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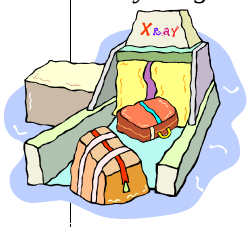
FHH Telecom Law

Current Issues in Telecommunications Law and Regulation September 2006

Everything but snakes . . .



New Airport Security Device Approved

Detects metals, non-metals, liquids

By Mitchell Lazarus
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As we shuffle forward in the airport security line, waiting to be de-shod and wanded, our thoughts turn to how that suspicious-looking individual in front of us might have a huge ceramic knife taped to his leg, not to mention a Zip-lock bag of explosives under his shirt – and the metal detectors would miss both.

Relax. The FCC recently approved a new type of security screening device that reliably picks up both metal and non-metallic weapons and other contraband, including liquids, hidden in and under the clothing. The subject enters a round chamber rather like a modernistic telephone booth, and stands there for two seconds. A low-power beam of high-frequency radio waves scans the subject, processes the reflections, and shows an image displaying any threat objects on the subject's person.

The device is made by SafeView, part of L3 Communications. It works by sweeping a radio signal over a very broad range of spectrum, from 24.25 to 30 GHz, in just 6 millionths of a second. The average power from the device is extremely low, about 70 nanowatts (billionths of a watt), well within FCC limits. The device nonetheless raised a question at the FCC, whose rules require measuring a swept-signal transmitter with the sweep stopped. In the case of SafeView's device, the company says, this has the effect of overstating the emissions and interference potential by a factor of 10,000.

SafeView asked the FCC for a waiver to allow taking the measurements with the sweep running. Companies that hold licenses in the 24 and 28 GHz bands objected, because they feared the device might cause interference. SafeView revised its calculations, adopting many of the

(Continued on page 5)

Myste-REEs of the FCC

What Must DE's Report?

Concentrate and ask again later

By Donald J. Evans
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Medieval theologians are said to have spent a lot of billable hours arguing about how many angels could dance on the head of a pin – a dispute that seems to have revolved more around the ethereal nature of angels' substance than the specifics of their terpsichorean preferences. Modern communications carriers find themselves in a similar head-scratching quandary when considering the mysterious and ethereal nature of Reportable Eligibility Events.

As we have reported, the FCC in April took steps to tighten up eligibility for discounts in auctions by policing more rigorously the various relationships that putative Designated Entities were entering into. Among other things, the FCC will prospectively deny DE status to entities that have "material relationships" with bigger companies such that the bigger companies' revenues should really be attributable to the putative DE. A prohibited material relationship consists of a lease or resale arrangement whereby 50% of a DE's spectrum capacity is effectively committed to the larger entity. Where such an arrangement results in a 25% commitment of spectrum to the bigger entity, the bigger entity's revenues will be attributed to the applicant or licensee entity. Fair enough going forward.

However, the FCC took several other steps. It now requires DE's to report on the anniversary of their license any Reportable Eligibility Events (REEs) which have occurred. Unfortunately, the definition of an REE is elusive. The rules define it with perfect circularity: an REE is (1) a lease or resale arrangement which would cause the licensee to lose DE benefits under the FCC's affiliation rules or (2) any other event that would lead to a change in eligibility of a DE. The first criterion is straightforward enough since there are actual rule sections that one can use as points of reference. More problematical is the second criterion.

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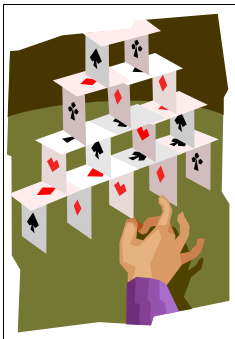

While industry players look to deal . . .

FCC Proposes to Re-Shuffle 700 MHz Deck

By Sima N. Chowdhury
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On August 3, 2006, the FCC adopted a Notice of Proposed Rulemaking (NPRM) in WT Docket Nos.06-150 & 01-309, seeking comment on proposed changes to numerous aspects of the service rules governing licenses in the 700 MHz spectrum band. This particular NPRM addresses changes in the Upper and Lower 700 MHz bands and does not raise changes to the Guard Band portions of the 700 Mhz band. (An NPRM, released on September 8, 2006, seeks comment changes to Guard Band licensing rules in a separate docket, WT Docket No. 06-169.)

With respect to unauctioned spectrum alone, the FCC proposes several potential changes. First, it considers assigning additional licenses to smaller areas not defined by Economic Area Groupings, resulting in a range of possible service areas. Should such new areas be created, the FCC also raises the question of which spectrum block(s) would be suitable for reassignment to the newly-designated areas. Finally, it seeks comment on establishing more definite performance requirements that would revise the current "substantial service" standard, in order to facilitate access for all consumers.

With respect to both auctioned and unauctioned spectrum, the FCC discusses modification of the rules pertaining to licenses. In particular, the FCC seeks comment on adding criteria to the end-of-term requirements for license renewal and extending the license terms beyond the current January 1, 2015 expiration date. It also solicits comment on whether increasing the maximum licensed power limits in the unauctioned 700 MHz bands could be achieved while still preventing interference to Public Safety operations. Significantly, the Commission is considering a substantial reduction in the authorized power of stations in the Lower Band which have already been auctioned. This change would very significantly alter the terms of existing 700 MHz licenses.

In the last section of the NPRM, the FCC tentatively concludes that certain services using 700 MHz spectrum should be subject to 911 and E-911 requirements as well as hearing-aid compatibility requirements, based on the criteria in the *E911 Scope Order* adopted in 2003, and seeks comment on amending the rules in Part 20 to set out effective dates and measurement methods to implement this conclusion.

Why raise these issues now? The FCC attributes the timing of this NPRM primarily to the existence of a firm date for the DTV transition. As is well-known, the transition will allow the reclamation of a significant amount of spectrum in this band, which the FCC will sell via auction. Prior to congressional passage of the Digital Television and Public Safety Act of 2005 (the DTV Act) at the beginning of this year, two separate proceedings cov-

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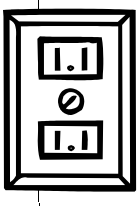
Socket to me?



Broadband over Power Line – A Step Closer

FCC disposes of reconsiderations as feuding factions find common ground

By Mitchell Lazarus
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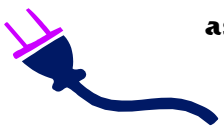

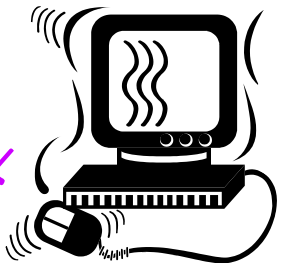

The FCC's 2004 adoption of rules for Broadband over Power Line (BPL), electric utilities' delivery of Internet service along with raw wattage for the toaster, outraged amateur radio operators and certain other licensed radio users. Those parties had argued throughout the proceeding that placing the radio-frequency signals needed for broadband operation on power lines would turn a city's electrical distribution system into a giant antenna, disrupting radio communications for miles around. The FCC order disagreed with those claims, and OKed BPL, but did institute a series of measures intended to protect the amateurs and other opponents. BPL providers must maintain a public database of frequency usage by zip code, and after July 7, 2006, may only install BPL equipment certified as having the capacity to "notch out" individual frequencies by remote control. The providers also must avoid using certain frequencies in certain areas, and in other areas must consult in advance with public safety, Government, or aeronautical users.

Both sides requested reconsideration. The BPL industry objected to a requirement that it post operational information in the public database 30 days before initiating service, and asked for more time to roll out notching-capable equipment. The amateurs and their allies sought to scuttle the BPL enterprise entirely, pending further testing, and argued at length that the rules were inadequate to prevent interference, and in any event had been unlawfully adopted.

To no one's surprise, the FCC defended the legitimacy of its rules, called claims of their inadequacy "premature," and declined to require further testing. But the BPL industry did not get much relief, either. The 30-day advance notice requirement remains in place, as does the July 7 deadline for remote-controllable equipment. The FCC carved out only a minor exception, giving BPL providers another year to fill in gaps in older systems using older, uncertified devices.

The BPL proceeding has raised a lot of anger in the amateur radio community, which felt its interests had received insufficient priority. But the leading amateur radio association since voiced its approval of two BPL technologies that completely avoid amateur frequencies. As it happens, one of those technologies accounts for the major ongoing commercial deployments of BPL. After years of conflict, peace may be at hand.

Wilkommen, Bienvenu, Welcome

Meet Patrick Murck and Ron Whitworth

FHH is also pleased to announce the arrival of two new members of our legal team. Ron Whitworth and Patrick Murck, both recent graduates of the Columbus School of Law of the Catholic University of America, are scheduled to start work with FHH immediately after Labor Day. Ron received his bachelor's degree from Indiana University; Patrick received his from American University. Both have taken the Virginia Bar exam and are currently awaiting the results.

The respective backgrounds of Patrick and Ron are strikingly similar in a number of ways, not the least being the levels of excellence each has attained. Both were editors of law school publications, both participated in the National Telecommunications Moot Court competition, both have pre-law school experience in journalism, both have authored numerous articles on various topics related to communications law, and both have worked at the FCC as part of the law school curriculum. Ron served as a Special Assistant to Commissioner Adelstein, and Patrick interned in the Media Bureau.

FHH is confident that you will find Ron and Patrick to be valuable additions to our team. Ron can be reached at whitworth@fhhlaw.com; Patrick can be reached at murck@fhhlaw.com.

21st Century Snidely Whiplash foiled again

FCC, RCMP Ally to Nab Equipment Manufacturer

By R.J. Quianzon
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In an interesting and unusual show of international unity, Canadian regulators called up the FCC and told the Agency that they had problems with a company from Taiwan. The problem was with the company's wireless internet consumer equipment which was being sold throughout North America under two brand names. The Canadians had tested the equipment and found that it created spurious emissions.

Tipped off to the potential miscreants, alert FCC agents quickly trotted off to a store and wrestled the wireless equipment to the ground. The agents tested the equipment and found that, as promised by the Canadians, the equipment did create spurious emissions. The FCC wrote a letter to the company indicating that they had problems with the equipment. The company wrote back and provided the FCC with test reports and information about the equipment. The company thought that its equipment passed Part 15 certification requirements.

However, the FCC dusted off its rule book and pointed to subsection (b) of rule section 2.947. Gotcha! The company's testing report failed to identify the measurement procedures used when the company conducted the testing. More importantly, the FCC (and our neighbors to the North) did find that the equipment was producing spurious emissions.

The base fine for marketing unauthorized equipment is $7,000. However, because the FCC found that the company had been distributing the equipment for at least 17 months in large quantities, it more than tripled the fine to $25,000. The FCC also justified the large fine on the fact that the company had revenues of $133 million in 2005 and could pay the higher fine. The equipment was being sold under the brand names of Hawking Model HWRR54 and Phoebe AR315W.

Spanked $100K for clamming up

FCC Fines Suspected Data Broker

By R.J. Quianzon
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Just as Feds used tax evasion to put Al Capone in the slammer, the FCC has used a paperwork rule to fine a suspected data broker nearly $100,000. Constant Readers may recall that in the Autumn of 2005, many media outlets were reporting on problems with data brokers accessing phone records. For a fee, a data broker would obtain telephone calling records – often mobile phone records – for any number that a customer requested. The privacy concerns raised by this practice were brought to the attention of many federal agencies.

In response, the FCC issued subpoenas to several suspected data brokers demanding information about their practices. At least one of the suspected data brokers decided to simply ignore the subpoenas. Although there were legal pleadings, motions to quash, and questions about the FCC's jurisdiction, in the end the suspected data broker simply did not comply with the subpoena.

Although the FCC may indeed have found a data broker who is improperly obtaining call information, there was only limited evidence confirming this fact, so the FCC was not able to conclusively prove that the suspect engaged in data brokering or violations of privacy. But because the suspect refused to turn over information to the government as required, the FCC was able to catch it on that basis rather than the substantive offense. The Commission issued a $97,500 fine to the company. Each Commissioner individually released a statement about the fine, protection of privacy and the wrongdoings of data brokers.

It should be noted that the FCC currently has an open proceeding regarding data brokering (or "pretexting") and has several on-going investigations. Yet, in this case, the data brokers suffer only from a fine for failing to submit paperwork.

IRS announces terms of surrender

Telecommunications Tax Refund Program Established

By R.J. Quianzon
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In our July 2006 issue we reported that the Internal Revenue Service had finally given up its attempt to assess the telecommunications excise tax on some long distance services (*see* "IRS Surrenders", July 2006, p. 7). This month the IRS announced how individuals will get that tax back from the government.

In order for businesses, non-profit organizations and other entities to seek a refund of the tax, they must actually calculate the amount of tax that they paid from February 2003 until August 2006. However, the IRS realized that it would be dealing with some very upset taxpayers if it made individuals, couples and families dig through the past 41 months of long distance phone bills from all their carriers. So, the IRS has thoughtfully established a standard refund amount. If taxpayers feel so inclined, they can still shuffle through phone bills dating back to the second season of American Idol to prove that they have paid more tax than the standard amount; however, most taxpayers likely will avoid that task. Note that the tax refund should cover 3% of the charges for long distance (and *only* long distance) calls assessed by telecom carriers for the last three years. To us, the standard amounts set by the IRS seem a little chintzy if that is what they are supposed to approximate, but the alternative is no refund at all if you cannot demonstrate the actual amounts of tax you paid.

Standard Refund Amounts Proposed by IRS

Number of Exemptions	Refund amount
1	$30.00
2	$40.00
3	$50.00
4 or more	$60.00

Taxpayers who wish to take the standard refund will do so based upon the number of tax exemptions that are taken on their tax return for 2006 (filed in 2007). The IRS has indicated that they will include a special line on the 2006 tax return so that taxpayers can request the refund on their standard 1040. The IRS will also be creating a new tax return (From 1040-EZ-T) for people who would not normally file taxes but who want the refund. See the accompanying chart showing the standard refund amounts.

***(700 MHz Re-Shuffle** - Continued from page 2)*

ered the redistribution of the 700 MHz band, due to requirements stemming from separate statutory provisions affecting the Upper and Lower portions. The DTV Act eliminates separate auction periods and procedures, which will offer potential bidders more certainty as to the availability and value of spectrum space.

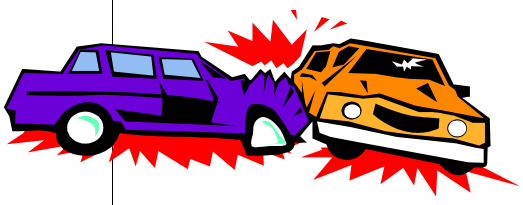
Comments are due September 20th, with replies October 20.

***(Safeview** - Continued from page 1)*

assumptions favored by the opponents, and concluded that no interference would result. It also proposed a series of measures intended to protect licensed users, including indoor-only operation, a database of device locations, and a cap on the number of waivered devices. Citing the importance of the device to national security, the FCC agreed with SafeView that the proposed conditions would reasonably guard against interference, and granted the waiver.

Watch for a round phone booth at an airport near you. And leave that big ceramic knife at home.

On-board warnings, coming to a dashboard near you soon?



More Tweaks To Dedicated Short-Range Rules

By Donald J. Evans
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The Dedicated Short-Range Communications Service (DSRC) is an idea whose time may finally be coming. DSRC is that service which will permit vehicles to be alerted instantly of impending crashes and permit other informative communications with moving vehicles. Although proposed and originally adopted more than four years ago, the FCC and the industry have been fine-tuning the process for the last few years prior to wide-scale licensing and deployment of equipment. The latest round of reconsideration petitions has resulted in the following adjustments to the regulatory scheme announced in late 2003:

- Channels 172 and 184 will be dedicated to public safety-related applications. Although the FCC had previously resisted dedication of channels in this service, it became convinced that even milliseconds of delay due to congestion could create the potential for accidents which might otherwise have been avoided. These channels are therefore now reserved for public safety, with channel 184 being permitted a higher operating power for longer distance safety applications such as "intersection violation mitigation."
- Licensees must file a notification when licensed sites have been constructed and put into operation.
- Higher power is authorized for antennas between six and fifteen meters above ground.

The FCC rejected proposals to appoint a third party database manager for this service and to assign a unique identifier to licensed DSRC operations (as opposed to adjacent unlicensed ones). Underscoring the sense that this service remains a work in progress, the FCC left open for further study the adoption of new emission mask rules for certain higher power operations, the designation of a special licensing category for public safety-related On Board Units, and, most significantly, the need for prior frequency coordination with fixed satellite service earth stations. The industry is working on standards that may or may not warrant further action in these areas in the future, and the FCC indicated it would accept those recommendations as part of this Docket when consensus is achieved.

***(Designated Entities** - continued from page 1)*

What other events are they talking about?

The FCC's order tries to be helpful but actually muddies the water further. Certainly entering into a material relationship would be one such event, but also covered are events "which *might* affect [a DE's] ongoing eligibility." *Might* affect? What does that mean? In a footnote, the FCC helpfully supplies a non-exhaustive list of examples of events which might affect DE status: changes in ownership, and agreements between DE's and third parties such as "management, credit, trademark, marketing and facilities agreements." Does that mean that entering into a standard financing agreement is an REE? Entering into a standard trademark licensing agreement? Having a switching arrangement with another carrier? Opening an account with an advertising agency? All of these would normally be considered run-of-the-mill arrangements for an operating company which would not call into question its bona fides as a DE. And what about other types of arrangements that aren't included in this list but which "might" affect your DE status if somebody chose to so find?

To complicate matters further, not only do REEs have to be reported once a year, but a DE licensee must now

(Continued on page 7)

Megabits - musings hot off the press

Licensees Fined Despite FCC Assurances

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"[A]n oral contract is not worth the paper it's written on," according to legendary movie mogul Sam Goldwyn. The same is unfortunately true of informal FCC advice.

In late August, while most of Washington was at the beach, the FCC issued fines to three microwave operators for transmitting without a license. The facts were similar in all three cases. Each defendant is a company on the U.S. side of the Mexican border. In 2001, each applied for an FCC license to communicate with a Mexican station. When a grant was not forthcoming, each asked for a special temporary authority (STA) – essentially, a short-term license.

The FCC's International Bureau told each of the companies that the requested STA would not be granted, because Mexico was not granting authority in the opposite direction, *but that no U.S. enforcement would result from unlicensed operation.* Taking the Bureau at its word, the companies put their stations on the air. Three years later, a different arm of the FCC – the Enforcement Bureau – notified each one that it was in violation of the law and would be fined $10,000. Each responded with a sworn affidavit attesting to the International Bureau staff's assurances that operators in that situation would not be prosecuted.

Last month the Enforcement Bureau rejected the defense and imposed the $10,000 fine on each company. *The Bureau does not dispute that other FCC staff told the companies they were safe from enforcement.* Instead, the Enforcement Bureau criticizes the companies for relying on informal oral opinions from FCC personnel. (The Bureau goes on to argue that the companies must have known the staff gave bad advice in 2001, because each reapplied for a license in 2004. But the Bureau also concedes that U.S.-Mexico licensing relations were not normalized until earlier in 2004, so applying before then would likely have been futile.)

It has always been a principle of administrative law that an agency like the FCC is not officially bound by informal advice of its staff, and so is free to disavow anything the staff tells the public. On the other hand, good faith oral dealings between the staff and the industries they work with are an essential lubricant that keeps the regulatory process working smoothly. These cases are a harsh reminder that, as a practical matter, informal oral opinions of a staff member are only as good as the tenure and memory of the staff person involved – and the willingness of the agency to stand by what that staffer says.

***(Designated Entities** - continued from page 6)*
seek approval to engage in the REE before doing it. In other words, if a DE thinks that something it's thinking about doing – like entering, let's say, into a preferred roaming agreement – might affect its status, it must first file an application with the FCC and get the activity approved. Presumably the FCC will indicate at that time whether or not it agrees with the applicant's assessment as to whether the REE will result in the loss of the DE's benefits and whether unjust enrichment penalties will be applied.

We quite frankly don't see how the new rules can be strictly enforced because they are so vague that nobody can be sure what is covered – even some of the cited examples do not seem to qualify as events which might affect your DE status. At the same time, the rules hang ominously over the heads of DE's and must be dealt with in some way. Where is a medieval theologian when you need one?

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First Class

Wilkommen, Bienvenu, Welcome–Redux

Kevin Goldberg Joins FHH as Senior Counsel

FHH is pleased to announce that Kevin Goldberg has joined the firm as Special Counsel.

Kevin is a recognized expert on First Amendment issues, with particular emphasis on newspaper and Internet publishing. His work includes representation of press organizations in lobbying efforts and in the protection of the rights and privileges of reporters. He also reviews news stories before broadcast by radio and television stations in order to identify and (if possible) avoid possible legal problems.

A 1992 graduate (*magna cum laude*, thank you very much) of James Madison University, Kevin received his law degree (with high honors, if you please) from George Washington University in 1995. He also won the prestigious Imogene Williford Constitutional Law Award for exemplary achievements in constitution law while a law student.

No stranger to FCC practice, Kevin interned at the Mass Media Bureau during his third year of law school, working on a number of far-reaching rulemaking proceedings.

Kevin is currently licensed to practice law in Maryland and the District of Columbia. He is a member of the Federal Communications Bar Association, the ABA's Forum on Communications Law, the Computer Law Association and the Virginia Coalition for Open Government. And how's this for an item on your résumé – he is the youngest of person to have been inducted into the National Freedom of Information Hall of Fame, an honor bestowed on him for his continued and superlative service in pursuit of open government.

Over and above his law practice, Kevin has been a prolific writer and commentator on First Amendment issues and the media. And in his spare time, he is an avid soccer player (and licensed referee), as well as a hiker, runner, cycler and golfer.