

FHH TELECOM LAW

Current Issues in Telecommunications Law and Regulation



A NOTE FROM THE EDITOR

This month's issue of FHH Telecom Law is a bit leaner than our readers are accustomed to – not because, like the Editor, it has gone on a diet as its New Year's Resolution, but because things at the FCC are moving very sluggishly. Ex-Chairman Martin of the FCC tried mightily to push through a number of his long-pending agenda items at the December meeting of the Commission. The agenda included some critical items including intercarrier compensation reform, E-911 accuracy revisions, AWS-3 rules, and other items. But before anything could happen, Congressional heavyweights from both the House and Senate wrote to the Commission urging it do nothing other than DTV transition matters until the new Commission was in place. The other Commissioners, clearly feeling their oats as the departure of the Republican Chairman loomed, were only too happy to do nothing in anticipation of a new Democratic Chairman and a Democratic majority on the Commission.

Both the other Commissioners and the FCC staff had long chafed under the autocratic and close-to-the-vest practices of the former Chairman. On January 21, with Mr. Martin safely out of the building, it was as though walls were being torn down and statues of Stalin were being toppled around the Commission's 12th street offices. The staff stepped livelier, stopped whispering behind closed doors, and breathed the crisp, clean air of bureaucratic freedom. New Acting Chairman Copps contributed to this "Prague Spring" atmosphere by announcing an immediate policy of openness and transparency in the Commission's proceedings. Change, or at least Acting Change, is certainly in the air.

Unfortunately, what has not changed is the lack of action by the FCC. Despite the new spirit of cooperation, none of the important agenda items have been moved forward. Hundreds of contested adjudications which have long been stuck in some cubbyhole of ex-Chairman Martin's

(Continued on page 4)

Revenge of the trees?

Too Much Paperwork is Bad

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



One of the pleasant vestiges of 1980 is the Paperwork Reduction Act, a law intended to curb the excesses of federal regulatory agencies by mandating independent review of all new regulations which impose paperwork burdens on the public. The idea was that agencies must quantify and justify such burdens before imposing them on regulated industries or the public. The Office of Management and Budget (OMB) was designated to be the final checkpoint on the regulatory assembly line to ensure that agencies were not overstepping. This, of course, was in the era when "big gov'ment" was Public Enemy #1, and "paperwork" was a dirty word.

There's obviously been some slippage since 1980 as the FCC has imposed burden after burden on the telecom industries, many of which involve considerable expense and reams of paperwork in the form of periodic reports or record-keeping. The vast majority of these regs have been rubber-stamped with OMB approval. (Ironically, the process actually increases the amount of paperwork generated by an agency as part of its justification of the paperwork it is imposing on others.)

That's why it was satisfying last year to see OMB manfully exercise a rare veto over an FCC rule. Specifically, the FCC had adopted rules which imposed an obligation on the largest cellular carriers to maintain eight hours of emergency battery back-up at cell sites. (This was a knee-jerk reaction to difficulties encountered during Hurricane Katrina when many cell sites lost electrical power and could not operate for hours or days.) The rule elicited howls of protest from the affected carriers who challenged the procedures used by the FCC in adopting the rules as well as the enormity of the burden which had rather casually been imposed.

The tenuousness of the FCC position was first confirmed when the reviewing court of appeals granted a stay of the rules – an indication that it considered the

(Continued on page 10)



What's the Harm in Harmful Interference?

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

The concept of “harmful interference” is central to FCC spectrum policy. The FCC has never said just what the term means. Oddly, though, that might be a good thing.

Nearly every band of the radio spectrum is shared among two or more categories of users. If we think of the spectrum as being spread out horizontally, the users of each band are stacked vertically.

Each band has a predetermined pecking order among its users: primary, secondary, and unlicensed. The relationships among all of these turn on harmful interference. Specifically:

- “Primary” users are protected against harmful interference from all other users.
- “Co-primary” users – services in the same band jointly designated as primary – may not cause harmful interference to each other.
- “Secondary” users may not cause harmful interference to primary users, and must accept harmful interference from primary users.
- Unlicensed users may not cause harmful interference to primary or secondary users, and must accept harmful interference from everybody.

The notion of harmful interference being key to the whole enterprise, we might expect to find a crisp and objective definition in the FCC rules. But when we look, we find something else. It comes in two parts:

In the case of a radio-navigation service (like GPS) or a safety service (police, fire, distress beacons, etc.), harmful interference is anything that “endangers” its functioning.

In the case of any other licensed service, harmful interference is whatever “seriously degrades, obstructs, or repeatedly interrupts” the service.

The two criteria are very different, giving safety services a lot more protection. But it is not always obvious which criterion should apply in a given case. Cell phone service, amateur radio, and satellite service all belong to the second, less-well protected group. Nowadays, though, a third of 911 calls come from cell phones. Should these receive the more stringent, “safety service” level of protection? How should we treat amateur radio operators coordinating rescue efforts during a flood? Or a satellite service carrying an OnStar subscriber’s request for an ambulance? The FCC has never ruled on the level of protection for these kinds of communications. (And of course it may be difficult in practice to single out some calls for more protection than others.)

Other terms in the definitions are just as opaque. Does “endangering” a safety service necessarily entail an actual impact to the service, or is a mere threat of interference enough to qualify? What does it take to “degrade” or “obstruct,” or “repeatedly interrupt” a service? We don’t know. Common sense suggests that an occasional minor blip would probably not qualify as harmful interference, while long-term blanketing interference probably would. But common sense is a risky guide to FCC rule interpretation. And anyway, most real-world interference oc-

(Continued on page 7)

Fletcher, Heald & Hildreth A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209

Tel: (703) 812-0400

Fax: (703) 812-0486

E-Mail: editor@fhhlaw.com

Web Site: fhhlaw.com

Editor

Donald J. Evans

Design

Harry F. Cole

Contributing Writers

Harry F. Cole, Paul J. Feldman,
Kevin M. Goldberg, Mitchell Lazarus,
and Michelle McClure

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

Copyright © 2009 Fletcher, Heald & Hildreth, P.L.C.
Copying is permitted for internal distribution.
All other rights reserved.



Telecom tickler

CPNI Certifications Due by March 1

By Michelle A. McClure
mcclure@fhhlaw.com
703-812-0484

After the holidays are over most people begin looking toward the inevitable deadline of filing taxes. The Commission has now added to that present prospect by setting up its own annual filing deadline for telecommunications carriers. On January 7, 2009, the Commission issued a Public Notice from the Enforcement Bureau reminding telecommunications carriers on the suggested format and procedures for the filing of annual Customer Proprietary Network Information (CPNI) compliance certifications. The Commission also helpfully provided a copy of an acceptable form of CPNI certification.

The CPNI rules are intended to strengthen the privacy rules and require safeguards to protect customer's CPNI against unauthorized access and disclosure. To refresh the recollection of all who may be unaware of their filing obligation in this regard, CPNI certifications must be filed annually between January 1 and March 1 by all telecommunications carriers. The Commission's rules require that telecommunications carriers must have an officer sign and file with the Commission a compliance certificate on an annual basis stating that he or she has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules. The carrier must provide a statement accompanying the certification explaining how its operating procedures ensure that it is or is not in compliance with the rules. Additionally, the carrier must include an explanation of any actions taken against data brokers and a summary of all customer complaints received in the past year concerning the unauthorized release of CPNI.

Apparently it has not been so obvious to all telecommunications carriers that they need to meet this requirement as evidenced by the rash of inquiry letters sent out by the Enforcement Bureau last Fall. These letters requested information and documents from the addressees as to why they had not filed such cer-

(Continued on page 6)

.Tel Me More, .Tel Me More

New Top Level Domain Names – Come and Get ‘Em

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

The window opened on December 3 of last year for registering “.tel” domain sites. “.tel” is a new top level domain name that is intended to identify repositories of corporate and personal contact information. As we become increasingly reliant on our Blackberries, iPhones, Palms, Treos and even plain old mobile phones, “.tel” domains are likely to become essential resources for accessing important information that once required a computer or even those old things known as “books”.

The “.tel” domain name will allow anyone – individual or business – to store any and all of its contact information directly in the DNS (Domain Naming System) for on-the-run access by anyone with a handheld device. In other words, information stored in the “.tel” domain can comprise a virtual phone book: extending well beyond simple addresses and phone numbers, it can include links to websites, keywords and any other forms of contact information now known or conceived of in the future. And the page will not require “building” by the user.

A “.tel” address owner can thus assure that, with a simple click on the “.tel” address, anyone in the world can find all the contact information the owner wants to make available - no heavy phone book with microscopic print, no full website navigation, no directory assistance necessary.

An example: Let's say we here at Fletcher, Heald & Hildreth, register the domain name www.fhhlaw.tel. We can upload to that domain not only the firm's address and main number, but also the names, direct-dial numbers and email addresses of all of our personnel, as well as links to our website and blog, and just about any other potentially useful contact information. Anyone accessing www.fhhlaw.tel from a handheld or other device would get a listing of all that uploaded information, complete with hyperlinks that would allow the user to, *e.g.*, directly dial our phone number(s) or click through to our website. No need for graphics or other high-falutin' web develop-

(Continued on page 9)

FCC's Cable Survey: Fighting the Last War?

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

Recently, the FCC released a Public Notice seeking comments on a survey form that all cable operators will have to respond to, once it is approved by the federal Office of Management and Budget. This was triggered by the fact the FCC finally released its "Thirteenth Annual Report" on Video Competition, assessing the state of competition as of 2006. Now, you might say "2006 – isn't it a bit late to be releasing the report on 2006?" You would be correct, but this is the final shot in the battle between former Chairman Kevin Martin and the cable TV industry. The late release is apparently related to the fact that the Report addresses the hotly contested and politicized issue as to whether the cable industry has met the so-called 70/70 test (*i.e.*, whether systems with 36 or more channels pass at least 70% of households, and whether at least 70% of those households subscribe to the cable systems).

If the facts show that the cable industry has passed both 70% thresholds on a national basis, then under Section 612(g) of the Communications Act, the FCC is broadly authorized to enact regulations designed to promote "diversity of information sources." This would have given Chairman Martin the opening to put more of a squeeze on the cable operators. In any case, it appears that the former Chairman may have tried to skew the numbers to meet the 70/70 test, but the re-

maining Commissioners would not buy into that approach. Rather than dropping the matter now that Chairman Martin is gone, however, the FCC will now be requiring all cable operators to respond to a survey requesting information on system-by-system basis regarding (1) the number of homes passed, (2) the number of homes passed with facilities of more than 36 channels, (3) total number of subscribers, and (4) total number of subscribers with 36 or more channels.

Critics will say that there is much that is nonsensical about this survey. In a manner that appears to be fighting the old battles instead of moving forward, the data requested are for the years 2006 and 2007. And the 36 channel distinction is quaint at this point, but is a historical artifact from 1984, when Section 612(g) was enacted. We shall see if OMB approves the survey form. Even more importantly, we shall see if the new FCC continues an aggressive approach towards regulating cable operators. Notwithstanding the release of the new survey, with Chairman Martin gone, the news out of the FCC will likely get better for the cable operators. In the meantime, people who have no wish to file detailed reports about their cable subscribership can lodge objections with OMB on or before February 17, with replies due no later than March 14.

Critics will say that there is much that is nonsensical about this survey.



(From the Editor -Continued from page 1)
office remain unissued and undecided. To be fair, the Commission is presently short-handed with only three Commissioners on board, and Mr. Copps has prudently opted to

leave permanent reforms and policy initiatives to the arrival of the permanent new Chairman. (Julius Genachowski has been widely reported to be President Obama's pick for this slot, but the inordinate delay in officially nominating him is causing some folks to wonder if that choice has hit a snag.) So the Commis-

sion has just been treading water for a couple of months.

In addition to the negative effects this inaction is having on the world of telecommunications at large, it causes a small but notable ripple in the little microcosm of our publication. We thrive on news, and when the FCC does nothing newsworthy (or nothing at all), it leaves us short of material. So we apologize in advance for the dearth of hard news, but promise a more weighty tome as soon as the FCC gets back on track.

Good bureaucracy knows no holidays

Departing Martin Takes 31 Parting Shots At Cable

By Harry F. Cole
cole@fhhlaw.com
703-812-0483



In what has to have been an unprecedented farewell kiss-off by any Chairman, on January 19, 2009, now-former FCC Chair Kevin Martin appears to have caused the Enforcement Bureau to issue 28 separate notices of apparent liability (NALs) and three forfeiture orders, all directed to cable companies, seeking an aggregate of more than \$500,000 in fines.

Don't check your calendars – January 19 was, indeed, Martin Luther King Day, a Federal holiday. (It's probably a fair question to ask whether the Bureau staffers – many of them union members – got time-and-a-half for coming in on their day off.)

The fines all stem from the cable industry's on-going conversion to digital signal distribution, which usually cannot be seen on a TV set without a cable box of some sort, for which a monthly gratuity to the cable company gets tacked on to your bill. An earlier round of related NALs was described in the October, 2008 Memo to Clients.

Fifteen of the new fines (ranging from \$7,500 to \$22,500 each) were directed to operators who had moved program services to digital tiers, unavailable to analog customers, without first giving those customers the notice required by the Section 76.1603(b) of the rules. These fines were accompanied by an order requiring the operators to refund affected subscribers the princely sum of \$0.10 per channel per month.

In the forfeiture orders, three systems were each spanked for \$20,000 for navigation device-related violations arising from their shift to switched digital video (SDV) platforms. (By the way, "forfeiture orders" are the next step after NALs in the Enforcement Bureau's playbook.) These folks also got hit with refund obligations on top of their fines. One operator was fined \$7,500 for failing to notify its local franchising authority of the shift to SDV. Three cable systems which had previously been ordered to shell out refunds for various violations were fined \$25,000 each for failing to provide the Commission with a timely description of their proposed refund methodology. (They had previ-

ously been ordered to refund subscribers for certain similar violations.)

And nine systems were whacked \$25,000 each for suggesting to the FCC that some of this is none of their beeswax, which in governmentese is called "failing to respond fully and completely" to FCC inquiries sent to them last October. (Think Glenn Close in *Fatal Attraction*: "I will not be ignored.")

Nine systems were whacked for "failing to respond fully and completely" to FCC inquiries. (Think Glenn Close in Fatal Attraction.)

Having confirmed that the 31 *billets doux* were out the door, Martin then took pen in hand to send a three-page letter to Senators Rockefeller and Hutchinson (the new head honchos on the Senate Commerce, Science and Transportation Committee) to let them know what a good boy he had been, beating up on the bad, bad cable industry and all.

Notwithstanding Martin's grandstanding letter (in which he parrots language from some of the NALs, accusing the cable operators of "contempt for the Commission's authority", among other things), the NALs do not constitute final determinations of misconduct. Rather, they are more in the nature of accusations to which the targeted companies may respond. Of course, the charges may lead to final determinations sometime down the line . . . but then again, they may not. If the cases get litigated out to the max, it could take years before we know for sure who's right and who's wrong, particularly since a new Chairman will be piloting the FCC cruise liner when the seagulls come home to roost. And if the kerfuffle gets resolved through the settlement/consent decree process, we may never get a clear-cut ruling of guilt or innocence. However it all ends up, it will be out of Martin's hands (and in the hands of an Administration which may take more kindly to cable than Martin did).

The underlying factual basis for the Commission's claims may not be 100% favorable to the Commission's position. It appears that most if not all of the cablers did respond to the Commission within the deadline established in the October NALs. Consider-

(Continued on page 8)



Man vs. Trees – the Path to Victory

But Not Enough Paperwork is Also Bad

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

On February 2, the FCC proposed two fines resulting from sloppy paperwork by manufacturers.

One concerns “verified” equipment, which makes it a rarity in FCC jurisprudence. Verification is a form of equipment authorization that does not require any filings with the FCC, and so it is not often a target of enforcement. This time, though, the FCC became interested when it checked the website of Inter Tech FM, which manufactures 15 models of FM broadcast transmitters. (Why? We don’t know. But often these investigations start with a tip from a disgruntled competitor.) When asked, Inter Tech was unable to produce its copies of the paperwork that the verification procedure requires. It also told the FCC it had discontinued marketing a particular model, even though the model was still being promoted on the company’s website.

The FCC proposed a fine of \$7,000 for the verification violations. With regard to the company’s misinformation about the model on the website, the FCC proposed to fine it \$11,000 for “provid[ing] material factual information that is incorrect . . . without a reasonable basis for believing that any such material factual statement is correct and not misleading” – in other

words, for getting it wrong without checking the facts first.

Inter Tech was lucky. The FCC could have imposed the \$7,000 fine separately for each of the fifteen different models. It might also have started criminal proceedings for lying to federal officials – the same offense that put Martha Stewart in an orange jumpsuit back in 2004.

If nobody has checked your company’s system lately, now is a good time.

On the same day, the FCC cited Proxim, a long-standing industry participant that manufactures a wide range of wireless products. Proxim had shipped 5,500 wireless access points labeled with the wrong FCC ID number. Some of the units also failed to comply with a U.S. technical rule, although they may be lawful in other countries. The result is a proposed fine of \$11,000.

One can always learn from others’ misfortune. All of these violations – probably even the Proxim technical noncompliance – resulted from paperwork slip-ups. Every company that deals in FCC-regulated products, whether as manufacturer, importer, distributor, or retailer, needs a system in place to track FCC labeling and record-keeping requirements. If nobody has checked your company’s system lately, now is a good time.



(CPNI Certifications - Continued from page 3)

tifications previously. These letters evidently were sent out wholesale to large numbers of entities which had not been aware of the new requirement to file the certifications adopted in 2007. In some cases there also appears to be some confusion as to the entities subject to the requirement. The triggering event seems to be those entities which file the annual Form 499s with NECA and hence have Form 499 Filer ID numbers. While the other shoe has not yet dropped, we anticipate that some hapless carriers will be receiving hefty Notices of Apparent Liability in their Easter

baskets.

Due to the potential enforcement action by the Commission and the uncertainty surrounding the requirement and future Commission action, it is recommended for any entity who files the Form 499 or has a Form 499 Filer ID number, or who might meet the definition of telecommunications carrier, to either consult with your communications lawyer or, to be on the safe side, develop a compliant CPNI program and file the requisite CPNI certification by the deadline of March 1, 2009.



(Harmful Interference - Continued from page 2)

curs in the vast grey area between these extremes, where the FCC has provided almost no guidance.

Periodically one or another spectrum management body calls for the FCC to promulgate a more objective definition of harmful interference. But that would be ill-advised. We will do much better to continue with a vague formulation that leaves the FCC the flexibility it needs to reach the right result in case-by-case decisions.

Accommodating New Technologies

The question of harmful interference emerges in its sharpest form whenever the FCC tries to squeeze a new radio technology into the already-crowded spectrum. Today there is no empty spectrum below about 50 GHz (and higher frequencies are suitable only for limited purposes). That leaves only two ways to find room for most new technologies: have the newcomer share a band with incumbents, or clear a band by moving its current users somewhere else – where they will have to share with incumbents. Either way, someone has to move in to an already-occupied band.

The existing occupant nearly always objects. Some genuinely fear interference. Some reflexively protect their spectrum, even if the actual threat of interference is very low. Some, particularly associations, object in hopes of looking important to their members. And some, sad to say, object in order to impede new competition. Typically the proponents of an incoming technology insist it will not cause harmful interference, while the incumbents claim that it will. In reality, both are usually wrong. Harmful interference is rarely a yes/no proposition; it tends instead to be a matter of probabilities. The newcomer might impact $X\%$ of an incumbent's service $Y\%$ of the time. Those numbers are rarely either zero or 100%. The question then becomes: What values of X and Y indicate a level of harmful interference that should justify the FCC's denying access to the newcomer? In a better-run world, the FCC would disregard the oppositions of all except incumbents who are realistically threatened. In the world we live in, however, the FCC must consider all oppositions. Making its job more difficult is the near-universal tendency of both opponents and proponents of the new technology to overstate their claims. This costs both sides credibility, and ultimately damages everyone's interests.

There are only two ways to find room for most new technologies. Either way, someone has to move in to an already-occupied band.

Incumbents often take positions along these lines:

- ☛ My service is vital to the public interest and therefore is entitled to maximum protection.
- ☛ I paid for my spectrum, so I don't have to share it with anyone. (Wrong, as a legal matter.)
- ☛ I can show incoming interference by stringing together worst-case possibilities; using implausible transmitter-receiver geometries; calculating with no other sources of radio noise (the "Jurassic assumption"); and burying unstated safety margins in my calculations.
- ☛ Any small risk of any interference to my service is harmful interference.

Newcomers likewise have their own typical positions:

- ☛ My proposed service is vital to public safety (or to broadband competition, or rural broadband, etc.)
- ☛ The high public interest in my service justifies making other people accept some interference.
- ☛ I can show my application won't cause interference by downplaying the likelihood of interfering geometries; overstating the effects of ambient radio noise; underestimating victims' receiver characteristics; and overstating victims' tolerance of brief interference.
- ☛ My innovation must have the benefit of the doubt (citing 47 U.S.C. §157, which indeed puts the burden of proof on an opponent of new technology).

The advantages of a new technology are often very real. Public safety and homeland security are benefiting from new devices that help to protect both officers and the public. Consumers are enjoying a host of go-anywhere communications and entertainment options. The FCC's assessment of harmful interference amounts to finding the right balance among the competing claims of the innovators and the incumbents.

Making the Call

When it comes down to making actual decisions, though, harmful interference is not just a matter of numbers, or even of probabilities. It depends heavily on context. These are some of the issues the FCC will properly take into account:

Public interest in the interfering service vs. the victim service. If an innovation promises to save the

(Continued on page 8)



(Harmful Interference - Continued from page 7)

lives of first responders (for example), and the opposition is a hobby service, the threshold for harmful interference will be set very high. But the opposite is also true: a proposed video-game device in a band used for aeronautical communications would be held to very exacting standards.

Whether the incoming application can work in less critical spectrum. Some bands (such as the Wi-Fi bands) that are already congested with non-critical applications can accept more usage with little or no incremental harm. Others, like satellite uplink bands, are inherently tolerant of other signals, if their power is low. The proponent of a new technology that seeks to operate in sensitive frequencies (such as a satellite downlink band) may be asked why it cannot use a more robust band instead.

Whether the incoming application can be made less interfering. Can the new technology get by with lower power? Less bandwidth? Shorter transmission times? Is it amendable to frequency coordination (which helps individual users keep out of each other's way)? Can it be set up to reliably detect and avoid victim devices? (TV "white space" devices and those for the expanded unlicensed U-NII band must have this capability.)

Whether the incumbent's equipment is unduly sensitive to interference. An incumbent that is running a badly-designed system – one unable to tolerate reasonably expected levels of interference – will generally get less sympathy from the FCC, and may get

less protection as well.

Whether the victim service can tolerate occasional interruptions. Interference that causes brief shut-downs – say, a tenth of second – may cause severe harm to a data system that needs several minutes to re-synchronize, but would barely be noticeable to an analog voice service.

Whether an interfering device can be turned off if needed. The FCC moves with the greatest caution when the new service entails large numbers of transmitters which, once shipped, are beyond the manufacturer's control. It is more tolerant of units at known, fixed locations that can be disabled if they cause trouble. It may also accept a higher risk of interference from a system that can be remotely shut down in case of interference (as is effectively required for TV white space devices).

Given the wide range of valid considerations in play, no fixed definition of "harmful interference" can give the right answer in every instance. Any such definition would run a very high risk either of letting in new services that in fact are likely to disrupt existing applications, or of unnecessarily locking out useful technologies that could be accommodated without harm. Besides, innovation is hard to predict. (If predictable, it wouldn't be innovation.) Even if we could somehow formulate a definition that appropriately covers all of today's cases, chances are that some new technology would soon raise questions that the definition cannot properly answer.

The present definition, vague though it is, allows the FCC to reach the right result in difficult cases. And nowadays, most of the cases are difficult.



(Martin vs. Cable - Continued from page 5)

ing that that deadline was only two weeks after the inquiries were sent out, some of the responding companies said that they did not have enough time to pull together all the information the FCC requested. Some also pointed out that the requested information included materials covered by confidential provisions in agreements they have with third-parties, certainly a valid complicating factor for anyone who takes his/her contractual obligations seriously.

Alas, the Commission was unmoved by such considerations. (The fact that it took the FCC more than two months to crank out the NALs, though, would seem to lend credence to the claim that a two-week response

limit might not have afforded enough time – but you never know about these things.)

A curiosity appears in the NALs for shifting program services to digital tiers without notice. Those NALs indicate that the shifting of each program service is a separate violation, and each violation warrants a \$7,500 fine. But only two cable operators were hit with fines of more than \$7,500, even though several more were alleged to have moved more than one service without notice.

Time will tell whether the accused cable operators have been (a) unjustly vilified, or (b) properly brought to justice, or (c) something in between.

(Continued on page 9)

(Tel Me More - Continued from page 3)
ment.

Clearly, businesses should consider registering their business names, trade names and trademarks as “.tel” domain names alongside any .com, .org, .edu, .tv or other domains they already own. Such intellectual property can represent a very substantial investment in accumulated good will (not to mention promotion). Failure to incorporate those names and marks in “.tel” domains gives rise to the risk that cybersquatters will register them, in which case persons looking to reach your company would likely be directed elsewhere instead (and we can probably assume safely that “elsewhere” in this context means someplace with which you would prefer not to be associated). The Anti-Cybersquatting Consumer Protection Act and Internet Corporation for Assigned Names and Numbers’ Uniform Domain Name Dispute Resolution Policy that we have previously discussed on our blog (www.commlawblog.com) will apply to .tel domain names, but while helpful in evicting cybersquatters, they can be a cumbersome and even expensive process. It is far simpler to invest the ounce of prevention by registering the name yourself in the “Sunrise” period discussed below if you own a trademark or get in early during the “Landrush” period if you do not.

“.tel” domain names can be registered through any ICANN accredited registrars. Registrations will be good for up to 10 years. These domain names may be sold or transferred like any other intellectual property in the event that all or part of a related business is sold.

A list of accredited.tel registrars was published at www.telnix.org upon the December 3 launch of this service. Speaking of the launch, it has been taking place in stages. **Phase I**, which applied only to trademark owners who already had a registered trademark or had an application pending just expired as of February 2.

“.tel” domain names can be registered through any ICANN accredited registrars.

Phase 2 – Landrush

3:00 p.m., Greenwich Mean Time (10:00 a.m., EST), on February 3, 2009 through 11:59 p.m., Greenwich Mean Time (6:59 p.m., EST), on March 23, 2009.

Anyone may apply for any previously unregistered .tel domain name at a premium price. In other words, this registration period is open to those who are willing to pay more to obtain a specific .tel domain name.

Registration will be on a first come, first served basis. ***If you have a domain name, but do not have a federally registered trademark that corresponds to the domain name, you may only register the same domain as a “.tel” domain name in the Landrush period and are would be best served by doing so as soon as possible after the Landrush opens on February 3.***

Phase 3 – General Availability

Anytime after 3:00 p.m., Greenwich Mean Time (10:00 a.m., EST), on March 24, 2009. Anyone may apply for any previously unregistered .tel domain name. Any .tel domain names that have still not been registered will be available for registration at a price lower than the premium price offered during the Landrush phase. Registration will be on a first come, first served basis.

We urge our clients that have trademarks, especially those consisting of call signs, to register a .tel domain name during the Sunrise period. Those without a registered trademark – *including those who already have the same term registered in other top level domains* – should still consider paying the premium rate to register a domain name during the Landrush phase starting on February 3, 2009. Please do not hesitate to contact a Fletcher, Heald & Hildreth, P.L.C. attorney if you need assistance or advice in the registration process.



(Martin vs. Cable - Continued from page 8)

But whatever the merits of the MLK Day orders, they are a remarkable final testament to the former Chairman’s style of administration. Why, after all, was it so all-fired important to get the orders out the door before he left the Commission? Yes, we all know of his pronounced lack of affection for the cable industry, and some of us who have seen our own analog cable signals flicker into darkness unless we rent expensive cable boxes may feel that the lack of affection is warranted.

But isn’t it a bit, er, cheesy to insist that the Bureau staff come in on a Federal holiday to crank out orders on the technical last day of his tenure so that Martin can then claim credit for them in a letter to the Hill?

In any event, the Martin regime is now in the history books, for better or worse. Many industries and individuals affected by the Commission’s activities will breathe a sigh of relief, while keeping their fingers crossed that the new Administration will not bring with it some new regulatory yoke or quagmire.



Step Away From Your Cell Phone, Sir

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

The campaign of a company called CellAntenna to conduct demos of its cell phone jamming equipment inside prisons got a boost last month from the FCC. CellAntenna manufactures equipment which can apparently jam cell phone calls within highly circumscribed environments like prisons. Corrections authorities are very interested in the device as a tool to prevent unauthorized use of cell phones by prisoners to arrange drug buys, plan escapes, order hits on witnesses, call their bookies, exceed the minutes in their monthly plans, call their stock brokers (some of whom may be in the same facility), etc. To that end, CellAntenna has arranged several demonstration events at prisons around the country, drawing the wrath of CTIA and cell phone companies who object on principle to their signals being jammed. Not to mention that such jamming operations are normally impermissible within the U.S. and the CellAntenna equipment therefore can't even be sold here. In the face of threats from the cellular industry, the Texas Corrections Department cancelled a scheduled test in December.

The D.C. Department of Corrections, however, took the step of requesting the FCC to authorize the scheduled January 8 test in advance, a request which the FCC's Wireless Bureau granted with unusual alacrity.

The authority was highly circumscribed -- it only permitted operation of the jamming equipment for 30 minutes at lunch time on January 8 and only within the confines of the DC Jail. This test too was cancelled after CTIA sought a writ from the courts to prevent it from going forward.

The cell industry is extremely wary of this particular camel getting its nose under the cellular tent.

While this brief demo seems harmless enough and even seems to have some potential public interest benefits, the cell industry is extremely wary of this particular camel getting its nose under the cellular tent. It is but a short leap from blocking calls in prisons to blocking calls in concert halls, movie theaters, class rooms, airplanes, etc. While we can sympathize with folks who would dearly love to have such calls jammed, the

fundamental human right of cell phone users to make phone calls wherever and whenever they please could be abridged, along with the fundamental human right of cell phone companies to make money from their exclusive frequency licenses. We presume that CellAntenna will eventually seek an appropriate rule change or waiver to permit the marketing and sale of its product in the U.S. At the same time, legislation has been proposed in the new Congress to authorize this type of jamming. Clearly we have not certainly not heard the last of this story.



(Paperwork Reduction Act - Continued from page 1)

appeal to have substantial merit. When it came time for oral argument, the Court suddenly became interested in the Paperwork Reduction Act. Since OMB had not yet signed off on the rules, the court decided that the case was not yet ripe for action. If OMB ultimately rejected the rules, the Court reasoned, the Court would have wasted its time reviewing the substance of the rules -- and courts never decide cases if they don't have to. The case was therefore remanded to the FCC to await OMB action.

It turns out that the Court's reticence was well-founded. OMB *did* reject the rules as being unjustifiably burdensome. While an agency can contest the OMB's

determination, the FCC has decided not to do so. The rules are therefore ineffective unless and until the FCC revises them and justifies whatever burden is then created. The FCC has now announced that it is throwing in the towel and going back to the drawing board on these rules, so the world is temporarily safe from battery back-up requirements.

The larger lesson here, though, is that the Paperwork Reduction Act remains a viable, if little used, salient in the public's thin defenses against the onslaught of federal regulation. This decision may invigorate the industry to aggressively challenge FCC regulations at the OMB level with the hope that somebody over there is now actually listening.

Owed on a Grecian's yearnings?

On Taking Out the Garbage

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

(Ed. Note: The following article has nothing to do with communications, but in the absence of actual news, we thought we'd try to fulfill our goal of at least being entertaining, if not informative.)

Now Socrates and Xanthippe had partaken fully of the comestibles that she had prepared for them. Socrates pushed himself back from the table and picked up TV Weekly to see what might be available for their mutual entertainment. Xanthippe took the dishes to the sink and chattered away – something to do with their gay neighbor, or something about her sister, Xenia, who was contemplating another cosmetic procedure.

“Are you listening to me?” Xanthippe interjected every now and then.

“Yes, dear. Of course. Something about Xenia.”

Eventually he finished reading and rose to relocate his center of operations to the living room.

“Honey, this garbage needs to go out,” his wife observed before he could make it to the kitchen door. Socrates paused for a moment, then turned, lifting his bearing just a notch.

“The garbage? But is not this garbage inanimate?”

“Quite true, Socrates.”

“Does it experience desire?”

“Surely not.”

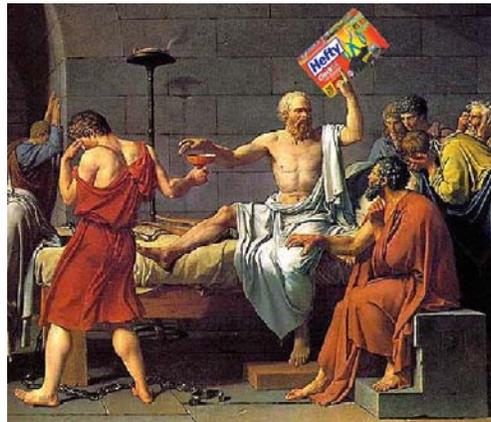
“Does it have longings?”

“Of course not.”

“Then surely it cannot experience ‘need,’ for its natural state is to want nothing, to be always perfectly content

in its present condition. A state, I might add, that men may sometimes envy.”

“All true, good Socrates. Yet it remains a fact that the garbage is here, full, in a bag and it must be placed outside in a can soon or it will start to stink. You would agree, Socrates, that a smelly kitchen cannot be good.”



“My good woman, I have spent my entire life trying to fathom the good, the true and the beautiful. And this lifetime of examination has led me to a single conclusion: that I know nothing. Who can truly say that a smelly kitchen is not good? To a fly, putrid garbage is like the very nectar of the gods to us. If putrid garbage is ‘good’ to a fly, how can it also be ‘bad’? A thing cannot be both good and bad in itself – perspective is all.”

Xanthippe pursed her lips and furrowed her brow, signs of cognitive activity. Socrates decided to stop toying with her.

“The question before us is not so much the true nature of the garbage but rather the means by which it is to be carried to the garbage can. You would surely agree that you are closer to the garbage bag than I, that you are as capable as I of lifting the bag and toting it outside, and that, given these two predicates, you could accomplish the task with less time and effort than I. This would also allow me to devote those two minutes of time to contemplating the problem of human suffering. Surely the work at hand would be best allocated between us by you taking out the garbage and me thinking great thoughts.”

Xanthippe sighed, picked up the garbage, and headed for the door. “You can be a real bastard, Socrates.”

Socrates smiled and settled into a chair before the TV. “And you, my sweet, are good and true and beautiful.”

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

First Class