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Current Issues in Telecommunications Law and Regulation February 2008

Taking Sides on Net Neutrality?

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The long simmering debate over net neutrality and, more specifically, the role of the Federal Communications Commission as Internet traffic cop appears to have reached a boiling point as the FCC suddenly (a) demanded answers from Comcast in response to allegations that it degraded or blocked applications over its broadband Internet service, and (b) opened a spate of other proceedings related to net neutrality. (*See* related article on page 4.) For an agency that only grudgingly issued, two years into the national debate on the subject, a *Notice of Inquiry* on net neutrality last April, the FCC suddenly appears poised to act.

Less than a week after a January 9 announcement by FCC Chairman Kevin Martin at the Consumer Electronics Show (CES) in Las Vegas that the FCC would investigate allegations that Comcast degraded broadband Internet service to its customers – including allegations that Comcast, the nation's second-largest Internet service provider, engaged in outright blocking of the Internet file-sharing application BitTorrent – the FCC demanded explanations from Comcast with a short response deadline of January 25. On January 14, the Commission opened public comment periods for responses to two separate petitions: (a) a petition for rulemaking seeking clarification of "reasonable network management" practices under the Commission's *Internet Policy Statement*; and (b) a petition for declaratory ruling that the degradation by broadband service providers of peer-to-peer Internet traffic violates the *Policy Statement* and is not a reasonable network management. On February 12, the FCC announced a public hearing on broadband network management practices would be held February 26 (since re-scheduled to ***February 25***) in Cambridge, MA.

The net neutrality issue had been languishing at the

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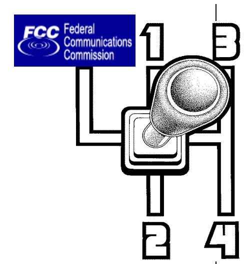
Clutch play?

Putting Auctions Into Reverse



By Michelle McClure
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The FCC is seeking comment on a proposal to use reverse auctions to determine the recipients and amounts of support for carriers providing service to high-cost areas. This proposal, championed by FCC Chairman Kevin Martin, would award support to the carrier that commits to provide service in a geographic area at the lowest cost. The FCC tentatively concluded that reverse auctions have advantages over current high-cost support distribution mechanisms and is now seeking comment on this notion and how to implement it. These are the key points on which comment is being sought:

Eligibility Requirements. The FCC tentatively concluded that a bidder in a reverse auction must hold an eligible telecommunications carrier (ETC) designation covering the relevant geographic area in order to participate in an auction for that geographic area. You would think this would be an uncontroversial component of the plan, but the fact is, the FCC has been taking years to act on uncontested petitions to be designated as an ETC. The FCC will either have to speed up the ETC designation process or make it an automatic part of the reverse auction process.

Single Winner Versus Multiple Winners. Should universal service support go to a single auction winner or to multiple winners and should only the carrier submitting the lowest bid be allowed to receive the subsidy? The FCC recognized that awarding support to a single entity would result in less overall support than to multiple entities. However, it also acknowledged that a single-winner auction might eliminate the consumer benefits of a competitive market by discouraging competitive entry or affecting the accessibility of both wireline and wireless services.

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"Identical support" rule on the way out?

No Lock On LEC-Like Cost Support For CETCs

By Paul J. Feldman
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In one of the three Notices of Proposed Rulemaking recently released by the FCC on restructuring the federal universal service mechanisms, the Commission seeks comments on a proposal to eliminate the current "identical support" rule – also known as the "equal support rule" – which provides competitive eligible telecommunications carriers (CETCs) with the same per-line high-cost universal service support amounts that incumbent local exchange carriers (ILECs) receive, regardless of their actual costs. Instead, the FCC proposes to provide support to a CETC based on its own costs of providing the supported services. The Commission seeks comment on methodologies for determining a CETC's relevant costs for universal service support purposes, how the support should be calculated, including the appropriate reporting obligations, and, importantly, whether such support should be capped at the level of the ILECs.

Under the Commission's existing rules, a CETC that serves a customer in an ILEC's service area receives the same per-line amount of high-cost universal service support that the incumbent LEC would receive for serving that same customer. High-cost support for competitive ETCs has grown rapidly over the last several years, placing extraordinary pressure on the federal universal service fund. In 2006, the universal service fund provided approximately $4.1 billion per year in high-cost support. By contrast, in 2001, high-cost universal service support totaled approximately $2.6 billion. In recent years, this growth has been attributed to increased support provided to competitive ETCs. While support to incumbent LECs has been flat, or has even declined since 2003, competitive ETC support, in the six years from 2001 through 2006, has grown from under $17 million to $980 million – an annual growth rate of over 100 percent. This rate of growth of federal support is seen as unsustainable by the Commission, and by many of the ILECs and interexchange carriers. On the other hand, the wireless carriers benefiting from this growth believe that they are getting no more than their fair share of support, and that policy makers are ignoring the rapid growth of wireless service not only as a supplement to wireline, but as a substitute.

In the NPRM, the Commission tentatively concludes that the identical support rule, which was originally enacted based on the principle of technology neutrality (equal amount of support for wireline and wireless service to a customer, in spite of unequal costs of providing service), has not been consistent with developments in the market: supported wireless carriers do not "capture" customers from supported wireline carriers, but merely supplement that service, leading to expensive duplication of support and unproductive growth of federal high cost support. In addition, the NPRM notes that the Commission never expected the vast majority of CETC support to go to wireless carriers; rather, it had apparently expected greater growth of wireline competition. Lastly, the Commission asserts that the identical support rule fails to create efficient investment incentives for competitive CETCs. Because a CETC's

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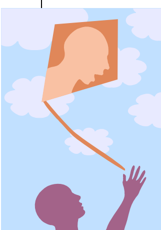
Aloha bids aloha to C-Block licenses



Wireless Spectrum, No Strings Attached

By Patrick Murck
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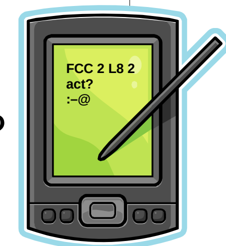
The Commission approved AT&T's purchase of 281 licenses in the C Block of the much sought after 700 MHz band from Aloha Communications. This $2.5 billion purchase may have spared AT&T from paying even higher prices in the ongoing 700MHz auction.

The transaction is noteworthy because, in approving the transaction, the Commission revised the market concentration threshold in its HHI merger analysis from 70 MHz to 95 MHz. In other words, the FCC will now not deem a wireless acquisition to be presumptively problematic unless the acquirer would be holding at least 95 MHz of wireless spectrum after the transaction closes. Even under this more expansive threshold, 11 markets did not pass the initial screening. However, the FCC found there would be no competitive harm after an individualized analysis and therefore did not require any divestiture.

In fact, the FCC didn't require much of anything at all. The order was unusually brief, a fact pointed out in a dissenting and a concurring opinion. Nowhere to be found were the conditions and public interest discussions in the Commission Orders a few months ago approving AT&T's purchase of Dobson Communication's licenses and ALLTel's privatization. Similarly, the much more recent approval of T-Mobile's acquisition of SunCom Wireless's licenses escaped without imposition of the conditions.

One hallmark of administrative law (or all law, really) is that there should be consistency. That's what precedents are all about – having everyone understand that similarly situated people will be treated the same. The FCC's actions in these recent cases unfortunately leave no one with the ability to predict when or whether special conditions may be imposed on a transaction.

Short shrift for short codes?



R TXT MSGS COMML MOB SRVCS?

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A Petition for Declaratory Ruling filed by eight parties in late 2007 could evolve into one of the most hotly debated issues facing the FCC in 2008, and could have a serious impact on a communications medium that is experiencing massive increases in popularity every month.

A joint petition was filed requesting that the Commission clarify the regulatory status of text messaging services, including short-code based services sent to and from mobile phones. The Petitioners (Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, EDUCAUSE, Media Access Project, New America Foundation, and U.S. PIRG) asked the Commission to find that text messaging falls under the definition of "commercial mobile services." Such a determination would place text messaging under the purview of Title II of the Telecommunications Act of 1996, which includes common carrier nondiscrimination rules.

Alternatively, the Petitioners have argued that if the Commission finds that text messaging falls outside Title II, it should apply non-discrimination rules via its ancillary jurisdiction, applying the non-discrimination rules to protect the public interest.

Text messaging is exploding into the communications landscape as a viable replacement for voice communications and a primary means of communication for many mobile phone users. The Petitioners have become increasingly concerned at the actions of many mobile carriers, such as Verizon, which have engaged in discriminatory behavior through refusing to issue "short codes" to certain parties based on the messages they intend to send via the service.

"Short codes" are five or six-digit codes administered by the Common Short Code Administration

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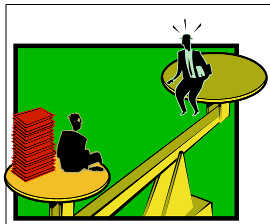
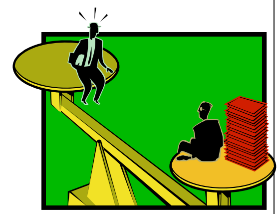


Balancing unequal forces

FCC Faces Wireless, Internet "Neutrality" Demands



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Can a Network Provider Treat its Customers Differently, Based on the Content of their Communications?

The question is not hypothetical. Consider the following:

- Comcast, a major cable ISP, concedes that it limits customers' capacity when they attempt to access certain file-sharing programs. These include a service used for movie distribution, a potential competitor to Comcast's cable TV business.
- Verizon, a wireless phone provider, hinders the transmission of political text messages based solely on their content; it reconsiders, but reserves the right to do the same again in the future.
- Two major ISPs announce they see nothing wrong with delivering the content of certain websites at faster speeds than others, in exchange for premium payments.
- Three major wireless carriers limit text messages that customers need for accessing a technology that provides a competing voice service.
- AT&T signals that it may begin inspecting its customers' Internet communications in search of copyright violations.
- Wireless carriers routinely limit the services subscribers can access over their handsets, allowing those acceptable to the carrier and blocking those that compete.

Can They Do That?

Back in the Era of Big Black Telephones, each of the above actions would have been illegal. The phone company was simply not allowed to base service decisions on who a subscriber talked to, or on what they said.

From 1935, when the Communications Act took effect, until the mid-1970s, the telephone and telegraph companies held the special status of common carriers. As such, they could charge only rates that the FCC or the states approved, had to give similar treatment to similar customers, and had to keep the content of communications secret, even from themselves. In exchange, their rates were set to assure a reasonable profit. Phone service was pretty good; but some components, particularly long-distance calling, cost a lot more than they do today.

> *Back in the Era of Big Black Telephones, phone service was pretty good. Two developments brought this era to an end.*

Two developments brought this era to an end.

One was a 1979 FCC decision called "Computer II." Although the public Internet was still a decade away, engineers had begun interconnecting computers over telephone lines. The FCC's problem was how to regulate the new combination of computing and communications. The elegant solution embodied in Computer II was based on a sharp distinction between the pure transport of information, which remained common carriage, and the creation or modification of information, which the FCC forbore from regulating. An example from the times: A telephone subscriber could call an automated service to obtain a weather forecast for any city in the world. Under Computer II, provision of the weather information was not regulated, but its transport over the phone lines was, just like any other call. To make sure the phone company did not leverage its ownership of the lines into an information monopoly, the FCC set strict conditions on its entry into businesses that create or modify information.

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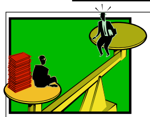

(**Net Neutrality** - Continued from page 4)

The phone companies (they become plural in 1984, with the break-up of AT&T) never liked the restrictions of Computer II. In the 1986 "Computer III" decision, they persuaded the FCC to let them into the information business over their own networks. In return, they promised to offer their competitors access to the same internal network functionality they used themselves. The competitors say the phone companies dragged their feet in providing that access, and sometimes misled subscribers into believing that only they could provide services that in fact were also available from competitors. But all of that is now moot. In the last few years the FCC has dropped all of the Computer II/III restrictions as to broadband, thus allowing the phone companies to provide information services over their lines while still locking out competitors.

> *The FCC has allowed the same wireless and broadband companies both to create content and to transport it – yet has exempted them from the old rules on uniform rates and non-discrimination.*

The second key development that undid the old common carrier regime was the emergence of MCI, which in the 1960s set out to compete with AT&T in providing long-distance service over selected, high-traffic routes. Even then seeing the handwriting on the wall, AT&T dispatched battalions of lawyers to keep MCI from connecting its customers to AT&T's local phone lines. But the battalions failed. MCI flourished. And once its role as a long-distance competitor was secure, other providers rushed into the market. With competition in place, the FCC dropped most of the common carrier restrictions on long-distance providers, allowing them to set their own rates and treat their customers pretty much any way they wanted. A provider that abused the flexibility, the theory went, would lose business to others who charged less and took better care of the customers.

When U.S. cellular service began in 1982, the FCC set up a minimally competitive market and put that, too, outside the traditional common carrier regime. Within the past few years, the FCC has similarly declared most forms of broadband Internet delivery – DSL, cable, broadband-over-power-line, and wireless – to be non-common-carriage. The reasoning varies a little for the different platforms, but in all cases relies on the offerings being competitive.

The Current Controversy

Fast-forward to the present. One small, seemingly innocuous step at a time, the FCC has allowed the same wireless and broadband companies both to create content and to transport it – yet has exempted them from the old rules on uniform rates and non-discrimination.

In principle, an aggrieved customer can simply change providers. In practice, though, that is not always a practical option. Many parts of the country offer only one broadband provider, if that; many more have only two. That may change over the next several years; but in the meantime, a customer dissatisfied with his or her broadband provider may have limited alternatives. A wireless customer typically has more choices, but many are tied into a long-term contract by expensive early termination fees. (The FCC has promised to look into this.)

Non-carrier companies that offer service over the Internet, including some in competition with the carriers, have asked the FCC to impose a requirement of "network neutrality." Although less demanding than the old common carrier rules, this step would prohibit networks from discriminating among users in certain respects.

After batting off the neutrality requests for a few years, the FCC ten months ago launched a leisurely proceeding to gather information on whether a problem exists, whether new regulations are necessary to combat it, whether the FCC has jurisdiction to impose such regulations, and how various alternative regulatory approaches might affect broadband deployment and other public interest issues. Given the very broad range of policy questions raised, concrete action is unlikely before the next decade.

The FCC has taken a partial step in the meantime with an "Internet Policy Statement" that assures consumers access to lawful content, free choice of applications and services, the ability to connect their own hardware, and the benefits of competition among providers. But the document has a number of shortcomings: it is sparse

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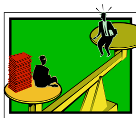


*(**Net Neutrality** -Continued from page 5)*

on specifics, has no enforceable rules, and does not squarely address the abuses that are beginning to emerge.

The public is impatient. So far, the neutrality inquiry has drawn over 28,000 comments. Many cite one or more of the incidents listed above; nearly all paraphrase the slogan, "Keep the Internet free!" More come in every day.

In a belated follow-up, the FCC recently requested public comment on three filings that raise important policy issues:

- A coalition of eight public interest groups asked the FCC to rule that text messaging is subject to the old common-carrier non-discrimination rules. (*See* related story on page 3.) Among other things, this would prohibit a carrier from refusing to handle a message based on its content, or because the transmitting party is a competitor. The filing cites Verizon's denial of easy-to-use "short codes" for a political message, and several wireless carriers' doing the same for messages that would otherwise enable wireless subscribers to use a competing service. Comments were due on February 13; reply comments on March 14.

28,000 comments filed so far point to a level of public outrage that the FCC cannot long ignore.

- A coalition of six public interest groups and two law professors makes a credible claim that Comcast deliberately blocked file-sharing traffic between users – a service that can be used to deliver video in competition with Comcast's cable TV service. The coalition alleges that Comcast sent users forged packets, each constructed to appear that it came from another user and requesting an end to the communication. We expect this kind of behavior from hackers, the coalition says, but not from the ISPs that take our money every month. The coalition asks the FCC to clarify that intentionally degrading a targeted Internet application violates the FCC's Internet Policy Statement, described above. Comments were due on February 13; reply comments on February 28.

- A company that distributes lawful, high-quality video over the Internet claims to be a victim of intentional degradation of service by Comcast, and possibly other broadband providers as well. The company suspects Comcast of deliberately slowing its performance so as to hinder it in competing with traditional cable TV providers (such as Comcast). The company asks the FCC to go beyond the generalizations in the Internet Policy Statement, and to adopt rules that specifically bar a network operator from discriminating against particular Internet applications, content, or technologies. Comments were due on February 13; reply comments on February 28.

Why Does This Matter?

Before the Internet, no one could reach a wide audience without first persuading a publisher or broadcaster to carry the message. The Internet changed that. Now you, and I, and anyone barely able to type can all bring our views to every IP-connected computer in the world. Of course, there is no guarantee that anyone will pay attention. Each of us has to compete for eyes and ears with every other would-be speaker on the planet. But to try, we no longer need the approval of an expensively suited executive in New York or Los Angeles.

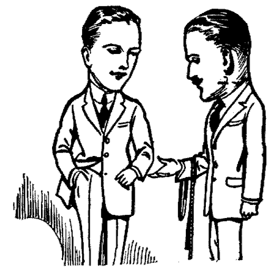
The actions of ISPs and wireless carriers now threaten that newly won freedom.

A year ago, when the FCC first announced its proceeding on network neutrality, the ISPs scoffed. No new policy was needed, they insisted, because there had been no claims of discrimination. The FCC was trying to solve a problem that did not exist.

That argument no longer works. The three pleadings above make a persuasive case that some ISPs and wireless carriers are attempting to abuse their control over customers' access in order to stifle legitimate competition and possibly to shape political discourse. The 28,000 comments filed so far on neutrality issues point to a level of public outrage that the FCC cannot long ignore.

For USF toll revenue calculations . . .

Q: When Is A Toll Call Not A Toll Call? A: Whenever The Carrier Says So.



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There was a time when it was easy to tell what "toll revenue" was: it was the extra charge which was imposed for a long distance call. But it seems like nothing is ever easy any more. Nowadays carriers, especially wireless carriers, often offer bundles of service that permit you to call anywhere in the country for a flat rate; calls to distant points under such a plan may be "long distance," but there's no extra charge for the call. Are those "toll" calls? Conversely, other plans sometimes permit customers to make flat rate calls within a very limited "home service" area; calls made outside the service area may not be long distance at all, yet a surcharge is imposed. Are those "toll" calls?

Cynical observers such as ourselves marvel at the FCC's refusal to go for the quick buck here.

Inquiring minds – in this case, Cingular and CTIA – wanted to know, so they asked the FCC for a declaratory ruling as to what constitutes toll revenue. The issue was an important one because a carrier's USF contributions are based on self-reported "toll revenues," and there are severe penalties for underreporting one's toll revenues. The problem is particularly thorny for those bundled rate plans which impose no specific charge for the long distance component of the plan. Intuitively, it is obvious that some portion of the revenue received by the carrier is for the long distance service provided to the customer. If some of that bundled revenue constitutes "toll revenue," how was the carrier to calculate the correct attribution?

The FCC, for once, made it easy. Toll revenue, the Commission clarified, is only revenue which is received from distinct charges for service to areas outside the "home calling area" of the plan the customer is on. The home area can be defined however the carrier wants, but if an extra charge is imposed for service outside that area, that's toll revenue. That means, as the FCC acknowledged, that you could have home areas defined to include the entire United States (as many plans do) so that no domestic toll revenues would exist. It was unclear whether you could include the entire planet in your home area, but some intrepid carrier will no doubt push that envelop. The FCC also made it clear that roaming revenues are not included in toll revenues.

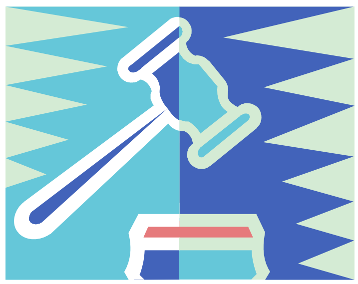
By the same token, plans which have very restricted coverage areas, with surcharges for calls outside that area, *do* generate toll revenues, even though the calls may only be going to a neighboring county. Carriers with such plans may need to double check whether they are correctly including those "out-of-plan" calls in their USF toll revenue calculations.

Cynical observers such as ourselves marvel at the FCC's refusal to go for the quick buck here. They could easily have chosen to say that a portion of the bundled revenues must be toll and therefore carriers have to either determine what percentage of their traffic was attributable to non-local calls or use a safe harbor percentage. (This is the way, for example, that the FCC allocated revenues between interstate and intrastate for purposes of USF contributions – it assumes that 37.1% of your revenue is interstate, unless you do a traffic study to support an alternative percentage.) Roaming revenues are also sort of non-local and therefore might have qualified for "toll" treatment. Instead, the FCC adopted a fairly easily administered definition and stuck with it. Where's the catch?

(**Reverse Auctions** - Continued from page 1)

The FCC notice seemed strangely unconcerned that a "single-winner" auction would eliminate the historic subsidy to incumbent LECs, an eventuality that would almost certainly cause mass panic in the LEC community.

Method of Distributing the Subsidy. How should subsidies be handed out? Subsidies could be offered as a fixed payment for each geographic area, on the basis of the number of subscribers or households served, or on some combination of these methods. The answer to this issue might affect where and how quickly recipient carriers build out their systems.



Geographic Areas. In most areas of the country, telecommunications services are provided by a wireline incumbent LEC and possibly by one or more competitive ETCs, most of which are wireless carriers. Basing the geographic areas on any carrier's service areas would likely give that carrier an advantage in bidding because competing carriers are unlikely to have the same service footprint. Should an incumbent LEC's study area, its wire centers, or some other geographic division be used for the auction?

Universal Service Obligations. What should be the obligations born by ETCs? Historically, there were "carriers of last resort" who received universal service support and were obligated to serve customers subject to rates and terms specified by state regulatory authorities. How would universal services be ensured under a reverse auction mechanism? Also, should the winner of an auction be allowed to transfer its universal service obligations. What should be the ramifications for an auction winner who does not fulfill its universal service obligations? Should the current requirements for a designated ETC be maintained or should more or less requirements be imposed on ETC's winning universal service auctions?

? What build-out commitment should apply to ETCs winning universal service auctions? Currently the FCC requires that ETCs must provide service to all customers who make a reasonable request for service and if the request comes from a customer located within the applicant's licensed service area but outside its existing network coverage, the ETC should provide service within a reasonable period of time if the service can be provided by certain build-out options. A competitive ETC applicant must submit a five-year plan describing its build-out plan for upgrades to its network within its designated service area. Should applicants and/or winners of auctions also be required to submit such plans?

? Should an applicant and/or winner be required to provide a demonstration that it offers a local usage plan comparable to the incumbent LEC or some other local usage threshold? Should retail rates for the local usage plan be regulated?

? Should all ETCs participating in and/or winning universal service auctions be required to demonstrate their ability to remain functional in emergencies?

? Should all wireless ETCs participating in and/or winning universal service auctions be required to comply with CTIA's Consumer Code for Wireless Service? Are there other consumer protection and service quality standards that should apply to auction participants and/or winners?

? Should ETCs participating in auctions be required to demonstrate that they have the financial resources and ability to provide quality services throughout the area to be auctioned?

? Should broadband Internet access services with particular transfer rates be required? Should services be required to be offered at a particular price?

Reserve Prices. The FCC feels that it is important to establish a reserve "price," *i.e.*, a maximum subsidy level that auction participants would be allowed to place as a bid. How should these reserve prices be

(Continued on page 9)

(Neutral on Neutrality? *-Continued from page 1)*

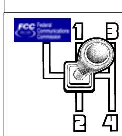
FCC until last November, when a coalition of advocacy groups led by Free Press filed a petition seeking two declaratory rulings: "that the practice by broadband service providers of degrading peer-to-peer traffic violates the FCC's *Internet Policy Statement*" and that degradation of lawful Internet applications does not fall within the *Policy Statement*'s limited exception for reasonable network management. Shortly thereafter, Vuze, Inc., a provider of software platforms for the delivery of high resolution video content over the Internet, petitioned the Commission to initiate a rulemaking to clarify "reasonable network management" as used in the Commission's *Internet Policy Statement*. Specifically, Vuze asked the Commission to establish that the *Policy Statement* "does not permit broadband network operators to block, degrade or unreasonably discriminate against lawful Internet applications, content or technologies."

Both petitions argued that a study by the Associated Press (and subsequent studies by the Electronic Frontier Foundation replicating the AP results) proved what had long been feared but fervently denied by the cable giant: that Comcast intentionally degraded traffic utilizing peer-to-peer applications that have emerged, post-Napster, as a primary means for lawful distribution of content. Comcast eventually admitted in public statements as well as in comments filed with the FCC on February 13 that it purposefully slows delivery of some high-bandwidth content (and quietly changed its terms of service in January to disclose this policy), but that such practices fall within the rubric of reasonable network management as contemplated by the *Policy Statement* because they are necessary to ensure overall network integrity and the provision of quality service to all of its customers. The *Internet Policy Statement*, of course, is just a set of non-binding principles adopted by the FCC in 2005 as an informal guideline for the industry. The Statement is therefore unenforceable either offensively or defensively by the combatants.

The sudden flurry of activity by the FCC comes as broadband providers are revisiting Internet service pricing models and flirting with usage-based plans in response to the explosion in popularity of online video (in fairness, only Time Warner has publicly announced a capacity-based pricing trial). If the FCC fails to act, lawmakers appear poised to force the Commission's hand. On February 13, Rep. Ed Markey (D-MA), chairman of the House Subcommittee on Telecommunication and the Internet and a long-time advocate of legislating net neutrality, introduced with Rep. Chip Pickering (R-MS) the Internet Freedom Preservation Act (H.R. 5353), which would codify the principle of broadband service non-discrimination and affirm FCC authority to enforce that policy against network operators. The bill also directs the Commission to hold a series of public "summits" and to report to Congress its findings and recommendations for action.

The sudden flurry of activity by the FCC comes as broadband providers are revisiting Internet service pricing models and flirting with usage-based plans in response to the explosion in popularity of online video.

Comments on the petitions were due in WC Docket No. 07-52 by February 13, with reply comments due on or before February 28. The Commission also solicited submission of public comments and "other documents" in the 07-52 docket (and Docket No. 08-7, concerning the related matter of discrimination in text messaging service provision) but established no cut-off date for these submissions. (*See also the* article on test messaging on page 3.)



(Reverse Auctions *-Continued from page 8)*

set? Should they be based on the current levels of support for the geographic area?

Auction Design. The FCC generally invited comment on the differences between auctions for spectrum and reverse auctions for subsidies. Is the current design of spectrum auctions appropriate for the reverse auction? Should the auctions be conducted every five years or less? Should a pilot program be adopted to test the use of reverse auctions? CTIA, Verizon and Alltel have all proposed plans and the FCC requests comment on these proposals.

Interested parties may file comments 30 days after publication of the Notice in the Federal Register and reply comments 60 days after publication of the Notice in the Federal Register. As of this writing, the Notice has not yet been published in the Federal Register.

Moving toward consensus

FCC Raises Volume On Hearing Aid Compatibility

By Lee Petro
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In November, the Commission issued a Second Report and Order and Notice of Proposed Rulemaking regarding its ongoing initiative to ensure that those with hearing disabilities will have access to digital wireless communications.

This action comes on the heels of the Joint Consensus Plan that was submitted in June, 2007, by parties representing the deaf and hard of hearing community, along with major wireless service providers and equipment manufacturers. The Joint Consensus Plan proposed new requirements for the technical capabilities of new wireless devices, and new deadlines for the wireless industry to meet the benchmarks. It also sought to modify the rapidly approaching February 18, 2008, deadline for wireless carriers to offer hearing aid compatibility in at least 50% of their products.

In the "Order" portion of the Commission's piece, the Commission declined requests to expand to independent retailers the FCC requirement that customers be able to test the devices at the point of purchase. The Commission also declined to require manufacturers with small product lines to come into compliance with the hearing aid requirements. In both cases, the Commission did not find that the public record supported these requests, but agreed to seek additional comment in the NPRM stage of this proceeding.

In addition, the Commission tentatively concluded that it would adopt the Joint Consensus Plan in large measure. In particular, the Commission is seeking comment on the adoption of eight specific revisions to the hearing aid compatibility rules, including modifying the deployment schedule for M3 devices. The Commission concluded that it would stay the effective date of the February 18, 2008, deadline mentioned above until such time that it could receive comment

(Continued on page 13)

So long, Pittsburgh! Hello, St. Louis!

FCC to Fee Payers: "Show Me" The Money!

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On Friday, January 25, 2008, the FCC announced it is changing its "lockbox" bank location for all fees required to be submitted to the Commission that are not submitted online by credit card payment. Effective immediately upon publication of the Order in the Federal Register on February 19, 2008, all application fees, filing fees, regulatory fees, and tariffs (and any accompanying paper applications, forms or filings) previously directed to the Commission's lockbox bank in Pittsburgh, PA, must be delivered instead to the new lockbox bank in St. Louis, MO. Perhaps in recognition of the fact that old habits die hard, the Order provides a forty-five (45) day "transition period" to begin the day of publication. During this period, any fee-based filings and fee or tariff payments submitted to the Pittsburgh location automatically will be forwarded to the St. Louis lockbox bank, and the date-stamp reflecting the date of receipt by the Pittsburgh lockbox bank will be deemed the official filing date.

This would not be a federal administrative agency, however, without some confusion. On February 12, the FCC announced that the Pittsburgh location would stop accepting certain filings, but also announced that the new St. Louis location would not start accepting such filings until February 14. What if you had to file something on February 13? Also, the new location did not legally become the correct filing site until the publication of the enabling order in the Federal Register, which, as indicated above, did not happen until February 19. How does that affect filings submitted to either lockbox location between the 12th and the 19th?

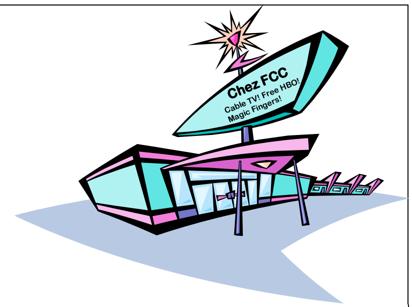
Practically speaking, the Order merely means

(Continued on page 11)

They'll leave the light on . . .

Government Sets Up Test-Bed, Hangs Out "Vacancy" Sign

Terms of use less than specific



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Spectrum is like real estate: they're not making any more of it. As demand increases, congestion continues to worsen. The people in charge – the FCC and the National Telecommunications Information Administration (NTIA), which coordinates spectrum for the federal government – are running through a catalog of attempted solutions. The use of spectrum auctions is part of the process, on the thinking that somebody who pays a lot of money for bandwidth will work to get the most possible use out of it. So are the much-delayed "refarming" rules, which require manufacturers of two-way radios to cram the same communications into ever-smaller slices of spectrum. The switch to digital TV, although touted for improved picture and sound quality, also has the happy benefit of quadrupling the carrying capacity of each channel.

> *The simultaneous FCC and NTIA announcements are amazingly vague.*

Now, trying yet another approach, the FCC and NTIA have jointly announced a "Spectrum Sharing Innovation Test-Bed" to explore ways of better sharing spectrum between federal and non-federal users. The FCC is offering use of the 470-512 MHz band, home to TV channels 14-20 and many thousands of two-way radio users. NTIA is putting up the nearby 410-420 MHz government band, used for law enforcement and protection of the President and other personnel, plus telemetry, paging, and a wide variety of other federal applications.

Beyond those basics, the simultaneous FCC and NTIA announcements are amazingly vague. We learn that each test is limited to 10 MHz. We also learn that NTIA is particularly interested in "Dynamic Spectrum Access" (DSA) technologies, defined as those which use spectrum sensing and/or geo-location to identify available frequencies, and can reconfigure themselves to those frequencies automatically. (The concept seems very similar to the FCC's notion of "cognitive radio.") The study's three phases will consist of: laboratory testing at the NTIA's facilities in Boulder, Colorado; evaluation of capabilities; and field tests.

The NTIA notice lists eight criteria for evaluation, but these too are unhelpfully general. (How well does the technology achieve the study goals? How well does the technology explore creative and original concepts?) The criteria do little to clarify what the agencies might be looking for.

NTIA wants to hear from would-be participants by February 29. The FCC invites non-governmental participants to indicate their interest by applying for experimental licenses.

*("**Show Me" the Money** - Continued from page 10)*

that Fletcher, Heald & Hildreth will submit on behalf of our clients all affected FCC fees and fee-based applications or filings to the new lockbox location in St. Louis once the Order becomes effective. However, clients should be keenly aware that, while the proximity of our office to the Pittsburgh lockbox (approximately four hours in reasonable driving weather) permitted some last-minute "day-of" submissions by courier, the location change to St. Louis will eliminate our ability to provide that kind of same-day service. Accordingly, fee payments from clients to be submitted to the FCC in St. Louis by FHH must now be received by us at least two business days before the due date to permit enough time for delivery to St. Louis. We will post a notification on our blog as well as include a notice in future issues of *FHH Telecom Law* and the *Memo to Clients* when the change becomes effective.

White spaces, gray areas

White Space Battles Rage On

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There have been several changes in the White Spaces landscape over the past few months. New parties have jumped into the fray proposing alternative uses for unused portions of the television spectrum, and new devices have been delivered to the FCC for testing. Alas, *plus ça change, plus c'est la même chose* – as neither Microsoft nor the National Association of Broadcasters has made much progress on a New Year's Resolution to get along in 2008.

The first salvo in the renewed White Spaces War is a White Paper supported by Sprint T-Mobile, Fiber Tower, and the Rural Telecommunications Group. Under their proposal, the Commission would license the unused TV spectrum in rural areas as "back haul" spectrum for their wireless system for a fixed, point-to-point or point-to-multipoint use of the spectrum that would be secondary in nature to full-power television stations, and those low-power television stations and television translator stations that are licensed as of a certain date. The power limitations would be in line with what is currently permitted in the TV auxiliary rules (35 dBw EIRP), and would protect the Grade B signal of co- and first-adjacent channel television stations. These guys did their homework, as they would also take steps to limit their channel selection (only UHF) to protect wireless microphone users, and would also not operate on Channel 36, 37, or 38, to protect medical devices. This proposal has not yet been put out for public comment, and the broadcasters are also studying the implications of the proposal on their post-transition DTV service.

While the NAB argued that Microsoft was now "two-for-two" in proving that their devices would not work, Microsoft responded by calling the NAB's comments "absurd and extreme."

As with all warfare, the battle is also being waged to win the Hill. In this case, the bombs are made of paper (mostly green…some black and white), with the ultimate goal of winning sufficient support for legislation to direct the Commission to act on the white spaces proposals. According to recent reports, as many as 100 signatures have been obtained on letters sent to the Commission to hold off on the white spaces initiative, while the Wireless Innovation Alliance has at least 20 members of Congress supporting its initiative.

Finally, the war is being fought at the FCC, with the Commission announcing a new round of testing of white spaces devices. The testing commenced on January 24th with Microsoft , Philips, Adaptrum, Motorola, and Google submitting devices. The first casualty in this skirmish was a Motorola device, which was ruled defective by the FCC in early February due to power issues. While the NAB argued that Microsoft was now "two-for-two" in proving that their devices would not work, Microsoft responded by calling the NAB's comments "absurd and extreme." No clear word on whether the second prototype Microsoft provided worked, or on the status of the other devices, but the testing process is still ongoing.

It should be obvious from observing the battles on multiple fronts that all involved parties face uphill battles in reaching a resolution on this issue. The proponents must both produce a device that actually works, and be able to sell it to Congress and the FCC. The detractors must be able to point out the deficiencies of the plans and devices provided without losing their legitimacy before the FCC and Congress. Congress must be sure not to step on the toes of the expert agency (the FCC) and legislate technology that may not work under any circumstance, and the FCC must live up to its role as the "expert" agency and, following the physician's creed, first, do no harm. Finally, the public is put in the position of a spectator at a championship ping-pong match, trying to keep an eye on the ball without falling out of their seat.

(Text Messages *-* *Continued from page 3)*

("CSCA"), which rents out the codes to applicants for between $500-1,000 per month. Upon the assignment of a short code from the CSCA to an applicant, each mobile carrier must provision that code to the customer, typically through a third party "aggregator" which provisions the code for multiple carriers. If a particular mobile carrier fails to provision the short code, subscribers to that carrier will not be able to send or receive messages from that short code.

There have been documented instances of discrimination amongst mobile carriers over the past couple of years, including two high profile cases involving Verizon. In September, 2007, Verizon refused to issue a short code to an activist group called NARAL Pro-Choice America, saying it "does not accept issue-oriented (abortion, war, etc.) programs" and it would refuse service to "any organization that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users."

Verizon, T-Mobile and Alltel all admittedly refused to carry short code messages for a service attempting to provide competitive VoIP services.

After a front page article was published in the *New York Times* on September 27, 2007, Verizon reversed its decision, but has maintained that it is entitled to prevent the assignment of short codes based on the content of messages being sent through its service.

Similarly, Verizon, T-Mobile and Alltel all admittedly refused to carry short code messages for a service called Rebtel because the company was attempting to provide competitive Voice over Internet Protocol services which potentially take business away from the mobile carriers. In this instance, the mobile carriers did not have a change of heart. In fact, a spokesman for Verizon confirmed that the company does not intend to cease discrimination in text messaging services.

In a *Public Notice* issued on January 14, 2008, the Commission opened up a Comment window to seek a full record on the issue and move towards making a determination on how text messaging should be classified. The Commission granted a request from CTIA to extend the Comment deadline one month, with Comments now due on March 14, 2008, and Reply Comments due 30 days later.

Similar to the landmark *Brand X* case in 2005 in which the Supreme Court determined that a cable internet provider is an "information service" and not a "telecommunications service," the Commission's answer to this Petition for Declaratory Ruling could have significant impact on how a primary means of communication is classified and regulated. It is quite possible that the Commission's decision, regardless of the outcome, will be challenged and eventually determined by the Supreme Court as well.

FHH clients with questions regarding this proceeding or wishing to participate should contact their FHH attorney immediately, as the deadline to file Comments is looming and the consequences of the outcome are significant.

(Hearing Aid Compatibility *-* *Continued from page 10)*

on the proposals. The Commission proposed to require service providers to make available M3 and T3 (or higher) rated devices on deployment schedules running from 2008 to 2010 (for M3 devices) and 2011 (for T3 devices).

The Commission also sought comments on the Joint Consensus Plan's proposal to require manufacturers to "refresh" their product line on a yearly basis, and to provide compatible devices that have differing levels of functionality (*i.e.*, simple phones and smartphones). The Commission also proposed adopting the reporting requirements set forth in the Consensus Plan. Finally, the Commission also proposed adopting several technical standards proposed in the Plan.

Comments were filed in December and January. Should you be interested in reviewing the comments submitted in the proceeding, please let us know. The FCC had committed to get an Order out before the February 18 deadline, which would require a very prompt turn-around by the staff in January and February. As of this writing, it is not clear whether that deadline was met.

*(**Universal Service Proposals** - Continued from page 2)*

per-line support is based solely on the per-line support received by the ILEC, rather than its own network investments in an area, the competitive ETC has little incentive to invest in, or expand, its own facilities in areas with low population densities, thereby contravening the Communications Act's universal service goal of improving the access to telecommunications services in rural, insular and high-cost areas. Instead, the NPRM asserts, CETCs have a greater incentive to expand the number of subscribers, particularly those located in the lower-cost parts of high-cost areas, rather than to expand the geographic scope of their networks.

Accordingly, the NPRM follows the suggestion of the Federal-State Joint Board, and proposes that CETC high cost support be based on the individual CETC's costs of providing service, and that CETCs seeking high-cost support should be required to file cost data demonstrating their costs of providing service in high-cost service areas. Specifically, the NPRM proposes that each competitive ETC should file cost data with the Commission or the relevant state commission – whichever approved, or subsequently approves, its ETC application – on an annual basis and line-count data on a quarterly basis. CETCs would have the option of updating their cost data on a quarterly basis, as do rural incumbents today. Only if the cost data were to be approved by the relevant state commission or the Commission could the CETC then file the cost data submission with the Universal Service Administrative Company (USAC) to obtain federal support. It is unclear why the costs so established should be capped at the same level as the ILEC's costs since the whole concept is to get away from artificial "parity" and award support based on actual costs, but the Commission must be worried that CETC costs might possible come out *higher* than ILEC costs, and thus increase the support burden even more.

The NPRM seeks comments as to whether the FCC should establish a system of accounts for competitive ETCs, including wireless carriers, that mirror the Part 32 rules applicable to ILECs for such cost calculation purposes. The NPRM also seeks comment on whether, because competitive ETCs will, in general, operate in multiple study areas of incumbent carriers, it will be necessary to disaggregate each CETC's cost by relevant CETC service area, and by the relevant incumbent LEC study area, wire center, or disaggregation zone. On an issue that is sure to be controversial, the NPRM tentatively concludes that wireless spectrum costs should be included in high-cost support cost submissions, but only to the extent that the competitive ETC actually paid for the spectrum, either through an auction or by purchasing it on the open market. There are more details regarding calculation and limits on cost support for CETCs, so please contact us if you need further information.

This proceeding, like the other two high cost support items, will be hard fought and fascinating to watch. Yet, while the Chairman may wish to create a legacy with a radical change in federal universal service programs before he leaves the Commission, these proceedings contain intractable problems that may take much longer to resolve than the Chairman wishes. We will keep you informed.

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 40,000 visits to our site already — you can come to the party, too!!!

Is interference in our SDARS, dear Brutus, or in ourselves?

NPRM Addresses Interservice Interference Criteria

By Donald Evans
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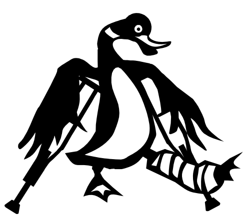
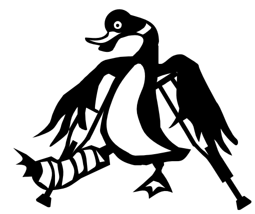
The FCC has issued a Notice of Proposed Rulemaking intended to settle once and for all the long-simmering dispute between Satellite Digital Audio Radio Service (SDARS) licensees and neighboring Wireless Communications Service licensees. A decade ago, the two satellite broadcasters were allocated 12.5 MHz each of spectrum in the 2300 MHz band in order to provide "ancillary terrestrial service." This was intended to permit the satellite operators to reach hard-to-serve terrestrial spots by using terrestrial repeaters. Regular terrestrial broadcasters have long been wary that such "ancillary" operations could easily become an avenue for delivering local programming throughout the country – a key competitive element that distinguishes regular broadcasters from their satellite cousins. At the same time, the Commission's existing rules have hampered the ability of either SDARS licensees or WCS licensees in the adjacent bands to go into operation without interfering with each other.

The FCC, having received competing proposals from both sides as to how to proceed, has put both proposals out for comment in an effort to come up with technical rules which are workable on a long term basis. It also is considering placing clear limitations on the ability of SDARS licensees to distribute local programming over their ancillary facilities. Comments were due February 14, and replies may be filed up to March 15.



Court ruling for the birds - a fowl bawl?

Increased Environmental Scrutiny Of Proposed Tower Construction Ordered



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The U.S. Court of Appeals for the D.C. Circuit dealt potential tower constructors a potential setback in a decision issued on February 19. The FCC had been petitioned by bird lovers to adopt rules providing for the protection of migratory birds in the tower permitting process. The bird people insisted that the National Environmental Protection Act requires the FCC to take the impact on birds into account in its licensing decisions by the preparation of an environmental impact statement (EIS). The FCC gathered extensive comments on this petition but ultimately concluded that the evidence was conflicting about whether migratory birds are or are not significantly affected by communications towers. (The bird people estimated that 4 to 50 *million* birds are killed each year by collisions with towers or associated wires, while industry groups said hardly any are killed.) The FCC decided that because the evidence was conflicting, it would continue to investigate the matter but not adopt the rules requested by the petitioners.

Not so fast, the Court ruled. Because the evidence was conflicting about whether there will be an impact on protected species, the FCC was required to at least consider an environmental assessment to try to determine whether there would be an adverse impact. This assessment is less burdensome than the full EIS demanded by the birders but considerably more than what the FCC does now. In addition, the Court required the FCC to get input from the folks at the federal Department of Fish and Wildlife who presumably know more about birds than the FCC. The Court also required the FCC to permit more meaningful pre-grant participation by members of the public who want to evaluate proposed construction for bird impact. All of this promises to be good for birds but less good for people want to construct towers along the migratory paths. One solution might be to re-name such towers "bird motels" where tired avians can rest and perch on their way south.

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