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FHH Telecom Law

January, 2012 — *Current Issues in Telecommunications Law and Regulation* — No. 12-01

FCC's USF/ICC Order: How It Affects Wireless Providers

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The FCC released its historic 751-page Report and Order and Further Notice of Proposed Rulemaking on the Universal Service Fund (USF) and Intercarrier Compensation on November 18, providing a sumptuous repast for the communications industry to feast on over the Thanksgiving and Christmas holidays. It took many readers a few weeks to fully digest the vast smorgasbord of items resolved by the Commission in this one proceeding. But having pushed ourselves away from the table at last, we can now comment on particulars of the Order that most affect wireless providers. The Order also very radically affects the rules governing intercarrier compensation and USF for wireline service, but we are reporting on those developments separately out of compassion for our readers.

Definition of Supported Services. The first big step taken by the Commission was to bring broadband within the universe of services supported under the USF umbrella. The FCC chose not to simply define broadband as a supported service, but instead to expand its definition of supported "voice telephony" to include VoIP. At the same time, the FCC is requiring supported voice telephony providers to provide broadband.

This awkward dance permits the Commission to continue ducking the issue of whether broadband should be reclassified as a "telecom" service regulated under the common carrier regime of the Communications Act or an "information" service regulated only under the FCC's ancillary jurisdiction. But this dance creates problems of its own.

Because USF support is expressly targeted at "telecommunications services," the FCC jeopardizes its whole scheme for supporting broadband. For example, the

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AT&T Gets More Spectrum with Buy from Qualcomm

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The march toward spectrum consolidation continues. In a Christmas week action, the FCC approved AT&T's purchase of a potential treasure chest of spectrum from Qualcomm. How much treasure? $1.925 billion worth.

In green-lighting the deal, the FCC may have been trying to avoid accusations that it is suffocating the growth of AT&T's wireless services. The Commission had, after all, just slammed the regulatory door on AT&T's attempt to buy T-Mobile (that would be AT&T's only GSM cellular competitor), saying that the transaction would not be approved without a hearing. Whatever the Commission's motivation, though, the AT&T/Qualcomm decision was released on December 22, just in time to keep lawyers busy over the Christmas weekend. Holiday notwithstanding, the deal had already closed a week later.

In return for its $1.9B, AT&T got access to what used to be TV Channel 55 on a nationwide basis and TV Channel 56 in New York, Boston, Philadelphia, Los Angeles, and San Francisco. Qualcomm had originally obtained some of this spectrum from Aloha Partners and the rest at an FCC auction. They used it to launch their MediaFLO mobile video service, which did not live up to expectations and was shuttered earlier this year.

The spectrum is unpaired. In other words, it does not include blocks separated by a gap that facilitates interference-free two-way traffic. AT&T plans to use it for one-way downlinking only, to deliver data-intensive services like movies and other video material requiring little or no uplink interaction. That kind of one-way heavy data dump could

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Inside this issue

Caveat Bidder, 2012: Trust But Verify

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We've warned would-be FCC auction participants about the need to perform due diligence before diving into the bidding. The FCC routinely – and prominently – announces that it doesn't guarantee that any spectrum it may put up for bids is actually going to work. Accordingly, careful examination of the engineering specs you have in mind is always a good idea before you commit to plunking down a chunk of change on a channel.

But now we have yet another reason to sound the Caveat Bidder alarm again. It turns out that, even if the FCC tells you that you're qualified for bidding credits, you should remember the cautionary admonition: trust but verify. A bidder found out the hard way what happens when you believe what the FCC tells you.

The situation arose seven years ago, in FM Auction 37.

A couple of brothers formed a partnership to bid on some channels. They owned attributable interests in only two stations, so they qualified for a 25% discount as new entrants to broadcasting. In their short-form Form 175 auction application they specified the four FM channels they planned to bid on; they also laid claim to the 25% discount, identified their two stations, and fully disclosed their interests in them. So far, so good.

The FCC's staff then wrote them a letter, pointing out that their stations happened to be in the same area as one – but only one – of the channels they planned to bid on. The FCC advised the brothers that they would ***not*** be eligible for any bidding credit with respect to that one channel. Not to worry, though, because the FCC affirmatively advised that the brothers ***could*** claim the 25% credit for the other three channels they planned to bid on.

So bid they did – successfully in fact.

They were the high bidders on one of the three channels for which they were to get a credit. But when the time came to pay up, imagine their disappointment when the FCC told them that they would have to pay the full, undiscounted amount of their winning bid – an extra $63K and change over what they had expected to pay. According to the Commission, the 70 dBu contour of one of the brothers' existing stations would overlap the equivalent contour of the station they planned to build on their new channel. That overlap rendered them ineligible for the credit. That'll be $63,250 more than we told you it was going to cost, please. Thanks for your business and come back real soon.

The brothers protested that they had been expressly advised by the Commission that they could claim the bidding credit for the channel in question. Yeah, responded the FCC, about that advice – our staff messed up. Sorry about that. But forget what we told you, because you should have known that your existing station was in the "same area" as the channel you were bidding on. So you also should have known that you weren't eligible for the credit for that channel. After all, the Commission lectured, auction participants are expected to know the rules.

But isn't the FCC's own staff also expected to know the rules? When the staff provides a seemingly official interpretation of those rules, you wouldn't normally question that interpretation. After all, who knows the rules better – you or the FCC? And

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A look at the upcoming Congressional session

The View From the Hill

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Having enjoyed a long holiday respite from doing the people's business, Congress has now returned to take up a number of key communications issues which were left hanging during the long recess. The House opened the second session of Congress on January 17. The Senate goes into session on January 23.

Spectrum Legislation

Near the close of 2011, spectrum auction authority seemed tantalizingly close to passage, then victory (or defeat) snatched its antipode from the metaphorical jaws. After much debate over the inclusion of auction authority in a larger tax extenders bill, on December 23, Congress agreed to a two-month payroll tax extension absent auction authority. The House and Senate instead named conferees to a year-long payroll tax extension where it is expected the spectrum language will rise again. This conference committee will seek to reconcile the House-passed version of H.R. 3630, which includes spectrum auction authority (and its much valued budgetary offset) with the Senate-passed version lacking such authority. Republican conferees from the House are: Energy and Commerce Chairman, Fred Upton (R-MI); Energy and Commerce Communications Subcommittee Chairman, Greg Walden (R-OR); Rep. Dave Camp (R-MI); Rep. Kevin Brady (R-TX), Rep. Tom Price (R-GA); Rep. Tom Reed (R-NY), Rep. Renee Ellmers (R-NC); and Rep. Nan Hayworth (R-NY). House Democrats include: Energy and Commerce Committee Ranking Member, Henry Waxman (D-CA); Rep. Sandy Levin (D-MI); Rep. Xavier Becerra (D-CA); Rep. Chris Van Hollen (D-MD); and Rep. Allyson Schwartz (D-PA). In the Senate, conferees are Sen. Max Baucus (D-MT); Sen. Jack Reed (D-RI); Sen. Ben Cardin (D-MD); Sen. Robert Casey (D-PA); Republican Whip Jon Kyl (R-AZ); Sen. Mike Crapo (R-ID); and Sen. John Barrasso (R-WY).

When we last tuned in, House Democrats were particularly interested in unlicensed use of spectrum.

When we last tuned in, House Democrats were particularly interested in unlicensed use of spectrum and the governance structure of the NextGen 9-1-1 plan. Of interest to television broadcasters was the final disposition of the fairly favorable House language, including signal contour protections, the ability to innovate with television spectrum in the future, protections from involuntary relocation to less desirable spectrum within the TV band, and a $3 billion fund to cover the costs of moving within the band. The earliest expected outcome would be in February due to the few days the House and Senate are actually in session in January.

New FCC Commissioners and LightSquared

On December 8, the Senate Commerce Committee voted to approve the nominations of Jessica Rosenworcel and Ajit Pai to be FCC Commissioners. Why if they are not yet confirmed by the full Senate are they tied to the LightSquared issue? Because Senator Chuck Grassley (R-IA) has promised to put a hold on their confirmation until the FCC provides requested information regarding the agency's review of the LightSquared wireless broadband plan. If Senator Grassley insists on his hold, confirmation would require 60 votes in the Senate.

Meanwhile, LightSquared continues to have a rough go of it with a January 13 letter from the Space-Based Positioning Navigation and Timing National Executive Committee, an interagency body headed by representatives of DoD and DoT tasked with testing the LightSquared plan for potential interference. The Executive Committee reports continued serious interference with GPS systems and states that "no additional testing is warranted at this time." This, tied with the National Defense Authorization Act language requiring a finding that the LightSquared network is not harmful to DoD GPS technologies prior to FCC approval seriously hampers the LightSquared efforts. LightSquared for its part, strenuously objects to the engineering approach used in the testing and insists its approach is workable, particularly in light of failure of GPS devices to stay within their own spectrum. On January 4, Philip A. Falcone, LightSquared's largest investor, and staff met with FCC staff including the Chairman's Chief of Staff, Eddie Lazarus, to continue to push forward.

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*(**Caveat Bidder** - Continued from page 2)*

if the FCC tells you what the rules mean, how often does it make sense to try to argue the point, even if you're pretty sure that they're wrong?

But that's apparently what the Commission thinks the brothers should have done.

And if that doesn't surprise you, how about this? The brothers objected that the FCC was making them pay more than the channel is worth, since the brothers calculated the value of the channel based on the credit that the FCC had told them they were entitled to. In response, the Commission accused the brothers of "buyer's remorse".

"Buyer's remorse"? The Commission itself had told the brothers that they would be entitled to a discounted price (thanks to the bidding credit). The brothers presumably wouldn't be remorseful if they had to pay just that discounted price. Their reluctance to pay the non-discounted price looks more like a reasonable reaction to a bait-and-switch tactic than "buyer's remorse". But maybe that's just us.

The brothers' plight highlights at least one aspect of the FCC's auction process. That process involves multiple self-certifications by the bidder. In order to make those self-certifications, the applicant must know the underlying rules: an applicant's ability to accurately certify, for example, that it's entitled to a bidding credit depends on the applicant's familiarity with the bidding credit rules. If the applicant turns out to be wrong, disappointment can ensue – even, apparently, if the FCC's staff made the same error and led the applicant astray on that very point.

Preliminary reports suggest that the level of interest in the upcoming FM Auction 93 may be extremely low. That could be a function of the economy, or the relatively slim pickings, channel-wise, that are available for bidding. But if the Commission wants to encourage increased participation in its auctions, it might want to think twice about how it treats those, like the luckless brothers mentioned above, who do choose to participate.

*(**View From the Hill** - Continued from page 3)*

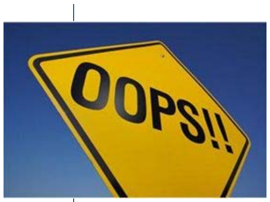
Privacy

Congressional interest in privacy issues continues to percolate. This area clearly illustrates the difficulties of formulating federal legislation to fit the needs of a rapidly expanding global telecommunications and technology marketplace. The question is whether Congress can sufficiently anticipate the needs of an increasingly online, wireless, mobile world – one with a significant population of minors – before the next, and inevitable, privacy scare (say, for example, a massive consumer privacy breach) dominates the news and urges the Congress to action. Currently, the FTC is able to regulate much online content through its unfair or deceptive acts or practices authority. The Administration and much of the Congress continue to encourage the development of enforceable industry codes of conduct. Individual Members' missives encourage and/or demand private sector changes in practices. Meanwhile, comprehensive legislative privacy solutions are in the future.

The difficulties of this semi-voluntary steering of privacy guidelines are apparent, most recently, in Congressional dealings with Facebook. Having demurred on an invitation to participate in a Congressional Privacy Caucus briefing in December, Facebook appears to continue to be a burr in the saddle of some Congressional leaders. On Jan 9, Congressmen Edward J. Markey (D-MA) and Joe Barton (R-TX), co-Chairmen of the Bi-partisan Congressional Privacy Caucus, expressed frustration with Facebook's responses to their queries on privacy and online tracking. In February 2011, the Caucus sent questions to Facebook on its patent application regarding tracking of online activities of Facebook users, even when off Facebook. Said Barton, "In the company's response, it talks a lot about how they don't currently 'track' users online, but they just asked for a patent that would allow them to do just that. Why ask for something you don't ever plan on using?"

Also of note, in a January 12 letter to the relevant House Energy and Commerce Chairmen, their Ranking Member counterparts, Reps. Henry Waxman (D-Calif.), Diana DeGette (D-Colo.) and G.K. Butterfield (D-N.C.), requested a hearing on the Carrier IQ controversy regarding data collected from consumers, including possible storage of keystroke data "including the content of text messages and other sensitive data."

Meanwhile, Rep. Mary Bono Mack (R-CA), Chair of the Commerce, Manufacturing and Trade Subcommittee of the House Energy and Commerce Committee, will continue to hold hearings and highlight questions to address privacy concerns. This is helpful in airing and considering issues related to notification, transparency and consumers choice to opt in or out. As of this writing, discussions are still ongoing behind the scenes for a Bono Mack data security bill. Whether this remains narrowly defined, or becomes a larger vehicle to protect consumer online privacy more generally, remains to be seen.



FCC Miscue Results in Withdrawal of Proposed Fines and Citations

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In the last few months we have pointed out on our blog (www.CommLawBlog.com) a number of instances in which a disconnect between the FCC's process for adopting new rules and the review of those rules by the Office of Management and Budget (OMB) has resulted in very significant delays in the effective date of new rules. When the FCC (or any federal agency) adopts a rule which imposes paperwork burdens on the public, the Paperwork Reduction Act requires the rule to be approved by OMB before it can go into effect. This is why there is often fine print in the closing paragraphs of FCC orders indicating that the rule adopted in the order is subject to OMB approval and will not be effective until that approval is received.

The way the process is supposed to work is that the FCC ships the adopted rule over to OMB to review, a process which normally takes just a few weeks. OMB almost always approves the rule (despite the often staggering amounts of new paperwork generated by it), gives the rule a "control" number, and the FCC publishes a notice in the Federal Register notifying the public that the rule adopted some weeks before is now effective. Unfortunately, this seemingly simple process has been breaking down with increasing frequency.

If someone at the FCC neglects to send the rule to OMB or if someone at the FCC forgets to publish the notice of OMB approval once it's received, the rule cannot be legally effective even though it was formally adopted by the Commission and has been formally approved by OMB. Often this tiny detail is ignored by the FCC and the public, who are understandably thinking that the rule became effective months or even years before.

The most recent fiasco had to do with hearing aid compatibility reports. The FCC imposed strict rules on telecom service providers in 2008 to carry a line of hearing aid - compatible handsets. It also – and here's where the paperwork comes in – required service providers to submit an annual report detailing the handsets offered and other efforts to make service more accessible to the hearing impaired. The industry by and large has been providing these reports since January, 2009, assuming the rule was in effect and, indeed, reminded by the FCC of the need to

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FCC Fiddles with Rules for Broadband-over-Power-Line

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Regulating new technologies can be a slow business. So slow, in fact, that the regulatory process sometimes outlives the usefulness of the technology.

Take broadband-over-power-line (BPL), a technique for delivering Internet access over the same electric wires that come into the house to work the toaster. Early in the last decade, BPL was hailed as the long-awaited "third wire" that would provide real competition to the cable and phone companies for broadband Internet service.

The FCC initially put BPL on a fast track, at least by FCC standards. It released a Notice of Inquiry in April 2003, a Notice of Proposed Rulemaking in February 2004, and rules in October 2004 – just 18 months after the proceeding began. Trust us; this is blindingly fast. The FCC has not moved that quickly with a new technology in recent memory.

Not everybody liked BPL.

Some parties, led by the amateur radio community, were vehemently opposed. That is because some BPL systems use some of the same frequencies that amateur radio does, and some of the energy leaks off the power lines in the form of potentially interfering radio waves. Indeed, in recognition of that phenomenon, the new BPL rules featured unprecedented protections for amateur radio, including a requirement that BPL operators turn down the power on equipment that causes interference, and if necessary, turn it off completely. But that did not satisfy the amateurs. They claimed that a city-wide BPL system amounted to a city-sized antenna that would blanket the amateur bands with interference. BPL providers countered that interference, if any, came from isolated units of equipment, mounted on widely spaced power poles, that could be identified and adjusted if necessary.

The FCC received 15 petitions for reconsideration. Some, including those from BPL providers, sought relatively minor adjustments to the rules. But the amateurs asked the FCC to rescind the rules completely, pending further technical study.

The FCC put the petitions on a shelf and turned to other

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*(**BPL** - Continued from page 5)*

priorities. It took two years, until August 2006, to rule on reconsideration, and even then it made only minor adjustments to the rules. The decision bluntly refused the wholesale changes sought by the amateurs. To the contrary, one passage arguably allowed BPL to cause interference to amateur receivers mounted in cars, under certain conditions.

The amateur radio association, ARRL, challenged the revised rules in court. It raised several arguments, among them a claim that the FCC could not lawfully permit an unlicensed service, such as BPL, to cause interference to a licensed service such as amateur radio.

The courts move at their own leisurely pace. It took almost another two years – until April 2008 – for a decision. ARRL lost on its main argument (*i.e.*, that a potentially interfering signal from an unlicensed device violated the Communications Act). But ARRL prevailed on two subsidiary issues. The court ordered the FCC to publish, for public comment, certain passages in technical studies it had previously redacted; and it required the FCC to justify a certain mathematical formula used in BPL compliance testing.

The proceeding will lurch on for months and years to come, Zombie-like.

Almost a year later, in July 2009, the FCC got around to requesting public comment on the matters sent back by the court. And now, in October 2011 – more than two years after that request – it has made further small adjustments to the technical rules, although it leaves unchanged the particular formula the court had questioned.

But during the eight and a half years of legal wrangling among the amateurs, the BPL providers, and the FCC, the rest of the world continued to evolve. Among other changes, BPL ceased to be the breakthrough Internet service that had made it so important as a policy matter. The technology is still used by utilities for their own internal purposes, such as meter reading and load management. But the promise of the Internet "third wire" has faded. The companies that used to offer BPL Internet service have mostly stopped. They are not saying why, but we have a suspicion. The initial versions of BPL provided speeds of up to about 2 megabits/second. That was entirely respectable in 2003, but a tad slow nowadays, when speeds of 5-20 megabits/second are the norm. As a result, the new BPL rules, while important to some utilities, will have almost no effect on the Internet-using public.

Nor are the recently issued rules necessarily the end of the road. The amateurs still do not have the levels of protection against BPL interference they have fought for all along, and we doubt they will give up now. Indeed, the president of ARRL, in an article titled, "FCC Tightens BPL Interference Rules – But Not By Enough," predicted his organization would petition the FCC to reconsider the new rules, and they did indeed do so.

And so the proceeding will lurch on for months and years to come, Zombie-like, increasingly irrelevant in the real world, yet unable to be stopped. And nobody in Washington seems the least bit surprised.

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file the report.

A few hapless entities, including Circle-K and 7-Eleven, who sold pre-packaged handsets next to the Slim Jims and hotdogs, did not even know they were "service providers" who had to comply with various FCC rules, including the HAC report. Yet the long arm of the FCC reached out and tapped them on the shoulder in 2010 when no such report was received. Both entities got "citations" – effectively a warning that precedes a fine if a violation continues – for not filing the report.

But then on December 13, 2011, the FCC published a public notice indicating that the 2008 rule had just then become effective. OMB had approved the rule back in July of 2008 but the FCC had neglected to publish the necessary notice of the effectiveness of this action until last month. (To its credit, the FCC had actually published the fact of the OMB approval on July 21, 2008 but did not indicate that the rule was then effective.) In any event, since the FCC could hardly issue citations and other punitive actions based on violations of the not-yet-in-effect reporting rule, the citations and notices of apparent liability had to be quietly withdrawn.

So the Paperwork Reduction Act, which so often seems to

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Big deal in 2010; 2011 not so much

"Bill Shock" Off the Docket

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As we reported a little more than a year ago, the FCC released a Notice of Proposed Rulemaking proposing that wireless carriers be required to take steps to avoid "bill shock". Readers with good memories will recall that in the summer of 2010, Congress, the Administration and the FCC were highly exercised about the heartbreak of bill shock. Numerous complaints were rolling in from parents of teenagers and international travelers, among others, who were shocked to discover that they had somehow exceeded their plan limits or incurred international roaming charges which they had not expected. Horror stories of phone bills of $34,000 and $18,000 prompted our trusty regulators to leap into action with a plan to make carriers warn consumers of impending danger before it strikes.

That was then; this is now.

> *The FCC breathed a sigh of relief. If the industry is willing to police itself, all the better.*

The furor over bill shock died down in 2011, with the FCC turning its attention to other matters, and what had seemed to be a major consumer crisis in 2010 faded from the spotlight entirely. Some carriers, chastened by the bad publicity and customer relations resulting from the horror stories, started voluntarily warning their customers about impending surcharges. Now that voluntary movement has crystallized into an industry standard. CTIA, which is comprised of companies serving the vast majority of American wireless customers, announced that it has adopted new guidelines as part of its Consumer Code for Wireless Service. Dubbed the "Wireless Consumer Usage Notification Guidelines" (and appended to the Consumer Code as the eleventh provision), the CTIA's standards appear largely to track the proposals put forth by the Commission last year. The plan calls for notification to consumers that they are about to exceed and/or have exceeded the minutes of use included in their plans, and notification when international roaming charges will be assessed. All notifications will be cost-free to the consumer, and they will be provided on an "opt-out" basis – *i.e.*, unless Joe or Loretta Cell-User expressly chooses ***not*** to receive the notices, he/she can expect to be getting them.

The guidelines are, of course, voluntary. No carrier has to abide by them, unless it voluntarily subscribes to the CTIA's Consumer Code. The notifications are to be phased in over the next couple of years. By October, 2012, participating wireless providers will be providing required alerts relative to at least two of the four service categories (*i.e.*, voice, text, data and international use); full compliance is not due until April, 2013. The fine print on the guidelines has yet to be revealed – for example, how and when is the consumer supposed to receive these warnings? Nevertheless, the FCC breathed a sigh of relief at not having to impose new regulations on an already highly regulated industry. If the industry is willing to police itself, all the better. So the FCC put its proposed anti-bill shock regulations back in the freezer in the hope and expectation that the industry guidelines will eliminate the problem.

This observer can attest that he has already gotten a timely warning from AT&T that his daughter was fast approaching the data limit on her smart phone plan. That warning resulted in a rather more forceful and dire warning being delivered to the daughter in question. Disaster safely averted. And possibly proof that common sense, bad publicity and the mere threat of regulatory intervention can sometimes work as well as actual governmental regulation in addressing social ills.

***(FCC Miscue** - Continued from page 6)*

create mounds of *additional* paperwork for all concerned, for once did its job. It spared a few innocent members of the public from the horrors of reporting. But while Circle-K and 7-11 are now vindicated, the thousands of poor souls who have spent an average of 13.2 hours per year (by the FCC's estimate) filling out this report will never get those hours of their lives back. And as of December 13, the reporting requirement is officially on the books, so failure to file the reports from here on out will lead to forfeitures that probably won't be rescinded. But companies that had already entered into consent decrees or paid fines for violating the rules over the last couple of years may want to ask very nicely for a refund.

Death of a Merger

The AT&T/T-Mobile Merger: What Killed It and What are T-Mobile's Prospects In the Aftermath?

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It is probably old news to most of our readers that AT&T and T-Mobile abandoned their planned merger or, should I say, the planned absorption of T-Mobile into AT&T. But there is a story worth telling about how the proposed merger cratered, and some interesting thoughts worth conveying on the future prospects of T-Mobile.

First, the events leading the parties to abandon their merger plans. After announcing the proposed merger last March, AT&T commenced the most elaborate, ambitious and expensive lobbying campaign we have ever seen here in DC. AT&T somehow convinced lead organizations of almost every major interest group that supported the President, including labor groups, to announce their support of the merger. Initially, it appeared that the FCC Chairman would support the merger. But, by August, AT&T's bold plans were dealt a major setback with the unexpected filing of a federal court case by the Department of Justice (DOJ) in which it sought an injunction to block the merger based upon DOJ's argument that the merger would substantially lessen competition in violation of the Clayton Act. Still AT&T vowed to fight on, hoping for an FCC approval that would take the wind out of DOJ's sails. Instead, the FCC's Chairman shocked AT&T and T-Mobile by threatening to designate their FCC consent application for hearing. Following the Chairman's threat, and a preliminary hearing before the federal court, AT&T and T-Mobile threw in the towel.

I and most observers who have commented on the death of the merger see the FCC Chairman's actions as the death blow. What is interesting, however, is that the FCC did nothing! The demise of the merger started without the release of any formal FCC document. Instead of following accepted and transparent procedure, the Chairman of the FCC called the President of AT&T and the CEO of T-Mobile just before Thanksgiving. He told each of them that he had asked the other Commissioners to adopt an order in which the FCC would make a preliminary finding that it could not find the merger to be in the public interest and would designate the merger consent application for hearing. This order would cause the application to be referred to an Administrative Law Judge (ALJ) who would conduct a trial-type proceeding in which the FCC staff would attempt to convince the ALJ to deny the merger approval application. Now, don't go to the FCC web site and expect to find any such order, as it was not adopted and has not been released. And bear in mind that the FCC is a "commission." No single commissioner represents the Commission and, as stated above, the proposed hearing designation order had not yet been voted on and therefore had not taken effect. So, who was the Chairman representing when he called the President of AT&T and the CEO of T-Mobile to wreck their Thanksgivings? The FCC is keeping mum. Were these courtesy calls? Or was the FCC's Chairman attempting to kill the merger without actually releasing the order or conducting the hearing simply by letting AT&T and T-Mobile know that the hearing designation order would contain FCC staff analysis of the proposed merger which would repudiate all of the benefits that AT&T claimed would derive from the merger, such as building out AT&T's LTE footprint from 80 to 97 percent of the US population, the "on-shoring" of 5,000 jobs and the employment of "up to" another 96,000 people? The release of such a document by the expert agency for communications would have been a political nightmare for AT&T and T-Mobile on Capitol Hill and could have other unwanted ramifications (discussed below).

> *The FCC is a "commission." No single commissioner represents the Commission.*

So what did AT&T and T-Mobile do in response to the FCC Chairman's threat? They had their lawyers go into the office on Thanksgiving Day and dismiss the FCC merger application, effective immediately. Separately, the parties announced that they would change the structure of the merger to satisfy concerns with its competitive effect. While AT&T has steadfastly adhered to its position that the merger is not anticompetitive and would serve the public interest, for reasons unknown to us AT&T apparently did not want its case tested in the crucible of an FCC hearing. Were there other reasons for AT&T's withdrawal of the FCC application? AT&T is not saying, but I believe that one reason for the dismissal was to make sure that the draft hearing designation order did not see the light of day. Why do I believe that? Because of the bizarre occurrences that followed the voluntary dismissal of the FCC application. Following the dismissal, an emer-

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*(**AT&T Merger** - Continued from page 8)*

gency pleading was filed by a public interest group asking the FCC to release the FCC Wireless Telecommunication Bureau's "Staff Analysis and Findings" (the "staff report") that analyzed the proposed merger and formed the factual and legal basis for the draft hearing designation order. In response to that pleading, AT&T lawyers ran to the FCC Headquarters building and argued strenuously against the release of the staff report. As I understand their arguments, the FCC never releases internal staff recommendations, so why release the staff report? Internal staff recommendations are protected to the point that you cannot even get them with a Freedom of Information Act request. And, if the FCC decided to release the staff report, would that action not call into question its ability to protect other internal deliberation documents from public disclosure? If I were representing AT&T, I would certainly also argue that the FCC is wasting staff resources by releasing a document in a case that has been rendered moot by the dismissal of the application.

In fact, the FCC almost never responds to pleadings filed by parties in a proceeding that has been dismissed by the applicants, rendering the allegations and arguments moot and freeing the FCC staff to tackle real issues and problems. No one who follows the FCC and knows its procedures would have given the chances of the release of the staff report more than negligible odds. So what did the FCC do? Its Wireless Telecommunications Bureau released the staff report, after having members of the staff carefully review the report and redact portions of it that it deemed confidential. In a companion order, the Bureau offered several justifications for releasing the staff report, all of which are quite novel and somewhat strained. For one, the Bureau said it would be unfair to those who have participated in the proceeding not to know what the FCC staff had recommended to the FCC. For two, the Bureau observed that the staff report remains relevant because AT&T intended to submit a new merger proposal to the FCC, while in the next breath the order dismisses petitions to deny with the caveat that they may refilled against a new merger application *if they remain relevant*. And, thirdly, the order states that transparency is served by the release of the staff report, thus capping a process started with phone calls made by the FCC Chairman in which there was no transparency. Needless to say, this attorney is less than convinced by the Bureau's rationale for releasing a staff report on an abandoned merger that might be followed up with a new merger proposal having a substantially different structure, and associated public and private benefits and detriments.

AT&T responded to the release of the staff report through a blog article.

So what was the real reason the FCC staff released the staff report? Perhaps the FCC was moved to act by an AT&T press release saying that AT&T continued to covet the assets of T-Mobile and would pursue victory in the antitrust case before the federal court and then go back to the FCC. If the FCC did not want to once again face an application to approve the absorption of T-Mobile by AT&T (and I believe that the staff's finding that the merger would cause "unprecedented concentration in the wireless industry" says just that), releasing the "irrelevant" staff report would certainly make the FCC's position known and undermine AT&T's massive lobbying campaign as well as create difficulties for AT&T and T-Mobile in their antitrust court case.

In another bizarre and unusual twist, AT&T responded to the release of the staff report through a blog article posted by AT&T's Washington representative which damned the FCC's release of the staff report in language that is highly inflammatory. The article directly and unabashedly accuses the FCC of partisanship ("obviously one-sided") and misstating the facts ("document lacks all credibility"). The blog piece concludes with the statement that the staff report "has no legal status, without a vote of the Commission." It seems pretty clear to us that this blog posting was authored (or at least edited) by one or more of AT&T's litigation attorneys, as it takes a combative tone that is unusual from a company that deals with the FCC as much as AT&T – a tone that you just do not hear in DC lobbyists. The tone suggests that AT&T believes that the FCC Chairman misled AT&T, and that AT&T was very worried about what was in the staff report.

After reading the FCC staff report, one is left with the conclusion that it would have been almost impossible for the FCC to approve a modified merger proposal, as the staff report directly and unequivocally disputes every one of the material benefits AT&T and T-Mobile claimed would arise from the merger, and finds significant competitive harms from the absorption of T-Mobile. The FCC staff report states that AT&T and T-Mobile bear the burden of proof that the merger is in the public interest and examines each of the parties' claimed merger benefits to determine whether, based upon the facts as then known, these claimed benefits are "merger specific,"

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are real and are not outweighed by public interest detriments.

Regarding the applicants' claim that the merger will cause wireless output to rise and prices to fall, the staff report finds that the applicants used an economic model that is unreliable for five separate reasons and, accordingly, the staff report finds that the applicant's claim that the merger would result in service price reductions is not credible. As to other alleged benefits, like offering subscribers a wider range of service plans, the staff report finds that these alleged benefits are not "merger specific."

Perhaps the most important "merger specific" benefit claimed by the applicants was that the transaction will enable AT&T to extend its LTE build from a footprint covering 80 percent of the population to 97 percent of the population. According to AT&T, absent the merger, a build-out beyond 80 percent of the population "could not be justified." The staff report does not buy this claim. It notes that Verizon and other wireless carriers are building a collective LTE footprint of 97 percent of the population, and that AT&T historically has attempted to match the build-out of its rivals. The staff report notes that AT&T has claimed that the merger will give it a larger capital budget and more resources to support a larger build-out, as well as reductions in costs that will improve the business case for a rural LTE build-out, but that the FCC cannot give any credit to those claims because AT&T declined to quantify these resources or reductions.

AT&T invoked the mantra of "jobs". The staff report does not buy this claim either.

Finally, AT&T invoked the mantra of "jobs," claiming in an advertising blitz on Washington, DC TV stations that the merger would result in the creation of "up to" 96,000 new jobs. The staff report does not buy this claim either, finding that it cannot be reconciled with AT&T statements that AT&T will eliminate redundant positions, and redundant assets, as well as save on capital expenditures. In short, jobs would be lost, not gained.

Ultimately, it was the effect on competition that led the FCC staff to recommend against FCC approval of the merger. The staff report found that the merger would cause a concentration of wireless spectrum within discrete metropolitan service areas greatly exceeding any that the FCC has ever been asked to approve. Worrisome and unheralded concentration levels would arise in 99 of the 100 top local cellular markets. In addition, the staff report recognized for the first time that the national cellular carriers compete on a nationwide basis and that the merger would result in AT&T and Verizon Wireless sharing 75% of the national retail wireless market. Overall, the staff report concluded that the merger "would substantially lessen competition and its accompanying innovation, investment, and consumer price and service benefits, thus undermining key goals of the Communications Act."

Probably least helpful to AT&T was the change in the staff's position on how it defines wireless geographic markets for purposes of analyzing the competitive effects of wireless mergers. When the FCC staff analyzed the Cingular/AT&T Wireless merger in 2004, it defined wireless markets as solely local ("We conclude that these facts regarding the six nationwide carriers do not establish the existence of a national market."). If that is the case, a merger can be justified by divesting wireless assets in those markets where the concentration resulting from the merger is at intolerable levels. But, what can you do to resolve concentration and competition objections to a proposed merger when the FCC also defines the relevant geographic market as national? Not much. The DOJ had also, for the first time, objected on the basis of national effects to this proposed merger, and AT&T vigorously disputed the concept of a national wireless market. Having the expert agency, the FCC concur in the concept of a national wireless services market gave credence to the DOJ and let a cat out of the bag that could kill AT&T's hopes of ever acquiring T-Mobile.

In spite of the staff report, AT&T and T-Mobile said that they planned to continue to pursue their merger by defending against the DOJ in the federal court case. If AT&T had been successful in that case, the court would have ruled either that the DOJ failed to prove its case or that the merger is not anti-competitive. At that point, the parties could have gone back to the FCC with a modified proposal and a favorable court decision on the issue of the effect of the merger on competition. But the FCC would be under no obligation to follow that court decision. I for one do not see how the parties could accomplish the merger and address the FCC's objections. It appears that it is the loss of T-Mobile as an aggressive and independent competitor that is of ultimate concern to the FCC, and I cannot see how that competitor could

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be replaced.

Ultimately, as we now know, AT&T and T-Mobile decided not to pursue the strategy of winning in court and then asking the FCC to grant its consent. I suspect that a hearing held by the federal court before the decision was made may have convinced the parties that their chances before that court were not that great. In this hearing, the court told the lawyers that the court was aware that AT&T and T-Mobile had announced that they would restructure the merger to suit the FCC, and so the court did not understand why the court case dealing with a merger structure that would not be pursued was anything but moot. In addition, the judge wondered out loud how the parties could pull off their serial approval plan of successfully trying the court case, and then seeking and receiving a brand new FCC approval, all before the September 20, 2012 drop-dead date for the merger. The court also showed that it was aware of what the FCC had done and mused openly about calling the FCC's General Counsel to testify. The apparent message, which it seems that AT&T and T-Mobile got, is that they were not going to win before the court. Following the court appearance, the parties publically announced the abandonment of the merger.

A spectrum-hungry service such as LTE cannot be launched without the spectrum to support it.

So where does that leave T-Mobile?

A very interesting question. T-Mobile's owner, Deutsche Telekom, wanted to sell T-Mobile and take the net proceeds of the $39 billion sales price back to Europe to focus on that market. I offered some interesting speculation on what avenues remained for T-Mobile in the event the merger did not occur in a prior article. And now I have some additional ideas.

I still believe that Deutsche Telekom wants to sell T-Mobile but I also believe that Deutsche Telekom will not allow such a valuable asset to deteriorate and it has said as much. As I suggested before, there is no US carrier that could obtain FCC and DOJ approval to buy T-Mobile that is either in a position or could be put into a position to acquire it and pursue the growth of T-Mobile's nationwide business. Verizon would be just another AT&T; Sprint Nextel is too small and has debt, growth and other challenges that would be compounded – not relieved – by acquiring T-Mobile; the other carriers (such as MetroPCS and Leap) do not have business cases that support the post-paid, national business case of T-Mobile.

Unless a foreign carrier with USA ambitions emerges (DoCoMo, perhaps?), T-Mobile needs to continue its aggressive marketing against AT&T and T-Mobile. That means taking the $3 billion in breakup money from AT&T and adding perhaps another $7 billion in cash from other sources to build a LTE network that can compete with those of AT&T, Verizon Wireless and Sprint Nextel. But, a spectrum-hungry service such as LTE cannot be launched without the spectrum to support it, and I do not believe that either T-Mobile's existing spectrum holdings or the $1 billion of spectrum it will acquire from AT&T along with a roaming deal as the other part of the merger breakup consideration is enough to satisfy T-Mobile's long or short term LTE needs.

So where does T-Mobile go to acquire more wireless spectrum. While AT&T was busy attempting to buy T-Mobile, Verizon spent its time acquiring 700 MHz and AWS licenses. After those acquisitions (which remain pending), what is left? Perhaps T-Mobile might be interested in Clearwire's EBS and BRS wireless spectrum, of which it holds a surfeit and which it tried to sell a year ago. The advantages to T-Mobile of this spectrum are that it can be acquired much more cheaply and in much larger chunks than 700 MHz or AWS spectrum (assuming licenses in those bands remain available). The advantages to Clearwire are obvious – Clearwire gets much needed cash – and not so obvious – Clearwire improves its valuation and ability to raise funds. Focusing on the not so obvious benefits to Clearwire, Clearwire needs a lot more cash to build its LTE network, cover operating costs and pay its debt. I and most other observers of Clearwire believe that Clearwire cannot tap the debt market for the foreseeable future because it has too much debt. This leaves two avenues for Clearwire to raise capital: (1) secondary stock offerings (and it just completed one for about $700 million in cash) and (2) asset sales. I do not see these alternatives as either/or; rather, I see them as elegantly complementary. If Clearwire sells excess spectrum inventory for more than current valuations, the sales could result in a boost to Clearwire's stock price which, in turn, will allow Clearwire to earn more per share in secondary stock offerings and take financial pressure off of Sprint Nextel. I have no inside knowledge, but don't be surprised if T-Mobile and Clearwire are talking.

Tips from the NLRB

Coping With Social Media In The Workplace

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With the explosion of subscribership to Facebook and its imitators, employees' use of social media has become a significant problem for employers. Now we can thank the Acting General Counsel of the National Labor Relations Board (NLRB) for recently issuing a helpful memo summarizing 14 NLRB decisions all involving (wait for it) the use of social media in the workplace. The memo is short on analysis, much less any attempt to tie the cases together into overarching themes. But it's a good read anyway, allowing even non-labor law wonks to get a sense of the general rules and come up with some dos and don'ts.

The primary focus of the NLRB decisions: negative employee commentary, usually about the employer, that shows up on Twitter, Facebook or other social media for all to see. Sooner or later, everybody has a bad day at work and snaps in some way. Take Christopher Cristwell, for example. One day the 25-year-old Starbucks barista finally had it up to here with annoying customers, so he wrote a song and uploaded it to YouTube. It's kinda catchy. Higher ups at Starbucks didn't think so, apparently. It kinda got him fired.

While this is an extreme example of an apparently disgruntled employee publicly expressing his disgruntlement, it's clearly not unique or even rare. Blogs and social media like YouTube, Facebook and Twitter have created new venues for the employee rant. Back in the day, complaints were more confined: a couple of folks blowing off steam in the break room, or maybe an employee crying in his beer with friends, and that's the end of it: they vented, they moved on, that was that.

But when the complaint shows up in social media, there's a permanent, totally public record of the complaint. Given that, employers may wonder just how far they can go to keep their employees in line and preserve the company's image.

Some answers may be found in longstanding legal tests and principles of Section 7 of the National Labor Relations Act (NLRA). How do those tests and principles get applied to new situations? That's where the NLRB's decisions, and the acting GC's memo, come in handy.

Historically, the NLRA protects employees' speech if the employee is engaged in (a) protected activity or (b) concerted activity, as long as the activity is (c) not "opprobrious". The 14 cases shed light on what the NLRA means by each term and provide some examples of what can be disciplined and what cannot.

Protected Activity

Section 7 of the NLRA exists primarily to assure employees some manner of communicating concerns about the conditions of their employment. Ordinarily, an employee can successfully challenge disciplinary action arising from his or her expressive activities if those activities were "protected" under the accepted interpretations of the act. Speech implicating or relating to terms and conditions of employment is generally "protected." For example, if an employee chats with coworkers or speaks publicly in preparation for a discussion with employers relating to the job, that is likely to be "protected."

The NLRA has said that what constitutes "protected activity" does not change if the employee's comments are communicated via the Internet. Protests of supervisory actions in a Facebook post or Tweet? Pictures posted on-line of oneself carrying a picket sign in front of the company logo or wearing shirt with the company logo during a protest? Both activities would probably irritate your employer – but both are protected.

Concerted Activity

Concerted activity exists when an employee acts with or on the authority of other employees and not solely by and on behalf of himself/herself – think one employee trying to rally co-workers into group action. It could also include an individual employee bringing group complaints to management's attention, but only if that employee's statements are a legitimate outgrowth of a group's complaints.

The application of "concerted activity" in the context of social media is the area that may require the closest review in practice. Is that lone Tweet an idle complaint (unprotected because it is not "concerted" in nature) or is it the first attempt to gather other workers sharing similar concerns (and therefore protected)? Is activity "concerted" *per se* if others comment on your Facebook post? (Spoiler alert: not always) It's very contextual and fact-specific.

Thankfully, the NLRA's 14 cases offer plenty to chew on. For example, the following qualified as "concerted activity":

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(*Social Media*- Continued from page 12)

- An employee posting a complaint to Facebook after conversations with others about the issue or after another employee has specifically requested that management be contacted;
- Four workers posting concerns and anecdotes relating to a fifth worker's complaints in advance of a discussion with supervisors;
- An employee's post expressing the sentiment of a group after the employee tells *several employees* of the plan to take action and then following through with that action.

The following were determined ***not*** to involve "concerted activity":

- A newspaper reporter airing personal grievances and criticizing other media and companies on a work-related Twitter account;
- An employee posting a complaint when (a) the topic never previously discussed with coworkers, and (b) no coworkers responded to the post, and (c) there were no employee meetings or any attempt to initiate group action.
- A complaining Facebook post complaining of an individual where the only responsive comments are all in the nature of "hang in there".

> *There are limits to what an employee can say and how he or she can say it.*

"Opprobrious" comments

Of course, there are limits to what an employee can say and how he or she can say it, even when engaged in protected and/or concerted activity.

One test the NLRB applies (dubbed the "*Atlantic Steel*" test) involves public outbursts by an employee against a supervisor. The test: were the employee's statements "opprobrious?" Since "opprobrious" isn't a word most of us hear in everyday conversation, here are some of the factors considered in that analysis:

- The time, place and manner of the discussion. Was it in the workplace, during work hours, in a manner that does or is likely to interrupt the work of other employees? If so, the employer is more likely to be permitted to penalize it. Of course, the development of social media has complicated this consideration. While many people use social media at work, most social media commenting use still occurs on private time – but even comments posted on any employee's own time can still create a negative buzz in the office or among customers or competitors.
- The subject matter of the discussion. Is it directly related to the "protected" activity (*see* above)?
- Was the protected concerted activity provoked by unfair labor practices? If so, this greatly favors the employee.
- Finally, what is the nature of the outburst? This is the one that often gets the employee in the most trouble, especially in the relatively unedited, uncensored, stream-of- consciousness social media world. Based on the NLRB's review of cases, we know that simply swearing is not enough to put someone on the wrong side of this line, nor is name calling. "Liking" someone's egregious comment probably won't do it either. In fact, at this point, verbal or physical threats are the only clear examples of opprobrious conduct that can be disciplined.

It's fair to assume that employers still have significant leeway in determining what an employee can and cannot say in a company Twitter feed or blog page or on the employer's Facebook page. On the other hand, the employer's ability to discipline an employee for statements made on a personal account appears to be limited. *But one thing that seems to be unique to the media world* is the extent to which individual social media accounts aren't really individual. A recent on-line discussion focused on the extent to which some journalists are "branding" themselves. By doing so, aren't media figures – journalists, radio hosts, personalities, etc. – also holding themselves out as representatives of the media companies (and *their* brands) for which they work?

Another NLRB test (this one's called the "*Jefferson*" test) applies when an employee makes disparaging comments about an employer or product to third parties. In such cases, the employee is protected if the communication involves an ongoing labor dispute and is not excessively disloyal, reckless or maliciously untrue.

Another Look at Employment Policies

We have previously suggested that employers address issues relating to use of social media in their company handbooks and policies specific. We still think that's a good idea, especially for media companies that are actively using (or trying to use) social media to engage with listeners, readers or viewers, promote programming, events and contests, or simply distribute information through new channels. But these NLRB decisions show that company policies along these lines must be drawn precisely.

What does that mean? According to the NLRB, policies can***not*** create a "chilling effect" on employees' speech by imposing rules that:

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(USF Report and Order - Continued from page 1)
FCC relies on Section 706 of the Act as a source of authority to support broadband through the USF. That section directs the Commission to accelerate the deployment of advanced telecommunications capabilities regardless of whether they are strictly "telecom" services. However, the Commission then imposes on non-telecom service broadband providers the same requirements that apply to regular eligible telecommunications carriers (ETCs) who of course *are* telecom service providers.

One of the requirements so imposed is that an ETC must provide stand-alone voice telephony throughout its "designated service area," yet many non-telecom broadband providers will not *have* designated service areas. Similarly, many broadband providers simply offer a broadband data pipe and do not care what particular applications (such as a VoIP application) their customers use over the pipe. Although it would make sense for such service providers to qualify for USF support, the Commission's scheme would exclude them.

The definition of an "unsubsidized competitor" is critical here .

Required service levels. USF fixed service recipients must provide broadband at speeds of 4 Mbps downstream and 1 Mbps up. This represents a great leap upward in the minimum speed expected of a broadband provider. Latency of less than 100 milliseconds is expected and, while monthly capacity requirements are not specified, the FCC expects wireless broadband providers to offer capacity limits consistent with those offered in urban areas.

Build-out areas and "unsubsidized competitors". USF support will be offered for the build-out of areas now unserved by an unsubsidized competitor. because there are many areas where mobile wireless providers offer service in competition with subsidized LECs. The rule banning support where there is an unsubsidized competitor would prevent landline providers from receiving support in those areas. The Commission protected local exchange carriers (LECs), however, by narrowly defining an "unsubsidized competitor" as a "facilities-based provider of residential fixed voice and broadband services." Fixed voice and broadband service is defined as service to end users primarily at fixed endpoints using stationary equipment. This limitation to fixed services is curious since so many people these days are now cutting the cord not only for voice service but for data service as well. The result is that broadband service to end users primarily using *mobile* stations would ***not*** qualify as unsubsidized competitors. However, the FCC did note that a mobile services provider could become an unsubsidized competitor by offering fixed service that guarantees that the speed, latency and capacity minima applicable to fixed providers will be met throughout the relevant area.

Elimination of identical support rule. The FCC has done away with the identical support rule which subsidized multiple carriers in any given area. This action alone hacks several hundred million dollars in support away from competitive ETCs (CETCs) because they now no longer qualify for duplicate payments.

In a clear win for LECs, the FCC provided for a phase-out of support to existing non-LEC recipients by mid-2016. In addition to retaining their current subsidies (as revised to cut out certain support mechanisms), LECs also get the privilege of offering to be the sole provider of basic services in currently unserved areas in each part of a state where they provide service. That is, an existing LEC ETC may propose to provide the full panoply of supported services everywhere – *but not less than everywhere* – in the state where it is the designated LEC.

If the LEC picks up that option, obviously no other carrier would be designated to provide fixed service in those areas. If no LEC picks up the challenge, then there will be unserved areas in each state where USF support will be offered by a reverse auction mechanism. Build-out in these currently unserved areas will be supported by a one-time distribution of up to $300 million to price cap LECs.

Mobility Fund (Phase I). The FCC is also offering a one-time build-out subsidy to mobile services providers via a Mobility Fund (Phase I). Under this program, up to $300 million will be distributed to companies willing to provide service to areas currently without 3G or better wireless service. (An additional $50 million is made available for build-out of unserved tribal areas.) These funds are expected to be up for grabs by a reverse auction to be conducted in the third quarter of 2012. Several components of participating in this auction involve considerable lead time.

Identifying unserved areas. The FCC has promised to identify, prior to the auction, the areas that are actually currently unserved. This is a big improvement over the 2009 federal stimulus plan process where each individual applicant had to figure out for itself whether an area was unserved or not. In determining whether an area is unserved, the FCC will take into account commitments to

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*(**USF Report and Order** - Continued from page 14)*

provide service in an area (including stimulus fund-based commitments) made prior to the end of 2012.

Unserved areas will be determined on a census block basis using road miles as the marker of mobile service. A tentative map of unserved areas will be posted prior to the auction, with the public given an opportunity to point out that areas have not been accurately characterized. A final map of unserved areas will be posted prior to the auction (typically a couple of months before), but that poses an obvious logistical problem: most interested parties will not have enough time to apply for ETC designation in those unserved areas.

Auction eligibility requirements. To participate in the auction, an entity must: (1) be an ETC; (2) have access to spectrum by ownership or lease; and (3) be financially qualified to provide service after the build out takes place. This raises a host of chicken and egg problems that the FCC does not seem to have adequately considered.

> *The auction eligibility requirements raise a host of chicken and egg problems.*

First, in some states the ETC designation process can take years. By imposing this hurdle, the FCC is precluding perfectly capable and willing carriers from participation.

Second, in many instances it may be impossible to serve as an ETC unless one is receiving USF support. One would be loathe to take on ETC responsibilities without knowing beforehand that the support money will be available, but the rules are set up backwards. The Commission alludes cryptically at one point in the Order to a "conditional" ETC designation where one could be designated as an ETC conditioned on receipt of USF support. This process would partly solve the problem, ***if*** both the FCC and the states will grant provisional ETC designations – something that is far from clear. In any case, interested parties should start thinking about applying for ETC designation *now* if they hope to participate in the auction.

Third, a prospective service provider whose viability depends on whether it will be receiving USF money might not be willling to buy or lease the necessary spectrum without that assurance. Yet the Commission's rules require that the spectrum be in hand. The sole break here is that the spectrum acquisition or lease may be conditioned on receipt of Phase I USF support.

And fourth, the auction participant must not only certify that it is financially capable of providing service in the area after the build-out is complete, but also secure its obligation by posting a letter of credit in favor of the FCC. This unusual arrangement might preclude all but very financially well-heeled companies from being able to participate.

Obligations of winners. Winners in the reverse auction will have to provide either 3G service (200kbps down/50 kbps up) or 4G service. The service provided must be measured by drive tests and reported to the FCC. Winners must also: allow collocation at reasonable rates on towers constructed with USF money; allow voice and data roaming; and charge rates comparable to urban rates. Winning bidders who fail to meet their build-out obligation will default on their Line of Credit to the FCC ***and*** be required to repay all monies received under the program.

Auction procedures. Most of the details of the reverse auction have been left to the FCC's auction staff to flesh out, but the FCC did express a preference for a single-round sealed bid auction, as distinct from its normal multiple round bid process. This would obviously require bidders to make their single best bid at the outset with no opportunity to drop the bid lower in reaction to other bids.

Mobility Fund Phase II. In addition to the one-time Phase I funding opportunity, the FCC plans a Phase II program providing funds to cover on-going costs of providing mobile service to areas requiring subsidies. $500 million has been allocated for this purpose, of which up to $100 million is prioritized for tribal needs. This money will be awarded by a reverse auction process similar to that used for Phase II.

The specifics of which areas – unserved? underserved? high cost? – will qualify for such subsidies are not yet clearly defined. In particular, if Phase II support is limited to unserved areas, that would seem to preclude recipients of Phase I build-out funding from qualifying for Phase II operations funding, particularly since they would have been required as a Phase I condition to attest that they have the financial wherewithal to operate without such support. Phase II will be fleshed out by the further rulemaking portion of the FCC action.

Intercarrier compensation. The second major subject area of the FCC's order is intercarrier compensation, a field which spans all exchange of traffic between carriers and, now, some non-carriers. Because of the sweeping extent of the changes regarding intercarrier compensation, we will limit this discussion to items particular affecting wireless interests.

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*(**USF Report and Order** - Continued from page 15)*

The FCC's Order here is a genuine and fundamental sea change in the way traffic exchanges have been handled for generations. Specifically, the FCC has adopted as its root principle that "bill-and-keep" should be the basis for exchanges. This principle – that each carrier should charge its own customers for service provided to them and not be compensated by other carriers that interconnect with it – represents a repudiation of the previously prevailing concept that the calling party is the party who benefits by a communication. Instead, the FCC now recognizes that both the called and calling party benefit by connection to the network and that each party should bear its own costs for participating.

This radical reform at one swoop would erase a myriad of complex payment structures that have governed intercarrier relationships for years. To minimize the trauma of this upheaval, the FCC has provided a six-to-ten year transition period for LECs who have depended on these intrinsic subsidies. The ultimate effect of this reform should be positive for wireless carriers, since various access charges will be reduced or eliminated over time. To be sure, the FCC did confirm that non-access traffic exchanged between wireless carriers and LECs (typically intraMTA traffic) is to be exchanged on the basis of interconnection agreements between the parties. But with bill-and-keep as the default payment model, non-LECs have a significant leg up in such negotiations. A few other points to be aware of:

The Commission did not immediately impose the bill-and-keep regime on originating access charges, though it capped those charges and signaled that intends to move in that direction.

The Commission intends its bill-and-keep principle to apply to both intrastate and interstate communications, but the Commission's authority to impose this rule on intrastate communications is questionable. This issue will certainly be hashed out in the appeals that have already been filed in court.

Reciprocal compensation rates between CMRS carriers must be consistent with the rate model adopted for price cap carriers.

The FCC decided to treat all VoIP-to-PSTN traffic similarly, regardless of whether it is fully interconnected on a two-way basis. Such VoIP traffic is subject, in the case of toll traffic, to the same rates applicable to non-VoIP traffic, and in the case of other traffic, to reciprocal compensation agreements. This reform is intended to eliminate the widely decried disparity in treatment between VoIP and non-VoIP traffic. Here again the Commission's refusal to denominate VoIP traffic as telecommunications could undercut its regulatory effort.

We have gone on at greater length here than is our wont, but only because the scope of the FCC's order is so vast. We expect to be providing further guidance on some of the elements of the USF/ICC Order in the weeks ahead.

In the meantime, no less than 23 parties have filed petitions for reconsideration of various parts of the FCC's action. Comments on the rate represcription, Connect America Fund, ETC, and Phase II auction refinement elements of the Further Notice of Proposed Rulemaking were due by January 18, 2012, and reply comments by February 17. Comments on the intercarrier compensation portion of the rulemaking are due by February 24, with replies due by March 30.

Judicial appeals must be filed no later than January 30. Anyone thinking about taking the new rules to court should be aware that a number of other parties have already headed down that path – and, thanks to the U.S. Judicial Panel on Multi-District Litigation, it has been decided that the U.S. Court of Appeals for the Tenth Circuit, headquartered in Denver, will be the court to hear all such appeals in a consolidated proceeding.

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- explicitly restrict protected activities;
- could cause employees reasonably to believe their protected activities would be limited;
- are promulgated in response to protected union activities.

From the NLRB, some examples of ***unduly restrictive*** provisions:

- A prohibition on posting pictures in any media (this is overbroad because it would prohibit employees from showing pictures of protected activities);
- Requiring "respectful and courteous communications", or prohibiting "sensitive", "embarrassing", "harassing", "inappropriate" or even "defamatory" statements or discussions;
- Prohibiting the posting of private or confidential information without defining those terms (this could be construed as preventing free discussion of wages and other

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*(**AT&T/Qualcomm** - Continued from page 1)*

also be provided by broadcasters, if the FCC would only let them. A number of broadcast organizations – Sinclair Broadcast Group and SpectrumEvolution.org, for two – have formally proposed such use. Their proposals, however, have thus far been met by nothing but stony silence, and in some cases hostility, from the FCC.

This purchase is not AT&T's first.

They already control former TV Channels 54 and 59 (bought directly from Aloha Partners). With its latest acquisition, AT&T now has access to Blocks C, D and E of the "Lower 700 MHz" band. (That band consists of former TV Channels 52-69. The commercial segment has been broken up into five blocks for non-broadcast purposes, known as A, B, C, D, and E.)

In the FCC's view, the AT&T/Qualcomm deal was different from the AT&T/T-Mobile deal. According to the Commission, the Qualcomm deal did not put a competitor out of business, because AT&T was buying only Qualcomm's spectrum, not Qualcomm as a company. Some sticklers might see this as a distinction without a difference: after all, if you buy all of a company's spectrum resources, don't you remove that company from the competitive marketplace just the same as if you bought the company itself? The FCC apparently isn't much of a stickler this time around.

The FCC did admit that the concentration of spectrum resources might be reaching harmful levels, but it felt that the public interest could be protected through remedial conditions. Among the conditions:

- The new spectrum must not be "bonded" with other spectrum so as to make roaming by other carriers' subscribers impossible;
- Power levels must be limited to avoid interference to Lower 700 MHz frequency blocks AT&T does not control;
- AT&T must allow other Lower 700 MHz operators to collocate on towers AT&T owns. (The precise reach of this condition isn't clear, since we don't know what percentage of the towers used by AT&T are owned by it and are thus subject to the condition);
- The newly acquired frequencies may also not be used for uplink traffic – a condition that may be difficult to retain as technology evolves.

The FCC's propensity to place conditions on large acquisitions to accomplish policy goals that would be difficult to achieve by rulemaking was subdued in this case. We know this because the Commission rejected petitions seeking additional conditions. The FCC concluded the proposed-but-rejected conditions were not specific to this proceeding and could/should be dealt with elsewhere. (Conditions that didn't make the cut included: requiring handset interoperability; accelerating build-out timetables; reducing early termination fees; forbidding exclusive deals with handset manufacturers (like the early iPhone); priority access for public safety users; and net neutrality.)

The FCC also brushed aside questions about changing its screening threshold. That threshold is a processing device by which the level of regulatory scrutiny given a deal depends on how much spectrum is proposed to be controlled by the buyer and which frequency bands are included. Since the Commission was approving the AT&T/Qualcomm transaction without any spectrum divestiture condition, the screen didn't matter here.

And so the spectrum consolidation march continues. As has been the case so often in the past, marketplace forces are finding ways to rearrange resources faster than the government can keep up. Whether the incentive auction concept to knock TV off of much of its spectrum perch will be relevant by the time Congress and the FCC can figure out how to adopt and implement it, and whether the impact on competition will be acceptable policy-wise, remain to be seen.

*(**Social Media** - Continued from page 16)*

terms and conditions of employment) or the posting of information identifying the employer in personal profiles.

And some examples of restrictive provisions that ***are*** permissible:

- A narrowly drawn and sufficiently specific provision prohibiting employees from pressuring coworkers to become Facebook "friends," if it is created with the goal of preventing harassing conduct;
- Limiting who can speak on behalf of the company, especially when further clarified with references to "crisis situations" and "timely and professional" communications.

So what are the new lessons to be learned here? More than ever, words matter – both the words that employees use and the words you put in your social media policies or employee handbooks. You definitely need to consult an attorney if you're going to revisit and rewrite your policies or if you're thinking about taking action against an outspoken employee.

FCC Proposes Airport Radars at 78-81 GHz

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The FCC seeks comment on radar operations in the 78-81 GHz band, and in the meantime, has granted a waiver for limited use.

There has been a lot of regulatory interest lately in radar devices above 75 GHz, up in the "nosebleed" portion of the spectrum. Back in 2009, the FCC granted a waiver to allow the Atlanta airport to use 77-76 GHz radars to track aircraft and vehicles on the ground. In 2010 it granted a waiver to use 77-81 GHz to measure the levels of substances inside large industrial tanks. Meanwhile a rule change is still pending. Last May, the FCC proposed to relax the rules for vehicle radars at 76-77 GHz, which provide for automatic braking when the car senses an obstacle ahead. That rule, too, is still under consideration.

Now the FCC has revisited the airport environment, with a proposal to authorize 78-81 GHz radars to detect "foreign object debris," or FOD – apparently a term of art in the airport business. We are all in favor of FOD detection, remembering that a stray piece of metal on the runway tripped up an Air France Concorde in 2000 at the cost of 113 lives. Apparently aircraft shed parts more often than most of us realize. Other common forms of FOD include misplaced tools, equipment and supplies, luggage, and wildlife.

A close reading suggests the FCC is determined to approve FOD radars. But it is not sure how: whether to authorize 78-81 GHz radar on an unlicensed basis, like cordless phones, or under license, like taxi radios. Another question is whether to restrict the band to use at airports, or to permit other applications as well. A third question is whether radar users should have to coordinate their operations with others who share the band.

All of these questions turn in large part on the need to protect radio astronomy from interference. Radio astronomers have a primary allocation across most of the band. The good news is that radar signals at these frequencies tend to form narrow beams and do not propagate well, thus cutting the risk of interference. On the other hand, radio astronomy facilities use exceedingly sensitive receivers, and so can be disrupted by even a very low level of interfering signal.

While the rulemaking proceeds, the FCC has granted one company a waiver to market equipment in the band, solely for FOD detection at airports, and only under a license.

FCC Approves Another Ultra-Wideband Waiver

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The FCC has issued yet another in a long series of waivers for ultra-wideband imaging devices.

This time the product is an instance of "ground-penetrating radar" (GPR), one of eight species of ultra-wideband equipment approved by the FCC back in 2002, each with its own set of technical restrictions. This particular GPR unit is towed behind a truck at highway speeds to inspect roadbeds and bridges for hidden defects.

The device fails to comply with two of the detailed rules that govern ultra-wideband devices: it generates a wide bandwidth by quickly stepping from one frequency to another, rather than transmitting on many frequencies at once; and it complies with the applicable emissions limits only when the frequency stepping is active, rather than stopped on one frequency, as the rules require. The waiver applicant, Curtiss-Wright Controls, Inc., explained why these departures are necessary to achieve better performance, and why they do not increase the threat of interference to other spectrum users.

Two opponents argued, in effect, that a waiver would allow manufacturers to concentrate radio-frequency energy in sensitive bands, including the band used by GPS satellites. The FCC responded with conditions on the waiver that prevent the device from using any one frequency for longer than 2 microseconds at a stretch, and more than 0.033 percent of the time overall. Other conditions require the device to avoid certain sensitive bands. With those limitations in place, the FCC determined, the Curtiss-Wright device will be no more interfering than a compliant GPR.

We have written before about the disadvantages of regulating by waiver: delays in getting a product to market (the Curtiss-Wright proceeding took 19 months, about par for the course), high legal expenses, unpredictability as to outcome and, in the end, a confusing patchwork of permitted and non-permitted devices. Not that the FCC should stop granting waivers to applicants that make a good case. Given the fragmented nature of the ultra-wideband rules, the waivers are the only way the industry can evolve to meet customers' demands. Far better, though, would be an overhaul of the ultra-wideband rules that drops unnecessary restrictions and distinctions, and instead authorizes any ultra-wideband device that presents no realistic threat of interference. We

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Up, up and away!

Trial Balloon: FCC Looks Skyward for Disaster Relief

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The sequence is predictable: first the disaster, then the finger-pointing over the failure of emergency communications. We saw it on 9/11, Hurricane Katrina, and even the eventful Mineral, VA earthquake, the one that toppled plastic lawn chairs miles away.

Now the FCC has issued a white paper aimed at solving the problem of communications in the aftermath of a disaster. The new acronym is DACA, for "Deployable Aerial Communications Architecture": a set of techniques for hoisting a communications system to an altitude suitable for relaying signals. The paper mentions four specific approaches.

- Small unmanned aerial vehicles: hand-launched, battery-powered aircraft that fly at an altitude of about 500 feet. Think of those model helicopters they sell at the mall, but bigger.
- Weather balloon technologies that can carry a six-pound repeater package, although only for short periods of time.
- High altitude long distance unmanned vehicles that can operate for longer durations with heavier payloads.
- Deployable "suitcase systems" that use pre-packaged portable transceivers loaded onto low-flying aircraft.

The white paper, though, leaves a lot of questions unanswered. The biggest omission, to us, is a failure to mention that none of the proposed DACA systems would operate on its own. Each of the options, rather, is a mechanism for relaying communications from the ground. But those ground-based communications in turn must depend on the same facilities that are vulnerable to damage, flooding, or power failure. The white paper does mention the importance of satellite communications in disaster scenarios, but satellite systems likewise merely relay signals between ground-based earth stations. Thus, even with DACA in place, communications systems remain vulnerable.

Also missing from the white paper is any detailed discussion of frequencies DACA systems might use without causing interference to whatever terrestrial systems remain operating. And we hope that future work acknowledges the important contributions of amateur radio operators to post-disaster communications, with provisions to improve the reliability of their efforts.

The white paper does contain an interesting new idea.

Past discussions of communications following a disaster have focused mostly on the needs of first responders. Here, though, the FCC, while mentioning the need for uninterrupted public safety communications, also seeks to maintain consumer services such as cellular, Wi-Fi, and Internet. This would allow the public to stay in touch and informed, notwithstanding major hurricane or earthquake damage – although some of the public we know will take the opportunity to keep up with Facebook updates and watch funny cat videos, even while the storm rages and the earthquake rocks the foundations.

The FCC took the release of the white paper as an opportunity to expand its toy room. Exhibits there during September include DACA equipment, along with "command and control" solutions and situational awareness devices, and vehicle mounted platforms for public safety communications. (While the FCC's announcement of the display of this gear includes the obligatory fine-print disclaimer that inclusion in the display does not constitute Commission endorsement of any particular device, more prominently in that announcement we are told that the display "showcase[es] a range of state-of-the-art tools", including the "latest" in certain types of devices.)

The next step in developing these ideas will be a Notice of Inquiry that asks the public what issues the FCC should consider in moving toward implementation. That will be a key step. A lot of seemingly good ideas break down when it comes to specifics. We look forward to seeing whether DACA's trial balloon can survive the stormy weather involved in transitioning from rough outline to operational details.

***(Ultra-wideband Waiver** - Continued from page 18)*

understand that would take political finesse, as certain influential spectrum users have a history of overstating the risk of interference to their respective services. But we think the task is worth the effort. A single, coherent set of rules would be a big boost to an industry that, from the beginning, has shown an enviable flair for technical innovation.