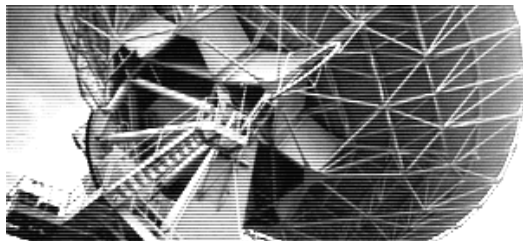


FHH TELECOM LAW

Current Issues in Telecommunications Law and Regulation



Comparative renewal, renewal expectancy – WRS style

Contemplating The Comparative Conundrum

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As part of an ambitious rulemaking looking to impose consistency across a wide range of radio services, the Commission has set its sights on solving a vexing problem involving license renewals in the Wireless Radio Services (WRS), a fairly large universe encompassing “all radio services authorized in parts 13, 20, 22, 24, 26, 27, 74, 80, 87, 90, 95, 97 and 101 . . . whether commercial or private in nature.” The problem: How to deal with applications for new licenses which are filed against (*i.e.*, mutually exclusive with) applications for renewals of existing licenses.

At a time when the Commission’s resources are focused on finding vacant or underused spectrum to feed the broadband beast, the WRS proceeding runs smack into a core issue that has resisted resolution for decades: how to determine the “renewal expectancy” to which a license renewal applicant may be entitled, and how to assess the weight of that expectancy against a competing applicant. While “renewal expectancy” historically received considerable attention in comparative renewal proceedings relating to *broadcast* licenses, the issue has now emerged in the WRS context.

“Renewal expectancy” is a concept which arises from tensions inherent in the licensing process. Commercial businesses which depend on FCC-issued licenses need to have some assurance that those essential licenses will be routinely renewed – otherwise, the risk of non-renewal would likely discourage necessary investment and hamstring the business’s commercial operation. That, in turn, would lead to reduced, less-than-optimal service, which the FCC would

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Overcoming the bureaucratic hobgoblin?

FCC Seeks Consistency In Wireless Rules

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When the FCC first opened its doors, back in 1935, there were just two kinds of radio service: AM broadcast and maritime. That made for simple regulations. But the inventors stayed busy over the ensuing years, and the FCC kept busy, too. As each new kind of radio service appeared, the FCC added a new section to its rules. The services and the rule sections each now number well up into the dozens.

Most of the licensing rules address common issues: who is eligible; how to apply; duration of the license term; when construction must be complete and/or service offered; renewal requirements; and so on. But the details on these items vary from one radio service to another.

Such differences do not seem to cause a lot of trouble. Most companies with FCC licenses have only one or two kinds. Either they know the applicable rules, or they have an advisor or lawyer who does. When people get on the wrong side of the FCC, it is rarely for confusing one section of the rules with another.

Even so, the FCC thinks more uniform rules might promote efficient spectrum use, give certainty to licensees, encourage investment, and facilitate planning. Defying Ralph Waldo Emerson, it has now proposed imposing greater consistency in the rules on renewal requirements, discontinuation of service, and licensees’ obligations following partitioning and disaggregation across a wide range of wireless services.

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Performance anxiety in the WCS

FCC Resolves One Long-Standing 2.3 GHz Controversy, Promptly Creates New One

*By Donald Evans
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By a Report and Order released May 20, 2010, the FCC brought to an end years of bickering between the Wireless Communications Service (WCS) industry and the Satellite Digital Audio Radio Service (SDARS) industry regarding the extent to which they can interfere with each other. The WCS has been largely unused since it was auctioned off in 1997, while the SDARS licensees (now consolidated into a single entity, Sirius XM Radio) have used their spectrum to provide a terrestrial-based complement to satellite transmissions. The two services, like neighbors whose houses are too close, have been squabbling for the better part of a decade about how their respective, immediately adjacent operations can co-exist so as to minimize cross-interference between them.

After having tried to resolve the dispute by many meetings, tests and technical submissions over the years, the Commission finally gave up on a negotiated solution and laid down the law as it saw it. The FCC adopted power levels for both services that it felt would minimize interference potential, depending on whether mobile or fixed usage was involved, with tighter restrictions for WCS licensees in the bands closest to the SDARS band. It also protected

Aeronautical Mobile Telemetry sites (used to gather data in flight testing of planes and missiles) by requiring coordination of usage within 45 kilometers (or line of sight) from the AMT site to a WCS base station. While no one is likely to be happy with the Commission's resolution, it at least has the virtue of bringing the technical dispute to a close. Licensees and manufacturers alike can finally proceed with certainty as to what the governing technical rules are.

Unfortunately, the FCC at the same time created a significant new problem for WCS licensees. Shortly before it was scheduled to act on the technical issues, the FCC hastily issued a public notice requesting comment on proposed "performance requirements" for WCS. The Commission suggested, without any prior input from the industry, that the current 10-years-to- provide-service-to-20%-of-your-population standard was too lax. Since virtually no licensees in the service had met even this very forgiving standard, it is unclear why the FCC thought that a new, tougher standard was appropriate. In any case, the FCC proposed performance requirements that are likely the most onerous ever imposed on any service: 40% of the population had to be covered within 30 months and 75% with 60 months – or else. (For point-to-point links, service to at least 15 links per million of population would be required in 30 months, 30 links in 60 months.) The "or else" was the regulatory equivalent of the death penalty: loss of your entire license regardless of how much had been built out and how many customers you have.

This last-minute proposal raised predictable, unanimous and, in the view of some observers, justifiable howls of protest. The Commission had never before imposed such harsh performance requirements on any class of common carrier service, and the feasibility of completing a nationwide build-out of this service in the time allowed was extremely doubtful.

The FCC responded by relenting slightly from its originally proposed deadlines. It extended the build out periods to 42 months and 72 months, respectively, and dropped its proposal to require specific build-out levels in sub-areas of the geographic licenses. It retained, however, the death penalty for failure to meet the

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The Third Way or the highway?

The FCC's "Third Way": Say What?

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When an appeals court here in D.C. overturned the FCC's attempt to enforce "Net Neutrality" in April (reported in our May issue), the FCC chose to come up with a new jurisdictional basis for its Internet policies. It needed a way to support not only the net neutrality rules it proposed in 2009, but also key elements of its proposed National Broadband Plan. The regulatory approach had to sail between the Scylla of an overly burdensome, telephone-type Title II approach, and the Charybdis of the Title I approach rejected by the *Comcast* court. The FCC's recently released Notice of Inquiry (NOI) attempts to craft a "just right" jurisdictional answer. In the process, the NOI raises – both intentionally and otherwise – revealing and challenging questions.

Trouble from the Start

Even a careful reading of the NOI leaves largely unanswered a basic question: what service is the FCC trying to regulate? The stated goal in the NOI is to define and isolate a pure Internet connectivity service that can be regulated as a "telecommunications service", while leaving the remainder of Internet access under the current classification of "information service". But defining that narrow connectivity service will not be easy, and may not even be possible.

The problems begin in the first footnote of the NOI, where the FCC unhelpfully introduces new terminology, or (more accurately) uses a variation of an established term to mean something possibly different. Where the Commission had previously used the term "broadband Internet *access* service" for a bundle of services that allow end users to connect to the Internet, it now drops the term "access" and calls the bundle "broadband Internet service". This seems backwards. According to Commissioner Copps, at least, the Commission is seeking only to regulate how people "get to the Internet," not the Internet itself. Deletion of "access" certainly suggests that the target of FCC regulation is getting broader, not narrower.

The proposed component the FCC would regulate would now be denoted as "Internet connectivity service" or "broadband Internet connectivity service". According to the NOI, "Internet connectivity" must include functions that "enable [broadband Internet subscribers] to transmit data communications to and from the rest of the Internet." But this definition is so general that it could swallow up the entirety of "broadband Internet service". Apparently sensitive to this none-too-subtle nuance, the Commission solicits information on the specific functions necessary to allow end users to merely access the Internet, without more.

The NOI leaves largely unanswered a basic question: what service is the FCC trying to regulate?

Previously, the Commission had used the term "Internet connectivity" to refer to a wide range of elements, including: the establishment of a physical connection to the Internet; interconnecting with the Internet backbone; and provision of numerous other features (think protocol conversion, Internet Protocol address assignment, domain name resolution, network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting). Now the Commission wants to revisit "Internet connectivity". But who is to make the call? Should ISPs be given latitude to define their own telecommunications service, should the FCC define only "bare minimum characteristics" of such service, or should the FCC step in and define "functionality, elements, or end-points of Internet connectivity service"? Complicating the picture are important differences among the various technologies for delivering broadband Internet, and even among providers' implementations of those technologies.

Re-engaging in this kind of functional analysis could be a dangerous task for the FCC. After similar analyses, a pair of Commission orders in 2002 and 2005 concluded that the transmission component is so integrated with the finished Internet service as to make them a single, integrated offering. Is there adequate

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Compromise Tower Agreement - For The Birds

*Conservation groups, tower groups flock together
on interim tower registration procedures*

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As the FCC tries to get a grip on its overall regulation of antenna structures (we reported about those efforts in our May, 2010 issue), there is a ray of hope that one historically contentious aspect of the tower registration process may be heading toward a compromise solution. In May, a *Memorandum of Understanding* (MOU) was signed by several communications industry groups *and* several conservation groups. In their MOU the parties propose some interim processing standards for the FCC that might break a years-long impasse, and result in new procedures (interim, at least for now) governing the regulation of new tower construction.

The issue here is, for the most part, birds.

Since way back in 2001, conservation groups (including the American Bird Conservancy and the Forest Conservation Council) have been pushing to get the Commission to take steps to help save birds in the Gulf Coast region. They claimed that bird collisions with communications towers kill millions of birds annually – just the kind of thing that the National Environmental Protection Act (and the Endangered Species Act and the Migratory Bird Treaty Act) were designed to address.

However, the Commission's relatively loosey-goosey (to use technical avian terminology) approach to tower regulation provided no mechanism for any potential objectors to bring such concerns to the FCC's attention before any tower was constructed. While many towers *are* subject to the Commission's Antenna Structure Registration (ASR) program, the registration process has historically not included any universal *pre*-registration public notice of proposed construction. In a 2002 petition, the bird fanciers asked that the Commission start issuing such pre-registration notice; they also argued that the Commission should have undertaken separate environmental assessments for about a gazillion towers already built

throughout the Gulf Coast region.

The Commission looked into the claims preliminarily, but ultimately decided to consider bird-related issues on a nation-wide basis (not just in the Gulf Coast). The birder groups were not inclined to wait, and they sought judicial intervention. In 2008, the U.S. Court of Appeals for the D.C. Circuit landed on the side of the avian avengers. The Court concluded that the FCC needed to straighten up and fly right, with more notice to the public and better consultation with the Fish and Wildlife Service, among other things.

The Commission has been roosting on the matter since then.

With the FCC's wheels grinding ever so slowly, the parties – that is, a number of

bird groups, on the one hand, and a number of tower folks, on the other – got together to work out some guidelines of their own. The parties to the MOU include the American Bird Conservancy, Defenders of Wildlife and National Audubon Society (collectively referred to as the "Conservation Groups"), and CTIA, NAB, PCIA and the National Association of Tower Erectors (collectively, the "Infrastructure Coalition").

The MOU is the result of their efforts. The MOU creates three categories of ASR actions, each entailing different notice and filing requirements.

Category #1 ASRs include new towers taller than 450 feet above ground level (AGL). For these bad boys, the ASR filing would have to include an Environmental Assessment (EA) *and* public notice by the FCC. An EA is no small matter. It requires, first, that the applicant undertake a detailed assessment of an extensive panoply of environmental, cultural, his-

*The Commission
has been roosting
on the matter
since 2008.*

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The National Broadband Plan at work . . . again

FCC Runs Attachment Rule Proposals Up the Pole

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The National Broadband Plan (NBP) strikes again, this time by prompting revision of the Commission's pole attachment rules. The NBP recommended that the pole attachment rules be revised to lower the cost of telecommunications, cable and broadband deployment and to promote competition. So, as is the case these days, if the NBP recommends it, it must be done.

The FCC issued an Order and Further Notice of Proposed Rulemaking to implement the NBP recommendations. The Order clarifies that communications providers have a statutory right to use space- and cost-saving techniques that are consistent with pole owners' use of those techniques. Providers also have a statutory right to timely access to poles. In the Further Notice, the FCC seeks comment on additional reforms to promote deployment and competition.

Congress adopted the Pole Attachment Act of 1978 to ensure that the rates, terms and conditions for pole attachments by cable television systems are just and reasonable. Section 224 of the Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications services and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. However, the 1996 Act permits utilities to deny access in cases of insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes. The 1996 Act also establishes a rate formula for telecommunications carriers that differs from the rate formula for attachments used solely to provide cable service.

The NBP identified access to rights-of-way – including access to poles – as having a significant impact on the deployment of broadband networks. The NBP included several recommendations regarding pole attachments such as:

- establishing rental rates for pole attachments that are as low and close to uniform as possible;

- implementing rules that will lower the cost of the pole attachment “make-ready” process;
- establishing a comprehensive timeline for each step of the access process and reform the process for resolving disputes regarding infrastructure access;
- improving the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.

The Order adopted immediately some of the recommendations to clarify the rules governing pole attachments and to streamline the pole attachment process and also seeks comment on possible changes to the FCC's regulatory framework governing pole access.

The FCC proposes a specific timeline for all wired pole attachment requests.

The FCC concluded that the nondiscriminatory access obligation requires a utility to allow cable operators and telecommu-

nications to use the same pole attachment techniques that the utility itself uses, although utilities retain the right to limit their use when necessary to ensure safety, reliability, and sound engineering. For example, if a utility uses techniques such as boxing (the installation of communications on both sides of the same pole at approximately the same height) and bracketing (the installation of “extension arms” which extend from the pole to support communications lines at the same level as existing lines attached to the pole), then the use of these techniques will be presumed appropriate for use by other users of that utility's poles under comparable circumstances.

Furthermore, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not “insufficient capacity” (and thus access may not be denied under section 224(f)(2)) within the meaning of the pole attachment requirements. Because there have been instances of foot-dragging by utilities in preparing their poles for third party attachments (a process known as “make-ready”), the FCC also held that this process must be timely in order to constitute just and reasonable access.

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Lawyers load photon torpedos, set phasers on stun

Star Wars: Satellite Companies Accuse Intelsat of Anticompetitive Practices

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On June 15, the FCC sent its eleventh annual report to Congress on the privatization of Intelsat and Inmarsat, as required by the ORBIT Act. (ORBIT Act? That would be the Open-Market Reorganization for the Betterment of International Telecommunications Act, a law passed in 2000 to ensure that INTELSAT and Inmarsat were transformed from intergovernmental organizations to privately-held businesses in a “pro-competitive manner”.) The Act requires the FCC to report to Congress at least once a year about how things are going with INTELSAT/Inmarsat privatization, including (among other things) the views of “the industry and consumers”.

The past few years, the report has been a snooze, mainly because Intelsat and Inmarsat have been the only ones bothering to comment. With such a limited, one-sided record, the FCC’s reports to Congress have tended to describe a rosy, peaceful view of the privatization process. This year’s report, however, is anything but rosy or peaceful. Rather, it reveals a growing acrimony within the Fixed Satellite Services (FSS) industry.

A bit of history. Before 2006, Intelsat’s product was bare satellite transponder capacity – or “space segment” capacity – sold wholesale to others (such as ARTEL, CapRock, SpaceNet and Globecom), who then integrated it into their own end-to-end network service offerings. This changed in 2006, when Intelsat acquired its major competitor PanAmSat. As part of the deal, Intelsat became the proud owner of its own end-to-end service arm – Intelsat General Corporation (IGEN). That put Intelsat in possession of a very large share of the world’s transponder capacity, a huge debt load, and a subsidiary in direct competition with Intelsat’s wholesale customers, all of whom are dependent on Intelsat’s capacity. What could possibly go wrong?

According to the commenters, Intelsat gradually succumbed to temptation and began to use its control over the space segment capacity supply to choke off IGEN’s competitors, in a classic antitrust bottleneck scenario. And as a result, this year multiple parties – including ARTEL, CapRock, SpaceNet and Globecom (disclosure: FHH assisted Globecom in the preparation of its comments) – felt compelled to advise the FCC

that the FSS playing field may not be exactly level.

Specifically, the commenters alleged that: they have been forced to negotiate with their direct competitor IGEN for Intelsat capacity; they are precluded (by various cozy arrangements which Intelsat has struck with, among others, its primary competitor) from looking elsewhere for transponder capacity; and IGEN receives preferential pricing from its parent. The commenters suggested a variety of specific cures, but one consistent thread runs through all their suggestions: they would all have the FCC initiate an inquiry into competitiveness in this market and to clarify Intelsat’s obligations as the recipient of “legacy” inter-governmental assets.

*This year’s ORBIT
report is anything
but rosy or peaceful.*

For its part, Intelsat sniffed that the various complaints and recommendations are just inappropriate efforts to undo the past ten years of privatization by re-regulating Intelsat as an inter-governmental organization. Furthermore, obviously casting a longing eye on the non-contentious past, Intelsat claimed that the annual ORBIT Act report is meant merely to confirm that the privatization of Intelsat is complete, and not to serve as an opportunity to carp about the stifling of competition and the like. According to Intelsat, the critical comments should have been tossed out as an inappropriate attempt to drag the FCC into essentially private disputes.

Appropriate or not, the various comments (all duly reflected in the FCC’s annual report) have squarely placed the issue of the competitiveness within this industry before Congress and the Commission. The FCC seems inclined to take the first cut at the issue. It concludes the report by saying:

Going forward, the Commission will consider the appropriate options for addressing those issues raised by the commenting parties and Intelsat that are within our jurisdiction under the ORBIT Act and other laws.

We wouldn’t be surprised if some sort of proceeding follows, such as a Notice of Inquiry (NOI) seeking further comment on the state of competitiveness within this sector of the satellite industry. Interested parties should take note.

FCC Eases Rules For Fixed Point-to-Point Microwave Operations

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Important new changes to the FCC's rules for fixed point-to-point microwave systems will give operators greater flexibility and allow faster initiation of service.

Microwave radio is key to the nation's economy and safety. Operating through the sideways-facing dishes and domes that dot radio towers, water towers, and tall buildings, these systems regulate the movement of railroad trains, control the electric grid and natural gas and oil pipelines, carry long-distance telephone calls and Internet traffic, transport TV programming to cable systems, send 911 messages to the local police station, deliver cell phone calls to the towers, tell the ATM your bank balance, and carry vast amounts of data that fuel ordinary businesses nationwide.

Conditional Authorization

To obtain a microwave license is time-consuming. The applicant must: (1) design the system; (2) go through frequency coordination, which limits harmful interference to and from the system; (3) file an application with the FCC; and (4) wait for the FCC to issue the license.

But there is a shortcut. Under a procedure called "conditional authorization", the applicant can flip the ON switch after step (3). The system can thus provide service while the application wends its way through FCC processing, conditioned (hence the name) on having to shut off if the application is turned down. That rarely happens.

Demands for service can arise quickly, while the FCC sometimes moves slowly. This makes conditional authorization an important tool for microwave service providers.

Rule Changes

The Fixed Wireless Communications Coalition (FWCC) asked for two improvements in the rules, which the FCC has now granted. These concern the 6 GHz and 23 GHz fixed service bands.

Demands for service can arise quickly, while the FCC sometimes moves slowly.

The 6 GHz band is the long-haul workhorse of fixed microwave. Low frequencies travel farther; and in much of the country, 6 GHz is the lowest available. For links that must span tens of miles or more, 6 GHz is often the only choice.

The band has two segments, called the "Lower 6" and the "Upper 6", which differ in two important ways. The Lower 6, shared with over 4,000 C-band satellite uplink earth stations, tends to be more congested than the Upper 6, which has no earth stations. On the other hand, the Lower 6 allows microwave channels up to 30 MHz wide, while the Upper 6 maximum was only 10 MHz. An operator who needed 30 MHz of bandwidth, but could not find room in the Lower 6, was not entirely out of luck. It could ask the FCC for a waiver to use 30 MHz in the Upper 6. The FCC has issued about a thousand of these. But an application that needs a waiver does not qualify for conditional authorization, and so the system cannot be turned on until after several weeks of FCC processing, even if the risk of interference is nil.

At the FWCC's request, the FCC has now amended its rules to add 30 MHz authorization to the Upper 6. That eliminates the need for 30 MHz waivers, and thus allows operators to use conditional authorizations, so they can commence service much more quickly.

The FWCC also had a request concerning the 23 GHz band. Suitable for shorter distances, this band is ideal for transporting cell phone and mobile Internet signals to and from cell towers. The catch here is the federal government, which shares the band. On the one hand, the government long ago set aside four channels in the band for conditional authorization. On the other hand, those channels are everyone's first choice; they tend to be crowded, and are not available everywhere. An applicant for any other channel does not qualify for conditional authorization, and so cannot operate until the FCC grants the license. In addition,

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New BRS licensees get reprieve on build-out deadline

– When the FCC auctioned off about 78 BRS licenses last year, it indicated that the winning licensees would be bound by the build-out deadline applicable to all other BRS licensees, including some who have held their licenses for more than 20 years. That deadline – May 1, 2011 – is less than a year away, and it made some bidders and prospective bidders skittish about acquiring a license with such a short fuse already smoldering. The Commission did issue an NPRM, before the auction began, in which it proposed to apply a four-year build-out deadline to these new licensees. Now it has dropped the other shoe by formally extending the deadline as proposed. Noting that considerable progress toward build-out has been made in major markets, the Commission rejected the contention by one commenter that six years was needed to complete construction. The Commission’s action was a welcome relief to those successful bidders whose licenses were granted last month, and also to those still awaiting action on their long-form applications. – **Donald J. Evans**

FCC Tweaks Unlicensed PCS



Rules (*Tweaks what?? We had to look it up, too.*) –

Most of the 1.9 GHz PCS spectrum is earmarked for voice and text cell-phone service, and very widely used. But when it created the Personal Communications Service in the early '90's, the FCC also set aside 20 MHz at 1910-1930 MHz for unlicensed operation. The sub-band at 1920-1930 MHz, used mostly for cordless telephones, is subject to the rules at issue here.

Unlike most unlicensed bands, 1920-1930 MHz has a “listen before talk” requirement. A device must monitor a channel before using it, and can transmit when signal levels are below a certain threshold. If the unit has monitored at least 40 channels and found signals to be too high on all of them, it can transmit on the quietest, so long as the activity there is below a second, higher threshold.

The FCC proposes to change these rules. One change would raise the first threshold that makes a channel available for operation, so that a unit is more likely to find a channel it can use. Another change would reduce the number of channels that a device must check

from 40 to 20. This would allow the use of wider channels, making the band more suitable for broadband transmission. (Practitioners’ tip: nowadays every proposal for an FCC rule change should include the word “broadband”.) The FCC also proposes to: remove a rule section on coordination with the microwave fixed service, which no longer uses the band; drop a corresponding labeling requirement; and make other conforming and administrative changes.

Comment and reply dates have not yet been announced. – **Mitchell Lazarus**

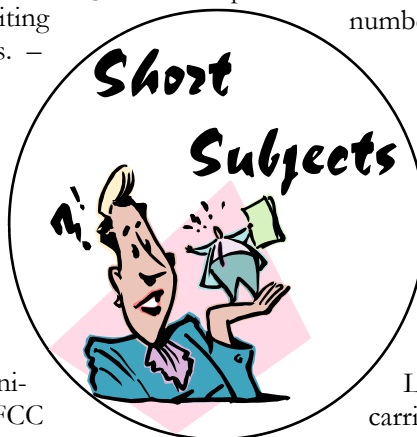


Changing phone carriers? Keeping the same number? You have friends at the FCC

– For several years now, consumers have been able to keep their telephone number when changing telephone service providers, making it easier to switch from AT&T’s iPhone to Verizon’s Droid phone and back again without having to change their number each time. You can even switch the same number between wireline, and wireless, and VoIP carriers. The problem has been that while wireless carriers have adopted a voluntary industry standard under which intercarrier wireless number “ports” take only a couple of hours between wireless carriers, they take up to four days when a wireline carrier is involved.

Last year, the FCC ordered all wireline carriers to reduce their porting time to one business day, regardless of the type of line on which the number is used, including VoIP services interconnected to the public switched network. A fracas then ensued over how much information the new carrier must provide before the old carrier has to give up a number. The FCC, exercising the wisdom of Solomon, has now concluded that uniformity and standardization are the most important considerations, and decided on 14 data fields. That was more than the eight recommended by competitive carriers and endorsed by the North American Numbering Council (NANC), the FCC’s advisory arm on telephone numbering issues, but fewer than demanded by some incumbent wireline carriers.

The FCC reminded carriers that they are required to protect the privacy of both customer and carrier pro-



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proprietary information, so data provided in number porting requests must not be used for other purposes. The FCC did not specify the information a current service provider can demand from a requesting provider to verify that the porting request is valid, but it warned against excessively stringent requirements.

Porting requests between 8 a.m. and 1 p.m. Monday through Friday, excluding local holidays, must be fulfilled by midnight the same day. Requests received after 1 p.m. will be deemed made the next business day.

If your number is 703-GET-LOST, you never have to give it up, and you can switch carriers in only a day. Major carriers must have the one-day porting system in effect by August 2, 2010. "Small providers," as defined by the FCC in 2009, have until February 2, 2011. If your carrier is in the process of merging or being bought out, you may have to wait a bit longer, as the FCC has received waiver requests indicating that trying to merge the databases of two companies and implement one-day porting at the same time is inefficient, if not an invitation to a system crash. — **Peter Tannenwald**



FCC proposes consolidation, simplification of personal radio rules – Over the

years, the FCC has assembled something of a hodge-podge of rules governing radios that the public may use without an individual license. It started with the old CB radios, but today there is an alphabet soup of radio services – CB, R/C, FRS, GMRS, MURS, LPRS, PLB, and even a couple of wireless medical services. These services are used for a wide range of activities, including: two-way conversation; remote control of model airplanes, cars and boats; personal emergency locator beacons; and monitoring and control of life-saving devices attached to or implanted within the human body.

The FCC is now proposing to consolidate many of the rules governing these various services. It hopes to eliminate unnecessary repetition of the same regulatory admonitions and (ideally) reduce to plain English regulatory language intended for users (as opposed to manufacturers and other tech-savvy folks). This is a daunting task for a government agency (although the Commission did manage to pull off the feat several years ago for CB radio).

Among the numerous changes proposed by the Com-

mission:

- ☛ The General Mobile Radio Service (GMRS) would no longer require an individual license – perhaps an inevitable move, since not many GMRS purchasers apply for those licenses anyway. (GMRS is a higher powered service whose channels overlap with those used by Family Radio Service (FRS) walkie-talkies. You see FRS gear on shelves everywhere from RadioShack to Walmart; GMRS gear not so much.)
- ☛ Handset power levels would be regulated to protect your brain from being fried by radiation.
- ☛ The once-popular "voice scramble" feature would be expressly prohibited. (Interest in the feature has pretty much died anyway, probably because the FCC starting making nasty noises about it in enforcement proceedings.) The FCC's thinking is that, in case of emergency, everyone should be able to hear and understand everyone else's transmissions. True enough, but banning the "voice scramble" may not achieve the FCC's goal. After all, the Commission is not proposing to prohibit the use of foreign languages, which most of us can't decipher at all. By contrast, undoing the "voice scramble" feature is as simple as buying a radio with that feature or building a circuit requiring only high school level electronics sophistication.
- ☛ More flexibility in radio design would be permitted. For example, Global Positioning System (GPS) features could be included in GMRS handsets (as they are already permitted for FRS units). Multi-purpose radios may be sold allowing access to multiple radio services, but combinations of FRS or CB radios with services used for safety would be prohibited. (That is, FRS and marine radio would not be combined in one handset, nor would CB and Amateur radio.)
- ☛ Wireless CB handsets would be permitted, assuming anyone wants them with the declining popularity of CB radio. In fact, because of that decline, the FCC suggests that some of its CB rules intended to lighten frequency congestion – such as time limits on CB messages and the prohibition against transmitting music – may no longer be necessary.

Despite its inclination to de-regulate, the FCC declined

(Continued on page 11)



(Wireless Consistency - Continued from page 1)

Renewals

The FCC proposes a general prohibition on competitive renewal applications in the wireless services, on the stated ground that such applications trigger needless litigation and invite abuse of FCC procedures. Under the proposed approach, where the renewing licensee has not met its obligations, its spectrum would revert to the FCC for re-auction.

Renewal of geographic-area licenses would require a “renewal showing” demonstrating levels of service and record of expansion, among other things. Affected services include:

- ♦ 1.4 GHz Service;
- ♦ 1.6 GHz Service;
- ♦ 24 GHz Service;
- ♦ 39 GHz Service;
- ♦ 218-219 MHz Service (formerly IVDS);
- ♦ 220-222 MHz Service;
- ♦ 700 MHz Guard Band Service;
- ♦ 800/900 MHz Specialized Mobile Radio Service;
- ♦ Advanced Wireless Service;
- ♦ Air-Ground Radiotelephone Service (Commercial Aviation);
- ♦ Broadband & Narrowband Personal Communications Services;
- ♦ Cellular Radiotelephone Service;
- ♦ Dedicated Short Range Communications Service;
- ♦ Local Multipoint Distribution Service;
- ♦ Multichannel Video Distribution and Data Service;
- ♦ Multilateration Location and Monitoring Service;
- ♦ Multiple Address Systems (EAs);
- ♦ Personal Communications Service;
- ♦ Paging and Radiotelephone Service;
- ♦ Public Coast Stations, including AMTS; and
- ♦ Wireless Communications Service.

The Broadband Radio Service and Educational Broadband Service got a pass for the current license term nearing its end, but they will be bound by the new rules in the future.

Renewal of most site-based licenses, in contrast, would need only a certification of prior compliance with the license requirements and the FCC’s rules and policies. The services that use these licenses are:

- ♦ 220-222 MHz Service (site-based);
- ♦ 800/900 MHz (SMR and Business and Industrial Land Transportation Pool);

- ♦ Air-Ground Radiotelephone Service (General Aviation);
- ♦ Broadcast Auxiliary Service;
- ♦ Common Carrier Fixed Point-to-Point Microwave Service;
- ♦ Digital Electronic Message Service;
- ♦ Industrial/Business Radio Pool;
- ♦ Local Television Transmission Service;
- ♦ Multiple Address Systems (site-based), excluding public safety licenses;
- ♦ Non-Multilateration Location and Monitoring Service;
- ♦ Offshore Radiotelephone Service;
- ♦ Paging and Radiotelephone Service (site-based);
- ♦ Private Carrier Paging;
- ♦ Private Operational Fixed Point-to-Point Microwave Service (excluding public safety licenses); and
- ♦ Rural Radiotelephone Service (including BETRS).

The current rules are all over the map.

The FCC also seeks comment on whether the above lists are the right ones.

Services which are authorized by rule, on a non-exclusive basis, or on a “personal” basis would be *excluded* from the new requirements. Also excluded, as a logical necessity, would be all uses of unlicensed devices, including Wi-Fi, Bluetooth, ZigBee, and hundreds more.

Permanent Discontinuance

Most FCC licensing rules have a use-it-or-lose-it provision, under which the license cancels automatically if service is “permanently discontinued”. But the meaning of that last phrase varies among the various services. Some (Parts 24, 27, and 80) have no real definition. Others specify 90 days (Part 22) or one year (most Part 90). Part 101 (fixed microwave) licensees are subject to both a 30-day rule for equipment removal and a one-year rule for permanent discontinuance.

The FCC proposes to adopt a uniform **180-day rule** for Parts 22, 24, 27, 80, 95, and 101; and a **365-day rule** for Part 90 (except SMR, which would fall under the 180-day rule). It asks for comment on these time periods, and for help in defining “discontinuance”. Other questions turn on when the new requirements would take effect. One option, for example, is to trigger application of the new rule on the date of the first construction showing.

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(Short Subjects - Continued from page 9)

to allow Multi-Use Radio Service (MURS) radios, which operate on some two-watt VHF industrial radio channels (151-154 MHz), to interconnect to the public switched telephone network.

Roger Dodger, over and out – for those who still use these radios rather than doing everything by cellphone. I still have two GMRS radios – in fact, I’m one of the handful of people who actually has a license for them, although I haven’t found an occa-

sion to use them for several years. But then again, I tend not to trek through remote areas where cell-phones don’t work and where a two-way radio might be a lifesaver.

Comments on the proposals will be due 30 days after (and reply comments 45 days after) the proposals appear in the Federal Register. The 30-day period is short enough to suggest that the FCC does not anticipate significant controversy; it also suggests that the Commission will probably adopt most, if not all, of the proposals. – *Peter Tannenwald*



(Pole Attachments - Continued from page 5)

The FCC seeks comment in the Further Notice section of a proposed comprehensive timeline for each step of the pole access process. Specifically, the FCC seeks comment on how to improve access to essential infrastructure and expedite the build-out of affordable broadband services as well as telecommunications and cable services. The FCC proposes a specific timeline for all wired pole attachment requests (including fiber or other wired attachments by wireless carriers) and seeks comment on the timeline. The FCC also proposes rules allowing for use of contract workers in certain circumstances and reforming its access dispute-resolution process. Finally, and importantly, it seeks to establish rental rates for pole attachments

that are as low and close to uniform as possible.

Under the umbrella of the NBP and the stated goals of speeding the availability of broadband by making it easier and less expensive for telecommunications and cable companies to use existing infrastructure, the FCC proposes far-ranging reforms to its current rules. Comment is requested on all these proposed reforms and the all important details such as the timelines for each stage of the pole attachment process and the formulas for establishing the rental rates. Comments will be due 30 days after publication in the Federal Register and reply comments will be due 60 days after publication in the Federal Register. We will keep you informed as to when those deadlines are established.



(Wireless Consistency - Continued from page 10)

Geographic Partitioning and Spectrum Disaggregation

The FCC generally permits a geographic licensee to partition a license (*i.e.*, divide it geographically) or to disaggregate the spectrum (*i.e.*, split the licensed frequencies among two or more parties). But after partitioning or disaggregation occurs, who is responsible for meeting the FCC’s requirements for station construction?

The current rules are all over the map. Various services allow the parties to satisfy their construction obligations independently, to assign obligations among themselves, or to satisfy their respective obligations collectively. Some rules look just to the original licensee. There has been (prepare to be shocked) some abuse. In some services, for exam-

ple, a licensee can assign a tiny sliver of spectrum to an affiliate, and also assign the construction obligation to the affiliate. When the affiliate fails to construct, the FCC takes back that little bit of spectrum. The original licensee, having built nothing, still gets to keep its license for the bulk of the spectrum.

The FCC proposes to clean this up by sticking each of the parties, after partitioning or disaggregating, with its own construction obligations for its spectrum and geographic area, and would carry over the deadlines from the original license. Inflexible application of this rule could make such “after-market” acquisition of spectrum decidedly less attractive than it is now.

The deadlines for comments on the Commission’s proposals have not yet been set. Check back here for updates.



(WRS Comparative Renewal -Continued from page 1)

generally like to avoid. So to encourage commercial stability and investment leading to desirable levels of service, the Commission has created the notion of “renewal expectancy”: if a licensee achieves appropriate levels of service, then the licensee is entitled to “expect” that its license will be renewed.

The problem with any such “expectancy”, though, is that it runs counter to the fundamental concept of a “license.” A license is temporary. As the FCC has reminded everybody *ad infinitum*, a license is *not* a property interest and gives the licensee no permanent rights. So even though there may be benefits to be gained from industry stability promoted by “renewal expectancies”, the FCC has to be careful that such expectancies do not convert a mere temporary license into a permanent property right.

The Commission’s track record in this area has been at best spotty. On the broadcast side, the FCC was sharply criticized by the U.S. Court of Appeals for the D.C. Circuit because the renewal expectancy developed there seemed to amount, in practical effect, to an insurmountable barrier to challengers. (Congress stepped in to relieve the FCC of this problem in the 1996 Telecom Act. There Congress explicitly eliminated the comparative renewal process for broadcast licenses.)

In an effort to articulate “renewal expectancy” standards for 700 MHz Commercial Services Band renewal applicants, the Commission has held that such applicants must show “that they have provided substantial service during their past license renewal term.” Substantial service is defined by an antique formula that the Commission has applied for decades without much thought: “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.” The Commission has not yet had occasion to apply those broad, somewhat platitudinous terms to any concrete set of facts in a way that might shed light on what the terms really mean. And now the Commission has decided that it needs to re-think what warrants renewal expectancy and what constitutes substantial service in the WRS arena.

It is churlish to quarrel with any effort aimed at reviewing and clarifying such an important concept. However, the current proceeding runs into one big problem:

The FCC’s track record in this area has been at best spotty.

what to do about all the renewal applications that have already been filed for WRS renewals and the 178 applications that have already been filed against 151 pending renewal applications in the Wireless Radio Services. [Full Disclosure: My colleague, Don Evans, represents a number of the applicants challenging those pending renewals.] The Commission’s current rules invite competing applications and, as noted, numerous applications have been filed in response. But how can the FCC rationally resolve such comparative renewal situations while it’s hip-deep in reassessing the core renewal expectancy issue?

The quick answer – a freeze on the filing of new applications that are mutually exclusive with a WRS renewal application filed by an incumbent licensee and a hold on the further processing of such mutually exclusive applications that have already been filed. More specifically, the Commission has suspended the filing of applications that are mutually exclusive with the renewal applications of incumbent licensees for all Wireless Radio Services as of May 20, 2010, the adoption date of the Notice of Proposed Rulemaking.

A processing hold has been placed on the 178 competing applications already on file as of May 20, 2010. If the Commission adopts the rules and policies it is now proposing, these pending applications will be dismissed along with all related correspondence. The good news is that these applications, which have heretofore not been viewable on the Commission’s Universal Licensing System, will now be viewable.

The Commission will also hold in abeyance all pleadings and correspondence regarding the 178 pending mutually exclusive applications, and parties will not be permitted to file anything further regarding those applications or the comparative renewal situations. While eschewing more paper filings, the FCC has taken the unusual step of treating not only the rulemaking proceeding but also the pending renewal applications and mutually exclusive applications as “permit-but-disclose” proceedings for purposes of the *ex parte* rules. This permits meetings and discussions with FCC staff about the competing applications. It strikes us as odd that the Commission would refuse to accept paper filings regarding these applications – which have not previously been open to public comment – while inviting *ex parte* meetings on the same matter, but that’s what they have done.

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(The Third Way - Continued from page 3)

justification – based, for example, on changes in the functional components over the last decade – for adopting some alternate definition that splits the previously integrated components? In the *NOI* the Commission floats a few candidate explanations, none very persuasive.

Such salami-slicing can also have unintended consequences. To its credit, the FCC does ask commenters to describe the possible consequences of classifying Internet connectivity as a telecommunications service. But all of the business and technical consequences of such reclassification may be impossible to perceive at this point. And mistakes now could be hard to correct later.

Can the FCC Prevent “Un-forbearance”?

There is considerable agreement that full-blown traditional Title II regulation of Internet access would be unduly burdensome on ISPs, and ultimately harmful to the Internet. A key element of the “Third Way” solution is intended to avoid that burden. That is, the Third Way includes a promise to forbear from applying most of the Title II statutory obligations to Internet connectivity.

But just how permanent could that promise be?

ISPs remain concerned that some future Commission could alter, or scrap entirely, the decision to forbear. Could the Genachowski Commission establish a policy of forbearance that would be immune from reversal at some point down the line? There is precious little precedent on these issues, although normally general administrative law contemplates flexibility to allow agencies to adjust rules and policies to deal with changed circumstances. Still, in the *NOI* the Commission seeks comment on possible provisions to “establish a heightened standard for justify-

ing future unforbearance.” Crafting such provisions will take great creativity – and even if a plausible approach is identified now, it’s difficult to imagine that future Commissions, and (perhaps more importantly) future courts or future Congresses, will feel themselves handcuffed by today’s Commission.

Make no mistake: today’s Commission is acutely aware of the problem. The *NOI* describes a sort of worst-case-scenario for ISPs. It runs like this. First, the FCC classifies Internet connectivity as a Title II service but forbears from applying many of the Title II obligations. Someone appeals the order, as someone usually does. The reviewing court upholds the Title II classification, BUT vacates some or all of the forbearance, thus requiring the FCC to regulate more heavily than the current FCC thinks is necessary or appropriate. (Yes, a court could do that, if it thought the statute requires it.) The result: the Internet would be subject to precisely the full-tilt Title II burdens that the Genachowski Commission hopes to avoid through the Third Way.

In an attempt to plan ahead, the FCC asks how it might deal with that scenario. One option, of course, would be to undo the Title II classification, much as the proposed Title II regime would undo earlier orders that combined transmission and information services into a single offering under Title I. But the undoing would be neither easy nor quick, and would itself be subject to judicial review. Just the possibility of these events creates a degree of regulatory uncertainty that many people (including Commissioners McDowell and Baker) fear will limit crucial investment in the nation’s broadband network. But the FCC’s current route to Net Neutrality runs straight through this particular minefield.

The *NOI* asks some hard questions. We look forward to seeing the FCC’s answers.



(WRS Comparative Renewal - Continued from page 12)

Incumbent licensees will be required to file renewal applications during the pendency of the rulemaking, and interested parties may file objections and petitions to deny those renewal applications. Curiously, the Commission has announced that it will grant all such renewal applications, subject to the outcome of the proceeding. This is curious because the Supreme Court’s 1945 decision in *Ashbacker* – which has long cast a “towering shadow” over FCC jurisprudence – would appear to preclude precisely that “grant now, compare later” approach. Just how the Commission may attempt to reconcile its

current game plan with *Ashbacker* remains to be seen.

As noted, interested parties may file petitions to deny any such renewal applications. If a petition to deny raises issues related only to the rulemaking proceeding, the renewal applications will be granted subject to the outcome of the proceeding. If a petition raises other issues concerning the qualifications of the renewal applicant, the Commission will try to resolve the issues if it can do so, and make conditional renewal grants. Our crystal ball foresees much confusion for years ahead as this situation sorts itself out.



(Bird/Tower Compromise - Continued from page 4)

torical and other factors. The Commission then conducts an independent review of the EA and any comments received to determine whether the proposed facility is worthy of a Finding of No Significant Impact (FONSI) on the environment. If the Commission concludes that a FONSI is in order, then the application can be granted.

Category #2 ASRs include: (a) new towers between 351 and 450 feet AGL and (b) certain changes in lighting styles (*i.e.*, from a “more preferred FAA Lighting Style” to a “less preferred” style). These would have to be put out on public notice, but no EA would be required up front, although the Commission *could* eventually require an EA to be filed after the agency reviews the ASR application and any comments filed in response to the public notice.

Category #3 ASRs include: (a) new towers no taller than 350 feet AGL; (b) certain other types of tower modifications that normally require an ASR (such as administrative or ownership changes, dismantlement, repair, parts replacement, etc.); and (c) certain changes in lighting styles (*i.e.*, from “less preferred” to “more preferred”). No up-front EA would be required for these. The parties could not agree on whether public notice should be required.

The MOU includes some fine print concerning what constitutes a “replacement tower” as opposed to a “new tower”, and some cross-references to certain FAA Advisory Circulars. But by and large the MOU is a short and sweet document that gets right to the point. It also specifically identifies as an “unresolved issue” the question of whether public notice should be required for Category #3 ASRs, but the parties all agree to abide by whatever the FCC may decide in that regard.

The concept of a pre-registration public notice for two large categories of towers is a major change from the way the Commission has historically done business. But the fact is that the 2008 opinion by the D.C. Circuit clearly directed the Commission to come up with some notice mechanism to “ensure meaningful public involvement” in the tower registration process – so the FCC doesn’t have much wiggle room there.

The parties have submitted the MOU to the Commission in the still-on-going bird-related proceedings started back in 2003 and 2008. While it’s too early for the parties to crow about their success, it’s hard to imagine why the Commission would *not* embrace the MOU’s approach. But loonier things have happened, so stay tuned for further developments.



(Point-to-Point Relaxation - Continued from page 7)

tion to the usual FCC processing, a non-conditional 23 GHz application requires government sign-off, which further delays the grant.

The industry was pleased back in 2007 when the government freed up two additional channels for conditional authorization. But they were of no immediate benefit. Because the conditional- authorization chan-

nels are listed in the FCC rules, adding two more requires a full-scale rulemaking proceeding. The FWCC formally requested that change in November 2007. A year ago, the FCC granted a waiver pending the rulemaking, which made the two additional channels available for conditional authorization. The FCC has now codified the change by formally adding the additional channels to the rules.



(WCS Performance Requirements - Continued from page 2)

liberalized benchmarks, a threat that must be of concern to licensees as they contemplate provision of service to wide geographic areas.

For incumbent licensees, the situation is even more problematic since most of them are subject to challenges to their renewal applications. The controversy surrounding those applications is likely to drag on for

several more years since the Commission’s actions in that regard are of doubtful legality. (*See* article by Alan Campbell on page 1.) [Full disclosure: the author represents applicants who are challenging the incumbents.] So at the same time that these licensees must be constructing extensive networks, they have no assurance whatsoever that their licenses will be renewed. Petitions for reconsideration of this part of the order are expected from all concerned.