

# FHH Telecom Law

Current Issues in Telecommunications Law and Regulation

April 2006



*Meet the next new boss (re-mix)*

## Long-Awaited Fifth Commissioner At Hand?

By Michael Richards  
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It took the Senate Commerce Committee just twenty minutes to complete its interview of FCC Commissioner-designate Robert McDowell. With such issues as media ownership deregulation and the AT&T merger with Bell South on the Commission's agenda, you might think that there would have been more questions. But the Republican telecom lawyer and lobbyist may turn out to be iconoclastic enough to overcome the partisan battle lines that typify debates over communications regulation.

McDowell is a Bush-Cheney loyalist, having served as legal counsel to the campaign Florida Recount Team in 2000. FCC Chairman Kevin Martin also worked for the Bush-Cheney campaign organization in 2000. And, no doubt, McDowell will provide Chairman Martin the crucial third vote on a number of initiatives -most notably the Chairman's efforts to relax certain media ownership limits. These efforts have been stymied because, until McDowell takes office, the Commission is deadlocked with two Republicans and two Democrats who are often at odds.

But when it comes to telecommunications, no one is sure where McDowell will come out. His most recent resume entry is as Vice President of Comptel, a trade association that represents alternative providers of telecommunications services. These little guys are facing increasingly large competitors among the incumbent "Baby Bells," which have metamorphosed into behemoths more closely resembling the Old Ma Bell in sheer market girth. Of course, the old Ma Bell remnant, AT&T, was merged into SBC Communications (which took on the AT&T name). The new SBC/AT&T is now seeking permission to merge with another of the old telco incumbents, Bell South.

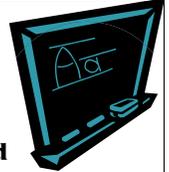
*(Continued on page 4)*

*The new ABC's of DE's*

## New Meaning for "Designated Entity"?

**Fast Track Action on Proposal Expected**

By R. J. Quianzon  
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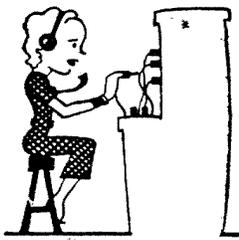
Within days of setting the start date of the forthcoming advanced wireless services (AWS) auction, the FCC announced that it may be changing its Designated Entity (DE) rules. The FCC's DE rules implement a Congressional mandate to ensure that spectrum is made available to small businesses.

The rules provide DE's with discounts on their bids and, in some cases, set aside licenses. However, the standards which the FCC imposes to ensure that small businesses are truly "small" have been called into question. Since establishing the standards, the FCC has repeatedly had to deal with proceedings where competitors call a winning bidder's DE qualification into question. In recent weeks, main stream press and media have been reporting on the FCC's standards.

Tentatively acknowledging that modifications to its rules were warranted, the FCC is proposing to add an additional test to ensure that designated entities are not unduly influenced by large operators. Establishing a "material relationship" test, the FCC proposes to disqualify a bidder from obtaining credits if it has a close relationship with a large in-region wireless carrier.

The latest FCC test avoids the equity, voting, control and facilities tests that remain in place for determination of a controlling interest. Instead, the FCC proposes to create another level of analysis. A bidder will be restricted from designated entity benefits if a large wireless carrier has a management, joint marketing, trademark, or other material operational arrangement with the putative DE. Unfortunately, the FCC has provided little more than this in describing its "material relationship" standard. The FCC recognizes that many operational agreements can cur-

*(Continued on page 4)*



*A little less information, please*

## Under Fire, FCC Proposes New Customer Privacy Standards

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**S**everal well-publicized reports of the routine disclosure of customer information by persons or entities who have gained access to telecom carriers records have prompted demands on Capitol Hill and at the FCC to erect new safeguards for such information. Theoretically, the Telecom Act and the FCC's rules prevent third parties from gaining access to such material without customer consent. These "safeguards" have turned out to be very porous indeed. Congress has hauled the Chairman and several carriers to hearings to explain how and why customer information (famously dubbed "CPNI" -- customer proprietary network information) is being divulged to third parties without customer consent. The resulting heat has prompted the FCC first to investigate the largest carriers and slap \$100,000 fines on ALLTEL and AT&T for failure to submit proper certifications of compliance. Next the FCC demanded that *all* telecom carriers file reports detailing their CPNI protection policies, with top-level management having to certify to the adequacy of the policies. (The requirement to have a privacy enforcement policy and certify to it annually had been on the FCC books for several years but had been largely ignored by the carrier community.) Finally, the FCC has initiated and placed on a super fast-track a rulemaking proceeding to impose additional protective measures on carriers.

The FCC has proposed to do some or all of the following:

1. Require consumer-set passwords for all outside access to CPNI. This would deter third parties pretending to be the customer from accessing the information but would also complicate all customer transactions and lead to lost-or-forgotten password problems.
2. Require an audit trail to be established for disclosure of CPNI to the customer herself. (Records must already be kept of disclosures to third parties or for marketing use.)
3. Encrypt all CPNI data.
4. Require the destruction of CPNI when no longer needed for billing purposes.
5. Notify the customer whenever his security has been breached.
6. Establish safe harbors from enforcement activity if a carrier complies with CPNI requirements.
7. Require carriers to file annual reports on a date certain certifying that the company has adequate CPNI protection policies in place.

There is some question as to whether these measures significantly improve consumer protection or, if they do, whether the cost is justified. We can expect that the FCC will, at a minimum, require annual reporting since that just imposes a cost on carriers and gives the appearance of having gotten tough on

*(Continued on page 4)*

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*FCC to regulatees: "I will not be ignored"*

## **Another Fine Mess: Ignoring FCC Leads to Heavy Forfeitures**

*By Jeffrey Gee  
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**T**he FCC issued two very substantial fines in February - one to a purveyor of "junk faxes" and the other to a manufacturer of digital audio music devices. While the underlying offenses were different, both cases drove home the same point: when the FCC cites you for a violation, don't thumb your nose back.

In the case of *First Choice Healthcare, Inc.*, the company in question, First Choice, was cited by the FCC's staff for sending unsolicited advertisements to fax machines in violation of the Communications Act and related FCC rules. The citation warned First Choice that further violations could result in forfeitures of up to \$11,000 per violation and informed First Choice that it had 21 days to either request a personal interview or provide a written response.

First Choice's first choice, apparently, was to ignore the citation. Indeed, the record indicates that First Choice refused to even accept delivery of the citation. The US Postal Service returned copies of the citation to the FCC marked "unclaimed."

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### McDowell Nomination (Continued from page 1)

While many analysts expect Chairman Martin to support the proposed combination, McDowell's background as a lobbyist and lawyer for the anti-AT&T insurgency suggests a possibility that he may not follow Martin's lead here – and instead side with Democrats on the Commission who have been more skeptical of such mega-mergers.

Although McDowell promises to “wipe the slate clean” and “prejudge nothing,” the odds-makers inside the Beltway aren't giving either the pro- or anti-merger teams much of a spread when it comes to the new Commissioner. In fact, informed speculation is rampant that McDowell might be forced to recuse himself from the Bell South merger altogether. The pressure for McDowell to step back from the merger debate would be especially strong if his last employer, Comptel, were to take a formal position.

Should McDowell recuse himself from the Bell South merger proceeding, it will give the FCC's two Democrats more leverage to either extract conces-



sions, as occurred when SBC and AT&T merged, or to torpedo the deal. If McDowell does participate and maintains sympathies with his old Comptel crowd, the outcome could be similar. Of course, in Washington's currently polarized state, party loyalty may trump all else. In which case, McDowell would follow Chairman Martin's lead. But, with McDowell professing clean slates, prognostication here would be no better than a coin flip.

McDowell is a cum laude graduate of Duke University, and received his law degree from the nation's oldest institution of higher learning, the College of William and Mary. A native Virginian, McDowell, his wife and two children live on land that was once

the McDowell family farmstead, in a now suburban area just a little beyond Washington's beltway. He currently serves on the board of a hometown arts organization and has twice run unsuccessfully for the Virginia legislature. A website is operational from his last bid for state delegate in 2003. It still contains a link for campaign contributions by credit card.



### Designated Entity (Continued from page 1)

rently be drafted in order to satisfy FCC equity standards and still sign away a great deal of control. The proposed “material relationship” test is intended to eliminate these loopholes.

The FCC has proposed that large wireless carriers will be “large” only if their average gross wireless revenues for the preceding years exceed \$5 billion. In addition, the FCC has sought comment on whether its exclusion should be limited to wireless carriers or more broadly expanded to include companies with signifi-

cant interests in communications services.

The FCC is also seeking comment on how a winning bidder who enters into a later agreement with a large carrier should reimburse any credits. The FCC has been very clear that their yet-to-be-determined standard will apply in forthcoming auctions, including AWS auctions coming up in June. If you have questions about this proceeding or wish to file comments, contact the lawyer at FHH with whom you usually work or the author.



### Privacy Proposal (Continued from page 2)

the industry. The FCC is also looking for other suggestions as to how to deal with the CPNI disclosure problem.

Interested parties may file comments on or before April 14. Replies are due by May 15. We do expect the FCC to act on this proceeding by the early summer.

*Heading for the white open spaces?*

## “White Space” Proposal Gets Boost From Capitol Hill

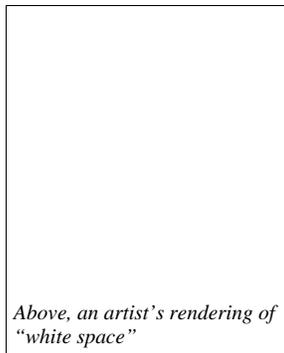
By Lee Petro  
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**R**einventing a debate that many had given up for dead, two separate bills have been introduced in the U.S. Senate which would require the Federal Communications Commission to adopt rules to authorize the unlicensed use of television spectrum for wireless broadband services. The bills have been fast-tracked in the Senate and, thus, have raised the attention and concern of television broadcasters and other affected parties.

The bills differ in substance slightly, but the impact of either likely could be detrimental to television broadcasters and other users of the spectrum. First, both bills would require the Commission to complete the long-pending television white space proceeding within 180 days. You may remember that the Commission opened a proceeding a few years back in which it sought comments on a proposal from its Spectrum Task Force to adopt rules to permit fixed and mobile uses of the TV band for wireless services. The idea was that large stretches of the television band were actually unused over many parts of the country. In theory, if that unused portion of the band could be identified, it could be captured and put to use by unlicensed transmitters. A large majority of the comments filed in the proceeding were against the proposals, and press reports indicated that Chairman Martin did not view this as a high priority when he came into the head office.

However, the bills would require the completion of this rulemaking, and adoption of technical rules and certification processes for unlicensed devices to “facilitate the robust and efficient use” of the TV band (S.2332). One bill goes so far as to require the television broadcaster to provide field measurements in order to file a complaint with the Commission over alleged interference.

The Senate Commerce Committee held a hearing on the bills on March 14<sup>th</sup>. Many of the senators, including a certain former presidential candidate, cautioned broadcasters against raising false claims of interference in an attempt to derail the bills. It would appear that the hearing was merely a formality, and that the two bills will be reconciled and attached to a larger bill in late April. While there is not yet a companion bill in the House of Representatives, it is possible that such a bill will be introduced should the Senate bills gain traction.



*Above, an artist's rendering of  
“white space”*

Several groups have already begun to start grass-roots movements against the bill, including the wireless microphone users who also use the TV band, the consumer electronic companies who fear the unlicensed devices will interfere with the digital set-top boxes, and, not surprisingly, television broadcasters. There are several concerns that are raised by these parties. First and foremost, thus far the proponents have not developed a device that will be able to

sense whether a television station is using a particular frequency. Second, to date no one has provided a solution for the problem of the unknown receiver. While a device may be developed to accurately sense whether a TV station is **transmitting** in the vicinity, and then either transmit, or select a new channel, there is no way for the device to know if there is a TV **receiver** nearby. Without knowing its proximity to a television receiver, the unlicensed device cannot determine whether it will cause interference to the reception of a particular TV channel if the device begins to transmit. Since the device will not have the same reception abilities as a television receiver, many are concerned that an unlicensed device will transmit on a channel it has incorrectly judged to be available. Similar attempts to develop acceptable devices to operate in other bands have been unsuccessful to date. More-

*(Continued on page 6)*



## You Want to Enhance Public Safety? Create a New Bureau

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**F**ollowing the lead of the larger federal government, the FCC has reorganized itself by consolidating all public safety-related functions into a single Bureau to be called, of course, the Public Safety and Homeland Security Bureau. The new bureau will be the home of disaster-related and security-related planning and functions within the Commission such as the Emergency Alert System, 911, CALEA, and network reliability planning. The theory, as with the Department of Homeland Security, is that these functions can be better coordinated within a single bureau charged with this specific mission. The FCC provided few details about the day-to-day operations of the new bureau, except that it will be the smallest of the bureaus (fewer than 150 people) and will handle licensing of public safety radio licenses which have heretofore been within the bailiwick of the Wireless Bureau. There is no indication at this time that any other licensing functions will go to the new bureau. Because the bureau is being formed out of parts scavenged from existing parts of the Commission, there will be no new manpower thrown at the

security problem. The faces in the new bureau will therefore look very familiar.

The reorganization had been under discussion for many months. It remains subject to approval by Capitol Hill and compliance with employee union obligations, which are expected to be obtained in a couple of months.

While it is easy to scoff at the efficacy of bureaucratic reorganization as a tool to enhance security (witness the performance of FEMA and the reorganized Dept. of Homeland Security in responding to Katrina), the FCC has, to its credit, been extraordinarily responsive to public disasters like hurricanes. It has also moved (though with somewhat less alacrity) to improve the communications infrastructure for public safety and first responders. If shuffling the cubicles around at 445 12<sup>th</sup> St. helps to improve coordination at all, the effort will not have been wasted.

*White Space (Continued from page 5)*

over, since the devices are unlicensed, it will be impossible to track down and order the users to cease using the devices should they interfere with licensed operators on the spectrum.

Finally, many broadcasters are concerned about the impact of the unlicensed devices on the DTV transition. Since the unlicensed devices will be digital, and the transition is slightly three years from ending, many are concerned that the unlicensed use of the spectrum will detrimentally impact the digital operations of television stations as they commence full-power service on their channels. Since digital reception is an all-or-nothing proposition - *i.e.*, either (a) there is a picture on the receiver or (b) the screen is blue, the question has been raised whether the public

will put up with the new DTV service if it is constantly being interfered with by mobile devices that are unable to be tracked down and turned off.

The grass-roots campaigners have urged parties to send letters to their Senators to inform them of their concerns regarding the unlicensed devices. On the other side, Intel and Microsoft are strongly lobbying the Senate to adopt the bill to permit the introduction of new wireless broadband services and devices. In the middle, per usual, will be the viewers of the television stations that may or may not continue to receive their digital programming.

We will continue to monitor the situation, and provide updated as future events occur. In the meantime, if you have any questions, please contact the attorney with whom you normally work, or Lee G. Petro.



## The Wheels of Rebanding Grind Slow

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**M**any public safety, business, industrial and transportation licensees in the 800 MHz band are in the midst of a daunting task of mandatory frequency changes known as “rebanding.” Unfortunately, the rebanding process is proceeding slower than expected, though there are a few positive signs.

The FCC mandated 800 MHz rebanding to address serious interference problems caused by Nextel, which also operates in the band. The process requires most licensees in the band to swap frequencies with Nextel, with all of the direct and indirect costs paid for by Nextel, pursuant to FCC rules and guidelines established by an independent 800 MHz Transition Administrator (TA).

Rebanding requires agreements to be reached between incumbent licensees and Nextel, covering the cost of retuning equipment, or in some cases providing new radios, to work on the replacement frequencies. All such agreements are subject to approval by the TA. Disputes are resolved through mediation and, if necessary, FCC decision.

While the rebanding process is straight-forward for some, it becomes a very complex and costly undertaking for large interoperable radio systems used by public safety agencies and others with extensive coverage requirements. A significant preliminary problem has been securing advance funding to cover planning and negotiation expenses. While perhaps unnecessary for commercial entities, public safety licensees often require advance funding to avoid difficult procurement and appropriation issues. The TA procedures allow licensees to negotiate preliminary agreements with Nextel to cover these estimated expenses, with a “true-up” process afterwards to reflect actual costs.

These early negotiations, however, have proved to be far more contentious and difficult than many anticipated. While a few agreements have been reached, many others are still in early stages, and some have gone into a mediation process established by the TA.

There have also been other delays, including a large number of final frequency reconfiguration agreement negotiations that were forced into mediation, and some that went to the FCC for final resolution. All of these factors are likely to lead to some adjustment in the rebanding schedule.

*While there is no current plan to extend the “end date,” there could be some adjustments to the negotiation periods, especially for the “Wave 1” NPSPAC stage which will certainly take more time than currently is allotted.*

The TA developed a rebanding schedule that divides the nation into four “waves” with staggered negotiation periods. Within each wave there are two “stages,” one for channels 1-120 (806-809/851-854 MHz, which must be rebanded first) and one for “NPSPAC” li-

enses (821-824/866-869 MHz). The whole process is to be completed by 2008. While there is no current plan to extend the “end date,” there could be some adjustments to the negotiation periods, especially for the “Wave 1” NPSPAC stage which will certainly take more time than currently is allotted.

The TA has also altered its procedures, as it now screens requests for planning funding prior to the negotiations beginning with Nextel. The TA may also become more involved in the process, at least by providing more rapid resolution of disputes as they arise in the negotiations. As early issues are resolved through mediation or FCC intervention, the process should speed up for transitions which are further upstream. The end result of this enormous, multi-billion-dollar undertaking should be a band which is simplified and more conducive to the communication needs of public safety and commercial interests alike.

**More on the Fine Front:** A Taiwanese manufacturer was recently assessed a \$75,000 fine for selling four devices that intentionally re-radiated GPS signals. This manufacturer seemed unusually inept since it first professed not to be aware that it couldn't make transmitters that operate in the highly restricted GPS band, then tried to remedy its error by undertaking a "Declaration of Conformity" – an abbreviated equipment approval process not applicable to intentional radiators. (*Editor's Note:* "The Intentional Radiators" would be a swell name for a rock band.) Even the DOC was defective, however, since it tested the devices'

**In Brief**

operations in the wrong band. The FCC showed little sympathy for the hapless manufacturer – it multiplied the base fine of \$7,000 by four to account for the four separate non-compliant devices, then upped that amount even further because the unlawful sales had gone on for three years, involved some 5,000 devices, and, most especially, involved transmissions in the GPS band which the US government has been especially protective of. Still, despite these multiple transgressions, the fine was much lower than those levied against other manufacturers who failed to cooperate with the FCC at all. (*See Another Fine Mess* on p. 3)



*Another Fine Mess (Continued from page 3)*

Based on this record, the FCC issued a proposed forfeiture of \$1,000,000. Apart from the unusual size of the forfeiture, the FCC's action in this case is notable for two reasons. First, the FCC adjusted the amount of the upward from the base forfeiture amount of just \$350,000, in large part because of the volume of units Behringer continued to import and market *after* being placed on notice that it was not authorized to do so. The FCC also justified the upward adjustment on the basis of the substantial economic gain Behringer realized through its violations (\$28.5 million in sales during the period after the first LOI). The other significant point was the FCC's consideration of Behringer's actions over the past five years, despite the statutory limitation that prohibit the

FCC from issuing forfeitures for actions that occur more than one year prior to the issuance of a Notice of Apparent Liability. Acknowledging this point, the FCC stated that although Behringer was only being sanctioned for its acts within the past year, its behavior over a longer period of time was relevant in determining the *amount* of the sanction. In particular, the FCC cited its actions after receiving the first LOI.

These cases illustrate a point that has been made many times over several decades. The FCC expects timely and honest responses to its inquiries and will come down like a ton of bricks if it doesn't get them. Hell, it seems, hath no fury like a regulatory agency scorned. Ignoring the FCC's warnings, or worse, failing to deliver on promised corrections, can only lead to worse problems.

**On the Auction Block**

**800 MHz Air-Ground Spectrum**  
(in flexible 3 or 1 MHz packages)

Short form application deadline:  
**March 24**  
Upfront payment deadline:  
**April 17**  
Auction date:  
**May 10**

**400 MHz Air-Ground Spectrum**  
(in paired 300 kHz bands)

Open only to applicants already on file  
Auction date:  
**August 23**

**Advanced Wireless Service**  
(100 MHz of spectrum in varying blocks in the 1700 MHz and 2100 MHz bands)

Auction rules and deadlines still being finalized  
Auction date:  
**June 29**

# Advanced Wireless Services Auction Set for Summer, 2006

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**T**he Commission announced that it will auction the first set of Advanced Wireless Services spectrum on June 29, 2006. The Commission is currently considering certain rules with respect to the bidding procedures, and it is expected that these rules will be issued soon.

The Commission will be licensing spectrum in the 1710-1755 and 2110-2155 MHz bands throughout the country. This spectrum is intended to be used for mobile wireless services, including voice, data, and video wireless broadband services. The Commission will be licensing different-sized spectrum blocks, in a variety of geographic service areas (*see box, below*).

The 12 Regional Economic Areas (REAGs) cover large portions of the country, with the continental US divided into six areas. The Cellular Market Areas (CMAs) and Economic Areas (EAs) cover smaller portions of the country. It is likely that smaller, rural telephone companies and start-ups will be bidding on the CMA and EA licenses. In fact, the Rural Cellular Association recently gave testimony before the Senate Committee in support

of retaining the smaller blocks of spectrum.

There are a few interesting twists relating to this auction. First, because the spectrum is being taken from federal incumbent users, the Commission is not permitted to close the auction until the net bids reach 110 percent of the total costs associated with the relocation of the federal incumbent users of the spectrum. Specifically, the federal government has determined that the relocation of the 2,240 frequencies used by the federal government will cost \$935,940,312. Therefore, the auction must have net bids in excess of \$1,029,534,343.20 before the auction can close. In light of this statutory requirement, it is not surprising to see that the upfront payments, which must be submitted for the honor of participating in the auction, are quite large. For example, the least expensive continental US REAG license block has a required upfront payment of \$15 million (Mississippi Valley), and the smaller CMA licenses in the top 35 markets all exceed \$1 million (New York CMA is \$16,134,000).

In addition, the Commission is considering withholding information from bidders regarding the

Block	Frequency Bands (MHz)	Total Bandwidth	Geographic Area Type	No. of Licenses
A	1710-1720 / 2110-2120	20 MHz	CMA	734
B	1720-1730 / 2120-2130	20 MHz	EA	176
C	1730-1735 / 2130-2135	10 MHz	EA	176
D	1735-1740 / 2135-2140	10 MHz	REAG	12
E	1740-1745 / 2140-2145	10 MHz	REAG	12
F	1745-1755 / 2145-2155	20 MHz	REAG	12

(Continued on page 10)



*New devices really under the radar*

## 5 GHz U-NII Conundrum Resolved (Maybe)

By Mitchell Lazarus  
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**T**he FCC expanded the 5 GHz U-NII band back in 2003, but questions still remain on when the new spectrum will become available for use.

Previously, the U-NII bands had consisted of three 100 MHz segments, each subject to different power limits and other restrictions. The 2003 expansion added 255 MHz to the highest-power segment, which is suitable for Wi-Fi-type services and broadband delivery. (The “U” stands for unlicensed; and the band can be used for any service that fits the technical rules.) This FCC action responded to forecasts that the heavily-used Wi-Fi band at 2.4 GHz will be unable to accommodate the continuing surge in demand for unlicensed devices.

The new part of the U-NII spectrum contains radars operated by the federal government. To protect those, the rules require U-NII devices in that part of the band to monitor for the radars and to choose transmission frequencies that will minimize interference. And, to make room for the greatest number of users, the rules also require that U-NII devices in this spectrum automatically adjust their

output power to the minimum needed for communication. The FCC extended these rules to new devices in the original 100 MHz, as well as the new 255 MHz, and set deadlines for their compliance.

As it happened, however, the specifics of testing candidate products for compatibility with the ra-

*No products have yet been certified for sale, and the FCC has repeatedly put off the deadlines for compliance in the older U-NII spectrum.*

radars proved to be much more difficult than anticipated. As a result, no products have yet been certified for sale. And the FCC has repeatedly put off the deadlines for compliance in the older U-NII spectrum

Several weeks ago the FCC, the federal government (via the National Information and Telecommunications Administration) and industry

representatives were able to agree on a test procedure, and on criteria for FCC certification, which will finally permit equipment in the new band to be manufactured and operated. At this writing, the FCC is pondering whether it needs another rule-making proceeding to implement the agreement. If so, use of the new U-NII spectrum will likely be delayed for at least another year, and parallel extensions in the deadlines for old spectrum will be necessary.



*AWS Auction (Continued from page 9)*

other bidders in the auction, such as other interests and their identities because the Commission wants to enhance the “competitiveness and economic efficiency” of the auction. This would be a dramatic change from its consistent past practice of making all bidders transparent to other bidders. Finally, the Commission is considering adopting rules to permit “package” bidding, whereby parties can bid on an aggregation of different channels, and the entity will obtain the licenses only if the bid on the

entire package is successful. The Commission believes that this new bidding structure will “better express the value of any synergies.” However, the Commission has raised this possibility in other auctions, but has always declined to adopt the procedure.

Our website will be updated to highlight the final rules when the Commission issues them. In the meantime, please contact the attorney with whom you normally work, or Lee G. Petro, with any further questions.



Look before you leap

## Choose Wisely When Suing a Competitor

### Court holds CLEC lawsuit is barred because plaintiff had earlier filed complaint with FCC



By R. J. Quianson  
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**A** recently decided case from Texas reminds anyone with matters before the FCC that it is of the utmost importance to choose the proper forum for filing a complaint. In the most recent case, a federal court of appeals kicked a competitive local exchange carrier (CLEC) out of court for, as the Court phrased it, trying to take several bites at the apple.

In May of 2002, a CLEC was concerned that an incumbent local exchange carrier was mistreating it in providing access to 555 services. The federal statute controlling this matter provides that a complaint against a common carrier can be filed either as a complaint to the FCC *or* as a suit in a federal court. The statute prohibits a complainant from pursuing both of these remedies.

The CLEC in this case chose the FCC path and filed a complaint against the incumbent using FCC procedures. The complaint alleged that the incumbent was engaging in discriminatory and anti-competitive practices. Shortly thereafter, the CLEC stated that it was optimistic that the parties could resolve their difference in some other way. The CLEC asked the FCC to dismiss the complaint that it had earlier filed. A little more than a year after the initial complaint was filed, the FCC dismissed the matter. The FCC also told the CLEC that if it came back, it would have to provide an analysis showing how the new complaint was different from the one it was dismissing.

Five months after the FCC dismissed the complaint, the CLEC marched into federal court in Texas and filed suit against the same incumbent. This time, rather than just complaining about dis-

criminatory and anti-competitive practices – as it had limited itself at the FCC – the CLEC listed nine different claims including state law claims such as breach of contract, tortious interference and fraud.

Both the federal district court and the appeals court which reviewed the case agreed that the law was

clear. If a complaint is filed with the FCC, the federal district courts no longer have any jurisdiction. There are numerous cases which address this matter of jurisdiction. However, the CLEC felt that it had a loophole. The complaint was never actually ruled upon by, nor was it currently pending before, the FCC. The CLEC told the court that because the FCC dismissed the case it could be brought to the courts. In fact, the court had to agree with the CLEC

that they could find no earlier cases where a case was kicked out of court because the FCC proceeding had been dismissed.

The court decided to make this the first case so that others would be able to reference it in the future. The mere **filing** of a complaint with the FCC – not what the FCC does with it – controls where the case will be heard. The court did not accept the CLEC's argument that the FCC reset the jurisdiction when it dismissed the case. The determinative factor was the filing of the complaint with the FCC in the first place. Because the CLEC initially chose to file with the FCC, it was stuck with that choice, regardless of whether it later dismissed the complaint without a resolution on the merits. Allowing the CLEC to file at the FCC, seek dismissal, and then walk over to the court house defeats the clear elec-

(Continued on page 12)

*Both the federal courts which heard the case agreed that the law was clear: if a complaint is filed with the FCC, the federal district courts no longer have any jurisdiction.*

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## First Class



*Choosing Remedies (Continued from page 11)*  
tion of remedies that is built into the law.

Any clients who are planning to file a complaint with the FCC, whether it is a formal or informal complaint, must bear this case in mind. A hasty decision to send off a letter to the FCC could be deemed an informal complaint that could then significantly limit the party's later options. Before any decision is made, clients must carefully consider the precedents for their facts at both the FCC and in the courts. Because the choice of forum is a strict "either/or" proposition, both options should be carefully reviewed prior to proceeding down either path.

For more information regarding this case and complaints against common carriers, please contact the attorney at our firm with whom you regularly work or the author.

*It's already Spring, 2006 -  
Do you know where your proceedings are?*

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