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A mandate to play nicely with others?

700 MHz Interoperability Issue Reaches Primetime

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In response to years of increasingly urgent agitation about the need for interoperability in the 700 MHz band, the FCC has issued a Notice of Proposed Rulemaking to look into the basic questions of whether there are any interference issues raised by interoperability and whether there is a need for regulatory intervention to ensure that users of all licenses in the band have roaming access to each other's spectrum and can get affordable handsets.

The problem arises because AT&T and Verizon have significant holdings in the 700 MHz band. Verizon has many licenses in the Lower A and B Blocks and the entire Upper C Block, while AT&T has Lower B and C Block licenses and all or most of the Lower D and E Blocks. The 3GPP (*i.e.*, 3rd Generation Partnership Project) standards setting body has established Band Class 12 to cover operation over the entire lower 700 MHz band and Band Class 17 to cover operation in only lower B and C Blocks. This means that user devices manufactured for Band Class 17 will not be able to operate on the A Block where the licenses are held mostly by smaller entities, though the A Block licensees will be able to operate on the B and C Blocks.

You might think that it would be the Verizon and AT&T customers who would have the most to lose from this situation, since they would have Class 17 handsets and would not be able to roam in many of the smaller rural areas where A Block licensees will be building out. To be sure, AT&T and Verizon customers will find that they are unable to get 700 MHz service in places where only A Block service is available. But the thing that gives A Block licensees nightmares is not so much the loss of that significant roaming revenue, but the inability to get handsets *at all.*

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Resolution may be illusive

FCC Addresses VoIP Intercarrier Compensation, Sort of

By Paul J. Feldman
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Recently, the FCC issued an order intended to resolve a major issue regarding the compensation to be paid between telecommunications companies for the origination of voice-over-Internet-protocol (VoIP) traffic. While the FCC addressed the issue, its answer may not permanently resolve the on-going dispute over compensation for VoIP traffic.

Last fall, the FCC radically reformed the rules determining the payments that telecommunications carriers pay to each other to originate and terminate calls on each other's networks. In this world of intercarrier compensation, one long-standing source of confusion involved the compensation (ICC) to be paid in connection with VoIP traffic. Many VoIP providers claimed that VoIP is an information service, and thus not subject whatsoever to the access charges and other ICC payment obligations required for telecommunications services. Even where there was agreement that VoIP calls triggered the payment of ICC, some parties argued that VoIP calls were inherently of an interstate nature, so that VoIP providers should never have to pay the commonly higher rates for intrastate calls. These disputes often resulted in litigation, as well as petitions for declaratory rulings to the FCC, which the FCC typically failed to address.

In last fall's so-called "*Transformation Order,*" the FCC resolved some VoIP ICC issues, specifically ruling that the local exchange carriers (LECs) may tariff default ICC rates for most VoIP traffic, at rates equal to interstate access rates for traditional telephone traffic. Unfortunately, the language in the *Transformation Order* was far from crystal clear as to whether, in the case of *origination* (as opposed to termina-

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Pssst, kid, try this – the first one's free . . .

FCC Query: How Much Free Internet Does it Take to Get Consumers Hooked?

By Christine E. Goepp
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For more than a decade, the federal Universal Service Fund (USF) has subsidized (1) telephone lines in places where there isn't enough of a business case for phone companies to build and operate them, and (2) monthly telephone service for people who couldn't afford it. That's not good enough anymore, according to the FCC. High-speed Internet – broadband – is a *necessity*, not a luxury. Accordingly, the FCC has kicked off a process that will eventually siphon off USF funds to support broadband in addition to voice service. Most likely, this will take the form of a monthly discount on broadband for those recalcitrant consumers who have thus far shown no inclination to get online.

Using a ruse familiar to the criminal element, the FCC is curious to know how much free Internet Joe Consumer needs to get hooked and start paying for the rest. In a public notice released April 30, 2012, the FCC's Wireline Competition Bureau set out a framework to pay broadband providers $25 million to carry out "field experiments" on customers. These experiments would test various factors in encouraging broadband adoption: primarily what discount dollar amount would be most effective, whether it should be a single discount or monthly (and if monthly, how long it should last), as well as how speed, usage limits, and consumer outreach might affect adoption.

For scientifically-minded broadband providers that might like to participate in the program, there will be an informational webinar on May 14, 2012, with third party experts to discuss design options and answer questions regarding application procedures. Applications are due on or before July 2, 2012. Would-be participants who are not already eligible telecommunications carriers (ETCs) must be designated *before* the application deadline. Participants will likely be selected during the third quarter of 2012. The Pilot Program is anticipated to last about 18 months: three months of provider back office implementation, 12 months of subsidized service, and three months of finalizing and reporting data.

Here's how the program is supposed to work:

Experiment design. ETCs seeking to participate in the Pilot Program will submit an application describing each of their proposed projects. Each project must be designed along the lines of a field experiment and include a detailed description of the experimental design, including what variables will be tested. As mentioned above, the focus is on learning which discount plans are most effective in promoting broadband adoption and retention, but speeds, usage limits, and the effect of consumer outreach are also of interest. The experimental design should randomize variations on broadband service offerings (*e.g.*, geographic randomization).

Individual applicants are not required to incorporate an extensive number of potential variations of broadband service into their projects; rather, the FCC will create a "portfolio" of projects by selecting multiple projects to test a range of variations in diverse geographic areas (*e.g.* rural, urban, Tribal). The Bureau encourages ETCs to partner with field experiment experts and third-party organizations working to increase broadband adoption, such as academic researchers, social research organizations, contract-research firms, or non-profit organizations. ETCs are also encouraged to work collaboratively with each other, including identifying ways of sharing administrative costs where possible.

Preference. Preference will be given to:

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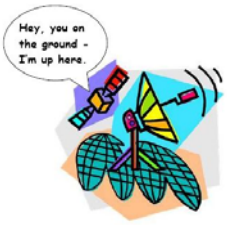
Satellite, Terrestrial – What's the big deal?



FCC Proposes to Make $6 Billion Donation to Dish Network

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In an act of charity worthy of Mother Teresa, the FCC has proposed to convert the 2 GHz Mobile Satellite Service spectrum which Dish Network acquired a few months ago into AWS-4 spectrum that could be used for terrestrial mobile services. As readers of our last issue will recall, the FCC approved Dish Network's applications to acquire two MSS licenses from bankrupt estates for a total of about $2.75 million. Dish requested that the FCC grant it waivers similar to those granted to LightSquared last year to permit very extensive, not to say primary, use of the two 20 MHz bands for terrestrial rather than satellite purposes. The FCC approved the assignments of the licenses, which Dish has now consummated, but – perhaps mindful of the criticism it got from Capitol Hill for granting the LightSquared waivers without much public input – the FCC denied the waiver request. Instead, it promised to, and did, initiate a rulemaking proceeding to get a full public record on the question of whether to effectively grant the relief that Dish sought.

The FCC proposes to simply allow terrestrial operations in the band, converting it to AWS-4, and dropping the requirement that any satellite service at all be provided by the incumbent. Analysts have estimated that the spectrum so converted would be worth at least three times as much per MHz/pop as the spectrum encumbered by its current satellite-oriented obligations. The Commission devoted a single sentence to the possibility that perhaps the spectrum, as now radically re-purposed, should be made available to other applicants rather than handed to Dish on a silver platter. This proposal is likely to be the subject of considerable comment by prospective applicants who would have been very interested in 40 MHz of terrestrial spectrum in this band but had no interest at all when it was satellite-oriented. We would also expect some raised eyebrows on Capitol Hill, since Congress is now looking under every sofa cushion for spare change to finance public safety and other infrastructure costs while this gambit would divert some $6 to $7 billion from the public coffers to Dish Network's.

As part of its re-purposing of the band, the FCC is proposing to divide the band into two 10 plus 10 MHz

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No green card? No problem!!

FCC Seeks Further Input on Foreign Ownership Rules

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Last fall we reported on an FCC Notice of Proposed Rulemaking in which the FCC is considering how to simplify the application of the foreign ownership restrictions that appear in the Communications Act. After digesting the comments submitted in that proceeding, the FCC has asked for more input. It seems that a number of commenters were concerned about the interplay of Section 310(b)(3) of the Act with Section 310(b)(4).

Section 310(b)(3) strictly forbids ownership of a broadcast or common carrier licensee by a corporation which is more than 20% owned by aliens or their representatives or by foreign governments or foreign corporations. In other words, no more 20% of the *licensee entity* itself may be owned by aliens or their representatives. Section 310 (b)(4), however, permits licensee entities to be owned by companies that are themselves owned by aliens or their representatives, so long as the FCC OKs the ownership. In other words, *indirect* ownership of licensee entities by *any* quantum of aliens is permissible as long as the FCC approves it. These provisions have long been thought to define two separate classes of ownership, direct and indirect, with distinct restrictions applicable to each.

Apparently Verizon – a company whose Cellco Partnership subsidiary has significant foreign ownership – pointed out that the FCC's 2004 effort to provide guidance on these matters actually confused things. Those 2004 guidelines seemed to treat indirect interests in licensees as being subject to the strict 20% prohibition of 310 (b)(3) rather than the more liberal 25% provision applicable to indirect interests under Section 310(b)(4). Verizon correctly noted that this makes no sense, and the FCC seems to have heard Verizon's plea.

The FCC seeks comment on this specific issue. It also proposes a possible solution. Under the Communications Act, the FCC is allowed to forbear from applying any provision of the Act to a telecom carrier if the Commission finds such forbearance to be in the public interest, unnecessary to protect consumers, and unnecessary to ensure just, reasonable and non-discriminatory rates. Accordingly, the FCC asks whether it should use that tool to get around the strict prohibition of Section 310(b)(3) if

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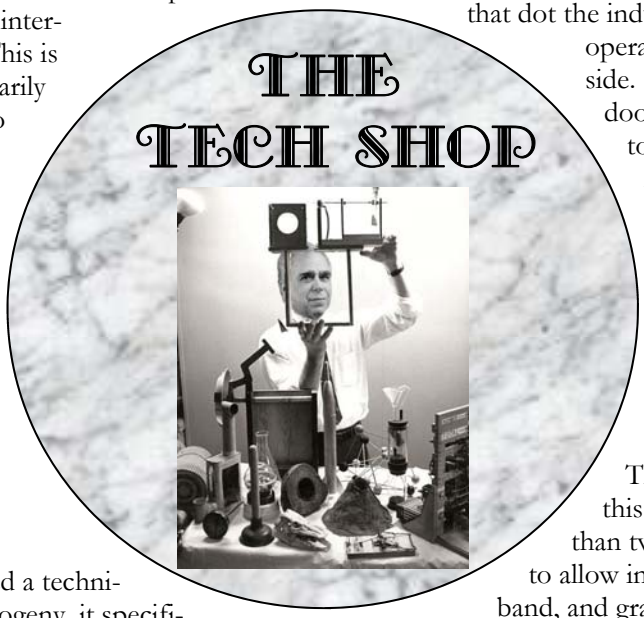
(Editor's Note: In The Tech Shop, a new feature of FHH Telecom Law, our resident expert and MIT-degreed former electrical engineer, ***Mitchell Lazarus****, will briefly highlight recent developments in the world of spectrum regulation and technological innovation.)*

Unlicensed device users at 902-928 MHz challenge LMS provider Progeny's test results.

We reported back in February about a *licensed* service provider being required to demonstrate that its operation would not cause unacceptable interference to *unlicensed* devices. This is unusual. The FCC rules ordinarily require an unlicensed device to accept any and all interference from any source. But certain technologies used in the licensed Location and Monitoring Service (LMS) at 902-928 MHz are uniquely subject to a reversal of the usual priority. Those LMS licensees must demonstrate through actual field tests that their systems do not interfere with unlicensed devices.



When the FCC recently granted a technical waiver to LMS provider Progeny, it specifically required field tests to show that the waivered system does not cause unacceptable levels of interference to unlicensed devices in the same band. Among the thousands of unlicensed applications in the band, the FCC mentioned "smart grid" applications, including remote meter reading and utility load management, as well as cordless telephones and wireless local area networks. Other unlicensed uses of the band include wireless Internet access, ZigBee industrial controls, and a vast host of wireless consumer devices.

Progeny has since filed its test report. But commercial users of unlicensed devices have come forward to criticize the study. (Consumer devices, such as cordless phones, may have a similar potential for interference, but so far consumers and their advocates have remained silent.) Progeny, the commercial users say, used too few unlicensed devices, the devices Progeny used were non-representative, and the conditions used in the testing were artificially rigged to understate interference. Progeny, needless to say, disagrees with its critics. (Interested readers may find the entire FCC docket by searching for Docket No. 11-49 at the FCC's ECFS webpage.)

FCC proposes new rules for level probing radars at 6, 26, and 80 GHz with a wide variety of industrial applications.

The FCC has proposed new rules for "level probing radars" (LPRs) in three bands: 5.925-7.250 GHz, 24.05-29 GHz, and 75-85 GHz. LPRs are downward-aiming radars used to determine levels of materials at industrial installations. Some are mounted inside those enormous tanks that dot the industrial landscape, to tell the operators how much liquid is inside. Other LPRs are used outdoors – at quarries, for example, to measure piles of gravel, or at nuclear power plants, to monitor the water level in the ponds used to store highly radioactive fuel rods. There are thousands of potential applications. The new rules would apply equally to in-tank and outdoor radars.

The FCC is easing its way into this area very gradually. More than two years ago, it proposed rules to allow in-tank radars in the 77-81 GHz band, and granted a waiver pending the rulemaking. Without having reached a decision on the original questions, the present Further Notice of Proposed Rulemaking expands the proceeding to add outdoor LPRs and more frequency ranges. Up in the nosebleed part of the spectrum, the FCC had earlier proposed radars for airport use at 78-81 GHz, to detect debris on the runways, and a relaxation of the vehicle radar rules at 76-77 GHz to allow non-vehicle applications and higher power.

An LPR typically transmits a train of very short pulses, with relatively long separations in between. For historical reasons, the FCC's technical rules are more hospitable to continuous transmissions, such as those used to carry voice and data signals. The same rules, when applied to a pulsed transmission, effectively require operation at greatly reduced power. That lower power is sometimes adequate for measurement of highly reflective surfaces, but otherwise has largely prevented the successful operation of LPRs.

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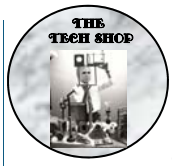

*(**The Tech Shop** - Continued from page 4)*

The newly proposed rules, being specifically geared to LPRs, should allow the downward-aiming transmitter to provide adequate power for a wide variety of applications. To protect other spectrum users from interference, the FCC has proposed much more stringent limits on radio-frequency emissions from the sides of the device and upward. Those stray emissions can be due either to properties of the antenna or to reflections from the material being measured. In the 24.05-29 and 75-85 GHz bands, they are limited to the same very low levels that are permitted for an iPad or a digital toy: 70 billionths of a watt. In the 5.925-7.250 GHz band they must be lower still, at about 3 billionths of a watt.

Comments and reply comments will be due ***May 30*** and ***June 29***, respectively.

FCC relaxes unlicensed PCS rules to permit denser device concentration, higher data rates.

If you have no idea what unlicensed PCS is, you have a lot of company. Even among spectrum experts. Most voice calls from a cell phone don't actually use cellular frequencies, which are a little above 800 MHz, but instead use higher frequencies allocated to the Personal Communications Service (PCS) in the vicinity of 1.9 GHz. Some PCS frequencies carry signals from the tower to your handset, while other frequencies carry signals the other way, from the handset to the tower. The two have to be kept well separated, lest the transmitter in the handset overpower its own receiver. Of the several ways to achieve this separation, the FCC chose the simplest: a "guard band" 15 MHz wide between the tower-to-handset and handset-to-tower frequencies. But the guard band need not be completely idle, and in fact is used for multiple purposes. One segment, at 1920-1930 MHz, is available on a shared basis for unlicensed applications: hence unlicensed PCS, or in Washington-speak, UPCS.

Unlike some of the other unlicensed bands that house Wi-Wi, Bluetooth, ZigBee, and thousands of consumer applications (our own favorite is a wireless diaper wetness sensor), the UPCS band is lightly populated, mostly with cordless phones. The FCC rules for the band include a complicated "spectrum etiquette" – a listen-before-talk scheme that minimizes the odds of one device stepping on another's transmission. But the benefit comes with downsides: added equipment costs, and an upper limit on the number of devices that can successfully operate in a given environment.

A new FCC order does not eliminate these technical rules, but it simplifies them considerably. The result will allow more devices to work in close quarters, and will allow devices to transmit at higher data rates. The new rules are closer to those used in many other countries, which simplifies life for global manufacturers. The FCC also cleaned up provisions that were needed when the 1920-1930 MHz band was transitioning from fixed microwave to UPCS and the other current applications, but are no longer needed.

FCC reminder: cell phone jammers are illegal.

The FCC has issued one of its periodic warnings against selling or using jammers to interfere with cell phones, GPS, Wi-Fi, or any other radio-based service.

The story this time begins with a guy named Eric who rides the buses in Philadelphia. Whenever someone on the bus disturbed his tranquility by talking on a cell phone, Eric fired up his pocket-sized cell phone jammer. The caller's phone stopped working, and Eric resumed his internal dialogue undisturbed. "A lot of people are extremely loud," explained Eric, "no sense of just privacy or anything. When it becomes a bother, that's when I screw on the antenna and flip the switch."

One of Eric's fellow passengers works for a local TV station. "He's blatantly holding this device that looks like a walkie-talkie with four very thick antennae," she reported to her colleagues in the news department. "I started to watch him and any time somebody started talking on the phone, he would start pressing the button on the side of the device." A news crew went undercover and caught Eric in the act. It must have been a slow news day in Philadelphia. The story went semi-viral, drawing both support and condemnation. Some people, along with Eric, believed that jamming cell calls is not illegal.

The FCC wants you to know that's wrong.

"In recent days," says the FCC, "there have been various press reports about commuters using cell phone jammers to create a 'quiet zone' on buses or trains." That would be Eric. The FCC goes on: it is illegal to use a cell or GPS jammer or any other type of device that blocks, jams or interferes with authorized communications, as well as to import, advertise, sell, or ship such a device. Penalties can

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*(**The Tech Shop** - Continued from page 5)*

be steep, adds the FCC: fines of up to $112,500, seizure of the illegal jammer, and possible imprisonment.

Now so far as we know (and we try to keep track of these things), the FCC has never tried to lock anybody up for using a jammer; at most, it just takes away their jammer, shakes a firm regulatory finger at them, and tells them not to do that anymore. The FCC does, however, try to cut off offenses at the source by levying fines against companies that sell jammers to U.S. customers.

Anyone who has had to suffer through one side of an unpleasant cellphone conversation on public transportation can easily sympathize with the Erics of the world. But the FCC's perspective is considerably broader than any single discomforted individual. Jammers tend to create a bigger zone of interference than the user may intend. Seventy percent of 911 calls come from wireless phones, so someone using a jammer may unknowingly block a neighbor's cry for help. Because the FCC worries about things like that, its ban even prohibits jammers inside a person's own home.

Eventually even Eric got the message, and told the Philadelphia TV station he plans to dispose of his jammer. Maybe the FCC should hire him as a spokesman.

Audio Manufacturer Pays $72K to Settle with FCC

For the second time in less than a year, the FCC has moved against a manufacturer of audio gear for violation of its "digital device" rules.

Digital equipment – which nowadays includes almost everything with an on/off switch – generates internal signals that operate at radio-type frequencies. Inevitably, some of that energy leaks out in the form of radio waves. Because the leakage has the potential to interfere with radio communications, the FCC sets maximum limits, and mandates procedures manufacturers must use to establish and document their compliance with those limits.

A company called American Music and Sound (AMS) got in trouble with the FCC for not having complied with those procedures. In entering into a consent decree, it did not admit wrongdoing, but did agree to a "voluntary contribution" of $72,000 to settle the charges. This follows a similar case last May.

The AMS case is troubling because the company manufactures gear for professionals, not consumers, which made it subject to a relatively painless regulatory regime. Compliance with respect to any particular device consists of measuring that device's radio-frequency emissions (which can be ten times higher than for a consumer product), and putting the test results in a drawer. There are no requirements for the test lab, no submission to the FCC, and no special labeling. (Procedures for consumer products are only a little more involved.)

Other manufacturers might benefit from AMS's misfortune. If you (a) make a product having any digital components, and (b) do not qualify for a small handful of exceptions, then you are regulated by the FCC and you ignore its rules at your peril.

*(**Alien Ownership** - Continued from page 3)*

it applies to indirect interests. A company would simply have to make a showing similar to the one now needed to obtain Section 301(b)(4) approval and the Commission would then routinely forbear from applying the prohibition.

This seems to us to be a cumbersome and unnecessary procedure that could be handled much more directly. If the FCC simply interpreted 310(b)(3) straightforwardly to apply only to *direct* ownership interests in licensee – as Congress seems to have intended – the Commission would limit the application of that section to a very limited number of situations while handling the indirect ownership scenario through the now tried and tested Section 310(b)(4) approval process.

The forbearance process floated by the FCC in its recent notice can apply only to *telecom licensees* because the forbearance process is limited to that class of regulated entities. By contrast, the course we are suggesting would have the added benefit of applying to broadcast licensees since it would apply across the board to all licensees. However, since to date the FCC has virtually never approved indirect foreign ownership of more than 25% of a broadcast entity, broadcasters under our approach would get only the marginal relief of being able to have up to 25% foreign ownership without running afoul of the statute.

There's a short window to comment on this one – comments are due ***May 15***, replies ***May 25***.

***(Pilot Program** - Continued from page 2)*

- Projects that include partnerships with non-ETCs that already have existing adoption programs in place to provide digital literacy (such projects may also include a control group that does not receive digital literacy training).
- Projects that also test, with appropriate control groups, whether access to equipment can influence adoption.
- Projects that indicate that their proposed projects promote entrepreneurship and small business, including those businesses that may be socially and economically disadvantaged.
- Projects that demonstrate ability to execute the proposal (in terms of funding and expert and third-party qualifications).
- Projects that demonstrate the value of the data to be collected in credibly addressing questions of interest.

The Bureau will also take into account the aggregate funding amount requested for each pilot project. In addition, it will select at least one pilot project directed at providing support on Tribal lands.

Costs and obligations. Participants in the Pilot Program will have the following minimum obligations during the program period (in addition to conducting the project):

- ✔ Participants must use the funds they receive from USAC to subsidize the services they provide to low-income consumers under the Pilot Program.
- ✔ Participants must submit monthly reimbursement forms to USAC (similar to Lifeline reimbursement) for (1) any monthly discount of broadband service, (2) applicable discount amount for voice telephony service if the broadband subscriber is also getting Lifeline support, and (3) any non-recurring fees for broadband provided to subscribers under the pilot project.
- ✔ Participants must submit subscriber data on a "Low Income Broadband Pilot Program Reporting Form" to be collected directly by the ETC and submitted to USAC. Alternatively, at the participant's request on its application, USAC will solicit this information directly from subscribers using an online survey. In either case, ETCs must obtain consent from their subscribers to provide this information before enrolling them in the program. This information will be collected at least twice: once when the subscriber first initiates service and again near the end of the project. The form will include income, age, ethnicity, family size, and details regarding subscriber usage.
- ✔ Subscribers should all be enrolled within nine months of the start of the trial period, unless applicants make an upfront case as to why their project should have different timelines.
- ✔ Participants are "strongly encouraged" to file a final report sharing additional information with the Commission about lessons learned from the project, including cost on a per-subscriber basis of converting consumers to broadband. A representative may be asked to present such information at a Commission event.

The Public Notice lists a number of specific items of information that must be submitted with each application that are not itemized here. Feel free to contact us with any questions.

***(2 GHz Re-purposing** - Continued from page 3)*

bands with appropriate technical specifications to preclude interference. The exact specifications (and even the exact spectrum blocks) are not yet set as the FCC considers how best to protect adjacent bands. The Commission also proposes to break the licenses into smaller geographic blocks to facilitate licensing or re-licensing if necessary.

While Dish Network has bravely voiced confidence that it will have its new terrestrial licenses by late summer, we expect considerable wrangling over the fundamental changes proposed. The proceeding is certainly on a fast FCC track, with comments are due no later than ***May 17***, with replies due by ***June 1***.

Hearing aid compatible handset shortfall nets $819K fine

FCC Gives T-Mobile an Earful

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The FCC has been extraordinarily vigilant about enforcing the requirement that telecom carriers offer their customers certain minimum numbers of hearing aid-compatible handsets. This requirement arose in 2008 when the Commission established a gradually increasing quota of acoustically coupled and inductively coupled handsets which carriers must make available to hard-of-hearing customers. The idea is that hearing-impaired folks must have a broad range of handsets of different feature levels to select from.

Although the FCC alerted the industry repeatedly to the requirements of Section 20.19 of the rules, T-Mobile seems to have seriously dropped the ball. According to a recent Notice of Apparent Liability (NAL), T-Mobile came up way short: as many as 33 acoustic hearing aid compatible handsets short in 2009 and 2010, and 14 inductive handsets short in that same period. These shortfalls were clear on the face of the annual report that T-Mobile (like other carriers) must file with the FCC detailing, among other things, the handsets they offer. The NAL doesn't explain how T-Mobile could have failed to take steps to bring itself into compliance when its own disclosures apparently showed a shortfall in the required handsets.

The price tag for this problem? $819,000.

Several things are notable about the NAL which, we hasten to mention, is only a preliminary set of allegations, not a final determination. T-Mobile will still have plenty of opportunity to plead its case to the Commission.

First, the amount of the proposed fine approaches the $1 million mark, even though by the FCC's own account T-Mobile cooperated in the FCC's investigation. Although the FCC points out that T-Mobile had revenues of over $21 billion in the years in question, a fine this size might be enough to get someone's attention.

Second, the amount of the fine was higher than might have been expected because the Commission used a new calculation method. Previously, the FCC used a "highest handset shortfall" approach. Under that policy, a carrier was assessed a $15K fine for each handset it was short in the month of the year in which it fell the furthest short. So if you were short, say two handsets in February, one in March and three in April, the FCC would fine you three times $15,000 for the three phones you were short in the month when you were the shortest; shortfalls in the other months would be ignored.

No more. The FCC has now decided that that approach didn't encourage compliance, since it essentially forgives all but one of the months when you are non-compliant. It also treats you the same if you were non-compliant for 12 months or one month. T-Mobile would have gotten only a $165,000 fine under the old approach.

Under the new policy, you can be fined for being short a handset in every month of the year.

Under the new policy, you can be fined for being short a handset in every month of the year. The shortfalls each month are added together to calculate the total. Accordingly, since T-Mobile was apparently short seven handsets in November and December of 2009 and 45 handsets through August of 2010, its base penalty was $780,000 (*i.e.*, 52 handsets short x $15K per handset short). The FCC then adjusted that amount upward by $39,000 to take into account T-Mobile's size, but mitigated that increase to reflect the fact that it had cooperated in the investigation.

Third, we observe that normally the FCC can impose forfeitures on common carriers only for violations occurring within one year of the NAL. All of the violations charged here occurred in 2009 and 2010, more than a year ago. That's not a problem here, though, because T-Mobile had voluntarily agreed to toll the statute of limitations for offenses occurring after October, 2009. But the FCC said it was exercising its "prosecutorial discretion" not to fine T-Mobile for violations occurring prior to that time. Hmmm – it's not clear that the FCC could legally have assessed a fine for those old violations even if it wanted to.

Finally, a cautionary note. In reporting the Hearing Aid Compatibility (HAC) ratings of its handsets, T-Mobile made a few mistakes, according to the FCC. T-Mobile defended itself by claiming that it had relied on HAC rating information provided by one handset's manufacturer –

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FCC Deletes 2,456 Fixed Microwave Licenses

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The FCC has denied reconsideration of an order that terminated 2,456 fixed point-to-point microwave licenses.

Metropolitan Area Networks (MAN) obtained the licenses between January 2008 and March 2009. FCC rules require a link to become operational within 18 months of the license grant, or the license automatically terminates. For MAN, the deadlines fell between July 2009 and September 2010. But before the earliest of those dates, in June 2009, MAN filed applications to extend all of the deadlines until March 2011. It explained that the microwave links were intended to support TV "white space" systems, and that delays in the FCC's finalizing of the white space rules required the extension.

When a fee waiver is sought, the filing fees to be waived must accompany the waiver request.

Ordinarily an application to extend a microwave construction deadline must be accompanied by a filing fee, which at that time was $175. The total filing fees for all of MAN's applications works out to almost $430,000. Understandably, MAN filed a simultaneous request for a waiver of all but one of the filing fees. But the FCC's rules state that, when a fee waiver is sought, the filing fees to be waived must accompany the waiver request; if the waiver is granted, the fees will then be refunded. MAN paid the fee for one application, but not the others. In July 2009, the FCC dismissed all but one of the extension requests for failure to pay the fee.

MAN filed a timely Petition for Reconsideration of the dismissal. No one opposed. Eighteen months later, when the FCC had not yet acted, the Fixed Wireless Communications Coalition asked it to delete the MAN licenses from the database, as they were hindering frequency coordination of other license applications. The FWCC argued that even if MAN prevailed on its reconsideration request, that would extend the construction date only through the preceding March, so that MAN would *still* be in default regardless of the outcome.

The Wireless Telecommunications Bureau has now denied MAN's petition for reconsideration, and ordered the removal of its licenses from the database. As to all but one of the licenses, the FCC found the extension applications to be defective for failure to pay the filing fee. As to the single application for which the fee in fact was paid, the FCC found that MAN had offered insufficient grounds for the extension.

MAN can still ask the full Commission to review the Bureau's decision. Its problem, though, is that even a reversal of the Bureau, and a grant of the extension request, would carry the licenses only through March 2011 – now more than a year in the past. So far as we can tell, MAN has no procedural path by which it might keep the licenses in force until it is ready to use them. It can, however, reapply for the same licenses when that time comes, although other applications filed in the meantime may have made some of the paths unavailable.

The guidance here for other microwave applicants is clear: the FCC's 18-month construction deadline has teeth. Applying for licenses too soon can turn out to have expensive consequences.

***(T-Mobile Fine** - Continued from page 8)*

and that information turned out to be wrong. The FCC rejected that claim. Turns out that T-Mobile had relied on a manufacturer's tech sheet that was incomplete, as the tech sheet itself clearly indicated. Later filings by the manufacturer with the FCC all showed that the device was not HAC-rated.

Moral: If you're going to rely on the manufacturer for HAC ratings information, be sure to get the final technical specs supplied by the manufacturer to the FCC

So, as with many FCC enforcement actions, the message from the FCC here is simple: "Listen up, people. We mean business."

Rorschach-like NAL imposes whopping $25K fine – Ouch!

Google v. FCC: And the Winner is [REDACTED]

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In a *Notice of Apparent Liability* (*NAL*), the FCC has proposed to fine Google. Not, mind you, for the alleged misconduct the Commission first set out to investigate. Rather, Google would be fined for allegedly impeding that investigation – even though the FCC now pretty much concedes that no violation took place. But it's hard to tell exactly what happened, because large portions of the FCC's published order are redacted. One thing that wasn't redacted: the proposed fine. That would be the princely sum of $25,000.

This much is known: between 2007-2010, Google collected Wi-Fi network data all over the world in support of its Street View project. In addition to providing totally bitchin' online photos of just about anywhere in the world, the Street View project collected network data to support various location-based services. But in collecting those data about available networks here, there and everywhere – including home wireless networks – Google also happened to collect the actual content of various unencrypted communications carried over these networks (i.e., "payload" data) – things like e-mails, text messages, passwords, Internet usage history, and other potentially sensitive personal information.

Google didn't bother to search its email files because doing so "would be a time-consuming and burdensome task".

When word of this surfaced, governments everywhere – federal, state, foreign – launched (with considerable fanfare) investigations, on the theory that the unauthorized collection of that kind of private data couldn't possibly have been legal.

Our federal government sicced an agency tag-team on Google. First, the Federal Trade Commission (FTC) took a close look at Google's activities, but closed down its investigation without finding any problems. The FTC came away convinced that Google didn't plan to use any of the payload data, would be deleting that data pronto, and was taking steps to improve "its internal processes". Nothing to look at here, folks. Show's over. Just move along.

Then the FCC jumped in.

Within a month of the FTC's exit, the FCC had fired off a Letter of Inquiry (LOI) in an effort to figure out whether Google's data collections had broken the law. The law in this case is Section 705(a) of the Communications Act (which, oddly enough, is codified as 47 U.S.C. §605(a)). In relevant part (that would be the second and third sentences of Subsection 605(a)(6)), it bars the unauthorized interception, followed by divulgence, publication or use, of certain radio communications.

The LOI sought vast amounts of information and documents about Google's Wi-Fi data collection activities. Google reacted like any public-spirited organization with nothing to hide would – by cooperating fully, opening its files to the FCC and happily walking the agency through the complexities of its data-collection process . . . NOT. *Au contraire*, Google mounted an impressive effort – some might call it stonewalling – to keep the FCC in the dark.

The LOI was designed to bring in huge numbers of documents – including internal emails relating to the data collection process – so the Commission was doubtless disappointed with what Google produced: a very small handful of documents, a few apparently unhelpful interviews, and no emails at all. The paucity of materials presumably stemmed, at least in part, from Google's somewhat circumscribed approach to the LOI. According to Google, it had "not undertaken a comprehensive review of email or other communications" because doing so "would be a time-consuming and burdensome task". (Having responded to our share of LOI's, we are sympathetic to Google's concerns here; we only wish that we had thought to raise the "Gee, that's a lot of work – we think we'll pass" defense.)

Google also chose not to identify any of the individuals responsible for authorizing its collection of Wi-Fi data or any employees who had reviewed or analyzed the Wi-Fi communications collected. Consistent with this insistence on anonymity, it also redacted the names of its engineers from the limited documents that were produced. Google claimed that identifying its employees "at this stage serves no useful purpose with respect to whether the facts and circumstances give rise to a violation".

The FCC sleuths *were* able to identify the engineer who developed the software code that Google used to collect and store payload data. In the NAL he is referred to as "Engineer Doe". We're guessing that's not his real name . .

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. not that knowing his real name would help anything. According to the NAL, Engineer Doe lawyered up and took the Fifth, effectively slamming the door on that potentially useful source of information.

And the icing on the cake: Google declined for nearly the entire length of the investigation to provide a verification, under penalty of perjury, from any corporate official with either first-hand involvement in the data collection effort or personal knowledge of the information contained Google's response. Such a verification of the accuracy of the response was specifically required by the LOI and is SOP in dealing with the Commission.

Undeterred (and perhaps nonplussed), the FCC issued a supplemental LOI, but that didn't result in more useful intel from Google. That was followed by a demand letter making sure that Google knew that the FCC was really, really serious – it ordered Google to provide complete responses to earlier requests and requested additional information. Same non-result. And then a final supplemental LOI. Ditto. Throughout the process, the Bureau was also in touch with Google by phone and in person. All to no avail.

Google assured the FCC that these were not the droids it was looking for.

So despite the fact that the Commission dipped its regulatory arms deeply into what appeared to be a trough brimming with useful factual information, the Commission came up empty-handed.

But Google was not completely silent. While it kept its factual cards close to the vest, it laid out a legal argument to show that the data collection that occurred during its Street View process was not illegal.

Google pointed out that the Wiretap Act – a section of the federal criminal code the relevant part of which you can find at 18 U.S.C. §2511 – effectively trumps Section 705(a) of the Communications Act, at least as far as the alleged misconduct is concerned. The Wiretap Act provides that it's OK

to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.

The statute defines "readily accessible to the general public" as, among other things, not being scrambled or encrypted. According to Google, the payload data it collected and accessed was ***only*** from ***un***encrypted networks, ***not*** from any encrypted networks. QED: Nothing illegal happened here. With a casual wave of its cloaked hand, Google assured the FCC that these were not the droids it was looking for.

And even if the Commission weren't susceptible to Jedi mind tricks, what was it to do? Thanks to (a) Google's refusal to provide virtually anything in the way of hard information, and (b) Engineer Doe's Fifth Amendment embrace, the FCC had no evidence from which to dispute Google's self-serving conclusion.

Presumably recognizing its predicament, the Commission beat a quick retreat, at least with respect to the claim that Google may have violated Section 705(a). Acknowledging that there is no FCC precedent on this particular question, and acknowledging as well its lack of evidence, the Commission declined to find any such violation here.

But the Commission wasn't ready to let Google off the hook entirely. Obviously miffed that Google had, um, largely ignored the Commission's LOI, and its supplemental LOI, and its demand letter, and its second supplemental LOI, and its various blandishments delivered by phone or in person, the Commission wanted at least something to show for its efforts. (Think Glenn Close in *Fatal Attraction*.)

So with a carefully honed prosecutorial knife, the Commission lunged boldly at Google's capillaries, proposing a fine of $25,000 because Google's "level of cooperation with this investigation fell well short of what we expect and require". The base fine for such lack of cooperation would normally have been $4,000, but the FCC wanted to give Google what for, in part "to deter future misconduct". For sure the $21,000 bump over the base fine should scare the bejeebers out of Google, whose 2011 gross revenues were a paltry $38 billion or so. With a forfeiture amounting to, what, not even one ten-thousandth of one percent of its annual revenue, Google obviously has much to fear.

Actually, the NAL subliminally suggests that Google has very little to fear, at least from the FCC. That's apparent from extraordinary redactions that make many pages of the NAL look like Rorschach tests. (See the graphic, above, which depicts one page from the NAL.) Some sample redactions:

- "In response to the Supplemental LOI, Google expanded upon **[REDACTED].** Google explained that **[REDACTED]."** "Google further stated that **[REDACTED]."**
- "In interviews and declarations, managers of the Street View project and other Google employees who worked on the project told the Bureau they **[REDACTED]."**
- "One engineer remembered **[REDACTED]."**

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*(**Google v. FCC** - Continued from page 11)*

- "During interviews with Bureau staff, Google employees stated that **[REDACTED]**."
- "In both his written declaration and his interview with Bureau staff, the engineer characterized **[REDACTED]**."

Such redactions are rarely seen around these parts. Our guess is that these were done at Google's request. The Commission, after all, would appear to have no incentive to withhold the redacted information. Google, on the other hand, is facing potential liability in a number of other venues where its data collection activities are still under investigation. It's reasonable to assume that Google plans to stick to its stonewall approach as long as possible in response to as many investigations as possible. Inclusion of lots of informational tidbits in an FCC NAL available to the whole world would not be consistent with that strategy. So we're guessing that Google asked the FCC to be nice guys and black out vast swatches of the NAL.

What's something of a puzzle is why the FCC would go along with that request. After all, the Commission seems, rightfully, to be cheesed off at the way Google cavalierly thumbed its nose at the FCC's investigation. Why should the Commission turn around and do Google any favors?

In addition to that practical question, though, the NAL leaves open other far more important legal questions.

Is Google correct that the Wiretap Act effectively permits interception of communications carried on unencrypted Wi-Fi networks? The Act's language can be read to support that position, and there is nothing contrary to that reading in FCC precedent, as the Commission concedes. But the Wiretap Act was drafted in the 1980s, a decade or more before the advent of even the earliest Wi-Fi networks. It's not at all clear that, in referring to "electronic communication . . . readily accessible to the general public", the authors of the Act had in mind a home wireless network, as opposed to the technologies of a generation ago.

And even if the "readily accessible" exception turns out to be applicable where individuals fail to encrypt personal home wireless networks, should data collection of the scale and scope as the Street View project nevertheless be subject to some legal constraint? And at what point does the massive aggregation of data provide sufficient information to violate our expectations of privacy?
We, of course, have no official opinion on this matter. If we did, though, we would have to say **[REDACTED].**

Post Script (5/7/12)

Well, we now know why "Engineer Doe" pleaded the Fifth.

After our blog post, and under the withering scorn of many around the globe, Google released an almost-entirely unredacted version of the FCC's heavily redacted Notice of Apparently Liability. Google had made much effort in the early versions of its public explanation to say the Street View personal data collection was a mistake, then the work of a rogue engineer, then the dog ate its software code, then . . . you get the point. In the drip, drip of information coming from the consecutive and concurrent domestic and international investigations we now learn that in fact the "lone Engineer" had on multiple occasions shared the nature of his work with fellow engineers and at least one supervisor.

One of the popular clichés in DC circles is that it's not the crime, but the cover up that often causes a wrongdoers downfall. Now the FCC has explicitly said they have found no crime but they sure didn't like the post-incident management.

As the unredacted story becomes available we see that this software was designed with the intention of collecting the contents of emails and other online communications (which the FCC declined to find illegal since the networks involved were unencrypted) and that this purpose was described in the design document that was shared with – but purportedly unvetted by – Google supervisors.

What did the now un-redacted pieces of the report reveal? Well, among the items were:

> "[T]he Company provided evidence to the Federal Communications Commission (Commission) showing that the data collection resulted from a deliberate software-design decision by one of the Google employees working on the Street View project."
>
> "Engineer Doe developed Wi-Fi data collection software code that, in addition to collecting Wi-Fi network data for Google's location-based services, would collect payload data that Engineer Doe thought might prove useful for other Google services. In response, to the LOI, Google made clear for the first time that Engineer Doe's software was deliberately written to capture payload data."
>
> "In a discussion of 'Privacy Considerations,' the design document states, "A typical concern might be that *we are logging user traffic* along with sufficient data to precisely triangulate their position at a given time, *along with information about what they were doing*."
>
> "In addition to the design document, Google also produced to the Bureau a copy of the software that Engineer Doe developed, which independently revealed his plan to

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*(**700 MHz Interoperability** - Continued from page 1)*

It seems that handset manufacturers know very well where their bread is buttered. If they can get orders in the millions from Verizon and AT&T, why should they bother designing, testing and producing a different handset for the limited market represented by A Block licensees? That market segment is simply not attractive enough to justify major investment from the big equipment vendors. Even a firm the size of C-Spire had difficulty getting A Block handsets at economically reasonable levels. One question left unanswered by the FCC or the comments to date is "what about Verizon's A Block licenses?" Verizon has announced that it plans to sell off it's a block licenses in favor of receiving the AWS spectrum that it is seeking in it s deal with SpectrumCo. This nicely rids it of unwanted and problematic spectrum that it appeared to be warehousing while improving its chances of getting the AWS spectrum it really wants.

The interference claims raised by Verizon and AT&T in support of the separate Band Class arise from the proximity of TV Channel 51 to the A Block. Recall that the 700 MHz block was created out of the old UHF TV Channels 52 to 69 that were vacated by the Digital Transition in 2009. TV Channel 51 continues to sit adjacent to the A Block, and digital TV licensees can operate at up to a million watts in power. There is therefore theoretically the potential for adjacent channel interference from that high power source in many parts of the U.S. Since the B and C Blocks don't need to worry about such interference, they can be designed without that issue in mind. AT&T says that if the interference concern can be resolved, it has no problem going with Band Class 12.

So this all leaves the FCC with a few basic questions. Is there really potential interference from Channel 51 that cannot be safely avoided by appropriate filters in 700 MHz handsets? Is the market really not functioning to permit independent licensees to buy Class 12 handsets at a reasonable cost? Does the FCC even have the power to do anything about this since it has limited direct authority over equipment manufacturers? This proceeding must be wrapped up quickly since Verizon and AT&T are already rolling out LTE service on their 700 MHz bands using Class 17. The more that such units get out into the marketplace, the harder it will be to impose a consistent policy across the whole user community.

The FCC candidly admits that it is hoping that the industry itself will work out a solution to this problem without regulatory intervention. So far it has been loath to impose interoperability conditions on AT&T and Verizon in the context of their spectrum acquisitions, but the need for a global solution is becoming increasingly urgent for all parties as the initial build-out deadline for 700 MHz licensees approaches and the need for broadband spectrum becomes more intense. Both of the new Commissioners whose confirmations have been languishing in the Senate for many months are well aware of the interoperability issue and seem to have expressed some sympathy for A Block position, so their entry onto the scene may also help to sweep the FCC to action.

The deadlines for comments and reply comments in response to the Notice of Proposed Rulemaking are ***June 1*** and ***July 16***, respectively.

*(**Google v. FCC** - Continued from page 12)*

collect and store payload data from unencrypted Wi-Fi networks."

The unredacted text also shows Engineer Doe emailed his draft design document and draft software code to Street View project leaders who then forwarded his email to the full Street View team.

"[O]ne of the e-mails the Company withheld for several months recounted the conversation in which Engineer Doe openly discussed his review of payload data with a senior manager of the Street View project."

After Google's molasses-quick response to the FCC requests, one almost has to wonder whether a frustrated FCC broadly redacted these items in the hopes of generating further concern amongst the public that there was something to be seen. (Almost.)

The key takeaway is: this is not quite over yet.

Rep. John Barrow of Georgia sent a letter to Google's CEO, Larry Page, encouraging Google to play nice with government investigations. Rep. Ed Markey of Massachusetts, co-chair of the congressional privacy caucus, has called again for Congressional hearings. State Attorneys General are continuing their investigation. And European regulators were described in news reports as now considering whether to reopen their Street View investigations.

Wish we could listen in on Google's conversations right about now . . .

On the lighter side. . .

What is the Sound of One Phone Transmitting?

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People who went to school in ancient times – *i.e.*, pre-social media – may remember that there was something called "philosophy" that students and academics spent a lot of time jawing about. The great thoughts of gentlemen like Plato, Marcus Aurelius, and Kant were duly scribbled into notebooks and just as duly forgotten once the exam was over. (One especially obtuse musing by the Danish philosopher Soren Kierkegaard has, however, stubbornly remained with me to this day. In *The Sickness Unto Death*, Kierkegaard declared – and this is an actual quote – "The self is a relation that relates itself to itself or is the relation's relating itself to itself in the relation; the self is not the relation but is the relation's relating itself to itself." Huh? I sometimes use that sentence as a soporific when I cannot get to sleep at night.)

Nevertheless, these wise old men did prompt us to ponder First Things: What is virtue? How does one find meaning in life? Is there a soul? What is beauty? What is truth?

Plato and Aristotle might feel right at home in the world of modern communications.

The most fundamental questions in philosophy, as in science, are often the most difficult ones to answer. That's why we're still arguing about these issues 2500 years after Plato and Aristotle first offered their two drachmas on the subject. Plato and Aristotle might feel right at home in the world of modern communications since even in this small segment of earthly reality there are fundamental questions to be grappled with during the dark night of the soul. The more obvious the question, the more obscure the answer.

? What is a common carrier? This concept basic to communications regulation is one that developed out of railroad regulation in the century before the last one. Congress refined the concept a bit by changing common carriers to "telecommunications carriers" in the 1996 Communications Act re-write, but even though you might think you know a telecom carrier when you see one, it can be difficult at the edges to categorize service offerings.

? The big difficulty used to be differentiating between common carriers and private carriers, with the latter exempt from many of the regulatory obligations (and some of the regulatory benefits) that telecom carriers are subject to. The '96 Act added a new wrinkle: an "information service provider" such as a provider of internet services is not a telecom carrier, even though its customers may receive many services which are indistinguishable from the telco next door's offerings. The FCC has buried its head deeply in the sand when it comes to categorizing or re-categorizing much of the "information service" traffic that competes directly with telecom services. Instead, the FCC uses alternative regulatory tools to impose common carrier-like regulation on the Internet people without actually calling them common carriers. This straddle is becoming harder and harder to maintain as the telecom world moves more and more to an internet-based network where telecom services are all information services and vice versa.

? What is a cable company? It is becoming increasingly difficult to distinguish a cable company from a common carrier or an internet service provider. Cable companies are delivering voice and data and internet services over their cables along with broadcast channels and cable-only channels. They create and distribute original programming as well as retransmitting broadcast programming. So one company sometimes wears three or four regulatory hats at the same time. The idealized forms of these entities whose shadows Plato saw in his famous cave have become blurry.

? What is a broadcaster? Again, this used to be a pretty easy answer: somebody who transmits programming over the air for free to the world at large. But some "broadcasters" offer their services on a subscription basis, either by satellite or terrestrially. Others are offering their programming over the Internet rather than over the air. Others are using their "broadcast" spectrum to offer auxiliary services like paging or texting or two way services or they are "narrowcasting" their programs to discrete segments of the public. And how does a broadcast network like NBC differ from a cable network like CNN? Why should they be subject to vastly different regulatory structures when most people these days are receiving them through the same set-top box?

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***(VoIP Compensation** - Continued from page 1)*

tion) of VoIP traffic, those tariffed interstate rates applied only to *inter*state VoIP traffic, or to *intra*state VoIP traffic as well. Certain LECs then filed petitions seeking clarification, and urging the FCC to rule that origination of *intra*state VoIP traffic is subject to rates equal to *intra*state access rates for traditional telephone traffic. VoIP providers of course filed oppositions to these petitions, arguing that the FCC's prior *Order* was perfectly clear, holding that originating intrastate VoIP traffic should be subject only to interstate rates.

In a recently released *Reconsideration Order*, the FCC essentially "split the baby." While it rejected the calls of LECs to "clarify" that the *Transformation Order* in fact provided for default intrastate rates for origination of intrastate VoIP traffic, the Commission ruled that that should be the case for a two-year transition period, based on "new evidence" in the record. Specifically, the FCC claimed that all of the recent pleadings on this issue had the effect of informing the Commission for the first time that LECs have in fact been collecting intrastate access charges on intrastate VoIP traffic, and thus that a ruling that they could only collect interstate rates on such traffic would be harmfully disruptive. Accordingly, the FCC amended its rules to permit LECs to tariff default rates equal to their intrastate originating access rates when they originate intrastate toll VoIP traffic, but only until June 30, 2014. Effective July 1, 2014, LECs will be permitted to tariff default rates for such traffic only equal to their *inter*state originating access rates. The two-year period is apparently a compromise between the longer general period in which ICC rates are transitioning to zero (bill-and-keep), and the desire to create incentives for carriers to move more quickly to all-IP networks.

Of course, in the always confusing world of VoIP regulations, an FCC ruling is rarely definitive. Thus, while the *Reconsideration Order* purported to rule on the rates for origination of VoIP traffic, it also stated that those rates are subject to modification in as part of the pending Further Notice of Proposed Rulemaking in the proceeding. To the extent that the Commission acts to reduce all originating access rates more quickly in that context, those new rates will form the basis of the default origination charges for most VoIP traffic.

In addition to the possibility of changes coming from a new future Order in the proceeding, the pending court appeal of the *Transformation Order* adds further uncertainty to the issue of ICC for VoIP, and ICC generally. One major issue on appeal is whether the FCC has jurisdiction to directly or indirectly mandate rates for *intra*state services. A ruling on this issue could have broad and historic impact on the telephone industry. Stay tuned.

***(One Phone Transmitting** - Continued from page 14)*

? What is a radio license? It used to be that a radio license granted you the exclusive right to transmit signals at a certain frequency in a certain area. Now a radio license may give you rights to transmit, but there may be other people who are allowed to transmit on your frequency as long as they do it at low power and theoretically don't interfere with you. Or a license, as in the 3650 MHz band, may permit you to operate but does not preclude other people from operating on the same frequencies in the same area.

? What is a multi-channel video program distributor? The FCC itself is wrestling now with this problem since an MVPD is traditionally thought of as a cable or cable-type content consolidator and distributor. But how does a company like Netflix or Hulu fit into that paradigm? They don't have "channels" per se – their content is all IP distributed, yet they are clearly offering multiple program choices simultaneously.

? What is the Internet? Again, something that seemed so simple has become so complicated. The Internet is an amorphous system for organizing inter-computer communications that has so far defied regulatory capture. Now dark forces are massing in anticipation of the 2012 ITU World Congress on International Telecommunications to rein the Internet in, define it, and make it the tool of individual nation-states. If you cage the Internet and iron out its unruly side, is it still the Internet?

? Who's on first? The philosopher team of Abbott and Costello propounded this conundrum in the mid-twentieth century, and it continues to baffle scholars to this day.

Of course, a Zen master would scoff at any attempt to define these concepts at all. Dichotomous distinctions that appear real to the rest of us – good and evil, light and dark, telecom service and information service, "tastes great" and "less filling" – are false and illusory. All is one. Or, in our parlance, everything is converging. So communications lawyers and policymakers will continue to ponder these questions over glasses of sherry, and again later as they toss and turn in their beds alone in the deep of the night. Chances are they will not arrive at any answers, but one thing is certain: truth, beauty and virtue will have very little place in the resolution.