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FHH Telecom Law

Current Issues in Telecommunications Law and Regulation December 2007

USF pay-outs to ALTELL, Dobson capped

Commission Conditions Consents, Caps Cost Contributions

By Ron Whitworth
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In late October, Chairman Kevin Martin circulated three proposals designed to impose a temporary cap on Universal Service Fund (USF) payments, as recommended by the Federal-State Joint Board on Universal Service (Joint Board) in May. The Joint Board recommended that the Commission take "immediate action to rein in the explosive growth" in high-cost USF support disbursements. The federal fund subsidizes telecommunications and Internet connectivity in rural and underprivileged areas.

But before Martin's proposals could be brought to a Commission vote, Martin spearheaded the placement of conditions on the purchase of two massive wireless providers, ALLTEL Corporation (ALLTEL) and Dobson. ALLTEL was purchased and privatized for $27.5 billion by TPG Capital and Goldman Sachs Capital, while AT&T acquired Dobson for $2.8 billion.

In issuing its consent to the purchases, the Commission imposed conditions on both companies, requiring them to accept an interim cap on high-cost, competitive Eligible Telecommunications Carrier (ETC) support. The conditions stated that the cap will be applied "until fundamental comprehensive reforms are adopted to address issues related to the distribution of support and to ensure that the universal service fund will be sustainable for future years."

The interim cap places both companies at the level of support that they received as a competitive ETC in 2007, measured as of the end of June, 2007, on an annualized basis. A limited exception was offered on both conditions, exempting ALLTEL and Dobson from the cap to the extent they: (1) file cost data showing their own per-line costs of providing service in a supported service area, and (2) demonstrate that their

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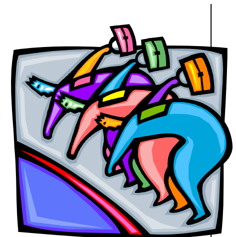
Jockeying for position before the starting gun

700 MHz Bidders On Their Marks



By Donald Evans
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The 700 MHz auction took another step toward the starting gun in early December when a number of filers submitted their "short form" applications to participate. Although the auction will not begin until January 24, 2008 and upfront payments need not be deposited until January 4, December 3 was the last day to declare your intention to participate.

FCC anti-collusion rules for this auction preclude disclosure of which markets the applicants have expressed interest in, though the FCC has now revealed who the applicants are. Google, which had been coyly sitting on the fence for some months, declared its intention to participate, as did Cox, while other potential players like Nextel, Time Warner and Comcast bowed out. Interestingly, and very annoyingly for the bidders, although they are bumping against each other in the starting gates, the anti-collusion rules preclude them from communicating with each other in any way that might reflect on their auction strategies until this auction (and, if necessary, the follow up auction) are completed. This should cast a pall on holiday party chitchat among bidders and their representatives.

As has become *de rigueur* for this service, last minute adjustments to the rules were issued, prompting petitions to delay the deadline. The FCC had already granted some relief to prospective D Block bidders by reducing the deficiency payment for a defaulting D Block bidder from 15% to 10%. It has now gone on to permit winning D Block bidders who are "Designated Entities" (*i.e.*, companies with less than $40 million in revenue) to wholesale their spectrum to other users (with some limits). These steps seem to corroborate our theory that the original rules had made the D Block unattractive to prospective bidders, and these tweaks

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Car 54, where are you – redux

Revised E-911 Standards and Benchmarks Released

New levels phase in over next five years

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As we reported in last month's *FHH Telecom Law*, the FCC set new Phase II E-911 benchmarks. The Commission has now released the full details of that order and we have them for you here.

By September 11, 2012, carriers will have to meet the following Phase II E-911 standards as measured at the PSAP service area level: (a) for network-based technologies 100 meters for 67% of calls and 300 meters for 95% of calls; and (b) for handset-based technologies 50 meters for 67% of calls and 150 meters for 95% of calls. These are the same substantive standards (for the time being) that have applied for several years, but establishing compliance at the PSAP level will be much more difficult for carriers. The new rules have already been challenged in court by the industry association and individual carriers.

The Commission also set up annual interim benchmarks that carriers must meet along the way to full compliance. They are:

- by September 11, 2008, carriers will have to meet the Phase II E-911 standards within each Economic Area the carrier serves;
- by September 11, 2009, carriers must file a status report describing its efforts to implement Phase II E-911;
- by September 11, 2010, carriers will have to meet the Phase II E-911 standards within each Metropolitan Statistical Area and Rural Service Area the carrier serves. Additionally, by this date carriers will have to demonstrate PSAP-level compliance within at least 75% of the PSAP's in their service area and must meet a reduced accuracy requirement (within 50% of the 2012 requirements) for *all* PSAP's in their coverage area; and
- by September 11, 2011 carriers must again file a status report describing its efforts to implement Phase II E-911.

It should be noted that for all the PSAP-level requirements codified in this new rule, they only apply to PSAP's that are at the time capable of receiving Phase II E-911 information.

It's almost 2008 -
Do you know where your proceedings are?

Due dates for filings in FCC proceedings are subject to last-minute change. Call us any time for current information.

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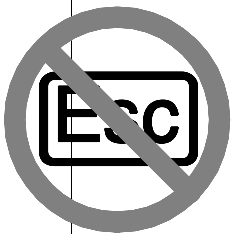
Gated communities and trailer parks alike



FCC 86s ESCs in MDUs

By Paul J. Feldman
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The FCC recently enacted rules prohibiting the enforcement by cable operators of exclusivity clauses in Exclusive Service Contracts (ESCs) in multiple dwelling units (MDUs) such as apartment buildings, and in other real estate developments. This prohibition applies to *existing* ESCs, as well as to future agreements. In regards to the existing agreements, only the exclusive service provisions of the agreements will be unenforceable, while the remainder of the agreement would remain untouched by this action.

Beyond this general principle, the text of the Order clarified certain details:

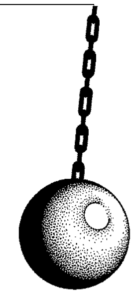
- The prohibition only goes to clauses that prohibit access to the premises of the MDU by competitors ("building" exclusivity clauses). In contrast, clauses that grant exclusive use to the incumbent of the existing wires in the MDU ("wire exclusivity") or prohibit the MDU owner from marketing the services of a competitor ("marketing exclusivity") are not prohibited at this time. However, the Commission issued a Notice of Proposed Rulemaking (*NPRM*) that does seek comments as to whether exclusive marketing agreements are harmful to competition and should be prohibited.

- The other major issue that was clarified was the scope of the "other real estate developments" covered under the prohibition. We already knew that MDUs included apartment buildings, cooperatives and condominiums. For purposes of this Order*,* the FCC expanded this definition to include: gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. The FCC explicitly excluded the following from the prohibition: time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons,

(Continued on page 8)

Board to FCC: Sweeping changes are in order

Extreme Make-Over: USF



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The Federal-State Joint Board on Universal Service (Joint Board) has issued a Recommended Decision (RD) urging the FCC to address the long-term reform issues facing the high-cost universal service support system and to make fundamental revisions in the structure of existing Universal Service mechanisms. The Joint Board recommended a number of sweeping changes in the current USF support regime:

☑ Establishing three separate "funds" with distinct budgets and purposes: one to support wireline voice services ("Provider of Last Resort Fund"), one to facilitate construction of wireless services in unserved areas ("Mobility Fund"), and one to facilitate construction of new broadband services to unserved areas ("Broadband Fund");

☑ Eliminating the "identical support rule" under which competitive carriers receive support based on the incumbent's cost of service, rather than on the competitor's cost of service. Savings from elimination of that rule will provide funds for the Mobility and Broadband Funds. While that may sound like taking money from one pocket and putting it in the other, the RD suggests that rather than providing for on-going support of operations, the primary objective of the Mobility and Broadband Funds should be the expansion of geographic coverage, and support from these funds should therefore be targeted for capital spending for new construction in unserved areas;

☑ Imposing a cap on the total amount of high-cost funding at $4.5 billion, which is approximately equal to the 2007 level of high-cost funding;

☑ Transitioning away from existing funding mechanisms and transferring some or all of the savings to the new Funds and mechanisms described above. During the transition, wireless competitive

(Continued on page 9)

First-Time Class A Violator Fined $63,000 For Failure To Verify

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Recently the FCC imposed a fine of $63,000 on a company that, it said, marketed Class A digital devices without first having them "verified" for compliance, as the FCC rules require. The action is unusual in two respects. First, Class A devices rarely become enforcement targets. These are devices marketed for commercial or industrial use which, by their very nature, are unsuited to consumer applications. Here the offending products were rack-mounted computer gear – not sleek high-end audio racks, but the kind used in back-room installations. These have all the esthetic appeal of the back of a refrigerator. They don't go with anyone's living-room furniture.

An FCC rule mandates that most violators receive a citation – a formal warning – before they can be fined. Though such a warning was apparently required here, the FCC skipped that step entirely.

"Verification" of Class A devices like these consists of three steps: (1) test the product for compliance with FCC rules; (2) put the test results and certain design data in a drawer; and (3) close the drawer. That's it. No submission to the FCC; no special labeling; no paperwork to the customer. Enforcement actions involving Class A devices are unusual because compliance is easy, and violations are hard to spot. An un-verified device looks just like one that has been verified. In this case, the FCC tells us it launched its investigation because it "received a complaint," which usually means a phone call from a competitor. Without those phone calls, the FCC has no practical way to enforce the verification rules.

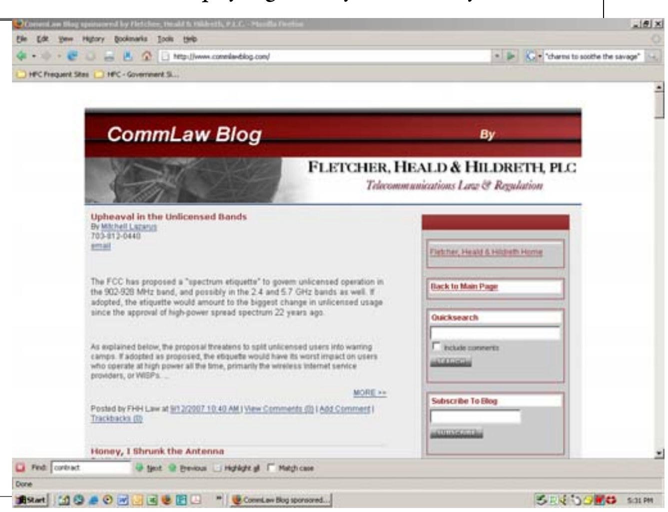
The second reason this case raises eyebrows is an FCC rule mandating that most violators receive a citation – a formal warning – before they can be fined. There are exceptions for FCC licensees and other recipients of FCC authorizations, who can be fined without a warning, on the theory that they should know better. And no warning is necessary if the offending activity is one for which a license, permit, or certificate is required but wasn't obtained. Here, though, the defendant was not (and need not have been) a licensee, and the offense was a simple lack of verification, which does not entail a license, permit, or anything of the kind. A warning citation would therefore seem to have been a necessary prerequisite to a fine; yet the FCC skipped that step entirely.

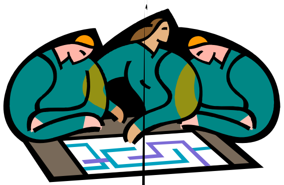
Companies that manufacture or market Class A equipment can easily avoid becoming featured in one of our articles about recipients of FCC fines. All it takes is having your products tested, and keeping your records in good order. True, there are costs involved. But compliance is a lot cheaper than paying fines to the FCC. Or paying a lawyer to bail you out.

Late Breaking News???

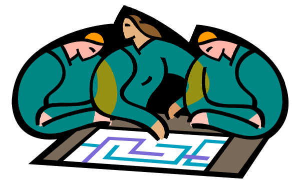
If you're looking for information and insight about late-breaking developments, check out our commentary on the Fletcher Heald blog at **www.CommLawBlog.com**. (See the screen grab at right for a sample view.) We cover the gamut of communications issues – plus, if you feel so moved, you can submit your own views for posting.

We've had nearly 20,000 visits to our site already – you can come to the party, too!!!





Feds Forge Forbearance Reform Formulation



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On November 30, the FCC issued a Notice of Proposed Rulemaking (*NPRM*) seeking comments on reforming the Title II forbearance procedures. Because of the numerous petitions for forbearance which are pending, the Commission is moving expeditiously to complete this rulemaking process. The comment period ends on December 30.

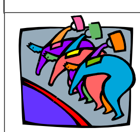
Forbearance means that the FCC can decline to apply what would otherwise be a governing rule. This regulatory flexibility was added as a part of the Telecommunications Act of 1996. It can be applied when the Commission determines – usually upon the request of a regulated entity – that the regulation is not needed to protect consumers or ensure just and reasonable rates and practices by carriers, or when it would otherwise promote the public interest. As it is now, if the Commission does not act on a petition for forbearance within a year (plus a potential, one-time, 90-day extension), it is deemed granted. This unique provision of the statute – that a forbearance petition is deemed granted if not acted on within this time frame – has been a godsend to long-suffering regulatees who usually must sit and wait, often for years, for the FCC to act on a particular request. The statute in this case forces the Commission to do something.

This provision of the law has drawn criticism from some legislators and led to calls to change the law.

Interestingly, the U.S. Court of Appeals for the D.C. Circuit recently upheld the Commission's "grant" of a forbearance petition when the grant was actually a *failure* to act. This somewhat unlikely set of circumstances arose as a petition for forbearance filed by Verizon was approaching the one-year deadline and the President hadn't appointed a fifth Commissioner. The four Commissioners were evenly split on whether to grant the petition. The result was a 2-2 deadlock. The issue before the court was whether this constituted Commission action or not on the petition, and the court held that it did not. Therefore the petition was deemed granted.

The Commission is specifically seeking comments on:

- Whether new rules should govern the format and content of forbearance petitions;
- Whether new notice and comment rules, such as default comment periods and time limits on *ex parte* filings, should be adopted; and
- Whether other rules would facilitate the participation of state commissions, as well as other parties, in forbearance proceedings.



(700 MHz Auction - Continued from page 1)

help somewhat in that regard.

At the same time, the FCC granted a license to the adjacent Public Safety licensee whose system the D Block winner must build out. The Public Safety licensee has provided guidance on what it expects of the D Block winner, which at least gives prospective bidders some measure of comfort about what they are getting into. Inevitably, petitions challenging some of these actions have been filed by competitors. Frontline filed a last minute request to delay the filing deadline by a week, which the FCC ignored and thus effectively denied.

Meanwhile, back at the court, all of the appeals we mentioned in our last issue remain pending and unresolved, as do the various petitions for reconsideration which were filed at the FCC in August and September. We do expect the Commission to deal with those petitions prior to the auction, and probably before the upfront payment deadline at the end of the month. The FCC's disposition of those petitions may prompt further appeals. Despite these uncertainties — or perhaps because of them — interest in the auction remains intense. If things run true to form, we can expect several more strange twists and turns in the auction process before bidding opens in January. Stay tuned.

Re-opening Pandora's Box?

Rate Uniformity Proposed In Pole Attachment Overhaul

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In 1978, when cable service was young and growing fast, Congress authorized the FCC to regulate "pole attachments": the rates that owners of poles (usually electric utilities) could charge cable systems for space to string their wires, and the conditions under which utilities could refuse to accommodate them. The FCC adopted rules in a series of vehemently contested orders, then refereed hundreds of disputes over how to apply the resulting formulas.

By the time of the 1996 Telecommunications Act, cable service had grown and matured. Various telecommunications providers, some seeking to compete with cable, also wanted pole space. The 1996 Act accordingly updated the FCC's authority. In yet another set of contentious proceedings, the FCC expanded its reach over poles to encompass any duct, conduit, or right-of-way owned or controlled by a utility. It increased the class of those entitled to attachments to include not only traditional telecommunications carriers, but wireless carriers as well. And, in accordance with the 1996 Act, it separately regulated pole attachment rates for cable service and for telecommunications service, including wireless.

The FCC recently took the lid off the pot once again with a Notice of Proposed Rulemaking that opens another overhaul of the pole attachment regime. The FCC notes that cable companies increasingly offer telecommunications services, and vice versa, thus calling into question the wisdom of separate rules and rates for the two categories. The FCC proposes a new uniform rate for broadband services regardless of platform, somewhere in between the current cable and telecom rates.

As of press time, comment and reply dates have not been established.

(USF Contribution Caps -Continued from page 1)

networks are in compliance with section 20.18(h) of the FCC's rules specifying E911 location accuracy as measured at a geographical level defined by the coverage area of each Public Safety Answering Point (PSAP).

These unusual conditions were met with some criticism, including Democratic Commissioners Michael Copps and Jonathan Adelstein. The Commissioners indicated that the conditions were improper, given that the Joint Board was busy working on recommendations on broader reform, while the Commission had an open proceeding to address how carriers must implement PSAP-level accuracy. Meanwhile, wireless carriers began a comprehensive lobbying effort to avoid the cap, arguing that they were being unfairly targeted by the Commission in addressing USF cap issues.

Some wireless industry representatives have been outspoken about Martin imposing conditions on just one segment of the industry, particularly one that is growing rapidly and is increasing its coverage into more remote rural areas. These conditions have the potential to thwart those efforts.

Copps, Adelstein and even Republican Commissioner Robert McDowell have expressed concern about the effects of imposing the conditions on these mergers before USF reform and E-911 location rules are sorted out on an industry-wide basis.

"[T]he condition prejudices the Commission's open docket considering universal service support distribution," McDowell wrote in a separate statement in the ALLTEL *Order*. "I also question whether we have thought about how the actions today may skew future treatment of similarly-situated parties."

It remains to be seen whether the Joint Board's recommendation will be implemented, with a blanket cap being imposed on all USF funds. But through Martin's imposition of these interim conditions, the Commission has already taken major steps to address the Joint Board's concerns.

Court Rejects FCC Limitation on "Telecommunications Service" Category For Certain Prepaid Cards

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The U.S. Court of Appeals for the D.C. Circuit has affirmed in part and vacated in part the Commission's 2006 decision classifying IP-transport prepaid telephone calling cards and menu-driven calling cards as "telecommunications services."

"IP-transport cards" use internet protocol technology to transport part or all of a phone call. Because part of the call utilizes IP technology, AT&T argued to the FCC that IP-transport cards constitute an "information service", as opposed to a "telecommunications service" – this despite the fact that the Commission had previously ruled that similar so-called "IP-in-the-Middle" calls were NOT information services. "Menu driven cards" use a menu-driven interface through which users can either make a call or access several types of information. AT&T had argued to the FCC that the offering of information (such as weather or news) through either a menu or an operator qualified it is an "information service." Both of these arguments were intended to exempt AT&T's card services from the obligation to pay the access charges, Universal Service Fund contributions, and other fees which are associated with telecommunications services but not information services.

> *AT&T's arguments were intended to exempt AT&T's card services from the obligation to pay access charges, Universal Service Fund contributions, and other fees.*

The FCC saw through the ploy rather easily, and there was no dispute about the correctness of the FCC's classification of both types of card as "telecommunications services." But since that classification meant that issuers of the cards were subject to various charges, the date on which the classification would be applied was a matter of some consequence.

In its 2006 decision, the Commission determined that the "telecommunications services" classification would be retroactive for IP-transport cards but prospective only for menu-driven cards. In other words, all IP-transport cards – including those which had been issued prior to the FCC's 2006 decision — were to be treated under the newly-announced classification. Menu driven cards, on the other hand, would be subject to the new classification only if the cards were issued after the FCC's decision.

The Court upheld the retroactive application of the ruling with respect to IP-transport cards, but decided that the FCC had not articulated any sound basis for not also making the ruling retroactive with respect to menu-driven cards. Accordingly, the Court vacated the FCC's order "to the extent that it foreclosed application of its substantive ruling in the calculation of access charges before the Order's issuance." This opinion underscores the crucial difference between adjudicatory decisions and rulemaking decisions in administrative law: adjudications (which deal with past conduct) are normally retroactive in effect, while rulemakings (which deal with changes in the regulations) are normally prospective. The Court's assessment of the case as an adjudication determined the outcome.

Getting Its ATC Together

Expansion of L-band and S-band Spectrum For Increased Terrestrial Use Considered

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The FCC is seeking comment on a proposal to expand the L-band and S-band spectrum in which mobile satellite service (MSS) operator Globalstar, Inc. is authorized to operate ancillary terrestrial components (ATC). ATC allows MSS operators to integrate terrestrial services into their satellite networks in order to augment coverage in areas where their satellite signals are rendered largely unusable due to terrain blocking. ATC operations reuse the MSS operators' assigned satellite frequencies terrestrially.

The proposed expansion would enable Globalstar to provide a higher-capacity ATC.

The Commission first authorized the implementation of ATC in a 2003 *Order*. ATC operations, however, were limited to the 1610-1615.5 MHz, 1621.35-1626.5 MHz and 2492.5-2498 MHz Big LEO (low earth orbit) bands. Subsequently, the Commission shifted the S-band ATC block to 2487.5-2493 MHz, so that ATC and the Fixed and Mobile services allocation at 2495-2500 MHz would not overlap.

In the instant Notice of Proposed Rule Making (*NPRM*), the Commission solicits comment on expanding the L-band and S-band spectrum in which Globalstar is authorized to operate ATC. Such an expansion would enable Globalstar to provide a higher-capacity ATC than would be possible with its current 11 megahertz ATC assignment.

The Commission has tentatively concluded that ATC is not feasible in the L-band spectrum Globalstar shares with Iridium at 1617.775-1618.725 MHz. The Commission also tentatively concluded that ATC cannot share spectrum with co-primary Fixed and Mobile services in the 2495-2500 MHz segment of the S-band. It seeks comment on what measures would be needed to protect services with which MSS shares the S-band.

Comments on the NPRM were due on or before December 19, 2007, with Reply Comments due on or before January 3, 2008.

***(MDU Exclusivity Ban** - Continued from page 3)*

halfway houses, hospitals, nursing and other assisted living places, and other group quarters characterized by institutional living, high transience and, in some cases, a high need for security.

- The FCC also clarified that to the extent a video provider is not a franchised cable operator, but is a common carrier or "open video system" provider, the prohibition applies to it as well. The Order does not apply the prohibition at this time to satellite operators or so-called "private" cable operators (who take programming down off of a satellite and then re-distribute it throughout an internal MDU network without ever crossing a public right-of-way). However, the *NPRM* seeks comments as to whether these sorts of entities enter into ESCs and whether the prohibition should be expanded to include them.

- While it was no surprise, the FCC explicitly stated that the prohibition on the enforcement of exclusivity clauses does not constitute a form of mandatory access for competitors to MDUs, and does not impose a duty on an MDU owner to allow multiple video providers within its premises. Mandatory access was never proposed here, and the FCC probably could not have justified such an action legally, even if it wanted to do it.

The prohibition on enforcement of building exclusivity clauses ***goes into effect 30 days after publication in the Federal Register***, which has not occurred yet. In its *NPRM*, the Commission seeks comments on the following issues:

(Continued on page 9)

(***Joint Board Recommendations*** *- Continued from page 3)*

ETCs would receive reduced levels of support under the identical support rule, but would be eligible to seek funding from the Mobility Fund. The Board anticipates that this transition will be revenue neutral, with about $1.0 billion of funding per year eventually being distributed through the new Mobility Fund. Since the overall fund size will be capped at $4.5 billion, any reductions in support for wireless carriers in year 1 will be available for disbursements from the Mobility Fund in year 2, and so forth;

☑ Capping each of the current POLR support mechanisms at their 2007 levels. "Modernization" of the POLR programs should result in savings that could be transferred to the Broadband Fund. Possible reforms include: applying a rates test as a condition or an adjustment to cost-based support; considering LEC costs on a comprehensive basis, as opposed to separate programs for loop and switching costs; considering unregulated revenues in calculating carriers' need for support; making the Local Switching Support mechanism more sensitive to high costs; providing more limits on support for operating expenses; targeting support to only one service provider in an area; and reducing or eliminating, over time, the support to areas with multiple providers;

☑ Making support for operation and maintenance available for a limited period of time, thus eliminating Mobility and Broadband support once the objectives of geographic coverage in an area have been met; and

☑ Providing support to only one wireline, one wireless, and one broadband provider in any given area, once the transition is complete.

In addition to these recommendations, the Board suggested that the FCC seek further comment on a number of issues:

? how to allocate funds among the states;

? how to determine unserved areas for both broadband and wireless coverage;

? how to define "broadband service" for purposes of USF, given that the current 200 kbps definition is outdated;

? whether the proposed high-cost fund transition will have an impact on Lifeline and Linkup initiatives; and

? how to transition support from areas that no longer need support to areas unserved by either broadband or mobility providers.

The FCC will now have to decide what to do with these recommendations. Since numerous interested parties will be vying over how big a piece of the $4.5 billion pie they receive, swift action should not be anticipated.

(***MDU Exclusivity Ban*** *- Continued from page 8)*

? whether the prohibition on MDU exclusivity should be expanded to apply to satellite operators (DirecTV and EchoStar), "private" cable operators (whose facilities do not cross a public street and are therefore not franchised) and so-called "wireless" cable operators; and

? whether the prohibition should be expanded to apply not just to exclusive service agreements, but also to exclusive marketing agreements and bulk service agreements.

The FCC announced that it is endeavoring to take action on the above questions within six months. It also announced that it is likely to ban exclusivity on the provision of *telecommunications* services in MDUs in the next two months. It previously banned exclusive telecom agreements in *commercial* "multiple tenant environments" (MTEs), and its action on residential buildings has long been pending.

In any case, the Commission's prohibition is far from set in stone. Appeals are expected to be filed by major cable operators and real estate interests. We will keep you informed on this proceeding, which promises to significantly impact the dynamics of competition in the provision of cable TV and other multichannel video services.

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