



In-Flight Cell Phone Use Would Come With Strings for Airlines

*By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440*

Almost everybody agrees: letting airline passengers talk on cell phones is a terrible idea. Nobody wants to fly cross-country strapped in next to a blabbermouth. If the matter were up for national referendum, there would be no doubt as to the outcome. Even the people who don't trust the government to get anything right will make an exception: they want the regulators to silence the individual in the next seat.

The problem is finding a regulator having the authority to do this.

The FCC is one place to look. And indeed, since 1991 its rules have prohibited the use of in-flight cell phones, at least on the original cell frequencies at 800 MHz. The ban originated because, in earlier times, airborne cell calls posed a threat to cell phone operations on the ground. (Contrary to many reports, protecting electronic equipment on the aircraft was never the objective.)

Since those days, however, engineers have figured out how to place a miniature base station on board the aircraft, which removes the threat to ground-based calls. [Details are here.](#) In addition to keeping the on-board phones at very low power levels, the base station equipment deliberately creates radio noise in the cabin that keeps the phones from attempting to communicate directly with base stations on the ground.

In the view of the FCC – whose mandate covers radio interference, but not peace and quiet in the air – these technical developments have rendered the ban outdated and superfluous. The agency is not, [in the words of its chairman](#), the “Federal Courtesy Commission.” With the

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Maybe it can't buy me love, but . . .

FCC Shares More Love with DISH

*By Donald Evans
evans@fhhlaw.com
703-812-0430*



The passionate lovefest between the FCC and DISH Network continued last month as the Commission delivered the satellite service provider an early Christmas gift. In a [Memorandum Opinion and Order](#) released December 20, the Commission's Wireless Bureau duly carried out its part of the bargain which was struck in September by granting DISH all of the waivers and build-out extensions it had requested.

As we have previously reported, in 2012 the FCC agreed to effectively convert DISH's two S Band satellite licenses to terrestrial licenses, in one stroke adding about \$6 billion in value to the licenses. This action created the AWS-4 service, a nationwide 40 MHz swath of prime spectrum useable for broadband and other mobile communications. The FCC's beneficence in this regard at the expense of the public treasury was extraordinary, but its generosity did not stop there.

We reported in our last issue that the FCC oversaw intense negotiations among industry stakeholders last summer to achieve voluntary agreement on interoperability in the 700 MHz band. A triumphant announcement of an agreement was released by then-Acting Chairwoman Clyburn in September, although the actual terms were never formally revealed by the Commission or the parties to the backroom deal. AT&T agreed to certain conditions on its use of the 700 MHz band which, if ever implemented, would foster interoperability in the band. DISH, also a holder of 700 MHz spectrum, agreed to the arrangement, which generally reduced the authorized power of its own 700 MHz E Block licenses while allowing higher power transmissions in rural areas.

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In the wake of the derecho

FCC Imposes New Requirements for 911 System Service Providers

By Bradford Ham
ham@fhhlaw.com
703-812-0417

(Editor's Note: Bradford Ham, the newest addition to the FHH family and a recent admittee to the NY Bar, makes his maiden appearance as a contributor to these pages. Welcome, Brad!)

In a matter of hours on June, 2012, a powerful, fast-moving, killer storm (dubbed a “[derecho](#)”) swept from the Midwest to Northern Virginia, a silver-dollar’s-throw across the Potomac from the FCC’s headquarters. It laid bare severe shortcomings in 911 service: from isolated breakdowns to systemic failures, 911 service was unavailable (or at least unreliable) for millions of residents for extended periods.

In the wake of that unacceptably poor performance of a critical public safety function, the FCC completed an extensive review of the 911 system begun in 2011. As a result of that review, the [FCC has now imposed on 911 system service providers \(SSPs\) a new and rigorous set of requirements](#). (This latest action is separate from, but motivated by some of the same concerns as, the FCC’s [Notice of Proposed Rulemaking](#) released last September looking to require facilities-based Commercial Mobile Radio Service providers to provide daily public reports of the percentage of cell sites operating in their networks during and immediately after major disasters.)

SSPs are, generally speaking, wireline phone companies that route 911 calls from wireline and wireless phones to 911 call centers. Historically, SSPs have not been subject to detailed regulatory requirements relative to system maintenance and monitoring. Instead, the Commission has expected SSPs to voluntarily adhere to a number of “best practices” developed by several industry organizations, including (a) the Network Reliability Steering Committee (NRSC) of the Alliance for Telecommunications Industry Solutions, (b) the Network Reliability and Interoperability Council (NRIC) and (c) the Communications Security, Reliability, and Interoperability Council (CSRIC). The FCC did require SSPs to keep track of, and report, outages. Analysis of the outage reports – by both the FCC and the reporting SSP – was thought to provide adequate information, and impetus, to assure the identification and correction of any systemic problems.

The FCC’s review of the 911 system, however, demonstrated convincingly what the derecho experience had strongly suggested: throwing a host of acronyms at the problem didn’t work, and the submission of outage reports didn’t uncover the resulting problems.

According to the Commission, the problems encountered in the aftermath of the derecho occurred “in large part because of avoidable planning and system failures, including inadequate physical diversity of critical 911 circuits and a lack of functional backup power in central offices.” Those were among the operational considerations that were supposed to be (a) avoided through implementation of best practices or at least (b) detected and corrected through routine review of outage reports.

As a result, the Commission has now developed an approach that requires all covered SSPs to take “reasonable measures to ensure 911 circuit diversity, availability of backup power at central offices that directly serve PSAPs [public safety answering points], and diversity of network monitoring links.” (What’s a “covered SSP”? Any entity that “provides 911, E911, or NG911 capabilities

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FLETCHER, HEALD & HILDRETH A Professional Limited Liability Company

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: editor@fhhlaw.com
Web Site: fhhlaw.com

Editor

Donald J. Evans

Design

Harry F. Cole

Contributing Writers

Tom Dougherty, Paul J. Feldman,
Bradford Ham, Mitchell Lazarus,
Tony Lee, Peter Tannenwald,
Jamie Troup and Howard M. Weiss

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Concession to reality

Incentive Auction Update: Projected Auction Date Moved into 2015

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

Despite the FCC's repeated insistence that it's been on track to complete all the necessary prep work to conduct the [Incentive Auction](#) sometime in 2014, Chairman Wheeler has now taken the opportunity – in a [blog posted on the FCC's website](#) – to throttle back that ambitious schedule. While Wheeler is less than specific about the likely timing of the auction, he is now expressing the belief that it can be held “in the middle of 2015”.

Of course, in order to do that, the Commission will have to hit a number of milestones in terms of nitty-gritty preparation details along the way, as the Chairman acknowledges. We should get a better idea of precisely what those milestones are and when they might be met at the January, 2014 Commission meeting. That's when the Incentive Auction Task Force is slated to make a presentation on its anticipated timeline for rolling out the auction.

The very rough roadmap sketched out by Wheeler in his blog post mentions an initial Report and Order establishing “policies” that should be ready for a Commission vote “in the spring” of 2014. That would be followed “in the second half” of 2014 by release of two public notices – an “Auction Comment Public Notice” and a “Procedures Public Notice” – designed to “provide additional details and seek comment on how the specific parts of the auction will actually function.” No other specifics (if you can call those vague references “specifics”) are laid out.

And no mention is made of possible procedural slow-downs along the way. Each of the various decisions the Commission will have to make between now and the auction – and there are bound to be a boatload of very complex decisions to be made – will theoretically be subject to reconsideration, possibly appeal, maybe even a stay. Also, the longer that any of the various components of this sprawling proceeding are out for comment, the greater the likelihood that one or another of the zillions of interested parties may come up with new or different proposals, consideration of which may engender further delay. In other words, the new target of the “middle of 2015” may still prove to be ambitious, even if the Commission meets all the milestones it currently envisions.

Perhaps sobered by the fiasco of the massively flawed roll-out of the federal government's Obamacare website in October, the Chairman repeatedly acknowledges the absolute necessity

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700 MHz picture comes into focus

FCC Acts Promptly to Implement AT&T Interoperability “Commitments”

By Tony Lee
lee@fhhlaw.com
703-812-0442

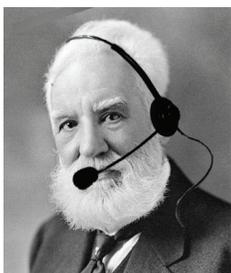


Last issue we reported on a voluntary industry solution, proposed by AT&T and DISH Network, looking to bring interoperability to the 700 MHz block. (See related story on DISH Waivers.) Since AT&T required, as a condition to its proposal, that the FCC adopt a number of rules to AT&T's liking by December 31, 2013, we expressed some skepticism as to the FCC's ability to meet that ambitious deadline. But lo and behold, the FCC has managed to do just that in record breaking time.

In a [“Report and Order and Order of Proposed Modification” released on October 29](#), the FCC, among other things, modified: (a) certain technical requirements for the Lower 700 MHz D and E Blocks; and (b) AT&T's B and C Block licenses, as [AT&T had requested](#) as part of the voluntary industry interoperability solution. The Commission also extended the interim construction benchmark deadline for all 700 MHz Lower A and B Block licensees until December 13, 2016, and issued a waiver of the interim construction benchmark for certain Lower 700 MHz A Block licensees that must limit their deployments in order to protect incumbent Channel 51 operations.

What's particularly noteworthy in the Order is the inclusion by the FCC of various escape valves AT&T provided for itself, which could delay the roll-out of 700 MHz interoperable devices for at least six months. It's not clear what the FCC would do, if anything, to extend the interim construction deadlines for Lower A and B Block licensees should AT&T miss the deadline to begin the roll-out of interoperable devices.

In keeping with the breakneck speed with which the FCC seems to be dealing with AT&T's proposal, [the Order has been published in the Federal Register](#) already. The amended rules took effect on **December 5, 2013**.



Like moving from horse-and-buggy to hot rods

Can the FCC Handle Phone Service over the Internet?

By Mitchell Lazarus
Lazarus@fhhlaw.com
703-812-0440

Slowly and carefully, the FCC is circling around a problem that may be its hardest ever. The digital TV transition? Piece of cake. First-on-the-planet incentive auctions? No sweat. But this one is tough: nothing less than a remake of the U.S. telephone system, all 120 million phones and 1.5 *billion* miles of wire.

The engineers and entrepreneurs have gotten out ahead of the FCC lawyers. Now the lawyers are scrambling to catch up.

Bell's System

Imagine you're Alexander Graham Bell. It's 1876. You've just finished constructing the first two working telephones. You have made the first ever telephone call, to your assistant in another room: "Mr. Watson, come here, I want to see you." The call needed a pair of copper wires between the telephones, to carry an electrical signal whose variations matched the sound waves of your voice.

Now you're ready to scale, as we say these days – to start the rollout that will place a telephone in every home and business. Your problem: just like that first time, any two telephones on a call must have a pair of wires connecting them.

Does that mean connecting every telephone to every other telephone? That would take a lot of wires. But, hey, you're Alexander Graham Bell. You're smarter than that. You open an office, from which you run a single pair of wires to every telephone in the neighborhood. You hire a young woman to sit at a "[switchboard](#)" that lets her plug in a direct connection between any two telephones in the system. As demand spreads, you open additional offices and connect them to each other with bundles of wires called "trunk lines."

That was basically the phone system for the next 125 years. Improvements came mainly in better ways of handling the switchboard function. The young-women

operators gave way to noisy, clunky [Strowger switches](#) that let customers establish their own connections by dialing numbers on their phones. Decades later, fast, reliable crossbar switches replaced the Strowgers. Decades later still, computer-based switching systems supplanted the crossbars, offering features like call waiting, caller ID, and call forwarding.

All of these technologies serve the same function: creating a direct, metallic connection from one telephone to another. Dialing a number – or later, punching the Touch-Tone buttons – puts in motion a cascade that ripples through the system, setting up connections from one switching office to the next, sometimes a dozen or more, from your telephone all the way to the individual telephone being called.

When you hang up, another message goes out to take down these connections, freeing up the lines and switches for other callers.

The AT&T and Bell Canada long-distance divisions, beginning in the 1950s, replaced some of the intercity copper wires with microwave radio. Each call, though, still had its own dedicated circuit, now running partly over radio facilities. When the microwave systems converted to digital transmission in the 1970s, each ongoing call acquired its own time slot, rather than a separate circuit, but the principle of dedicated facilities remained.

This is "circuit switched" telephony, in which switches create separate, temporary circuits for each call. Insiders call the system the "public switched telephone network," or PSTN. It provides POTS: "plain old telephone service," dial-up voice communications and nothing else.

Most countries made the telephone system a government function, typically part of the post office, but the United States and Canada kept it in private hands. Both countries began regulating phone service around the 1930s. Local phone companies had to provide service

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*Bell's problem:
Any two telephones on a
call must have a pair of
wires connecting them.*



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to anyone who asked. Rather than make rural customers pay the full cost of installing their expensive lines, regulators told the companies to average out the costs among all customers in the area. Each company had to physically interconnect with the others, so that any phone could call any other phone. Tariffed rates kept phone companies from discriminating unfairly among their customers. Rate regulation held profits at reasonable levels, yet encouraged investment in reliability and modernization. Charges for long-distance service, used mostly by businesses, were set artificially high to subsidize local service, and thus keep it inexpensive for consumers.

The U.S./Canadian telephone system that resulted was the envy of the world. Despite its stunning complexity – by far the most complicated machine of its time – the system operated with near-perfect reliability, except sometimes on Mother’s Day. Even when ice storms and hurricanes knocked out power, picking up the handset almost always gave a dial tone.

Packet switching routes pieces of the message on the fly.

The Packet Principle

Then came digital transmission.

Sending digital information over wires is not new. In fact, it’s very old. Morse code telegraphy, which goes back to the 1840s, is a form of digital transmission. So are teleprinter machines, such as Teletype, which displaced Morse for sending text around the middle of the last century. The major U.S. teleprinter service, Western Union’s Telex, operated its own switched-circuit system that paralleled the telephone system.

Nineteen-sixties-era computers, although big, slow, and expensive, were moving into commercial applications such as billing and accounting. That created a need to move quantities of data from one place to another. Some early applications used modem signals over ordinary phone lines – a precursor to the dial-up Internet. Systems needing to cover longer distances could connect their computers to Telex lines which, although slow, were less expensive than long-distance telephone, and were highly reliable. I worked on one such system in the early 1960s that controlled a 3,500-mile natural gas pipeline from a central location, over the Canadian equivalent of Telex.

A decade later, with computers becoming smaller, faster, and cheaper, modem and Telex speeds no longer sufficed. The phone companies offered high-speed data transmission over dedicated lines, but at costs too high for many applications. Fortunately, a new communications technology promised to meet the need: packet switching.

A packet-switched network superficially resembles a circuit-switched network, consisting of switching facilities connected by lines (or radio links or fiber-optics). There the resemblance ends. Where circuit switching reconfigures the wiring in advance for each call, packet switching leaves the network unchanged and instead routes pieces of the message on the fly.

The computer sending a message hands it off to an access point, called a host, that separates the message into chunks (packets) of uniform size, typically between 1024 and 524,280 bits. The host adds to each packet a “header” that carries the destination address along with other needed information. The host transmits the packets, one at a time, to a switching point, called a node, in the general direction of the destination. Equipment there inspects each header and directs the packet to another node, one still closer to the destination. The packet migrates in this way through the network, from node to node, until it reaches another host at the destination. There the host strips off the headers, reassembles the packets into the original message, and delivers it to the recipient.

Some systems, including the Internet, allow the packets for a given message to travel by different routes, possibly arriving at the receiving host out of order and requiring reassembly. Other systems use the first packet to drop a trail of electronic breadcrumbs that subsequent packets must follow, so that they reach the destination in sequence. There can also be arrangements for prioritizing packets, instructing the nodes to pass through urgent messages first.

The Internet Speaks: “Can You Hear Me?”

At first circuit switching carried mostly voice (and some data modem) traffic, while packet switching carried only data. But phone companies were already digitizing voice in their circuit-switched long-distance networks. Why not digitize voice end-to-end, and send it through the same packet networks that carry data? The technique

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would offer high reliability: if a node or a line failed, the system could reroute around the damage. And costs would be low. Today packet networks carry data in staggering quantities; the relatively tiny amount of capacity needed for voice adds negligible cost. Cisco CEO John Chambers saw this coming back in 2000, when he terrified the phone companies with his prediction that “[voice will be free](#).”

But the phone companies liked the *status quo*. They still owned the massive switched voice network, also reliable and mostly paid for, from which they hoped to keep extracting revenues.

It took the growth of the public Internet, and particularly the spread of broadband connections to homes and businesses, to bring about change. Many peoples’ computers were sending and receiving email and web data over the collection of packet networks called the Internet, using standards called Internet Protocol, or IP. Beginning ten years ago, a few start-ups began offering digitized voice over Internet Protocol – VoIP: a telephone-like service that ran over the Internet via a broadband connection to the user’s premises.

Consumer VoIP now comes in two main types: “[interconnected VoIP](#),” which can place calls to and receive calls from ordinary phones, using ordinary phone numbers, and “non-interconnected VoIP” that usually connects through a user’s computer and does not have its own traditional phone number for receiving calls. Some non-interconnected VoIP services are free. Although interconnected VoIP entails a monthly charge, that may include low-cost calling to much of the world, with an overall bill that is often far less than that for traditional phone service. Moreover, an interconnected VoIP user can obtain a phone number unrelated to his actual location. A user in Australia, for example, who has family and friends in New York City, can request a number with New York City country and area codes. Calls from New York City to Australia become local calls at local rates, while calls from Australia back to New York City go at low VoIP rates.

Although interconnected VoIP originally substituted for wireline phone service, the spread of smartphones changed that. A smartphone can use a VoIP connec-

tion over Wi-Fi or 3G/4G data services to send and receive mobile calls without eating into expensive cell plan minutes.

The Regulator’s Dilemma

VoIP presents the FCC with a doctrinal conflict. On the one hand, VoIP is an Internet application, and the FCC has long forbore from regulating Internet applications. This principle says: leave VoIP alone. On the other hand, the FCC tries to be technology-neutral – that is, to regulate similar services similarly, regardless of how they are delivered. Applying this “quacks like a duck” test, the FCC determined that consumers were using interconnected VoIP – but not non-interconnected VoIP – as a substitute for PSTN POTS. It accordingly applied partial telephone-type regulation to interconnected VoIP: Much like wireline and cell companies, interconnected VoIP providers are regulated as to 911, law-enforcement wiretap capability, disability access, number portability, universal service contributions, protection of subscriber information, and various reporting requirements. Other traditional telephone regulations, like carrier-of-last-resort and interconnection obligations, do not apply to VoIP. (Non-interconnected VoIP is essentially not regulated at all, except for a few handicapped-accessibility requirements.)

The economics dictate that more and more telephone users and functions will migrate to the Internet.

The economics dictate that more and more telephone users and functions will migrate to the Internet. Some public interest advocates view this trend with alarm. In particular, they fear losing hard-won consumer protections that benefit PSTN users. Their concern may have some basis in history. Back in the dial-up Internet days, thousands of independent Internet service providers (ISPs) flourished under rules that gave them equal footing with the telephone companies’ own ISPs. But the FCC dropped those rules for broadband. The telephone and cable company broadband providers duly locked out the independents, leaving them no way to reach their customers. Today, except for wireless ISPs that provide their own broadband connections, the independents are mostly extinct. VoIP providers are likely to argue, as the broadband providers did, that traditional telephone-line protections are infeasible or unneeded in an Internet age.

Here is one example of the coming problems. Run-
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ning telephone lines to deeply rural areas and isolated Indian reservations is expensive. But the phone companies do it anyway, and they spread the cost, because the rules require it. Mobile service providers, in contrast, have no comparable obligation to reach every potential customer. The cell companies accordingly can (and do) omit base stations that would serve only small numbers of people. This leaves many rural and reservation residents with no access to the mobile voice and data services that the rest of us take for granted.

Will the FCC regulate the coverage of IP telephony like wireline phones or like mobile phones – or possibly some other way? One theoretical solution is to leave VoIP providers lightly regulated, yet still require the traditional phone companies to continue serving anyone who asks. But if VoIP picks off the low-cost urban and suburban markets, leaving the traditional companies with just the expensive rural customers, those customers will pay high rates. Requiring VoIP companies to serve everyone does not work, either; VoIP needs broadband, and providing broadband to remote locations is even more expensive than running wireline service – although ubiquitous broadband service would have a lot of social value. The answer may be a fund that all providers, whether wireline or VoIP, would pay into, and that would subsidize rural and reservation service – somewhat like the present high-cost component of the universal service fund, but with much of the revenue coming from outside the conventional telephone industry.

Multiply this issue by every other facet of telephone regulation. The overall task will be something like updating the rules of the road from horse-and-carriage traffic to modern automobiles.

There is an added complication. Local wireline service is a tough market to get started in, even as a non-incumbent competitive local carrier. Accordingly, there are relatively few companies to regulate. But almost anybody can become a VoIP provider. With cloud services bringing down the costs of entry, VoIP companies are likely to spring up all over. The competition will undoubtedly be good for customers. But for regulators, collecting payments and reports from multitudinous small providers will be a major headache.

Will the FCC regulate the coverage of IP telephony like wireline phones or like mobile phones – or some other way?

Today the states have a large role in regulating local wireline telephone service, but no jurisdiction over the Internet. At first glance it makes little sense to extend or replicate the states' present wireline authority in order to allow them to regulate VoIP – if it is possible at all; a customer with an in-state phone number might actually be far outside the state. But governments do not easily give up their powers, and the states may fight for the right to protect their citizens.

Finally, the current policy of regulating only interconnected VoIP, while leaving non-interconnected VoIP nearly untouched, cannot survive indefinitely. There used to be a marked difference between the two: where interconnected VoIP needed no special skills, the typical non-interconnected VoIP customer was a highly computer-literate person with a headset plugged

into a laptop. But then smartphones appeared. They combined the functions of both the headset and the laptop, while VoIP apps eliminated the need for computer skills. A lot of the people chatting on their phones at Starbucks may well be using VoIP. Many of the apps can dial out to any phone number. But because

they have no number themselves for dialing in, they are deemed non-interconnected, and hence are mostly unregulated. Sooner or later, the providers will work out ways for their customers to call each other without using phone numbers at all. Regulatory efforts that continue to ignore these apps and their providers will miss a large piece of the industry. That will put more of the regulatory burden on interconnected VoIP, which will drive still more users to the non-interconnected apps.

If the FCC wanted to, could it apply full telephone regulation to the non-interconnected providers? Its statutory mandate does not extend that far. Besides, providers could easily locate off-shore, outside the FCC's reach. And even just identifying the myriad of providers and their untold numbers of customers could be a formidable task. Not many people think that completely unregulated telephone service is the right outcome, but we may be heading in that direction at accelerating speeds.

Last year the FCC [heard a high-level presentation](#) on some of these issues. Experiments are planned. It is good to see the FCC getting started. But they sure have a long way to go.



Call completion concerns

Commission Starts to Address Rural Failure(s) to Communicate

By Jamie Troup
troup@fhhlaw.com
703-812-0511

Acting with impressive speed (a mere nine months after issuing the underlying [Notice of Proposed Rulemaking](#) (NPRM)), the FCC has [adopted new rules designed to increase its ability to monitor, and correct, the “frequent and pervasive” problem of failed telephone calls](#) to small towns and rural areas. The new rules mark an important first step toward safeguarding the integrity of our nation’s telecommunications network and protecting the consumer’s right to communicate without service provider interference or intrusion. The FCC has done the right thing, giving priority to the rights of consumers to have their calls completed without interruption or degradation.

The new data collection and reporting requirements – adopted in the face of extensive lobbying by large telephone companies seeking exemptions that would have rendered the new rules useless – should provide the FCC with the tools to uphold the social compact between carriers and consumers. In the words of the new FCC Chairman Tom Wheeler, the Commission is looking to “make networks work for everyone.”

Whom do the new rules apply to? “Covered Providers” – defined here as any provider of long distance voice service that makes the initial long distance call path choice for more than 100,000 domestic retail subscriber lines. So long as the 100,000 line threshold is met, a Covered Provider can be an ILEC, CLEC, interexchange carrier (IXC), CMRS provider, or a voice over Internet protocol (VoIP) service provider – both one-way and two-way VoIP. (Some VoIP providers argued that the FCC didn’t have the authority to impose rules on them; the Commission rejected those challenges.)

Contrary to the FCC’s original proposal, a Covered

Provider can be a reseller (as opposed to the first facilities-based long distance carrier involved in the call). For example, if the first facilities-based IXC that receives a call from the calling party sends all calls to a reseller which decides how to route the call, then the *reseller* is the Covered Provider; in that example, the first facilities-based IXC would not be required to submit the reports.

However, any originating long distance voice service providers that (a) serve more than 100,000 domestic retail subscriber lines, but (b) are not required to file quarterly reports, must still file a one-time letter with the FCC explaining that they do not make the call path choice. The letter must also identify the providers to which they hand off calls. This one-time letter must be filed with the FCC by the time Covered Providers begin to record the required call attempt data; the letter must be served on the provider identified in the letter as having the reporting obligation.

The new requirements should provide the FCC with the tools to uphold the social compact between carriers and consumers.

What will Covered Providers have to do when the new rules take effect? Record, and retain for six months, information about each intrastate and interstate call attempt to a rural incumbent local exchange carrier (ILEC) operating company number (OCN). The information to be recorded includes the identity of any intermediate provider to which a call is handed off, but it does **not** include information regarding call attempts to customers of non-rural ILECs, competitive local exchange carriers (CLECs), commercial mobile radio service (CMRS) providers or VoIP.

On the first day of the month that is at least 20 days after the new rules become effective, Covered Providers must begin recording the call attempt data re-

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quired by the new rules. Once per calendar quarter, they must then electronically file with the FCC a report containing call attempt data for each month in that quarter. (An officer or director of the provider must certify the report's accuracy.) A template of the mandatory report showing the specific data and cause codes that must be reported is attached as Appendix C to the [FCC's Report and Order](#).

To ease the reporting burden, the FCC will itself calculate answer rates from the reported data. (The Commission had originally proposed that the reporting entities should perform those calculations.)

In addition, the FCC adopted a new rule that prohibits any audible ringing from being sent to the caller before the called party has been alerted by the terminating provider.

What safe harbors are available? In its NPRM the Commission proposed two safe harbor provisions which, if adopted, would have exempted most major Covered Providers from the new requirements. In the final rules, the FCC has significantly reduced the scope of one of the proposed safe harbors and has rejected the other. And even carriers qualifying for the single remaining safe harbor will still be required to file quarterly reports with the FCC for one year. Covered Providers that qualify for the safe harbor are also still required to retain information regarding each call attempt to a rural ILEC OCN.

To qualify for the single safe harbor adopted by the FCC, a provider must certify on an annual basis that it either does not use any intermediate provider or that all of its contracts with intermediate providers allow a call to be handed off to no more than one additional intermediate provider. Providers of terminating tandems do not count as intermediate providers. Contracts must permit disclosure of the identity of all intermediate providers to both the FCC and the terminating ILEC.

In addition to this single safe harbor, the FCC also indicated that it will consider waivers of these new rules on a case-by-case basis. A vigilant review of such waiver requests will be necessary in order to avoid

undermining the new rules with widespread exemptions. In the "Further Notice of Proposed Rulemaking" (FNPRM) portion of its order, the FCC also seeks comments on whether it should adopt additional safe harbors.

The Commission declined to adopt its original proposal that would have excluded from the data recording and reporting all call attempts to rural OCNs to which fewer than 100 call attempts were made in a single month. Had it been adopted, that exemption would have left unreported as many as 99 blocked calls to each small LEC exchange in any given month.

The FCC also declined to limit reporting to call attempts made during peak periods. Call attempt information regarding short duration calls must also be recorded and retained. In addition, Covered Providers must include auto-dialer traffic in their recording, retention, and reporting. In the FNPRM, the FCC seeks comments on whether it should require separate reports for auto-dialer traffic.

*The FCC did **not** apply the new reporting obligations to intermediate providers.*

Calls to toll-free numbers and call attempts that are handed back to the upstream provider are excluded from the recording and retention requirements. The FCC also decided not to require recording and retention of post-dialing delay information.

What other changes are in the works? Although most of the rural call completion problems appear to be caused by intermediate service providers, such as least cost routers, the FCC did **not** apply the new reporting obligations to intermediate providers. Instead, in the FNPRM portion of its latest decision, the FCC has requested comments as to whether to impose those obligations on intermediate providers. The FNPRM also requests comments on whether these new reporting requirements should be imposed upon rural ILECs responsible for terminating the calls that are not being properly completed. (The deadline for filing comments is January 16, with replies due no later than February 18.)

What happens next? Once the required reports have been submitted for the first two years, the FCC will

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More 411 on 844

New Toll Free Numbers Up For Grabs as of 12/7/13

By Peter Tannenwald
tannenwald@fhhlaw.com
703-812-0404

If you've got your eye on a vanity toll free telephone number you'd like to use – or if you might want to expand an existing vanity number to include another toll free area code – listen up: New toll free area code 844 has made its debut. And [now the FCC has announced](#) how numbers in that area code will be assigned.

Last summer [we wrote about the new toll-free code](#), which became available at noon (ET) on **December 7, 2013**. At that point area code 844 joined the ranks of 888, 877, 866, and 855, along with the original toll-free 800 code.

All toll free numbers are administered by SMS/800, Inc., which oversees the toll free Service Management System for the North American Numbering Plan. Entities known as “Responsible Organizations” – usually referred to simply as “RespOrgs” – can access the SMS/800 database and reserve particular numbers.

If a subscriber wants a particular toll free number, it contacts a RespOrg, which in turn obtains the number for that subscriber from the database. A RespOrg is not supposed to reserve any number unless the RespOrg is doing so at the specific request of a telephone subscriber.

Anticipating an initial rush for numbers using the new 844 code, the FCC asked for comment on how distribution of those numbers should be handled. Its conclusion: limit each RespOrg to 100 numbers per day for the first 30 days. (The FCC imposed a similar limit when area code 855 first came on line.) After the first 30 days, the usual rule will come back into effect for numbers in the 844 code: like other toll free numbers, they will be assigned on a first-come, first-served basis.

Number reservation is particularly important to companies that use vanity numbers (think 1-800-FLOWERS, 1-800-FLOWERS FREE and the like) for promotional purposes. Whenever a new toll free area

code opens up, it makes sense for such companies to sign up for the same vanity number in the new area code to make sure that no one else grabs it and siphons off business from customers who misdial the toll free code. (Some users have registered their numbers as trademarks, which provides some protection – but trademark registration does *not* protect them from someone else's use of the same number as long as that use is not commercially promoted.)

A coalition of a number of RespOrgs questioned the FCC's distribution plan. “Hold the phone,” they said. (My mother still says “hold the wire,” a phrase from another era.) In their view the 100-to-a-customer limit doesn't really make the 844 numbers available equitably among all RespOrgs because some RespOrgs have “affiliates” with separate RespOrg ID codes. Thanks to such “affiliate” relationships, those RespOrgs get, in effect, 100 daily bites at the apple for each affiliate, obviously an advantage over stand-alone RespOrgs.

Another concern of the coalition: some RespOrgs have direct access to the toll free database through a “Mechanized Generic Interface” which enables them to get their dibs in on particular numbers faster than those who don't have an MGI. That's not fair, according to the coalition.

The FCC did not disagree. But no matter, because the Commission was in a big hurry to get 844 up and rolling since the other toll free codes are running out of numbers. It would take the Commission months, even years, to investigate and address possible RespOrg ID abuses. The FCC wasn't willing to delay its planned December 7, 2013 roll-out – presumably even if such delay might mean some abuses will occur – because doing so would “put unacceptable pressure on toll free numbering resources”.

The Commission was in a big hurry to get 844 up and rolling.

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Turn of the regulatory screw prompts turn of the key

Cell Carriers Agree to Unlock Phones

By Mitchell Lazarus
lazarus@fhhlaw.com
703-812-0440



Last month the FCC had planned to consider a rule that would require cell companies to allow “unlocking” of their phones for transfer to a competing carrier. Unlocking phones used to be legal, until a 2012 ruling by the Librarian of Congress – at the cell companies’ request – [made it a criminal offense](#). The public backlash reached the White House, on whose behalf, reportedly, the [National Telecommunications and Information Administration](#) petitioned the FCC to take the issue away from the Librarian and [make unlocking legal again](#).

On the very day the FCC was to address the matter, the cell companies’ trade association, CTIA-The Wireless Association, [sent a letter to the FCC](#) essentially capitulating. Five major carriers – AT&T, Sprint, T-Mobile, U.S. Cellular, and Verizon Wireless – have now agreed to unlock a phone on request after fulfillment of the (usually) two-year contract required when buying a subsidized phone through the carrier, or within one year of buying a prepaid phone. Matter closed.

Or maybe not.

While a definite improvement, CTIA’s action solves only part of the problem. If I buy a subsidized phone from Carrier A, I certainly owe them two years of payments *on the phone*. But I should be able to keep up just the phone payments, and stop paying Carrier A for service as well, if I want to take the phone to Carrier B for service. CTIA’s position does not allow this. T-Mobile is the only major company so far that properly

separates the phone and service payments. We hope the others follow its lead.

Two additional caveats: First, CTIA’s newly announced policy is *not* yet in effect. According to CTIA, the policy must first be formally adopted into the “CTIA Consumer Code for Wireless Service.” The letter does not indicate how long such adoption might take, but once it’s happened, part of the policy will be implemented within three months and the rest within 12 months. The letter does not indicate which parts are on the three-month fast track and which aren’t.

While a definite improvement, CTIA’s action solves only part of the problem.

Second, CTIA’s letter points out the technical limitations on “unlocking”:

“[U]nlocking” a device will not necessarily make a device interoperable with other networks – a device designed for one network is not made technologically compatible with another network merely by “unlocking” it. Additionally, unlocking a device may enable some functionality of the device but not all (e.g., an unlocked device may support voice services but not data services when activated on a different network).

Most modern smartphones will not be subject to these limitations, as the same hardware will support nearly every carrier almost anywhere in the world. But the possibility remains that an unlocked phone may not work properly on some other carrier’s network. The only way to know is by checking with the destination carrier.



(411 on 844 - Continued from page 10)

The FCC also reminded one and all that its rules forbid reserving a number without an actual customer who has ordered the number, and they forbid the sale of toll free numbers. There has been some enforcement of these rules, although

something of a black market in phone numbers has not been completely snuffed out.

So as of December 7 we were off and running. If you want to reserve numbers in toll free code 844, better get ’em while the getting’s still good.

Clarifies hurdles to be overcome by waiver seekers



FCC Grants, Denies Waivers to EBS Licensees Seeking New Licenses

By Tom Dougherty
dougherty@fhhlaw.com
703-812-0409

The Educational Broadband Service (EBS) was created by the FCC in the 1960s to enable educators to use radio for distance learning and related educational activity. It operates on broad channels within the 2.6 GHz band. It has evolved through a series of FCC rule-makings that have enabled its channels to be leased first for wireless cable use and subsequently for commercial fixed and mobile broadband operations. It should come as no surprise that this flexibility in use has made EBS very popular and valuable.

EBS licenses are normally granted via FCC-scheduled application filing windows. Despite the popularity and value of EBS, the FCC has not opened a window for the filing of applications for new EBS licenses since 1996. The problem in scheduling filing windows arose in 1998, when the FCC decided that 1993 changes to the Communications Act required the FCC to grant mutually-exclusive EBS (then ITFS) applications for new licenses by auction, even though EBS is a noncommercial educational radio service. The FCC and the educational community appear to share the view that auctions are incompatible with maintaining the noncommercial educational character of EBS, but Congress has yet to take action to authorize the FCC to license EBS by means other than auction.

The result has been a *de facto* freeze on the filing of applications for new EBS licenses. Cognizant of the unusual and harmful effects of this unusually lengthy application freeze, the Commission has made some exceptions to this freeze over the last five years to grant some new EBS station applications. In each of these handful of cases, the Commission or the Wireless Telecommunications Bureau (WTB) has waived the freeze to allow the filing and non-auction processing of new EBS license applications in what the applicants have touted as their own unique or special circumstances.

Recently the WTB disposed of six EBS filing freeze waiver requests. The WTB's action on these applications provides insight into its current thinking on the types of proposals that justify waivers and those that do not. (Full disclosure: the author filed one of the applications that

received a waiver and opposed one of the applications that was denied a waiver.)

First, the losers. In [*Indiana State University Board of Trustees*](#), the WTB denied the University's ("ISU") request for a waiver. ISU claimed that the University needed four EBS channels to make broadband access available to students, many of whom live off campus "in places where they do not have access to affordable, consistent or reliable broadband service." The WTB concluded that "ISU persuasively demonstrates that its faculty and students and those of other local institutions would benefit from wireless broadband connectivity." The WTB also concluded that it "could see waiving the freeze..." based upon that showing. But the WTB found that showing, standing alone, to be insufficient to justify waiving an application acceptance freeze

put in place "to ensure an orderly process which gives all eligible educational institutions the opportunity to apply for the EBS spectrum." WTB said that ISU also needed to show that it could not obtain or lease spectrum from other licensees in the area. ISU failed to make this showing. Here 19 EBS or BRS channels were licensed in the area of the campus. Accordingly, ISU did not meet its burden of showing that its situation was "unique or unusual" or "it lacked any reasonable alternative."

A second denial occurred in [*Educational Broadband Corporation*](#). In this case, Educational Broadband Corporation ("EBC") sought a waiver to acquire two licenses, each for four EBS channels in an area where EBC already had four EBS channels. The spectral capacity of the eight existing EBS licenses was leased to commercial broadband access providers. The WTB denied this application, finding that EBS "has not shown an immediate need for the requested spectrum." EBC argued that the area of proposed operations is a depressed, rural area where more than half of the students do not have access to Internet access at home, and must rely upon obtaining that access from schools who are struggling to provide enough capacity to meet the needs of students. The WTB was unimpressed because EBC "already has access to 22.5 MHz of spectrum [*i.e.*, four EBS channels] in

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The problem in scheduling filing windows arose in 1998.



(EBS Waivers - Continued from page 12)

both” areas and EBC is leasing that capacity to a commercial operator. The WTB contrasted EBC’s request with ones that had been granted in the past. Those granted in the past could not gain access to EBS spectrum because none were licensed in the proposed areas of operations, thus precluding the applicant’s access to the spectrum through leasing existing capacity, purchasing the license for an existing station or pursuing a partition or disaggregation of already licensed spectrum. In the WTB’s view, EBC could not claim a need for spectrum for educational purposes when it had diverted its existing educational spectrum to a commercial lease. The EBC application was opposed by EBS interests.

A third denial occurred in [Performance Learning Cooperative](#). In this case, PLC sought the assignment of eight EBS channels in a proposed area of operations that it characterized as broadband starved. PLC told the WTB that it would use the requested channels to create an online classroom and a wireless broadband system, which would be financed and provided by a lease of the requested channel capacity to Utopian Wireless. In denying the application, the WTB said it was not persuaded of the merits of the proposal because there was no commitment as to when the classroom and system would be built. The WTB also looked unfavorably on the plan to finance these educational initiatives through a lease of the spectrum.

Turning to the winners, in [Nisqually Indian Tribe](#) (which involves the application filed by me), the WTB granted a waiver of the filing freeze and granted the Tribe’s request for a license to operate four EBS channels serving the area in and around the Tribe’s rural reservation in the state of Washington. Unlike the situation in [Educational Broadband Corporation](#), the Tribe had no EBS channels. In contrast to the facts in [Educational Broadband Corporation](#) and in [Indiana State University Board of Trustees](#), there were no EBS channels available to the Tribe in the proposed area of operations. Unlike the situation in [Performance Learning Cooperative](#), the Tribe sought the channels solely to meet the educational and cultural development needs of the Tribe and expressly agreed **not** to lease the channel capacity. Finally, the strength of the Tribe’s proposal was greatly enhanced (1) by proposing just an eight mile radius area of operation (or GSA), which would encompass just Tribal land and adjacent areas having Tribal populations, (2) by the lack of any broadband in most of the reservation, (3) by the pending construction of a campus for the Northwest Indian College on the reservation, and (4) by the Tribe’s status as a Native American tribe

with a historical lack of access to robust communications services.

The second grant and the third grant occurred in two cases, each styled [The Board of Trustees of Northern Michigan University \(I and II\)](#). In one of these cases, Northern Michigan University (NMU) sought a single channel to add to the four EBS channels it had received in what was one of the few applications to be granted through the waiver process. NMU supported the request by saying that WiMAX equipment operates on 10 MHz channels, which will allow NMU only to create two 10 MHz channels with its existing 24 MHz of EBS spectrum, thus stranding 4 MHz, unless the WTB gave it access to an additional and contiguous 6 MHz channel, thus allowing NMU to create three 10 MHz WiMAX channels. With three 10 MHz channels, NMU would be able to build 360° cell sites, while with just two 10 MHz channels NMU was restricted to 240° degree coverage at each cell site. The WTB saw the merit in this proposal, and found that it deserved a waiver because there are no other EBS licensees in the area of operation who could provide the needed channel.

The WTB is very leery of lessee-driven proposals

In the other NMU case, NMU sought a waiver and a license for all of the remaining EBS channels to be deployed in Marquette, Michigan. This application request is by far the boldest yet proposed, at least in terms of channel capacity. In granting this application, the WTB focused upon the low population density of the area and the facts that: NMU had deployed its preexisting EBS channels; NMU would put the additional spectrum to use immediately; and there was not only no other EBS spectrum licensed in the area, but not even any cable and telephone company Internet access service in the area. Finally, the WTB emphasized that a key to its decision was the commitment of NMU not to lease the spectrum.

What lessons can we derive from this series of decisions? First, the WTB is very leery of lessee-driven proposals. The WTB recognizes that there are many prospective EBS applicants waiting for the opportunity to obtain channels to serve educational needs who will not have an opportunity to obtain channels before the application freeze is lifted and will not accept a proposal where a large part of the spectrum will be diverted to commercial use.

Second, the absence of existing EBS channels in the area of operations is very important to a waiver request. If there are existing alternatives, then the FCC will want the waiver proponent to explain why those alternatives are

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Leaving no stone unturned

Quest for Data on Special Access Market Leads to Major New Reporting Chores

By Brad Ham
ham@fhhlaw.com
703-812-0417

The FCC has recently adopted [mandatory reporting requirements for providers and purchasers of special access service](#) through their *Special Access Order*. The Commission's goal is to use the information to "evaluate competition in the marketplace" and "advance the public interest goals of just, reasonable, and nondiscriminatory rates" for consumers. However, the scope of the data collection is so large that it will likely impose tremendous costs and burdens on small wireline and wireless carriers.

Before we get into the new requirements, a bit of background may be helpful. Over two decades ago, the Commission implemented a system of price cap regulation for the nation's largest local exchange carriers (LECs). The price cap regulation unduly interfered with competition in the marketplace, and the Commission adopted a plan to move toward a more market-based approach. In 2000, the Commission adopted the *Pricing Flexibility Order* that permitted price cap LECs to raise or lower their rates throughout an area, but required that they maintain generally available price constrained tariff rates in order to protect consumers who lacked competitive alternatives. In the years following the *Pricing Flexibility Order*, industry consolidation, as well as other competitive and regulatory developments in the special access market, caused the Commission to revisit its rules once again. Finally, in August, 2012, the Commission temporarily suspended its pricing flexibility rules, and decided to use data collection to determine what should be done to maintain competition in the special access marketplace.

Now, the FCC is mandating that all providers and purchasers of special access services comply with the data collection. The term "provider" includes incumbent

local exchange carriers (ILECs), competitive local exchange carriers (CLECs), interexchange carriers, cable operators and wireless providers. A colossal amount of information is required from these entities, and determining exactly what information is required is a complex task in and of itself. The data collection questions alone span more than 25 pages. Filing entities must include detailed information regarding their traditional special access service (DS1s and DS3s), packet-based dedicated service, and best efforts business broadband Internet Access service (there is a small exception for carriers with fewer than 15,000 customers who do not have to submit best efforts broadband information). Wireless carriers are required to provide the location of mobile provider's cell sites and connections to those sites. Other information regarding market demand, market conditions, and pricing decisions is also required.

While the FCC clearly seems set on imposing the reporting requirements, those requirements are *not* yet in effect. They constitute new "information collections", so they must first be approved by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA). In the first phase of the PRA process last spring, a number of parties advised the FCC that the reporting chores would be far more time-consuming and burdensome than the FCC seems to believe. The same or other parties may tell OMB the same thing. Whether such contrary input might result in changes to any of the reporting requirements remains to be seen. In any event, the reporting chores will not become effective until OMB has approved them and the FCC has reported that approval in a notice in the Federal Register. Check back at CommLawBlog.com for updates on that.



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not available to it.

Third, opposition to a waiver request from the EBS community is very detrimental to the chances of success of the waiver request.

Finally, one can reliably predict which waiver requests will fail and which will succeed. In each case where the applicant prevailed, the proposal appeared to arise from a *bona fide* educational institution's real and pressing need

for channel capacity that it could not otherwise meet, and where no other avenues of providing the broadband service existed. In those instances in which the applicant failed, the proposal appeared to be motivated more by commercial interests than by service to students.

We expect to see more EBS application waiver requests, as there is no presently-announced plan to open an EBS application window. One would hope that the new applicants for waivers will learn from these six decisions.



(911 Service Requirements - Continued from page 2)

such as call routing, ALI [automatic location information], ANI [automatic number information], or the functional equivalent of those capabilities, directly to a PSAP, statewide default answering point, or appropriate local emergency authority, or that operates one or more central offices that directly serve a PSAP.” PSAPs themselves are **not** subject to the new requirements.)

In its [Report and Order](#) (R&O), and in the rules adopted in the R&O, the Commission spells out in considerable detail the steps that SSPs will be required to take. They include:

- annual audits of the “physical diversity of critical 911 circuits or equivalent data paths to each PSAP they serve” (accompanied by certain prophylactic measures, depending on the results of the audits);
- provision of specified levels of “sufficient, reliable backup power” tested to manufacturers’ specs; and
- annual audits of the physical diversity of the “aggregation points” in their networks (again accompanied by appropriate prophylactic measures). (The aggregation points here are those used “to gather network monitoring data in each 911 service area and the network monitoring links between such aggregation points and their [network operations center(s)]”).

Each covered SSP will be required to submit an annual certification that it has, in fact, completed all those chores. If an SSP believes that any of the nitty gritty details specified by the Commission are not necessary for that SSP’s particular situation, or if the SSP believes that some alternative approach may be sufficient, the SSP will have to spell that all out in the certification. Any certification that includes such non-conforming provisions will be subject to more detailed review by the Public Safety and Homeland Security Bureau, which will have considerable latitude in evaluating such non-conforming provisions and, in some instances, ordering “remedial action”.

The certification will have to be signed by a corporate officer “responsible for network operations in all relevant service areas”, somebody with “supervisory and budgetary authority over [the SSP’s] entire 911 network.” The goal here is to insure that the top brass in the SSP organization are attuned to the seriousness of 911 reliability so that they make it a corporate priority. To prevent certifying officials from claiming that they

were kept in the dark by their underlings, the certification will also have to “reflect the existence of internal controls sufficient to ensure that the certifying official has received all material information necessary to complete the certification accurately.”

Only the certification will have to be filed with the FCC, but the SSP will still have to maintain backup data supporting each certification for two years after the filing.

In addition to the new requirements, the Commission has also tightened up SSP obligations in the event of an outage. Now, SSPs will be required to provide detailed notification to affected PSAPs of outages within 30 minutes of discovery of the outage, with follow-up notifications within two hours of the initial contact.

The new substantive rules are set to take effect 30 days after the R&O is published in the Federal Register. When that effective date arrives, the various chores that were previously only voluntary will become mandatory right away. However, the certification requirement constitutes a new “information collection” and, thus, will have to be run through the standard Paperwork Reduction Act drill at the Office of Management and Budget before it can take effect. Because of that, and because some of the underlying chores (e.g., circuit diversity audits) will take time

to implement, the Commission has specified that the first full annual certifications will be due **two years after the effective date** of the underlying rules. Check back with [CommLawBlog.com](#) for updates on that front.

The R&O was not adopted unanimously. The Republican Commissioners – [Ajit Pai](#) and new arrival [Michael O’Rielly](#) – both dissented. While they both agree that SSPs need to be more effectively monitored, they feel that the imposition of mandatory measures is unnecessarily intrusive and burdensome and will ultimately impose additional costs on PSAPs, to whom the SSPs will pass along their own compliance costs. Both dissents expressed their respective author’s (a) preference to achieve unanimity among the Commissioners and (b) disappointment at having their suggested alternatives rebuffed by the majority. For an agency which has historically prided itself on the collegial and consensus-based nature of its day-to-day workings, a 3-2 decision in the earliest days of Tom Wheeler’s chairmanship is something of a surprise and disappointment. It’s probably too early to say for sure whether this is an aberration or the sign of a new age of dissent at the Portals. Stay tuned.

SSP obligations in the event of an outage have been tightened up.



(Cell Phones on Airplanes - Continued from page 1)
 issues of radio interference resolved, a majority on the Commission feel it is time to back off. Their recently issued [Notice of Proposed Rulemaking](#) would drop the current prohibition against phone use at altitudes above 10,000 feet, leaving each individual airline to make the call (so to speak) on its passengers' cell phone use.

The mere elimination of the prohibition would not, of course, require airlines to allow passengers to use their phones. Moreover, the airlines would have some flexibility in what services their passengers can use. For example, an airline could program the equipment to allow the use of 3G and 4G data services while blocking voice calls.

In addition to eliminating the existing prohibition, the NPRM proposes two other sets of changes. One would establish technical requirements and a licensing program for the on-board base stations. Any airline wishing to provide airborne mobile service would have to install and operate what the FCC calls "Airborne Access Systems" in its planes. These would consist of hardware and software that enable passengers to use their phones, and also enable the airline to manage services on the plane. Airlines will need FCC licenses to operate the Airborne Access Systems. Those flying internationally already have individual FCC licenses, which must be modified to cover cell operations. Domestic-only airlines, whose aircraft radio equipment can otherwise be "licensed by rule," will need individual licenses for the on-board cell equipment.

The other changes would make the rules uniform across all frequency bands that provide cell and cell-type service, beyond the existing prohibition on the 800 MHz frequencies that served 1980s-era cell phone systems. The FCC has since authorized cell-like operation on other frequencies that provides services essentially indistinguishable from 800 MHz services, plus data services in several other bands. The NPRM pro-

poses that Airborne Access Systems be permitted – but not required – to operate across all bands accessible by mobile devices.

Will the terrestrial cell carriers go along? To communicate with people's phones, the aircraft-borne base stations will have to use the same frequencies that are already licensed to AT&T, Verizon, and others that provide service to the phones on the ground. The FCC says the proposed airborne operations will not impair ground-based operations, and so will not infringe on the carriers' license rights. The carriers challenged this same reasoning once before, [and lost](#). They may try again. Or, seeing that the proposed regime would have passengers' phones "roaming" while in the sky, the carriers might prefer to let the rule changes go forward so as to charge roaming fees.

The two Republican members of the Commission dissented. They are concerned about the airborne base stations intruding on the carriers' licenses. They ask how an airline can be licensed to provide cell service without becoming subject to the full range of wireless-phone-company regulations. They wonder whether the proposed rules might make it easier for terrorists to coordinate in-flight attacks. And they side with the flight attendants who predict higher incidences of air rage.

The FCC notes that the airborne cell phone equipment may separately be subject to FAA safety regulation. But the FAA may go farther. On the same day that the FCC voted to adopt the NPRM, U.S. Secretary of Transportation Anthony Foxx announced that his department will begin a [process to look at the possibility of banning in-flight calls](#).

Comment due dates for the FCC proceeding are not yet available. But you don't have to wait; you can tell the FCC what you think right now. Just browse to [this link](#) and submit in Docket No. 13-301.



(Rural Call Completion - Continued from page 9)
 analyze them and release the results (although only aggregate data will be disclosed). Covered Providers will be able to ensure that their respective reports will be kept, at least initially, confidential simply by requesting such treatment. (The Wireline Competition Bureau will issue a public notice instructing filers how to do this.) This approach is considerably more streamlined than

the ordinary process for requesting confidentiality set out in [Section 0.459 of the rules](#). However, if the Commission receives a request for public release of a particular report (or decides on its own to propose such release), the reporting entity will be required to jump through the Section 0.459 hoops, which require extensive explanations justifying confidentiality. After three years, the FCC will initiate a proceeding to deter-

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(DISH Waiver and Extension - Continued from page 1)

Although DISH's AWS-4 license and the procedures applicable to the upcoming H Block PCS auction have nothing to do with 700 MHz interoperability, DISH managed to extract two additional important concessions from the Commission in the course of the interoperability deal making: (a) it would be granted a waiver that would permit it to change the current uplink band of its AWS-4 license to downlink at its own election, and (b) it would be granted an extension of time to build out its AWS-4 facilities. DISH promptly filed a petition on September 9 seeking the relief the FCC had agreed to, the Commission immediately put it on public notice, giving interested parties a scant 17 days to comment, and on December 20 the Commission duly and formally granted the requested relief. Why the haste? DISH had required the FCC to grant its petition no later than 30 days before the scheduled H Block auction or the deal was off. With the auction scheduled for January 22, the FCC needed to act fast, and it did.

The FCC guaranteed itself a successful auction by skewing it at the outset.

So what was in it for the FCC? Unlike the original creation of the AWS-4 licenses, which was a pure gift, this gift had a string attached. DISH had to agree to bid at least \$1.5 billion in the H Block auction. Such a bid would ensure that the FCC would haul in a hefty sum which would go toward funding the First Net public safety licensee under the terms of the H Block auction. So the FCC guaranteed itself a successful auction by skewing it at the outset. Of course, if DISH outbids all other bidders in the auction based on its committed bid, it will have acquired 10 MHz of spectrum nationwide, in addition to the waiver and extension it wanted for its AWS-4 license. If it is outbid, it will have obtained an extremely valuable waiver and extension for nothing. Not a bad deal. And if DISH for some reason changes its mind about bidding now that it knows who the bidders in the auction are, it can always walk away from the deal by simply not bidding the requisite amount in the auction. Sweet.

What exactly did DISH get by the waivers? First, it got a one-year extension of time to complete the final build-out of its AWS-4 system – from seven years to eight. This was unusual since DISH has not made the slightest effort to begin construction of its network. It had committed, at the

time it got its AWS-4 authorization, to “aggressively build out a broadband network,” a commitment which the FCC declared that it expected DISH to meet. Yet one year and no construction later, both parties have slinked away from their declarations. Second, and more importantly, DISH got the right to flip the AWS-4 band which is immediately adjacent to the H Block from uplink – as required by the rules – to downlink. It can make this election over the next 30 months. This flexibility permits it to determine whether it can acquire uplink spectrum from other sources (such as the LightSquared bankruptcy) and then put this AWS-4 spectrum to more efficient use. (DISH's bid for the LightSquared spectrum has since been withdrawn, according to reports, so it will have to look elsewhere for such spectrum. Fortunately it has 30 months to do so.)

The grant of this uplink/downlink waiver was unusual in a couple of respects. The technical configuration of the AWS-4 band and the interference protections associated with it were the subject of prolonged wrangling at the FCC in the course of the AWS-4 rulemaking. That the FCC was able to jettison all of that analysis and its associated public interest determinations in a matter of weeks shows you how persuasive \$1.5 billion can be. By giving DISH the right to flip or not flip this band, the Commission also gave it a large advantage in the H Block auction. Everyone agrees that the usage of the band adjacent to the H Block will affect the value of the H Block since interference protection measures will or will not be required. But only one bidder, DISH, will know what the value is since it unilaterally controls a key variable.

The author should acknowledge that he has opposed the cornucopia of favors the FCC has bestowed on DISH, but in particular there is something fundamentally troubling about a federal administrative agency taking money in exchange for indulgences. That the money will ultimately go to promote public safety is no more exculpatory than the mayor of Atlantic City in “American Hustle” insisting that the cash he took was all to create jobs and infrastructure in his city. Once public interest determinations become dependent on how much money is paid to the agency in exchange for a favorable ruling, the integrity of the process is inevitably compromised.

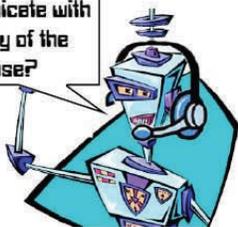


(Rural Call Completion - Continued from page 16)

mine whether the reporting requirements should remain in effect or be changed. (The FCC rejected a specific sunset date for automatic expiration of the rules.)

There is room for improvement to the new rules – for example, intermediate providers could be required to file reports – but the FCC's Report and Order still marks an important step forward toward identifying, and ultimately eliminating, the sources of call completion problems plaguing rural areas.

Good evening, may I communicate with the lady of the house?



Prior written consent requirement not in effect

FCC to Telemarketers: Get It In Writing!

By Paul J. Feldman
feldman@fhhlaw.com
703-812-0403

If you're a for-profit company that engages in or relies on telemarketing, BEWARE! Rule revisions [adopted by the FCC nearly two years ago](#) have recently [taken effect](#). Those revisions, adopted pursuant to the Telephone Consumer Protection Act (TCPA) impose significantly tighter restrictions on certain telemarketing activities. Since the number of potentially expensive TCPA-based law suits targeting telemarketers continues to grow, everyone involved in such activities should pay close attention to the revised requirements.

The TCPA, enacted more than two decades ago, is Congress's effort to protect consumers from unsolicited telephone and fax advertising. The particular TCPA-based rules at issue here involve: (1) autodialed or pre-recorded telemarketing calls to cell phones; and (2) telemarketing calls, to any residential line, using an artificial or prerecorded voice. Historically, both types of call have been permitted under certain limited circumstances. The new rules tighten up those limited circumstances considerably.

First things first. What is "telemarketing?", you ask. The FCC defines it (in [Section 64.1200\(f\) of the rules](#)) as

the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

Some telemarketing calls, often referred to as "robocalls", are made using automatic dialing equipment (autodialers); some may include prerecorded or artificial voices. With few exceptions, all telemarketing calls require some form of consent on the part of the party being called.

Telemarketing to cell phones and prior express

WRITTEN consent. Prior to October 16, 2013, if you wanted to deliver a telemarketing call or text to a cell phone using an autodialer or prerecorded/artificial voices, the FCC's rules required you only to have "prior express consent" from the party called. (That's the same level of consent required for *non*-telemarketing calls.) As of October 16, though, "prior express **written**

consent" is now required for any such telemarketing calls to cell phones.

The FCC's insistence on **written** consent is a major change. Just what is "prior express written consent"? It's a written (naturally) agreement that:

- ✍ contains the signature of the person to be called;
- ✍ includes the specific phone number to which the person authorizes calls; and
- ✍ explicitly authorizes the use of an autodialer and/or artificial/pre-recorded voice to deliver telemarketing calls or text messages to the consumer.

*The FCC's insistence on **written** consent is a major change.*

In addition, the written agreement must contain a "clear and conspicuous disclosure" informing the person signing that he or she is not required either to sign the agreement (directly or indirectly), or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

While a handwritten signature can fulfill the requirements of the new rule, any electronic or digital form of signature recognized under state or federal law will also do the trick – so signatures may be obtained via email, website form, text message, telephone keypress, or voice recording.

It is important that written agreements be properly drafted to protect those who engage in or utilize telemarketing. In any litigation alleging a violation of the TCPA, the telemarketer bears the burden of proving that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained. Once a written document reflecting such disclosure and consent is in hand, telemarketers should be sure to retain copies in order to demonstrate consent should the need arise.

Calls to residential numbers and the loss of the established business relationship exemption to the consent requirement. Since 1992 the FCC has permitted prerecorded telemarketing calls to residential lines with-

(Continued on page 20)

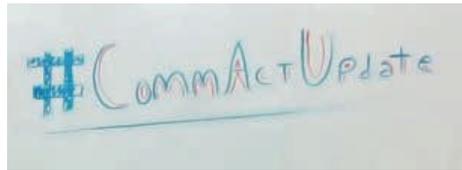
Probably no need to hold your breath

Comm Act Overhaul Underway . . . Sort of

By Howard M. Weiss
weiss@fhhlaw.com
703-812-0414

It's generally acknowledged that the Communications Act – first enacted four score years ago and not substantially updated in nearly 20 years – is ill-suited for regulation of the 21st Century communications landscape. And now two well-placed members of Congress have announced the start of an effort to update the Act and perhaps restructure the FCC itself.

Given the prominence of the folks making that announcement, anyone subject to the FCC's regulatory reach should pay attention. But before you get overcome with visions of sweeping change just around the corner, it's important to temper your expectations with a healthy splash of reality: any significant change to the Act that may occur isn't likely to happen in the immediate future, if at all.



The two gentlemen responsible for the latest initiative are Fred Upton (R-MI) and Greg Walden (R-OR), the Chairs of, respectively, the House Energy and Commerce Committee and that Committee's Communications and Technology Subcommittee. You can see them explain their plans in [a 13-minute video posted on the Committee's website](#). To summarize: Noting that (a) the FCC first opened its doors in the Great Depression and (b) the last time the Act was amended, 56 kb/s by dial-up modem was the state of the art, Upton and Walden sensibly feel that it's time to talk about an update.

The emphasis, though, is more on the “talk” part than the “update” part.

Rather than advance any proposals, specific or otherwise, they advise that they are “prepared in essence to talk about a launch of a number of hearings”. That suggests that they're at least four long steps away from any actual legislation, since they are (1) “prepar[ing]” to (2) “talk about” (3) “a launch” of (4) “hearings” – all of which would have to occur before any amendment could occur. They also plan to generate a

“number of white papers examining a whole number of different issues”.

The goal of all this is to “begin to actually launch an update beginning in 2015”. So the actual “launch” of any actual legislative activity is at least a year away. And since all Members of the House face elections in the meantime, it's pretty clear that the 2015 date is optimistic, to say the least.

And did we mention that Messrs. Upton and Walden are both Republicans? While Democrats – and anybody in the Senate, for that matter – may very well share the Upton/Walden view that a revised Act is desirable, it's not

entirely clear how many of their colleagues on Capitol Hill support the Upton/Walden effort. The Energy and Commerce Committee website now features [a “one-stop-shop” for information](#) about “the committee's plans for a #CommActUpdate”, but there's no evidence currently on that site reflecting any formal Committee action.

The site does include a link to the first promised white paper. Running three pages (not including a number of questions, described below) and titled “Modernizing the Communications Act”, the white paper is essentially a historical outline of the evolution of communications regulations since 1934. It points out that, besides the 1996 overhaul of the Act, other efforts to modify the Act have been piecemeal and, like the Act itself, segmented (or, to use the white paper's term, “siloeed”) according to technological sector – e.g., telephone, cable, broadcast. While that approach made sense in the beginning, it doesn't work as well in the modern era of convergence and “intermodal competition”.

Of course, none of this is a surprise to anyone who has observed the communications industries for very long. But the process of change has got to start some-

(Continued on page 20)



(CommActUpdate - Continued from page 19)
where.

Perhaps best illustrating the very long road ahead for this project are the questions which the white paper poses for “stakeholder comment”. They include such fundamental, open-ended queries as:

- ? Around what structures or principles should the titles of the Communications Act revolve? What should a modern Communications Act look like?
- ? How should the structure and jurisdiction of the FCC be tailored to address systemic change in communications?
- ? How do we create a set of laws flexible enough to have staying power in the face of rapidly evolving technology? How can the laws be more technology-neutral?
- ? Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

Obviously, we’re starting at the very, very beginning.

While the Upton/Walden announcement – and related website, Twitter feed and white paper – seem sincerely aimed at starting an important inquiry, there are at least some indications that the effort may be less serious than it

appears. Take, for example, the “#CommActUpdate” legend scrawled on the white board behind Upton and Walden in their video. (See graphic, above.) It looks more like a high schooler’s graffiti than the emblem of a landmark Congressional initiative.

Another example: While the white paper invites comments about any or all of the sprawling questions that it asks, the deadline for those comments is January 31, 2014 – barely three weeks after they were first announced. Such an appallingly abbreviated turn-around time for comments on such vast and – thus far, at least – unanswerable questions seems to send the wrong message. (Anyone who decides to take a crack at responsive comments should send them to CommActUpdate@mail.house.gov.)

An interesting question for broadcasters is what might emerge from a re-write of the Act by a Congress and FCC plainly focused on the telecommunications industry, not broadcasting (which, we all must admit, is viewed in some quarters as a fossil technology). Some hope on this score is offered by the involvement of Walden, who is a prominent former broadcaster. But he doesn’t dwell on broadcasting’s virtues in the posted video, or suggest how it might be regulated, or deregulated, in an overhaul of the Act.

A lot of roadblocks to the modernization effort remain on the road to the promised land. Perhaps the trip has started; perhaps not. Check back here for updates.



(Telemarketers—Get it in Writing! - Continued from page 18)

out the need for additional consent **provided that** the caller had an established business relationship (EBR) with the consumer. However, in 2008, the Federal Trade Commission – which shares jurisdiction over such things with the FCC – eliminated its own EBR safe harbor. Now, to conform its approach to the FTC’s Telemarketing Sales Rule, the FCC has amended its corresponding rule to require **prior express written consent** for prerecorded telemarketing calls to residential lines **even where** the telemarketer and called party have an EBR. The term “prior express written consent” here requires the same components described in the preceding section.

What about previously obtained consent? Because the new FCC rules impose new requirements on these types of telemarketing calls, any consent previously given by a consumer may have to be revised to meet the new standards if the telemarketer wishes to continue making such calls to that consumer. Ironically, telemarketers will have to be careful not to violate the new rules in the process of contacting consumers to obtain new consents.

The penalties for noncompliance. The FCC can impose monetary forfeitures of up to \$16,000 for each violation of its TCPA rules (with a statutory maximum of \$122,500 for any single continuing violation). Perhaps more ominously, the TCPA also provides a private right of action for consumers to sue in state or federal courts. In other words, each and every person on the receiving end of a telemarketing call for which the telemarketer cannot demonstrate “prior express written consent” can sue for actual monetary damages or statutory damages of \$500 per call (and up to \$1,500 per call for “willful” violations). And don’t think that such suits are unlikely: class action suits alleging hundreds or thousands of violations (with aggregate claims easily in the six or seven figures) are something of a “growth industry” among some enterprising plaintiff’s attorneys.

Anyone engaging in or utilizing telemarketing practices should review their procedures and documentation to confirm that they are in full compliance with all governmental rules. Failure to do so could be bad news in the event of FCC enforcement action and civil litigation. Review of those procedures and documentation with counsel could also prove to be helpful.

Net Neutrality 2014

D.C. Circuit Tosses Most of the FCC's "Open Internet" Rules

By Paul J. Feldman
feldman@fhhlaw.com
703-812-0403



In the war over how, if at all, the Internet will be regulated, a major battle has been decided. Both sides can claim victory to some degree, but no knockout punch was landed: the war wages on.

The [U.S. Court of Appeals for the District of Columbia](#) has struck down the core “anti-blocking” and “anti-discrimination” elements of the FCC’s Open Internet rules. At the same time, the Court agreed with a crucial aspect of the FCC’s strategy: the Court held that the FCC *does* have the authority to regulate Internet traffic management under Section 706 of the Communications Act. While that affords the Commission at least a ray of hope going forward, how the FCC might utilize that authority remains to be seen.

The FCC now has some choices to make as it contemplates its next step. In the meantime, broadband Internet Service Providers (ISPs) will be able to experiment with new traffic management techniques and business models.

In late 2010 the FCC adopted its “Open Internet” rules. The Commission was concerned that Internet service providers (ISPs) could, in the position of “gatekeepers” controlling access to the Internet, unfairly bar some Internet content providers (edge providers) or at least disadvantage some edge providers relative to others. Accordingly, to assure a level Internet-access playing field, the FCC stepped in, adopting three primary measures:

- ❖ A prohibition against blocking of content, applications, services, or non-harmful devices, applied to both fixed and mobile ISPs (the “Anti-Blocking Rule”);
- ❖ A prohibition against “unreasonable discrimination” among lawful network traffic, applied to fixed ISPs only (the “Anti-Discrimination Rule”); and
- ❖ Mandatory requirements for ISPs to disclose transmission performance and traffic management practices to end users, applicable to both fixed and mobile providers (the “Transparency Rule”).

“Fixed” ISPs here include telephone, cable, and fiber

wireline providers, and also satellite and wireless ISP service to particular premises.

ISPs would still be permitted to undertake “reasonable management” of traffic on their networks to remedy congestion or prevent spamming. However, the FCC made clear that anti-competitive behavior would likely be deemed unreasonable under any circumstances. Such behavior could involve, for instance, offering to let an edge provider pay the ISP to prioritize delivery of its content to end users, or hindering services that compete with some other part of the ISP’s business.

For a more detailed discussion of what the FCC did in 2010, read [our post on CommLawBlog.com here](#).

The FCC now has some complex choices to make.

The Commission asserted that [Section 706 of the Communications Act \(47 U.S.C. §1302\)](#) authorizes it to regulate along these lines. Unfortunately for the

FCC, its previous claim that Section 706 gave it that authority had run aground in the same court.

In 2008, reacting to attempts by Comcast to limit consumer use of peer-to-peer transmissions, the Commission declared such activities contrary to federal policy. The FCC said Section 706 gave it the authority to take that step. In its 2010 decision in [Comcast Corp. v. FCC](#), however, the D.C. Circuit disagreed, holding that the FCC failed to demonstrate that it had the statutory authority to regulate Internet network management practices.

Several months later, in response to the *Comcast* decision, the FCC issued its Open Internet rules, relying on a revised rationale regarding its statutory authority under Section 706 of the Communications Act. That FCC action was the subject of the Court’s most recent decision.

As it had in its 2008 *Comcast* ruling, the FCC relied heavily on Section 706 as the jurisdictional basis for its Open Internet rules. [Section 706\(a\)](#) generally urges the FCC to “encourage” the deployment of “advanced telecommunications capability” (*i.e.*, broadband capability) by

(Continued on page 22)



(New Neutrality Tossed - Continued from page 21)

using various regulatory or de-regulatory measures to promote competition or remove barriers to infrastructure investment. [Section 706\(b\)](#) requires the FCC to conduct inquiries concerning the availability of advanced telecommunications; if it finds service is not being deployed in a timely manner, it must “take immediate action” to accelerate deployment by removing barriers to infrastructure investment and promoting competition in the telecommunications market.

In the Open Internet Order, the FCC found that broadband Internet was not being deployed in a sufficiently timely manner, and that enactment of Open Internet rules would promote competition and accelerate deployment through a “virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.”

Challenging the Open Internet rules, Verizon argued that Section 706 was merely a statement of policy, not a substantive grant of authority to enact rules. Indeed, the FCC had asserted that same position back in 1998, a fact that came back to haunt it in the *Comcast* case: observing that the Commission had not even questioned, let alone overruled, its 1998 interpretation of Section 706, the *Comcast* Court held that Section 706 as interpreted by the FCC did not give the agency the authority to regulate Comcast’s behavior.

Having lost the *Comcast* decision on the basis of its earlier reading of Section 706, the Commission took another look at the statute in its 2010 Order, and lo and behold, concluded that Section 706 in fact did grant substantive authority to the FCC! And this time around, under established case precedent directing courts to defer to an agency’s reasonable interpretation of an ambiguous statute, the Court concurred: the Commission could change its mind, turn its back on its 1998 interpretation of Section 706, and now find that that section does indeed constitute a grant of authority to impose some Internet regulation.

The Court warned, however, that that the FCC’s authority is limited. First, the Commission may regulate only the “wire” and “radio” aspects of Internet communications, *not* the *content* of Internet transmissions. In addition, any FCC regulation of the Internet must have the

sole purpose of encouraging reasonable and timely deployment of “advanced telecommunications services” (*i.e.*, broadband). Nevertheless, the Court found that the FCC’s “virtuous circle” theory supported the use of Section 706 authority to enact *some sort* of Internet traffic management rules.

So far, so good for the FCC, right? Not so fast.

While the new interpretation of Section 706 generally authorizes the FCC to enact *some* rules, it does *not* permit the Commission to enact *some* rules that contravene *other* provisions of the Communications Act. [Section 153\(51\) of the Act](#) states that “providers of telecommunications services” may be treated as common carriers *only to the extent* that they are providing telecommunications services. But the Court found that the Anti-Blocking and Anti-Discrimination Rules treated Internet service like common carriage. This is a major problem for the

FCC because a decade earlier the Commission changed the classification of broadband Internet service, labeling it an unregulated “information service” and *not* a common carrier telecommunications service. And if broadband Internet service is not a common carrier telecommunications service, the Act says that it cannot be subjected to common

carrier regulation – including the Anti-Blocking and Anti-Discrimination Rules.

Whoops.

The FCC tried to argue that its Open Internet rules did not impose common carrier obligations, but the Court wasn’t buying it. Rather, the Court held that the Anti-Blocking and Anti-Discrimination Rules are barred by the Act. (Generously, the Court found that the Transparency Rule could be “severed” from the other Open Internet rules and, because that rule does not regulate ISPs like common carriers, it can stand.)

So where does the FCC go from here?

Chairman Wheeler now has a chance to establish his own legacy on Net Neutrality. His comments on Net Neutrality have been ambiguous: [he has expressed willingness](#) to allow some level of pricing experimentation by ISPs, but in response to the recent court decision he stated that [he is considering a court appeal](#) of the Circuit’s order.

So where does the FCC go from here?

(Continued on page 23)



(Net Neutrality Tossed - Continued from page 22)

Taking the Open Internet litigation to the next level – either by a petition for rehearing (whether to the three-judge panel or to the D.C. Circuit *en banc*) or by a petition for certiorari to the Supreme Court – presents risks. While the FCC might hope for a ruling that its Anti-Blocking and Anti-Discrimination Rules do *not* amount to common carrier regulations, such a result does not appear likely. And, by seeking review of the Circuit’s decision, the FCC would risk a reversal of the valuable holding that Section 706 gives the FCC some degree of substantive regulatory authority. (That is a non-frivolous risk: Judge Silberman, dissenting in part from the Circuit’s decision, opined that the FCC had *not* made a sufficient case for substantive Section 706 authority.)

From a practical perspective, the appeal process is not a quick one. An appeal would prolong the uncertain status of the Open Internet rules, contrary to the FCC’s years-long effort to resolve that status.

A more attractive option for the FCC might be to try to craft new Open Internet rules. The Circuit has now given the FCC some clues as to how that might be done. For example, a more robust opportunity for ISPs to engage in “reasonable network management” might reduce the common carrier like impact of the Anti-Discrimination Rule. The Anti-Blocking rule might be more difficult to preserve in any form. The Court did suggest that a rule requiring ISPs to provide a certain minimal level of service to all edge providers, while allowing individual bargaining to charge others for a higher level of service, might pass muster. That, however, would require elimination (or at least substantial modification) of the Anti-Discrimination Rule.

A simpler alternative for the FCC could be to re-classify

What can we expect from ISPs?

broadband Internet service as common carriage. However, any such attempt would trigger aggressive opposition from ISPs, from many members of Congress, and from Commissioners [Pai](#) and [O’Rielly](#), both of whom urged their colleagues to accept the Circuit’s decision and get out of the Net Neutrality business.

In the meantime, what can we expect from ISPs?

At least for now, the Anti-Discrimination and Anti-Blocking rules have been vacated by the Court and, in effect, no longer exist (except for Comcast, which committed to follow those rules through 2018 as a condition of approval of its merger with NBC). As a result, most ISPs are free to begin experimenting with “two-sided” business models in which ISPs might boldly begin offering paid prioritization to edge providers. (One possible model: AT&T Wireless’s recently announced plan by which edge providers can sponsor free data downloads to end users.) The market may well reveal whether such prioritizations have a pro- or anti-competitive effect, or both.

But moderation would be a wise approach in any new traffic management or business models, and statements from the major ISPs reflect their understanding of that. Seemingly abusive or blatantly anti-competitive practices could trigger negative reactions from consumers, who have strong feelings about their Internet service. Similarly, such practices could trigger enforcement actions from the Department of Justice (perhaps invoking the anti-trust laws) or the Federal Trade Commission (acting to end unfair or deceptive trade practices) or state regulators.

The Net Neutrality war continues. Check back with [CommLawBlog.com](#) for updates.



(Incentive Auction Date Moved - Continued from page 3)

of having all processes up and running *before* the auction commences. To that end, he assures us that the Commission will “check and recheck the auction software and system components against the auction requirements, and under a variety of scenarios replicating real life conditions”. And it will conduct “several software demonstrations” in addition to its routine “mock auction”. His bottom-line promise: “Only when our software and systems are technically

ready, user friendly, and thoroughly tested, will we start the auction.”

Chairman Wheeler’s commitment to getting things right is reassuring, and his willingness to move the date back into 2015 seems to be a practical manifestation of that commitment. That’s good (although it’s hard to imagine that anyone realistically thought a 2014 auction was ever in the cards). But we all have a very long way to go before the incentive auction can happen. Let’s hope that he sticks with that commitment for the duration.