

FHH Telecom Law

Current Issues in Telecommunications Law and Regulation

May 2008



BRS/EBS Tidied Up

But how should the FCC deal off the spectrum?

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In a combined Order/NPRM released last month, the FCC resolved a number of petitions for reconsideration and other extraneous pleadings which had nibbled at the edges of the new Broadband Radio Service/Educational Broadband Service regulatory structure adopted in 2004 and 2006. In the "Order" portion of the document, the Commission addressed a smorgasbord of outstanding issues including the following:

- Decided to go ahead and auction available BRS spectrum without awaiting the end of the spectrum transition process.
- Clarified the dates applicable to self-transitioning licenses: proponent-driven transitions must be initiated no later than January 21, 2009; self-transitions must be initiated no later than April 21, 2009. Both proponent-driven and self-driven transitions must be completed by October 20, 2011.
- Clarified technical issues with respect to antenna height benchmarking, out of band emissions, the complaint process in the event of interference, and GSA definitions where applications were pending as of January, 2005.
- Grandfathered mid-band high powered operations by EBS licensees if needed to maintain existing service.
- Clarified transition and interference rights for BRS Channel 1 and 2/2A licensees.
- Denied a proposal to limit the rights of former

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Prince Albert in a can?

FCC Looks To Tank Pranks Dead cellphones haunt 911 services

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In response to alarming reports concerning fraudulent 911 calls emanating from non-service initialized (NSI) phones, the FCC released a *Notice of Inquiry (NOI)* to examine the issue and explore possible solutions.

A *Petition for Notice of Inquiry (Petition)* filed by nine public safety organizations and a software development firm (Petitioners) was granted to determine whether a change in the Commission's rules is necessary to curb a staggering number of prank phone calls to 911 using NSI phones. NSI phones are those that are discarded, do not have service plans, or lack Automatic Number Identification and/or call back features that would assist call recipients in identifying callers.

As a result, according to the Petitioners, NSI phones have become a regularly-used device for 911 pranksters, many of whom are children. According to the *NOI*, these calls are growing at a staggering rate. During a three-month span in late 2006 in Tennessee alone, more than 10,000 prank calls were made to 911 from NSI devices. The Petitioners report that in December, 2006, Florida public safety answering points (PSAPs) covering approximately half the state's population reported more than 8,400 such calls in a single month.

The calls have evolved from a sporadic issue to an epidemic that is putting an undue strain on PSAP resources and diverting the attention of public safety officials. The *NOI* seeks industry feedback on the present call-blocking solution and three potential solutions proposed and highlighted by the Petitioners.

The Petitioners contend that the current call-blocking solution cannot work due to technical and legal concerns. From a technical standpoint, the Petitioners ar-

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Listen Up!!!

Commission Sets Dates For Telephone Coupling Compliance

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Although the FCC's new Hearing-Aid Compatibility rules have just appeared in the Federal Register, carriers should already be planning for the late-summer effective date (for Tier III carriers) of detailed new requirements for handsets sold to customers. In addition to imposing new requirements phased in over the next few years, the FCC action relieved carriers in the nick of time from the looming obligation to have a significant percentage of their equipment compatible by April 19 of this year. The highlights of the new rules are outlined below. (The given dates apply to non-Tier I carriers; the Big Guys have to comply three months earlier.)

The rules cover two types of hearing-aid compatible phones. The less sophisticated phones achieve compliance by acoustic coupling. These just amplify the normal phone volume in a way that can be picked up by hearing aids. They have an "M" rating, with M3 being the current level of performance considered minimally compliant. The other type of phone uses the inductive coupling method. These work directly with the customer's hearing aid to transmit the audible signals to the hearing aid itself where they are then converted into sound. These devices have a "T" rating, with T3 being the required minimum level.

- 📞 As of **September 9, 2008**, non-Tier 1 carriers must have the lesser of eight or 50% of their stocked handsets be M3 compliant, and the lesser of three or one-third of them T3 compliant. Note that some models meet both the M3 and T3 standard and therefore can be counted for both.
- 📞 As of **May 15, 2009**, the minimums change to the lesser of nine M3's or five Ts or 50% or a third of the models offered, respectively.
- 📞 As of **May 15, 2010**, the minimums rise to the lesser of ten M3's or seven T3s or 50% or a third of the models, respectively.
- 📞 As of **May 15, 2011**, the minimum for T3's rises to the lesser of ten or a third of the models.

The devices offered must have varying degrees of functionality to cater to different price points, and they must be available for testing in stores, correctly labeled as to compliance status, and posted on the company's website. To assist carriers in meeting these requirements, the FCC is requiring manufacturers to post on their websites the rating level of each model offered. This should permit verification of the products' compliance status, something which had been remarkably difficult to verify in the past.

Beginning on January 15, 2009 (and every January 15 thereafter), carriers will have to file a report detailing their handset offerings and other steps taken to comply with the rules. The reporting requirement will force carriers to certify in extreme detail whether they have complied with the foregoing rules, and is thus

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Globalstar/Open Range hook-up

FCC OK's ATC For MSS CDMA In The Big LEOs

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On April 10, 2008, the FCC released a “*Report and Order and Order Proposing Modification*” wherein it increased the amount of spectrum in which code division multiple access (CDMA) operators of Mobile-Satellite Service (MSS) low earth orbit satellite systems in the 1.6/2.4 GHz bands (the Big LEO bands) may provide ancillary terrestrial component (ATC) service. The Big LEO L-band spectrum available for ATC was expanded from 1610-1615.5 MHz to 1610-1617.775 MHz. The Big LEO S-band ATC spectrum was expanded from 2487.5-2493 MHz to 2483.5-2495 MHz. The FCC also adopted rules to prevent ATC operations from causing interference to other services in these and adjacent bands. In order to implement this decision, the FCC proposes to modify the ATC authorization of Globalstar, Inc. (Globalstar) pursuant to Section 316 of the Communications Act. The FCC believes its decision will enable CDMA Big LEO MSS/ATC systems to provide improved service to customers, particularly in urban and underserved rural areas of the United States.

Globalstar disclosed that it has entered into an MSS/ATC partnership with Open Range Communications, Inc. (Open Range). Open Range plans to build an advanced wireless network largely in rural areas of the country. Globalstar intends to offer broadband service to rural areas using its MSS satellite network and Open Range’s terrestrial network to provide mobile broadband service. Globalstar contends that deployment of ATC in urban areas will enable it to overcome structure blockage and that transportable base stations in combination with its satellite network will enable it to provide communications when terrestrial-only services are disabled or overloaded. Globalstar also intends to expand service to military and civilian users in the Middle East and Southwest Asia with its MSS/ATC network.

In order to ensure that ATC operations in the S-band
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PSAP-based E-911 Rules Stayed **“Procedural irregularities” cited**

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Wireless carriers have upped the ante in their struggle against PSAP-based E-911 requirements by filing suit in the DC Circuit challenging the Commission’s rulemaking and seeking a stay of the order. Sprint Nextel, T-Mobile and Verizon Wireless filed suit despite the fact that the FCC already had decided to postpone the first benchmark date from September 11, 2008 to March 11, 2009.

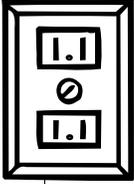
The DC Circuit granted the carriers motion for a stay pending judicial review of the Commission’s rulemaking. The Court cited “procedural irregularities” as being sufficient to justify a stay. Commissioner Adelstein weighed in on the issue, stating his displeasure that the Commission is “plowing forward with compliance benchmarks without a full record, rather than conducting this proceeding in a more thoughtful and deliberate manner.”

As you might recall from our previous reporting on this issue, the Commission instituted a timeline for reporting and compliance requirements. By September 11, 2012 carriers must be in full compliance with the Commission’s rules. In the interim the Commission has set up benchmark dates beginning with the filing of an annual progress report within each economic area the carrier serves on September 11, 2008 (as mentioned above the Commission subsequently stayed this deadline until March 11, 2009).

Performance benchmark dates would begin on September 11, 2010. By this date carriers must meet Phase II E-911 requirements within each of their metropolitan statistical areas and/or rural service areas. Also, carriers must meet their accuracy requirements for at least 75% of the phase II ready PSAPs within the carrier’s coverage area. By September 11, 2012 the carrier’s will be required to meet these requirements for 100% of the PSAPs within their coverage area.

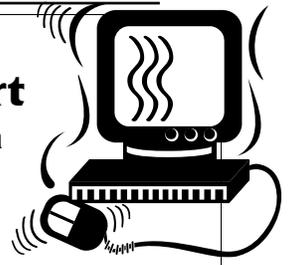
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Court to FCC: Not bad, but try again



BPL Withstands Broadside Attack In Court But Court remands some details for further explanation

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Granting amateur radio operators a partial victory, a federal appeals court has sent parts of the Broadband-over-Power-Line (BPL) rules back to the FCC for a second look. BPL works by sending radio-frequency signals along the power lines using frequencies anywhere from 1.7 to 80 MHz. The useful part of the signal is conducted along the lines, much as voice signals are carried along a telephone line. At issue here is so-called "Access BPL," a technology for delivering broadband, including high-speed Internet, to homes and businesses over the electrical power lines. The power companies like Access BPL, not only as an additional source of revenue, but also to read customers' meters remotely and for system-related communications.

Amateurs vs. BPL

Amateur radio operators have opposed BPL from the beginning. Because some of the BPL signal leaks off in the form of radio waves in eleven different amateur frequency bands over 1.7-80 MHz, the amateurs are concerned about that leakage as a source of interference. For some of them, the battle against BPL took on the fervor of a religious crusade.

Although the FCC went ahead and authorized BPL in the amateur bands, it required BPL operators to undertake unprecedented measures to cure any interference they cause. But the amateurs wanted more. They wanted BPL completely off their frequencies. When the FCC refused to go along, ARRL (the association of amateur radio operators) went to court.

The Part 15 Problem

BPL devices, both on the power poles and in customers' homes, are treated as "unlicensed devices" under Part 15 of the FCC rules. There has long been some tension between the amateurs and the Part 15 industry. Most of the higher-powered Part 15 operations occur

in bands shared with the amateurs. In some of these bands, Part 15 power can exceed one Watt - 10 million times higher than the limit elsewhere in the spectrum. As Part 15 devices proliferate, the amateurs are exposed to increasing risks of interference. The amateurs routinely oppose expansion of Part 15 in the shared bands. Starting about fifteen years ago, those oppositions began including a stock footnote suggesting that Part 15 might be unlawful under Section 301 of the Communications Act. That section can be read to say that any device emitting radio waves must be "licensed" by the FCC. If that were the correct reading, then the statutory language would leave no room for unlicensed devices.

Section 301 can be read to say that any device emitting radio waves must be "licensed" by the FCC - a reading that, if correct, would leave no room for unlicensed devices.

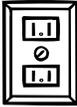
Back in 2001, the FCC approved another in a string of Part 15 power increases in shared amateur bands. ARRL sought reconsideration, and this time argued head-on that the FCC's action violated Section 301.

The FCC made the following points:

1. We think Section 301 requires licensing only for devices that actually cause interference. Harmless devices like laptops and PDAs and musical greeting cards are exempt - and would be impossible to license anyway.
2. And we, the FCC, get to decide which devices cause interference.
3. We now decide those higher-power Part 15 devices you oppose are non-interfering. That makes them lawful under Section 301.

ARRL promptly filed an appeal. But it withdrew the appeal shortly afterward, giving no reason for the change of heart. Observers at the time thought ARRL, to prevail, would need a case having better facts.

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(BPL in Court - Continued from page 4)

From ARRL's point of view, the ideal set-up for a challenge would have the FCC authorizing a Part 15 device that the FCC itself conceded could interfere with amateur radio. But that seemed unlikely, to say the least. The FCC had always been careful about limiting Part 15 emissions to make interference to other users a very remote possibility. But it took only three years for the planets to align. In the BPL rules, the FCC seemed to give ARRL everything it needed to contest Part 15.

Mobile vs. Fixed

There are two kinds of amateur stations. *Fixed* stations are typically installed in a building such as a residence or club; *mobile* stations are usually in a car. Fixed stations tend to have better antennas and receivers, and so can receive weaker signals. That makes the fixed stations more sensitive to very weak levels of interference.

The FCC at first adopted the same BPL rules as to fixed and mobile amateur users. If an amateur reports interference, the BPL operator must "notch" (turn down) the signal on that frequency by either 90% or 99%, depending on the band. If that does not resolve the problem, the operator has to completely shut off the offending BPL unit. In addition, the BPL industry must maintain a publicly accessible database showing the frequencies in use and details on the equipment at every location nationwide, with phone numbers and email addresses to report interference. All of this added up to a major victory for the amateurs, far beyond anything else in Part 15.

In a reconsideration order, the FCC made a small but significant change. The rules remained the same for fixed amateur users. But on a complaint from a mobile amateur, the BPL operator must only effect the 90 or 99% notch; it need not turn off the unit. The FCC acknowledged that intermittent interference might remain after notching, but it absolved the BPL operator of further obligations. The mobile user could escape the interference by relocating, the FCC noted, and besides, the public benefits of BPL justified "a small increase in instances of disruptions" to mobile communi-

cations.

No party had asked for this particular ruling. But a look through the 8,000 filed comments turns up a possible motivation. A few of the more zealous amateurs had said they planned to drive around looking for interference, report it, and thus shut down BPL "one pole at a time." Eliminating the shut-down requirement as to mobile users ended this threat to BPL. But it stirred outrage in the amateur community.

ARRL thought it finally had its case. The FCC had admitted possible interference from a Part 15 device.

Is Part 15 Lawful?

ARRL's central argument in Court turned on the Section 301 licensing requirement. If a device can cause interference, said ARRL, it must be licensed, according to prior FCC rulings, and therefore is ineligible for authorization under Part 15.

The FCC answered by saying, yes, while BPL may cause minor and intermittent interference, that does not constitute *harmful* interference. Because Part 15 must protect amateur

radio only against harmful interference, BPL is therefore proper under Section 301.

The court accepted the views of the FCC that BPL would not cause harmful interference to mobile amateurs. This means the missing shut-down requirement would never have to be invoked, so its absence from the rules does not run afoul of Section 301.

Other Issues

Having lost the war on the basic licensing issue, ARRL nevertheless won two skirmishes. The Court agreed with ARRL that the FCC should have made available for public review certain staff studies that were part of its decisional record, and it should also have explained better how it arrived at the factors for computing permissible emission levels. This will necessitate further proceedings at the FCC to consider these matters. In the meantime, the rules remain in effect. The amateur community is unlikely to pass up this opportunity to express yet again its displeasure with BPL.

The FCC argued that, while BPL may cause minor and intermittent interference, that does not constitute harmful interference from which amateur radio must be protected. The court agreed.

Lifeline limited

FCC Grants TracFone Limited ETC Status

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The Commission has conditionally granted the petitions of TracFone Wireless, Inc. (TracFone) to be designated as an eligible telecommunications carrier (ETC) to receive universal service Lifeline support in its licensed service areas in New York, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia. This decision acknowledges that wireless service can be useful in providing Lifeline service to low-income consumers especially in rural areas.

TracFone is a non-facilities-based commercial mobile radio service (CMRS) provider that offers prepaid wireless telecommunications service. The Commission had previously conditionally granted TracFone's request for forbearance from the facilities-based requirements of section 214(e)(1)(A) of the Act and section 54.201(k) of its rules for purpose of considering TracFone's petitions for limited ETC designation. Otherwise, TracFone provided the required showing that it complies with the eligibility requirements in the states in which the petitions were granted. The Commission determined that TracFone's services provide a variety of benefits to Lifeline-eligible consumers including increased consumer choice, high-quality service offerings, and mobility. It further determined that the prepaid feature essentially functions as a toll control feature and may be an attractive alternative to Lifeline-eligible consumers who are concerned about usage charges or long-term contracts. The Commission stressed that compliance with 911/E911 requirements applicable to wireless resellers must be met and conditioned TracFone's grant upon such compliance.

Under section 254(e) of the Act, TracFone is required to use the universal service support it receives only

for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Lifeline support therefore can be used to reduce the price of an ETC's telecommunications services by the amount of the support for the eligible consumer. To ensure that TracFone has met this requirement and the other conditions of forbearance from the facilities requirement, the Commission required TracFone to provide compliance plans and certifications to be provided periodically to the Commission. Additionally, the Commission may examine any ETC's records and documentation to ensure that the universal service support an ETC receives is really being used for the purpose for which it was intended, so TracFone must be prepared to provide such documentation upon request.

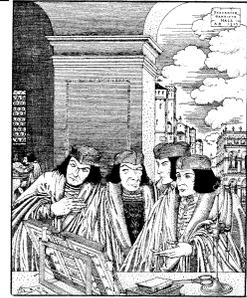
Scores of petitions by other carriers for ETC designation have been languishing at the Commission – sometimes for several years.

This FCC action is interesting since scores of petitions by other carriers for ETC designation have been languishing at the Commission – sometimes for several years. The FCC has been reluctant to grant such designations because this would open the door to claims from those designees for Universal Support subsidies at a time when the Commission is already concerned about the growth in that support. (The Joint Board and now the Commission itself have been struggling with a comprehensive reform of the USF system that would control costs and better direct the subsidies.) By simply sitting on the petitions, the FCC has delayed having to pay out the subsidy which Congress intended ETCs to have. Here the FCC did grant the petition, but limited it to *Lifeline* support – a relatively small drain on the USF fund because the amount of the subsidy is so small. While other carriers with pending petitions could probably demand similar treatment, it is questionable whether the effort would justify the cost.

NPRM may be in the offing . . .

Bureau Parses Section 222(b), Passes On Retention Marketing . . . For Now

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Recently, the FCC's Enforcement Bureau issued a "Recommended Decision" that the Commission deny in part a formal complaint filed by a number of cable operators against Verizon in regards to certain customer retention marketing practices Verizon has been using when it receives a notice to port a phone number to one of the cable operators.

It seems that the aggrieved cable operators provide VoIP services, in part, by relying on wholesale carriers to interconnect with incumbent LECs and provide transmission services, local number portability functions, and other functionalities. Around the summer of 2007, Verizon started a new program of so-called "retention marketing." Under this program, when Verizon is alerted that one of its customers wants to port its phone number to a competing cable company, it contacts these customers and encourages them to remain with Verizon, offering price incentives such as discounts and American Express reward cards. Verizon conducts this marketing while the number-porting request *is still pending*, *i.e.*, before the new provider has established service to the customer.

The understandably miffed cable operators filed a complaint, apparently claiming that Verizon's use of the porting request constituted a violation of Section 222(b) of the Communications Act, which provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." Section 222(b) thus prohibits a telecommunications carrier from using for its own marketing efforts any proprietary information that it receives from another carrier "for purposes of providing any telecommunications service...."

The problem here was that Section 222(b) does not expressly state *whose* provision of telecommunications services is protected by the marketing ban. The Bureau tentatively agreed with Verizon that Section 222(b)'s marketing ban applies *only* when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service, as opposed to receiving the information for the purposes of porting out a number, which the Bureau concludes is not itself a telecom service.

Rather than clearing up the operative rule, the Bureau's decision muddles things more.

We are not overwhelmed with the primary Section 222 analysis. It seems to follow some of the words of the Act, but may well ignore the broader *purpose* of the statute. This "recommendation" also seems to conflict with other cases where the Commission has found that a telecommunications carrier violates Section 222(b) when it "exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer" (*i.e.*, when the ILEC finds out about the customer change due to the ILEC's status as a provider of the UNE line or wholesale service that serves the end user). By contrast, the Commission has also found that "Section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier." Rather than clearing up the operative rule, the Bureau's decision muddles things more. Perhaps this is why they recommend that the Commission look at the whole thing in an NPRM.

As noted above, the legal status of retention marketing under Section 222 remains in limbo since the Bureau's order here was only a "recommendation." There will likely be an NPRM on this at some time in the future, but until this matter is definitively resolved, there may be legal risks for telecommunications carriers in doing retention marketing. Meanwhile, Verizon has filed its

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(BRS/EBS -Continued from page 1)

Channel 2A licensees to split the football with incumbent Channel 2 licensees. The concept here was that 2A licensees had gotten a huge windfall by being allotted 6 MHz of spectrum in the new plan rather than the 4 MHz which they originally held, and they therefore should not be entitled to divide the overlap area between their new spectrum and the GSAs of long-standing Channel 2 licensees.

- Adhered to its split-the-football approach to overlaps between grandfathered EBS E and F Channel licensees and co-channel BRS licensees.
- Decided to reverse course and establish a licensing plan for BRS/EBS spectrum in the Gulf of Mexico due to new oil drilling needs and Katrina-related communications needs. The Gulf will be divided into three license zones (excluding area up to 12 miles from shore which is licensed to BRS incumbents) and auctioned. It is unclear whether EBS spectrum will be reserved for EBS licensees since there are presumably no educational institutions in the Gulf.
- Clarified that EBS leases entered into prior to January 10, 2005 were limited to 15 years in length. EBS leases entered into between that date and July 18, 2006 can be of indefinite length. (The Commission noted that state contract law may imply a term limit to avoid an absurd, infinitely long lease.) Leases entered into after July 18, 2006 are limited to 30 years, with five year re-evaluations after the 15 year mark. The Commission also clarified that video-only EBS leases with unknown start dates executed more than 15 years ago will be deemed to have expired. At the expiration of lease terms, EBS lessees can make available “comparable” equipment to EBS licensees – not necessarily the exact equipment that has been used in the operation.
- Refused to create a safe harbor for licensees based on past service which has been discontinued.

The FCC has recognized that many educational institutions cannot from a practical standpoint engage in an auction process, so the FCC seems unusually open to outside-the-box ideas about alternatives to auctions.

BRS licensees had wanted the comfort of being able to rely on service provided earlier in the license term when they had to have service or risk loss of their license. Many licensees have discontinued service as allowed by the Commission pending the transition process. However, the FCC will be demanding a “substantial service” showing from BRS and EBS licensees as of May 1, 2011. (Some markets may not even be transitioned by that date.) It would have been useful to licensees to be able to point to the service that they provided earlier in their license terms (*i.e.*, pre-January, 2005) as constituting substantial service. The FCC would only agree to consider such past service as a factor but not as a guarantee that you have met your service obligation. The FCC did provide some relief by permitting licensees with GSAs which have been severely truncated by overlapping service areas of other licensees to rely on service provided by them over other facilities in the market.

- Clarified that EBS licensees may use EBS spectrum for purposes other than video programming to establish their educational eligibility.
- Ruled that in situations where a late-filed EBS or BRS renewal was filed and the Commission has already elected to reinstate the license, the late-filing licensee will be treated as the equal of other co-channel licensees for purposes of splitting the football of overlap between it and the timely-filed licensees. However, licensees who have pending reinstatement petitions that have not yet been acted on will, if reinstatement is granted, be entitled only to the areas of their GSA where they have no overlap with other timely-filed licensees. Licensees will, however, be allowed to make a special showing if application of this policy works a bizarre result.

The second part of the Commission action sought input on how to handle the award of EBS spectrum which is currently vacant. The usual method would

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(Fraudulent 911 Calls - Continued from page 1)

gue that not only are carriers refusing to honor requests from PSAPs to block calls, but even if one carrier blocked a call, the NSI device would simply roam until it found an alternate carrier available. The Petitioners also cite concerns about the number of towers and PSAPs that each block would apply to, the duration of each call block, and their termination.

From a legal standpoint, the Petitioners claim that the technological developments necessary to block calls to PSAPs have not occurred because of legal liability concerns. The Petitioners state that carriers and PSAPs are concerned about being held liable should tragedy result from the block of an attempted emergency 911 call.

The three potential solutions highlighted in the Petition are:

(1) Implementing further call-back capabilities for NSI devices

- The Commission seeks comment on whether potential solutions proposed by the National Emergency Number Association (NENA) (originally in 2005) are practicable and desirable, and if so, how they

might be best implemented.

(2) Eliminating the Commission's call-forwarding requirement for NSI devices

- In four jurisdictions examined by the Petitioners, approximately 1-3.5% or fewer of 911 calls placed by NSI phones were legitimate calls relating to actual emergencies. The Petitioners suggest that, given these overwhelming statistics, the Commission might consider revisiting its 2002 decision to pass on eliminating the 911 call forwarding requirement for NSI phones.

(3) Requiring carriers' donation programs to provide service-initialized phones

- The Petitioners report that the Commission has encouraged but never mandated that carriers provide service-initialized phones in their donation programs. The NOI questions whether such a mandate is necessary and whether that might help solve the fraudulent call problem.

Comments in the proceeding are due 45 days after publication in the *Federal Register*, with Reply Comments due 30 days thereafter. As this issue goes to press, the item has not yet appeared in the *Federal Register*.



(Big LEO Spectrum - Continued from page 3)

do not cause harmful interference to Broadband Radio Service (BRS) Channel 1 operations in the 2496-2502 MHz band, Globalstar will be required to adhere to the out-of-band emission standards applicable to BRS/Educational Broadband Service (EBS) licensees, measured from the upper edge of Globalstar's ATC authorization at 2495 MHz. There will be an absolute obligation on ATC operations to eliminate any harmful interference to BRS that may nevertheless occur. ATC operators must also resolve any complaints of harmful interference to other authorized services in and adjacent to the S-band, including grandfathered Broadcast Auxiliary Service (BAS) and private radio operations.



(Retention Marketing - Continued from page 7)

own "what's good for the goose..." pleading, requesting that the Commission facilitate changes by cable customers from one provider to another. This has suddenly become a hot button as AT&T and Verizon begin rolling out video services competitive with cable. The Commission may wrap this issue into the NPRM.

In sum, this is a big mess that is getting bigger as the competition in "triple play" increases. We will let you know as the "clean up" proceeds.



(Hearing Aid Compatibility - Continued from page 2)

a strong incentive to be compliant. The report will also necessitate scrupulous record-keeping by carriers to be able to respond accurately. The FCC has been very vigilant about enforcing compliance with these rules, so care should be taken to avoid being the first one on your block to get a fine.



(BRS/EBS - Continued from page 8)

be to auction it, but the FCC seems to have recognized that many educational institutions cannot from a practical standpoint engage in an auction process. The FCC therefore seemed unusually open to outside-the-box ideas about alternatives to auctions. Persons with an interest in acquiring or leasing EBS spectrum should submit suggestions or proposals in the sixty-day window which will be opening shortly for comments.



DTV Fines 'R' Us Millions Meted Out For Mishandled Marketing

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Faithful Readers know that full-power analog TV stations will go off the air for good on February 17, 2009, leaving only their digital counterparts. Sadly, though, not everyone is so well-informed. Come that Tuesday morning, a lot of people will turn on their trusty old TVs, ready to start the day with a little news or Gilligan's Island, and instead see . . . nothing. With a little advance warning, those folks can either upgrade to digital TVs or attach a government-subsidized adapter to the old one. But some people—many of them elderly, poor, or not fluent in English—will be caught short.

The FCC wants to keep the numbers of these unfortunates to a minimum. To that end it prohibited the manufacture and importation of analog-only TVs as of 2005-2007 (exact dates depended on screen size), and required that analog-only TVs offered for sale after last May carry a warning. It also mandated certain upgrades to the V-chip circuitry.

The FCC has lately enforced these rules with unaccustomed zeal. Recently it announced fines in three categories:

- ☛ Seven retailers—Sears/K-Mart, Wal-Mart, Circuit City, Fry's, Target., Best Buy, and CompUSA—were fined a total of \$4 million for omitting the warning signs on displays of analog-only TVs.
- ☛ Two importers were fined a total of \$1.6 million for bringing in analog-only TVs after the cut-off date.
- ☛ Seven manufacturers entered into consent decrees costing \$3.4 million, and two other manufacturers were fined another \$1 million, in connection with alleged violations of the V-chip rules.

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Wireless EAS System Design Adopted But no takers yet for "Alert Aggregator" position

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On April 9, 2008, the FCC adopted an Order establishing the architectural framework for a voluntary emergency alert system for commercial wireless mobile devices. This was in response to a Congressional mandate to adopt standards, procedures and protocols for a national alert system no later than April 9. By procrastinating until the last possible day to act, the FCC sent a strong message of how seriously it takes its emergency mission.

The FCC set up an Advisory Committee to make recommendations on the issues to be addressed. By and large, the Commission adopted the recommendations of the Advisory Committee, noting that the Committee's recommendations were the result of a consensus reached after 10 months of deliberation among a variety of stakeholders: commercial wireless carriers, equipment vendors, public safety agencies, broadcasters, the disability community, and other emergency alert experts. The basic network arrangement is depicted in the diagram below (reproduced from the FCC's order).

Under the adopted framework, an "Alert Aggregator" will receive, aggregate, and authenticate alerts originated by authorized Alert Initiators (*i.e.*, Federal, state, tribal and local government agencies) using the Common Alerting Protocol (CAP). The Alert Aggregator will also act as an "Alert Gateway" to formulate a 90 character alert based on key fields in the CAP alert sent by the Alert Initiator. Based on CMS provider profiles maintained in the Alert Gateway, the Alert Gateway will then deliver the alert over a secure interface operated by the CMS provider to another gateway maintained by the individual CMS provider. The CMS Provider Gateway is then responsible for formulating the alert, mapping the alert to the associated cell sites/paging transceivers, and managing congestion within the CMS provider infrastructure. Ultimately, the alert, in a five-element text format pat-

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(Wireless Emergency Alert System-Continued from page 10)

turned after National Weather Service alerts, will be received on a customer’s mobile device. However, by the time the message is received, it appears that the emergency will either be over or the recipients will be in no condition to check their cell phones.

There will be three classes of alerts provided via the alert network: Presidential, Imminent Threat, and AMBER alerts. Presidential alerts are those originating from the President or his designee in times of national emergency and will be granted highest priority. The Imminent Threat Alerts class is tailored to those emergencies where life or property is at risk, the event is likely to occur, and some responsive action should be taken (such as hurricane evacuation orders). AMBER alerts, which originate from voluntary partnerships between law enforcement agencies, broadcasters and CMS providers in connection with child abduction cases, will be the third class.

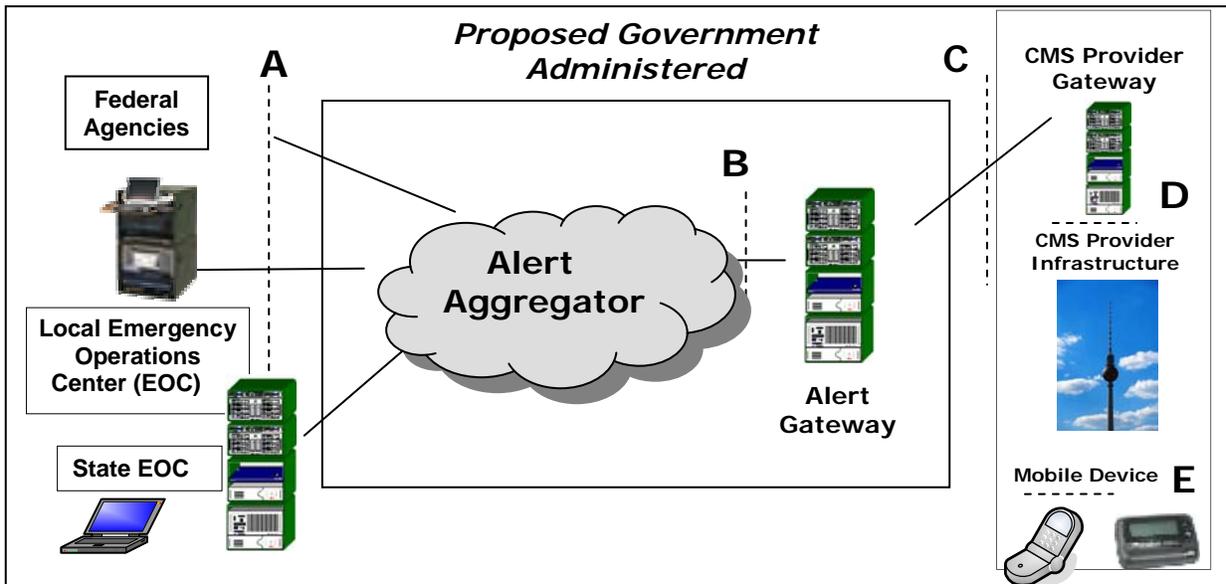
Alerts will be geographically targeted at the county-level. They need be transmitted only in English. Roaming subscribers of a participating CMS provider will receive alerts only if the operator of the roamed upon network is also a participating provider and the subscriber’s device is configured to receive alert messages from the roamed upon network; there is no requirement that the individual providers ensure such interoperability. Significantly, the Commission ruled that emergency alerts must *not* preempt a voice call or data session already in progress, on the rationale that, in an emergency, alerts should not be permitted to interrupt

calls for aid.

The rules also require that mobile devices be able to authenticate interactions with the CMS provider infrastructure, monitor for these alerts, maintain customer options (including the ability to opt-out of the alerts), and activate visual, audio, and mechanical (e.g., vibration) indicators when an alert is received on the mobile device. The varied indicator requirements were adopted to ensure access by the elderly and disabled.

Interestingly, no one has agreed as yet to become the Alert Aggregator. Potential candidates include FEMA, some other Department of Homeland Security office, or NOAA, but this portion of the equation remains undetermined. The system cannot proceed until one of these agencies steps forward to take on the responsibility for directing the whole thing. In this sense, the emergency alert rules typify all too well the government’s solution to problems in the emergency response system: issue a bold proclamation that gives the appearance of addressing the nation’s needs (after having a committee study the situation for a couple of years), while really doing nothing whatsoever to actually help anyone.

The new rules will take up residence in a new Part 10 of the Commission’s Rules, and go into effect 30 days after publication in the Federal Register. However, as noted in new Section 10.11, compliance by providers with any of these new rules will not be mandatory until 10 months after an announcement naming the federal entity responsible for aggregating and formulating these emergency alerts.



D Block still on the block

700 MHz Auction Gaveled To A Close

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Large swaths of the spectrum formerly known as TV Channels 52 - 69 were put up for auction and the bidders came out in droves to snap up the robust broadband frequencies. Amid much media and industry fanfare, the 700 MHz auction began in January and ended several weeks later on March 18. Not to be outdone by the media, the FCC piled on with its own fanfare; within 48 hours of the auction's end, Chairman Martin held a press conference to announce that the auction would add nearly \$19 billion to the federal coffers. But the auction sold only four of the five available frequency blocks. Never one to avoid the spotlight, Congress became involved in an effort to figure out what happened to the lone fifth block.

The Auction Rakes in \$19 Billion

The FCC divided the available spectrum into five different blocks. The area covered by each block varied in size so that local bidders would have available spectrum to compete with nationwide providers.

The smallest block, the B Block, sliced the country into 734 different pieces. Many of the 100 auction winners walked away with a license in this local block and the Federal Treasury made \$9 billion from them. Larger territories - 176 regions in all - were covered by the A and E blocks, which brought in a combined total of \$5.3 billion. As expected, the largest markets - the C Block, which divided the country into only 12 huge sections - were won almost exclusively by Verizon. The total bids for the C Block were \$4.7 billion.

The grand total from the auction was \$18,957,582,150, which the FCC happily rounds up to \$19 billion when it brags to the other agencies about how they have become a profit center for the government.

The D Block Stands Alone

The combined \$19 billion total for the A, B, C and E

blocks brought in far more money than a \$10 billion Congressional requirement for the auction. However, the FCC tinkered with the Congressional requirement and the agency added minimum dollar requirements for each block. Among the requirements was a reserve price of \$1.3 billion for the D Block. During the auction, the D Block received only a single bid of \$472 million and went unsold.

In keeping with the small-to-large geographic variances among the different Blocks, the FCC created the D

In contrast to the other spectrum Blocks, a winner of the D Block knew that they would instantly have "tenants" on their new property.

Block as a single license that covered the entire nation. One may wonder why Verizon did not bid on this single license rather than cobble together the C Block map noted above. The answer is found in still more tinkering that the FCC did with the D Block license. The FCC imposed an obligation on the winner of the license to cooperate with public safety agencies

around the country and provide service for these agencies using the new license. In contrast to the other spectrum Blocks, a winner of the D Block knew that they would instantly have "tenants" on their new property.

The concept of such a public safety-operator partnership was proposed by several companies early in the planning process for the auction. However, when it came time to bid, those companies did not show up. Curious about this strange turn of events, Congress held hearings and the FCC's own Inspector General reviewed the process. The Inspector General determined that nothing was awry and various members of Congress used the hearings as an opportunity to make their opinion known.

The FCC now faces the task of determining how best to use the D Block. Chairman Martin continues to promote the potential success of the public/private partnership to use the spectrum. On a daily basis, the FCC is lobbied by various industry groups or represen-

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And last but not least, another

Report from Planet FCC

(Our latest dispatch from that sometimes wacky planet orbiting along the Potomac River)

In an order released last month, the FCC rejected a petition for reconsideration that requested the refund of monies which everyone agrees were improperly paid into the USF fund in the 1998 - 1999 period. The petitions were timely filed in 1999. The amount in controversy - about a billion dollars - had improperly been collected by the FCC on certain intrastate and international revenues generated by carriers, as determined by court review. Normally this would result in the improper charge being retroactively corrected. However, the Commission determined that it would be "manifestly unjust" to correct the problem retroactively since the billion had already been paid to deserving USF recipients and the carriers who paid in the money had already collected it from their customers. There was



basically no way to unscramble the egg since many of the carriers who would receive the refund no longer exist, and, if they do exist, there is no assurance they would remit the refund back to their customers. So the carriers would simply get a windfall and current customers would actually have to pay *more* into the Fund to make up for the amount refunded. Of course, had the FCC simply acted on the petitions promptly in 1999 instead of sitting on them for nine years, the entire problem would have been significantly reduced or eliminated, and a refund could have been fairly distributed. So the direct result of the FCC's procrastination is that you and we lose a billion dollars that we paid in to support USF, and the USF recipients get a corresponding windfall of unmerited support. Talk about manifest injustice!



(700 MHz Auction - Continued from page 12)

tatives with ideas on how to use the spectrum. At the very foundation, the D Block will provide an extremely robust, unencumbered 10 MHz of spectrum that can be used all over the nation. The value of the license alone is significant; the value becomes less so as the FCC adds requirements to the license. It is now up to the FCC and a cadre of well-heeled industry representatives to determine the balance of obligations that will still keep the license attractive.

Coming Up On the Auction Block

While there is much buzz about the terms and timing of the re-auction of the 700 MHz D Block, the FCC has quietly indicated that it will auction some dregs and lees of AWS and PCS spectrum on July 29. The detritus consists of chunks that either did not sell the first time around or were returned to the government through default.

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 75,000 visits to our site already - you can come to the party, too!!!



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(E-911 Measurements - Continued from page 3)

The effect of the Court's stay on these deadlines is uncertain even if the court upholds the FCC's order. It is possible the delay caused by the Court's action will force the FCC to adjust all of these deadlines.

The wireless carriers are challenging not only the deadline for reporting but the requirement that compliance with Phase II E-911 be measured at the PSAP-level as opposed to statewide coverage. Prior to the latest FCC order, carriers were required to identify the location of a

911 caller within a certain distance over an entire region. For providers employing a GPS-based solution the required accuracy was within 50 meters for 65% of their customers and 150-300 meters for 95% of their customers. For providers employing a network-based (*i.e.*, triangulation) approach the required accuracy was 100 meters for 65% of their customers and 300 meters for 95% of their customers. The new rules won't allow carriers to boost their averages by aggregating areas with low-percentage results and areas with high-percentage results; instead they must meet these accuracy goals at the PSAP level.

(Fines and Forfeitures - Continued from page 10)

Putting signs on store displays may be one way to educate the public. But where the subject matter concerns changes to TV itself, and the people to be reached are (by definition) TV viewers, there must be some other way to get the

word out. If you do not think of the answer right way, don't worry - it's a hard problem. It took the FCC a long time, too. They did not require TV ads about the coming digital TV transition until March.