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FHH Telecom Law

Current Issues in Telecommunications Law and Regulation

February

Meet the new boss . . .

New Cop on the Beat

By Sima Chowdhury
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The newest Commissioner at the FCC, Deborah Taylor Tate, is a Tennessee Republican who served on the Tennessee Regulatory Authority ("TRA") for six years, with two years as Chairman, and prior to that, acted as policy advisor to Tennessee Governor Lamar Alexander. Ms. Tate, a 49-year-old lawyer, had devoted much of her early career to mental health and juvenile justice issues. She is a graduate of the University of Tennessee and Vanderbilt Law School.

The buzz on Commissioner Tate is that there *is* no buzz – so far. Her views on divisive topics, such as media ownership regulation and intercarrier compensation, remain largely unclear, primarily as a result of her deft and diplomatic deflection of controversy during the Senate confirmation hearings. As one communications analyst put it, she "brilliantly succeeded in avoiding being pinned down on virtually any issue." A member of the Tennessee Telecommunications Association described her approach at the TRA as being characterized by inviting comment from all sides and "building consensus."

Amid all this neutrality, though, media watchdogs see potential for Commissioner Tate to take a favorable stance towards new technology, as indicated by her position on the Federal-State Joint Conference on Advanced Telecommunications Services and her statements in support of IP-enabled services. VoIP industry members are "cautiously optimistic" about Commissioner Tate's appointment. Such leanings could pit her against fellow Republican, Chairman Martin. You'll recall that in June, 2005, the Chairman led the drive to require VoIP providers to implement E-911 capabilities and, in his statement accompanying the Report and Order, admonished the industry

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Up, up and away?

Air-to-Ground Off the Ground?

By Donald Evans
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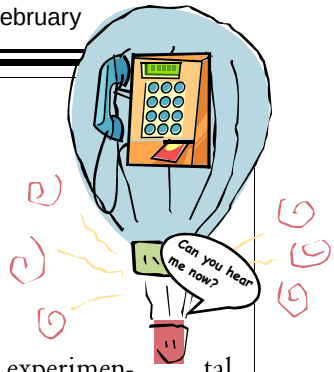

Having labored on the very first experimental applications and associated rulemaking petitions for the commercial air-to-ground service in 1980, we continue to have a soft spot in our heart for this promising-but-never-quite-delivering service. Since cellphone use is verboten during flight (and likely to remain so, given the strong opposition to the FCC's proposal last year to permit such use), there would seem to be a large, well-heeled and captive market of travelers trapped on planes for hours at a time. From the perspective of a frequent flyer, there is a significant need to access the internet and get on-line while in flight. Yet the venturers into this field to date have somehow been remarkably unsuccessful at getting the public to use the phones at profitable levels. Verizon Airfone remains the only service provider in the market on the original frequencies. At its December meeting, the FCC readied the new, improved air-to-ground (ATG) service for departure by disposing of petitions for reconsideration and setting the rules for the eventual auction of the 4 MHz of spectrum allocated to this service. Specifically, the FCC rejected the claims of AirCell (an incipient provider of air-ground service via cellular radio frequencies) that the FCC should give Verizon Airfone only 6 months rather than 2 years to transition its present 4 MHz system to 1 MHz under the new band plan. (Airfone can keep those customers on that 1 MHz for up to 5 years but then must permanently vacate in favor of the auction winner.) It also rejected a proposal to use the spectrum for ancillary land mobile use. Finally, and interestingly, the FCC clarified that ATG service could be provided from balloons placed in the stratosphere, as long as the balloons complied with the ATG rules. There's something wonderfully low-tech and Jules Vernish about incorporating hot air balloons into a communications design.

(Continued on page 4)

Some licenses will self-destruct . . .

Automatic Cancellation of Wireless Licenses Programmed Into ULS System

Trigger date: February 1, 2006

By Lee Petro
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The FCC has announced that it will be implementing a fiendishly helpful new function in its Universal Licensing System that will automatically terminate those wireless licenses for which notices of construction and/or coverage certifications have not been filed as of February 1, 2006.

The new automated system will automatically review the licenses for all wireless facilities (including, *e.g.*, broadcast auxiliary stations), and determine if the licensee has filed the required notice indicating that each location and frequency specified in the licenses have been constructed, and, if applicable, meets the coverage requirements for that particular wireless service. ***If such notices have not been filed, the Commission will automatically release a public notice canceling the license of the facility.*** In the event that the Commission cancels a wireless license, the licensee will have thirty days from the public notice to file a petition for reconsideration seeking reinstatement of the license authorization.

We recommend that the licensees of wireless facilities review their licenses to determine if the required notifications have been filed with the Commission. It is important to note that the construction/coverage requirements were not imposed on some licenses until 2002, so some licenses, such as studio-transmitter links issued prior to 2001, will likely not have construction/coverage requirements. However, we recommend that you check your licenses nevertheless to confirm this fact. This can be done on-line at the FCC's website. The instructions on determining whether you have a "Notification" or "Coverage" deadline will vary depending on the specific wireless service, but you will need to go into the path or location details portion of the FCC database to determine if the notifications have been filed. The Commission will also be doing a demonstration of this process on January 24, 2006, for which they will be having a live streaming broadcast. You can view the demonstration at: http://www.fcc.gov/realaudio.

Of course, if you would like our assistance in completing this task, please contact the attorney with whom you normally work, or Lee G. Petro at 703-812-0453.

It's already 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.

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700,000 good reasons to get those reports filed . . .

Telecommunications Providers Given $700,000 Spanking

By Raymond Quianzon
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The FCC's Commissioners declared that they are serious about making a level playing field among telecommunications carriers and complying with Congressional mandates. Wielding a big paddle, the Commissioner recently singled out two telecommunications companies and issued them a combined fine of $700,000 for failing to file Universal Service Fund paperwork with the FCC.

Federal rules mandate that telecommunications carriers who are entering or anticipate entering into interstate telecommunications markets must submit an annual reporting worksheet to the FCC. In addition, based upon income limitations, carriers are required to file quarterly reporting worksheets. In the industry, the forms are referred to as 499-A and 499-Q reports or TRWs. All providers of interstate telecommunications services should be familiar with this form and its filing requirements. Based upon revenue and traffic data contained in the reports, the FCC assesses carriers several fees for FCC programs such as Universal Service, the Schools and Libraries Fund, and Telecommunications Relay Service.

The total fines well exceeded the amount of contributions for which the companies would otherwise have been responsible if they had simply completed the reporting worksheets.

In an effort to find filing scofflaws, the FCC contacted telecommunications wholesalers and requested a list of customers to whom they sold service. Armed with the list of retail providers, the FCC checked all reporting forms on file. Among those retailers who were not FCC filers were a local exchange and long distance reseller as well as a Georgia based interstate service provider. The FCC sent the two companies inquiries as to why they had not been filing their paperwork with the FCC. The companies sent back replies which did not satisfy the FCC.

The FCC has fined each company $100,000 for failing to register their companies with the FCC and $50,000 per quarter for failing to file quarterly reports. In addition, the FCC fined each of the companies a 50% fine for underpayment of their USF contributions. These fines were significant and, as likely intended by the Commission, were widely reported in the industry media. The total fines well exceeded the amount of contributions for which the companies would otherwise have been responsible if they had simply completed the reporting worksheets. Indeed, because the bulk of each fine was associated with failure to submit reporting worksheets, they could have been avoided simply by filling out the FCC forms.

The FCC claims that its ultimate goal is to bring fairness to its programs. As the FCC correctly points out, a company's failure to contribute to a fund results in a larger burden being borne by all other carriers. By levying such large fines, the FCC has served notice that it will aggressively pursue participants, or those who should be participants, in its programs to ensure that companies are reporting data and contributing into funds. Clients who provide any telecommunications service should be filing, at a minimum, a 499-A and in many instances also a 499-Q. If you have questions about what services qualify as telecommunications services and what filing requirements apply to your company, you should immediately contact the attorney at our firm with whom you generally work.

FCC Takes a Look at the Bright Side of Rule Violation

By Mitchell Lazarus
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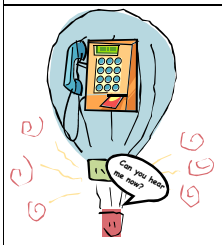
Following a wave of enforcement actions over its equipment authorization rules, the FCC has suddenly stopped to ask whether an offender should receive a waiver instead of a fine. The offender here, Respironics, Inc., acquired a company that manufactures equipment for monitoring medical patients. It discovered after the acquisition that its new product line is not in compliance with FCC technical rules.

The Respironics device uses unlicensed radio signals at 104 kHz to download data from a patient-worn unit to a stationary unit. The power is low enough to be inoffensive. But the frequency falls in the band used for LORAN radionavigation signals. This is a "restricted band" in the FCC rules, meaning it is closed to unlicensed transmitters, regardless of how low their power might be. Thus, marketing of the Respironics product violates FCC rules.

Respironics has asked the FCC for a waiver of the rules, not only to keep an existing 1,500 units in operation, but to market 1,000 more while it develops a new and compliant version of the product. Respironics points out that its device operates well below the emissions levels permitted for off-frequency emissions from transmitters operating in other bands. It argues that victim receivers are equally unaffected by emissions that are fundamental, such as its own, and those that are spurious. Also, says Respironics, since the device has a useful range of only a few millimeters, and is used solely in controlled settings such as hospitals, it is unlikely to cause actual interference.

The FCC could have cited Respironics for an admitted violation of the rules. Instead, it issued a public notice inviting comment on the waiver request. This does not necessarily guarantee that no fine will ultimately be assessed, but at least the FCC's approach here appears constructive rather than punitive. Would-be offenders are nevertheless cautioned not to rely on the kindness of strangers at the FCC.



***(Air-to-Ground** - continued from page 1)*
At the same time, the FCC adopted the usual auction discounts (15% -25%-35%, depending on the bidder's size) for small businesses, rejecting claims that only large operators could get into this market. The curious thing about this auction, though, is that bidders will be bidding not just on spectrum but on conflicting band plans. You can bid on 3 MHz of spectrum shared with another cross polarized licensee using the same patch of spectrum, or you can bid on exclusive 1 MHz or 3 MHz channels configured in two different channel combinations. All of the proposals are mutually exclusive with each other. Whichever channel plan garners the highest bids will win the license. This will make for some tortured auction bids, since you will want to bid the lowest amount possible to win the license on the band plan you've selected, but also bid the highest amount necessary to outbid people bidding on the other band plans.

To complicate matters further, broadband usage of this spectrum on the 3 MHz channels is what the FCC expects and is encouraging, yet such usage will require amendment of international treaties to authorize, and the FCC does not guarantee that the treaties will be modified. As usual, therefore, the FCC has cast a slight pall of uncertainty over the licenses it plans to auction, thus ensuring that it will not garner top dollar when the auction, now scheduled for May 10, 2006, takes place. The filing deadline for prospective applicants has not yet been set.

IRS losing streak runs to 0-8

Another Court Sacks IRS on Communications Tax

By Raymond Quianzon
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In the previous edition of this newsletter we reported on the IRS's refusal to heed two Circuit Court decisions holding that excise taxes should not be assessed on long distance charges that do not vary by distance (December 2005, page 8). The IRS lost yet another battle on this issue in the D.C. Circuit.

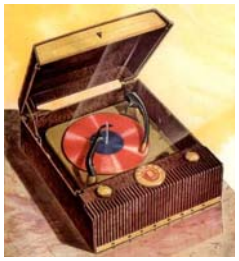
The Communications Excise tax has been on the federal books for more than a century and was introduced as a revenue stream to fund the Spanish American War. However, the last time that Congress changed the language of the tax was forty years ago in 1965. At that time, telecommunications toll services were billed by time and distance. The latest court reviewed the circumstances of the tax and declared that the language no longer applies to many long distance services and neither can the tax.

Previous courts have ruled against the IRS on this issue after conducting extensive analysis regarding the placement of "and" in the tax law. The issue arises due to the specific language in the tax code that assesses tax for telephone charges that vary based upon time *and* distance. Previous courts found the use of the word "and" to require that both factors be present in order to assess the tax. The recent court agreed with previous courts that "and" requires both time ***and*** distance to be a factor in the calculation of the phone charges. However the most recent court, located in the shadow of the Supreme Court, also spent time analyzing the state of telephone service in 1965 - - when Congress crafted the language.

The Court provided a detailed description of the state of telecommunications in 1965, the monopoly held by AT&T and the methods used to bill for long distance calls. In the intervening years, AT&T lost its monopoly and long distance bills significantly changed. The Court found that the tax law was written for 1965 telephone bills and have not yet been updated. As such, the tax no longer can apply to a service that is not described. The Court found that the IRS should not be assessing the tax.

Readers of the previous article also may recall that the IRS refused to abide by other court holdings telling it that the tax could not be assessed. However, there is no indication as to what the IRS's next move will be. As the IRS continues to lose case after case - - the latest court referred to seven other losses - - they should defer to the court decisions. Yet the IRS remains pigheadedly obstinate on this issue -- their hope at this point must be either that Congress will change the law to clarify its application or that one Circuit Court somewhere will rule in its favor, thus necessitating Supreme Court review. In the meantime, large excise tax payers should keep track of their payments since refunds may very well be available.

*(**Commissioner Tate** - continued from page 1)*
for failing to ensure its customers access to emergency services. Since then, he has overseen the creation of a joint NARUC/FCC enforcement task force to facilitate the implementation of the new rules. Some see Commissioner Tate's nomination as the White House administration's attempt to mollify the high tech sector, though it's important to note that her background includes time spent as a member of NARUC. She has also expressed a particular interest in seeing that the Commission reaches out to rural Americans—a far cry from rallying behind the proponents of cutting-edge telecommunications services aimed at serving big businesses. Commissioner Tate's background in mental health should come in handy as she attempts to preserve her own mental health in the coming years.



It's hip, it's happening, and it's oh so retro

Analog: On the Comeback Trail?

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Reports of the demise of analog radio, it turns out, have been greatly exaggerated. Two recent petitions at the FCC suggest analog radio devices could be making an unexpected comeback.

Analog modulations are historically much older than digital, going back to the earliest days of AM crystal sets. They are more prone to distortion and more sensitive to interference than digital, and use spectrum less efficiently. When cellular providers switched from analog to digital modulation, there was a sharp increase in voice quality, and the number of callers who could squeeze into the same spectrum increased tenfold. For decades the main drawback of digital equipment was higher cost, but nowadays in many applications the price of digital radios is competitive with analog.

In an age when almost every gadget in the home and car is moving relentlessly toward digital technology, there is something almost quaint about this high-tech return to old-fashioned analog modulation.

The FCC gave digital technology a big boost back in 1985 when it allowed unlicensed radios in three bands to use the unprecedentedly high power of one watt, provided they adopted one of two specific "spread spectrum" digital modulations, later typified by Wi-Fi and Bluetooth. In 2002 the FCC dropped the spread spectrum requirement and opened the same bands at the same high power to a much wider range of unlicensed digital radios.

Remington Arms Company, the firearms manufacturer, recently asked the FCC for a waiver to allow marketing of a device that is thrown like a baseball into an inaccessible or hazardous location. Intended for use by law enforcement, it contains a video camera and radio transmitter, allowing personnel on the scene to see around corners and behind walls. Octatron, Inc, and Chang Industry, Inc. propose a small egg-shaped device that can be similarly thrown or mounted on a pole. It too contains a camera and transmitter. The two products operate in two different high-power unlicensed bands.

Each device is a throwback (sorry!) in its use of analog modulation. The products need waivers because unlicensed operation at these power levels is ordinarily limited to digital radios. The FCC makes the distinction because digital transmitters spread their power more evenly over the spectrum, and so are less likely to interfere with other users. Why don't Remington and the others go with the digital flow? They claim that analog radios provide longer battery life, more predictable operation under weak signal conditions, and -- even today -- lower cost.

The FCC granted the Remington Arms waiver, but limited the market to law enforcement agencies already authorized to use public safety radio frequencies. The Octatron-Chang request is still pending.

In an age when radio, TV, and almost every other gadget in the home and car is moving relentlessly toward digital technology, there is something almost quaint about this high-tech return to old-fashioned analog modulation. Watch for wind-up gramophones on sale next to the MP3 players.

Megabits - musings hot off the press

A Modest Proposal

By Donald Evans
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In 1934, when the Communications Act was born, King Kong had been swatting at bi-planes from the top of the Empire State Building for a year already. Mr. Kong is now back, and still swatting at planes from atop buildings, but the rest of the world has changed since those innocent days when the communications world could be neatly divided into broadcasting, common carriage or private radio. Cable TV was added to the telecom menu in the '60's. Each neat category had – and still has – its own regulatory framework. But all of this is fast becoming irrelevant. The new paradigm of communications is one where data, video and audio content are distributed digitally via the Internet or otherwise to customers on demand without regard to the medium of distribution.

Digital transmissions respect no taxonomic or regulatory boundary. They are neither broadcasting, nor cable, nor common carrier - they are just huge streams of binary data channeled into our receivers at our command. This is one reason why the FCC has been hard-pressed to classify Internet service as a telecommunications service (subject to common carrier regulation), a cable service (subject to cable regulation) or an information service (subject to no regulation). It cannot even definitively decide whether Internet access is intrastate or interstate. Even the line with broadcasting is becoming blurred as network TV shows are now being "broadcast" to people's cell phones on demand.

As the digital revolution becomes more general, many of the regulatory structures which have been erected to regulate or control the distribution of information become untenable. How can individual states tax Internet purchases when the transaction may be occurring simultaneously in two states or perhaps in no state at all? How can long distance carriers like MCI be charged access charges for the origination or termination of their calls while voice-over-Internet companies deliver functionally identical services without having to pay such fees? Is a digital broadcast station entitled to mandatory carriage on a cable system when there is virtually no one watching it over the air? How can copyright arrangements designed for the protection of 19th century books and music be applied to electronic distribution of artists' works instantaneously around the world? Why should Howard Stern get a hundred thousand dollar fine for talking dirty on a broadcast radio station when the same words distributed by a plethora of different means are immune? Why should wire-based cable companies pay local franchise fees while competing wireless operators distributing the same programming to the same audience pay nothing? None of these distinctions seem to makes sense any more. The technological convergence which is already taking place rapidly in the world around us is going to force changes in the way information channels are licensed, regulated, taxed, and exploited (in the best sense of that word) for profit.

If we look at the telecommunications regulatory scheme erected in 1934, a good case could be made for erasing most of the distinctions between broadcasting, cable TV and common carriage and regulating them all under a single consistent model. One start-from-scratch approach might simply regulate bandwidth and data rates regardless of whether the transmission medium is wired or wireless. Users of public rights of way could pay localities for those rights just as users of the airwaves would pay the FCC for those rights based on some market-based assessment of what a fair charge should be. All content-based regulations could be eliminated except those that clearly should -- and do now -- cross all regulatory boundaries (e.g., fraud, obscenity and child por-

(Continued on page 8)

In Brief

The FCC has opened a rulemaking proceeding to consider how to make E-911 service available to deaf people who try to contact emergency service providers using VRS or IP Relay connections. VRS is an internet-based method of using a real-time video image to convey sign language from a deaf person to a translator who can then convey the message orally to the recipient of the call and then translate the response back using sign language as well. The technique permits a smoother and quicker conversational interface than the cumbersome typed TTY connection of the past. IP Relay is essentially a TTY-like typed interface between the deaf person and a translator who then conveys the spoken message to the recipient. However, the typed message can be conveyed over the internet without the need for a TTY connection. In both cases, because the connection is established over the internet, there is no way of knowing for sure the physical location of the calling party. The lack of call origination information adversely affects the ability of public safety responders to locate callers who cannot convey their location. In this instance, however, the internet is a great leveler because deaf people are no worse off in this regard than others who use the internet to initiate an emergency "phone call." The internet is blind to the location of *any* call origination. Having already established rules in an attempt to address this problem for the public at large, the FCC is now proposing to extend those solutions (e.g., mandatory registration of the physical location of computers used to make E-911 calls) to VRS and IP Relay calls also. Other tweaks in the registration process and/or TRS funding process to deal with this issue are under consideration. Comments were due January 18, 2006, but replies may still be filed on Feb. 1.

Lee Petro Becomes Member of FHH

FHH is pleased to announce that, as of January 1, Lee Petro has become a member of the firm. Lee, who joined the FHH team as an associate in 2002, handles a wide range of regulatory and transactional matters before federal and state regulatory bodies for radio, television, broadband, cellular, and other wireless communications service providers. A 1992 graduate of the James Madison College at Michigan State University in International Relations, Lee received his law degree from the Catholic University of America, where he was editor-in-chief of the Journal of Communications Law and Policy. He is active in the Federal Communications Bar Association.

***(Modest Proposal** - continued from page 7)*

nography). The concept of a telecommunications common carrier could be eliminated entirely. All state and local regulation of telecommunications could be eliminated. The FCC could be cut in half, but would still have a role in assigning spectrum among competing applicants, resolving interference disputes, making any policy decisions not obviated by the simplification of the regulatory structure, handling consumer complaints, and maintaining a database of licensees and operators.

This is only one possible approach, but the idea of bulldozing a dilapidated, cobweb-laden structure which has been patched, added on to, and rehabbed has considerable appeal. What we need to define is the essence of electronic telecommunications and the basic principles that should govern that flow of data. Most of the details can then be left to the market. If we're successful, in the next re-make of King Kong, the big guy can simply stay on his island and download virtual blondes without leaving his paw prints all over the Empire State Building.

Your tax dollars at work?

A Hard Look at Hard Copy

By Mitchell Lazarus
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The perversely titled "Paperwork Reduction Act" requires the Office of Management and Budget (OMB), part of the White House complex, to monitor how much paperwork the Government imposes on the public.

As Government agencies go, the FCC is relatively light on paperwork requirements. But it does have a few. One applies to manufacturers of computers and certain other consumer products -- a procedure called Declaration of Conformity (DoC). This entails testing the product, keeping files of the test results and certain other data, and providing an information sheet to consumers.

Question: How much is 4,000 times 18?

Answer: It depends.

As part of its paperwork reduction responsibilities, OMB recently placed additional paperwork in the Federal Register. This item estimates that DoC requirements affect 4,000 respondents and take an average of 18 hours per response, for a total annual burden of 76,000 hours and $12 million dollars.

The public is invited to create still more paperwork in the form of comments on the accuracy of this estimate.

Perhaps the public will file comments to remind OMB that 4,000 x 18 is 72,000, not 76,000. The public might also mention that DoC preparation works out to $157.89 per hour, which is pretty good money. (We might go into the business ourselves.)

And maybe the public will note that OMB left out the time that it (the public) spent puzzling over the DoC information sheet it got with its Christmas laptop this year, before finally throwing it away. If 200 million consumers each spend one minute in real paperwork reduction -- *i.e.*, discarding their DoC sheets -- that's 3.33 million hours. At $157.89 per hour, it adds up to half a billion dollars, probably enough to pay for a year of OMB paperwork reduction activities.

The public could also point out that any errors in OMB's estimate can have no discernable effects in the real world. In the name of reducing paperwork, the Government has not only created more, but ensured that it cannot serve any useful purpose.

Here in Washington, we're not the least bit surprised.

Time spent preparing this article: 20 minutes.
Time spent reading this article: 1 minute
Estimated number of readers: 2.
Total burden on the public: definitely excessive.