forward the deadline for all television sets 13 inches and larger from July 1, 2007, to December 31, 2006. In addition, the Commission sought comment on whether

(Continued on page 10)

It's almost 2006 - Do you know where your proceedings are?

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

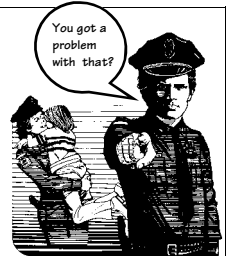
Call us any time for current information.



“*Ve heff our vays . . .*”

ISP's Dragooned Into Law Enforcement Role

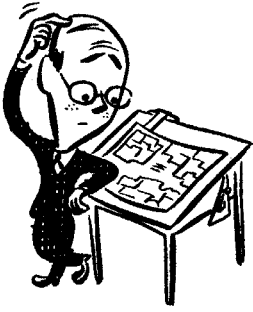
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When is an ISP not an ISP? When the FBI wants it to be a telecommunications carrier. This is the lesson to be derived from the FCC's recent decision to apply CALEA obligations to facilities-based broadband Internet Service Providers (ISP's). It will be recalled that in March, 2004 the federal law enforcement community (the FBI, Department of Justice and DEA) jointly petitioned the FCC to apply the strictures of CALEA (Communications Assistance for Law Enforcement Act) to communications entities never before thought to be common carriers. CALEA requires wireline and wireless telcos to make their communications networks technically accessible to various specific forms of electronic interception. Most telcos have met the requirements of CALEA to gradually upgrade their hardware and software in order to accommodate Law Enforcement's requirements. However, in the years since 1994 when CALEA was enacted, Law Enforcement has discovered that more and more communications are taking place over the internet rather than traditional land or mobile phone networks. These communications are both via e-mail and, increasingly, via VoIP.

This development in communications practices left Law Enforcement at something of a loss. Not only does CALEA expressly provide that “information service providers” (i.e., ISP's) are *exempted* from the obligation to comply with the intercept requirements, but the FCC has repeatedly defined ISPs in other contexts *not* to be “telecommunications carriers,” the entities who *are* required to comply with CALEA. Moreover, Congressional pronouncements at the time of enactment repeatedly said that CALEA was not intended to apply to the internet. It would seem to be a no-brainer that CALEA does not apply, and was never intended to apply, to ISPs. This would seriously underestimate, however, the ingenu-

(Continued on page 11)



A federal thumb on local franchising scales?

FCC Considers Limits On Local Franchising Authorities

Greasing the skids for more video competition

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The Commission has initiated a rulemaking to seek comment on its implementation of Section 621 (a) (1) of the Communications Act, which requires that local franchising authorities (“LFAs”) not unreasonably refuse to award cable franchises to competitive entrants. The Notice of Proposed Rule Making (“NPRM”) seeks to further the FCC’s interrelated goals of enhanced cable competition and accelerated broadband deployment. The NPRM is largely seen as an effort by the Commission to facilitate the recent efforts by Verizon and SBC to provide competitive video services.

In the NPRM, the Commission tentatively concludes that Section 621 (a) (1) should not only be interpreted to prohibit the ultimate refusal by an LFA to award a franchise, but should also bar a broader range of behaviors by LFA’s. The NPRM seeks comment on whether LFAs are unreasonably refusing to grant competitive franchises. The NPRM also explores whether the local franchising process is inhibiting the ability of incumbent cable operators to deploy broadband services.

The Commission tentatively concludes that it has authority under both Title I and Title VI of the Communications Act to ensure that the local franchising process does not serve as an unreasonable barrier to entry for competitive cable operators. The Commission also tentatively concludes that any law or regulation of a state or LFA that causes an unreasonable refusal to award a competitive franchise is deemed preempted and superceded by Section 621 (a) (1) of the Communications Act.

On the issue of “red-lining”, the Commission tentatively concludes that it is not unreasonable for an LFA, in awarding a competitive franchise, to assure that access to cable service not be denied to any group of subscribers because of their income. A cable operator must be given a reasonable period of time, however, to become capable of providing cable service to all households in its franchise area. The LFA may require that cable operators provide adequate public, educational and governmental access channel capacity, facilities, or financial support. The Commission tentatively concludes that it should interpret Section 621 (a) (1) broadly so as to prohibit LFA procedures and other requirements that unreasonably interfere with the ability of would-be new entrants to introduce quickly their competitive video offerings.

The Commission plans to hold an en banc hearing to supplement the record in this proceeding. The deadline for filing Comments and Reply Comments had not been announced at the time of this writing. If you are interested in participating in this proceeding, please contact this office.

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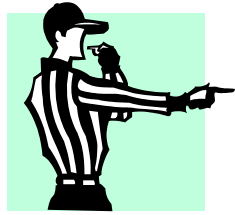
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FCC throws the flag on uncertified equipment

Equipment Vendor Fined \$17K FCC Ups Fine Based on Violations Outside Statute of Limitations Period

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The FCC recently fined a company \$17,000 for marketing two models of a motion detector that lacked valid FCC certification. These were upgrades of earlier models that were properly certified. But the upgrade did not qualify as a “permissive change” under the FCC rules, and hence triggered the need for a new certification, which the company failed to obtain.

The otherwise routine case is interesting for two reasons.

First, equipment violations are subject to a one-year statute of limitations, and the FCC may not impose fines for violations outside that period. Here, separate violations occurred within the one-year period and beyond it. The FCC therefore fined the violator for offenses occurring within the statute of limitations but then adjusted the fine *upward* to account for the alleged violations occurring outside the statute. This is, we believe, a new approach by the Enforcement Bureau and it can greatly increase an offender's financial exposure. Whether this action by the Commission is legally sustainable is open to question since it is effectively punishing offenders

for activity occurring in a time period for which they were immune from fines. Continuation of this approach could be challenged at the full Commission or Court, if circumstances occur where the size of the fine merits appeal.

In addition, the company received its new certification less than two weeks after the Enforcement Bureau issued its letter of inquiry. The FCC acknowledges that the company caught the problem by itself and began coming into compliance before it heard from the FCC. When this has happened in the past, especially with an offender having an otherwise clean record – as seems to be the case here – the FCC often closed the matter with a warning. Here, the company's good-faith effort succeeded only in reducing an initial fine from \$25,000 to \$20,000 (later reduced by another \$3,000 in view of the company's clean record.)

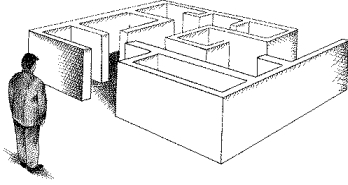
This is just the latest in a series of cases implementing what appears to be a get-tough policy on equipment violations. Manufacturers and importers should keep a close eye on regulatory compliance.



E-911 : DON'T CALL US, WE'LL CALL YOU

The FCC has issued a series of decisions temporarily relieving certain wireless carriers of their obligation to meet the high E-911 Phase II requirements established by the rules. The FCC has been cracking an increasingly harsh whip on carriers who remain non-compliant with the Phase II rules which were put in place nearly seven years ago but still remain out of reach for some carriers. Phase II, you will no doubt recall, requires E-911 calls from mobile customers to be traceable to within 300 meters for network-based systems and 150 meters for handset-based systems.

While most network-based carriers have, after much travail and many fines, come into some form of compliance, handset-based carriers have struggled. Either they have found that the right equipment for their system is not available from vendors, or they have found that their customers are not transitioning to new equipment fast enough to meet the FCC requirement that 95% of their handsets be location-capable by the end of 2005. Recognizing that these circumstances were not their fault, the FCC has somewhat grudgingly agreed to extension the compliance date for a year. In each case it is requiring periodic progress reports and extensive public education campaigns to encourage customers to switch phones. Whether the FCC will require wholesale distribution of free location-capable handsets when the next deadline approaches remains to be seen.



Speeding Innovation Through the FCC

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Your office phone rings. The caller tells you he runs a high-tech start-up. The company just developed a new kind of product that uses low-power radio signals. He wonders if it might need FCC approval.

Chances are, it does.

We're almost ready to ship, says the caller. How long will the approval take?

You ask some questions. Looking at the frequency, power, and so forth, you ascertain the device does not comply with any licensing category, nor with any known kind of unlicensed operation. You tell the caller that he will need a waiver of the rules or a rule change. You point out the downsides of a waiver – that they are hard to get, and even if it grants one, the FCC can pull it back at any time.

The client agrees a rule change is the way to go. How long will it take?

The answer: at least two years, probably three, and possibly four or five.

There is a long silence. The caller patiently relates what you already surmise. The company cannot go that long without revenue. Over that time the markets will change. Competitors will leapfrog the technology. And he makes a good case that the product cannot possibly cause radio interference. So why should the FCC care at all? Considering the lack of harm, he says, and the potential economic benefits, why should it take so long to okay the technology?

Good question.

The FCC has succeeded at expediting approvals for equipment that complies with its rules. It allows

the manufacturer or importer to quickly self-approve not only products that emit radio waves unintentionally – this includes all digital devices – but even some intentional emitters, such as microwave ovens, with no need for filings or authorizations. Of the products that still need outside certification – primarily mobile, portable, and unlicensed radio transmitters – the FCC lets the large majority be approved by third-party Telecommunication Certification Bodies (TCBs), which specialize in speed. And even certifications that go through the FCC are much faster than they used to be, with the median processing time currently down to about three weeks.

The more novel an idea, the less likely it is to conform to the existing FCC rules – which, after all, were written for the technologies that came before.

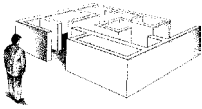
But if a device is sufficiently original – *i.e.*, if it fails to comply with the existing technical rules – its prospects for fast approval are bleak.

The unlicensed regime, which accounts for several recent radio-based innovations, and the various licensed services are both catalogues of mind-numbingly specific rules.

Each frequency band, and sometimes each different application, has its own set of detailed technical requirements. These tend to grow by accretion, with the rules for each new technology grafting awkwardly onto those already in place. The FCC finished a heroic clean-up of the unlicensed rules back in 1989. But activity since then has made even that regime more complicated than ever.

Sometimes a new technology fits into an existing category of regulation. Bluetooth, for example, was designed around a pre-existing rule, enabling products to reach the U.S. market with no regulatory delay. But that strategy limited Bluetooth to what the rules already permitted, which may hinder it vis-à-vis newer technologies.

(Continued on page 5)



Speeding Innovation (continued from page 4)

The biggest product improvements usually result from technical innovation. The more novel an idea, the less likely it is to conform to the existing FCC rules – which, after all, were written for the technologies that came before. But changing the rules to handle new technologies is a frustratingly slow process. Those delays have real-world economic consequences. Products that are authorized too late may miss a critical market window. And some products may not reach the market at all. Start-up companies occasionally go under while waiting for regulatory approval.

What Takes So Long?

Some of the delay in updating FCC rules stems from the Administrative Procedure Act (APA). This federal statute, passed in 1946, sought to make the regulatory process more transparent and open to public participation. It bars a federal agency from adopting rules until after it previews its intent in a Notice of Proposed Rulemaking (NPRM) and considers public comments on the proposal. A series of U.S. Supreme Court decisions further require the agency to respond publicly to those comments, and to explain the reasoning behind whatever rules it ultimately adopts.

The APA brought badly needed reforms to the regulatory process. But its procedures were established in the days of manual typewriters and carbon paper, and have not changed since. Transparency came at the cost of speed. Today, FCC technical rulemakings can take years. And that is becoming a serious drag on technological advance.

The FCC can arrive at an NPRM by a few different routes. One starts with a company filing a “petition for rulemaking.” Typically this asks for a rule change to suit a particular new technology. The FCC issues a public notice that identifies the petition and sets deadlines for comments and reply comments. Alternatively, the FCC can start the process itself by publishing a Notice of Inquiry (NOI). This does not propose specific rules, but

rather sets out relevant issues for discussion. The NOI likewise solicits comments and reply comments.

After studying the comments filed in response to the petition or NOI, the FCC issues an NPRM. More rarely, the FCC may issue an NPRM on its own, without prior public input, but usually it does so only for relatively minor rule adjustments. Whatever its origins, the NPRM proposes specific rules. Often it sets out alternative regulatory schemes, sometimes in each of several areas. The FCC tries to be thorough at this stage, because the APA allows it to adopt only those rules anticipated in the NPRM or their “logical outgrowth.” Anything else requires another NPRM. The proposed rules may include

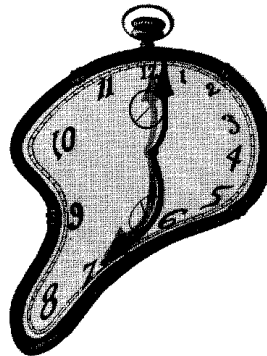
definitions of the new technology, frequency bands, operating power, bandwidth and modulation, permissible applications, licensing, eligibility, operating restrictions, and other issues particular to the technology. The NPRM solicits yet another cycle of comments and reply comments.

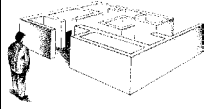
Eventually, the FCC promulgates a Report and Order (R&O) that responds to the comments, adopts and explains the new regulations, and makes them official. Parties can still ask the FCC to reconsider its decision, or can challenge the decision in court. The rules remain in effect pending any subsequent proceedings, unless the FCC or the court says otherwise (which they seldom do).

Ordinarily each cycle of comments and reply comments takes at least a year. That includes time for members of the public to research and write up their views, and for FCC staff to read and analyze the comments, and then to draft, review, and publish whatever document follows, such as an NPRM or R&O. The whole process – from petition or NOI, through an NPRM, to an R&O – entails two complete cycles of comments and reply comments, and hence usually takes at least two years.

Most rulemakings attract opposition. Because the radio spectrum is essentially full, novel uses of radio impinge on someone already operating. Those in-

(Continued on page 6)





Speeding Innovation (Continued from page 5)

Incumbents can be counted on to resist the rule changes needed to make the novel use possible. Each side typically submits engineering studies to support its view that the new technology will (or will not) cause harmful interference. The FCC has to sort out the differences and try to arrive at a set of rules that can let the new technology go forward while adequately protecting the incumbents.

In practice, the comments mandated by the APA are just the beginning. Even after comment deadlines have passed, interested parties can still make both written and oral presentations to the FCC Commissioners and staff, so long as they disclose the substance of what they say on the FCC's website. These are called "*ex parte*" presentations, a Latin phrase meaning "from one side." But the other side reads the FCC website, and will visit or write to the FCC to counter its opponents. Often FCC staff uses the *ex parte* meetings to float proposals of their own and to mediate among the factions. These exchanges can go on for many months, sometimes years. The process is often useful in helping to arrive at rules that all sides can live with. But it is very time-consuming. And, although in principle anyone can participate, in practice only the insiders even know the *ex parte* process exists.

The proceeding on ultra-wideband is one recent example of a long-running, *ex parte*-driven rulemaking. It was contentious from the start because ultra-wideband signals potentially overlap with a great many incumbents, including many categories of licensed users and several Federal agencies. The NOI appeared in September 1998. The R&O adopting rules did not take effect until July 2002, almost four years later, following scores of *ex parte* meetings and hundreds of written submissions. But even that was not the end. Since then, two major orders have responded to multiple petitions for reconsideration. One of these also incorporated a follow-up NPRM. Reconsideration proceedings relating to the most recent order are still open, so we have at least one more order to come. And there is talk of yet an-

other NPRM. The proceeding could reach the ten-year mark.

Mechanisms for Improvement

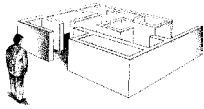
The FCC has two options for speeding new technologies to the market, while continuing to protect incumbent users. One is to make the rules themselves more flexible, so they can accommodate new technologies without change. The other is to accelerate the process for changing the rules.

An example of the first approach comes from the history of "spread spectrum" radios. The FCC first authorized this technology in 1985. Now, twenty years later, it has become a mainstay of unlicensed commercial and consumer applications, including Wi-Fi, Bluetooth, and countless others. But the original technical rules were rigidly specific. Every minor tweak in the technology needed a full-scale proceeding. From 1981 until 2002, the FCC had one or another spread spectrum rulemaking in progress almost all the time, along with several mini-proceedings over authorization of particular spread spectrum devices. Around the time that each rulemaking wrapped up, yet another technical improvement arose, and a new proceeding began. The FCC finally called a halt in 2002 by authorizing "digital modulation," a very general category that includes all forms of spread spectrum and many other modulations. Those rules effectively allow any form of digital signal on the original spread spectrum frequencies, subject only to very general power limitations. Manufacturers can now market products based on new forms of spread spectrum and successor technologies without the need for years-long proceedings at the FCC.

The FCC's other option is to speed up the rulemaking process. Even now, not all of its proceedings are slow. Proposals to adopt rules for Broadband Over Power Line, for example, were vigorously opposed, but still went from NOI to release of the R&O in 18 months. Ideally, though, this time scale should become the outer limit, rather than a best case.

The ex parte process is often useful in helping to arrive at rules that all sides can live with. But, although in principle anyone can participate, in practice only the insiders even know that the process exists.

(Continued on page 7)



Speeding Innovation (continued from page 6)

These are a few suggestions for getting new technologies approved more quickly, yet in full compli-

ance with the APA:

▶▶ At the outset, the FCC should adopt an explicit policy that favors speed when enabling new technologies. While individual staff members and Commissioners understand how delay can cripple innovation, the FCC has a whole sometimes lets months slip by while markets bypass a promising technology and an entrepreneur's funding runs out.

▶▶ Many proceedings can start with an NPRM. Ordinarily the FCC precedes the NPRM with a year-long comment-and-reply cycle on an NOI or a petition for rulemaking. And indeed, some proposals are so inchoate as to require public debate before an NPRM is possible. More often, however, the FCC could adequately address the uncertainties simply by including more alternative options in the NPRM.

If opponents of a new technology cannot kill off the new technology, their next best option is to drag out the proceeding as long as possible. For that reason, incumbents have a direct interest in keeping the mechanisms for rule change as cumbersome as possible.

▶▶ Many NPRMs can be short. Nowadays a new-technology NPRM typically runs to tens of pages. It may describe the technology and its possible applications, explain the regulatory history, summarize and respond to previous comments, weigh competing policies, review legal authority, and lay out and explain the proposed rules. All of this takes time to research, draft, and review. But the APA requires far less: merely the "terms or substance" of the proposed rule or a description of the "subjects and issues involved," and a citation to the statute. A minimal, APA-compliant NPRM could be just a few pages of proposed rules with the petition for rulemaking as an appendix. This could take months off the process.

▶▶ Comment periods can be short. Some proceedings have periods as long as 75 or even 90 days for comments, plus another 30 days for

reply comments. Few parties actually work on their filings all that time. Thirty or 45 days should usually be adequate for comments, and 15 or 30 days for reply comments.

▶▶ *Ex parte* presentations can be limited to a set period of time. Some rulemakings drag on because both sides want to have the last word, and each side wants to surprise the other with late-filed research. The FCC could confine *ex parte* presentations to, say, 60 or 90 days after the comment periods close. Of course the FCC can always extend that period, if it sees a need. And, as now, the FCC can always request information from a party.

* * *

The FCC has conflicting obligations. On the one hand, Congress requires it to "encourage the provision of new technologies and services." On the other, it must make regulations to "prevent interference." Opponents of a new technology – most often the spectrum incumbents – sometimes try to exploit the second obligation by exag-

gerating the threat of interference to their own operations. If they cannot kill off the new technology, their next best option is to drag out the proceeding as long as possible. For that reason, incumbents have a direct interest in keeping the mechanisms for rule change as cumbersome as possible. The years-long delays that sometimes result serve no constructive purpose, but only deny the public access to useful products and services.

New technologies, by their nature, need approval quickly. Authorization delayed is authorization denied. Of course the FCC must satisfy itself that proposed rules will not permit interference that unduly disrupts existing services. But it should reexamine its procedures with an eye to making that determination quickly, so as to avoid becoming a brake on innovation.



IRS asks: Conjunctive, disjunctive - what's the big deal?

IRS Straight-arms Court, Keeps On Collecting Taxes

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In May a federal circuit court – the 11th Circuit covering Alabama, Georgia and Florida – ruled that the IRS could not impose an excise tax on certain long distance calls. Most people assumed that the IRS would obey the court and stop imposing the tax. However, to everyone's surprise, the IRS released a notice declaring that it was aware of the court's decision but it would keep collecting the tax anyhow. At the beginning of November, another federal circuit court – the 6th Circuit covering Michigan, Ohio, Tennessee and Kentucky – also decided that the IRS was wrong. What the IRS will do now is anyone's guess.

At the turn of the century, not last century but the one before, Congress was looking for ways to fund the Spanish-American War. To pay for the war Congress created the telecommunications excise tax. The tax survives today even though Spain and America have been allies for decades. Congress tinkered with the tax over the years and in 1958 decided that the tax would apply to local, toll and teletypewriter service. In defining toll service, Congress specified that such service would be taxed if its cost varied by time and distance. At that time, and for years to come, this definition seemed appropriate as the charges for calls were billed based upon where and when you placed the call. Most calls from Boston to California were more expensive than calls from Chicago to Detroit.

However, along came Candice Bergen and Sprint's dime-a-minute plan. Every other long distance provider followed suit. Today, most callers pay a flat rate for long distance calls. Consumers in Seattle pay the same to call Miami as they do to call Portland, Oregon. The concept of paying more because the other phone is farther away has all but vanished. The tax nevertheless remains on the books and the IRS

must collect a tax on calls that vary by time *and* distance. However, the IRS insists that long distance calls should be taxed if they vary by time *or* distance. That little conjunctive here means a difference of hundreds of millions of dollars in taxes. After a few years, several organizations were tired of paying the IRS and sued them.

The IRS fought the lawsuits and usually lost on its interpretation. Most recently, the IRS lost at the federal appeals court level – the last stop before the U.S. Supreme Court. In May, the U.S. Court of Appeals for the 11th Circuit decided that the IRS was wrong. The Tax Code is clear: a charge must vary based upon the time and distance of the call. The IRS had its day in court and lost. However, the IRS decided that it would ignore the Circuit Court's decision. A few months later, a notice was released by the IRS which announced that it still would be collecting the taxes. The IRS noted

The Tax Code is clear: a charge must vary based upon the time and distance of the call. The IRS had its day in court and lost. However, the IRS decided that it would ignore the Circuit Court's decision.

that an appeals court elsewhere in the country was considering the same issue and that it would keep taxing. Consumers were told that if they thought the tax was wrong, they should pay the tax anyhow and then file for a refund of the taxes just paid. The IRS also told consumers that after they filed for the refunds, the IRS had no intention of processing the refund requests.

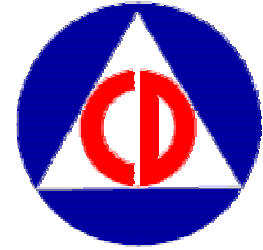
The IRS based its collection fervor, which many decried as flatly illegal, on the fact that there were similar cases elsewhere in the nation. Indeed, at the time that the IRS issued its surprising decision, the 6th Circuit was considering a case in which Office Max sued the IRS for collecting the tax. At the beginning of November, the 6th Circuit issued an opinion agreeing

(Continued on page 9)

EAS Goes Digital

**Mandatory Emergency Alert rules applied to digital broadcasters
But FCC mulls application of the emergency system to wireless carriers**

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In this new era of homeland insecurity, the government is doing what it can to maximize its ability to alert the public to emergency situations. So it is not surprising that the FCC recently announced that it is extending the reach of its Emergency Alert System (EAS) rules to include digital television (DTV), digital cable television, direct broadcast satellite television (DBS), digital radio (DAB or IBOC), and satellite radio (SDARS) in national EAS activations. Currently, EAS rules only require the participation of terrestrial analog television, terrestrial analog radio, analog cable systems, and terrestrial wireless cable systems in national EAS alerts.

Digital and satellite programming providers must begin participating in national EAS alerts by December 31, 2006, with direct broadcast satellite television given until May 31, 2007 to participate. Participation in state and local EAS activations will for the time being remain voluntary for all broadcasters and programming providers. If digital and satellite providers choose to transmit state and local EAS messages, they must comply with FCC EAS rules governing those messages, as terrestrial analog providers must do currently.

The Commission has had EAS in its sights for more than a year, with possible actions ranging from

tweaks to comprehensive overhaul to replacement by some more advanced warning system involving new technologies. The Commission sought comment last year on whether cellular carriers should be required to participate in the EAS system. While the Commission has now determined that EAS should remain an important component of any future alert and warning system and has now extended EAS participation to digital and satellite programming providers, it simply punted on whether to extend the EAS concept to non-mass media entities.

Instead, the FCC issued a Further Notice of Proposed Rulemaking seeking comment on all issues relating to a next generation alert and warning system and the role the FCC should take in developing such a system. Several issues which the FCC has placed on the table for discussion reach over the mass media/common carrier divide:

- (i) Should the FCC require wireless carriers to provide emergency alerts and warnings? Which distribution models and technologies can be used for wireless alert and warning? Would these models and technologies permit use of a common messaging protocol? Would they require customers to replace their current handsets?

(Continued on page 13)



IRS (Continued from page 8) with Office Max, the 11th Circuit and many other courts that the IRS was wrong. The 6th Circuit began its order with the observation that it is tempting to “make a crack about the demise of the rule of law.” However, the court went on and took 20 pages to analyze the claims made by the IRS and why the IRS may have decided as it did. Nonetheless, this court also ruled against the IRS.

What remains to be seen is how the IRS will react to the fact that two circuit courts have ruled against it. The nation is divided into 13 circuit courts. We expect that the IRS position will be challenged in these other circuits as well. Eventually, either the Supreme Court will decide the matter once and for all, or the crescendo of losses will force the IRS to relent. In the meantime, telecom carriers are required by the IRS to continue collecting the tax (even in the circuits where it has lost), and aggrieved customers must file a claim for a refund. Stay tuned.



DTV Update (Continued from page 1)
to establish a similar deadline for televisions sets with screens less than 13 inches.

Now, the other (and final?) shoe has dropped.

In an order adopted this month, the Commission established the final schedule for all digital television-related equipment. Specifically, the Commission moved forward the deadline for television sets with screens between 13 -24 inches from July 1, 2007, to March 1, 2007, and included within this deadline all television sets smaller than 13 inches, and all VCRs and digital video recorders (DVRs). This deadline is one year after the deadline for all digital television sets with screens between 25-36 inches are required to have DTV tuners. This deadline is also identical to the deadline established in House-version of the DTV bill that has yet to be reconciled with the Senate bill. Moreover, this deadline is roughly two years before the hard-return date of April 7, 2009, established in the pending Senate bill.

While the Commission was anxious to accelerate the deadline for DTV tuners, it did not honor the broadcasters' request to accelerate the deadline to a date before the 2006 holiday season. Instead, the Commission relied on the assertions made by CEA that it's members could not possibly meet a December 2006 deadline. In addition, the Commission declined to establish a labeling requirement for all television sets which would inform the public that analog sets would not be able receive over-the-air signals after a certain date. Instead, the Commission sought voluntary actions by the consumer electronics industry while the Commission put the finishing touches on a corollary rulemaking proceeding that may address this issue.

Only time will tell whether the March 1, 2007, deadline will be met by the consumer electronics industry. Since there are no remaining interim deadlines, however, it is entirely possible that the public will finally be in a position to make a reasoned decision on whether to buy a digital televi-

sion set. As the Commission, NAB and CEA have stated, more education is necessary at the point-of-purchase to ensure that the public fully understands the impact of their decision to purchase either an analog-only or digital television set. With the deadline now almost set, hopefully all three stakeholders will begin an educational program to educate the public in their future purchases, and adopt some sort of labeling that will inform those unaware of the DTV transition that the television set will not be able to receive over-the-air signals after 2009.

Secondly, the Commission sought comment on new rules that would permit a television licensee to use synchronized transmitters spread-out within its service area, rather than the standard single-transmitter model that has been used since Harry T. gave 'em hell. The main advantage of the distributive transmission system (DTS) technology is that it will permit a licensee to serve areas within its protected service area that may not receive strong signals due to terrain or man-made obstructions.

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These transmitters would fill-in these areas just as analog TV boosters do currently, but television receivers would not suffer the same on-channel interference typically present with analog signals. In addition, by using the DTS technology, licensees can avoid "tall tower" zoning concerns by placing the transmitters on lower antennas, and generally increase the signal strength within a station's service area more efficiently. In essence, the FCC is proposing to permit "cellular" style operations by digital broadcasters similar to the way cellular radio operators have been functioning for a couple of decades.

[Ed. Note: Without going into the specifics of the technical proposals, we can imagine digital broadcasters using the combination of this new authority and their existing authorization to use part of their spectrum for non-broadcast purposes to create their own cellular networks. One might see a certain unfairness to this since the broadcasters were given this spectrum for free while most cellular carriers (other than the early 800 MHz filers) had to pay dearly for the privilege.]

CALEA (Continued from page 1)

ity of desperate government lawyers.

Law Enforcement convinced the FCC (who, admittedly, were eager to be convinced) that the term “information service” as used by Congress in the 1996 Communications Act amendments meant something different than the term “information service” used by Congress in the 1994 CALEA. It turns out that an ISP exempt from telecommunications regulation under the '96 Act could nevertheless be deemed a telecommunications carrier under CALEA “if it is a replacement for a substantial portion of local telephone exchange service.” The FCC so found and . . . Presto! An ISP exempt from CALEA requirements becomes a telecommunications carrier subject to all of the requirements. It's all a matter of perspective.

Of course, at the same time the FCC stressed that ISP's are *not* local telephone exchange services – even though they are replacements for them – because this would have triggered the application of an entirely different set of obligations on ISP's under the '96 Act. The Commission's machinations here begin to look like a game of regulatory Twister where the same words have exactly opposite meanings depending on which square we're trying to put our hand or foot on.

This decision has far-reaching implications since facilities-based broadband internet service providers include many large corporations with internet sys-

tems, universities, library systems, MDS operators and even governmental entities. None of these entities had ever remotely considered themselves to be telecommunications carriers who need to open their systems to Law Enforcement surveillance. Compliance with CALEA will impose very significant financial and technical burdens on these entities, as it has already imposed on regular telecommunications carriers. Not unexpectedly, a consortium of these groups quickly challenged the FCC's decision in court, along with a number of organizations concerned about the privacy aspects of mandating Law Enforcement access to these forms of communication.

Left unresolved is the question of why the FCC stopped at defining only “facilities-based broadband” ISP's as telecom carriers. Nothing in its analysis would preclude non-facilities-based narrowband ISP's from also having the same characteristics as their broadband brethren. Making that small leap would capture in the CALEA net such giants as AOL and many smaller ISPs which rely on underlying telecommunications carriers for their internet access.

The optimal solution, as is often the case, would be for Congress to step in and address precisely whether it did or did not intend ISP's to be covered by CALEA, and for there to be a public policy debate about the import of that decision. Such an action is possible before the courts resolve the pending issues. We will keep you advised.



Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
Monday, December 26
and Monday, January 2.

We wish you safe and happy holidays.





Megabits - musings hot off the press

Holding FCC Meetings Where The Sun Don't Shine

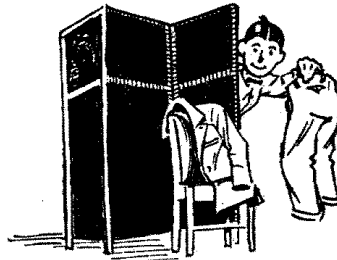
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Many observers of the FCC (including not a few communications lawyers) are in the dark about the applicability of the Government in the Sunshine Act to FCC proceedings. We occasionally hear that a proceeding has been “sunshined,” and might imagine that the matter has been exposed to some sudden scrutiny akin to turning over a big rock and watching the insects squirm. In fact, sunshining is simply the closure of a pending matter to further input from the public in anticipation of an FCC meeting on the subject. Once an FCC meeting is announced to consider a particular subject – normally seven days in advance of the meeting – no further oral or written presentations by the public are permitted. The idea is to afford the Commissioners and their staffs an opportunity to evaluate the material they have on hand without a continuing barrage of new submissions. This, of course, puts a premium on getting your own comments in just before the seven day sunshine period begins – thus having the proverbial last word. The prohibition involved here is actually a product not of the Sunshine Act but of the FCC’s strict rules on certain ex parte communications. But why is this called “sunshining” when the effect is to draw a cloak of secrecy over the Commission’s deliberations for seven days?

It all goes back to the Government in the Sunshine Act passed by a well-meaning Congress in 1976. The intent was to throw open the workings of the federal agencies so as to give the public, as the Act earnestly proclaimed, “the fullest practicable information regarding the decision making processes of the federal government.” Under the Act, agencies like the FCC must hold their deliberations in public, not in the Tammany Hall-style smoke-filled rooms which would otherwise presumably prevail. Of course, in large measure the concerns of the 1976 legislators have been obviated. GSA now forbids smoking in federal facilities, which puts a real damper on the availability

of smoke-filled rooms to regulators. Nowadays, smoke-filled rooms would have to be filled with incense, but this would undoubtedly engender a law suit from a nearby federal worker allergic to incense. Apart from the difficulty of locating a suitable room to fill with smoke, we can agree that smoke-filled rooms are probably a health risk anyway and should best be avoided, regardless of the policy-making that might take place there.



The Sunshine Act actually forbids a subset of Commissioners (at the moment, two) from deliberating together in private on a matter which could result in “the disposition of official agency business.” You would think that this would result in robust debate at the Commission’s monthly open meetings, with give and take, arguments, horsetrading, negotiation and persuasion. This is the way a group of five real people would come to a decision on a contested matter, and it seems to be what Congress envisioned when it required agency deliberations to be public. Yet attendees at Commission meetings see no such thing. There is never the slightest interaction between Commissioners on any of the issues; each Commissioner simply reads a canned statement announcing his or her position on the agenda item, praises the staff for its hard work, and then votes. In our memory, the Commissioners did actually question the staff person presenting the agenda item and would sometimes challenge the staff recommendations publicly, but even that mildly contentious process has almost entirely disappeared. Open “meetings” these days are simply a platform to announce the views which the Commissioners have already reached beforehand. There is no debate of any kind – robust or otherwise.

Congress was obviously naïve to believe that true de-

(Continued on page 13)



EAS (Continued from page 9)

Should traditional telephone companies competing with cable television service providers and DTV broadcasters in delivering digital content through fiber optic connections be required to transmit emergency alerts and warnings?

(ii) Common Protocols: For a digitally-based system to be distributed simultaneously over multiple platforms, must a common messaging protocol be adopted? Should the Common Alerting Protocol (CAP), endorsed by many public and private organizations responsible for emergency alerts, be adopted? Would a CAP allow simultaneous distribution to radio, television, and wireless media such

as mobile telephones and PDAs?

These issues will obviously be of concern to wireless and wireline carriers alike as they consider how mass dissemination of emergency announcements can be made over systems engineered and scaled for non-broadcast operation. The Commission is obviously looking far into the future, with an eye toward developing an emergency alert system which makes the most effective and timely use of all available communications technologies to bring emergency information to the public. The deadlines for comments and reply comments had not been established at press time, but it is likely that those deadlines will fall in early 2006.



Sunshine Act (Continued from page 12)

bate and decision-making could happen in the public limelight of a monthly meeting. That atmosphere can hardly conduce to frank give and take. So how does the actual give and take occur, given the prohibitions of the Sunshine Act? The Commissioners' staffs have to run back and forth among themselves carrying messages and doing much of the meeting and deliberating that the Commissioners themselves are forbidden to engage in. To us, this seems to subvert the deliberative process assigned by Congress to presidential appointees and turns the entire concept of "open government" on its head. Not only is the deliberative process completely secret, it is not even engaged in by the people who are supposed to be doing it. We've traded smoke-filled rooms for mineral-water-filled cubicles.

What is even more amazing is that sometimes the pre-open meeting horsetrading happens so close to the scheduled meeting that the Commissioners themselves aren't entirely sure what they're voting on. At one meeting involving the hotly contested triennial review, a couple of Commissioners voted on the agenda item but indicated in their contemporaneous public statements that they would have to see the text of the order - which had not yet been drafted - to be sure what it was they had just approved. While their candor was refreshing, it did little to instill confidence in a public that had sup-

posed that maybe the Commissioners would actually know what they were approving *before* they voted on it rather than after.

To be sure, Congress did create a few exceptions to the no-private-deliberations rule. Lawmakers expressly indicated that "banter on the golf course," passing encounters at social gatherings, hallways (and, presumably, the men's or ladies' room), and breakfast or lunch discussions about the day's events are not considered "meetings" for purposes of the Sunshine Act. It's somehow comforting to think of our usually hard-nosed regulators bantering together on the golf course about the great issues of the day, quipping in the FCC corridors, calling out to each other from adjacent stalls, and solicitously asking each other over their bacon and eggs how their day is going. At least they can enjoy these fleeting encounters without fear of violating the United States Code.

Commissioner Copps has publicly called for revisions of the Sunshine Act to permit more interaction by Commissioners in private, a call which several members of Congress have taken up. It seems increasingly possible that this reform of the 1976 reform will take place sometime in the next few years. And then it's only a matter of time until we'll be able to dig up those big fat cigars from their hiding places and fire them up.