FLETCHER, HEALD & HILDRETH, P.L.C.

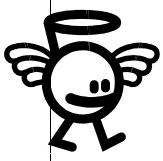
FHH Telecom Law

Current Issues in Telecommunications Law and Regulation November 2006

*Wrong or white ? **You** make the call*

White Space: The Final Frontier

Prudent Spectrum Stewardship or Highway to Interference HELL?



By Lee Petro
petro@fhhlaw.com
703-812-0453

The headline you select for this article probably classifies you as a patron of the broadcast medium – or not. The need to choose sides has been caused by the FCC's release of its *First Report and Order and Further Notice of Proposed Rulemaking* dealing with the authorization of unlicensed devices to operate in the spectrum currently set aside for television broadcasting. This proceeding, commenced in 2004, was once given up for dead, but has recently been the subject of Congressional scrutiny – which may explain its sudden resuscitation.

In the *Report and Order* (R&O) component of the FCC's decision, the Commission determined that it is possible to authorize low power devices to operate in the "white spaces" in the TV band (spectrum allocated to TV but not actually being used in a particular geographic area), so long as no harmful interference is caused to television stations. To that end, the Commission is refusing to authorize the use of personal *portable* unlicensed devices; instead, only *fixed*, or stationary, low power operations will be permitted. Because the use of personal portable devices would likely pose a greater risk of interference, the FCC is seeking further comment on such use in the *Further Notice of Proposed Rulemaking* (FNPRM) component.

The Commission also decided to prohibit any low power device from operating on TV Channel 37 (to protect radio astronomy services) and Channels 52-69 (to protect the wireless and public safety services authorized to operate on these channels). Finally, to protect the television stations that are busily finalizing their transition to digital transmissions, and to give itself time to adopt the

(Continued on page 8)

Waiting at the altar for the marriage license

FCC Delays, and Delays, AT&T/BellSouth Merger Decision

By Ron Whitworth, Law Clerk
whitworth@fhhlaw.com
703-812-0478

The $82 billion AT&T and BellSouth merger was on the brink of receiving Federal Communications Commission approval by the time *FHH Telecom Law* readers received this issue. But all bets are off following removal of the item from the agenda of both the October and November Open Meetings at the FCC.

Chairman Kevin Martin finds himself in very familiar situation, deadlocked 2-2, as he was so often during his first year as Chairman in the absence of a fifth Commissioner. First year Commissioner Robert McDowell recused himself from participating in the merger proceeding because, as a member of the Virginia Bar, his status as a public official prohibits him from acting on an issue he was involved with in private practice. McDowell's former employer, Comptel, has lobbied vigorously against the merger.

A dramatic stage was set for Oct. 12, one day following the Department of Justice's (DoJ) approval of the merger. The FCC was slated to announce its vote on the merger during its monthly agenda meeting, but delayed the decision one day, scheduling a special meeting expressly for the AT&T/BellSouth item. However, after keeping anxious observers and reporters waiting more than three hours, the Commission never appeared in the meeting room, canceling its vote for the second time in two days.

The vote was teed up once again for the Nov. 3 meeting, but was pulled one day earlier when it became evident that the two Democratic Commissioners would not budge on merger conditions.

(Continued on page 9)

The bureaucratic delay shoe slips onto the other foot

Martin Renomination Lingers in Limbo

Senate puts hold on confirmation for second term

By Ron Whitworth, Law Clerk
whitworth@fhhlaw.com
703-812-0478

The renomination of Chairman Kevin Martin hit a predictable snag in late September, as a hold was reportedly placed on his second term. Over the past two years, Commissioners Robert McDowell and Jonathan Adelstein experienced lengthy holds prior to their current terms, and Martin's renomination appears to be no different.

Martin's first term ended on June 30, but President Bush renominated him for a second, five year term on April 25. In early September, the Senate Commerce Committee voted 21-0 to approve the renomination, but as of press time, a reported hold on the renomination is delaying the vote by the full Senate, which had been expected to take place in late September.

For all practical purposes, the hold should have no effect on Martin's service at the Commission. Even without renomination, Martin is entitled to serve until the end of the next session of Congress (January, 2008). If the hold extends deep into November, Martin could get the vote in a lame duck session, or receive a recess appointment by President Bush, obviating the need for a full Senate vote.

Broadcasting & Cable reported that the hold was likely due to a policy concern. One rumored source is Senator John Sununu (R-N.H), arising from differences over E911 issues. There is little doubt that Martin's renomination will be finalized soon, particularly after the Senate Commerce Committee returned a unanimous vote.

In his remarks to the Committee, Martin discussed his achievements during his five-plus years as a Commissioner, including a year and a half as Chairman. Martin highlighted broadband deployment as his top priority at the Commission.

"During my tenure as Chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment," Martin said. "We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms."

Other issues highlighted by the Chairman included public safety and emergency preparedness, communicating with disabled persons, maintaining universal service, and the management of the FCC. Martin discussed his commitment to promoting competition, while ensuring that the govern-

(Continued on page 4)

Fletcher, Heald & Hildreth
A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*: (703) 812-0400**
***Fax*: (703) 812-0486**
***E-Mail*: editor@fhhlaw.com**
***Web Site*: fhhlaw.com**

Editor
Donald J. Evans

Design
Harry F. Cole

Contributing Writers
Paul J. Feldman, Kevin J. Goldberg, Mitchell Lazarus, Patrick Murck, Lee G. Petro and Ron Whitworth

FHH Telecom Law is intended to provide general information and does not constitute legal advice or solicitation of clients. Distribution of this publication does not create or extend an attorney-client relationship. Fletcher, Heald & Hildreth, P.L.C. may represent clients in proceedings described here.

Copyright © 2006 Fletcher, Heald & Hildreth, P.L.C.
Copying is permitted for internal distribution.
All other rights reserved.

Concentrate and ask again later

Prospects Are Cloudy for Telecom Legislation

By Kevin Goldberg
goldberg@fhhlaw.com
703-812-0462

When Congress adjourned for its pre-election break in late September, it left several important bills on the table. Although there is almost certainly going to be a "lame duck" session in November, many expect federal legislators to focus primarily on necessary appropriations legislation at that time. But it is also possible that substantive bills will get some attention, with pending reforms to the Communications Act falling squarely into this category. Members and staffers from both Houses and both sides of the aisle hold out hope that policy differences can be resolved in the short time available. Prevailing wisdom believes otherwise.

Derived from the FCC's August 2005 policy statement on the regulation of broadband networks, net neutrality stands for the principle that there should be open and unfettered access to the Internet.

It has been more than ten years since passage of thee last major telecommunications reform legislation, the Telecommunications Act of 1996, and it is without question that these laws need fine tuning. Competing proposals were introduced in the House and Senate which address issues such as cable and video franchising, Internet access, universal service fund reform, and mobile telephone taxes. The House version has continued to move forward, but even the best efforts of Senator Ted Stevens (R-AK), Chair of the Senate Committee on Commerce, Science and Transportation, failed to achieve his ultimate goal. Substantial differences remain which are likely to doom this bill's prospects for passage in the 109th Congress.

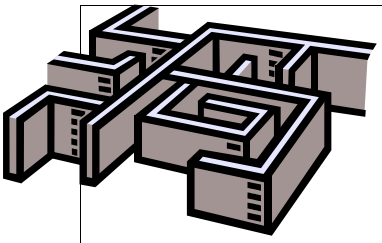
Rep. Joe Barton (R-TX), Chair of the House Committee on Energy and Commerce, introduced the "Communications Opportunity, Promotion and Enhancement Act" as HR 5252 on May 1, 2006. This bill progressed steadily, passing the House by a margin of 321-101 on June 8. On the other side of the Hill, Senator Stevens introduced a bill known as the "Communications, Consumer's Choice, and Broadband Deployment Act of 2006" (S 2686) on June 13, 2006.

The mere presence of the Senate bill was enough to forestall action on HR 5252. Key members of the relevant committees in each House went back to the drafting table in June and emerged with a vastly amended version of HR 5252. Approximately 200 amendments later, the bill has been renamed the "Advanced Telecommunications and Opportunities Reform Act." It passed the Senate Committee on Commerce, Science and Transportation and now serves as the starting point for any further changes when Congress returns in November.

The most hotly contested sections of this legislation deal with equal access to Internet service and content, and video franchising:

- *Internet Access*: One of the most controversial provisions in the bill addresses that subsection of broadband Internet access known as "net neutrality." Derived from the FCC's August 2005 policy statement on the regulation of broadband networks, net neutrality stands for the principle that there should be open and unfettered access to the Internet. This goes beyond access to Internet service to all content on the Internet as well. The FCC considers net neutrality an ideal, not a legal requirement and, thus, has adopted no actual regulations enforcing this policy. But those who argue that the Internet is the freest

(Continued on page 14)

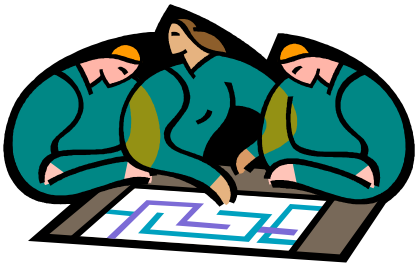


FCC adds to the bureaucratic maze

Public Safety and Homeland Security Bureau Established

By Patrick Murck
murck@fhhlaw.com
703-812-0476

The FCC has finally revamped its organizational structure in an effort to be responsive to an increased focus on public safety and security by creating a new bureau, the Public Safety and Homeland Security Bureau ("Homeland Security Bureau"). The reason for creating the Homeland Security Bureau was to consolidate public safety and national security functions that had previously been dispersed among seven different bureaus and offices. The reorganization plan was originally adopted in March, and the Commission then moved with FEMA-like alacrity to implement the new Bureau and install a new Acting (!) Bureau Chief six months later. The process has been so sluggish and so fraught with delay as to raise questions from the get-go about the fledgling Bureau's ability to respond to emergencies in any sort of timely fashion.



The Homeland Security Bureau is headed by Acting Bureau Chief Kenneth Moran and is organized into 3 divisions:

- The Policy Division headed by Dan Shaffer;
- The Public Communications Outreach and Operations Division ("PCOOD") headed by Richard D. Lee; and
- The Communications Systems Analysis Division ("CSAD") headed by Jeffrey Goldthrop.

The Policy Division will develop and administer rules such as E911, CALEA, and EAS. The Policy Division will also regulate in such areas as Public Safety Answering Points, interoperability of public safety communications equipment, and network security and reliability.

The PCOOD is responsible for coordinating the Commission's emergency response and preparedness, and will serve as the point of contact for intergovernmental coordination between the FCC and other Federal agencies. The CSAD will administer the Commission's information collection requirements (for example network outage reporting) as well as perform studies concerning public safety and disaster preparedness.

The Homeland Security Bureau currently has pending before it a waiver request from the National Capital Region to establish an interoperable broadband network on the 700 MHz band. In addition the Bureau is seeking nominations to fill the CMRS Alert Advisory Committee that was mandated by Congress as part of the WARN Act.

(***Martin Renomination*** *- Continued from page 2)*

ment fulfills its obligation to serve the public interest.

"If reconfirmed, I would continue to make decisions based on a fundamental belief that a robust, competitive marketplace, not regulation, is ultimately the greatest protector of the public interest," Martin said. "Competition is the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Competition drives prices down and spurs providers to improve service and create new products.

"Government, however, still has an important role to play. The Commission should focus on creating a regulatory environment that promotes investment and competition, setting the rules of the road so that players can compete on a level playing field."

Privacy protection stops short of kiddie porn

CPNI Privacy Rules Do Not Bar Ratting Out Child Pornography

By Paul J. Feldman
feldman@fhhlaw.com
703-812-0403

In a recent Declaratory Ruling, the FCC clarified that customer proprietary network information ("CPNI") privacy rules do not bar a telecommunications carrier from complying with requirements to report subscriber violations of specific federal statutes relating to child pornography. Companies that provide data transmission and Internet services should be mindful of this development.

Section 222 of the Communications Act creates a framework to govern telecommunications carriers' use of information obtained by virtue of providing a telecommunications service. All telecommunications carriers, including wireless carriers, have a duty to protect the privacy of CPNI. Practically speaking, CPNI includes information such as the phone numbers called by a consumer; the frequency, duration, and timing of such calls; and any services purchased by the consumer, such as call waiting. Section 222(c)(1) provides that, "*[e]xcept as required by law,*" a telecommunications carrier that receives CPNI generally may *only* use or disclose individually identifiable CPNI without customer approval (i) in connection with the carrier's provision of the telecommunications service from which such information is derived, or (ii) with services necessary to or used in the provision of such telecommunications service.

All telecommunications carriers, including wireless carriers, have a duty to protect the privacy of customer proprietary network information.

Recently, on its own motion, the FCC issued a ruling addressing how telecommunications carriers' privacy duties under Section 222 affect the requirement that suspected images of child pornography be reported to the CyberTipLine, operated by the National Center for Missing and Exploited Children (NCMEC), pursuant to 42 U.S.C. §13032. Specifically, 42 U.S.C. §13032 requires providers of an "electronic communication service or remote computing service" who obtain knowledge of the facts or circumstances of apparent violations of certain federal statutes prohibiting the production and distribution of child pornography, the sexual exploitation of minors, or the use of misleading domain names to deceive a person into viewing pornography, to report those facts to the CyberTipLine operated by NCMEC, after which NCMEC in turn is required to forward that report to a law enforcement agency or agencies designated by the Attorney General. "A provider of electronic communication services or remote computing services . . . who knowingly and willfully fails to make" such a report shall be fined up to $50,000 for an initial failure to make such a report and up to $100,000 for subsequent failures to make such reports. Nothing in the federal law requires companies to affirmatively monitor users or communications for such violations, however.

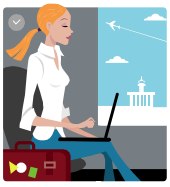
The wording of this separate federal child pornography reporting requirement would appear to make it apply to a broader set of service providers than just "telecommunications carriers." Specifically, "electronic communication service" is defined as any service that provides users the ability to send or receive "any transfer of signs, signals, writing, images, sounds, data or intelligence in whole or in part by wire or radio. . . that affects interstate or foreign commerce . . ." but does not include oral communications, paging, tracking devices or electronic funds transfer. Similarly, the term "remote computing service" is defined as "public computer storage or processing service by means of an electronic communications system." These definitions appear to include entities that the FCC would consider to be "information service providers" as well as telecommunications carriers.

In a brief few sentences, the FCC ruling holds that the "except as required by law" exception contained

(Continued on page 6)

In Brief

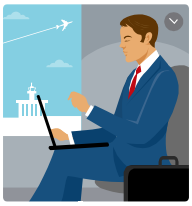
Communications tower builders may soon need to worry about birds as well as historic sites before they commence construction. The FCC has opened a rulemaking proceeding to determine whether towers are posing a risk to migratory birds, and, if so, what can be done about it. It's unclear at this point whether towers have any significant impact at all since natural predators and obstructions have been said to cause far more avian deaths than towers. But if the record shows that significant numbers of birds are being affected, the FCC must determine, first, whether it has the authority to do anything about the problem (is a bird call subject to rate regulation?), and, second, whether tower lighting, guy wires and other aspects of towers as presently built can be modified to remediate the problem. The Commission may also determine that an environmental assessment is required if a proposed tower will impact migratory birds. The deadline for comments has not yet been set, but should be about sixty days after the NPRM appears in the Federal Register, which should happen soon. Bird lovers are expected to comment in flocks; no word yet from the cat community.



All Part 15 users are equal in the eyes of the FCC

Unlicensed Wi-Fi Qualifies For Antenna Protection In Airport Setting

By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440



The FCC has ruled that MassPort, the authority that operates Boston's Logan Airport, cannot require Continental Airlines to remove a Wi-Fi antenna providing free service to the airline's frequent-flyer lounge.

MassPort, which provides its own Wi-Fi service for a fee, claimed the Continental system violated the airline's lease. MassPort also argued that the Continental Airlines installation could cause interference to public safety communications that use the MassPort Wi-Fi system as a backbone.

The FCC decision turned on its Over-the-Air-Reception Device (OTARD) rules. These generally prohibit third-party restrictions on an antenna that is: (1) one meter or less in diameter; (2) on property under the exclusive control of the user; and (3) used to transmit or receive fixed wireless signals. The FCC found the Continental Airlines facility met all of these requirements. It also found that MassPort's Wi-Fi communications – like all other unlicensed operations under part 15 – receive no interference protection, even though these may carry public safety traffic. In consequence, Continental Airlines can keep its system.

In ruling on this issue, the FCC fended off a myriad of arguments by MassPort, including arguments going to the core of the FCC's authority to regulate end-user antennae. The bottom line is that the FCC reaffirmed the fundamental premise of Part 15 operations: no operator is entitled to interference protection from any other operator as long as both are operating within the limits prescribed by the rules. The fact that MassPort was using Part 15 devices for critical backhaul operations did not give it any greater priority over other users of unlicensed spectrum.

(***Privacy v. Pornography*** *- Continued from page 5)*

in Section 222(c)(1) of the Communications Act applies to any report required to be made by a telecommunications carrier to NCMEC pursuant to 42 U.S.C. §13032. Therefore, a telecommunications carrier does not violate Section 222 to the extent it is compelled by 42 U.S.C. §13032 to disclose CPNI in making such a report. Of course, this exception to Section 222 only applies to the extent disclosure of CPNI is "required," and therefore would not cover voluntary disclosures by carriers.

There are a number of open legal issues involved in the situations contemplated here, and service providers would be well advised to consult with counsel when these situations arise.

FCC grants partial relief for MediaFLO service

700 MHz Rules Come Into Focus

By Donald J. Evans
evans@fhhlaw.com
703-812-0430

Proving once again that the wheels of justice at the FCC grind slowly, our favorite regulators acted this month on a petition for declaratory ruling filed in January 2005 by Qualcomm. Qualcomm has been taking steps to roll out its MediaFLO offering on the nationwide 700 MHz channel it acquired in the Lower Band auction held several years ago. It plans to use this spectrum to deliver broadband content to subscribers of cellular, PCS and AWS carriers in cooperation with those carriers.

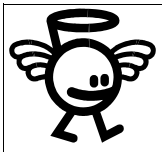
Between now and February 17, 2009 (when all incumbent analog TV broadcasters must have cleared the 700 MHz band), 700 MHz users must demonstrate that their operations will not interfere with the broadcasters. To date, owners of the spectrum have been hampered by the lack of reliable standards to evaluate the potential for interference to existing broadcast users in the band. Qualcomm's petition sought to rectify that problem by (i) confirming the engineering methodology to be used in demonstrating non-interference, (ii) getting the FCC to agree to *de minimis* levels of interference that would be deemed acceptable, and (iii) streamlining the process of approving proposed operations. While Qualcomm was not entirely successful, the FCC did provide some useful relief.

The FCC declined to permit streamlined action on 700 MHz operations, so every transmitter put into service must be filed with the FCC, put out for public notice, and subject to oppositions from broadcasters.

The FCC accepted OET Bulletin 69, a generally more accurate interference prediction methodology, for use in demonstrating the effects of 700 MHz operations on nearby TV stations. The method had heretofore been used for predicting TV-to- TV interference, but the FCC decided that the proposed MediaFLO situation was sufficiently TV-like to warrant use of the method here. The proponent must, however, take into account the fact that 700 MHz operations will typically involve multiple transmitting sites rather than single high power operations like those applicable to TV stations.

Next, the FCC partially granted Qualcomm's request that some levels of interference to TV stations be deemed *de minimis*. Qualcomm wanted interference to 2% of a station's service area to be considered *de minimis* and therefore an acceptable level of interference. Instead, the FCC ruled that the percentage of interference to TV stations would start at .5% and slowly ramp up to 2% by the time the 2009 deadline is reached.

Finally, the FCC declined to permit streamlined action on 700 MHz operations. Every transmitter put into service must be filed with the FCC and put out for public notice, thus being subject to oppositions from broadcasters and taking considerable time. This process has taken over a year in the applications filed to date because each such application is new and customized, each one has been opposed, and the parties and the FCC have not known what the terms of engagement were. Because the framework for filing these applications and demonstrating non-interference or acceptable interference has now been established, the grounds for opposing such applications should be reduced. But still the process is a cumbersome one fraught with potential for delay. Of course, as more and more TV broadcasters move to their permanent digital channels outside the 700 MHz band, the number of potential protesters will be reduced.



***(White Space** - Continued from page 1)*
technical rules under which the new unlicensed service will operate, the FCC has prohibited, until the end of the DTV Transition in February, 2009, the marketing of the types of unlicensed low power devices which will ultimately be covered by the new rules.

In the FNPRM, the Commission wades deeply into the devil's snare of technical rules, seeking comment on every regulatory element relating to the proposed fixed low-power devices. First, the FCC questions whether the use of the TV spectrum for these fixed low-power devices should be on a licensed or unlicensed basis. The FNPRM suggests that the Commission's strong preference would be for the ***un***licensed use of the spectrum, given the wide range of the spectrum's availability (rural vs. urban), and the difficulty which would be involved in creating priority rights to the spectrum among licensees.

Additionally, the Commission is seeking comment on the appropriate method to use for determining whether a particular swath of spectrum is available for use and, perhaps more importantly, whether unlicensed devices would cause harmful use to television stations in the vicinity. As we noted in a previous issue, the Commission has proposed three possible mechanisms: (1) enabling the devices to "sense" whether the spectrum is available; (2) requiring the devices to be professionally installed, equipped with GPS, and guided by a database of existing television stations; and/or (3) establishing a control signal program in which existing FM, TV and CMRS providers would continuously broadcast a signal providing a list of channels available to devices, and limiting the device to operate only on one of those channels. The Commission recognizes that there is only one other "sensing" system currently authorized for use in the 5 GHz band, but that there are substantial differences between that already-authorized use and the use which is contemplated in the current proceeding. Therefore, the FCC is asking for testing to show that a "sensing" system could work in the TV band.

The Commission is also seeking comment on the best system for making these services work, and which system the Commission should adopt. For example, the Commission is seeking comment on the appropriate threshold for "sensing" devices, and whether to protect television channels that are adjacent to the spectrum to be used for the unlicensed devices. Also, the Commission is considering whether these unlicensed devices will be required to use transmit power controls that will limit the transmit power to the minimum necessary.

The Commission is also considering excluding the devices from operating on TV Channels 2-4. And with respect to possible standards and limits for out-of-band emission levels, the Commission has asked whether it would be appropriate to use the same standards currently applied to other unlicensed devices.

Perhaps the most important directive from the Commission is for the public to substantiate their claims with data and test results. While the Commission will be conducting tests to determine if any or all of the methods for avoiding harmful interference will work, it is also seeking studies from the public.

The FNPRM includes numerous and extensive discussions of specific technical proposals. We invite any interested parties to contact us to discuss any or all of the FNPRM in more detail. Comments are due 75 days from the release of the Order/FNPRM in the Federal Register, which has not yet occurred. As always, we will keep you updated with respect to further developments.

It's already Fall, 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.

***(AT&T/BellSouth** - Continued from page 1)*

AT&T officials have been working feverishly to obtain FCC approval as soon as possible, fearing what might happen if the merger is left pending too long in an election year. At one point, AT&T was adamant about securing a 4-0 FCC vote on the item, but has since indicated a willingness to settle for the requisite three votes. There is speculation that if the Commission remains stuck at 2-2 for an extended period of time, McDowell's recusal may be revisited.

The two Democratic Commissioners, Michael Copps and Jonathan Adelstein, both expressed disappointment at the DoJ's approval of the mergers absent any consent decree/ modifications from the two parties. The DoJ had been urged by several members of Congress to wait until the completion of a federal court review of the SBC-AT&T merger under the Tunney Act prior to issuing its approval. Adelstein called the DoJ's decision "a reckless abandonment of DoJ's responsibility to protect competition and consumers."

AT&T stated it will agree to the same net neutrality conditions imposed by the FCC on the SBC/AT&T merger – essentially an agreement to abide by the FCC's net neutrality principles.

Copps and Adelstein have reportedly demanded many of the same conditions attached to last year's mega-mergers (AT&T-SBC and Verizon-MCI). Following the cancellation of an FCC decision on Oct 12 and 13, AT&T offered a series of merger conditions in an *ex parte* letter addressed to the Commission. The conditions included the following:

- By December 2007, the merged company "will offer broadband Internet access service . . . to 100% of the residential living units in the AT&T/BellSouth in-region territory."
- By June 1, 2007, AT&T "will make its disaster recovery capabilities available to facilitate restoration of service in BellSouth's in-region territory in the event of an extended service outage"
- The merged company will continue to offer UNEs and colocation service without seeking an increase in state-approved rates
- AT&T will implement a service quality measurement plan for special access like the one in the SBC-Ameritech merger conditions
- The company "shall initiate ten new trials of broadband Internet access service using 2.3 GHz or 2.5 GHz spectrum by the end of 2007" with at least five of those trials conducted in BellSouth's territory
- The company will offer ADSL service to customers "without requiring such customers to also purchase circuit switched voice grade telephone service."

Complete details regarding Copps and Adelstein's concerns have not been released, but information has slowly been trickling to the media as merger talks intensify. According to *Communications Daily*, one of the primary issues is the potential divestiture of 2.5 GHz and 2.3 GHz spectrum held by BellSouth in the Southeast. Clearwire is one major proponent of a divestiture, arguing that an AT&T/BellSouth merger without it would make it incredibly difficult for competitors to build a viable, nationwide network.

A significant amount of discussion has also revolved around net neutrality, which ironically was an item on the same FCC meeting slated to contain the FCC's merger decision. AT&T stated it will agree to the same net neutrality conditions imposed by the Commission on the SBC/AT&T merger – essentially an agreement to abide by the FCC's four net neutrality principles.

This is not sufficient for most proponents of net neutrality. "It's Our Net," a coalition of net neutrality supporters, is lobbying for the addition of a fifth principle concerning the nondiscriminatory treatment of applications, content and services. If the impasse between the Commissioners remains status quo, it is quite possible that many more conditions will be imposed for an agreement to be ironed out.

A violation of historic proportions?

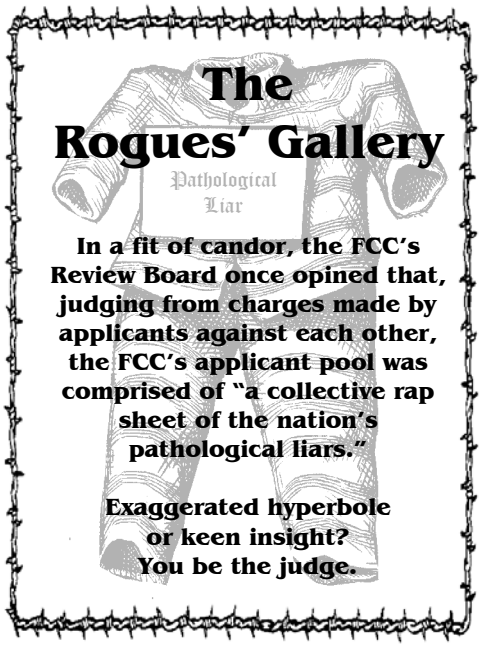
FCC Fines For Failure To Comply With Historic Preservation Requirements

By Donald J. Evans
evans@fhhlaw.com
703-812-0430

We have been beating the drums in these pages for some time about the need for communications facilities constructors to be mindful of the new historic preservation requirements that went into effect about a year and half ago. The now not-so-new rules require anyone constructing a tower or collocating a tower on an existing building to jump through some fairly high hoops in order to ensure that no adverse effect on historic properties is caused by the communications facility. Among other things, you must send notices to potentially affected Indian tribes, check the subsoil of the construction site for historic material, review the impact on nearby historic properties within sight of the tower, and provide extensive back-up information to the local state historic preservation office in order to get their blessing for the proposed construction – all before you initiate construction. These requirements can be especially burdensome on cellular or other geographically licensed operators who build scores of transmitter sites. We have been waiting for the FCC to catch someone in a failure to navigate these straits, and recently they did.

It seems that PCS carrier T-Mobile was planning to affix a 12-foot antenna to the top of a church steeple in Philadelphia. Although this was obviously not new construction, the building was more than 45 years old, and under those circumstances the rules require a historic preservation evaluation to be performed prior to initiating construction. This is true despite the fact that the 12-foot height addition would not even have merited FAA consideration.

(Continued on page 11)



But how will he sign the check?

Application "Executed" By Non-Existent Person

By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440

It's getting hard to find new ways to tick off the FCC, which has pretty much seen it all. But C5 Communications seems to have pulled it off.

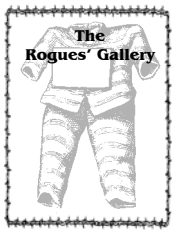
When C5 filed applications for temporary authority to operate two satellite earth stations, it signed them with the name "Noel Imitz." The problem? There is no such person. C5 created the name (to sound like "no limits") for handling inquiries from the public. Apparently someone put that name on the applications by mistake.

The FCC denied the applications, so it cannot claim to have relied on anything the fictitious Mr. Imitz might have said. There is no allegation that anything in the content of applications was untrue. The FCC accepts C5's claim of no intent to deceive the agency. Indeed, C5 itself voluntarily reported the mistake.

But the FCC nonetheless assessed a fine of $17,500 against C5 for the offense of "provid[ing] material factual information that is incorrect."

Certainly we can't have applicants routinely signing their paperwork with made-up names. The FCC's main assurance of truthfulness is the word of the person signing – backed up, of course, by the prospect of a perjury charge. But here, where the mistake was inadvertent and no harm resulted, the fine seems out of proportion. Having assessed C5 close to the legal maximum, how will the FCC respond when a real person signs off on a deliberate abuse of the truth?

Go, and Sin No More!



FCC Lets Wrong-doing Retailer Off The Hook

By Donald J. Evans
evans@fhhlaw.com
703-812-0430

Frequent readers are probably weary of a common refrain sounded in these pages: the FCC tends to throw the book at miscreants who ignore its inquiries regarding potential or actual rule violations. Quite frequently, it seems as though a violator is fined more for its lack of respect than its actual misdeeds. This lesson was driven home yet again in the recent case of a company called LightObject.

LightObject had been ratted out for selling certain wireless cameras on its website and on its EBay site. It was undisputed that the cameras were not only *not* certificated by the FCC as required, but they were transmitting in a band which is restricted to aeronautical navigation use. They could never be certificated.

When called upon by the FCC to account for its behavior, LightObject admitted its offense, said it only resold and did not manufacture the offending product, claimed that it had only sold 20 of the products, and discontinued the sale of the product immediately. For responding fully and honestly to the FCC enforcement staff and effectively throwing itself on the staff's mercy, LightObject was rewarded with a stern warning that if it sold the offending object again, it would be fined $11,000 per violation. Since LightObject had also admitted that it ceased to exist as a business entity last year, there seems to be little likelihood of future violations.

We should note that the FCC is required by its rules to first issue a warning to offenders who are not directly licensed or certificated by the Commission. So the "we'll-let-you-off-with-a-warning" result may have been a product of that requirement rather than the offender's responsive attitude. Still, we continue to observe that for those unfortunate enough to be caught in the FCC's dragnet, stonewalling rarely helps their cause. Hell hath no fury like an administrative agency ignored.

***(Historical Preservation** - continued from page 10)*

T-Mobile dutifully hired a consultant outfit to perform a historic analysis, and the consultant sent off notices to Indian tribes, and local planning and historical agencies. All of these contacts concurred with T-Mobile that the addition to the steeple would not have any adverse effect on historical properties – either the church itself or nearby buildings. The problem? T-Mobile had gone ahead and constructed the tower *before* it completed the evaluation process and before the state historic preservation office (SHPO) had signed off on the construction. T-Mobile realized its mistake about a month later and informed the SHPO and the FCC of its error. It acknowledged its mistake but said that it had immediately notified the authorities and it was providing further environmental training for its employees to be sure this did not happen again.

After mulling it over, the FCC's Enforcement Bureau decided that a base fine of $7,000 should apply to this kind of offense. This base level is then subject to adjustment upward or downward based on the particular circumstances. Here the FCC doubled the base amount to $14,000 simply because T-Mobile is big, but then reduced that amount to $11,000 because the company had voluntarily disclosed its error and had taken immediate steps to correct the problem even before the FCC began investigating. On the same day as the T-Mobile action, another cellular company, Panhandle, was fined by the FCC for a similar failure to undertake the historic preservation review prior to construction, though its fine was lower due to its smaller size.

(Continued on page 16)

FCC BPL decision appealed to a higher power?

ARRL Looks For Short Circuit From the D.C. Circuit

By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440

An organization of amateur radio operators has asked the U.S. Court of Appeals for the D.C. Circuit to review the FCC's rules on Broadband over Power Line (BPL).

This is hardly the first time the amateurs have spoken out against BPL. Along with their association, the Amateur Radio Relay League (ARRL), amateurs filed about 7,000 comments against BPL during the FCC's rulemaking. Virtually all of those claimed BPL would cause harmful interference to amateur operations. Some of the comments included well-reasoned engineering studies. Many more were cut-and-paste jobs from the ARRL website. And a handful expressed hostility toward BPL in terms that went beyond reasoned argument.

Having run out of options at the FCC, the ARRL has asked the federal appeals court in the District of Columbia to overturn the rules.

BPL uses radio-frequency signals to conduct broadband data along power lines. The amateurs insisted that much of this energy would leak off, transforming a city's power system into a huge antenna that would shut down amateur reception over many square miles. BPL proponents countered that only an insignificant amount of energy would leak, and gave the FCC data showing effects only a few feet around each BPL-equipped power pole.

The FCC agreed with the industry that extensive interference was unlikely, but nonetheless instituted protective measures. Among other precautions, a BPL provider must publicize the locations of its installations and the frequencies it uses, and must provide a point of contact for reporting interference. It must also have the capability to remotely turn down any frequencies on which interference does occur and, if that does not fix the problem, must shut off the offending unit.

That was not enough for the amateurs, who asked the FCC to rescind the rules pending further tests. The BPL industry generally defended the rules, but asked for certain changes. The FCC said no to most of the requests from both sides.

Now, having run out of options at the FCC, the ARRL has asked the federal appeals court in the District of Columbia to overturn the rules. The ARRL's single court filing so far does not say exactly which rules it challenges. But a news release on the ARRL website does. And the two rules mentioned there address only a small part of the issues the amateurs have raised in connection with BPL.

One of the rules cited is highly technical: a mathematical correction for measurements of radio-frequency signals taken at various distances from the power line. The other rule says that BPL providers need only turn down particular frequencies by so much, and need do no more, in responding to complaints of interference into mobile amateur equipment – even if those measures do not fully resolve the problem.

There is a strong legal presumption as to both rules that the FCC got it right. The applicable precedents require the court to uphold the FCC so long as it followed the correct procedures, and its result is not irrational.

On the technical point, the ARRL calls the FCC "clearly, demonstrably and inarguably wrong." But the FCC can be wrong and still win, so long as it reached its wrong result by the right methods and has some minimal justification in the record. After all, this is an engineering question, and the court has no engineers. The most it can do is to send the question back to the FCC for a second look. In the end, it will almost certainly defer to the expertise of the agency

(Continued on page 13)

Whistleblowers anonymous

Identity Of Confidential Complainants Withheld From Complaint Target

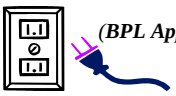
By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440

When the FCC proceeds against manufacturers or vendors for an equipment violation, often the impetus is a competitor complaining to the FCC. The target of one such proceeding, Rocky Mountain Radar, filed a request under the Freedom of Information Act (FOIA) for copies of the complaints, possibly in an effort to ascertain who had blown the whistle.

If the FCC ultimately has to disclose the complaints, it could find that a major source of information on violations quickly dries up.

The FOIA statute requires disclosure of most agency records. But there are exemptions. One of those covers records compiled for law enforcement purposes, where disclosure would interfere with enforcement proceedings. The FCC cited this passage in denying Rocky Mountain Radar access to the complaints it sought.

The wording of the order, however, suggests the exemption may no longer apply after the investigation is complete. If the FCC ultimately has to disclose the complaints, it could find that a major source of information on violations quickly dries up. Complainants desiring anonymity may wish to keep this in mind before throwing a stone through the Commission's window with their complaint attached.



***(BPL Appeal** - Continued from page 12)*

that Congress created to make just these decisions.

The ARRL has a more specific challenge to the rule that limits a BPL provider's obligation to correct interference to a mobile amateur operator. Long-standing law prohibits an agency like the FCC from adopting a rule without first giving public notice of the proposed rule and an opportunity to comment. The ARRL says this particular rule came without the required notice, and so is invalid. But the courts allow adoption of a rule that is different from the rule proposed, so long as it is a "logical outgrowth" of the proposal. Here, too, the agency gets the benefit of the doubt. And even if it loses, for the FCC to formally propose the rule, receive comment, and re-adopt the rule would take just a few months.

The ARRL has indicated it may also question this rule as running counter to a long-established principle at the FCC: ordinarily a licensed operator, such as an amateur, is entitled to protection from "harmful interference" caused by an unlicensed service such as BPL. For non-public-safety services, such as amateur radio, harmful interference is defined as that which "seriously degrades, obstructs, or repeatedly interrupts" communications. This language suggests that a BPL provider need not correct interference that is only minor or transitory.

Mobile amateur operations use smaller antennas than most fixed installations, so their reception is generally not as good. The FCC decided that an incoming amateur signal weak enough to be affected by a BPL device, after the device has been turned down, would probably be unreliable even in the absence of BPL, and hence is not be entitled to protection. Besides, said the FCC, a mobile operator receiving interference can just move away from the power line. ARRL may try to argue that the FCC has misconstrued the term "harmful interference." But here, again, the court is likely to give the FCC considerable deference on how to interpret its own rules.

Although the official order does not say so, the FCC may feel this rule is necessary to the commercial viability of BPL. Some amateurs have made clear that they are vehemently opposed to BPL as a matter of principle. The FCC may fear that some of those licensees might drive around looking for BPL interference to report, in hopes of shutting down the BPL system one pole at a time.

In the end, the ARRL has only limited prospects for

(Continued on page 16)

(**Telecom Legislation** - *Continued from page 3)*
medium on the planet claim that the FCC should have authority to ensure it remains open for everyone.

The Advanced Telecommunications and Opportunities Reform Act includes a "Consumer Internet Bill of Rights" which allows all Internet subscribers access to content on a non-discriminatory basis. Internet users must be able to purchase service without the requirement that the service be "bundled" with other telecommunications services. The ultimate goal is to make sure that access to high bandwith sites does not require that the operators of those sites pay higher rates to their servers (and possibly pass the cost onto consumers). For the time being, however, these remain recommendations; the FCC will still have no authority to enact new rules to effect these policies.

☑ *Video Franchising*: The bill offers the opportunity for newcomers to begin providing multichannel video providers (mainly cable and satellite services) by streamlining and relaxing the franchise application process. The FCC is required to promulgate a new form that will allow a local franchising authority to grant or deny an application within ninety days (the House version of the bill allowed direct application to the FCC). If not denied in that time, the applicant can begin offering service. Exclusive franchises are prohibited and new customer service protections will go into effect to promote real competition. Finally, "redlining" – discriminating against customers on the basis of race, religion, or income -- is not allowed. This will ensure that franchisees do not offer service to only the wealthiest areas of their franchise location.

Another major change with regard to video service is the permission of over-the-Internet video services known as "IP-enabled video service." However, the FCC cannot regulate these services.

Other issues of note include:

☑ *Universal Service Fund Reform*: The bill directs the FCC to require those providing telecommunications services, including broadband Internet and IP-enabled voice service, to contribute to the Universal Service Fund ("USF"). The FCC must develop a mechanism that will ensure that contributions are neutral in nature and based on intrastate, interstate or international revenue, working phone numbers, or network capacity. State USF programs will be continued and Native American libraries will begin to participate in the USF program.

Distribution mechanisms are also addressed. Telephone carriers that receive universal service fund support must begin offering broadband service within five years. This is made possible by the commitment of $500 million per year to provide broadband service to unserved areas. The requirements for receipt of funds by telephone carriers are heightened in the areas of service provision and fraud prevention.

☑ *Wireless Innovation*: The Wireless Innovation Act of 2006 is included to free up spectrum for the proposed increase in wireless broadband service. It seeks to take unused radio spectrum, currently known as "white space," and use it for unlicensed radio devices. The FCC must enact rules to ensure that these unlicensed devices do not cause harmful interference to licensed spectrum users. The FCC is also directed to reconfigure spectrum to allow for up to 6 MHz to be used by smaller licensees in rural areas.

☑ *Municipal Provision of Broadband*: The bill incorporates the "Community Broadband Act of 2005" which allows municipalities to provide advanced telecommunications services, including broadband Internet access, as long as they do not discriminate against competing private carriers.

☑ *Internet Tax Moratorium*: The moratorium on Internet access taxes which has been renewed periodically is made permanent.

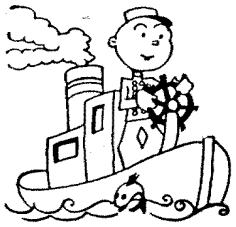
☑ *Wireless Tax Moratorium*: A new moratorium on wireless telephone taxes is created for three years.

☑ *DTV Transition*: Measures are taken to hasten the transition to digital television which is currently scheduled to occur in February 2009. Most of these involve regulations which will drive consumers toward digital equipment. An advisory committee known as the "DTV Working Group" must also be

(Continued on page 15)

Port Security Act brings EAS to CMRS

You Have Been WARNed



By Patrick Murck
murck@fhhlaw.com
703-812-0476

On October 13, 2006 the Port Security Act of 2006 was signed into law and included in that piece of legislation was an amendment called the Warning, Alert and Responsive Network ("WARN") Act. The WARN Act extends Emergency Alert Service ("EAS") provisions to CMRS providers. In addition, the bill requires the FCC to establish a CMRS Alert Advisory Committee, which must hold its first meeting by December 12, 2006.

The WARN Act changed dramatically from the initial draft legislation to the final passed legislation. The biggest change was limiting the scope of the Act to CMRS providers, as opposed to other types of communications services like Internet Service Providers. EAS and implementation of the WARN Act is being handled at the FCC by the newly formed Homeland Security Bureau.

For CMRS providers, the Act requires them to "elect" whether or not they will participate in delivering EAS services to their customers. This election must be made within 30 days of the first FCC order on the subject (which must occur within 120 days from when the bill was signed into law on October 13). If a CMRS provider elects not to provide EAS services they must give "conspicuous notice" to consumers at the point of sale. For those providers who elect to provide EAS, they cannot charge a fee for the service.

Currently the Homeland Security Bureau is seeking nominations to fill the CMRS Alert Advisory Committee, as required by the WARN Act. Additionally, the Act requires the FCC to regulate under the WARN Act based on the recommendations of the CMRS Alert Advisory Committee, which makes the current nomination process important for effected industries. It is also somewhat unusual that the FCC is, to a degree, bound by the Committee's recommendations.

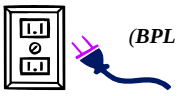
The WARN Act also affects noncommercial television and public television broadcasters. These broadcasters will be required to use their transmission facilities to broadcast "geographically targeted" alerts to CMRS subscribers. This obligation will begin 90 days after the FCC establishes technical standards for the EAS broadcasts. Affected broadcasters are entitled to receive "reasonable" compensation for their costs associated with these requirements. They will be able to recover there costs through NTIA at the Commerce Department.

***(Telecom Legislation** - continued from page 14)*
created.

As noted above, many on Capitol Hill are confident that some form of this legislation will pass – even if no one is willing to guarantee passage or offer specific guidance as to what can be done to ultimately effect passage. On September 19 more than 100 companies joined together on a letter to Senate Majority Leader Bill Frist (R-TN) and Minority Leader Harry Reid (D-NV) asking for this bill to be considered during any "lame duck" session in November. These companies, however, fear that the net neutrality provisions will kill the legislation. The bills' prospects are further dimmed by the fact that Sen. Daniel Inouye (D-HI), Ranking Member of the Senate Committee on Commerce, Science and Transportation, opposes the current version of this legislation as a danger to consumers, despite endorsing the earlier Senate version of this bill. Senator Inouye's about-face demonstrates the very high hurdle facing telecommunications reform legislation in 2006. Indeed, another high-ranking Minority Member of the Committee recently opined that there is absolutely no chance the bill will pass in November – or even next year!

Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Arlington, Virginia 22209

First Class



***(BPL Appeal** - Continued from page 13)*
success on the two issues that make up the announced target of its appeal. And while the appeal proceeds, BPL providers continue to offer service and build out systems. No plausible outcome of the case is likely to change that.

Meanwhile, back at the FCC, the Commission issued a ruling clarifying that BPL – including the underlying transmission function – is an "information service" (rather than a telecommunications service). This puts BPL on the same footing as DSL and cable modem service as being exempt from common carrier regulation. In other words, a consumer having complaints about BPL service cannot look to the FCC for a sympathetic ear, but instead has the option of signing up for cable or DSL service instead. And *vice versa*.

***(Historical Preservation** - Continued from page 11)*
In the scheme of regulatory violations, these offenses seem like minor ones – not only was there no actual adverse impact on any protected historic properties, but the infractions were inadvertent and promptly disclosed. Ordinarily, this would probably have been a good situation for a "no-call" by the FCC refs. The FCC may, however, have been looking for an opportunity to make an example of someone in order to send a warning signal to the industry. T-Mobile and Panhandle just happened to be in the wrong place at the wrong time.

Complying with the historic preservation rules can be daunting and frustratingly slow. FHH is therefore establishing relationships with qualified historical experts to assist us and our clients in avoiding the problem that T-Mobile and Panhandle ran into. The experts can provide the needed certification of no adverse effects to historic properties (or help in mitigating adverse effects to an acceptable level). We remind potential constructors that it is important to begin the historic evaluation process well before your proposed construction date since the lead time to get feedback from the tribes, the SHPO's, and sometimes the FCC can be weeks or even months.