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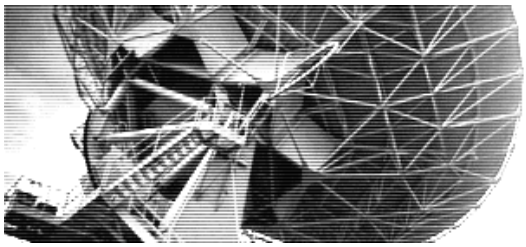

Super Big Gulp!

Enforcement Bureau Says 7-Eleven Is A Telecom Reseller

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On January 14, just beating the expiration of the statute of limitations to punish offenders, the FCC's Enforcement Bureau issued a spate of fines and citations against companies which had failed to file Hearing Aid Compatibility (HAC) Reports. While the Bureau's actions to some extent targeted the usual suspects (equipment vendors and carriers), they also, perhaps unwittingly, threatened a vast new class of businesses with regulation and enforcement actions.

Despite the far-reaching (and probably unforeseen) consequences of the Bureau's action, this whole affair started with good intentions. The Commission is rightly sensitive to the needs of the hearing-impaired. Because of that, the FCC's rules contemplate that telephone equipment manufacturers will produce, and telecommunications service providers will make available to the public, a significant stock of cellphone handsets that are compatible with hearing aid devices. To keep everybody honest (in a "trust but verify" mode), the Commission requires all phone manufacturers and service providers to submit HAC reports each year, detailing their compliance with the handset stocking rules. Since these rules came into effect a few years ago, the FCC has taken an extremely harsh and unforgiving attitude toward carriers who fail in the slightest measure to meet the requirements of the rules.

That harsh approach was evident in the fact that among the Bureau's targets was Firefly Mobile Communications. Firefly is a conventional telecommunications service provider, to be sure, but it was actually exempt from complying with the substantive handset stocking rules because it sold so few of them. Even so, Firefly was *not* exempt from the requirement to file an HAC report, so the Bureau slapped it with a citation and threatened to impose a fine if it fails to file the report again. (A "citation" is the FCC equivalent of a cop issuing you a warning rather than a speeding ticket; for some categories of offenders, the FCC is required to first issue such a warning before it can

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Analog switching – out? Digital IP – in?

FCC Launches Major Rewrite Of Phone Rules

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The telephone system formerly relied on the technology called "circuit switching": by dialing a number, a caller caused the equipment to set up a temporary, private connection with the person being called. This is inherently an analog technology. Now, however, calls are increasingly carried in data packets moving over heavily shared facilities, either on the public Internet or on private networks that operate in much the same way. But the FCC rules are still geared to the old analog circuit-switched system. They are not well suited to handling IP-related innovations like VoIP and Google Voice. Recently we harrumphed that these advances would soon trigger the need for a regulatory overhaul.

Either our harrumphings carried across the Potomac, or else (and more likely) the people at the FCC saw the same facts we did and reached similar conclusions. The FCC last December released a short public notice with the momentous title, "Comment Sought on Transition from Circuit-Switched Network to All-IP Network." It solicits input on the contents of a possible future Notice of Inquiry (NOI). Responses to the NOI in turn would inform a Notice of Proposed Rulemaking. And comments in response to the NPRM would help the FCC to formulate new rules. With three comment cycles planned, and allowing a year or two for each, the rules will take a while. (Though the initial comment deadline was December 21, 2009 – an extremely abbreviated comment period for a major upheaval on this scale – interested parties can still file *ex parte* comments.)

The FCC reassures us the job can be done. After all, it says, the country came through other transitions successfully. But the examples it offers are less reassuring: the shifts from analog to digital cell phones, and from analog TV to digital TV. The first of these was mostly transparent to consumers. Most of us didn't know when our cell phones went digital, nor did we care. The other example, the DTV transition, was the just opposite: a years-long,

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Some uses legalized, some uses prohibited

FCC Attaches Strings To Wireless Mics

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The FCC has bitten the bullet and taken steps to clear the 700 MHz band of wireless microphones in order to make room for new uses. At the same time, it has legalized these devices in the hands of formerly unlawful users.

Wireless microphones are ubiquitous. We see them on live and televised music shows and in TV news reporting. They are just as important, although less visible, when hidden under clothing in movies and TV drama and in live theater; they are equally indispensable to sports arenas, houses of worship, community centers, universities – anywhere that one person speaks to many. Even the FCC's own meeting room has a few.

Most professional wireless microphones use unoccupied channels in the TV bands. These don't cause interference to TV reception because the large users, and the companies that sell to small users, are careful about avoiding TV channels in use. Even the organizations devoted to protecting broadcast spectrum have accepted wireless microphones.

Until now, the use of wireless microphones required an FCC license. Eligibility was strictly limited to broadcasters and radio, TV, cable, and movie production, and a few other groups. All other users – music venues, Broadway shows, churches, garage bands – have been operating illegally. These folks are supposed to use non-TV frequencies, but the TV-band microphones work better, and so are by far the most popular. Even so, the unlicensed use of wireless microphones caused no trouble, so the FCC left things alone.

Then came the digital TV transition, in the course of which the FCC repacked the channels to free up the 700 MHz band (the channels formerly known as TV Channels 52-69) for other uses. But some wireless mics left over from before the transition still operate in that part of the band. These may cause problems for the new users of 700 MHz, primarily public safety and commercial applications.

The FCC has now issued a 101-page *Report and Order and Further Notice of Proposed Rulemaking* that attempts both to clear the 700 MHz band and to legitimize the non-licensed users.

The bottom line: starting when the new rules are published in the Federal Register (likely within the next few weeks), wireless microphones and other low power auxiliary devices on Channels 52-69 may no longer be imported, manufactured, sold, or leased in the United States. Use of any such devices now in operation must cease by ***June 12, 2010***, *with no exceptions*. They must clear out earlier on 60-days notice from a 700 MHz operator who plans to start operations, and immediately if they cause actual interference at any time.

None of this is a surprise. The FCC has been saying for over a decade that Channels 52-69 must be vacated. But it has waited unto now, six months after the DTV transition, to take definitive action.

The widespread use of non-licensed microphones puts the FCC in a bit of a predicament. The agency would take far too much heat if it started confiscating un-

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Shylock, shake hands with Yossarian

Commission Re-tightens Screws On Installment Debtors

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The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath . . .
NOT! –
The Merchant of Venice, Act IV, Sc. 1
(except for the "NOT")

This month the FCC got around to addressing requests for debt relief that had been filed by eight unrelated auction winners. The common denominator for the group was that all of them had, for one reason or another, sought stays, waivers or extensions of the strict payment deadlines applicable to installment note debtors. Some of these requests date as far back as 2002. All of the licensees had suffered the forfeiture of their licenses due to their failures to pay their installment notes within the time specified by the notes.

The installment payment program was one of the Commission's gloriously failed experiments in facilitating the purchase of licenses by small businesses. During the initial series of auctions in the 1990's, the Commission allowed auction winners to pay their winning bids by the installment method. Though it seemed like a good idea at the time, the program went disastrously wrong when NextWave and other auction winners realized that they had grossly overpaid for their licenses and sought the protection of bankruptcy to save them. The Supreme Court agreed that the bankruptcy laws prevailed over the FCC's claims on the licenses, and confusion reigned. The FCC accordingly abandoned installment payments in about 1997 – it's now cash on the barrelhead if you want a license – so by now all of the old 10-year notes should either have been paid off, discharged in bankruptcy, or defaulted on. The handful of licenses involved in this case are presumably the last remnants of that program. Despite being implored for mercy on a host of varying grounds, the FCC uniformly insisted on its pound of flesh from all supplicants.

The decision is notable in a number of regards. First, the FCC repeatedly took the position that it could not

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Just like back in kindergarten!

3650MHz Licensing Scheme: Play Nicely, Work Things Out Among Yourselves

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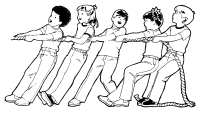

Sometimes the FCC has to act like a nursery school teacher, settling disputes among toddlers who want to use the same crayons – or, in the FCC's case, licensees who want to use the same frequencies. Some licensees, like cell phone companies, don't have to share; they have exclusive "dibs" on a frequency band over a given area. But when the FCC has licensees share bands, it usually applies one of two regimes.

For fixed installations, such as point-to-point links, a frequency coordinator typically must (a) certify that an incoming link will not cause harmful interference to those already in place, and also (b) warn the incoming user about interference it might receive. For mobile installations, the coordinator picks a frequency for the newcomer that poses the lowest available risk of interference to incumbents and newcomer alike. But often that risk is not zero. Mobile users, more than fixed users, expect to put up with a little interference now and then.

Some bands are authorized for both fixed and mobile applications, in which case the expectations for interference protection may differ.

One such band is at 3650-3700 MHz. This one has another wrinkle as well: do-it-yourself frequency coordination. It works like this:

- Every user initially obtains a non-exclusive, nationwide license which does not specify locations of operation.

- Before operating, a licensee must consult an FCC database that lists all users' locations and frequencies. Having satisfied itself that the proposed operation will not cause harmful interference to incumbents, the newcomer registers its own locations and frequencies.

- The FCC gives new registrations a cursory review before accepting them into the database, but does

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USF cap will not be doffed

Stop-Gap Cap Flap: Court Attack Falls Flat

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On December 11, the U.S. Court of Appeals for the D.C. Circuit decisively shot down a challenge to the FCC "interim cap" on Universal Service Fund payments available to CLECs and wireless carriers (collectively, "competing carriers"). It will be recalled that in the spring of 2007, a Joint Board composed of FCC commissioners and state representatives declared that an "emergency" in the Universal Service Fund was being caused by the rapidly increasing payments to wireless carriers who were entitled to subsidies under the payment scheme set up by the Commission. Although wireless carriers paid in by far the largest amount of support into the USF, the Joint Board begrudged them the right to take funds out of the USF when the system otherwise required it. The Board therefore recommended that the Commission impose an immediate interim cap on the amount of money that competing carriers could receive. The cap would not apply to LECs who, of course, received by far the largest amount of USF funding and are now competitors of wireless carriers and CLECs. A year later, the FCC agreed that there was an emergency (clearly you don't want to call on the FCC if you need the Heimlich maneuver) and imposed the cap.

The competing carriers howled. The cap had the immediate effect of reducing USF payments substantially in many states since the FCC simultaneously added new Eligible Telecommunications Companies (ETCs) to its roster of entities allowed to tap into the USF pool. Suddenly instead of an ever-expanding pie, there was a frozen pie being cut into much smaller slices to accommodate the new ETCs. With funds drastically cut, the competing carriers were presumptively no longer receiving the amount of money deemed necessary by the Commission itself to cover the costs of providing universal service. Because the governing statute requires the Commission to adopt "specific, predictable and sufficient . . . mechanisms to preserve and advance universal service," a challenge to the Commission's ruling seemed like a slam dunk. How could the capped funding mechanism, which was by definition insufficient to cover the competing carriers' costs, be deemed "sufficient" under the Act?

Somehow the Court saw it otherwise. The FCC said

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On the Auction Block

Paging License Auction Set For May

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For the past 11 years the FCC has been auctioning off lower and upper band paging licenses and has encountered a steady market of buyers. The FCC has just announced that it will be taking another batch of licenses to auction in May. In response to the FCC's announcement, only two comments were received by the FCC. In one comment, an operator from Kentucky opposed the minimum prices for the license. In another comment, a group of paging companies supported the minimum prices but opposed the anonymous nature of the bidding. The FCC likely will issue its final rules for the auction in February.

The FCC will start its auction of 9,600 paging licenses on May 25, 2010. Up for grabs will be 7,750 lower band paging licenses (operating at various frequencies from 35 MHz up to 460 MHz) and an additional 1,850 licenses at 930 MHz. For purposes of licensing the lower band, the FCC will be dividing the nation into 175 Economic Areas and issuing licenses that follow those boundaries. The FCC has taken a different approach to the upper band licenses and has cut the country into significantly larger Major Economic Areas. There are only 51 of these larger licensing areas nationwide.

Despite the variances in frequency, location and population, the starting price for each license has been proposed at a fixed $500. As a result, licenses for the Los Angeles area – with a population of 22.5 million – will start at the same $500 price as licenses for North Platte, Nebraska – with a 62,000 person population. The auction will likely last for several days under the proposed simultaneous multiple round format. Under this format, as long as there is bidding on any license, any of the other licenses will be open for bids. In application, if the Los Angeles licenses continues to receive bids after 50 rounds, bids can also be placed in Nebraska regardless of when the last bid was placed on that market. The FCC has also proposed to keep the identities of the bidders anonymous until the auction is complete.

Clients who are planning to participate in the paging auction should conduct a thorough study of the licenses upon which they intend to bid. Among the crucial elements which a bidder should analyze, close attention

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FCC to world: Next time get it in writing

FCC Fines Companies for Relying on Official's Informal Advice

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Here in Washington, regulatory agencies – the FCC is an excellent example – announce official decisions in written orders or public notices. But those official documents are just the tip of the iceberg when it comes to the nitty-gritty task of regulating. Much more agency business goes on informally, in meetings and phone calls between agency staffers and lawyers like us.

That's generally a good thing. If every little decision had to undergo the agency's formal review processes, actions would take even longer than they do now. Besides, many regulatory decisions just don't rise to a level of importance that warrants full-dress agency procedures resulting in detailed decisions memorialized in official documents.

On the other hand, relying on informal staff advice can get people in trouble.

Saying to an FCC official, "Can I have that in writing?" is to request a delay of weeks or months.

Consider the plight of Kojo Worldwide Corporation. Kojo and three other companies, all located in San Diego, need communications across the Mexican border. They had pending FCC applications for 23 GHz microwave links for that purpose. While their lawyer (not somebody here) was trying to get another client a temporary authorization for similar links, an FCC staffer told him the FCC was not issuing any more such authorizations. And by the way, the staffer added, we're not enforcing the FCC rules against unlicensed cross-border 23 GHz systems. Based on that seemingly solid and reliable information, the lawyer told Kojo and the other companies to forget the licenses and fire up their systems.

Bad move, it turned out. The FCC's San Diego office issued a Notice of Unlicensed Operation (NOUO) against the companies and subsequently fined each one $10,000. The companies appealed to the FCC in Washington, which has now upheld the fines.

The case turns on whether the companies were right in relying on the FCC staffer's informal advice. The staffer was not just some low level employee, the companies note, but the Deputy Chief of the FCC's International Bureau – high enough in the chain of command, they said, to be a reliable source on FCC policy. Not so, counters the FCC. Didn't you read that case 20 years ago where we warned against relying on oral statements by the staff? Get it in writing, or forget it. And anyway, says the FCC, you kept on operating after we sent out the NOUOs. Even if you thought unlicensed operation was okay before then, the NOUO should have told you otherwise. And, yes, a routine NOUO from a field office overrides whatever you heard from a Deputy Bureau Chief.

The main lesson from this case? Don't listen to your lawyer. No! Just kidding! The actual holding is: don't listen to a Deputy Bureau Chief.

We hope the FCC doesn't mean that. Saying to an FCC official, "Can I have that in writing?" is to request a delay of weeks or months. The FCC, for all the things it does well, does not move paper quickly.

It seems wrong to fine a company for doing what an FCC official suggests, even if the official was wrong. An admonishment would be more appropriate. Otherwise, the prudent lawyer will always have to demand written confirmation of everything he or she hears. That would seriously hinder smooth progress in the telecommunications and media industries.

***(Paging Auction** -Continued from page 4)*
should be paid to geographic incumbents in each license area. Although the FCC auction will be for licenses that cover an area defined by state, county or city borders, there are many existing licenses which are protected based upon their long standing geographic coordinates. Potential bidders should begin reviewing engineering specifications and maximum value of target licenses now.

EBS Leasing Primer: The Educator's Perspective

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With the merger of Sprint's and Clearwire's 4G operations, there has been a reduction in the leasing of Educational Broadband Service (EBS) capacity. In large part, this reduction in activity is owed to the fact that the merger gave the combined company a more robust national wireless broadband footprint than either company had individually. Indeed, these companies have more MHz of capacity available to them on a nationwide basis than Verizon Wireless and AT&T Mobility, *combined*. Against this backdrop, you would think that EBS leasing has been relegated to little more than a broadband afterthought. Far from it.

If you have EBS capacity that you already leased more than four years ago, there's a good chance that the lease will end in the next five years – and (as discussed below), it's never too early to scope out your options for when your existing deal expires. And if you have EBS capacity that is *not* currently leased, don't be surprised if you get approached in the near term about entering into a lease deal – in which case, again, it would be good to know what your options are. The combined 4G operation of Clearwire and Sprint – which is conducted under the Clearwire name (NASDAQ: CLWR) – is actively seeking new and renewal leases. In addition to Clearwire, there are a host of new or relatively young companies who desire to use EBS spectrum for broadband services, many of whom are reliant upon broadband stimulus money courtesy of the federal government and the taxpayers. So if you have EBS capacity – whether it's leased or not leased – you should consider the factors described below. From my experience, forethought and preparation relative to these items can result in serious benefits, and avoid serious mistakes.

Forethought and preparation relative to these items can result in serious benefits, and avoid serious mistakes.

The Expiration Date. If you have an existing lease you need to know when it expires. Knowing that important date should help you both to protect your valuable license and to obtain a new lease on terms favorable to your organization. And it may not be all that easy to determine your expiration date. Before the FCC imposed the secondary market rules on EBS spectrum in 2005, standard operating procedure was to set a lease's expiration for a date a specific number of years from the date of commercial launch of the system or the construction of your station. It may not be as easy now, several years down the line, to calculate exactly when that triggering event happened. Adding to that difficulty is a recent FCC order deciding how to implement the FCC's EBS lease duration rule, the result of which is to lengthen some existing leases and shorten others. Knowing the expiration date of a lease can provide you with important opportunities, but you may need time, possibly a significant amount of time, to assess the opportunities and to place yourself at a lease negotiation advantage. If you don't know when your lease expires, you could be putting yourself at a considerable disadvantage when expiration time rolls around.

And if you're a public institution, don't forget that you may be required by law or internal policy to seek lessees through a formal RFP process. That means that, before you would be able to enter into a replacement lease, you would have to jump through the RFP hoops, which can be a lengthy process. If you wait too long (because, for example, you don't know when your current lease expires), you could find yourself with no lease at all for a period of time between (a) expiration of your current lease, (b) successful conclusion of the RFP process and (c) negotiation of a new lease. Oh, and don't forget that, during that interim period, you would be receiving no lease revenue at all.

The Right-of-First Refusal. Many EBS leases contain a right of first refusal (ROFR) provision. Does your lease have one? (I'm guessing that as many as 80% of the leases that will expire in the next, say, five years contain ROFRs.) An ROFR generally gives the lessee the ability to sit back and, if you decide you want to try to find a new lessee, to match whatever deal you might make with a new lessee. An ROFR is within the class of what are called "preemptive rights." In other words, you and proposed lessees do all the work and

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***(EBS Leasimg** -Continued from page 6)*
the existing lessee takes advantage of it. If you, the EBS licensee, want to have third parties compete with the incumbent lessee for a new lease, a ROFR is generally not what you want. Obviously, it is important to review the lease to see if it contains an ROFR and, if it does, it is equally important to know exactly what your particular ROFR requires. ROFR provisions vary considerably, and the law on ROFRs is well-developed and nuanced, so it's not useful here to try to address any specific ROFR terms.

Battle of the Forms. Whether you negotiate a new lease with the incumbent lessee or a new lessee, it is important to decide whose lease form will be the document from which a new lease is crafted. Usually, but not invariably, the practice is to start the negotiations with the proposed lessee's form. Note that, if you use an RFP process, you (as the prospective lessor) could prepare your own initial draft lease and include it in the RFP with instructions for the bidder to review it and change it as the bidder desires. Anyone not using a RFP process should consider starting the negotiation process by agreeing on a term sheet before reviewing a draft of a proposed agreement. Negotiating by draft is time-consuming, inefficient and provides the party whose contract is used with a significant negotiating advantage.

Anyone not using a RFP process should consider starting the negotiation process by agreeing on a term sheet.

De facto Transfer Lease v. Spectrum Manager Lease. In the past, EBS leasing was relatively unfettered by FCC requirements: the Commission focused mainly on (a) the duration of the lease, (b) whether the lessor was given the right to buy or lease the transmission equipment at the end of the lease, and (c) making sure that the lessor reserved spectrum for its own educational use. Those concerns persist in today's regulatory environment (although no one has ever been able to explain how the equipment purchase or lease right is anything but a detriment to both parties).

But since 2005, a host of new requirements have been added as a result of the FCC's "Secondary Markets" rulemakings. Now what is a "Secondary Market?" It's no more than garden variety spectrum leasing dressed up in sophisticated-sounding FCC-speak. The FCC's "Secondary Market" rules provide for two types of spectrum leases. One type is a lease in which the licensee remains in actual control of the deployment of the leased spectrum. This type of lease is called a "spectrum manager" lease. Don't worry about this type of lease, because there is virtually no chance that your lease will fit within this category. The second type of lease is referred to by the FCC in even more fancy FCC lingo: the "*de facto* transfer" lease. This type of lease involves the transfer of actual day-to-day control of the leased spectrum to the lessee. The lessee is free to seek certain modifications of the license and is held responsible for any violations of FCC regulations which the lessee commits. This is the type of lease you will most likely sign. Despite its implications of a change in control, it is very beneficial to the EBS licensee.

Prior to imposing the Secondary Market rules on EBS leasing, the FCC required its licensees to retain control over the use of their licensed spectrum. If a licensee abdicated control (explicitly or otherwise) to a third party without FCC consent, that was viewed dimly by the FCC. Despite this FCC policy, the FCC turned a blind eye to EBS (then called ITFS) leasing, as well as the leasing of the commercial counterpart channels (*i.e.*, the BRS – then called MDS or MMDS – channels). EBS/BRS leases tended, in practical effect, to amount to a surrender of control to the lessee, even though the leases usually contained provisions ostensibly reserving control to the licensee. The post-2004 "*De facto* Transfer" lease regulations impliedly acknowledge this practice and require the parties to go to the FCC to get consent to their proposed leasing relationship, thus avoiding an unauthorized transfer of control.

What about any old leases that are still in existence? Any of these types of leases executed before the new leasing rules went into effect are now acceptable. But any new leases or lease renewals will have to follow the "*de facto* transfer" lease format and rules.

The Dangers of the De facto Transfer Lease. While "*de facto* transfer" leases can satisfy the FCC's control requirements, that does not necessarily guarantee that the EBS licensee can sleep comfortably thinking that it has no regulatory risk. The licensee is still expected to make sure that: (a) EBS channels meet the "substantial service" requirement by May 1, 2011 (the Doomsday scenario, under which you can expect to lose the license if none of the licensed channels is being used to

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***(EBS Leasing** - Continued from page 7)*
offer a real service); (b) applications for license renewal are filed on time; (c) you retain your eligibility to be an EBS licensee; and (d) you don't lose the license or have to pay fines due to the rule violations of the lessee. Risks (a) and (d) are big issues and need to be addressed effectively in the lease. Risks (a) and (d) often involve tricky questions of contract enforceability and questions of truly effective remedies (Sample situation: your lessee goes into bankruptcy and is not required to build the system necessary to meet the "substantial service" requirement – what would you do?).

Lease Term and ROFRs. You can sign an EBS lease having a 30-year duration. Is that really what you want? The lessee may very well ask for an ROFR. Have you considered whether you (or, more likely, your successor) are prepared to suffer the pain of an ROFR?

The Educational Use Requirement. Often overlooked in the EBS leasing process is the fact that the FCC still requires that the EBS *licensee* itself use each channel at least 20 hours a week for its original purposes (*i.e.*, educational and/or related purposes). Digital licensees may meet this obligation by using no less than five percent of their capacity for educational purposes, but must also retain the right to recapture 20 hours per week per channel over and above the five percent reservation. There are, of course, conventional ways of dealing with these requirements (*e.g.*, through channel loading), and the lessee can also help the EBS licensee with compliance. Still, these requirements are anything but straight-forward and need to be carefully considered in the lease, from the standpoints of both regulatory compliance and determining how you can best use your reserved capacity to meet real needs of your institution in a flexible and cost-effective manner. Once again, serious planning is in order.

Lease Fees. How much is EBS capacity worth? You could guess, but that's not really a prudent business approach. The better way is to let an expert help negotiate the lease fees. Experts can help in determining market rates (which are not easily determined in this environment) and how to translate those rates into lease fees (which is a highly nuanced exercise, involving financial modeling expertise). And be careful about getting too fancy in calculating lease fees. Lessees like predictable lease fees. For example, do not expect a tentative lessee to take kindly to a variable lease fee based upon the lessee's revenue (*e.g.*, a percentage of gross revenue) or other performance measure (*e.g.*, a per-subscriber fee). These types of fees can be hard to measure and hard to price in a start-up industry. Many leases go beyond the payment of periodic lease fees and require compensation to the licensee in the form of goods and services. If you elect to ask for this non-cash compensation, it is important to recognize that it has a price and is not a freebie to the lessee. It is also important to ask for non-cash compensation that the lessee can provide without changing its accounting system or dedicating headcount to your lease.

Planning. You may not need your EBS capacity now, but you may need at least a part of it in the future. It is important to consider this opportunity cost and provide for the retention of spectral capacity if you see a present or future need for it. But keep in mind that retention of spectrum means sacrificing lease fees.

***(Interim USF Cap** - Continued from page 4)*
that the mechanisms it adopted had to provide for "sustainability" of the USF fund – a priority not found in the statute. Moreover, the statute talked about preserving *universal service* – not preserving the universal service fund. The Court deferred to the FCC's view. The Court also shrugged off the discriminatory fact that the cap applies only to competing carriers and not LECs, accepting the claims that competing carriers are being oversubsidized and that the crisis in the fund was being caused by competing carriers who, as the newest claimants of USF funds, were creating additional funding burdens. Finally, the Court rejected the petitioners' claim that there was no evidence of an "emergency" to support the FCC's extraordinary action. The fact that the FCC sat on the Joint Board's recommendation for a year before acting might have called the "emergency" claim into question, as might the fact that the FCC's support figure (the percentage of carrier revenues needed to support the USF fund) actually went *down* after the emergency was declared. Nevertheless, the Commission prevailed. This observer, who had filed a "friend of the court" brief in support of the petitioners, feels that the Court was less than friendly.

***(No Relief for Installment Debtors** - Continued from page 3)*

grant debt relief unless the licensees showed that they were capable of paying the debt. Of course, all of them had based their waiver requests on the fact that they were temporarily *incapable* of paying the debt – if they had been capable of paying the debt, they would have just paid it. So the governing principle is that you are not entitled to debt relief unless you can show that you do not actually need debt relief.

Second, the Commission indicated that it would be more amenable to granting relief if a petitioner had continued to pay its installment payments after the FCC declared its licenses forfeit. It would take a brave licensee indeed to continue to pay hundreds of thousands of dollars to the Commission with no assurance whatsoever that its license would be reinstated. As one petitioner put it, that would be "foolish". That characterization proved true for one petitioner, Inforum Communications, which actually made nine installment payments after it had made a late payment resulting in the automatic cancellation of its license. It argued with some force that the FCC's acceptance of these payments over the course of two years constituted a constructive waiver of the deadline. The FCC rejected that argument but kept the money. This is hardly an inducement to licensees in default to continue to make payments in the hope or expectation that such a gesture will enhance their chances of getting their licenses reinstated.

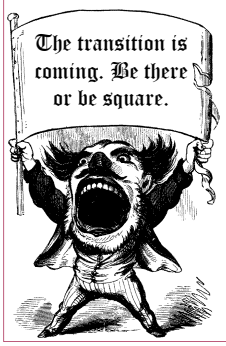
Finally, the FCC rejected the claim of one petitioner that the Uniform Commercial Code required the Commission as the debtor to set off payments received on the reauction of the licenses. To support its position that the UCC does not apply to transactions with the Commission, the Commission pointed to a "guidance letter" issued by the FCC general counsel in 1996 which the Commission said it had uniformly followed since that time. That letter addressed issues raised by some initial installment debtors about how the FCC would handle certain situations that might arise, including foreclosure on the secured licenses. Bizarrely, in that letter the FCC expressly opined that licensees *would* be entitled to a set off against their debt for amounts received by the FCC in a reauction. In other words, the document which the FCC declares has consistently guided its practices since 1996 espouses *the exact opposite* of the position taken by the Commission here.

The FCC's pound-of-flesh approach has actually boomeranged in many of these cases to cause the Federal treasury to lose money that it could otherwise have gotten and to delay or deny service to the public. Certainly some of the harsh stances – including the normally unconscionable position that the creditor can recover double the amount owed by the debtor – will be subject to review by higher authorities. Whether the FCC will suffer the same fate as Shylock remains to be seen.

COMING NEXT ISSUE: The *FHH Telecom Law* Digital Transition

Following the FCC's example in herding the television viewing public into a digital universe, we at *FHH Telecom Law* have alerted you in the past several issues that we are planning to do the same with our readers. In an effort to reduce our carbon footprint and bring the news to our readers as quickly as possible (and in color!), we are going to stop distributing *FTL* in a paper edition. Instead, we will distribute it electronically, ***STARTING WITH THE NEXT ISSUE***.

We already have an e-mailing list of several hundred subscribers. If you are among them, you need do nothing – your continued receipt of *FTL* is taken care of.



If, on the other hand, you are one of our several hundred "hard copy" subscribers who receive their monthly *FTL* fix on paper via snail mail , and if you wish to continue to receive *FTL* (and who wouldn't?), you will need to send us the email address(es) through which we can alert you to each month's edition. Just specify your preferred email address(es) in an email to ***cole@fhhlaw.com***; it *will be helpful if the subject line reads "**FTL email address change**".*

We encourage you to act sooner rather than later to avoid any possible delivery interruption.

Welcome to the 21st Century

FCC Seeks To Build A Better Website

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Depending on who you ask, 2010 may or may not be the start of a new decade. Depending on who answers, 2010 may or may not be the start of a new FCC. That's because the FCC is relying on you (and you and you, the guy in the brown shoes reading this during his lunch break) to help decide on the direction in which the agency should be moving. They've labeled this process "Reboot.FCC.Gov" and, as all the kids are doing nowadays, have set up not only a website at that domain, but also tied the whole thing together with the Blogging, and the Twittering and the Facebooking and the YouTubing (there's a bunch of other social media connections as well, including, for some reason MySpace, in case the next big indie band wants to participate).

A more conventional format was used to launch the rebooting process on January 13: a press release (the website does contain a one minute "welcome" video from New FCC Chairman Julius Genachowski). As that release explains, the Commission is "soliciting public input on ways to improve citizen interaction with the FCC." The Chairman elaborates on this, explaining that the goal is to "get input from all corners of the country on ways to improve usability, accessibility, and transparency across the agency."

You can suggest to the FCC the types of data that should be emphasized on the website and the format in which those data should be presented.

The project's efforts focus on five key elements:

Redesign of FCC.gov – Because the public's first point of contact is the FCC website, the bulk of the efforts (and, hence, the name of this project) are focused on FCC.gov. In addition to airing your complaints about the site, you can tell the FCC how to retain those aspects that work. This is, we assume, the best place to leave comments that don't neatly fit into the other categories.

Data – In the White House's recently-released "Open Government Directive" discussed in a bit more detail below, the Obama Administration accentuated the need for public access to the original data underpinning agency decisions. It said that "[w]ithin 45 days, each agency shall identify and publish online in an open format at least three high-value data sets…and register those data sets via Data.gov. These must be data sets not previously available online or in a downloadable format." The FCC is implementing this requirement through a new www.fcc.gov/data webpage that is part of this Reboot.FCC.gov process. You can not only gain direct access to FCC data, but you can also suggest to the FCC the types of data you feel the Commission should emphasize on its website and in what format that data should be presented.

Engagement – Consistent with its enthusiastic employ of social networks is a focus on increasing direct engagement with the public. Not just in terms of presenting more data to the public or redesigning existing databases, but also in terms of turning these one way streets into the proverbial – pardon our use of an "oh so 90s cliché" – "Information Superhighway" that allows information to flow in both directions.

The FCC wants you to share how you'd like the agency to share information with you. Should there be more streaming of live events, or is it more important that the FCC offer the public the opportunity to engage in real time feedback? You'll learn more about the FCC's new print and video logs, Twitter feed, video workshops and even how to break down those walls and directly interact with staff as never before.

Systems – This might be the area that excites us most: the potential redesign of the Commission's public databases, like the Electronic Comment Filing System, the Consolidated Database System and the Universal Licensing System. These are among the most accessed portions of the FCC's website, allowing anyone to get

(Continued on page 11)

***(Reboot.FCC.gov** - Continued from page 10)*
basic information about any Commission licensee or proceeding. No need to travel to the FCC's reference room or even file a Freedom of Information request. Just information you want, when you want it.

Except, not always. These systems tend to be clunky, difficult to navigate and sometimes out of date. They're difficult to use, even for attorneys who use these databases every day! As big believers in maximum access to government information, we're hoping that user comments strongly support upgrading these databases to achieve their promise of delivering accurate and useful government information in a timely fashion.

Rules and Processes – This is probably the section that most correctly wears the "inside baseball" tag: the revision of FCC rules and processes. That's because the FCC's rules and processes are largely the domain of specialized FCC practitioners like the attorneys of this very law firm. Let's face it, the common citizen just doesn't deal in the "ex parte rules" of the "Notice and Comment" proceedings of the FCC all that often.

This is part of the Administration's effort to increase transparency and public participation in government.

But this section is important for two reasons. First, as our colleague Mitchell Lazarus has aptly explained on several occasions, including in a post in our own CommLawBlog, the FCC's byzantine rules and processes have a tendency to hinder the development of new technologies. Second, the FCC wants you to be able to participate in these proceedings to the greatest extent possible. Does that mean you'll ditch the lawyers? Well, of course we'd hope not, but we firmly believe that we are able to do our jobs better when our clients understand and take an active role in FCC proceedings.

How to Participate

This is all part of the Obama Administration's larger efforts to increase transparency and public participation in government. The Reboot.FCC.Gov website has a very similar look and feel to a site the White House launched in 2009 as part of its government-wide "Open Government Initiative" that promoted open government through transparency, participation and collaboration.

This make sense, of course, as Reboot.FCC.Gov is the required response to the Open Government Initiative's edict that: "[w]ithin 60 days, each agency shall create an Open Government Webpage located at http://www.[agency].gov/open to serve as the gateway for agency activities related to the Open Government Directive and shall maintain and update that webpage in a timely fashion" (if you click on www.fcc.gov/open you get redirected to Reboot.FCC.Gov). It not only *looks* the same, but it *acts* the same, right down to the main function of taking user suggestions and allowing other users to comment on those suggestions as part of reinventing agency processes where possible.

So, if you're wondering how *you* can participate in this highest of democratic callings, well, it's quite easy. The Commission is soliciting open comments and ideas from anyone and everyone about improvements that can be made in all these areas. At the bottom of each substantive area's home page (all these home pages can be reached by going to the "Reform" page of Reboot.FCC.Gov), there is a section marked "Join the Discussion" where you'll find a short list of suggestions offered by other folks. Click on any of them and you'll be able to comment on existing ideas that others have already offered. You'll also be able to suggest your own ideas for reforming the FCC. Every idea, no matter how crazy or outlandish, will stand for public scrutiny. All you need to do is login and theoretically you've got a direct path to the FCC Chairman, the kind of access that you usually only enjoy by hiring a highly-connected, Washington-based attorney specializing in FCC matters.

Now, by no means do we suggest you ditch your highly-connected, Washington-based attorney specializing in FCC matters (unless we're not your attorneys). Quite the opposite, in fact. But we do encourage you to check out Reboot.FCC.Gov. Kick the tires, take her out for a test drive. Our early nosing around the site indicate that it's pretty user-friendly and easy to understand. You read some stuff, you vote or comment on some stuff, and you post some stuff of your own. As the Commission says, "No one knows how to reform FCC.gov better than the collective public opinion of the website's users." If you've had a gripe or a constructive suggestion for the FCC, now is the time to make it.

***(Phone Rule Re-write** - Continued from page 1)* sometimes chaotic process that many viewers found to be confusing and disruptive.

Regulation played very different parts in these two events. The cell phone transition was managed by a small number of service providers and handset companies with little involvement from the FCC. In fact, the cell phone rules barely mention the distinction between analog *vs.* digital service. The DTV transition, in contrast, was the FCC's show from the start. It could not have happened any other way. Broadcasters saw no point in launching digital broadcasts until viewers had digital TVs; but no one would buy digital TVs until there were digital broadcasts to watch. It took the FCC to cut the Gordian knot, first by requiring digital broadcasting and later on by limiting the sale of analog-only TVs.

The shift of the telephone system from circuit-switching to IP will not conform to either of these paradigms. The players here are far more numerous than in the cell phone analog-to-digital shift, and far less coordinated. But neither are those players waiting for the FCC to take the lead, as it did for digital TV. Different parts of the phone system have begun making the IP shift in piecemeal fashion. The FCC will step in to regulate a process that is already well underway.

The title of the public notice contemplates transition to an "all-IP network". It will be many years, if ever, before the network is "all-IP". Until then, the FCC will have to manage a phone system that is partly circuit-switched and partly IP. Today the center of the network, such as long-distance connections, is increasingly IP-based. But most people at home still get their service as they did a century ago: over a circuit-switched copper pair. There are exceptions. Some households rely only on cell phones; some use VoIP services like Vonage or Skype; and those who get phone service through the cable company also have VoIP, perhaps without knowing it. The numbers of these groups will grow. But especially in rural areas, where technology options arrive late, the old-fashioned switched copper loop will continue to be the mainstay.

Presently the FCC regulates the switched-circuit parts of the network and leaves the IP parts alone. (It subjects some VoIP to limited requirements.) As the switched-circuit portion shrinks, that separation will come to make less sense. But the way forward is not clear. On the one hand, to newly regulate IP services would undo 30-plus years of successful policy. On the other, abrupt deregulation of switched-circuit operations will not work, either. The parts of the phone system that will keep switched-circuit technology the longest are the most rural and least profitable. Without continued regulation, a phone company would have every incentive to walk away from just those users who have no other options.

We hope the public notice brings lots of good advice. The FCC is going to need it.

***(700 MHz Wireless Mics** - Continued from page 2)* authorized devices and shutting down Broadway and Sunday Mass, to say nothing of your kid's school play. Rather than investigate and prosecute ineligible users, the FCC decided to find a way for everyone to get most of what they want.

For now, both old and new users who are currently ineligible for licenses may nonetheless operate legally on an unlicensed basis, at up to 50 milliwatts power, until the FCC decides on permanent rules. In the "Notice of Proposed Rulemaking" portion of its document, the Commission has invited comments on who should be eligible for licenses in the future, how licensed and unlicensed operation should be permitted, and what technical standards should apply. The FCC must figure out power limits, whether new units must be digital to minimize interference potential, which TV channels should be available, and the interference implications to and from "white space" devices, including the details of database registration for wireless microphones. The rules are likely to forbid data transmission, interconnection with the telephone network, wireless telephone headsets, and after-market RF amplifiers. (Comments on these questions will be due 30 days after the order is published in the *Federal Register*; reply comments will be due 51 days after Fed Reg publication.)

And enough, says the FCC, of selling wireless microphones to customers who do not understand the license requirements. Effective February 28, 2010, conspicuous disclosure will be required throughout the distribution chain – on websites, in catalogs, in displays, and even on the boxes in which microphones are sold – to warn buyers about which frequencies are legal and who needs a license. The FCC is even considering making customers sign an acknowledgment that they understand the rules (which might work as well as their requirement, given up some decades back, that make everyone with a CB radio get a license).

(Continued on page 13)

***(7-Eleven Citation -** Continued from page 1)*
impose an actual fine.)

Firefly probably should have known that it was subject to the HAC reporting rules, even if it didn't have anything much to report. The same can't be said of 7-Eleven. 7-Eleven, along with thousands of other convenience stores, drug stores, and department stores, sells prepaid phone cards and cellphones with prepaid minutes, right there next to the revolving hotdogs. When 7-Eleven didn't file an HAC report last year, the FCC investigated. 7-Eleven claimed that it's not a telecommunications service provider at all – rather, it just sells phones (that it gets directly from various manufacturers) and prepaid wireless cards and services (that it gets from a mobile phone company). While 7-Eleven does offer these phones and cards under its own brand name, 7-Eleven urged – not unreasonably – that it should not be deemed a "telecommunications service provider" subject to the HAC reporting requirement.

This action could go a long way toward effectively killing off the prepaid card/ prepaid phone business.

The Enforcement folks disagreed. The Bureau concluded that 7-Eleven is a "reseller" and resellers are deemed to be "service providers" subject to the handset reporting and stocking requirements. Although the company got only a warning, the implications of the citation are far-reaching.

Sure, you could argue that, because a newsstand or convenience store sells prepaid cards, it could in some sense be dubbed a "reseller" of telecommunications services – and therefore a "telecommunications service provider" for purposes of the Communications Act. But let's think about that for a minute. The relationship of the convenience store to the customer has always been tenuous and fleeting, at best – certainly not consistent with the traditional model of a carrier-customer relationship. Typically the convenience store does not even know who its customer is, much less exercise any control whatsoever over the telecom service the customer gets. Is it really accurate to lump such vendors in with "real" telecom providers?

The Bureau evidently thinks so. It concluded that, because 7-Eleven resells prepaid cards and phones to customers, 7-Eleven is a telecom reseller. The Bureau did note that 7-Eleven sells the cards and phones under its own "SPEAK OUT" brand name, but it is unclear whether that practice distinguishes 7-Eleven from the CVS drug store that resells prepaid cards of other carriers under the carriers' respective brand names. Conceptually, there should be no difference between reselling cards and phones under one's own brand name or reselling them under the name of the underlying carrier – it is apparently the resale itself that categorizes you as a "service provider".

But let's assume that the Bureau is correct in its conclusion. As a result of the Bureau's decision, not only 7-Eleven, but CVS, Safeway, Macy's, and the cigar store down the street could now all be deemed "telecommunications service providers". And as such, they would need not only to file the annual HAC report (if they sell handsets), but also to contribute to the Universal Service Fund, file quarterly 499Q's, and comply with all other regulations applicable under Title II of the Act to service providers – just like AT&T and Verizon. And given the choice of either (a) undertaking all those regulatory chores (as well as the potential penalties for non-compliance), or (b) not selling phones or prepaid cards, such vendors could be expected to dump their phone/card business pronto. In that way this one Bureau action could go a long way toward effectively killing off the prepaid card/ prepaid phone business which has flourished up to this point.

The situation calls out for immediate full Commission review and possibly FCC forbearance from regulation of resale operations which were probably never intended to be subjected to the full panoply of common carrier regulation.

***(700 MHz Wireless Mics -** Continued from page 12)*
Retailers must pull 700 MHz-capable units off their shelves immediately. Those units may now be manufactured only for export, and starting April 15, 2010 (the Office of Management and Budget willing, that is), must be labeled in all cases with a clear advisory that the units cannot be used in the U.S. Manufacturers are encouraged to continue trade-in and rebate programs that replace noncompliant devices and are expected to notify users who have filed warranty registrations.

Current licenses that authorize 700 MHz band operation will automatically be modified to delete those frequencies effective June 12, 2010, but will remain valid for lower frequencies. A few licenses which are for only the 700 MHz band will be void.

So your clergy will not be forced to shout from the pulpit, Broadway will not shut down, and rock bands will still split your ears, thanks to a better organized and more realistic regulatory scheme. And the FCC can keep on using the wireless microphones in its meeting room.

***(3650 MHz Licensing** - Continued from page 3)*
not ordinarily check for interference to other users.

- And finally: "Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements" – *i.e.*, without running to the teacher – sorry, to the FCC.

In addition, transmitters in the band must incorporate a "contention-based protocol" capable of automatically avoiding interference to other users on the same frequency. More on this below.

There has been a lot of interest in the 3650-3700 MHz band for "backhaul" – transporting customers' calls and data to and from cell towers. This is a fixed application. Companies that provide backhaul are accustomed to the kind of interference protection ordinarily afforded to fixed users.

Every user has mutual and equal responsibilities to cooperate and avoid causing harmful interference, regardless of their sequence of arrival in the band.

Not in this band. An interference dispute in Puerto Rico has given us all a clearer idea of how the FCC expects the rules to work.

Licensee Neptuno Networks complained that another licensee, World Data, had failed to check the database before turning on its transmitters, failed to coordinate with Neptuno, and caused harmful interference to Neptuno. Moreover, said Neptuno, World Data began operating before its transmitters showed up in the database, thus making it hard for Neptuno to track down the source of interference. Neptuno expressed its displeasure over these alleged events in an enforcement complaint about the premature operation. It also filed two Petitions to Deny against World Data's efforts to register its stations.

World Data largely admitted the relevant facts (while blaming its contractor), but argued the FCC should leave it alone anyway.

In a decision that may surprise those accustomed to the more traditional fixed-service licensing regimes, the FCC here pretty much sided with World Data.

Most significantly, the FCC rejected Neptuno's claim that it was entitled to interference protection for being there first. The FCC likewise rejected Neptuno's argument that World Data was required to coordinate its operations with Neptuno. Rather, says the FCC, every user has mutual and equal responsibilities to cooperate and avoid causing harmful interference, regardless of their sequence of arrival in the band. The FCC found that World Data had met its obligation in that regard by choosing a modulation that could synchronize with Neptuno's, installing directional antennas, and using a polarization opposite from Neptuno's.

On the charge of premature operation, the FCC noted it had earlier issued a Notice of Violation against World Data, and did not see any reason to doubt the company would comply in the future. A possibly sarcastic footnote reminds Neptuno that the FCC had previously extended a similar courtesy to Neptuno.

Why did the use of contention-based protocols, as required, not allow these two licensees to share the band more harmoniously? The FCC order in the case does not say. According to the rules, a contention-based protocol allows multiple users to share spectrum by deciding in advance what will happen when two radios try to access the channel simultaneously, and by requiring each radio to give the other time to transmit. (In other words, play together nicely and take turns.) These protocols come in two kinds. An "unrestricted" protocol works with any kind of contention-based protocol, while a "restricted" protocol works with its own kind, but not all others. An unrestricted protocol can use the whole band; a restricted protocol is limited to the lower half. The early 3650-3700 MHz equipment, including some WiMAX gear, was all restricted. The FCC has only recently begun certifying unrestricted protocols. Perhaps their wider use will help to head off problems of the sort that occurred in Puerto Rico.

Historical, cultural chores still de rigueur

FCC Rejects Challenge to Tower Builders' Burdens

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Nearly five years after a petition was filed challenging requirements for tower siting under the Nationwide Programmatic Agreement (NPA), the Commission affirmed the historical and tribal impact assessment obligations and dismissed arguments that the requirements are unduly burdensome to tower owners and unjustifiably constrain build out of communications facilities.

In late 2004, the FCC adopted rules under the NPA to implement Section 106 of the National Historic Preservation Act of 1966 with regard to communications facilities. The rules require applicants for new communications structures to assess impacts on historic properties and tribal lands (these requirements also apply to modifications of existing tower which would increase height more than 10%) – the so-called Section 106 process. This process compels applicants with few exceptions to consult with the relevant State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) to determine whether the proposed facility may create an adverse effect on an eligible or listed historic property.

ALL new tower construction and many tower modifications are subject to the NPA and must complete the Section 106 process.

The NPA requirements are imposed in conjunction with requirements to ensure no significant environmental impact. Thus, in addition to environmental and RF evaluations, all new tower construction, regardless of height, and any modifications of existing tower heights by more than 10%, now entail, at minimum, coordination with local SHPO/THPO to ensure no adverse impact on historical or tribal property. If the local SHPO/THPO determines that there could be an impact or feels that further investigation is necessary, the tower owner can be required to conduct an archeological (or "Phase 1") field survey, a costly and time-consuming endeavor.

In light of these encumbrances on tower construction, the Tower Siting Policy Alliance (TSPA) – comprised at the time of members American Tower, Cingular Wireless, SBA Communications, and T-Mobile – filed a petition for reconsideration in early 2005, arguing that the NPA mandates were burdensome, unjustified, and overly broad. Several tribal and historic organizations filed comments in support of the regulation, of course. Curiously, no other tower company, wireless provider, or broadcaster filed comments in support of the petition. In the end, the FCC was unconvinced that the burdens on tower construction outweighed the need for historic and tribal land preservation.

Thus, unless and until TSPA seeks – and obtains – relief from the courts, *all* new tower construction and many tower modifications are subject to the NPA and must complete the Section 106 process. Tower owners dismiss these requirements at their peril. Failure to complete the full Section 106 process results in a bar on construction, and incomplete or untimely efforts can result in costly fines: in the past year, several tower owners have entered consent decrees with the FCC by which they agreed to pay $8,000 to $25,000 in penalties (for multiple sites).

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