

Traditional licensing down the tubes?



FCC Launches Remake Of Radio Spectrum Technology

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In an obscure and largely overlooked Notice of Inquiry, the FCC has begun to overhaul the very foundations of radio communications.

The first practical radio transmitters, early in the 20th century, used a simple “spark gap” technology that spread signals over a wide swath of frequencies. This was not a problem when few transmitters existed, but as their numbers increased, the then-useful part of the spectrum soon became crowded.

Within a few years, engineers were using recently-invented vacuum tubes in conjunction with a circuit that limits a radio signal to a specific frequency. That solved the immediate congestion problem, as each transmitter could be assigned a frequency different from others in the vicinity.

Now, a century later, we still use that same system. Every licensed transmitter, whether flea-powered walkie-talkie or megawatt TV station, is assigned a specific frequency. Over the decades, as more transmitters came into use, the licenses gradually filled up each part of the spectrum. The engineers, though, kept finding ways to use ever-higher frequencies, and thus steadily pushed the supply of spectrum ahead of the demand. Back in 1984, when I started doing FCC work, there were plenty of unallocated frequencies below 1 GHz, open spaces up to 40 GHz, and almost nothing above. Today everything up to 40 GHz and beyond is filled in solid, with active use extending up to 95 GHz.

Worse, the tactic of opening ever-higher frequencies has now run out. Those pesky laws of physics limit the frequencies above 95 GHz to short distances, straight lines, and dry cli-

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CETCs Denied Access to USF Monies Renounced by Verizon Wireless and Sprint

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On December 30, the FCC adopted an Order that permits it to re-purpose the monies that are relinquished by carriers who are no longer ETCs in particular states.

The back-story here starts in 2008. Under the Interim Cap Order adopted in May of that year, the FCC temporarily “froze” the amount of funds available for distribution to CETCs (including wireless carriers) at then-existing levels. The FCC emphasized at that time that the pool of funds would *not* change depending on the number of ETCs who were dipping into it – the FCC seems only to have been thinking about *increases* in the numbers of participants since it designated a lot of new ETCs at the same time as the Interim Cap Order, thus immediately reducing the pro rata funding available to participating ETCs.

In 2008, however, Sprint and Verizon both committed to relinquish their USF funds in certain states as a condition of getting mergers approved. One would have thought that these funds would then have been available for re-distribution to the remaining ETCs since the amount of funding was to remain fixed. This would have relieved at least a portion of the hit that CETCs took when the combination of the cap and new ETC designations reduced their support well below authorized levels.

Instead, in response to a petition by Corr Wireless (full disclosure: Fletcher Heald represented Corr) complaining that the funds were not being correctly distributed, the FCC decided to just keep the money itself as a rainy day broadband fund. Presumably recognizing the legal infirmity of expropriating these funds in contravention of its own rules, the

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The View From the Hill

The 112th Congress: New Line-up, New Players - New Priorities?

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(Editor's Note: FHH Telecom Law welcomes back guest commentator Catherine McCullough, who provides her perspective on what's going on in Congress. Catherine is a principal in Meadowbrook Strategic Government Relations, LLC and a specialist in Congressional relations.)

January is over, and the House and Senate Committees that oversee telecom issues have officially organized – issuing full lists of members, deciding on the rules by which the committees will work, and dividing up the budgets between Democrats and Republicans (thus setting the tone for how well the parties will work together in the 112th Congress).

So what will the legislative priorities of these committees be? The two themes of love and money – constituent votes and budget issues – that we identified in an earlier column still dominate. However, now that we know who all of the players are, including the subcommittee chairs, we can take these policymakers' legislative pasts into account, and perhaps identify which specific bills we should see introduced in the coming months.

The biggest changes from last Congress are on the House side, where the agenda will be determined by Commerce Committee Chairman Fred Upton (R-MI-6th) and the Chair and Vice-Chair of the Subcommittee on Communications, Technology and the Internet Greg Walden (R-OR-2nd) and Lee Terry (R-NE-2nd). The new Chair of Commerce's Subcommittee on Oversight and Investigations, Cliff Stearns (R-FL-6th) will have a strong impact on the Committee's telecom policy too, since he served as the Communications Subcommittee's Ranking Member last Congress.

Chairman Upton enjoys a reputation as solid, pro-business Congressman who is reasonable to deal with. He has chosen to hire former Ranking Member Joe Barton's (R-TX-6th) well-respected telecom aide, Neil Fried, as his Chief Counsel for telecom matters which gives his staff bench the depth and institutional memory critical for real legislative negotiations.

Upton jumped into the telecom policy fray early when he co-issued a strongly worded release – along with Reps. Walden and Terry – denouncing the FCC's rules on net neutrality. His communications on that front tend to focus, directly or otherwise, on the agency's process (or lack thereof), especially the lack of transparency in its decision-making.

Look for this concern about FCC process to color much of the Committee's telecom work this year. Complaints about the agency's lack of responsiveness are common, and Committee Republicans consider a lack of orderly process an impediment to investment and a barrier to job growth. In addition to the consumer and budget-related issues discussed in an earlier column, specific FCC reform legislation could be introduced this year. If so, it could resemble H.R. 2183, a bill introduced by Reps. Barton and Stearns in the last Congress. That bill called for a modified "shot clock" – deadlines by which the FCC would have to issue decisions – and statutorily-required processes for the issuance of FCC decisions.

On the Senate side, where Chairman Rockefeller (D-WV) still reigns, work has begun on spectrum allocation. As predicted, this issue is a top priority because Congress can use auction proceeds to pay down the debt or pay for other funding priorities.

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The Net Neutrality Order: A Look Inside

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As all sentient beings in the solar system are now aware, the FCC last month adopted rules designed to ensure “net neutrality.” The FCC, nominally a five-member organization, proved to be more of a one-man band in the adoption of net neutrality rules. While the official record reflects a 3-2 vote in favor of the rules imposing “open Internet” limits on broadband Internet access service providers, closer inspection reveals that only one member actually favored the rules which have been adopted. The vote tally was: one in favor; two strongly opposed; and two unhappy-with-the-rules-but-willing-to-sort-of-go-along-with-Chairman-Genachowski.

And with that ringing endorsement, net neutrality has become the law of the land . . . at least for the time being.

We pride ourselves on being among the precious few who have actually combed through the 194-page document and now provide a more in-depth look at the content and implications of the Commission’s new net neutrality rules.

The Commission concludes that it need not wait for problems to arise before it acts.

The Rationale Behind the Rules

The net neutrality debate is primarily about means, not ends. Both sides agree that the Internet should be open, which means, roughly, “the way it is now.” Today, consumers are free to surf websites, download and upload content, and use any online service they choose. Internet access providers do not generally block or prioritize online service and content providers. Consumers, not ISPs, determine marketplace winners and losers. The Internet is thus increasingly attractive to both consumers and service and content providers, creating a self-nurturing “virtuous circle” of innovation and demand. Shopping, entertainment, and civic participation for all.

Opponents of net neutrality think that the best way to preserve this model of success is to leave it alone. There is no need for government regulation, with its attendant cost, unintended consequences, and possible dampening effect on network investment, because there is no evidence of any systematic failure of the existing marketplace to deter “abuse.” Only a handful of instances of alleged abuse have come to light, and they have been swiftly resolved. In the opponents’ view, absent further evidence, the Commission should not attempt to micromanage a thriving, dynamic economic arena.

Net neutrality proponents, on the other hand, see a convergence of factors that makes future discrimination practically certain. Their thinking, as set out in the Commission’s net neutrality order, boils down to this: broadband providers have an ability and incentive they didn’t have before to block or impede selected traffic on their networks. Deep packet inspection (DPI) technology has advanced and is increasingly used for network management. Simultaneously, Internet telephone and cable services – VoIP and Internet video – are growing fast, delivered side-by-side with cable and phone companies’ own offerings and on their own network. As a result, broadband providers are in a position to, and have every incentive to, favor their own, affiliated, or pay-for-priority content, to the detriment of consumer choice and continued innovation. The few samples of discriminatory behavior already documented reinforce this prediction. Finally, the free market won’t help, because in many places there is little choice of broadband Internet providers.

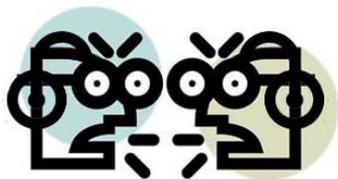
Given these circumstances, the Commission concludes, it need not wait for substantial, pervasive, and difficult-to-reverse problems to arise before it acts.

What is Subject to the Net Neutrality Rules

The net neutrality rules apply to “broadband Internet access service,” which the order defines as a “mass market retail service” that provides the capability to access “substantially all Internet endpoints.” Broadband Internet access service does not include dial-up, but it does include any service that the Commission finds to be a “functional equivalent” of Internet access service, or that is “used to evade” the net neutrality rules.

The regime will not apply to enterprise service offerings, which typically are individually negotiated. It also will not apply to non-mass market services, such as virtual private networks, content delivery networks, multichannel video programming, hosting or data services, or Internet backbone services. Nor will it likely apply to services offering very limited connectivity, such as those enabling a device like an e-reader or heart monitor to function fully. But the rules *would* apply to any service with only partial access that is clearly designed to be a substitute for full Internet access, such as a

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Net Neutrality: Both Sides Are Wrong

The FCC's new net neutrality rules won't work. Unfortunately, there are no better alternatives in sight.

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(The opinions below are those of the author. He formerly advocated network neutrality; a glimpse of what it might actually look like has prompted him to change his mind.)

Net neutrality is one of those issues that sharply divide the country. Those who take sides in the debate, do so passionately. To call it a “debate,” though, is misleading. In a debate, people listen to each other before responding. On network neutrality – as in health care, financial reform, and other key national issues – people just shout at each other. Making matters worse, the two sides not only hold conflicting opinions, but deal in conflicting facts.

You know the facts are up for grabs when both sides claim the same slogan: “Keep the Internet Free!” To some, this means keep the Internet free of regulation; to others, it means keep the Internet free of discrimination by the Verizons and Comcasts that connect us to the world.

You know the facts are up for grabs when both sides claim the same slogan.

One fact is inescapable: when the local Internet data load exceeds capacity, someone will decide whose traffic gets held back. It might be Comcast, making a business decision; it might be the FCC, controlling Comcast through regulation. If both keep their hands off—Keep the Internet Free!—the decision gets made anyway, by the kid down the street supplying bootleg hi-def movies through his parents’ connection. We know when he’s home from school, because service for everybody else on the street drops to a crawl.

How should Internet service providers (ISPs) decide which content gets priority? Some say regulation only makes things worse, so we should turn the ISPs loose and let the market sort things out. Others retort that a profit-making ISP seeks only to make a profit; if interfering with content furthers that goal, content will suffer. We suspect the first crowd, by and large, are the same people who also oppose health care legislation and financial reform, preferring to trust insurance companies and banking institutions (and ISPs) over government regulators. The second group believes with equal fervor that those

companies will happily wrong their customers in return for higher profits, so that only government control can assure fair treatment for all.

As to net neutrality, both sides are wrong.

Let’s start with a few of the supposed facts.

The pro-regulation forces justify their position with a long history of wrongful content discrimination by ISPs. First was the time back in 2007 when Comcast impeded BitTorrent content. That’s one. Then, a small phone company ISP may have blocked VoIP. We know it wrote the FCC a check to settle the claim, so let’s call that two. Third . . . well, the fact is, there is no third. The FCC mined reams of public comments to find a small handful of accusations, but no more smoking guns. Can this scant history justify a major and controversial regulatory effort?

But the small number of past abuses doesn’t matter! says the FCC. The broadband ISPs have both means and motive to discriminate! It’s just a matter of time!

Again, though, the facts get in the way. The broadband ISPs have had the same means and motive for the past five years. If they were as unscrupulous as the FCC seems to think, by now we should be awash in wrongdoing. But that is not happening. Maybe the FCC is right, and content discrimination is inevitable. Even so, we could wait a year or two, and see whether an actual problem arises, before setting out to solve it.

The anti-regulation folks are equally free with the facts. We don’t mean the Rush Limbaugh nonsense about net neutrality being an Obama plot to censor the Internet. We’ll take instead an often-heard assertion both sides seem to accept: the Internet has not been regulated until now, a state of affairs which fostered its explosive growth over the last twenty years.

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Looking for Comcast redux

Net Neutrality: Verizon Courts D.C. Circuit

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Wasting no time, Verizon has taken a bold move designed to herd the next round of appeals in the Net Neutrality proceeding back before the same panel of judges who slammed the FCC in the *Comcast* decision last April. Verizon has filed a “notice of appeal” with the U.S. Court of Appeals for the D.C. Circuit relative to the Commission’s latest Net Neutrality decision. That alone might raise some eyebrows. But taking it one step further, Verizon has filed a separate motion asking that the *Comcast* panel be assigned to Verizon’s appeal.

Appellate litigation *aficionados* take note.

Verizon’s decision to file a “notice of appeal” pursuant to Section 402(b) of the Communications Act is the first element of a one-two strategy. Section 402 lays out the ground rules for getting appellate review of FCC decisions. It establishes two separate and distinct types of review. Section 402(b) provides that agency decisions relating to licensing actions can be reviewed *only* by the D.C. Circuit; such review is initiated with the filing of a “notice of appeal.” All other agency decisions can be reviewed by *any* federal court of appeals; in those cases, the process gets started with the filing of a “petition for review” pursuant to Section 402(a).

In perhaps overly simplistic terms, the “appeal” route specified in Section 402(b) tends to be seen as applicable to Commission actions on specific applications for specific licenses or permits – that is, actions that directly relate to particular authorizations. In the same simplistic terms, the 402(a) “review” process is available for judicial review of broader rulemaking decisions of more general impact. Since the December Net Neutrality decision was plainly a rulemaking decision of very broad impact, one might have figured that it would be subject to the 402(a) “review” process.

So much for the simplistic view.

If that view were to hold, Net Neutrality – a broad rulemaking decision – might not end up in the D.C. Circuit, but rather in some other federal circuit court of appeals. Who knows how any other circuit might feel about Net Neutrality? But we *do* know from *Comcast* that at least some members of the D.C. Circuit have some strong

views that are not especially *simpatico* with the Commission’s. So if you’re Verizon (or any other opponent of the FCC’s latest take on Net Neutrality) and you’re given your druthers, you’d probably opt to have the next round of appellate review go to the D.C. Circuit.

You could, of course, file a Section 402(a) “petition for review” with the D.C. Circuit and keep your fingers crossed that nobody files a similar petition in any other circuit. (If petitions for review of the same order are filed in different circuits – and if certain procedural hoops are jumped through – a lottery process kicks in to determine which circuit gets the case.) But if you’ve got your heart set on one circuit alone, that’s iffy, at best.

What to do? Well, you could file a Section 402(b) “notice of appeal” with the D.C. Circuit – if you could figure out a way to claim that the FCC decision has at least arguably changed a license of yours in some way.

*An impressive
gambit on
Verizon’s part.
But wait,
there’s more.*

If you guessed that Verizon picked Option 2, go to the head of the class. Citing a couple of sentences buried in Paragraphs 133-135 of the Net Neutrality order, Verizon argues that

that order effectively changes Verizon’s licenses and, therefore, is appealable under Section 402(b).

And since 402(b) appeals can go *only* to the D.C. Circuit, if Verizon’s argument holds, the case is guaranteed to stay in D.C.

(Another advantage to Verizon: Section 402(b) appeals can be filed as soon as the FCC lets go of its order, while Section 402(a) review proceedings can’t be initiated until the order has been published in the Federal Register. The Net Neutrality order was issued in December but has not yet shown up in the Register – so anyone who thinks that 402(a) is the relevant section has not been able to file yet, leaving the field open to Verizon to make its move.)

An impressive gambit on Verizon’s part. But wait, there’s more.

There are 13 judges on the D.C. Circuit, but only three of them sat on the *Comcast* panel. In Verizon’s best case sce-

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(Verizon Net Neutrality Appeal - Continued from page 5)
nario, it would get those same three. But panel assignments in the D.C. Circuit are ordinarily made randomly, so even if Verizon's appellate strategy works, it might still take a stroke of luck to get the *Comcast* panel . . . unless, of course, you ask the Court to assign that same panel to your case. And sure enough, that's what Verizon has done.

Not that that is a conventional request. In fact, the court's rules don't seem to contemplate such requests . . . but they don't preclude them, either. So why not ask?

Enter Verizon's cleverly titled "Motion to Assign Case to the Panel that Decided *Comcast Corp. v. FCC*". Is that clear enough? Verizon can't point to any slam dunk precedents that mandate assignment of a particular panel. But it can legitimately argue that the issue of Net Neutrality is complex, and the *Comcast* panel already addressed one aspect of it, and the FCC's latest decision is plainly an effort to respond to the *Comcast* court's position. So Verizon can reasonably claim that its appeal is just another round in an on-going slugfest – in which case, wouldn't it make sense to assign the case to the *Comcast* panel?

The Court generally doesn't like being told by litigants how best to manage its own docket.

Will either – or both – of Verizon's strategies work? It's impossible to say just now. The Court generally doesn't like being told by litigants how best to manage its own docket. Plus, neither of Verizon's points – *i.e.*, the Section 402(b) "appeal" approach and the effort to get the *Comcast* panel – is a sure winner by any means . . . but neither is laughably wrong, either. So it's certainly worth a shot.

At least one other wireless carrier thought so.

That would be MetroPCS, which filed its own appeal shortly after Verizon's. The theory is essentially the same: according to MetroPCS, it can file pursuant to Section 402(b) because the Net Neutrality order modified its li-

censes in some way.

Needless to say, the FCC does not agree with either Verizon or MetroPCS, and it told the Court so in a couple of terse motions to dismiss. As the FCC sees it, the Net Neutrality order is a quintessential rulemaking order of general applicability, and decidedly **not** an action that would be subject to Section 402(b). According to the Commission, Section 402(b) appeals can be addressed to a rulemaking only if the rulemaking involved "*individual* licensing decisions and waivers as to *specific* parties." (Those emphases are the Commission's, by the way.) But (still according to the Commission) the New Neutrality decision "plainly falls outside that description" because it sets rules for *all* ISPs and doesn't address the effect of those rules on any specific ISP. Verizon has since retorted that (here's a surprise) the Commission is wrong. Ultimately, it will be up to the Court to decide.

If you doubt the potential benefits to Verizon should its approach pay off, check out the reaction of Public Knowledge, a Net Neutrality supporter. In a press release, the PK legal director sniffs that Verizon is "play[ing] legal games" and "trying to be cute." Oh snap. He urges the court to "see through this ploy" and reject Verizon's arguments. Such apparent resentment suggests serious unhappiness *chez* Public Knowledge relative to the possibility that Verizon's approach might work.

In prize-fighting terms, we're nowhere near the actual bout. We're still at the stage where the boxers' managers are jawing at each other and arguing about where the fight will be held. But with serious stakes at issue, we can expect plenty of creative – and expensive – appellate lawyering before the fate of Net Neutrality is finally resolved. Enjoy the show.

[Press-time update: On February 2 the Court denied Verizon's request that the case be assigned to the Comcast panel. Check out www.CommLawBlog.com for details.]



(Congressional Committee Line-up - Continued from page 2)
Rockefeller's bill, which was introduced with no support from fellow Republicans, would set aside the D-block for public safety use (thus removing it from the pool of auctionable spectrum) and would give the FCC incentive auction authority.

It is the first salvo in the debate over spectrum allocation policy, which is sure to move more quickly than usual through Congress given the strong incentives for all in-

involved to come to a common understanding. Look for Communications Subcommittee Chair Walden to have a strong hand in the negotiations here on the House side. His background as an owner and operator of radio stations makes him a natural ally for the National Association of Broadcasters (NAB) and its efforts to get its members to give up as little spectrum as possible for as much as possible.

The cast of characters is now set: let the play begin!

Travelers Information Service Expansion Under Consideration

*Longstanding limits on content, facilities
under scrutiny in wide-ranging NPRM*

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If you (like most of your fellow citizens) spend much time on the highways and byways of our great country – or if you have an interest (commercial or otherwise) in reaching folks on those same highways and byways – listen up. The Commission has launched a rulemaking to explore possible changes in the Travelers Information Service (TIS), the AM-based low-power service that provides a constant diet of, um, travelers information along highways and near various travel-based locations. At the request of several associations of government officials and TIS operators, the FCC has issued an Order and Notice of Proposed Rulemaking (NPRM) to consider whether TIS stations should be permitted to air a greater range of information at greater power in a greater variety of locations. The range of possible changes includes, at one extreme, a substantial redefinition of the service itself.

The TIS has been around since 1977. TIS stations operate in the AM band, as a primary service on 530 kHz and on a secondary basis on 535-1705 kHz. With maximum power of 50 watts, they are low-power operations designed to reach a narrow audience of travelers passing in the immediate vicinity of each station. The content of their transmissions is limited to “noncommercial voice information” about traffic (including road conditions, hazards, advisories, directions), nearby options for lodging, rest stops and service stations, and descriptions of local points of interest. The strict limitations on the service were imposed out of concern about possible interference and competition with commercial broadcasters.

Citing broad changes that have occurred in the country in the three decades since TIS began, the petitioning associations of government officials and TIS operators suggested that the Commission:

-  re-name the TIS as the “Local Government Radio Service”;
-  eliminate certain site and power limitations; and
-  expand the permissible content of TIS messages to include, among other things, alerts concerning the safety of life or protection of property, such as NOAA weather radio transmissions, AMBER alerts and other civil defense announcements.

*Mission-changing
overhaul or tweak
here and there?*

The key question posed by the NPRM is: “Should the Commission significantly expand the scope of permitted communications by local governments on TIS stations, or should it adopt more limited changes that are consistent with the traditional traveler-related focus of TIS?” In other words, does TIS get a comprehensive, possibly mission-changing overhaul, or should it just be tweaked here and there to preserve its “traditional” focus?

The proceeding started back in 2008, with a petition by Highway Information Systems, Inc., proposing sweeping changes to the TIS. Two months later, the American Association of Information Radio Operators (AAIRO, represented by Fletcher Heald) took a more measured approach: it asked the Commission simply to confirm that the permissible content of TIS stations includes “any message concerning the safety of life or protection of property that may affect any traveler or any individual in transit or soon to be in transit” – a reasonable interpretation of the notion of “travelers information.”

But other groups followed up with their own separate, and broader, suggestions. Declining to simply provide the confirmation that AAIRO had asked for in the first place, the Commission now asks whether the permissible content of TIS stations should be expanded to include such matters as NOAA Weather Radio retransmissions, AMBER Alerts, terror threat alert levels, civil defense announcements and the like. (How limited is the FCC’s view of existing content limitations? In 2007, the Enforcement Bureau issued a Notice of Violation to the City of Santa Monica for retransmitting NOAA weather broadcasts.)

Other questions up for discussion: If such expansion is permitted, what limits should be imposed? For example, should only non-routine NOAA reports be permitted, or could routine reports be included as well? Would the proposed changes adversely affect commercial broadcasting, as NAB maintains? One proponent goes so far as to suggest that TIS stations be permitted to broadcast “any information of a noncommercial nature.” Another emphasizes the possible use of TIS for general emergency-readiness information along with announcements about local history, environment and parks.

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Size still matters to the Feds



2011 Threshold Triggers For Federal M&A Scrutiny Announced

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Broadcasters and telecommunications operators contemplating possible deals for the coming year should remember that, as far as the federal government is concerned, there may be such a thing as Too Big. The Feds will step in to review an anticipated deal for potential anti-trust problems if the deal exceeds certain threshold dollar amounts. The law mandates that those threshold amounts be revised every year for inflation. The 2011 thresholds were announced in late January, and will take effect on **February 24, 2011**. If your deal exceeds one of the revised thresholds, you should plan for increased government scrutiny, with all the additional hassle, expense and delay that such scrutiny entails.

Under the so-called Hart-Scott-Rodino provisions of federal antitrust law, certain mergers or acquisitions which exceed the specified thresholds must be submitted to the Federal Trade Commission (FTC) and the Department of Justice for Uncle Sam's review *before* the transaction can be

consummated. (The theoretical basis for federal concern here: any transaction big enough to pass the thresholds is presumably big enough to affect interstate commerce.)

The newly-adjusted thresholds require pre-transaction notification if either:

- (a) the total value of the transaction exceeds \$263,800,000; **or**
- (b) the total value of the transaction exceeds \$66 million **and** one party to the deal has total assets of at least \$13.2 million (or, if a manufacturer, has \$13.2 million in annual net sales) and the other party has net sales or total assets of at least \$131.9 million.

When negotiating deals, all parties would be well-advised to bear these thresholds in mind. Once those lines are crossed, the prospect of additional time, expense and hassle to navigate the federal review process is a virtual certainty.



(TIS NPRM - Continued from page 7)

With respect to the technical aspects of TIS, the Commission is considering a variety of proposals advanced by the petitioners. Should TIS stations be untethered from their current geographical anchors (*i.e.*, roads, highways, public transportation terminals, etc.) and allowed to be located pretty much anywhere? One prominent engineering firm has objected to that proposal, citing its potential adverse effect on nighttime interference in the medium wave AM band. With that in mind, the Commission seeks comments on whether and to what extent interference problems could arise and, if so, how they should be addressed.

Along the same lines, should TIS stations be given greater potential power to expand their service areas? One possible rationale for a power increase: because of higher speed limits since 1977, vehicles are within TIS service areas for shorter durations, thus allowing only 90 seconds for transmission including station ID.

The Commission also addresses a proposal to allow networks or "ribbons" of TIS stations along a highway. It asks about the nature of the system proposed and how it would operate. On the one hand, such systems could be useful in, for instance, directing evacuation efforts along certain routes; on the other, they might attract travelers away from commercial stations with superfluous or redundant infor-

mation.

The potentially far-reaching nature of the changes under consideration is revealed in the seemingly simple proposal to change the name of the service from the "Travelers Information Service" to the "Local Government Radio Service" (or some variant along those lines). While some might invoke Shakespeare to suggest that a mere name change would have little effect, the proposed change here reflects the fundamentally different view of the service envisioned by some of the petitioners. After all, a "travelers information service," by definition, provides *information to travelers*. A "local government radio service", on the other hand, would appear to re-focus the goal of the service away from its intended beneficiaries (*i.e.*, travelers) and toward its operators (*i.e.*, local governments). While local governments might still be inclined to provide travelers information, they might also be inclined to expand the content far beyond that traditional limitation.

The Commission does not appear to have developed strong preferences on any of these issues yet, so if you're inclined to drive into the TIS debate, now's your chance. Comments will be due 30 days after (and reply comments 45 days after) the NPRM is published in the Federal Register.

Meantime, be safe out there.

The Commission asks —

Are the FCC's Hearing Aid Rules Really Aiding Hearing?

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The Wireless Telecommunications Bureau has opened a proceeding that is a refreshing – and rarely seen – step in a positive direction: assessing whether certain of its rules are actually accomplishing their intended purpose. Regular readers of this publication are aware that the FCC imposed very rigorous obligations on wireless carriers and handset manufacturers back in 2008. Those rules broadly require manufacturers to make, and carriers to sell, a certain percentage of hearing aid compatible (HAC) handsets as part of their cell phone product lines.

The FCC-mandated percentage of HAC products has risen over the years, as has the required percentage of more sophisticated inductive coupling-capable devices. And as is often the case with FCC rules, the HAC requirements include paperwork: along with the substantive requirements, the FCC also requires a detailed annual report on the devices which have been offered during the last year and how many qualify as HAC. The FCC has enforced these new rules with extraordinary zeal, levying heavy fines on carriers right and left who either failed to file the annual report or failed to offer the required percentage of handsets. It has even sanctioned such companies as Circle-K and 7-Eleven – neither generally known as a telecom provider – for failing to file HAC reports. In the Commission's view, the mere fact that both happen to market prepaid handsets subjects them to the HAC requirements.

The Bureau is now asking a good question: Are these far-ranging (and rather onerous) efforts actually accomplishing their intended purpose of ensuring the availability of HAC cell phones to consumers?

While no one can argue with the goal of helping hearing-impaired folks get access to cell phones, a question certainly arises as to whether the market itself would address that problem more directly by simply meeting the needs of customers. The handset market is highly competitive, and in a well-functioning marketplace, the addition of HAC features should win consumers who need that capability. The heavy hand of Soviet-type market intervention may not necessarily deliver what the people need or want. On the other hand, economists have observed that the engine

of the “free market” does not always function on all cylinders when it comes to meeting the needs of the disability community.

Also questionable is the severity of the penalties imposed by the FCC in connection with these rules. We have seen cases where carriers have been fined \$15,000 dollars for each handset that they are short in meeting the requisite HAC percentages. By contrast, a carrier who fails to light and mark a tower structure properly – thus creating a direct hazard to human life – may be fined significantly less. Query whether, on our scale of penal values, endangering human life should be rated as less reprehensible than a small diminution in the variety of cellular handsets available to consumers.

Heavy-handed Soviet-type market intervention may not necessarily deliver what the people need or want.

So there appears to be merit to taking a step back at this juncture and taking a hard look at how the system is working. Carriers and manufacturers who are subject to these rules may wish to weigh in to let the Commission know what's good and what's bad about the current regulatory framework.

Here are some of the specific questions the FCC is posing:

- ☛ Are the FCC's HAC rules effectively and efficiently resulting in improved HAC handset availability with a wide range of features?
- ☛ Are the special compliance circumstances of smaller carriers being appropriately handled?
- ☛ Is the system effectively and efficiently gathering needed HAC information and disseminating it to those who need it?
- ☛ Are point of sale disclosure and testing requirements effective and useful?
- ☛ Do wireless headsets create any special problems?
- ☛ Are the Commission's rules stimulating innovation and investment in HAC technology?

Comments in response to the Bureau's inquiry are due by **February 14, 2011**; reply comments are due by **March 1, 2011**.



From broadcast to broadband?

TV Spectrum Re-Purposing Out For Comment

By Lee G. Petro
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That muffled sound you might have heard a couple of months ago was the opening barrage in the long-anticipated struggle to revamp the TV spectrum. More than a mere warning shot but still well short of a coup de grâce, the FCC's Notice of Proposed Rulemaking (NPRM) is certain to shake the foundation of the television industry – an industry which is still re-building itself in the wake of the DTV Transition tsunami that crested in 2009.

The FCC's goal in the NPRM is to “lay important groundwork” (in Chairman Genachowski's words) toward the ultimate goal of permitting fixed and mobile broadband use in the TV band. Such use is thought by the Commission to be necessary to deal with the all-but-certain “spectrum crunch” which is expected to result from burgeoning mobile broadband demands.

The FCC's ultimate game plan appears to include coaxing existing TV broadcast licensees off their current channels in order to free up blocks of prime spectrum which would then be auctioned off for broadband use. While the Commission does not have the authority to “incentivize” broadcasters through, e.g., the sharing of the proceeds from such auctions, a couple of bills pending in Congress would provide such authority. The NPRM is intended to put the Commission in a position to move as quickly as possible toward effective spectrum repurposing if and when Congress gives it the power to share auction proceeds with displaced broadcasters.

The NPRM proposes feature three significant changes to the FCC's rules.

First, the Commission is proposing to include fixed and mobile wireless services as potential uses in the VHF and UHF spectrum blocks currently reserved primarily for television. This involves a simple amendment to the Table of Frequency Allocations (the Table), which can be found at 47 C.F.R. §2.106. The Table is the official master list of authorized uses of the spectrum. Spread over more than 40 pages of the FCC rule book, it consists of a chart reflecting (a) all of the blocks into which the radio spectrum has been divided and (b) the specific permitted uses for each of those blocks. The Commission is pro-

posing to include “Fixed Mobile” as an additional use for the spectrum currently assigned for television services.

This change by itself would not mean that broadband uses would automatically flood that spectrum. Rather, it would mean that the Commission could authorize such uses in that spectrum. Of course, the conventional wisdom is that the FCC will authorize such uses once it gets the rest of its ducks in a row. In order to facilitate that eventual process, the Commission is proposing to take this initial reallocation step now.

The NPRM is intended to enable the Commission to move as quickly as possible toward effective spectrum repurposing.

Second, the Commission is proposing rule changes to permit two television licensees in the same market to “share” one of their 6 MHz channels, thereby freeing the second channel for broadband uses. (Under such a sharing arrangement, two stations would share a single transmitting facility – although each station would be separately licensed and, in principle, independent of the other.) Historically, each TV station has had a full 6 MHz channel to use. Analog operation generally consumed the entire 6 MHz for a single program service, but the advent of DTV service has allowed multiple program streams by a single station over a single 6 MHz channel. The Commission apparently views this arrangement as inefficient. If every station were willing to share channels, that would free up 50% of the spectrum currently devoted to television – leaving that freed-up spectrum available for broadband.

Finally, the Commission is proposing rules to “maximize” the usage of the VHF spectrum. During the DTV Transition, many concluded that the VHF spectrum was not as well-suited for DTV use as UHF. As a result, most full-power stations elected to move to the UHF band to ensure uniform coverage within their service areas. But the UHF spectrum is particularly good for broadband operation, which means that the Commission would now like to wrangle as many TV stations back into the VHF band as possible.

To make such a move more palatable, the FCC is proposing VHF power increases and other revisions to improve

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Repo Madness

Assorted 700 MHz Licenses To Go (Back) On Auction Block

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The FCC has announced plans to auction a grab-bag of 700 MHz broadband licenses. The 16 licenses on the auction block include six in Puerto Rico, three in North Dakota, and three in the Carolinas, plus odds and ends in Texas, West Virginia and Virginia. If any of these licenses looks familiar to you, there's a reason: all were previously up for grabs in Auction 73 almost three years ago, at which time they either went unsold or were defaulted on by winning bidders.

The proposed terms of the recently-announced auction (dubbed Auction 92) are unremarkable, except for one slightly unusual feature: the Commission is proposing to set the minimum opening bid for all channels based on Auction 73 numbers. That is, the minimum bid amount would

be the greater of (1) the minimum opening bid amount for the same license in Auction 73 or (2) 10% of the highest bid amount received for the license in Auction 73. The hope is that, by upping the minimum opening bids somewhat, the Commission may be able to shorten the auction process, since it will presumably take fewer bidding rounds to get to the final auction prices.

With two exceptions, all of the licenses are for 12 MHz of spectrum for Cellular Market Areas (CMA's) in the 700 MHz B Block. (The two exceptions: the Wheeling and Lubbock licenses are for 12 MHz in larger Economic Areas (EA's) in the A Block.) The FCC is considering comments submitted on the proposed auction procedures. The auction is scheduled to begin on July 19, 2011.



(TV Spectrum Re-Purposing - Continued from page 10)

the performance of indoor antennas. The goal is to try to offset any disadvantages, perceived or real, in VHF operation. In particular, the Commission is seeking comment on the adoption of the baseline standards for indoor antennas based on the 2009 ANSI/CEA-2032 standard, which establishes testing and measurement procedures for indoor antennas. By taking these steps, the Commission would squeeze more television stations back into the VHF spectrum bands, and free up a larger contiguous block of spectrum adjacent to the 700 MHz A Block which was previously auctioned for wireless uses.

While the NPRM clearly sets the stage for TV re-purposing, it's only the first step in what will likely be a complicated and contentious process. After all, the repacking of large numbers of TV operations into a tighter chunk of the spectrum will present thorny issues, including the development of a New and Improved DTV Table of Allotments.

Here again the recent DTV Transition experience provides a glimpse of things to come. Back in the early days of the DTV Transition, the adoption of the first DTV Table of Allotments led to many a battle over which channel would be assigned to which station. Such struggles will likely be even more problematic in a repacking process because that process contemplates a reduced number of channels overall. With fewer options from which to pick, we can expect

considerable competition for channels which may be perceived as somehow "better." How the Commission plans to manage, and resolve, such competition is still a mystery.

One thing that sticks in this author's craw is the suggestion – expressly advanced by Chairman Genachowski and Commission Copps – that the television industry has been sloth-like in taking advantage of the digital spectrum. Genachowski laments that some stations are not "seizing the opportunity to offer multicast streams or mobile TV." Copps says that he "would have little interest" in a repacking process if only TV spectrum had been put to "positive use" through the provision of "public interest multicasting". But if you're talking about supposedly inefficient use of spectrum, what about the fact that other portions of the wireless spectrum for new wireless broadband services (the 700 MHz D block, for one) have lain unused for years while the Commission dithers about what to do with it. The current state of multi-cast broadcast television may not meet the halcyon expectations of Copps, Genachowski and others, but at least the television industry built out a nationwide digital television service with the spectrum available to it.

Be that as it may, the battle call has sounded and the FCC has made its first move. It's time to fall in and prepare for the long haul. This is likely to be an extended engagement. Comments are due by **March 18**, with replies due no later than **April 18**.



FCC Sets Out To Overhaul Experimental Licensing

New kinds of licensing promise innovators easy access to nearly all of the radio spectrum.

The FCC has always been friendly to experimenters, whether they are basement hobbyists or industrial researchers. Since 1934 the Communications Act has enjoined the FCC to “[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio” Just as important, many of the engineers at the FCC who began as teenage hams and tinkerers are eager to encourage the next generation. The FCC imposes only minimal regulation on amateur radio equipment, allows DIYers to design and operate home-brew transmitters with hardly any regulation at all, and offers “experimental licensing” so researchers and commercial innovators can test out new devices.

Nonetheless, while the pace of innovation accelerates, the rules on experimental licensing have stagnated. They require, among other things, separate FCC approval for each individual project. Ironically, considering their purpose, the rules are highly hospitable to minor variations on established uses of radio, while experimental licenses for more creative technologies can be hard to obtain. The FCC staff who do this work are technically capable and usually sympathetic to the applicants, but they are bound by the rules on the books.

In a burst of candor that may surprise equipment manufacturers and scientists, the FCC now concedes that the process for issuing these licenses can be a “roadblock to innovation.” With this new self-awareness comes a comprehensive Notice of Proposed Rulemaking (NPRM) on experimental licensing rules so the FCC can (in its own words) “inspire researchers to dream, discover, and deliver” innovations to promote “a better way of life for all Americans.” The path to this Norman Rockwell ideal entails both updating the current rules and creating new licensing arrangements for research and development.

Few would dispute that the current system has become an obstacle. The various regulations for experimental and developmental licenses are scattered haphazardly through eight different rule sections. But the biggest problem facing development efforts, whether corporate, educational, medical, or scientific, is the need for project-by-project approval. The process is not only slow, but uncertain as to the outcome. And all the more so, as the technology at issue departs from current practice.

To address these problems, the NPRM lays out six kinds of rule changes.

First, a new licensing scheme would allow universities and non-profit research facilities to conduct testing and experiments on almost all frequencies, without separate approval for each project. Special requirements would help to protect cell phone, 3G, 4G, and broadcast frequencies. Operation would be restricted to the licensee’s campus, with emissions limited at the campus boundaries. Licensees would have to register their operations seven days in advance on a publicly accessible FCC website, through which spectrum incumbents can raise concerns of harmful interference. The FCC invites comment on a great many specifics.

FCC: The process for issuing experimental licenses can be a “roadblock to innovation.”

Second, the FCC would establish “Innovation Zones” – geographic areas, possibly away from population centers – within which multiple innovators would have flexibility to experiment without separate project approvals. Licensees would need technical credentials, but would not be limited to universities and non-profit facilities. A landlord-licensee might invite companies and entrepreneurs to the facility to conduct research and development. As above, the public would have seven days’ prior notice of operations. The FCC again leaves a lot of details open for discussion.

Third, the FCC would establish a new licensing program specifically for institutions conducting research into medical applications, under rules otherwise similar to those above. Questions here center on the institutions that would qualify, the kinds of applications that could be investigated, and the appropriate reporting requirements.

Fourth, the FCC would consolidate and clarify a confusing collection of rules that now govern in-the-field testing and market studies for new devices. The revision would, among other changes, allow a manufacturer to sell not-yet-certified devices to a service provider, which in turn could lease (but not sell) them to consumers wanting to try them out. Manufacturers could sell uncertified devices to developers and system integrators as evaluation kits. The FCC would ease the caps on the numbers of uncertified devices that can be imported for testing and evaluation.

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Telecom Tickler 2011

CPNI Certifications Due By March 1

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Heads up, all you telecommunications carriers and interconnected VoIP providers! Your annual reports certifying compliance with the Customer Proprietary Network Information (CPNI) rules are due by **March 1, 2011**. And you don't have to take our word for that: the Commission has issued a helpful reminder notice to make sure that you're on top of this chore. The Commission has also helpfully provided a copy of an acceptable template for CPNI certifications, as well as a series of Frequently Asked Questions.

As we have explained before, the CPNI rules are designed to safeguard customers' CPNI against unauthorized access and disclosure. Since 2008, the rules have required that telecommunications carriers and interconnected VoIP providers have an officer sign and file with the Commission a compliance certificate, annually, stating that he or she has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules. The carrier must also provide: (a) a statement accompanying the certification explaining how its operating procedures ensure that it is or is not in compliance with the rules; and (b) an explanation of any actions taken against data brokers and a summary of all customer complaints received in the past year concerning the unauthorized release of CPNI.

The FCC takes this reporting requirement *very seriously*.

In 2009 the FCC issued Notices of Apparent Liability (NAL) to hundreds of carriers who had apparently failed to

file their reports. The standard forfeiture per violation – \$20,000. The FCC was in a shoot-first-ask-questions-later mode, as a number of the targeted carriers eventually demonstrated that they had, in fact, submitted their reports. But there were still plenty of carriers who ended up paying a fine (whether directly in response to the NAL or after entering a consent decree with the Commission).

Historically, there appears to have been some confusion as to precisely who must file annual CPNI certifications. In its recently-released FAQ, the FCC offers examples of “telecommunications carriers” subject to the reporting requirement: “local exchange carriers (LECs) (including incumbent LECs, rural LECs and competitive LECs), interexchange carriers, paging providers, commercial mobile radio services providers, resellers, prepaid telecommunications providers, and calling card providers.” But look out: the FCC cautions (in italics, mind you) that “*this list is not exhaustive*”.

This is *not* something that can or should be left to guesswork: as in most other areas of the law, ignorance is no excuse. If you are a telecommunications carrier or an interconnected VoIP provider, it would behoove you to tie down, sooner rather than later, whether you are required to file a certification. (Your communications counsel would be a good place to start, if you have any questions.) Remember: If you are in the broad universe of entities required to file the certification but you fail to do so for whatever reason, you're almost certainly looking at a \$20,000 forfeiture (not to mention the aggravation and legal fees normally associated with responding to an NAL).



(*Experimental Licensing - Continued from page 12*)

Fifth, the FCC would consolidate and streamline the existing rules on experimental licensing. The presently separate category for developmental licenses, little used, would be folded into the experimental licensing regime.

Sixth, the FCC makes proposals relating to specific situations such as anechoic chambers, Faraday cages, and open area test sites.

In the first three categories above, the FCC proposes to allow licensees to use any frequencies except those few marked as “restricted” in the FCC rules. (Restricted bands correspond to certain services that use especially sensitive receivers, such as GPS, satellite downlinks, and radio astronomy bands.) Even though most frequencies above 38.6

GHz are restricted by default (a few have been exempted), most of these, too, would become available to experimental licensees. Expect large numbers of incumbents in non-restricted bands to push back, each arguing that the importance of its service entitles it to greater protection.

The proposed rules, which run to 37 pages, will affect just about every current and prospective user of the spectrum. The FCC should expect vigorous and conflicting comments. We foresee a major divide between entities committed to innovation, which will want greater flexibility, and spectrum incumbents, who will each demand greater protection for their own particular operations.

Comments and reply comments are due 30 and 60 days, respectively, after the *NPRM* appears in the Federal Register.



(*Net Neutrality Order* - Continued from page 3)

“Best of the Web” or Internet access with certain websites blocked.

The Commission has adopted a “wait-and-see” approach to so-called “specialized services” (*i.e.*, broadband services delivered to the end user other than Internet access). In the meantime, it “expects” that broadband providers will both (a) disclose information regarding specialized services and (b) expand broadband Internet access service to keep pace with any additional capacity for specialized services.

What the Rules Require

Transparency. Both fixed AND mobile broadband Internet providers must publicly disclose information regarding their network management practices, performance characteristics and commercial terms. The extent of disclosure must be “sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.” At a minimum, providers must supply this information on their websites and at the point of sale. Providers are expected to tailor their transparency disclosures according to the above standard; however, the Commission provides a bit of guidance:

Required disclosures must be made on providers' websites and at the point of sale.

Network management practices include congestion management, application-specific measures, device attachment rules, and security practices.

Performance characteristics include the service technology, access speed and latency, suitability for real-time applications, and any specialized services and their impact on broadband Internet access service.

Commercial terms includes pricing, privacy policies (including inspection and the treatment of traffic information), and complaint procedures.

The FCC adds that the list is neither exhaustive nor a safe harbor, but does not tell providers exactly what they must do to comply.

Blocking. Fixed broadband Internet providers may not block any lawful content, applications, or services – in other words, *any* lawful traffic to or from end users – subject to “reasonable network management” (more below). Nor may providers block any non-harmful device from connecting to the network, though they may require that devices conform to widely accepted and publicly-available standards. Providers also may not impair or degrade traffic

to the extent that it makes an Internet service effectively unusable (again, subject to reasonable network management). Furthermore, providers may not offer content, application, or service providers the choice of paying a fee or being blocked.

The order defines “reasonable network management” as follows:

A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

Legitimate purposes would include, for example, ensuring network security and integrity and reducing or mitigating the effects of congestion on the network. Further development of the “reasonable network management” standard will be on a case-by-case basis. A practice is more likely to be considered reasonable if it is transparent, controlled by the end-user, and is use- (or application-) agnostic. A provider in doubt as to a particular practice may seek a declaratory ruling.

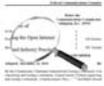
Mobile broadband providers are subject, for now, to a “lite” no-blocking rule: they may not block any websites and they may not block applications that compete with the provider’s voice or video telephony services. (In contrast, fixed broadband providers may not block *any* applications). “Blocking” includes degrading to the point of unusability. This rule is subject to reasonable network management, which does take into account the nature of the network. It does not apply to management of applications stores.

Discrimination. Fixed broadband providers may not *unreasonably* discriminate among lawful network traffic. In the FCC’s view, transparency would tend to make differential treatment more reasonable, as would end-user control. Differential end-user pricing for heavy use is permitted, and differential treatment of traffic that does not discriminate among specific uses would likely be considered reasonable. An arrangement between a broadband provider and another party to “pay for priority,” on the other hand, would likely be seen as unreasonable discrimination. The Commission will be paying particular attention to practices that:

harm an actual or potential competitor (such as an ISP/telephone provider degrading VoIP);

harm end users (by inhibiting them from accessing the

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(*Net Neutrality Order - Continued from page 14*)

content, applications, services, or devices of their choice); and

impair free expression (such as slowing traffic from a particular blog because the broadband provider disagrees with the blogger's message).

For the time being, the discrimination rule will *not* apply to mobile networks, although the Commission intends to “closely monitor” the mobile broadband market and adjust the rules as it sees fit.

Jurisdiction

Section 706. The Commission's jurisdiction to regulate the Internet at all has been the subject of much jurisprudential scuffling. Section 706 of the Communications Act, which blithely and broadly directs the Commission “to encourage the deployment of advanced telecommunication capability to all Americans” is one potential source of FCC jurisdiction over the Internet. But we continue to have qualms about the rules' ultimate durability based on this shaky foundation.

We continue to have qualms about the rules' ultimate durability based on their shaky foundation.

In the *Comcast* decision last April, readers may remember, the D.C. Circuit tossed out Section 706 as a source of net neutrality jurisdiction. The FCC, said the court, was bound by its own 1998 holding that Section 706 conferred no independent authority. Now the FCC makes the argument that its 1998 holding was limited to *forbearance* authority, leaving it free to pursue other actions under Section 706. That's not a bad argument—except that the Commission *already tried it* in the *Comcast* case, where the court thoroughly rejected it.

In the midst of regurgitating its *Comcast* brief, however, the Commission may have actually done what the D.C. Circuit said it needed to do – that is, expressly overrule its 1998 determination that Section 706 did not confer independent authority. Having arguably done so now, the Commission will have at least one new argument when it defends the new rules in court.

Titles II, III, and VI. The Commission also finds authority over broadband providers in its existing authority over services functionally similar to those now delivered over IP networks. So, since interconnected VoIP is a substitute for traditional voice, Internet access that delivers VoIP can be regulated as “contribut[ing] to the market discipline” of a Title II regulated service. Furthermore, the order explains, if calls to and from VoIP customers are not delivered efficiently and reliably by broadband providers, all users of the public switched telephone network would be limited in their ability to communicate. Finally, blocking VoIP could inter-

ferre with the interconnection requirement among telecommunications carriers.

Similarly, because the Internet is an increasingly important medium for radio and television programming, the Commission reasons that it can regulate the provision of Internet access under its Title III broadcasting authority. It likewise claims authority under Title VI to protect competition in the provision of multichannel video programming distributor (MVPD) services, such as cable and satellite television, by preventing cable operators and telephone companies from hindering delivery of competitive video service.

Wireless. The Commission's authority over wireless services is quite broad. Wireless licenses are granted when the “public interest, convenience, and necessity” warrants, and may be modified after grant. From there, with little further explanation, the FCC asserts its right to impose net neutrality on wireless broadband providers.

First Amendment. Lastly, the Commission asserts that broadband providers are without First Amendment rights because they are mere conduits of speech, not speakers.

There is no evidence, it claims, that providers use editorial discretion (such as cable providers have in the choice and arrangement of programming). Bolstering this conclusion are the arguments advanced by broadband providers themselves to deflect liability for transmitting unlawful materials.

Complaint Procedures

The order adapts the Commission's Part 76 cable access complaint rules to net neutrality complaints. Basically, anyone may file a complaint with prior notice to the defendant. Upon a *prima facie* showing that an open Internet rule has been violated, the burden to show reasonableness will shift to the defendant. In addition, the public can file informal complaints using the FCC website (which we are pretty sure the broadband Internet providers will not try to block). If used, these complaint procedures will bulk up the record of recorded instances of “abuse,” retroactively bolstering the Commission's analysis that a problem exists.

Committee

A new regime requires a new committee; in this case, the Commission has created an “Open Internet Advisory Committee.”

Oh, and the FCC will review all of this within two years, and adjust the rules as appropriate. Assuming the D.C. Circuit lets them live that long.



(Two Sides of Net Neutrality - Continued from page 4)

Sorry, but that's just wrong. While the Internet was developing from a tiny, hard-to-use network of nerds into the vast facility we know today, it was mostly under the thumb of the FCC. Otherwise, it might not have happened at all.

Once upon a time, in the dark days before Facebook and YouTube, there was no broadband. People accessed the Internet over a "modem" gizmo on the same phone lines they used to make voice calls. (Old-timers hearken back to the mating call of a modem seeking another of its kind.) Voice lines were (still are) subject to FCC regulation. Under a set of rules called *Computer III*, a large phone company that offered its own ISP service – all of them did – had to open its network to competing ISPs, giving the competition access to the same internal technical facilities that the phone company ISP used. The result was a breathtaking number of competing ISPs. *Computer III* was essential to this thriving marketplace. Without it, no other ISP could have matched the phone companies' quality and cost, so the early Internet would have become the exclusive province of the Bells. The Internet might never have flourished as it did.

*History overturns
the canard that
Internet regulation is
a new idea.*

This bit of history overturns the canard that Internet regulation is a new idea. True, *Computer III* did not impose content neutrality in so many words, but it had the same effect. A customer unhappy with an ISP's content offerings could quickly switch to a new ISP, at no added cost. Eager to keep the customers happy, ISPs left the content alone.

That was then. In 2002, the FCC declined to apply *Computer III* principles to cable modem broadband service, and in 2005, it withdrew *Computer III* from phone-company DSL broadband. Today *Computer III* applies only to dial-up. (And maybe not for long, as the FCC plans to propose watering down the *Computer III* requirements at its February 25 meeting.) In any event, few people use dial-up any more. Most Internet users subscribe to broadband. Without *Computer III*, this means signing up for the ISP run by the phone or cable company. That leaves most broadband users with one possible ISP, or two at most, possibly with long-term contracts and early termina-

tion fees.

Changing ISPs is no longer the ready option it once was. This is a big problem for the argument that markets are an effective control on ISP behavior. Markets work only where they exist.

But wait, say the anti-regulation people. New competition is coming!

Maybe; but having our hopes repeatedly dashed over the years has made us skeptical. Remember city-wide free Wi-Fi? Broadband-over-power-line? Nationwide fiber-to-the-home? Each of these launched with great fanfare, but they all petered out. FIOS, by far the most successful of the bunch, will top out at passing just one in six of U.S. homes. This year the big hope is for broadband wireless via 4G. We want it to succeed, but we're not holding our breath.

When the FCC eliminated broadband competition by dropping *Computer III*, it did so (it thought) for a good reason. The cable and phone companies insisted that requiring them to share their facilities would cut off the incentive to build more. The way to expand broadband, they said, is to leave the providers alone to do their job. The FCC bought the argument, and gave the providers exclusive use of what they build. As a result, the United States promptly surged ahead in global broadband deployment – NOT. The United States by some measures is around twentieth in the world, back in the pack between Estonia and Slovenia. The cable and phone companies tout their investment in broadband facilities, but in most cases the service they actually deliver is impressive only by third-world standards.

Some other countries treat broadband Internet like highways and airports – essential to the larger economy, and so justifying government investment. Here in the United States, we would call that a federal takeover. What we have instead, though, is deregulation without competition. This is the worst of all possible worlds: mediocre and expensive service, little or no customer choice, a threat of content discrimination, and no good solutions in sight.

(Continued on page 17)



(Two Sides of Net Neutrality - Continued from page 16)

Which brings us to the FCC's net neutrality rules.

A good rule, first of all, must guide behavior. A person reading the rule should know what it requires. NO TURN ON RED. CLOSE COVER BEFORE STRIKING. EMPLOYEES MUST WASH HANDS.

Here is a key net neutrality rule:

[A broadband ISP] shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

Discrimination is permitted if "reasonable"; otherwise, not. Does anyone know what this means? To be sure, the word "reasonable" is well understood in some areas of the law; but not this one. The FCC offers

The rule still leaves a great deal of room for both ISP mischief and unrealistic end-user demands.

some commentary and a few examples. But the vagueness of the rule still leaves a great deal of room for both ISP mischief and unrealistic end-user demands.

No doubt this will bring many disputes before the FCC. That might not be a bad thing, if decisions came back quickly. Alas, speed is not among the FCC's many excellent qualities. Allowing for internal appeals, we can hope for a two-year turnaround at best. That is forever, in Internet time. Whatever guidance might come from these decisions will arrive much too late, long after the problems that started them have evolved into entirely new species.

The obvious alternative to vague rules – more specific rules – does not work, either. Nobody wants the government meddling in the details of ISP internal operations. Nobody thinks they would be any good at it.

What, then, is the answer? Sadly, the FCC gave away its best shot when it abolished *Computer III* for broadband. That eliminated competition. Now the only options left are regulation or nothing. The prospect of regulation is unappealing, at least in its present form. And the prospect may not last long; as my colleague Christine Goepp explains in her article on page 3, the new rules might not make it out of the courtroom.

Even before the new rules took effect, two companies challenged them in Court. (See related article on page 5.)

In a parallel universe, one different from our own, the FCC could fix the problem. It would assert Title II telephone-type regulation over broadband ISPs – not all of Title II, which would indeed be oppressive, but just enough to re-impose a *Computer III* regime that requires ISPs to make capacity available to competitors. The ISPs would oppose this, to put it mildly. But they need not provide the capacity for free; the FCC could mandate charges that fairly compensate them for the competitors' share of infrastructure costs, plus profit. The ISPs would likely oppose it anyway, because even a fair profit may not cover losses that result from competitors forcing their prices down and quality up. One might answer that the ISPs originally developed their monopoly facilities under protective regulation, as cable companies or phone companies, and perhaps have no inherent right to carry

that monopoly over to a market that might otherwise be fully competitive. The ISPs would respond . . .

But the fine points don't matter, because this is all science fiction anyway. In our universe, the one where government politicians get applause by condemning government, the Title II/*Computer III* option is about as likely as free universal health care.

Our best hope for an Internet with neither regulation nor discrimination is the emergence of actual broadband competition, whether 4G or something else. But it better happen soon. In one scenario, after the appeals court strikes down the new rules, the current broadband ISPs set up exclusive deals with major Internet content providers. The competition, when it eventually appears, would be unable to provide the content subscribers want most.

In the meantime, let's enjoy what we have. But expect some delays. The kid down the street just started sending me the high-def *True Grit*.



(Adaptive Spectrum Use - Continued from page 1)

mates. The spectrum is effectively full and there is nowhere else to go, say the supposed experts.

But wait.

Take a scanner radio and tune through the bands. The local AM, FM, and TV stations will show activity, as will the cell phone bands and the amateur radio bands. The rest, though, is mostly empty. Even bands that are heavily licensed, such as those used for two-way radios, are actually used only infrequently, and will show sparse activity at most. To be sure, the scanner radio will miss satellite signals, fixed microwave links, “passive” applications (such as radio astronomy), and a few others. And some users, like a first responder who picks up a microphone to call for backup, see a vacant channel as a good thing. But the fact remains: although small pieces of spectrum are overcrowded, much of it goes unused most of the time.

The FCC has taken early steps toward smoothing out the load – for example, allowing licensees to lease out their excess spectrum to others. Industry engineers have come up with “cognitive radios” that respond to the ongoing state of the radio-frequency environment by changing frequency band, modulation, etc. to make better use of temporarily vacant spectrum. Every Wi-Fi laptop automatically sniffs out quiet channels within the Wi-Fi bands. Radios in another, less-used laptop band test the air to avoid radar devices that share the band. Still another band requires transmitters to share frequencies cooperatively. TV “white spaces” devices, if and when they appear, will either sense the spectrum directly or will check in with a database to find locally vacant frequencies.

The FCC now wants to expand automatic spectrum-sharing to help alleviate the shortage. Rather than offer specific proposals, however, it is on a hunt for ideas. The broadly-worded Notice of Inquiry asks for comment on several topics:

The current state of spectrum-sharing radios. Techniques for sharing include detecting and identifying other users’ transmitters, exchanging information among users to determine whether a frequency is vacant, and detecting changes in the noise floor to see if there is room for additional traffic. But straight sensing turned out to be an unexpectedly hard problem in the TV white space proceeding. Another hard problem is monitoring the noise floor. The FCC proposed something similar in its former interference temperature proceeding, since abandoned.

Rather than offer specific proposals, the FCC is on a hunt for ideas.

Use of geolocation and real-time database for checking frequencies. The white space proceeding will test this idea, if the FCC ever solves the problem of database design. After a two-year struggle, still on-going, an FCC official has informally indicated that a solution may be announced “real soon.” Also, geolocation usually relies on GPS, which does not work well indoors.

Building interference suppression into radios. Most experts would agree that good receivers are a key element of efficient spectrum use. Yet the FCC earlier considered the imposition of standards on receivers, only to drop the idea.

Improving interference prediction. Spectrum-flexible radios will have to avoid causing interference to other users. Effective technical rules must rest on good predictions of how radio signals at various frequencies behave, in different environments. The mathematical models needed for this work have lagged behind other aspects of radio technology.

“Policy radios.” The next step beyond cognitive radios, these are transmitters programmed with broad policy constraints on spectrum usage. The concept is still in its early stages.

After inviting discussion on these topics, the Notice of Inquiry turns to nuts-and-bolts practical questions. How should the FCC test the new radios for technical compliance? How should it license them? How can it facilitate spectrum sharing between licensees and other users? What frequency bands can make best use of the new methods?

The end result of this undertaking, years from now, will be an utterly different radio spectrum – as different from today’s as today’s is from the spark-gap era. Transmitters will automatically hop among frequencies, stepping into vacant channels temporarily and then moving on. The result will be vastly more traffic in the same amount of spectrum.

We commend the FCC for reaching out to the public early in the process, even though the agency’s own ideas are still embryonic at best. The many people who will be affected by the coming changes – manufacturers, service providers, end users, regulators – will welcome the opportunity to help shape the outcome.

Comments are due no later than **February 28**, with replies due no later than **March 28**.



(USF Fund Distribution - Continued from page 1)

FCC quickly initiated a rulemaking proceeding which would authorize it to lawfully re-purpose such relinquished funds in the future. The rulemaking was pushed through hastily, and on December 30, 2010, to no one's surprise, the Commission adopted the Order.

The new rule confirms that whenever a carrier relinquishes its ETC status and so gives up its USF financial support, the cap in that state will be reduced by the same amount the relinquishing ETCs used to receive, meaning that there will be no additional dollars to distribute to remaining ETCs.

What is not clear is how the new rule will provide funding for a broadband mobility fund, because slush money is available only if the public has to keep contributing at the old rate. If the state ETC caps are reduced, it seems that the amount to be charged to the public should also go down. That is obviously not what the FCC has in mind. Rather, the Commission wants to keep collecting the money from consumers and repurposing it for mobile broadband studies.

Just a couple of weeks ago, the FCC announced that the consumer contribution factor for the first quarter of 2011 will be a whopping – and record-busting –15.5%. We anticipate a fair amount of grousing from the public over a figure that will raise total taxes and fees on nearly all telephone bills to the 20-25% range. That pushback may get the FCC to think twice about how far it can boost telephone taxes before the public brings down the building walls.

Also unclear is the effective date of the new rules. This is not a trivial issue since the availability of millions of USF dollars renounced by Sprint is now up in the air. This is because the December 30 Order included an odd proviso. Typically, FCC rulemaking decisions (like the vast majority of federal administrative actions) become effective 30 days after the new rule is published in the Federal Register. New rules can in rare cases be made effective earlier, but the agency must justify this extraordinary timing by showing that there is good cause for it. Here, however, the FCC simply noted that Sprint had filed notices of its intent to relinquish its ETC designations in several states effective December 31, 2010, and unless the FCC got this new rule into place before De-

ember 31, those monies would have gone back into the pool for re-distribution. Accordingly, the FCC accelerated the effective date to get it under the wire of the December 31 renunciation date.

Huh? When the earlier Verizon and Sprint monies were relinquished, the FCC had no qualms about stuffing the money into its own pocket, so why couldn't it have done the same thing with the newly available Sprint money? Perhaps the FCC was candidly acknowledging that its earlier action was legally shaky.

Unfortunately, the new action simply confuses things further.

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First, the FCC's "good cause" showing for accelerating the effective date – that it wanted to prevent CETCs from getting funds that would otherwise be due to them under the rules – would hardly seem to qualify as a basis for deviating from the requirements of the Administrative Procedures Act.

Second, although the Order released on December 30 expressly states that it is effective upon release, when the order was published in the Federal Register on January 27, the effective date was given as . . . January 27. So if the Commission was trying to get things into effect before December 31, 2010, it seems to have stepped on its own foot.

Finally, although Sprint had requested its relinquishment of ETC status to be effective as of December 31, 2010, the Wireline Competition Bureau waited until January 14, 2011 to approve that request, effective on that same day. If the Bureau could simply delay the effective date of relinquishment by delaying approval of Sprint's request, why did the Commission need to act hastily on December 30? And as long as it was delaying Sprint's request anyway, why didn't it just wait to approve relinquishment until 30 days after the December 30 Order had appeared in the Federal Register? That would have removed at least a couple of the legal challenges that are otherwise certain to be filed to this unusual legerdemain involving millions of dollars.

So is the Sprint money available for re-distribution to CETCs or not? You make the call.