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Nightmare on 12th St. SW

What if the FCC *NEVER* opens again?

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As the government crisis grinds into its third week, one overhears persons of the libertarian persuasion chuckling to each other: "Crisis? What crisis? A government shutdown is not a problem; it's the solution!" People espousing this view can take comfort in the knowledge that "essential" government services like the entire Defense Department, the police, and all District of Columbia government workers are still somehow beavering away, while unessential workers from Great Society programs like HEW and HUD and from New Age agencies like the EPA remain on sabbatical. This is a libertarian's dream.

When the sequester cut government spending across the board by 10%, the Administration predicted massive furloughs and a kick in the shins to economic recovery. That mini-disaster failed to materialize. And so far, while we here in Washington are running around in circles wringing our hands, the rest of the country seems to be faring reasonably well without the Federal government. It's as though everyone has returned to his yeoman farmer roots, as Jefferson imagined, plowing his 40 acres of freely held land (without looking for subsidies from the Department of Agriculture), learnin' his children about the three R's and the Good Book without pointy-headed "educators" in Washington demanding standardized testing, and spreading good, clean manure on the good, clean earth without worrying about whether it will run into good, clean rivers and create so-called "pollution" for city slickers downstream.

But before we declare the current situation a Jeffersonian Paradise, we have to pause and think about the FCC. Hardly anybody is on the job at the FCC except the com-

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Special consideration for Sprint and DISH?

H Block Auction Scheduled

But big questions still remain

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Despite some dissension on the 8th floor of the FCC about whether to proceed immediately with the H Block auction, the FCC has adopted a scheduling order and associated rules and procedures to govern the auction. Commissioner Rosenworcel had argued that the H Block auction should be paired with the auction of AWS-3 spectrum in order to reap a larger pay-out to the FCC from the combination of the two. Despite this objection, the Commission plunged ahead on September 13 to set the auction up for January 14, 2014. The Middle Class Tax Relief and Job Creation Act of 2012 had directed the FCC to auction this spectrum no later than February 23, 2015, so the Commission had a little leeway here on when it had to initiate the auction.

The H Block consists of the 1995-2000 MHz and 1915-1920 MHz bands. It is therefore adjacent to the PCS G Block held by Sprint on one side and the AWS-4 band held by DISH Network on the other. This geographic setting has unfortunately made it the Alsace-Lorraine of telecommunications – the prize in a tug o' war between the two giant adjacent licensees who have tried to make it their own.

The rules applicable to this auction follow the procedures typical for auctions these days with a few key exceptions:

- ✓ The Commission set the "reserve price" (the total amount which must be garnered from the auction in order for it to be valid) at 50 cents a MHz/pop, or roughly a billion and a half dollars. This figure – magnitudes greater than anyone had anticipated – was proposed by DISH Network a few days before the auction procedures were adopted. It has been

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Inside this issue

When it comes to infrastructure regulation, less is more

FCC Proposes New Rules to Ease Wireless Infrastructure Construction

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When people talk about what's hot in the wireless revolution, it's always the device makers and spectrum auctions that get the attention. But everyone knows they're just the face men. Where would we be without the antennas, fiber optic cables, and transmission equipment that serve as the "go" to their "show".

The FCC commissioners, especially Jessica Rosenworcel, get it. Commissioner Rosenworcel called infrastructure "the unsung hero of the wireless revolution" in a Notice of Proposed Rulemaking (NPRM) issued on September 27. This NPRM is seeking comment on a host of new measures to make it easier for wireless companies to build new infrastructure, hopefully easing existing service gaps, reducing the burden on overwhelmed sites, and opening the way to new services and technologies.

The proposals seek to (1) expedite the environmental and historical review processes for new "small antenna" sites, (2) exempt some temporary towers from pre-construction notice and review rules, and (3) refine the rules governing when and how local and state governments have to approve new construction.

Expediting Review of "Small Antenna" Sites

Proposals in the NPRM would make it easier for wireless providers to build distributed antenna systems (DAS) and "small cells". These DAS and small cell systems can take the place of some traditional cell towers, usually in urban areas, and can fill in gaps where the existing towers provide insufficient service. They also allow carriers to serve more customers with the same spectrum, using facilities that are smaller and less conspicuous facilities than the big cell towers that sprout everywhere.

The FCC recognizes that its current review processes (mandated, in part, by the National Environmental Policy Act of 1969 (NEPA), requiring federal agencies to review all "major Federal actions" that "significantly affect" the environment) don't take into account the lesser impacts that these smaller facilities have on the environment and historical neighborhoods and buildings.

The Commission is considering: exempting collocations (adding new antennas to existing antenna towers and structures, which could include utility poles) from environmental and historical reviews; expanding the "existing buildings" exemption to include everything from water towers to road signs; and redefining "major Federal actions" that are subject to environmental review.

Expanding the "Emergency Exemption"

The second proposed change is to expand the "emergency" exemption for temporary facilities to include all temporary facilities that are less than 200 feet, have FAA notice, will be in place for less than 60 days, and need little or no excavation.

Right now, even these short-term towers are subject to a 30 day pre-construction notice period, which means that temporary infrastructure often doesn't get built. Surprisingly, the proposal would also allow these towers to avoid *post* construction public notice as well. The FCC must also decide how to

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It all depends . . .

700 MHz Interoperability At Last! Maybe. Sort of.

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For years, the build-out process for 700 MHz wireless networks has been slowed because of interoperability concerns. The FCC has made noises about possible regulatory resolutions, but so far those noises have not turned into action. So now a group of the private players have announced their own solution.

FCC Acting Chairwoman Clyburn has loudly proclaimed that that "solution will resolve the lack of interoperability in the lower 700 MHz band in the most efficient manner". But heads up – as the Chairwoman correctly notes, this is a "voluntary industry solution". Here, "voluntary" is used in its conventional meaning (as opposed to when the Enforcement Bureau refers euphemistically to the "voluntary contributions" it extracts from targets of its investigations).

Let's peek behind the curtain to see what we're actually getting, shall we?

Small carriers holding 700 MHz licenses have long complained that it isn't viable for them to build out their licenses unless there is interoperability with nationwide carriers. Small carriers operate in Band Class 12. AT&T and Verizon Wireless's 700 MHz networks operate in Band Classes 17 and 13, respectively. Due to the different technologies and wireless protocols used, none of the classes can talk to each other. So user devices manufactured for Band Class 17 can't operate on the A Block where the licenses are held mostly by smaller entities, though A Block licensees will be able to operate on the B and C Blocks.

The recently-announced interoperability solution looks to fix that, at least for Band Classes 12 and 17 (which operate in the Lower 700 MHz B and C Bands). In separate "commitment letters", AT&T and DISH both have made certain commitments *subject to* certain conditions. AT&T's letter is the more interesting of the two as it contains very positive developments for 700 MHz interoperability if fully realized. DISH offers to implement voluntary power reductions to make the whole deal work.

What exactly does AT&T have in mind?

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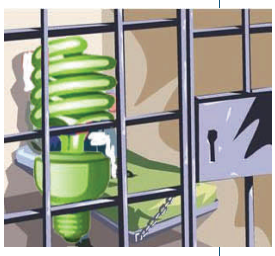
Report from Planet FCC

Bulb Behind Bars?

FCC Cites a Lighting Fixture for Radio Interference



By Mitchell Lazarus
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First the U.S. Department of Agriculture ordered a children's magician to set up a disaster plan for his rabbit. Then the FCC asserted jurisdiction over a lighting fixture. It must be something in the water here in Washington.

The offending fixture, which illuminates an office building in San Jan, Puerto Rico, apparently put out a stray signal at 712.5 MHz. That frequency is part of an auctioned band used for commercial wireless communications. The FCC does not say, but we think it likely that the wireless provider tracked down and fingered the office building, much as other wireless providers have complained about other sources of interference.

And, yes, the FCC has jurisdiction over all sources of radio interference, including lighting fixtures. It issued an official warning, called a citation, to the building's occupant, alerting it to possible monetary forfeitures up into six figures if the interference continues.

For the last few months, a new phrase has been turning up in FCC citations relating to radio interference (and one on automatic dialing). Previously, a citation recipient who commits the same offense a second time has been subject only to penalties for the new offense. The new language makes the re-offender also subject to additional penalties for the original offense that triggered the citation. It's as if the police stop you for speeding on Monday and give you a warning, stop you again on Tuesday, and thereby make you retroactively liable for Monday's fine as well as Tuesday's. Whether or not the imposition of additional penalties based on alleged misconduct that hasn't been fully adjudicated is really consistent with the Communications Act (and simple fairness) isn't entirely clear – but so far, the issue has not yet made it to the courts.

Our friend Gary Cavell suggests the office building switch to candles and kerosene lamps – except that might violate environmental laws and create a fire hazard, so their only legally safe choice may be to sit in the dark.

***(700 MHz Interoperability** - Continued from page 3)*

AT&T dangles the prospect of lower 700 MHz interoperability. In particular, it spreads on the table an attractive set of steps it's willing to take:

AT&T will implement its new Multi-Frequency Band Indicator (MFBI) features throughout its network by September 30, 2015. According to AT&T, the MFBI capabilities will permit AT&T's network to operate simultaneously as Band Class 12 and 17 networks, and support devices in both bands.

Once MBFI has been fully implemented, AT&T will begin providing LTE roaming Band Class 12 devices, and begin a two-year "Band Class 12 device roll-out period".

During the first year of the Band Class 12 device roll-out period, AT&T commits to having 50% of its handsets that operate on the 700 MHz bands to be Band Class 12 capable. During the second year of the device roll-out, AT&T will have 75% of its 700 MHz devices Band Class 12 capable. After the two year device roll out period, AT&T states that all of its 700 MHz devices will be Band Class 12 capable. AT&T excludes "M-two-M" (or M2M) devices from its commitment.

Interoperability heaven? Not so fast.

Interoperability heaven, right? Not so fast.

When AT&T acquired its lower 700 MHz D and E Block licenses, the FCC restricted AT&T to operating those licenses under the same power and antenna height restrictions that apply to lower 700 MHz A and B block licenses, and also precluded use of the licenses for uplink transmissions. So as a condition to making good on its interoperability "commitments", AT&T is insisting that the FCC adopt an order ***by December 31, 2013*** requiring that all E block licensees transmitting a signal with an emission bandwidth greater than one megahertz are restricted to an ERP of 1,000 to 2,000 watts/MHz and an antenna height of 305 meters above average terrain.

And if the Commission doesn't adopt such an order by December 31, or if that order is subject to appellate review, then AT&T "reserves the right to declare these commitments null and void".

Sort of cheapens the concept of "commitment." Not what you'd call enforceable. And if AT&T were to back off some or all of its offers, the FCC's only recourse would be to proceed with a rulemaking to implement its own 700 MHz interoperability rules. Bear in mind that the Commission has had an open proceeding looking into such rules since March, 2012. In other words, that approach doesn't seem likely to produce any near-term results.

How big is the escape hatch that AT&T has provided itself? First, the notion of getting the FCC to adopt an order along the lines AT&T is looking for *by December 31, 2013* is optimistic at best. The Commission is not known for prompt action, and let's not forget that a new Chairman (along with a new Republican Commissioner) is likely to take over sometime between now and then. That kind of circumstance can slow things down at the agency.

And even if the Commission were to adopt AT&T's desired order, AT&T is insisting that that order not be "subject to appellate review." The order in question would be a rulemaking order. Before anybody could appeal it, the order would have to be published in the Federal Register, a process which often takes several weeks. And once the order is published, would-be appellants have 60 days in which to file their petitions for review. That considerably stretches AT&T's ability to get out from its "commitments." And if anybody were to file an appeal, the appellate process would ordinarily drag on for at least 12-18 months.

In addition, AT&T could delay the implementation of the Band Class 12 roll-out for six months if it were to determine that the MFBI implementation would result in "significant negative customer impact." AT&T further states that if it encounters "obstacles beyond its control" that threaten its ability to meet its commitments or undermine the quality of its services, then it reserves the right to "seek an extension of time or a waiver" as appropriate. In other words, the way AT&T has set up its "commitment" enables it to change its timeframes to suit its own schedule simply by sending the FCC another letter.

Notwithstanding the sieve-like nature of AT&T's "commitment," it still provides the industry with some basis for hope that the 700 MHz interoperability problem may be resolved sooner rather than later. The FCC has included on its tentative agenda for its October 22, 2013 open meeting a Report and Order that implements the industry solution to provide interoperable service in the lower 700 MHz band. However, it is unclear whether that meeting will occur in light of the federal government shutdown. We're crossing our fingers that 700 MHz interoperability will come to pass without too much delay.

Miscreant carriers may need a lifeline themselves

FCC Imposes Million Dollar Fines on Carriers

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The FCC has proposed a $4.8 million fine for an Oklahoma company that received an extra $32,000 in USF Lifeline program reimbursement. More dramatically, a nationwide carrier that requested about $8,000 in USF reimbursement is staring down the barrel of a $4.5 million fine. These fines are part of an announced campaign by the government to improve the performance of its Lifeline program.

In the past, the FCC has frequently targeted USF contributors to ensure that money is flowing into the Universal Service Fund. The FCC also grabbed headlines for pursuing USF individual recipients and participants in various USF assistance programs including schools and healthcare. As its latest tactic, the FCC is targeting the companies that offer Lifeline program services to their customers. The FCC's Lifeline program offers low-income customers a discount on their monthly phone bill to ensure that they have access to telephone service. Low income consumers can take a discount of up to $9.25 per month in non-tribal areas; the Universal Service Fund covers the discount.

The FCC is targeting the companies that offer Lifeline program services to their customers.

The FCC has focused its latest effort on ferreting out carriers who sign up consumers who are already receiving subsidized service – in other words, a household with two or more subsidized phone services. The FCC will not simply seek a refund of any overpaid discounts; instead, it plans to assess a fine of three times the overpaid sums, plus $5,000 for each person receiving the discount in error, and another base fine of $20,000 for paperwork violations.

The specter of a minimum $25,000 fine for the first violation will likely have carriers turning away customers if they share a name with another person in the same apartment complex or mail drop. Two low-income consumers sharing the initials and name J.F. Kennedy at a senior citizen assisted living complex should anticipate extreme scrutiny from carriers under the new FCC policy. Low-income consumers who are not familiar with the FCC rules and policies for the Universal Service Fund may innocently submit multiple applications for assistance, but doing so could land a carrier in a great deal of trouble if it fails to catch the duplication, whether innocent or not. With companies facing massive punishment from Uncle Sam, those companies are likely to more intensely scrutinize their low-income customers if they seek reimbursement from Lifeline programs.

As part of its latest effort, the FCC released a Public Notice and press statements highlighting the $14.4 million in fines that it has saddled upon five companies for allegedly seeking an extra $73,245 in Lifeline support. The fines are calculated as:

	FCC Fine	Alleged USF Error	Number of Customers
Company 1	$4,806,381	$32,127	938
Company 2	$4,573,375	$ 7,792	842
Company 3	$2,203,977	$14,659	428
Company 4	$1,586,545	$10,515	307
Company 5	$1,234,456	$ 8,152	238

An inter-agency request

NTIA to FCC: Unlock Those Phones!

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We reported earlier this year on a decision by the Librarian of Congress that overnight made it illegal for consumers to unlock their cell phones – that is, to run software that lets the phone work with a different wireless carrier. The Librarian's decision discourages customers from straying to a carrier's competitor because doing so, if your phone is locked, usually means having to pay for a new one.

Almost everyone thought the anti-unlocking rule was a bad idea: the FCC chairman, the White House, 114,000 petition signers, and vast numbers of outraged bloggers. The only fans of the rule, it seems, are the Librarian himself and the wireless carriers that requested the change.

Now the National Telecommunications and Information Administration (NTIA), which represents the White House on spectrum-related matters, has filed a Petition for Rulemaking asking the FCC to adopt a rule that requires a carrier to unlock a phone (or tablet) at the customer's request. The rule would apply even while the customer is under the usually mandatory contract that goes with buying the phone from the carrier at a discount. (Adoption of the rule might require the carriers to separate their phone-selling contracts from their service contracts, a step T-Mobile has already taken.) The rule would also apply if the customer has completed the contract or paid an "early termination fee" to end it prematurely.

The New York Times editorial page came out in favor of mandatory unlocking, but only for customers who have completed their contracts. We don't see why an ongoing contract should make a difference, so long as the customer remains obligated to keep paying for the phone.

NTIA argues that mandatory unlocking at any time will increase competition among service providers, assist persons traveling outside their usual coverage area, promote the market for used phones and tablets, and encourage the donation of used phones and tables to charity.

One could ask why the White House went through NTIA, instead of just telling the FCC what to do. Most federal agencies, including NTIA, in fact report to the President. The FCC is different, having been created by Congress as an "independent agency." The President appoints its Commissioners, with the advice and consent of the Senate, but otherwise has no control over the FCC's actions. NTIA had to send in its petition just like we do for our clients.

One could also ask why NTIA filed its petition with the FCC, not with the Librarian of Congress, who is, after all, the source of the problem. His justification for phone locking arises from copyright law, not communications law. The problem is that NTIA ***did*** make its arguments to the Librarian, who went ahead anyway to issue the ruling that got everybody's knickers bunched up. NTIA's new petition is thus something of an end-around play, seeking to enlist the FCC (whose officials have already expressed sympathy for NTIA's position) in an effort to bypass the effect of the Librarian's decision.

It will be interesting to see how the FCC views the scope of its own powers.

According to NTIA, the FCC's broad authority to regulate wireless carriers enables it to mandate phone unlocking. There is nothing in principle that stops different agencies (the Librarian and the FCC) from having authority under different statutes (the Copyright Act and the Communications Act) over the same behavior (unlocking cell phones) by the same parties (the wireless carriers). It will be interesting to see how the FCC views the scope of its own powers in this situation.

FCC and NTIA personnel routinely collaborate on matters relating to the radio spectrum, and indeed, NTIA was careful to frame its request as one coming under the FCC's spectrum responsibilities. It is rare, though, for NTIA to involve itself in the business dealings of the FCC's regulatees. It remains to be seen whether the wireless carriers will oppose the new rule, which is probably their initial impulse, or take the out-

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Dark clouds closing in on the Open Internet?

Net Neutrality 2013: The D.C. Circuit Hears the Arguments

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It's been almost two years since net neutrality was the Big Issue here – and now it's back! On September 9 the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments in Verizon's appeal of the FCC's effort, dating back to late 2010, to impose "open Internet" rules on broadband providers. The importance of the argument could be seen from the turn-out at the court: it was SRO in the D.C. Circuit's main courtroom, forcing the marshals to herd the overflow into a separate courtroom where they piped in the audio of the argument.

Trying to guess the result in a case based on oral argument is an iffy proposition. Judges are adept at keeping their cards close to their robes. But still and all, it sure sounded to us like the Commission's net neutrality effort – or at least much of it – is skating on very thin ice. In particular, at least two of the three judges on the panel (Judges David Tatel and Laurence Silberman) seemed especially "dubious" – to use a term that popped up during the argument – of the anti-discrimination component of the Open Internet rules. And whether the remaining anti-blocking provision could survive in the absence of its companion anti-discrimination provision was far from clear (although at one point Judge David Tatel seemed to suggest that there might be some way to preserve the former without the latter). Judge Silberman, on the other hand, seemed convinced that the anti-blocking provision is also a goner. (The third judge -- Judge Judith Rogers -- asked significantly fewer questions than her confrères.)

One judge suggested that the FCC's authority derives from "emanations from a penumbra" of some statutory language.

With respect to Verizon's argument concerning the FCC's lack of clear statutory authority for its Net Neutrality rules, Judge Silberman jokingly suggested that the Commission's authority derives from "emanations from a penumbra" of some statutory language – which seemed to some observers, at least, to indicate that he may be more than a little sympathetic to Verizon on this point as well. Tatel, on the other hand, seemed at times to suggest that he could see some statutory basis for the FCC.

Although each side was originally allotted a total of 20 minutes of argument time, the whole affair ended up taking two hours – much of it because of extensive probing by the judges. But don't take our word for that – listen yourself. As it turns out, effective September 9, the D.C. Circuit is now posting recordings of oral arguments on its website! Here is a link to the argument in the Verizon net neutrality appeal. Grab some popcorn and a drink and prepare to be entertained for 120 minutes.

Conventionally the D.C. Circuit takes at least a couple of months to prepare its opinions following oral argument. Because of the complexities of the net neutrality case, it may take the court longer to crank out its decision. You never know. Check back at our blog (www.commlawblog.com) for updates on the status of the Court's decision.

***(NTIA Unlocking Request -** Continued from page 6)*
rage to heart and go along gracefully with the change.

Even if the FCC ultimately sides with NTIA, don't expect the predicted benefits any time soon. Rule changes typically take the FCC at least two years, and sometimes twice or even three times that. At this point, the FCC has not even agreed to open a proceeding in response to NTIA's petition. Before any rules can be adopted, the FCC ordinarily would take comments and reply comments on the petition, and then issue a notice of proposed rulemaking, accept more comments and reply comments in response, and eventually issue a report and order. Still, it's a reasonable assumption that a petition from NTIA may go through the process more quickly than a petition filed by most anybody else. We will keep you posted as the matter progresses.

If you've got a website, you could have some new chores.

New California Online Privacy Requirements Have Nationwide Reach

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In an effort to bring some "transparency" to the murky practice of data collection on the Internet, California has expanded its Online Privacy Protection law (CalOPPA) to include two new disclosure requirements.

Before you click away because, what the heck, you don't live in California so this expansion couldn't possibly affect you, think again.

CalOPPA applies to ANY commercial website or online service that collects personally identifiable information (PII) about "individual consumers residing in California who use or visit its commercial Web site or online service". So if your website collects PII (trust us, most websites do), and any visitors to your site happen to live in California (even if they're not physically there when they happen to visit your site), CalOPPA appears to apply to you.

"Do Not Track" technology is a response to the ubiquitous collection of data from Internet users.

The new law, which takes effect on January 1, 2014, requires affected Internet operators to disclose in their online privacy statements (a) how their online operations "respond" to "Do Not Track" technology and (b) whether other parties may collect PII about visitors to the operator's site. (The specific language is included in new subsections (b)(5)-(7) to Section 22575 of California's Business and Professions Code.)

What is "Do Not Track" technology?

It's a response to the ubiquitous collection of data, for commercial and other purposes, from Internet users. That data collection, occasionally referred to as "tracking" and often achieved through the insertion of "cookies" onto a visitor's computer, makes the collected data available to website operators and other parties who can slice and dice the gathered information and then use it for targeted online commercial purposes. Tracking routinely occurs in the background while users browse away, blissfully unaware that their PII is being recorded, analyzed and incorporated in advertising plans. Often, the first hints the user might get that she's been tracked are the targeted ads that arrive on her screen.

So far, such data collection is completely legal. To provide users with a way to counter tracking, virtually all of the major browser developers have in recent years included "Do No Track" options in their software settings. Those options generally permit a user to set her/his browser so that it sends a "do not track" message to all websites visited.

But the websites visited are under no obligation to comply with the user's wish (as expressed through his/her browser settings) not to be tracked. So invoking one's "Do Not Track" options is kind of like pinning a large sign reading "Don't Take My Picture" to one's back while walking through an area bristling with surveillance cameras. It's theoretically possible that somebody on the other end of one or another of those cameras might be willing and able to turn the camera off as you walk by, but it's pretty unlikely.

Some companies have committed to honoring "Do Not Track" requests, but many have not. And while a number of organizations, including the World Wide Web Consortium, have worked to come up with a standardized approach to the issue, those efforts have thus far been fruitless.

"Do Not Track" technology is reminiscent of the "Do Not Call" registry instituted several years ago to prevent unwanted telephone solicitations – both are intended to provide consumers with the opportunity to avoid commercial intrusions. But there are impor-

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*(**CalOPPA Changes -** Continued from page 8)*
tant differences. A telephone solicitor who violates the Do Not Call prohibition is subject to sanctions by the government; an online operator who ignores a "Do Not Track" signal currently is not.

And when a telephone solicitor does violate the Do Not Call prohibition, the consumer knows it because the consumer receives the prohibited solicitation. But a user often has no way of knowing when an online operator does not or cannot respond to a user's "Do Not Track" signal.

That's where California's new law enters the picture.

CalOPPA already required website operators that collect PII about California residents to "conspicuously post" their privacy policies and to comply with those policies. Under the recent expansion, those privacy policies must now also disclose:

how the Operator "responds to Web browser 'do not track' signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer's online activities over time and across third-party Web sites or online services, if the operator engages in that collection"; and "whether other parties may collect [PII] about an individual consumer's online activities over time and across different Web sites when a consumer uses the operator's Web site or service."

CalOPPA applies only to operators who collect PII.

So if you've got a website that might be visited by California residents, what do you do?

First, it's important to remember that the new law does ***not*** require you to respond to Do Not Track messages; it requires only that you *disclose* how you do or don't respond. In other words, you can ignore Do Not Track messages and collect PII despite them, but if you do that you will need to say so in your privacy policy. Of course, that may not go over well with your site's visitors, whom you would presumably prefer not to alienate. But that's a problem between you and your visitors, not you and the State of California.

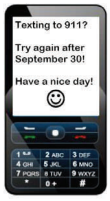
If you do respond to Do Not Track messages, you will need to disclose how you respond. The new provisions of CalOPPA don't specify exactly how detailed your disclosure must be, but presumably it should accurately reflect your response.

If you don't know how your website is set up to deal with Do Not Track messages, now would be a good time to investigate that question. In order to be sure that you're in compliance with a wide variety of Internet-related requirements, you should in any event be familiar with the intricacies of your site. That includes not only your own business's data collection and processing practices, but also those of any third parties to whom you have given access to your site.

The new CalOPPA rules permit you to satisfy the disclosure requirement by providing a hyperlink "to an online location containing a description … of any program or protocol the operator follows that offers the consumer [choices on tracking]." Also, for enforcement purposes, operators should be aware that, before they can be penalized for failing to make the necessary disclosures, they will be notified of the problem and given 30 days to remedy it.

Of course, another solution is simply not to collect PII. Remember – CalOPPA applies only to operators who collect PII. If you're not collecting, you have no obligations under the statute. However, that may not be consistent with your business purposes, or with the efficient operation of your web site because under CalOPPA, "persistent identifiers" necessary for the smooth interaction of consumers with web applications may fall under the definition of PII. (Theoretically, you could avoid liability under CalOPPA by somehow screening out California residents from access to your site – but even if you were inclined to try such an approach, it's not clear how effective it would be.)

The new CalOPPA requirements provide an excellent impetus to all website operators to review their PII practices and update their privacy policies as may be necessary. And while you're at it, why not also undertake a broader review of data collection operations and privacy policies as well?



In the nick of time . . .

Text-to-911 Bounce-back Rules Revised for Roaming Customers

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There's nothing like an impending deadline to get your attention – even if you are the FCC.

Readers will recall that, just last May, the Commission adopted new rules requiring text-to-911 "bounce-back" messages when a person sends a text message to "911" but text-to-911 capabilities are not actually available. As we reported, the new rules were set to take effect on September 30, 2013. But in July, CTIA sought reconsideration, pointing out that the bounce-back rule (Section 20.18(n)(7), if you need to know) would be impossible for carriers to comply with for roaming customers due to the way text-to-911 messages are handled. Obviously, addressing that problem ***before*** the effective date was a matter of some importance.

And sure enough, the FCC has done what needed to be done. In an Order on Reconsideration issued on (wait for it) September 30, the FCC amended Section 20.18(n)(7) to read as follows:

(7) Notwithstanding any other provisions in this section, when a consumer is roaming on a covered text provider's host network pursuant to 20.12, the covered text provider operating the consumer's home network shall have the obligation to originate an automatic bounce-back message to such consumer when (a) the consumer is located in an area where text-to-911 service is unavailable, or (b) the home provider does not support text-to-911 service in that area at the time. The host provider shall not impede the consumer's 911 text message to the home provider and/or any automatic bounce-back message originated by the home provider to the consumer roaming on the host network.

This appears to address the problem identified by CTIA.

But this amendment won't go into effect until it's been published in the Federal Register, while the rule as adopted last May is already in effect. Doesn't that mean that, at least for the time being, providers are technically in violation of the rule (even if compliance with the rule is technically impossible)?

Enter Section 1.3, the bureaucrat's best friend. Section 1.3 allows the Commission to waive its rules on its own motion if good cause warrants. And the Commission has apparently found plenty of good cause here. It has waived Section 20.18(n)(7) on its own motion pending the effective date of the amendment. The amended rule will become effective immediately upon publication in the Federal Register (which trims off a usual 30-day waiting period).

It remains to be seen whether carriers will have a problem with the amended rule as it is unclear whether the inability of a serving carrier to transmit text-to-911 messages to a home carrier, or the inability of a serving carrier to transmit such messages from a home carrier, constitutes an impediment as contemplated by the amendment.

***(FCC Shutdown** - Continued from page 1)*
missioners themselves, and since they rely on the staff for input into all of their actions, there is not much they can do. No inspections are going on. No FCC online databases can be accessed. No applications can be filed. You can't call anyone at the FCC to find out what is going on.

Sure, it's a pleasure to be able to use fleeting expletives on the airwaves with no fear of immediate reprisals. And, yes, it's nice not to have to read press releases issued by the FCC commissioners about every little world development. Sit back and relax – all FCC deadlines are delayed until an ever-receding *manana* – actually the day ***after*** *manana*, since the FCC has ordered that anything due in the interim will now be due the day after the day after the shutdown ends. Our licenses, as long as they don't come up for renewal while the shutdown is on, continue to exist without any intervention from the FCC. All's right with the world. Who needs the FCC?

But wait a minute. Almost anything you want to do with a radio station that changes the status quo, whether an ownership change or transmitting modification, requires affirmative approval from the FCC. Even grants that are issued automatically upon filing can't be obtained because the online filing systems are shut down. That means unless and until the FCC opens, operators are either stuck with the status quo or must "go rogue" in the hope that furloughed FCC operatives will never discover their sins. And what if you need advice from the FCC staff on how a rule is interpreted – the usually friendly people on the FCC end of the line are not there. If you need a waiver

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Watts Up, Doc!

FCC Grants Huge Power Increase for Some (But Not All) Unlicensed Use at 57-64 GHz

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If you work in this business long enough, radio bands start taking on individual personalities. The 57-64 GHz band is the cantankerous child genius: underdeveloped, enormously promising, and hard to work with.

This band, which stretches across 7 GHz, has the widest swath of spectrum anywhere in the FCC rules. The cell carriers fight over 10 MHz at a time; this band is 700 times bigger. Back in 2008, carriers paid $19 billion at auction for a mere 52 MHz of the 700 MHz band; at those same prices, the 57-64 GHz band would go for 2.6 *quadrillion* dollars – about 30 times the total economy of the world.

But operations in the band are unlicensed, so the spectrum is free – and that looks like a bargain. But the band has its downsides. All frequencies in these upper reaches of the spectrum propagate poorly. The 57-64 GHz region is worse than most, due to the pesky laws of physics. Much like a playground swing goes back and forth at a steady rate, several times a minute, oxygen molecules in the atmosphere vibrate at their own steady rate, about 60 billion times each second. Much like the playground swing, which absorbs energy from the parent pushing at the high point of each swing, oxygen molecules absorb energy from passing radio waves that happen to hit them at the right frequency: about 60 GHz.

Transmitted energy that goes into pushing oxygen molecules never gets to the receiver. That's why, at these frequencies, it takes (relatively) a lot of power to move a signal any reasonable distance.

Previously, the FCC's rules governing unlicensed operations in this band allowed about 10 watts of power. That's high, by unlicensed standards, but in most applications would reach only several tens of meters. You could link nearby buildings on a campus, or closely neighboring cell towers, but not much else.

An industry group asked for a power increase to help combat the oxygen fog. That was in 2004. The FCC thought about it for three years and issued a Notice of Proposed Rulemaking in 2007. Now, six years later still, it has finally acted on the request.

The FCC has now raised the power limits in this band by a factor of almost 16,000. This is possibly the largest single power increase in any band in FCC history. The new limit is equivalent to 158,489 watts average power – with no license. Peak power can be twice this amount.

But there is a catch. Only extremely directional outdoor antennas – those having beamwidths of about half a degree or less – are allowed this much power. Less directional antennas have to dial the power back. Operators hope the new rules will allow links in this band using suitable antennas to cover a mile or more. Indoor antennas are stuck with the old power limits. So are transmitters installed indoors and aimed out a window. The same order also made changes to the procedures for assessing technical compliance, and eliminated a requirement for station ID.

Other services that want a 16,000-fold power increase? Maybe a 64 kilowatt CB radio? Just ask the FCC. You never know.

***(FCC Shutdown -** Continued from page 10)*
from a rule for a perfectly valid reason, you can't get it. It turns out that the FCC, when stripped of its sixties-era diversions into advertising policy, indecency, equal employment opportunity, Native American rights, etc., actually has an important core function: issuing licenses to transmit over the airwaves without interference and keeping track of who owns what.

Many businesses rely on the FCC regulators for both routine approvals and extraordinary actions in order to meet their customers' needs, rationalize their spectrum holdings, or just operate more efficiently. Such businesses – and their law firms – find themselves with a mounting stack of unfiled applications and petitions with no place to call home. Legions of communications lawyers may have to find real forms of law to practice. And if the FCC never returned to operation, we would all remain forever frozen in a late 2013 diorama of communications history. Of course, even in the more likely scenario that the FCC does resume operations at some point in the next few weeks, there will inevitably be a backlog of applications and filings that will initially crash the system when everyone rushes to file, causing more delay on top of the delay already caused by the long filing hiatus.

So, much as one would like to believe otherwise, it appears that we do need the FCC. Please come back soon!

***(H Block Auction -** Continued from page 1)*
reported that as part of the interoperability deal brokered by the FCC (see story on page 3), DISH agreed to bid not less than this 50 cents a MHz/pop amount. In return, it was to be granted the option to reverse the uplink/downlink structure for its adjacent AWS-4 downlink band, as well as extensions of time to construct its licensed facilities. The fact that this reserve price is part of a backroom arrangement which has not been subject to public scrutiny is likely to be the subject of further pleadings as the auction process moves forward.

It is hard not to see this auction as having been designed largely to accommodate the needs and desires of Sprint and DISH.

- ✓ In keeping with the reported arrangement, DISH has sought a waiver of the rules applicable to its AWS-4 band adjacent to the H Block. The requested waiver would give it the option for up to thirty months to make the adjacent band uplink rather than downlink. If granted, that waiver would give DISH a significant leg up in the auction since it would unilaterally control the degree of interference that might be caused or not caused to the H Block. This too is likely to come up for further scrutiny.
- ✓ DISH has also conditioned its agreement to bid the $1.5 billion on the FCC granting its waiver request no later than a month before the auction date. The FCC put the waiver request on a very short fuse and seems to be on a track to accede to DISH's request in the timeframe demanded.
- ✓ The H Block licenses will be issued on an EA (Economic Area) basis. These vast geographic units are too large to be in the financial grasp of most small carriers, thus limiting the potential bidders to a few industry giants. The Rural Wireless Association has petitioned the FCC for reconsideration of this element.

Given all of these factors, it is hard not to see this auction as having been designed largely to accommodate the needs and desires of Sprint and DISH with very little regard to the needs or desires of anyone else. Nevertheless, for those bold enough to wade into these waters, the current auction schedule calls for short form applications to be filed no later than November 5 and upfront payments to be made no later than December 11. The auction schedule may be affected by the federal government shutdown since there remain key issues still to be resolved (including the DISH waiver and the interoperability deal) in less than two months. Whether the auction can go on as scheduled therefore remains one of the large questions looming over this process.

*(**Wireless Infrastructure -** Continued from page 2)*
respond when a carrier decides it wants to keep the "temporary" tower in service permanently.

Local and State Government Involvement

The last proposal revolves around a persistent issue with wireless build-outs: local and state governments getting in the way. Whether it's due to a city official responding to citizen opposition, a local building code, or just a permit office with a backlog a mile high, one of the biggest hurdles wireless companies face in building more infrastructure is getting the permission of state and local governments.

The 2012 Middle Class Tax Relief and Job Creation Act brought the Hammer of Preemption down on state and local governments, ordering that they "may not deny, and shall approve" any request to modify an existing facility that does not "substantially change" the physical dimensions of the facility. The result: the FCC has the power to define pretty much every term in the new rule (which is exactly what this part of the NPRM seeks to do).

One of the biggest hurdles wireless companies face in building more infrastructure is getting the permission of state and local governments.

The FCC indicated, however, that it doesn't want to completely foreclose state and local governments' opportunities to craft their own rules and procedures. It does want to promote collocation, and believes that the best path to that end is to set clear rules that limit the ability of non-Federal actors to obstruct the process. Issues include:

What counts as an "existing" facility (Verizon wants to include even buildings or poles that don't currently have an antenna);

What sorts of requirements may state and local governments put on new construction? For example, can they require compliance with local building codes? If permission for the original construction came with limitations, must the newly added facilities comply with those as well? What kinds of evidentiary or procedural requirements may state and local governments put in place? – recognizing that too much discretion could allow them to undermine the rule.

What happens if the state or local government fails to comply with the rule? Requiring the wireless company to go to the FCC or to court would undercut the intended acceleration of approvals. But the FCC also seemed hesitant to adopt a rule that would automatically deem a facility to be approved after a certain amount of time had passed.

The NPRM also seeks to further refine the "shot clock" rule that limits how long localities can wait to act on a pending application for a wireless facilities site. In 2009, the FCC decided that 90 days was sufficient for collocations, and 150 days was enough for all other applications. The ruling was affirmed by the Fifth Circuit and the Supreme Court. Now the FCC wants to clarify some additional issues:

What is a "substantial increase in size" that turns the shorter collocation period into the longer 150 day period?

What should the FCC do with regard to incomplete applications, which currently do not start the "shot clock"?

What happens if the municipality just keeps requesting additional information as a form of delay? Can governments impose a "local moratorium" that calls a time-out on all applications?

Comments on this NPRM will be due 60 days after publication in the Federal Register, with reply comments due 30 days after that. Check CommLawBlog.com for updates.

On the Lighter Side . . .

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5. ***Limitation on Damages***. In no case shall you be entitled to any damages greater than 25 cents, which, together with an additional two dollars, may get you a cup of coffee. On the other hand, in the event that you are found liable, we may elect to be compensated by either (i) money damages, including punitive, special, consequential, direct and indirect damages, or (ii) your first born child.

6. ***Waiver of Rights***. To the full extent permitted by law, you hereby waive all rights you can possibly waive, including, without limitation, the right to a trial by jury, the right to habeas corpus, the right to remain silent, and the right to life, liberty and the pursuit of happiness.

7. ***Governing Law***. The law governing this Agreement shall be the law of the Island Commonwealth of Togo, which happens to be an investor in the Company.

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[__] I accept!

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