



## Congress Opens Door for Spectrum Repurposing, Incentive Auctions

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**A**fter more than a year of back-and-forth, our friends on Capitol Hill finally came to terms on a plan to encourage – through “incentive auctions” – the so-called “repurposing” of spectrum now occupied by TV broadcasters to make it available for wireless broadband services. Snuggled in the middle of the payroll tax cut extension act, the long-awaited spectrum auction authority has now been signed into law.

(In signature Washington style, the curiously-named “Payroll Tax” bill – formal name: the Middle Class Tax Relief and Job Creation Act of 2012 – dedicates a mere three sentences to tax issues and more than 250 to other matters, like Medicare reimbursements, unemployment benefits, federal employee retirement rules . . . and the federal spectrum policy and telecommunications funds.)

Title VI of H.R. 3630 of the Act includes the particular provisions authorizing incentive auctions of broadcast spectrum and creating an interoperable public safety network.

The good news is that most, but not all, parties with some stake in the game received at least part of what they were hoping for. Of particular interest to broadcasters: the act requires the FCC to make “all reasonable efforts” to preserve existing coverage of TV stations; prohibits the involuntary moving of broadcasters from UHF to VHF, or from high-band VHF to low-band VHF; provides for a one-time auction and a relocation fund of \$1.75 billion; and requires coordination with Canada and Mexico on border concerns.

The bad news, at least for low power TV licensees: the definition of “broadcast television licensee” for the purposes of

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## Congress Requires State/Local Rubber Stamp Approval of Some Wireless Tower Modifications

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**I**n a little noticed section of the landmark Middle Class Tax Relief and Job Creation Act, Congress has thrown the wireless industry – or, more specifically, the folks who build towers for the wireless industry – a small measure of relief in the on-going struggle to get tower modifications approved and constructed. Buried in a collection of odds and ends dumped, seemingly as afterthoughts, at the end of the law, Section 6409 *requires* state and local governments to approve modifications of wireless towers and base stations as long as those modifications don’t substantially change the dimensions of the existing structures.

The wireless industry has long complained that local authorities hold up approval of *new* tower construction either out of misplaced concern for interference issues or simply as a revenue-generating mechanism. That problem has increasingly spread to tower modifications as well.

The streamlining of needed approvals is a big inducement to licensees to collocate on existing structures, saving considerable time and money in getting a station up and operating. Most federal rules properly treat minor modifications of existing structures as non-events that require little or nothing in the way of prior approvals. Local authorities, by contrast, have come to see such collocation applications as an additional opportunity to interpose themselves into the process, usually not to the financial or operational benefit of the carriers.

Congress moved to correct this abuse. In Section 6409 it simply pre-empts states and local authorities from being able to deny eligible facilities requests, *i.e.*, requests involving:

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Targets: fraud, waste, abuse

## FCC Tightens the Screws on Lifeline Providers

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As we all know, the federal Lifeline program, overseen by the FCC, provides subsidized phone service to low-income households. In 2010, the Government Accountability Office released a report revealing a significant lack of direction and control within the Lifeline program. In response, the FCC has now adopted comprehensive measures to combat fraud, waste, and abuse in the program. By doing so, it hopes to trim “up to” \$200 million from the Lifeline program this year and \$2 billion over the next three years.

The FCC’s Report and Order and Further Notice of Proposed Rulemaking (*R&O/FNPRM*) spans 231 pages (and another 100 pages or so of appendices). Eligible telecommunications carriers (ETCs) will want to familiarize themselves with the many specific requirements detailed in the *R&O/FNPRM* in order to assure compliance. The following provides an introductory overview of the highlights of the FCC’s action. (Important note: this article does *not* address (a) Lifeline issues specific to Tribal lands or (b) state-conducted eligibility review.)

The *R&O/FNPRM* focuses on two main problem areas: (1) support for more than one person per household; and (2) support for ineligible consumers.

**One per household.** The *R&O/FNPRM* codifies the policy that each household gets support for *only one* phone line, mobile or fixed. (The agency already clarified, back in June 2010, that an individual gets only one Lifeline-supported service.) A “household” is assumed to consist of everyone who lives as a single address (not a P.O. Box), unless the residents self-certify that they are financially independent from each other (for example, unrelated adult roommates). Commenters (including Commissioner Clyburn) have pointed out that this is increasingly out of sync with the way modern families use phones, but the Commission has rejected the extra cost of providing phones to multiple individuals within a single household. For customers who want to show that they are financially independent of their housemates, the FCC has directed the fund administrator, the Universal Service Administrative Company (USAC), to come up with a certification form within 30 days of the publication of the new rules in the Federal Register.

**National eligibility standards.** Right now, eligibility for Lifeline varies by state, although the FCC has developed certain “federal default” criteria applicable to the handful of states that have not claimed jurisdiction over Lifeline eligibility. Based on those federal default criteria, the *R&O/FNPRM* establishes as uniform national eligibility criteria: (1) household income at or below 135 percent of the Federal Poverty Guidelines; or (2) participation in one of a number of federal assistance programs, such as Medicaid or Food Stamps. The idea is to give uniform opportunities to low income consumers nationwide, make compliance easier for carriers, and make auditing easier for USAC. States *must* recognize consumer eligibility under the federal rules, but can add other qualifying criteria for participation in a state program.

**Clear marketing.** When advertising Lifeline services, ETCs must explain in clear, easily-understood language: that the offering is a Lifeline-supported service; that only eligible consumers can enroll; what documentation is necessary; and that the program is limited to one benefit (either wireline or wireless) per household. ETCs must also explain that Lifeline is a government benefit program, and false statements to obtain it may be punishable by fine, imprisonment, or being barred from the program.

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Can two bads make a good?

## Dish Network Allowed to Buy Two Bankrupt Mobile Satellite Licensees

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Are mobile satellite services (MSS) cursed? The record of these services over the last two decades is littered with the debris of bankrupt companies. They always start out full of promise and hope, but then they either fail to get off the ground entirely or come crashing back to earth in a glorious financial fireball. LightSquared is just the most recent entrant to bravely enter the mobile satellite fray flush with hundreds of millions of dollars, only to see its hopes dashed by regulatory requirements or the failure of the public to accept high priced satellite-based service.

So it is with some jaundice that we report on the FCC's approval of Dish Network's acquisition of two bankrupt MSS companies. DBSD North America and Terrestar each hold 20 MHz licenses in the 2 GHz band to offer

mobile service via gateway earth stations, mobile terminals and ancillary terrestrial components (ATC). DBSD launched a satellite in 2008 but is not providing any commercial service. Terrestar operates from a Canadian-licensed satellite providing satellite roaming to AT&T Mobility on a wholesale basis. Neither entity offers ATC services, *i.e.*, services provided over terrestrial facilities. Both companies went into bankruptcy, as seems to be customary with such licensees.

In the course of the bankruptcy proceedings, Dish Network, a provider of satellite television service, swooped in and acquired both licensees, thus garnering a cool 40 MHz of spectrum nationwide at bargain-basement prices. The acquisition was, of course, subject to FCC approval, which the FCC duly delivered on March 2. One might have thought that the consolidation of the only two MSS licensees in this band would have raised some anti-competitive concerns, especially since the FCC identified only two other competitors in the relevant market, Inmarsat and LightSquared. And LightSquared, as we reported in our last issue, has been dealt a powerful and possibly fatal blow by its not being allowed to operate in its own band due to interference to GPS receivers. So of the four potential MSS competitors, only Inmarsat is really operat-

ing. The FCC realistically concluded, however, that there was little likelihood that either DBSD or Terrestar was going to emerge separately as an MSS provider, but maybe if they were consolidated together, at least one additional player would enter the market. The FCC therefore held its nose and approved the deal.

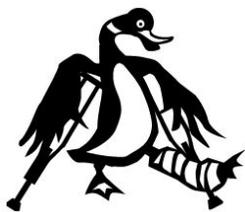
The hitch – there's always a hitch when it comes to MSS – is that the FCC did not at the same time approve Dish Network's request for certain waivers that would facilitate its ability to offer ATC services. As LightSquared and

others have found, the *sine qua non* of a viable satellite service is the actual ability to offer service terrestrially. Handsets capable of operating over satellites are too unwieldy and expensive for most customers to buy. The trick, therefore, is to convert relatively

cheap and unused satellite spectrum into relatively priceless and highly coveted terrestrial spectrum. To accomplish that alchemy, the FCC must grant waivers that free the satellite carrier to a large extent from the need to actually operate over its satellites. LightSquared received such waivers, but then ran into an unrelated interference issue with the GPS community which is yet to be resolved. The MSS bands used by DBSD and Terrestar suffer from no such concerns, so there appeared to be clear sailing ahead for Dish Network.

Instead, the FCC, perhaps burned by criticism about its hasty grant of hugely valuable waivers to LightSquared with only cursory public vetting, decided to take it slow here. It decided that it will consider the issue of how to handle ATC operations in this band in a separate rulemaking proceeding. The FCC did not say it wouldn't eventually grant the waivers, but it also didn't say that it would. So Dish now finds itself the owner of satellites and spectrum but, at least temporarily, no viable business plan to use them. While we remain hopeful that Dish's audacious stroke of joining two failed companies together will not just result in one bigger failed company, we recommend that readers keep an eye out for further debris falling from the sky in the months ahead.

*The sine qua non  
of a viable satellite service  
is the actual ability  
to offer service terrestrially.*



*New tower rules, for the birds*

## Revised Tower Registration Regimen Ready (But Not Yet In Effect)

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**I**t looks like new bird-friendly procedures for proposed tower construction could be with us by summer. If you're thinking about building a tower 200 feet tall (or taller) – and especially if you're planning to build something taller than 450 feet – you might want to get that proposal on file sooner rather than later. The longer you wait, the more likely it is that you'll end up subject to considerably more burdensome processes.

The new procedures have been years in the making. (We previewed them last April, shortly after the Wireless Bureau solicited comments on a preliminary version.) They arise from concerns raised by a number of conservation groups (e.g., the American Bird Conservancy, the National Audubon Society) who urged that the Commission should afford more opportunity for public comment about proposed tower construction. According to the conservation groups, towers pose risks to birds (particularly migratory birds).

Accordingly, the groups (with a boost from a 2008 decision of the U.S. Court of Appeals for the D.C. Circuit) have pressed the Commission to modify its Antenna Structure Registration (ASR) program. Those chickens will soon be coming home to roost.

Under new rules adopted last December (but which – as explained below – have not yet taken effect), anticipated tower construction subject to the ASR program must be brought to the Commission's attention *before* any application is filed. That is, before formally applying for an ASR (much less for the particular RF facilities to be installed on the to-be-built structure), prospective applicants must first submit a partially completed Form 854 (the standard ASR application form). That will include information regarding the type of tower proposed and the lighting that will be used. The prospective applicant must also provide local notice of the filing in a newspaper or through "other appropriate means."

Once filed, that partial Form 854 will be available for public review and comment for at least 30 days on the FCC's ASR website. Commenters may request that the tower proposal be subject to additional environmental review. (The tower proponent is entitled to respond to any such request.) The Commission will then evaluate the filings. If the Commission concludes that no additional review is necessary, the

tower proponent will be allowed to submit a complete Form 854. But if additional review is found to be warranted, the proponent will have to submit an Environmental Assessment (EA) showing in detail why the proposed tower will not have a significant environmental impact.

If an EA is required, it, too, will be posted on the Commission's ASR website and subject to public comment, although no second local notice will be required. (If a tower proponent determines on its own, prior to filing the partially completed 854, that an EA is required, that EA is to be submitted with the partially completed Form 854 at the beginning of the process.)

*The new procedures will – even once they take effect – be essentially interim measures.*

The process outlined above will cover *any* applications for new towers that require ASRs. Administrative modifications to ASRs (e.g., changes in ownership or contact information) will *not* be subject to the new provisions. Also exempted will be replacement of any existing tower with a tower which (a) has identical physical characteristics and (b) is located within one second of latitude and longitude from the original tower.

In addition to new towers, the partial Form 854 approach will be required for some, but not all, modifications to existing towers (including collocation of new antennas on existing towers). Generally, if a modification does not involve a "substantial" increase in the size of the tower or any new construction or excavation more than 30 feet beyond the existing tower, the new provisions will *not* apply. As used in the new processing rules, the concept of "substantial" changes will be defined as it is in the Commission's Nationwide Programmatic Agreement for Review of Effects on Historic Properties (NPA). For readers who haven't brushed up on their NPA definitions recently, "substantial" changes include (but aren't necessarily limited to) height increases of greater than 10 percent, and increases in the width of a tower by more than 20 feet.

Changes in the lighting used on an existing tower may also be subject to the new process. In its Order, the Commission has adopted a three-tiered system of "preferred" lighting styles, running from "most preferred" (i.e., no lights at all) to "least preferred" (i.e., red steady lights), with anything

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## Congress Seeks Info on 11, 18, and 23 GHz Fixed Microwave

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Among the little surprises buried in the 250+ page legislation to extend the payroll tax cuts is a provision instructing the General Accounting Office and the FCC to investigate the use of the 11, 18, and 23 GHz fixed microwave bands.

Currently these bands, along with some others, are licensed on a “link by link” basis. An applicant sends the coordinates and elevations of its proposed stations, preferred frequency band, and other technical data to a frequency coordinator, who tries to fit the new user into the band without threatening interference to the incumbents. The process usually works. Few applicants need be turned away, and unexpected interference from one system to another almost never happens. The arrangement also results in highly efficient use of the spectrum. But it does not bring in revenues to the Treasury, as auctions do.

The new law (the relevant portion of which is reproduced below) requires the FCC to report on the number and percentage of common carrier applications in these three bands that fail to make it through frequency coordination. Separately, GAO must assess whether the current rules provide “adequate incentive” for use of the bands, and whether they “ensure that the Federal Government receives maximum revenue for such spectrum through competitive bidding.” The bill further instructs GAO to consider adjacent spectrum that has been auctioned (which is just the 24 GHz band), and also the present and projected failures of frequency coordination in markets having high demand for common carrier use of these bands.

The object, apparently, is to lay the groundwork for auctioning these bands. But the bill has some odd features.

For one thing, although auctions have succeeded for mobile spectrum, such as the bands used for PCS voice and 3G and 4G data, they have never worked well for fixed point-to-point applications. The bands previously auctioned for that purpose, including 24, 28, 31, and 39 GHz, are all severely underused. They did raise some cash for the government, but make poor examples of spectrum efficiency. At least according to historical precedent, auctioning off a fixed point-to-point band is almost tantamount to removing it from productive use.

For another, the bill looks primarily to common carrier uses of the three bands. Although we don’t have hard data, we

strongly suspect that non-common-carrier applications account for the large majority of licenses.

Finally, the focus on failures of frequency coordination is curious, considering that most coordination efforts ultimately succeed, thanks in large part to the skills of the companies that provide this service.

The current system of regulation, in short, has worked well for decades. We respectfully suggest that Congress should have left it alone.

Both reports are due in nine months. No doubt the FCC will soon have to seek public comment on the issues raised in the bill. We will let you know when that happens. In the meantime, the relevant text from the new law appears below.

### SEC. 6412. DEPLOYMENT OF 11 GHZ, 18 GHZ, AND 23 GHZ MICROWAVE BANDS.

(a) FCC REPORT ON REJECTION RATE.—Not later than 9 months after the date of the enactment of this Act, the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the rejection rate for the spectrum described in subsection (c).

(b) GAO STUDY ON DEPLOYMENT.—

(1) IN GENERAL.—The Comptroller General of the United States shall conduct a study to assess whether the spectrum described in subsection (c) is being deployed in such a manner that, in areas with high demand for common carrier licenses for the use of such spectrum, market forces—

(A) provide adequate incentive for the efficient use of such spectrum; and

(B) ensure that the Federal Government receives maximum revenue for such spectrum through competitive bidding under section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)).

(2) FACTORS FOR CONSIDERATION.—In conducting

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*Top tips from the tip top*

## Top Ten Tips for Telecom Contracting

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*(Editor's Note: The following article is the maiden voyage in these pages of our newest member and contributor, Bob Butler. Bob focuses on telecom/enterprise contracting issues and shares herewith some of his wisdom.)*

**B**uying telecommunications and related services presents a different kind of contracting challenge. The combination of high tech products with their alphabet soup of acronyms – VANS/WANs, VPNs, VOIP, ISDN, DSL, ATM, MPLS, DS1s, 2s, and 3s, OC-1/10s, etc. – with a mix of regulated and unregulated offerings, contractual artifacts from a long gone monopoly era, the importance of communications to both the supply and sales chains in the modern marketplace, and the need for unique provisions addressing this specialized subject matter requires a steady and experienced hand to secure a customer-friendly deal. Having spent several decades advising clients in this area, I have set out below my personal Top Ten List of tips for negotiating such a contract on behalf of so-called enterprise customers (businesses with substantial and sophisticated demands for telecommunications) as well as other customers who wisely wish to limit their liability exposure on even smaller deals.

### Tip No. 1 - Plan Early

Whether you are contemplating a contract renewal or an entirely new deal, a year or more in advance is not too early to begin planning to meet your future telecommunications requirements. You will need time to identify your current and projected service demands, obtain detailed information regarding the former from your existing providers, and evaluate new and upcoming technologies in this fast moving field. Don't wait until your current agreement is about to expire, when you are at risk of sharply increasing rates for service. Carriers love to negotiate under such circumstances, as they retain all of the leverage.

Once you have assembled the necessary information about your own usage and projections, you should take full advantage of the request for proposal (RFP) process to solicit competitive bids from potential telecom vendors. Be sure to require detailed and specific responses to all items, including not only service and pricing proposals, but also key contract terms. The latter can be set out in actual contract language in the RFP, and respondents should be asked for

proposed edits to such language if they cannot unqualifiedly accept it. This will save substantial time in the inevitable follow up negotiations.

### Tip No. 2 - Understand the Structure of the Deal Documents

The typical telecommunications agreement is composed of a general terms and conditions document (a master agreement or MSA), service-specific attachments (supplements or addenda), service orders, applicable tariffs, and various referenced additional terms such as service or price guides. This structure presents significant risks for the uninitiated. Understanding how these documents fit together is crucial to ensuring that you actually sign documents reflecting the contract to which you think you agreed.

*Understanding how a deal's structural components fit together is crucial.*

In particular, the additional terms and guides may include hundreds of provisions totaling a thousand pages or more, all slanted in favor of the carrier/provider. These are often simply posted on a website and subject to unilateral changes by the carrier. Tariffs are similarly

changeable and control by operation of law even if your vendor has explicitly told you otherwise. It is therefore of paramount importance that all critical business terms be expressly set out in the core contract documents and that you preserve, as a minimum, the right to terminate the agreement (through inclusion of a material adverse change or MAC clause) in the event any provision is altered in a manner unfavorable to your interests.

In addition, service attachments and orders generally control over conflicting terms in an MSA. This means that a lowly clerk submitting an order for something as simple as a new phone line could make a material change in an agreement that was painstakingly negotiated by your executives and lawyers. It follows that a reliable contract administration process is likewise necessary to protect your deal.

### Tip No. 3 – Accommodate the Impact of Regulation

Telecommunications services are still regulated in various ways at the federal, state and local level in the US, and to even greater extents in many foreign jurisdictions. Such regulation may limit your vendor's flexibility in providing

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the service (but will rarely give a vendor an excuse not to meet your reasonable requests for service or specific contract terms) as well as increase both the vendor's and your costs through taxes and specialized levies such as universal service fund payments. Moreover, unlike in much of the past two decades, the recent trend is to increase regulation, even with respect to previously unregulated offerings such as Internet and other IP services. The evolving treatment of VoIP (Voice over Internet Protocol) to emulate traditional voice services, so-called net neutrality, and similar developments in other countries all threaten to undermine private contracting rights for these offerings. You must conduct the necessary due diligence to understand the effect of both applicable and potential regulation on your deal to avoid pitfalls. And an effective MAC clause is equally important to permit you to take action should regulatory changes adversely affect your interests.

#### **Tip No. 4 – Ensure That You Obtain SLA Commitments, Not Objectives**

The Service Level Agreement (SLA) sets out the performance characteristics of the services you are purchasing. Standard SLA language from most providers frames these as merely aspirational objectives, not contractually enforceable commitments. This language needs to be changed to establish performance guarantees. Failure to meet those guarantees should expose a carrier to substantial liabilities.

Unfortunately, carriers routinely offer only very modest credits as a customer's exclusive remedy for SLA failures. These need to be increased substantially together with the addition of a termination right for chronic failures. Finally, don't forget to except the SLAs from your contract's general disclaimer of warranties language to avoid the argument that the SLAs are nullified by that provision.

#### **Tip No. 5 – Watch for Term and Commitment Traps**

Most telecom contracts specify a minimum commitment – the dollar spend for services you agree to buy annually or over the life of the contract – and a term, typically 3-5 years. To maximize your flexibility and leverage, you should (a) opt for shorter terms (no more than three years except in specialized cases such as fiber build-outs); (b) commit to no more than 60-70% of your expected actual spend; (c) make the commitment only over the full term of the agreement rather than annually or with respect to particular services; and (d) secure a termination right that will kick in whenever you reach the committed

spend, even if early in the term. Moreover, don't agree to 100% shortfall liability if you fail to satisfy your commitment; 25-50% is more typical, and you may be able to negotiate rollover or work-off options as well. You should also ensure that you are not obligated to pay both shortfall and termination liability changes if you exit the contract early without cause or the carrier terminates you for breach. Finally, beware of perpetual agreements that lock you in for so long as any service order term remains unexpired.

#### **Tip No. 6 – Cloud or Data Center?**

For those with information processing requirements, the key decision is whether to go with cloud computing or set up your own equipment in a data center/collocation facility. With cloud computing, you are acquiring a service application hosted and managed by a remote vendor over a shared platform. This reduces required investment and provides increased scalability, but in exchange for limited flexibility (in the choice of services and vendors) and heightened security and privacy risks. In contrast, opting for having your own servers hosted at a data center with multiple carrier connections gives you exclusive control over the storage and processing of your content while offering variety and diversity in your transport options. The nature of your business, the sensitivity of your data, and the types of services you wish to acquire will guide you in that choice.

*Beware of perpetual agreements that lock you in as long as any service order term remains unexpired.*

#### **Tip No. 7 – Beware the AUP**

Historically, Internet service providers have established draconian acceptable use policies (AUPs) that purport to hold their customers liable for virtually any bad act perpetrated by anyone over the purchased services. These provisions will expose you to substantial liability and the threat of service cut off without notice or recourse. Increasingly, vendors are seeking to apply AUPs to non-Internet services as well. As a minimum, you should negotiate limits to your third party liability exposure, shift the responsibility for network security breaches back to the vendor, and secure meaningful advance notice and cure rights before your service can be suspended or terminated.

#### **Tip No. 8 – Key Carrier Boilerplate Is Not Effective**

Many telecom agreement templates contain clauses that at first glance appear to offer significant benefits to customers such as competitive rate reviews, business downturn relief and new technology migration. However, if

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you read those clauses carefully you will find that they rarely promise more than an essentially worthless willingness to talk about possible contract changes should any of those eventualities come to pass. Especially in the case of longer term deals – those of three years or more – it is important to put teeth in these provisions by negotiating a reduction in committed spend, additional termination rights, or the availability of an arbitrated dispute resolution if you are not satisfied with your vendor's response to your invocation of rights thereunder.

### Tip No. 9 – Limit Your Liability Exposure

The standard carrier agreement contains very one-sided risk allocations. Clauses limiting liability under the contract and requiring indemnification for third party actions are frequently drafted solely in favor of the carrier. You need as a minimum to make these provisions mutual and ensure that liability caps (a) are not so low as to be meaningless, and (b) do not apply to indemnification obligations. In particular, in this era of increasing litigation by patent trolls, a comprehensive indemnification from your vendor for all costs, not just finally awarded damages, for infringement of a third party's intellectual property is a must.

### Tip No. 10 – Secure Your Migration and Exit Strategies

The flip side of early planning is ensuring that you have a

sound migration and exit strategy. This means that your contract should permit you to: (a) terminate without liability for material vendor breach and extended force majeure events (watch out for obligations to pay vendor's third party costs); and (b) continue to receive service on the same terms and conditions for at least six months after expiration or termination of the agreement for any reason in order to permit you to transition in an orderly fashion to a new provider (the vendor should be obligated to cooperate in this transition). You also need to be aware of your vendor's plans for service obsolescence and the concomitant risk that you will be forced to migrate to a new service or technology. Carriers uniformly insist upon the right to discontinue aging services they no longer wish to support, often with only 12 months or less notice.

\* \* \*

While the foregoing make up my top ten contracting issues, the list is not meant to be exhaustive and your individual situation may warrant a reordering of priorities. Issues of confidentiality, network security, service provisioning, software and equipment use, account support and staffing, and other important topics may assume a greater importance to you. But it will still be advisable to pay heed to my top ten in order to secure the benefit of your bargain and avoid exposure to unacceptable liabilities in contracting for telecommunications and related services.



*(Fixed Microwave Report - Continued from page 5)*

the study required by paragraph (1), the Comptroller General shall take into consideration—

(A) spectrum that is adjacent to the spectrum described in subsection (c) and that was assigned through competitive bidding under section 309(j) of the Communications Act of 1934; and

(B) the rejection rate for the spectrum described in subsection (c), current as of the time of the assessment and as projected for the future, in markets in which there is a high demand for common carrier licenses for the use of such spectrum.

(3) REPORT.—Not later than 9 months after the date of the enactment of this Act, the Comptroller General shall submit a report on the study required by paragraph (1) to—

(A) the Commission; and

(B) the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(c) SPECTRUM DESCRIBED.—The spectrum described in this subsection is the portions of the electromagnetic spectrum between the frequencies from 10,700 megahertz to 11,700 megahertz, from 17,700 megahertz to 19,700 megahertz, and from 21,200 megahertz to 23,600 megahertz.

(d) REJECTION RATE DEFINED.—In this section, the term “rejection rate” means the number and percent of applications (whether made to the Commission or to a third-party coordinator) for common carrier use of spectrum that were not granted because of lack of availability of such spectrum or interference concerns of existing licensees.

(e) NO ADDITIONAL FUNDS AUTHORIZED.—Funds necessary to carry out this section shall be derived from funds otherwise authorized to be appropriated.

*Whose information is it, anyway?*

## White House Proposes Private Approach to Privacy Protection On-line

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**H**oping to shape the development of national – and possible international – consensus on the privacy protections to which on-line consumers should be entitled, the Obama Administration has issued a report on “Consumer Data Privacy in a Networked World” in which it lays out a “blueprint for privacy in the information age.” A central component of the report is a proposed “Consumer Privacy Bill of Rights”. That “bill of rights” reflects a set of principles which are, at this point, merely aspirational, with no independent legal force. The White House is hoping to change that on at least two fronts.

First, it is calling on Congress to pass laws that would impose the “bill of rights” on commercial sectors not currently subject to federal data privacy laws. And second – presumably because it recognizes that Congressional action is far from a sure thing – the Administration is calling on a wide range of “stakeholders” to develop their own “codes of conduct” effectively implementing the “bill of rights”. The idea is that such codes, once publicly and affirmatively adopted by companies subject to Federal Trade Commission (FTC) regulation, could be legally enforced by the FTC. The stakeholders the White House is targeting include companies, privacy and consumer advocates, “international partners”, state attorneys general, criminal and civil law enforcement representatives and academics.

This approach appears to have the support of major on-line companies such as Google and Yahoo. Some consumer advocates remain wary about the process and concerned that rigorous enforceable protections may not be achieved.

At this point, it's impossible to reliably predict the chances that the “bill of rights” will ultimately be adopted – whether by Congress or by a significant number of the commercial “stakeholders” identified by the White House. Still, the process of developing broad privacy standards has now been started, and all companies that do business on the Internet should be aware not only of the proposed “rights” (and the burdens that they could impose), but also of the process by which any such “rights” are likely to be developed and implemented.

**What Rights?** – Just what “rights” are on the table?

The White House’s “bill of rights” is intended to provide a “baseline of clear protections for consumers and greater certainty for companies.” It is based on longstanding, globally recognized, Fair Information Practice Principles (FIPPs), and bears a striking similarity to the European Union’s influential Data Protection Directive. Under the Administration’s proposals, consumers would be entitled to the following, while affected companies would be expected to respond as indicated:

*Individual Control* – Consumers: the right to exercise control over what personal data companies collect from them and how they use it. Companies: enable consumer choice over use of their personal data by providing easy-to-use mechanisms reflecting the “scale, scope and sensitivity” of the data being collected.

*Transparency* – Consumers: the right to easily understandable and accessible information about privacy and security practices. Companies: provide clear descriptions of what personal data they collect, why they need the data, how they will use it, when they will delete or de-identify it, and whether and for what purposes they will share the data with third parties.

*Respect for Context* – Consumers: the right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data. Companies: “heightened measures of Transparency and Individual Choice” would be required if, after collecting data, a company were to decide to use the data for purposes inconsistent with the original context under which it was collected.

*Security* – Consumers: the right to secure and responsible handling of personal data. Companies: assess their data collection and protection practices, and maintain reasonable safeguards to control risks of loss, unauthorized access, and improper disclosure.

*Access and Accuracy* – Consumers: the right to access and

*The “bill of rights” is intended to provide a “baseline of clear protections for consumers and greater certainty for companies.”*

*(Continued on page 10)*



*(On-Line Privacy Protection - Continued from page 9)*

correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate. Companies: use reasonable measures to ensure that they maintain accurate personal data.

*Focused Collection* – Consumers: the right to reasonable limits on the personal data that companies collect and retain. Companies: collect only as much personal data as they need, consistent with the Respect for Context right.

*Accountability* – Consumers: the right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights. Companies: accountability to enforcement authorities and consumers for adhering to these principles.

These concepts are obviously broad and vague. But that appears to be purposeful, since the “bill of rights” as envisioned by the White House is intended to serve merely as a basic framework for protections in the myriad commercial areas not already subject to more specific federal privacy regulation (*e.g.*, healthcare, financial services, education, telecommunications.)

**Implementation** – As it stands now, the “bill of rights” is little more than a wish list, a set of desirable goals the Administration would like the commercial world to embrace. Turning the “rights” into enforceable codes of conduct will not be simple. The White House proposes to do that through an “open, transparent, multistakeholder” process. The stakeholders would include “international partners” in the process. The goal there is presumably to assure that any U.S. codes of conduct would qualify for international “safe harbor” standards, thus facilitating international trade for U.S. companies.

The job of soliciting input from all of the stakeholders has been given to the Department of Commerce’s National Telecommunications and Information Administration (NTIA). While Commerce has previously waded into privacy policy, the FTC has as well. The choice of NTIA as the locus of the process may be an effort to encourage on-line industry participants to participate. Also, since the White House appears to contemplate that the FTC would be the agency with primary enforcement authority relative to any codes of conduct that get developed, the Administration may feel it more appropriate to leave the development to a separate agency.

*As it stands now,  
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a wish list.*

Several consumer groups have already expressed concerns, though, that one or more stakeholders may attempt to impose “unilateral solutions” on consumers. Those groups have proposed their own process principles.

Notwithstanding the involvement of NTIA, or the FTC, in the development phase of any codes of conduct, the Administration sees such codes as being primarily *private* initiatives that “can provide the flexibility, speed, and decentralization necessary to address Internet policy challenges.” As models, the White House is looking at such non-governmental organizations as the Internet Engineering Task Force, and the Internet Corporation for Assigned Names and Numbers (ICANN) which are responsible for important Internet-related technical standards.

**Is This Enforceable?** – Um, no. As matters now stand, the components of the Administration’s “bill of rights” are **not** enforceable. But there are at least two ways in which they might become enforceable, directly or otherwise.

First, as noted above, the White House hopes that the stakeholder discussions it is initiating will lead to the adoption of specific codes of conduct to which companies will publicly commit themselves. Such commitment to compliance could provide the FTC the hook necessary to enable it to bring enforcement actions against companies whose conduct falls short of their commitment to the code they have embraced. (This would be similar to the FTC’s current practice, under its authority to prevent deceptive trade practices, of bringing enforcement actions based on a company’s violation of its own website privacy statements.)

Along the same lines, private codes of conduct might also serve as a measure of the reasonable standard of conduct applicable to parties engaged in on-line activities involving data collection. For instance, plaintiffs in defamation cases often seek to use the Code of Ethics of the Society of Professional Journalists to establish that a defendant acted negligently because he or she failed to strictly adhere to that Code. The consumer privacy code of conduct envisioned by the White House could provide a similar yardstick for treatment of personal information collected on-line.

Second, the White House Report urges Congress to pass legislation adopting the proposed “Consumer Privacy

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Bill of Rights”, but with more specific terms that would be worked out between the White House and Congress during the drafting stage.

As the White House sees it, that legislation would provide a number of enforcement mechanisms. First, the FTC would be given the authority to (a) review any private codes of conduct that companies might adopt and (b) effectively grant those companies forbearance from enforcement under the statutory provisions *provided that* the companies commit to adhere, and do in fact adhere, to their private codes. Such FTC review would be subject to a number of limitations (*e.g.*, require public comment, complete agency review within 180 days, etc.). Importantly, such private codes would have to reflect the “consensus of all participants in the multistakeholder process”.

The “safe harbor” approach – *i.e.*, forbearance from compliance with a statutory “bill of rights” – would theoretically encourage companies to devise their own codes of conduct, subject to the FTC review process. (While the White House Report does not address the possibility expressly, it appears at least possible that a company that adopts a code not reviewed and approved by the FTC might still also be subject to FTC enforcement for violating that code, under the FTC’s existing Title 5 authority to prevent deceptive trade practices.)

Second, the FTC would be given authority to directly enforce each element of the statutory “bill of rights”.

So would state attorneys general (at least as long as they coordinate their enforcement actions with the FTC). But the ability of individual states to provide their own separate privacy protections would be limited. In the hope of establishing nationally uniform privacy rules, the White House recommends that state privacy laws be preempted to the extent that they are inconsistent with whatever “bill of rights” Congress may enact. And companies that adopt FTC-approved private codes of conduct would be exempt from enforcement activities based on state privacy laws. The Administration Report does suggest that states could enact their own privacy laws, but only so long as they “not disrupt the broader uniformity the Report seeks in consumer data privacy protections.” State officials are not likely to be happy with the proposed federal preemption of their existing privacy laws.

While it may be politically necessary for the Administra-

tion to suggest joint federal/state enforcement of federal privacy requirements, the result could become a confusing and dangerous quagmire for consumers, and negate the regulatory certainty that companies seek.

**What’s Next?** – The process the White House hopes will ultimately lead to enforceable private codes of conduct has started. The NTIA has called for comments on the “substantive consumer data privacy issues that warrant the development of legally enforceable codes of conduct, as well as procedures to foster the development of these codes.” (Comments are due by **March 26, 2012**.) The NTIA is seeking input on a wide range of threshold issues, including privacy issues associated with mobile apps, cloud computing services, and on-line services targeted to children. The NTIA also asks numerous questions regarding process, including how the term “consensus” should be defined.

*With regard to the prospects for legislation, it’s probably best not to hold your breath.*

With regard to the prospects for legislation, it’s probably best not to hold your breath. While some Senators and Representatives have publicly concurred that legislation to protect on-line consumers is a good idea, let’s not forget that a number of privacy bills have been sitting on the Hill for years already with no action. Given that, a betting man would not stake much on seeing such legislation any time soon.

Of course, it’s impossible to predict what impact, if any, the White House proposal will ultimately have. Time alone will tell.

What we do know is that the Obama Administration has clearly embraced the issue of on-line privacy and is seeking to position itself as a champion of the on-line consumer. In view of recent, highly public, privacy flaps involving a number of the major on-line players (*e.g.*, Apple, Google), that may be a smart move, particularly with a presidential election fast approaching. But note also that the White House proposal constitutes yet another effort by the Administration to try to assert some measure of federal control over Internet-related conduct. Such efforts might ordinarily alienate many on-line companies – as have the FCC’s net neutrality initiatives. But the White House’s proposed approach to privacy protection does include the notion of “private” codes of conduct. That notion arguably gives companies some opportunity to take control of their own fates (if you don’t focus too closely on the “consensus” obligation the White House Report would impose), which might deflect some opposition.

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*New twist on an old problem*

## Can Your Local Police Shut Down Cell Phone Service? Should They?

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The FCC has always been interested in preventing interruptions to telephone service. Usually it focuses on failures due to natural disasters, and plain old equipment breakdowns. But now it has a new concern: deliberate service stoppages implemented at the request of a state or local government. Yes, it sounds like something out of protests in the Middle East. But it happened at least once in the United States, and now the FCC is looking for policy guidance, hopefully before it happens again.

Last August, the folks who run the Bay Area Rapid Transit (BART) system in San Francisco/Oakland had word that protesters, objecting to BART police having shot and killed a man wielding a knife, planned to disrupt train service. The protesters intended to use mobile devices, according to BART officials, to coordinate their activities and share information on the deployment of BART police. Fearing platform overcrowding and other unsafe conditions, and hoping to disrupt the disruptions, the BART people pulled the plug on underground cell phone service. (Protesters nonetheless managed to briefly shut down three stations.)

The BART system is something of a special case, in that BART itself owns the underground wireless network in its tunnels. Its actions consisted merely of turning off its own equipment.

Or maybe the matter is not that simple.

In providing the last link for underground cell phone service, BART arguably took on some attributes of a common carrier. Certainly a cell-phone-using passenger neither knows nor cares that his signal is passing over BART-owned facilities, in addition to AT&T's or Verizon's. Did BART's ownership of the hardware give it the unquestioned right to disrupt passengers' communications? Or consider the more likely case of a threat to public or-

der *via* cell phone coming above ground. Could the San Francisco police, say, require AT&T and Verizon to shut down cell towers over a prescribed area?

From a legal standpoint, these are uncharted waters. But the BART incident has put the FCC on notice that local officials may sometimes seek to interrupt wireless phone service as a means to promoting public safety. Besides the possibility of a BART-type flash mob, police hypothetically might become aware of plans to use a cell phone to detonate an explosive device. At what point does the local government's interest in maintaining public safety outweigh the public's interest in having uninterrupted cell service?

*The FCC's dilemma combines a very old controversy with a very new one.*

The FCC's dilemma, in addressing these questions, combines a very old controversy with a very new one.

The old controversy pits individual freedoms against the constraints demanded by a civilized society. So far as speech is concerned, the authors of the First Amendment to the U.S. Constitution made their views very plain: "Congress shall make no law . . . abridging the freedom of speech . . ." It is hard to say this more clearly. Yet Congress has made, and the Supreme Court has upheld, many laws that do in fact abridge individuals' freedom of speech – in each case, to uphold other interests valued by society. The founders also recognized, and sought to protect, the technological aids to speech of their time. The First Amendment mandates a free press, and the Fourth Amendment specifically mentions "papers" as entitled to protection from unreasonable searches and seizures. Yet, as recently as the Patriot Act, Congress and the courts have, under the banner of public safety, approved intrusions into speech-carrying technologies.

The newer controversy looks to the stunning spread of

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In any case, the White House is trying to set the tone, and possibly establish some preliminary parameters, of the debate about on-line privacy

protections. We won't know whether that effort is going to be successful for some time. Check FHH's CommLawBlog for further developments – we'll keep you updated as circumstances warrant.



*(Wireless Interruption - Continued from page 12)*

wireless phones. In less than a generation, they have evolved from bulky curiosities to palm-sized ubiquitous essential to our lives. There are now more wireless phone connections in the United States than there are people. Have they become so necessary to our daily communications that protecting the First Amendment right to free speech requires protecting cell phone service?

Also affecting the balance of interests is the data point that 70% of 911 calls come from wireless phones. Shutting off wireless service, in response to an anticipated public safety threat, yields a different public safety problem: some ascertainable probability that a life-or-death 911 call will not get through.

The FCC has now waded hip-deep into this morass. It starts with no hint of its own views, but rather with a long list of questions, organized into 36 groups under six major headings. These are examples of the types of information in which the Commission is interested:

- ? whether other BART-type incidents have occurred in the past; examples of wireless phones being used to put

public safety at risk; whether public safety agencies have policies or mechanisms for interrupting wireless service;

- ? situations in which a government authority might seek to interrupt wireless service; how often these situations occur and how long they last; whether the service interruption in fact would alleviate the threat;
- ? the downside risks of interrupting wireless service;
- ? whether providers can interrupt ordinary cell service while still preserving the functionality of 911 calls, priority cell use by first responders, and/or public notification of emergencies;
- ? which agencies or officials (if any) should have the authority to order a service interruption; what procedures could ensure that such any orders are genuine; what after-the-fact reviews are appropriate;
- ? what laws and regulations, including First Amendment, due process, and common carrier considerations, would prohibit or constrain a government's ability to order an interruption, and a carrier's ability to lawfully comply.

Feel free to tell the FCC what you think. It will need all the help it can get. Comments are due by **April 30, 2012** and reply comments by **May 30**.



*(Wireless Tower Modifications - Continued from page 1)*

- ✓ the collocation of new transmission equipment;
- ✓ the removal of transmission equipment; or
- ✓ the replacement of transmission equipment.

Now that the law has been enacted, these seemingly innocuous alterations of existing structures will be safe from state and local meddling. (The law does leave all applicable environmental rules with respect to such towers in effect.) At least two questions remain.

First, the legislative history is largely silent as to any basis for the law's pre-emptive action. Normally, Congress is reluctant to pre-empt traditional local prerogatives without having built a strong rationale for the action. Since zoning laws have traditionally fallen within the province of cities and counties, Congress appears to be taking a large step into murky, and potentially dangerous, jurisdictional waters.

Second, this section of the Act applies to "wireless towers and base stations." Neither term is defined here or anywhere else in the Communications Act. Do "wireless towers" include broadcast towers, which of course transmit their content wirelessly? If so, this would add a large set of towers to the protected mix. Some broadcast towers, of course, simultaneously serve, or can serve, as towers for wireless communications carriers. The legislative history

suggests that Congress had in mind "cellular towers" when it referred to "wireless towers," but the law itself includes no such limitation. The scriptural exegesis of this point will no doubt put many a lawyer's offspring through private school in the years ahead.

Section 6409 also extends another apparent helping hand to the tower industry. It provides that agencies of the federal government "may" grant an easement or right-of-way to applicants seeking to install wireless service antenna structures on Federal property. While the thought here was nice, the absence of a mandate to permit the easement (*i.e.*, the critical use of "may" rather than "shall") pretty much leaves such things where they were: in the hands of sometimes quixotic bureaucrats.

The law recognizes that a maze of different federal agencies have been imposing a farrago of widely varying tower siting application requirements on hapless applicants. To rationalize the process, Congress has now mandated the development of a single government-wide form for siting applications and a standard contract for facilities sited on federal property. This seemingly small step could simplify enormously the process of securing rights to construct towers on federal properties.

These modest measures, together with the recent upholding of the FCC's "shot clock" rules, should put at least a small smile on the faces of tower constructors.



(Lifeline - Continued from page 2)

**Consumer certification.** When enrolling a new Lifeline customer, carriers must obtain a signed (including electronically or by interactive voice response) certification form from the customer. The required certifications include, *but are not limited to*, confirmation that the customer: understands how the Lifeline program works; is the only person in their household getting service; is eligible for Lifeline; and will let their carrier know if anything changes (within 30 days). Other distinct certifications not itemized here must be included on this form, so carriers should review the requirements carefully.

**Annual recertification.** In addition to the initial certification, carriers must recertify the continued eligibility of all of its customers by contacting them for confirmation. This is to be done by checking with an eligibility database, when available. If no such database is available (or if the database does not confirm eligibility), the carrier must contact the customer – in person, in writing, by phone, by text message, by email, or otherwise through the Internet – to confirm his/her continued eligibility. Previously, sampling could be used for this reconfirmation; *that is no longer the case*. No documentation is required at recertification. Again, there are a number of specific requirements regarding recertification in the order that carriers should review carefully (no, texting “BTW R U still eligible for Lifeline?” is *not* enough).

**Duplicates database.** The *ReO/FNPRM* establishes a new, nationwide duplicates database that carriers must query before signing up a new Lifeline customer. If that query indicates that the prospective customer is already getting support, the carrier can’t enroll the customer until the customer de-enrolls from the other service. The database will facilitate the transfer of Lifeline benefits from one ETC to another and will keep track of when a query was made and what information was submitted in the query. It will also verify the subscriber’s identification (without which the ETC will not receive reimbursement).

Two sidenotes on the duplicates database: (1) States can opt out of the national duplicates database if they can show that they have established their own state duplicates process at least as robust as the national; and (2) USAC will conduct a “scrubbing” of duplicates once the database has been populated. USAC will notify subscribers if they are receiving duplicate support and help them select a single provider.

**Eligibility database.** Lifeline consumers will no longer be able to simply self-certify their eligibility. Instead, the FCC will establish an eligibility database. The database will con-

firm – at least initially – enrollment in the three most common programs through which consumers qualify for Lifeline (*i.e.*, Medicaid, food stamps, and SSI). Until the database is established (ideally by the end of 2013), ETCs will be required to review documentation from the consumer to verify eligibility. The Commission is still seeking comment on the eligibility database at a fairly high level, including:

How to encourage state eligibility databases to provide state-specific eligibility data, including potentially conditioning receipt of federal Lifeline funds on the implementation of a state eligibility database;

Whether to help pay for state eligibility databases;

What privacy issues are implicated;

Whether to implement a national eligibility database instead of or in addition to state databases; and

Whether the eligibility database should be integrated with the duplicates database.

*Lifeline consumers will no longer be able to simply self-certify their eligibility.*

**Reporting subscriber data.** Carriers must populate the duplicates database by obtaining and reporting the following information about customers:

name;

address;

phone number;

date of birth;

last four digits of the social security number;

initial and de-enrollment dates;

the means through which the subscriber qualified for support (*e.g.*, Medicare, income); and

the amount of Lifeline support received per month for each subscriber.

ETCs will have to provide an initial data dump of subscriber information within 60 days of notice that the database is capable of accepting data. Because many carriers may not be currently collecting all the information required by the database, they must collect such information from both new and *existing* subscribers (which can be done as part of the annual re-certification described below).

The carrier that gets customer data into the database first is entitled to reimbursement for that customer, regardless of which ETC the consumer signed up with first.

**Disenrollment.** If a customer fails to respond to the annual recertification request, or if a carrier otherwise discovers duplicative support or lack of eligibility, the carrier must, after sending notification of impending service termination, disenroll the customer from Lifeline service. Likewise, pre-paid ETCs cannot receive Lifeline support for customers

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*(Lifeline - Continued from page 14)*

who do not activate their service, or who do not use their phones for a consecutive 60-day period.

**Carrier certification.** Carriers must certify, annually, that they are in compliance with the Commission's Lifeline rules when submitting FCC Forms 497 to USAC for reimbursement. As part of this certification, an officer must certify that the carrier has procedures in place to review consumers' documentation of income- and program-based eligibility and that it has obtained valid certifications forms from each consumer.

**Audits.** New Lifeline carriers will be audited within their first year of providing service. Carriers receiving more than \$5 million in annual support will be audited biennially.

**Enforcement.** Violators of the rules will be notified of the failure to comply and given 30 days to come into compliance. Penalties for violations include: suspension of payments; monetary forfeitures (up to \$150,000 per violation or per day of a continuing violation); revocation of authorization to operate as a carrier; and/or revocation of ETC designation. Also, funds obtained in violation of the rules are subject to recapture by the government.

The measures described above are addressed to fraud, waste and abuse. Beyond those, the Commission took measures to update and simplify the Lifeline system:

**Reimbursement.** The *Re&O/FNPRM* replaces the tiered reimbursement system, which was based on incumbent subscriber line charges, with an interim flat rate of \$9.25 (except on Tribal lands). Comment is sought on what would be an appropriate permanent flat rate. Reimbursement will also be based on actual subscriber counts, rather than projected subscriber counts. Starting July 1, 2012, to be paid by the end of the month, carriers will have to submit Form 497 by the eighth day of that month. Carriers may also file on a quarterly basis, with a single quarterly payment (rather than separate monthly payments). Any new or revised Form 497s that may be necessary to reconcile records may be filed within a year of the original due date of the Form 497.

**Phasing out toll limitation support.** Back in the day, a frequent cause of phone service termination was customers' inability to pay their long distance phone bills. To prevent this, the Commission required ETCs to provide a service that would automatically limit, or block, the amount of long distance charges a customer could receive in one month. Carriers were permitted to claim reimbursement from the FCC for the "incremental costs" of providing the blocking service. Nowadays, however, many service plans don't dis-

tinguish between local and long distance calls, instead charging a set monthly fee for a certain number of minutes. This effectively creates a "toll limitation" service. And the recovery of "incremental costs" has apparently been subject to creative interpretation: carriers were claiming reimbursement for anywhere between \$0 and \$36 per Lifeline subscriber per month, and were not required to substantiate their claims. So, the *Re&O/FNPRM* requires toll limitation in the future only for old-fashioned service plans that charge separately for long distance calls – capping reimbursement for "incremental costs" at \$3/month in 2012, \$2/month in 2013, and no reimbursement at all starting in 2014.

**Eliminating Link Up.** Another payout historically subject to abuse is the Link Up program, which reimburses carriers for half of their "customary charge" of initiating service, up to \$30. (It does not cover the cost of providing a mobile handset). Over time, many carriers' "customary" service initiation charge migrated to \$60, the number that would maximize the Link Up payout. In addition, many carriers were not charging the remaining \$30 to their customers. Also, some carriers imposed the initiation charge *only* on Lifeline customers and not on "regular" customers. In essence, carriers were simply collecting \$30 each time they signed up a Lifeline customer. In response, the Commission is eliminating Link

Up altogether, except for Tribal areas. Although the offending practices have been largely associated with wireless competitive carriers, the Link Up phase-out applies to wireline carriers as well.

**Support for VoIP.** The *Re&O/FNPRM* incorporates the Connect America Fund order's "voice telephony" definition of supported service into the Lifeline rules, making IP-enabled VoIP an expressly supported service. Of course, VoIP is increasingly the norm as carriers move from circuit-switched to IP networks.

**Support for bundled service plans.** The *Re&O/FNPRM* provides support for voice telephony service even if it's bundled with broadband, contains optional calling features, or is part of a family shared calling plan. Historically, the FCC's rules have been silent on this issue, and not all states permit reimbursement for such bundled plans. The new rules do not *require* carriers to apply Lifeline to any bundled service, although the Commission seeks comment on such a requirement.

The *Re&O/FNPRM* also establishes a Broadband Adoption Pilot Program to assess how Lifeline can best be used to increase broadband adoption among Lifeline-eligible consumers. The Wireline Competition Bureau will solicit applications from ETCs to participate in the Pilot Program. The

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*(Incentive Auctions - Continued from page 1)*

incentive auctions is limited to full-power television stations and “Class A” television stations. LPTV licensees get only a single provision stating that nothing alters their spectrum usage rights. That language will provide little comfort to some in view of the secondary nature of LPTV operations. Still, the language can be cited by LPTV interests as a Congressional directive to the FCC not to ignore the fate of LPTV stations if and when the TV broadcast spectrum is truncated.

Also of note:

- ☞ Stations that agree to forego reimbursement for relocation costs may make flexible use of their spectrum, including non-broadcast uses, as long as they continue one free television program stream. It isn't clear how such flexible modulation schemes can be implemented consistent with maintaining one free TV program stream, unless the free stream need not be in ATSC format – that presumably is among the details the FCC will have to sort out. Note that the act speaks only of such flexible use as an alternative to relocation reimbursement costs; it says nothing about such use either by stations that do not relocate and thus can't claim relocation costs, or by LPTV stations that are not entitled to reimbursement under the act. Whether flexible spectrum use by **all** TV broadcasters will be a possibility remains to be seen.
- ☞ Stations that agree to share a channel retain their current cable carriage rights.
- ☞ No stations may be permitted to move from VHF to UHF unless they filed a request by May 31, 2011, so most VHF DTV stations will remain in VHF.
- ☞ Stations' rights to protest license modification under this bill, otherwise available under Section 316 of the Communications Act, are suspended.
- ☞ Nothing in the bill is intended to “prevent” the FCC from implementing “white space” rules, but nothing requires “white space” rules either. The new law does provide for unlicensed use in the 5350-5470 MHz band, but only if (a) it is determined that licensed users will be “protected by technical solutions”, and (b) the “primary mission” of federal spectrum users in that band won't be “compromised”. An NTIA study of the impact of unlicensed use in the 5.4 and 5.9 GHz ranges will be conducted. Also, unlicensed use will be permitted in “guard bands [that] shall be no larger than is technically reason-

able.” What the FCC determines is “technically reasonable” will be interesting to assess come implementation of this section.

- ☞ Public safety operators using TV Channels 14-20 in the top 10 markets will have to give those frequencies back after 11 years.
- ☞ No mention is made of the 1755-1780 MHz band, the portion of the spectrum now occupied by government users and among the most coveted by prospective mobile broadband operators.

One major question left unanswered is precisely how much money is likely to be paid to any TV licensee opting to make its spectrum available for repurposing.

At least three different repurposing scenarios are possible. A TV licensee could simply turn in its spectrum, essentially bowing out of the over-the-air TV business.

Or it could agree to move to a different channel. Or it could choose to buddy-up with another licensee, sharing a common channel. To determine what the pay-out will be, the Commission will have to conduct a “reverse auction” in which any licensee interested in repurposing may “submit bids stating the amount it would accept

*Many nitty-gritty details  
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of this becomes reality.*

for voluntarily relinquishing some or all of its broadcast television spectrum usage rights”.

Meanwhile, the Commission will also conduct a “forward auction” to sell off the spectrum made available by the repurposing. The proceeds from that auction will provide the pot from which payments will be made; the amount to be paid to participants will be based on the results of the reverse auction, although it's not clear from the act how much of any participant's reverse auction bid will be paid out to that participant. To avoid potential embarrassment, the reverse auction may not be held unless there are at least two participants; additionally, the pay-out to TV broadcasters may not exceed the proceeds of the forward auction.

So while the outlines of the auction processes have been set in very general terms, there remain a ton of nitty-gritty details that will have to be resolved before any of this becomes reality.

On the non-broadcast side, Congress decided the FCC may not exclude participants from the “forward auction”, which means that the Big Guys (*i.e.*, AT&T and Verizon) will be permitted to bid. However, the FCC may imple-

*(Continued on page 17)*



*(Lifeline - Continued from page 15)*

Bureau will then test various amounts and durations of subsidies, geographic areas, and types of networks/technologies through a number of diverse projects. Carriers who are interested in participating but are not yet designated as ETCs should get their ETC designation applications in ASAP.

The *ReO/FNPRM* also cleans up some aspects of the ETC designation process for Lifeline-only carriers by:

- ❏ formalizing the Commission's practice of forbearing, for *Lifeline-only wireless resellers*, from requiring that an ETC have its own facilities. (That practice dates back to the 2005 *TracFone* order.) This forbearance is subject to certain conditions. The Commission did **not** address the status of Lifeline-only *facilities-based* carriers, who may need forbearance from the requirement that their service area completely overlap rural phone company service areas. (Wireless services are generally authorized by county boundaries, while rural phone company service areas are drawn by blindfolded three-year-olds, so they hardly ever match up).
- ❏ confirming that carriers can't get around the *TracFone* conditions by providing a component service – such as operator, directory, or toll limitation service – over their own switch and then claiming to be “facilities-

based.” This is because the new definition of “supported service” is “voice telephony service” as a whole – not its individual components.

- ❏ eliminating the requirement that Lifeline-only applicants submit a five-year network improvement plan.
- ❏ adding a requirement that Lifeline-only ETCs demonstrate technical and financial capacity to provide the supported service, among other showings.

Lastly, the NPRM portion of the *ReO/FNPRM* seeks comment on additional issues, including:

- ? whether universal service support should be used for digital literacy training;
- ? whether Lifeline support should be limited to ETCs that provide Lifeline service directly to subscribers (rather than wholesale), precluding the flow-through of Lifeline support to resellers;
- ? whether the Women, Infants, and Children (WIC) program and homeless veterans should be added to the Lifeline eligibility criteria;
- ? whether the record-keeping requirement for consumer eligibility should be extended to ten years to cover litigation under the False Claims Act.

Comments in response to the NPRM will be due on **April 2, 2012**, with replies due no later than **May 1**.



*(Incentive Auctions - Continued from page 16)*

ment policies to promote competition, presumably authorizing limits on spectrum holdings (either nationally or on an individual market basis) by any one entity. This reflects the outcome of a battle between those (mostly Democrats) who sought to provide the FCC latitude in formulating auction rules and others (mostly Republicans) who were less sanguine about the impact of such policy leeway for the Commission.

In addition to authorizing the voluntary auctions, the act reallocates the 700 MHz D-block to public safety and creates a Public Safety Trust Fund of up to \$7 billion to construct a national public safety network. While this comes more than a decade after the September 11 attacks, this is a case of better late than never. The new network will be managed by a First Responder Network Authority, created within the National Telecommunications and Information Administration – a compromise arrangement that was not specifically proposed by any interested party.

So after much anticipation, incentive auctions have now been authorized – but what does it all mean?

The FCC now must develop the rules for the auction. With the number of practical loose ends left unresolved in the act, that poses a major chore for the Commission. And once that's done, we'll have to see who among the broadcasters actually chooses to participate. Then who will bid? Time will tell. And time is a key consideration: estimates range from four, to five, to six years, possibly, before any actual availability of spectrum. Indeed, the bill recognizes how long all this will take: under the act, auction proceeds are not required to be deposited into the Treasury until 2022.

Beyond those administrative questions, there are others. What are the chances that efforts will be made to challenge one or more aspects of the auction process in court? For example, what if broadcasters find, after the repacking has been completed, that the FCC did not make “all reasonable efforts” to preserve their coverage area and populations? Or will LPTV players seek judicial remedies for the likely loss of much of their spectrum?

Time, again, will tell.

*Bringing cellular regulation into the 21st Century*

## FCC Proposes Auctioning Off Cellular License Scraps

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**A**lthough the last 30 years have witnessed the evolution of mobile telephone service from rare, status symbol brick-phones to the now ubiquitous smart-phones, government regulation of the cell phone industry has in some respects stayed frozen in time. In almost any given location in the United States, more than half a dozen different companies are licensed to provide mobile phone service. This plethora of licensees is the result of the FCC issuing numerous licenses for SMR, PCS, AWS and 700 MHz operations since the early 1990's. Despite the entrance of new competitors and new services into the CMRS industry, the trail blazers of the mobile phone industry continue to operate under a different set of rules.

When the FCC originally issued cell phone licenses in the 1980s, the heavy hand of government regulation dominated its rules. Cell phone operators grudgingly accepted the rules because: (1) at the time, tight regulation of radio signals was the norm for most FCC authorized transmitters; and (2) the government received no money for the issuance of the cell phone licenses (although a secondary market existed to the glee of many suddenly wealthy lottery winners). Thirty years later, the old regulations are still on the books for cell phone licensees who must file numerous applications, studies, maps and other reports in order to operate their systems. In the meantime, Congress ordered at the beginning of the 1990s that all spectrum had to be auctioned – with the government reaping the financial rewards – and the FCC relaxed regulation of newly issued licenses from auctions. This established a disparity among operators: newcomers who paid the government for auctioned licenses had significant latitude in how to deploy their systems while the operators from the 1980s had to play by different, more onerous, rules.

The FCC has proposed modifying its cellular rules to place all of the licensees on equal, flexible, footing. However, because all vacant spectrum must now be auctioned, the current effort to modify the FCC's rules requires a bit of shuffling. At the heart of the challenge which the FCC faces is the difference between auctioned and non-auctioned licenses. The cell phone licenses of the 1980s were issued to operators only after the companies submitted very specific coverage maps and data to the FCC. In turn, the FCC would issue a license that followed the contours of identified sites. When auctions were introduced,

the FCC took a more hands-off approach and issued licenses based upon geographic areas; a PCS/AWS/700 MHz license was issued to operate anywhere within the boundaries of X, Y and Z Counties. Moreover, the FCC did not require a geographic licensee to seek permission or even notify the FCC about where its sites were going to be located.

The FCC now wants to remove all of the application and notification burdens from the pre-auction cell phone licenses. To achieve this goal, the FCC has proposed issuing two types of cell phone licenses. The first license would go to those who already have site-based licenses. Based upon current contour maps and data that are already in the FCC's files, these licensees would be allowed to operate within their currently authorized contour areas with fewer reporting requirements. For the second type of license, the FCC would auction off any remaining area within a given geographic zone (X, Y and Z Counties) that was not covered by the first type of site-based license. These geographic licenses would similarly be subject to fewer reporting requirements.

*The FCC proposes to have the auction in two phases.*

If a current cell phone licensee were to win an auctioned geographic license, that operator would have both the site-based license (a series of circular sites within the area) and the previously unoccupied area in the defined geographic area. This would allow the current licensee to modify its system anywhere within the geographic area without the long-bothersome regulatory paperwork. Of course, if another party were to come and purchase the geographic license, the cell phone licensee would have a very cozy neighbor with whom it had to co-exist. The original cell phone operator would be entitled to operate within its site-based area but would have to protect the new geographic area licensee, and vice versa. This geographic licensee would also have residual rights to any spectrum that later becomes vacant in the CMA due to abandonment, discontinuance of service, non-renewal or revocation.

The FCC proposes to have the auction in two phases. Phase I would include any geographic area where more than 95% of the land area is already covered by a site license. Also included in the Phase I auction is any geo-

*(Continued on page 19)*



*(Revised Tower Registration - Continued from page 4)*

else falling in the middle. Changes from a more preferred style to a less preferred style will be subject to the partial Form 854 process, while “improvements” (*i.e.*, changes that would result in a more preferred lighting arrangement) will not.

Also exempt from the new processing rules are towers located on federal land, as long as the agency responsible for the land will assess the proposed tower’s environmental impact.

Finally, the Commission cautions that **any** application – even one that does not require an ASR and thus does *not* involve construction subject to the new processes – can be challenged based on claimed environmental impact.

In a separate but related change adopted in the same order, the FCC concluded that all proposals for towers over 450 feet must be accompanied by an EA to be submitted with the partially completed Form 854 at the beginning of the process. Public notice of the filing of the EA must be provided.

When do the new procedures kick in? It’s hard to say. Because they involve “information collections”, they must first be approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act. The process for securing that approval has begun, but the initial phase of that process won’t wrap up before March, and the second phase will likely stretch into April, maybe even May. Until OMB blesses the new rules, they can’t take effect.

*(Proposed Cellular Rule Revisions - Continued from page 18)*

graphic area that does not have any unserved area of more than 50 contiguous square miles. The FCC estimates that 80% of all Cellular Market Areas would fall into Phase I. The areas left for Phase II would presumably be the rather rural areas that have large land masses with little need for service. The Phase II auction would take place seven years after the new rules are adopted and would include leftover geographic areas. The seven-year delay will permit existing licensees a final opportunity to file applications for, and serve, the areas that remain unserved.

The public is invited to comment on the FCC’s proposal and it is expected that numerous companies and organizations will be voicing their opinions. Before the FCC had even released these proposed regulations, nearly a dozen companies and organizations had already submitted documents to the FCC in an effort to shape the proceeding. So interest in cellular licensing, at least among incumbent licensees, remains as strong as ever.

And while we don’t want to confuse things even more than they may already be, we are constrained to point out that the new procedures described above will – even once they take effect – be essentially non-permanent, interim measures. That’s because the Commission has only just recently completed its full assessment of the environmental impact of its own ASR program (the Programmatic Environmental Assessment, or PEA). The next step will be a rulemaking to determine what further steps the Commission needs to take in light of the PEA.

But the completion of this overall process (including evaluation of the PEA and/or the adoption of permanent rules) is not likely to occur in the near term. (Frame of reference: the Commission initiated its review of the impact of the ASR process on migratory birds not quite a decade ago, and it was ordered by the D.C. Circuit to proceed “with dispatch” in wrapping that proceeding up four years ago. Time, it would seem, is not of the essence here.) In the meantime, the procedures adopted last December and outlined above will have to be satisfied, once they become effective.

When the new processing rules do become effective, they will be applied only prospectively. Any pending applications for ASRs or service-specific applications will not need to be amended to address the new requirements. Since the new ASR procedures, once they take effect, will probably add significant delay to the FCC’s processing of applications, folks planning to build a tower subject to the ASR rules might want to get their applications filed as quickly as possible, to avoid that additional delay.

## CMAS Reminder!!!

If you’re a commercial mobile services provider who has elected to provide emergency alerts as part of the Commercial Mobile Alert System (CMAS), you’ve got until **April 7, 2012** to begin doing so. The CMAS is a voluntary service through which wireless providers who have elected to participate (some 98% of you) will deliver emergency alerts and warnings from FEMA to the public over cell phones and other mobile devices. This deadline marks the culmination of the 28-month development, testing, and implementation period initiated by the FCC in December, 2009.

And if you have chosen **not** to be a CMAS participant, you’re not off the hook. By **May 15, 2012** you have to notify your customers and prospective customers that you will **not** be providing emergency alerts throughout all or parts of your service area. The specific language to be included in those notices is set out in Sections 10.240 and 10.250 of the Commission’s rules.