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FCC nixes CLEC's IX charge

Q: When is an End User Not an End User?

(A: When it gets free service)

By Peter Tannenwald
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In a new decision in the ongoing saga of who should pay the cost of "free" conference calling services, the FCC has declared unlawful the interexchange switched access charge tariff of a competitive local exchange carrier (CLEC), because some of the CLEC's end user customers do not pay for local exchange service.

The FCC normally cuts CLECs a lot of slack in setting rates, because if a CLEC charges too much, it will not be able to woo customers away from the incumbent local exchange carrier (ILEC) with which it competes. But there is one area that is not so competitive – access charges imposed on interexchange carriers (IXCs) for incoming calls. An IXC must deliver each call to whichever LEC serves the destination subscriber, and the IXC has no influence over the destination subscriber's choice of carrier. Thus, if a call is destined for a CLEC customer, the IXC has to pay that CLEC's rates, or else the call will not go through.

The opportunity to set incoming access charges with relative impunity has led to arrangements where the principal business of a CLEC may be providing local service to conference call and chat line services which generate large volumes of traffic. The CLEC files a tariff with terminating charges that are high enough to cover all of its costs and then some. To attract high volume customers, the CLEC provides service for free and may even pay the customer a share of its access charge revenues. Needless to say, these arrangements are highly attractive to conference calling and chat line providers, as well as to the general public, which may pay nothing but normal long distance toll charges to use the services. The attitude of interexchange carriers is substantially more negative, because the access charges they pay sometimes exceed the toll rates they charge their customers.

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But unanswered questions remain

S.911: Senators Inch Toward Spectrum Reclamation, Public Safety License Resolution

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The Senate Commerce Committee has approved S.911, a bill – co-sponsored by the Committee's Republican and Democratic leaders – which provides perhaps the most detailed legislative effort advanced thus far to move incentive spectrum auctions closer to reality. Other bills have been floating around the senate for months, but this one has finally gotten enough steam to go forward. The bill now goes to the full Senate for its consideration, which is far from guaranteed at this point. Additionally, action on some corresponding bill (which has not yet surfaced) in the House will be necessary before S.911 becomes law. So we still have a ways to go before incentive auctions become reality.

But given its bipartisan origins and the fact that it's already made it to the full Senate, S.911 is probably the horse to watch in the race among incentive auction bills.

The bill's primary focus is the creation of a public safety wireless network which would be controlled by a new governmentally-created corporation (the "Public Safety Broadband Corporation" (PSBC)). TV spectrum re-purposing enters into the picture as a potential source of funding, mainly through the sale of "reclaimed" spectrum to wireless companies. (The bill spreads out over more than 100 pages; the spectrum re-purposing/incentive auction portion takes up only about 20 pages or so.) This article will focus on the TV spectrum re-purposing/incentive auction aspects of the bill.

Among other things, the bill as originally advanced by Senators Rockefeller and Hutchison provides that:

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Inside this issue

Broader broadband for 4G networks?

FCC Contemplates Relaxation of Out-of-band Emission Limits in the 2.5 GHz Band

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The FCC has proposed to relax out-of-band emission limits for the Broadband Radio Service (BRS) and the Educational Broadband Service (EBS), operating in the 2496-2690 MHz band (a/k/a the 2.5 GHz band). These services were formerly known as MMDS and ITFS. Their spectrum is now largely leased to Clearwire and others for 4G mobile broadband services.

Clearwire is the largest current user of the band. It relies on WiMAX technology, which typically utilizes 10 MHz channels. But Clearwire and other service providers are thinking that wider bandwidths might be in order. Clearwire would like to migrate to WiMAX2, while other service providers (and maybe Clearwire as well in the future) are considering Long Term Evolution-Advanced (LTE). Both WiMAX2 and LTE contemplate channel bandwidths of 40-100 MHz.

At first blush, there doesn't seem to be much reason why the FCC should not allow operators to choose their own bandwidth, and thereby improve 4G broadband performance. Except for one thing: it isn't as easy – or cheap – to sharply mask out-of-band emissions when using a broader bandwidth as it is when using narrower one. Faced with this conundrum, the Wireless Communications Association International (WCAI) asked the FCC to loosen the mask.

Ouch! cried some of the people who use adjacent bands for things like Mobile Satellite and TV Broadcast Auxiliary Services. Don't tread on me! Spicing things up, one developer/manufacturer of LTE-Advanced gear chimed in that it already produces 20 MHz bandwidth equipment that complies with the existing out-of-band limits. In this manufacturer's view, no relaxation of the current mask is necessary because the equipment it makes will take care of the problem even at the broader bandwidths.

According to WCAI, however, other equipment manufacturers support the proposed relaxation as "an appropriate and reasonable trade-off between form factor, battery consumption, and performance." Worry not, says WCAI, because our mobile units normally don't occupy the entire bandwidth, and they keep their power low to conserve battery capacity. So overall, the benefits of a relaxed mask outweigh the risks.

What shall we do with no consensus, the FCC asks? A mitigation rule is already in place that requires base stations to comply with a tighter emission mask within 60 days of receiving a documented interference complaint. Mobile devices operate with lower power and do seem to be less of a threat. So the Commission reasons that maybe it *can* lighten up – but should it also anticipate future bandwidths even wider than 20 MHz, and should it change mobile mask limits to make it easier and cheaper to make those ever-smarter devices without which no self-respecting teenager or twenty-something would be seen on the street?

Comments will be due ***July 6, 2011***, with Reply Comments only 15 days later. Those short times suggest the FCC does not expect a major brouhaha. It remains to be seen whether they guessed right.

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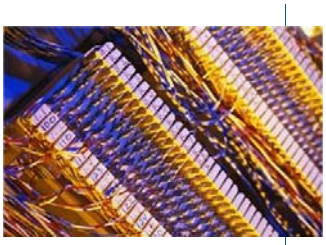
Rural interconnection direction correction



FCC Clarifies Interconnection Obligations of Rural Carriers and Role of State Commissions

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Telecommunications carriers are required to interconnect, directly or indirectly, with the facilities and equipment of other telecommunications carriers. Congress said so, in Section 251(a) of the Communications Act. In addition to fostering competition as much as possible, the goal is to assure that our telephone calls are all completed no matter which carrier we use to make the call or which carrier serves the destination number.

A couple of subsections later, though, in Section 251(f)(1), Congress created a limited exemption from some, but not all, interconnection-related obligations. The so-called "rural exemption" is available to rural local exchange carriers (LECs) under certain circumstances. It exempts eligible LECs from, among other things, the obligation (contained in Section 251(c)) for incumbent LECs to negotiate in good faith the terms of interconnection agreements.

Exempt rural carriers may not have to negotiate, but interconnect they must.

But if you aren't required to negotiate, how can you be expected to reach agreement on interconnection arrangements? If exempt rural LECs don't have to negotiate interconnection agreements, does that relieve them of the obligation to interconnect at all?

The Commission has recently answered that question in a Declaratory Ruling. The answer? No way.

According to the Commission, the rural exemption does *not* apply to Section 251(a), *i.e.*, the general obligation to interconnect. So exempt rural carriers may not have to negotiate, but that doesn't mean that they can just shut themselves off from other carriers. *Au contraire*, interconnect they must. The rural exemption also does *not* apply to the interconnection requirements spelled out in Section 251(b), involving resale of services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation arrangements. In other words, exemption or no, all carriers are subject to basic interconnection obligations.

The need for this Commission clarification arose in part because of another section of the Act – Section 252 – that gives state commissions the authority to mediate, and even arbitrate, interconnection disputes. Some state commissions have read Section 252 to mean that the state officials cannot mediate or arbitrate unless a negotiation between the carriers has already begun. Under that interpretation, since the rural exemption relieves eligible rural incumbent LECs from even having to start the negotiation process, well, then, the state commissions could be shut out of the process.

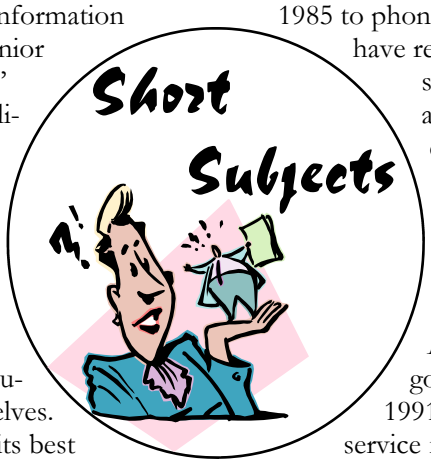
According to the FCC's Declaratory Ruling, that's an incorrect reading of the statute. As the FCC reads Section 252, Congress wanted state commissions to be involved, through compulsory arbitration or voluntary mediation, in all interconnection request situations, including those involving incumbent LECs that might otherwise qualify for the rural exemption. In other words, state commissions' Section 252 authority applies to requests to incumbent LECs for interconnection made pursuant to sections 251(a) and (b), as well as pursuant to section 251(c). All it takes to invoke state commission arbitration under Section 252 is an interconnection *request* made to an incumbent LEC, exempt or otherwise – whether or not there have been "negotiations".

You may think that all carriers would find it in their interest to interconnect with all other carriers, but that is sometimes not the case – especially where a large carrier refuses to pay a small carrier's charges for terminating traffic or a competitive carrier delivers traffic without complete billing information, leaving a rural carrier without revenue it needs to operate.

What happens if interconnection is just not feasible? That's unlikely to happen, since indirect interconnection through an intermediate carrier (usually a Bell Operating Company) is in place almost everywhere. And what about those pesky unpaid bills for terminating traffic? Resolution of that problem is likely to await the FCC's attainment of its so-far elusive goal of reforming the entire intercarrier compensation scheme.

Musical chairs at FCC. Rick Kaplan continues his meteoric rise through the ranks at the FCC by being anointed Chief of the Wireless Telecommunications Bureau as of June 20. Mr. Kaplan has held a variety of positions inside and outside of government, but since joining the FCC he has moved swiftly from Deputy Coordinator of the DTV task force to Media Advisor to Commissioner Clyburn to Chief Counsel to Chairman Genachowski. He is remarkably lacking in grey hair to be placed in such an august position, and we wish him well. His predecessor Ruth Milkman gives up the reins at the Wireless Bureau after two years to lead an FCC team working on regulatory innovation.

Speaking of appointments, there has been a spate of recent new appointments coming out of 12th St. Southwest, some for jobs that previously did not exist: a new Chief Economist and two Senior Economists, a Chief Information Officer, a Distinguished Scholar, and a "Senior Counsel to the Chairman on Transactions." These are part of a disturbing trend of duplicating personnel and functions in the Chairman's office rather than relying on career staff in the relevant Bureaus to advise the Chairman. The trend mirrors on a small scale the tendency of the White House to create shadow cabinets that oversee policy-making at the Federal departments while standing outside the bureaucratic structures of the departments themselves. The FCC administration is certainly doing its best to ameliorate the unemployment problem, but perhaps there should be a new senior official in charge of reducing unnecessary and redundant senior officials.



And while we're on the subject, we'd be remiss in not bidding Commissioner Baker adieu. She left the FCC rather abruptly to take up new and expensive quarters at Comcast, whose hotly contested merger with NBC she voted to approve a few months before. The proximity of these actions raised eyebrows, but we have no doubt that there was no quid pro quo. Ms. Baker was an earnest and energetic young face at the Commission, and though her tenure there was brief, we will miss her straightforward style.

CTIA withdraws petition on CT PUC overstepping its authority. We reported some months ago that CTIA and others had urged the FCC to declare that the Connecticut PUC had overstepped its bounds in requiring wireless carriers to get certificates of public convenience and necessity before they could access rights of way in the state. The CT measure appeared on its face to violate provisions of the 1993 amendments to the Communications Act that ban state regulation of entry into the mobile market. The CT PUC thought better of its original CPCN requirement, however, and dropped it, thus prompting CTIA to withdraw its Declaratory Ruling petition. No harm, no foul.

Spring cleaning at FCC. The FCC undertook some late spring cleaning this month by listing hundreds of old proceedings that had seen no activity for years and therefore had no apparent reason to continue to exist. Many of the proceedings seemed to be dockets related to transfers of control which had long been acted upon and consummated but without the related docket being terminated. Others were reminiscent of a visit to grandma's attic filled with quaint antiquities and curiosities. There is, for example, a 1985 rulemaking proceeding in which a visionary asked the FCC to designate frequency 930.0125 MHz for extra-terrestrial communications. Had ET used that channel in 1985 to phone home, the folks on Alpha Centauri could have received and replied to three different messages from their condos 4.39 light years away. (In four years or so we would no doubt receive this message: "Who is this Anthony Weiner we keep hearing about? Is he your god?" and our response would be: "Anthony Weiner? Never heard of him.")

Along with the dross, there is also some good stuff under the attic dust, such as a 1991 petition by Apple to establish a new radio service for direct high speed connections between personal computers. Seems like kind of a good idea now, but it went nowhere in 1991. Or the High Speed Rail Safety Coalition's petition to authorize equipment to promote high speed rail safety – an idea whose time had not come in 1998 but which has gotten some approbation by the passage of legislation to ensure rail safety (*see* article on Positive Train Control, page 7). The Commission's clean-up effort may have been stimulated by recent Congressional nagging that the FCC lets matters sit without action for too long. Tell that to the folks on Alpha Centauri.

Profanity – Not Just for Broadcasters Any More. Much has been said and written about Janet Jackson's televised wardrobe malfunction, Bono's, Cher's and others' use of the F-Word on TV, and other naughtiness. The FCC has been struggling mightily for years to articulate a legally sustainable definition of what is "indecent" or "profane." Usually this arises in the broadcast context where bad words or pictures could permanently corrupt innocent ears or eyes. But the FCC recently reminded us that the use of obscene, indecent or profane words, language or meaning is also banned over CB radios. 47 C.F.R. §95.413. The word at issue? Faggot.

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Walden ponders possibilities

House Hearings Highlight Needed Reforms of FCC Processes

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In recent months, the House Energy and Commerce Communications Subcommittee has increasingly turned its attention to the performance and operations of the FCC. This could easily, and somewhat cynically, be characterized as the logical result of the House majority party being of a different political party than the FCC Chairman. However, with concerns reaching back to decisions made under a previous FCC Chairman's tenure – a Chairman of the party now in control of the House – it is possible that we have entered a zone rarely seen in recent years in Washington, D.C. – a bipartisan effort to effect change.

Earlier this year, Communications Subcommittee Chairman Greg Walden made his thoughts clear regarding Congressional oversight of the Commission, stating: "Failure to do that only gives them license to do other things they don't have the authority to do." Walden, of course, had introduced a House-passed resolution to invalidate as an overreach of FCC authority the Commission's net neutrality rules. But in recent weeks and months Chairman Walden has reiterated his interest in a good faith effort on this matter and has cited the bipartisan support, including at the Commission, for some level of reform.

The Chairman began by stating that pursuit of reform shouldn't be an exercise in partisanship. Then the gloves came off ...

On May 13 Chairman Walden had an opportunity to further his reform-minded cause as the House Energy and Commerce Communications Subcommittee held a hearing on FCC Process Reform. The panelists were FCC Chairman Genachowski and Commissioners Copps, McDowell and Clyburn. Commissioner Baker did not participate due to her announced departure from the FCC. (This could have provided an opportunity for the Committee to raise larger merger-related questions with Baker moving on to NBC/Comcast but the moment went largely unremarked upon.)

Chairman Walden began by stating that pursuit of reform at the agency "is not, and should not become, an exercise in partisanship, or serve as a cloak to attack past or present commissions or chairmen."

Then the gloves came off . . .

Actually, while we are attuned to the possibility of partisan conflict, the discussion was relatively civil with Walden citing a growing consensus in favor of reform. While acknowledging efforts of the current FCC Chairman to improve the process, Walden described an agency that, "[a]t times . . . succumbed to practices under both Democratic and Republican chairmen that weaken decision-making and jeopardize public confidence." Walden suggested a statutory fix might best ensure consistency from issue to issue, and commission to commission.

Which bring us to a June 22 legislative hearing of the Subcommittee on Communications and Technology. The focus of the hearing was "on how to codify best practices to ensure consistency from issue to issue and from one commission to the next."

The hearing considered draft legislation circulated by Chairman Walden: the Federal Communications Commission Process Reform Act of 2011. This bill addresses:

- Rule Making Requirements
- Adequate Deliberation by Commissioners
- Nonpublic Collaborative Discussions
- Initiation of Items by Bipartisan Majority
- Public Review of Certain Reports and Ex Parte Communications
- Publication of Status of Pending Items
- Deadlines for Action
- Prompt Release of Certain Reports and Decision Documents
- Biannual Scorecard Reports
- Transaction Review Standards
- Communications Marketplace Report

Now that we have actual legislative language to consider we shall see how the Committee members react. Several of these individual provisions – or at least the animating ideas behind the provisions – have bipartisan support (*e.g.*, the nonpublic collaborative discussion issue was addressed earlier in a bill by Rep. Eshoo.)

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Check up on down time

FCC Proposes to Extend Outage Reporting Rules to VoIP and Broadband Service

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On May 13, the FCC released a Notice of Proposed Rulemaking (NPRM) proposing to extend its Part 4 outage reporting requirements to interconnected VoIP and broadband Internet access service providers (including Internet backbone network providers). The Part 4 rules, currently applicable to wirelines, wireless, satellite, and cable communications, require providers to report outages or serious degradations that last 30 minutes or longer and meet certain other thresholds (such as number of calling minutes affected).

It's necessary to extend the rules to VoIP (and the networks that carry it), says the FCC, because there is an increasingly large number of people who depend on VoIP for all voice service, including 911 calls. The Commission rejects arguments made earlier that market forces or network design are enough to ensure network reliability, saying that these factors have not prevented significant outages. Rather, it concludes that the most effective means of reducing outages is Commission intervention, noting its success in this arena: "the frequency of wireline outages, which had spiked in 2008, has dramatically decreased since the issue was identified through the Commission's ongoing, systematic analyses of monthly wireline outages."

McDowell does not believe the FCC has the authority to impose outage reporting rules on broadband Internet service providers.

Since the wireline reporting rule has been in effect since 1992, however, we're not entirely convinced that the 2008 spike demonstrates its effectiveness. Likewise, the Commission's claim that, in *2010*, Commission staff finally discerned that outages were being caused by a relatively small number of factors, each of which could be addressed by applying a known best practice, suggests that the FCC may have fallen victim to the correlation/causation fallacy. (Wiki refers to that as "*cum hoc ergo propter hoc*", which may thrill Latin scholars everywhere – but we prefer the XKCD illustration of the same phenomenon (which may be found at http://xkcd.com/552/.)

While the NPRM seeks input on many particulars, the proposed new rules would essentially require both facilities and non-facilities-based VoIP providers, as well as broadband Internet access service providers, to report outages of at least 30 minutes or more that also meet certain other criteria. In keeping with the current rules, the FCC proposes to include degrees of degradation based on latency, jitter, and the like in the definition of "outage." Timing would track the existing rules: a first report within 120 minutes of discovering the outage, with follow-up reports at 72 hours and 30 days. Reports are to be made electronically, through the Commission's "Network Outage Reporting System" (NORS).

Commissioner McDowell concurred with the NPRM generally, even though he disagreed with his colleagues on the fundamental issue of whether the Commission has authority to do what it's trying to do. In McDowell's view, the FCC simply doesn't have the authority to impose outage reporting rules on broadband Internet service providers. The majority, on the other hand, point to the FCC's direct statutory authority to "protect and promote the availability of 9-1-1 services for customers of interconnected VoIP service," noting that unless the FCC can guarantee the reliability of the underlying networks carrying VoIP service, it cannot fulfill its statutory mandate of ensuring that VoIP 911 calls will get through. Despite his misgivings on this issue, McDowell was willing to open the question up for discussion, which is all the NPRM does at this point. Whether the ensuing discussion will persuade him that Congressional authority really is there remains to be seen.

Comments are due by ***August 8, 2011*** and reply comments are due by ***October 7, 2011.***

***(FCC Process Reform** - Continued from page 5)*

Other individual items such as cost-benefit analyses and performance measures may engender full and frank debate amongst some members. Also, look for the members to segue into AT&T/T-Mobile discussions when the transaction review standards come up.

Additionally, the language authorizing a bipartisan majority of commissioners to initiate items did not garner support from FCC Chairman Genachowski or Commissioner Clyburn when discussed at the May 13 hearing. Time will tell whether this becomes a partisan item of discussion.

Stay tuned for further updates after the June 22 hearing. The seeming dissonance of bipartisan reform still has plenty of potential for fireworks. We will duly report.

Changes comin' down the tracks

FCC Seeks Spectrum for Positive Train Control

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In May the FCC released a *Public Notice* seeking comments on how to best facilitate the process for railroads to acquire spectrum for an important safety technology – Positive Train Control (PTC). While the Commission's search for spectrum for commercial wireless services has gained much more attention, the search for spectrum for PTC will have a similar practical impact.

PTC is a sophisticated communications technology that is used to monitor and control rail traffic from a centralized location. Its primary purpose is to reduce the potential for rail incidents resulting from human or technological errors that can cause significant property damage and, more importantly, loss of life. PTC systems use real-time data to remotely issue movement authorizations and set speed limits to individual trains, thus helping to prevent train-to-train collisions, over-speed derailments, incursions into established work zones, and the misdirection of trains through switches left in the wrong position. Because multiple rail carriers often operate on the same tracks, PTC systems must be interoperable (able to share frequencies and communications) among those different carriers.

PTC technology is still in the early phases of development in the U.S.

While PTC technology has been implemented in a number of other countries, it is still in the early phases of development in the U.S. That development has primarily occurred since the passage of the Rail Safety Improvement Act of 2008 (RSIA), and corresponding Federal Railroad Administration (FRA) regulations. The RSIA, which was enacted on October 16, 2008, and the FRA's regulations, require major passenger and freight railroads to implement PTC on most track lines by December 31, 2015.

Identifying and obtaining spectrum for the wireless portions of PTC networks has thus far been a daunting challenge for many rail carriers. Freight railroads acted quickly to obtain nationwide and regional licenses in the 220 MHz band, which should serve their needs in most geographic markets for the foreseeable future. However, in many areas – particularly urban markets, where there is a greater density of rail traffic and, thus, spectrum use – it appears that additional spectrum will be needed to fulfill the PTC requirements for passenger railroads. Due to interoperability requirements with the 220 MHz band spectrum used by the freight railroads, such spectrum must be in the range of 217 – 222 MHz.

Two existing FCC service bands are available as possible sources of spectrum for PTC: the Automated Maritime Telecommunications System (AMTS) band (217-218 / 219-220 MHz), and the 218-219 MHz Radio Service (the former Interactive Video and Data Service band). However, the current service rules for the AMTS band do not provide for PTC use, and any attempt by a carrier to use that band for PTC would require the carrier to file time-consuming petitions for waivers. Yet, in order to do the required planning, design and testing to properly implement PTC in a timely manner, rail carriers need certainty regarding the availability of spectrum, and the ability to obtain that spectrum as soon as possible.

It is this need to quickly find spectrum for PTC in the range of 217 – 222 MHz that sets the context for the questions in the FCC's *Public Notice*. Technical questions for which the *Notice* seeks comments include: how much spectrum is needed to provide PTC, what are the optimal frequency ranges, and what is the possibility of sharing PTC spectrum among carriers? The *Notice* does not address, however, the broader legal/policy issues of how the Commission should facilitate making spectrum available for PTC. Nevertheless, some carriers have already suggested solutions, including the creation of a new PTC Service, and allocation of 500 kHz of spectrum from the 218-219 MHz Radio Service to that new PTC Service. One attraction of this proposal is that much of the spectrum in the 218-219 MHz Radio Service is currently not assigned to any licensees. While the Commission was poised to auction that spectrum last year, they cancelled that auction, apparently in recognition of the need to consider options for PTC.

Alternatively, some carriers have attempted to purchase spectrum from AMTS licensees. These efforts have run into the potentially time-consuming waiver process mentioned above, and have also been stymied thus far by administrative litigation involving one of the major national AMTS licensees. Accordingly, some commenters suggest that the Commission should take steps to overcome regulatory barriers to using transactions to obtain PTC spectrum.

Reply Comments are due to be filed in this proceeding by ***July 11, 2011***. Please contact us if you would like further information on these issues.

*(**S.911** - Continued from page 1)*

- ☑ No full-power TV licensee would be forced – "directly or indirectly" – to give up spectrum in order to make spectrum available for an incentive auction. But if any licensees were to opt to cough up some or all of their spectrum for such an auction, the Commission would be authorized to cut each such licensee in for a piece of the auction action attributable (in the FCC's judgment) to the spectrum rights that that licensee gives up.
- ☑ Licensees choosing to hold onto their spectrum could still run into re-purposing-related hassles. S.911 would authorize the FCC to "reclaim" TV spectrum for re-purposing, opening the door for some involuntary jiggering that could force some TV licensees to move to different channels.
- ☑ In imposing such an involuntary move, though, the Commission would only have to make "reasonable efforts" to assure that the re-purposed licensee gets "an identical amount of contiguous spectrum": (a) in the same band (*i.e.*, UHF or VHF) that the licensee is forced to give up; (b) in the same geographic market; and (c) with the same areas/populations coverage and interference protection. And those efforts would be required only to the extent that meeting those conditions is "technically feasible" and "in the public interest". With the same "feasibility" and "public interest" conditions the Commission would also be permitted (but not required) to make reasonable efforts to allow low band VHF stations (*i.e.*, on Channels 2-6) to move to UHF channels.
- ☑ Licensees subjected to involuntary re-packing could also be in line for a portion of the auction proceeds to cover at least some of the costs incurred as a result of any involuntary relocation.
- ☑ The FCC would ***not*** be permitted to ***force*** stations to share a channel, although licensees who voluntarily elect to channel-share would be guaranteed the same MVPD carriage rights they currently enjoy.
- ☑ All proceeds of the incentive auctions would be deposited in a newly-created Public Safety Trust Fund (PSTF). Payments to TV licensees voluntarily giving up their spectrum would come from the PSTF. While the bill does not specify exactly how the FCC should determine how much each licensee is entitled to, the bill specifies that, at least three months before any incentive auction is conducted, the FCC Chairman must notify Congress of the methodology the FCC plans to use. The bill also indicates that the FCC's methodology must "consider[ ] the value of the spectrum voluntarily relinquished in its current use and the timeliness with which the licensee cleared its use of such spectrum."
- ☑ No less than five percent of the PSTF – but no more than $1 billion – would be set aside in a new Incentive Auction Relocation Fund (IARF). The IARF would be available to the National Telecommunications and Information Administration (NTIA) which would, in consultation with the Commission, dole out funds to licensees (and MVPDs) to reimburse them for the "reasonable costs" of equipment, installation and construction necessary to accommodate any re-packing that is ordered.

So like most (if not all) of the other incentive auction bills that have been tossed into the mix thus far, S.911 would give the FCC broad discretion with respect to how much any licensee is likely to get for voluntarily giving up its spectrum. The bill does appear to mandate that payments to such volunteers would be pegged to the spectrum's value as it is currently being used – which would in many instances likely result in a lower number than if it were pegged to the anticipated value of the spectrum in the hands of a wireless operator. And by assigning a priority to folks who clear out quickly, the bill obviously encourages those who are willing to act fast.

The size of the pot of gold at the end of the incentive auction rainbow is still anybody's guess.

As far as reimbursement for costs arising from re-packing goes, we are similarly in the dark: we know that those costs would get paid out of the IARF, and we know that the IARF would be no less than five percent of all incentive auction proceeds, but no more than $1 billion. Beyond those very wide parameters, though, we can only speculate.

In other words, the size of the pot of gold at the end of the incentive auction rainbow is still anybody's guess.

While S.911 includes considerably more detail than other spectrum re-purposing bills we've seen, it's still way too early to draw reliable conclusions about what the re-purposing process will eventually look like. How come?

First, the version of the bill that was available for review in the preparation of this article is the initial version offered by Rockefeller and Hutchison. It was subject to multiple proposed amendments in Committee before be-

(Continued on page 9)

*(**Short Subjects** - Continued from page 4)*

In a recent Notice of Apparent Liability issued by the FCC's New Orleans office, the FCC warned that a CB operator's continued use of the six letter F-word could subject him to further enforcement action for obscene, indecent or profane utterances. As offensive as the word faggot is, does it really qualify as a word that is illegal to utter over the airwaves? For if "faggot" qualifies as profane, then surely the full panoply of racial and ethnic slurs similarly qualify. And if those qualify, we assume that sexual slurs like "slut" or "ho" also make the enemies list. What about other hurtful terms used commonly on the playground and in the locker room? Douche bag? Jackass? Wimp? Sissy? How nice it would be if no one called anyone these things any more, but locking offenders up or fining them seems to go a bit far. Should it be unlawful to hurt someone else's feelings?

Further comment sought on fixed wireless backhaul. Last year the FCC initiated a proceeding to open up more spectrum for broadband backhaul – *i.e.*, the transport of signals between networks and from cell towers, which in turn communicate with users' phones and tablets.

Among the options proposed by the FCC is letting the Fixed Service (FS), a category that includes most backhaul, share spectrum at 7 and 13 GHz now used by the Broadcast Auxiliary Service (BAS) and Cable TV Relay Service (CARS).

Commenters have told the FCC there are technical incompatibilities between the FS, on the one hand, and BAS and CARS on the other. After hearing from the Fixed Wireless Communications Coalition, which speaks for many FS users, and the Engineers for the Integrity of Broadcast Auxiliary Services Spectrum, for BAS, the FCC also did some research of its own, coming up with a set of maps showing BAS and CARS usage nationwide. Based on those, it seeks comment on the feasibility of spectrum sharing based on geographic separation between FS facilities and certain mobile BAS operations. It considers reserving some spectrum for exclusively BAS use. The public notice also seeks ways to resolve discrepant channelization plans, coordination procedures, and capacity and loading requirements among the various services.

There is only one comment date, and it comes up very soon: ***June 27, 2011***.

*(**S.911** - Continued from page 8)*

ing voted on. While we believe that none of the Committee amendments directly affected the provisions described above, we have not had an opportunity to check the "approved" version of the amended bill.

Second, even if the amended bill doesn't change the provisions we have described, it's always possible that the full Senate might change them as the bill works its way through the legislative process. And let's not forget the House, which could also insist on changes.

Third, even if the bill were to be enacted exactly as originally drafted, it still provides few if any reliable details about just how the re-purposing process would affect TV licensees. From the currently available draft it's impossible to say:

- ☑ how much a licensee would get for voluntarily turning in its spectrum;
- ☑ what kind of involuntary spectrum relocation might be in store for those who don't turn in their channels. (Remember, the bill would require only that the FCC make "reasonable efforts" to achieve particular results – like identical amounts of spectrum, etc. – and then only if such results are "technically feasible" and "in the public interest". That's a heap of wiggle room.)
- ☑ how much a licensee would get reimbursed for such involuntary relocation.

Of course, there's also the practical reality that the bill might not be enacted at all. Again, the focus of the bill is not on TV spectrum but rather on establishment of a public safety wireless network. TV re-purposing would just be one of several preliminary steps on the way to that goal. Importantly, a core proposal in the bill – *i.e.*, creation of a new corporation that would hold the nationwide license for that network – could prove to be controversial. Ditto for the way(s) in which the bill proposes to allocate the funds that would be realized from incentive auctions.

All of which is to say that S.911 is far from the last word on any of this. But it does give us all something to focus on, and it reminds us that the juggernaut of spectrum repurposing is still a force that we are likely to have to reckon with, sooner or later.

Good news for people in the car just ahead of the driver who is texting

FCC Proposes to Ease Radar Rules at 76-77 GHz

By Mitchell Lazarus
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It's the future, now, for those of us who were kids several decades ago, looking forward eagerly to having flying cars. We're still waiting. But another automotive promise of that era – self-driving cars – is coming closer to reality. And self-stopping cars are here. You can be behind the wheel at 75 mph, unaware the semi in front of you has come to a sudden halt because you are busy texting or watching that video of a surprised kitten, when the car knows enough to jam on the brakes by itself, with no help from you.

That technology just got a little help from the FCC.

The car knows about the stopped semi ahead because it scans the road with radar. One of the favored frequency bands for this application is 76-77 GHz, well up into the nosebleed spectrum. Radio waves in that range can use small antennas and give precise radar readings. They also form tight beams and don't travel far, which helps to keep the radars in nearby cars from interfering with each other.

The current FCC rules for this band are complicated. Power limits depend on whether the vehicle is stopped or moving, and on whether the radar is aimed forward or in some other direction.

The FCC now proposes to set the same 100 watt power limit for vehicle radars aimed in any direction, all the time, moving or stopped. This should simplify the design of the radars and thus bring the cost down, which might eventually help to make them available in more cars. (We hope so, because we'd like the car behind us to have one.)

This should eventually help make radar available in more cars. (We hope so, because we'd like the car behind us to have one.)

The same FCC notice also responds to a request to allow stationary versions of a similar radar technology for use in tracking ground vehicles around airport ramp and gate areas, as we reported a couple of years ago. The FCC now proposes to allow the same 100 watt power limit for any fixed 76-77 GHz radar anywhere, not just at airports, and for any purpose.

Early opposition to the change in rules for the vehicle radars came from a radio astronomy group, whose members fear interference to their observations in the band.

Comments and replies will be ***July 18*** and ***August 1***, respectively.

***(Access Charges** - Continued from page 1)*

Qwest Communications Company decided to blow the whistle on Northern Valley Communications, which operates in South Dakota, by filing a formal complaint under Section 208 of the Communications Act. The FCC ruled in Qwest's favor, holding that tariffed rates apply only to "end users." An "end user," says the FCC, citing Section 69.2(m) of its Rules, is "any customer of an interstate or foreign *telecommunications service* that is not carrier." A "telecommunications service" is defined by Section 53(46) (47 USC Sec. 153(46) as "the offering of telecommunications *for a fee*." So, the FCC concludes, if a customer neither is a carrier nor pays a fee, it is neither fish nor fowl; and not being an end user, it is disqualified from being served by a tariff. That means that when calls are delivered to subscribers who do not pay a fee, any charges must be determined by a means other than a tariff, which means a privately negotiated contract.

If we could get into the room, the negotiation between Qwest and Northern Valley would probably be fun to watch. Of course, we may not have seen the end of litigation over Northern Valley's right to set rates by a tariff, since the implications of the FCC's ruling are rather broad, to say the least, for quite a number of competitive local carriers nationwide. Of course, sweetheart arrangements between CLECs and chat line providers may become a thing of the past anyway when the FCC issues its first rules in the ICC reform proceeding. These abuses were high on the FCC's target list, and preventing them is supposed to be on the fast track for prompt action.

The FCC giveth and the FCC taketh away

International Settlements Policy on the Way Out

But Some International Reporting Requirements May be Extended to VoIP, Non-Common Carriers

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On May 12, the FCC proposed to eliminate its 80-year-old International Settlements Policy (ISP) (except as it applies to Cuba – that would require the State Department's blessing). The ISP is intended to prevent monopolistic foreign carriers from charging U.S. carriers non-competitive rates for the termination of foreign traffic, leading to high international rates for U.S. consumers.

In its very simplest terms, the policy dictates a uniform bargaining position for U.S. carriers: they must accept the same rates as other carriers on that route, are entitled to terminate their proportionate share of incoming traffic from a foreign carrier, and have to split termination rates ("accounting rates") 50/50 with the foreign carrier.

The Commission will retain alternative ways of combating anticompetitive behavior by foreign carriers.

The ISP does not apply where carriers pay below a certain set benchmark rate for that route. There are only a few dozen routes to which the ISP still applies, so it is no longer an active key component of international regulation. Furthermore, the policy itself may be preventing carriers from negotiating benchmark or lower rates on ISP routes, because foreign carriers have little incentive to negotiate symmetric rates when they can re-originate traffic at lower rates.

After elimination of the ISP, the Commission proposes to continue to monitor the competitiveness of international rates by requiring that U.S. carriers file agreements – or at least notice of agreements – involving any above-benchmark rate. The Commission notes that it will retain alternative ways of combating anticompetitive behavior by foreign carriers, such as by ordering all U.S. carriers to suspend payments until the situation resolves (as it did recently in Tonga). It does, however, seek comment on additional measures it can take to identify and remedy anticompetitive behavior. Furthermore, on a limited, case-by-case basis, it proposes applying benchmark rates to indirect routing arrangements as a remedy to high anti-competitive rates passed on through intermediary countries.

The FCC also took steps to lighten the regulatory load on international telecoms carriers by eliminating certain "outdated and unnecessary" reporting requirements, including: (1) quarterly international traffic and revenue reports (that were required for large and foreign-affiliated carriers); (2) annual circuit-addition reports; and (3) telegraph toll division reports. (We wonder how many telegraph toll division reports have been filed in the last few decades.) It also eliminated separate reporting requirements for U.S. offshore points.

The Commission will continue to require annual international Traffic and Revenue Reports and Circuit Status Reports, including for resale, but intends to reduce the amount of information required on each form and the number of carriers required to file. It proposes to establish a revenue cutoff point, below which carriers would have to file basic information only, in an annual "Services Report." The Commission proposes a universal deadline and consolidated instruction manual for all three reports.

However, even as it relaxes certain reporting requirements, the FCC also proposes to extend the remaining requirements to international VoIP services and non-common carrier circuit services. As a "significant and growing component of the U.S. international voice traffic market," the Commission reasons that it needs data on international VoIP traffic to effectively protect U.S. consumers and carriers from harm caused by insufficient competition in the U.S. international telecommunications markets. Likewise, it considers non-common carrier international circuits to be "generally fungible" with common carrier circuits and therefore an essential part of the international telecommunications market. Accordingly, the Commission is looking for input on the various possible statutory bases for asserting ancillary jurisdiction over these services.

Comments will be due 30 days after publication in the Federal Register, with reply comments due 15 days thereafter.