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FHH TELECOM LAW

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80 prospective bidders in the wings

The AWS-3 Auction Finally Settles into Shape

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With the time to throw in their antes fast approaching, 80 bidders can now start to anticipate the thrill of actually bidding in the AWS-3 auction, which is currently scheduled to begin on November 13. Every FCC auction seems to take on its own unique character – different players, different issues, different glitches, different challenges – and this auction has a personality all its own.

For one thing, it came into being as a kind of step-sibling to the Incentive Spectrum Auction which has garnered far more attention from the media, Congress and the Commission. Many prospective bidders decided to pass on this auction in anticipation of the Big One coming up next year – maybe. Sprint is the most notable non-participant in that category. So being in the shadow of the Incentive Auction has already had a depressive effect on bidder enthusiasm on this one.

Although it's a step-child, the FCC seems to have big dreams for what the auction will achieve. It has set the reserve price at a whopping $10,066,326,600 because it has determined that it needs to take in that amount to meet its obligations under the Commercial Spectrum Enhancement Act that authorized the auction in the first place. 10 billion simoleons seems like a lot of simoleons for rather small spectrum swatches that are encumbered to one degree or another, but the FCC is nothing if not optimistic.

In that regard, the big two, AT&T and Verizon, have thrown their hats into the bidder circle, along with somewhat lesser lights like DISH Network and C-Spire. These players tend to show up at auctions with large, open

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Regulatory Weed-Whacking

The FCC Cleans Up Its Antenna Structure Regulations

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If you've got one or more tower structures, you may be in luck. The FCC has at long last taken a weed-whacker to Part 17 of its rules, a long-overgrown regulatory briar patch governing the construction, painting and lighting of antenna structures. While the substantive requirements remain largely intact, a number of procedural changes should make life at least a little easier for tower owners as well as the Commission's Staff. At a minimum, the changes should make the rules easier for real people to grasp.

The only real question here: What took so long?

Tower Inspections. The current rules require that tower lights be monitored at least once every 24 hours, either by observation of the tower itself or through an alarm system that takes care of the process automatically. In addition, any automatic or mechanical control devices, indicators, and alarm systems associated with a tower-lighting system must be inspected quarterly to confirm that the gear is working properly. Some major tower owners have set up Network Operations Centers (NOCs) which are staffed at all times, have highly sophisticated equipment that sounds an alarm at any tower lighting malfunction, and stores records of all alerts. An alert is sent not only if the lights fail at a tower but also if the monitoring system fails. Historically, the FCC has granted several waivers of the quarterly inspection requirement to companies that have demonstrated that their NOCs are adequately staffed and equipped.

Under the new rules, maintenance of an NOC will excuse a tower owner from quarterly inspections as long as the owner can certify (with appropriate documentation) that: its monitoring system has previously been approved by the FCC; the tower structures are in fact monitored as specified in the FCC's ap-

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Inside this issue

You ask: Why is this even a question?

Congress Says Unlocking Cell Phones is Okay

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Thanks to action by Congress – something we don't get to say often, these days – it will soon once again be lawful to "unlock" your cell phone so as to use it with a different carrier. You ask: Why is this even a question?

Because of an earlier act of Congress – the Digital Millennium Copyright Act (DMCA), to be specific – whose Section 1201(a)(1)(a) provides that:

> [n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.

The software in a phone is a "work protected under this title." The locking software is a "technological measure that effectively controls access" to the phone. So to "circumvent" the software by unlocking it violates the DMCA. Even a first offense, if done "willfully and for purposes of commercial advantage or private financial gain," can draw a fine of up to $500,000 plus up to five years in the federal penitentiary.

The DMCA allows the Librarian of Congress, the official in charge of copyright matters, to make exceptions to the law. And indeed, he used to have an exception on the books that covered cell phone unlocking. Located in 37 C.F.R. § 201.40(b)(3) (2012), it permitted the "circumvention of technological measures that effectively control access to copyrighted work" *i.e.*, "unlocking" of

> [c]omputer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.

Note the requirement that unlocking ("circumvention") be initiated by the "owner of the copy of the computer program" – i.e., the owner of the software in the phone. That's you, right? When you've bought a phone, haven't you also bought the software inside it? That's what a reasonable person might think.

But judges do not necessarily conform to the usual standards of reasonableness. Three federal appeals judges in the Ninth Circuit, back in 2010, ruled that the purchaser of a device that included software did not also purchase the software, but only a license to use it. Delighted, the wireless phone companies took this decision to the Librarian of Congress, who duly issued an order, effective on January 27, 2013, that limited the above rule to handsets purchased before that date. Unlocking a phone acquired on or after January 27, 2013, became illegal, subject to the full weight of the DMCA and its five-year prison term.

The public – or the subset that pays attention to these things – was outraged. A White House petition reached 114,322 signatures before the White House responded favorably. The FCC Chairman weighed in to ask if the Librarian of Congress should be making these decisions. So did the tech blogs, many of them using far stronger language. But in fact there was not much the White House, the FCC,

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When "no" may mean "maybe"

FCC Rejects LEC Access Tariff

Door left open for limited protective measures

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Despite an environment where the largest interexchange carriers (IXCs) often refuse to pay for their use of local exchange carrier (LEC) networks, the FCC's Pricing Policy Division has thrown up yet another roadblock to the efforts of small LECs to address these delinquencies. On August 25, 2014, a new competitive local exchange carrier (CLEC), GS Texas Ventures, LLC, filed an access service tariff with the FCC which contained provisions designed to ameliorate the adverse financial impact of non-payment by the largest IXCs. The proposed tariff contained an arbitration clause to reduce the undue burden that collection actions would impose upon such a new CLEC market entrant, if it was forced to litigate in federal court against the significant firepower of this nation's most powerful IXCs. Consistent with prior FCC decisions finding that an IXC constructively orders access service unless the IXC takes affirmative steps to discontinue routing calls over a CLEC's facilities, GS Texas Ventures also proposed tariff provisions that would have required an IXC to stop using the CLEC's facilities that the IXC does not want to pay for.

Three IXCs, Sprint, CenturyLink, and Level 3, filed petitions to reject GS Texas Ventures' proposed tariff. Rather than initiate a proceeding to investigate the reasonableness of only a few specific tariff provisions, the FCC's staff took the extraordinary step in an Order released on September 8, 2014 of rejecting the entire tariff. A tariff can only be rejected before it becomes effective and when its terms are both unambiguous and patently unlawful on their face. Since the decision was rendered by the FCC's staff, it is unknown whether the FCC Chairman and his fellow Commissioners would have voted for such a result.

The FCC's staff concluded that the proposed arbitration clause, "as written," was unlawful because it would have prohibited IXCs from filing a complaint pursuant to section 208 of the Communications Act. The tariff provision filed by GS Texas Ventures would have required "all" disputes with IXCs to be decided through arbitration, rather than just collection actions. Arbitration tariff provisions for both CLECs and incumbent local exchange carriers (ILECs) may be permitted by the FCC if they are written so as to avoid interfering with the section 208 FCC complaint process. For example, a LEC's access tariff could avoid violating section 208 by expressly preserving the right of IXCs to file FCC complaints and limiting arbitration to the collection of unpaid invoices

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AMR? What AMR?

Designated Entity Attribution Rule Waived

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Recently, the FCC granted a request by Grain Management, LLC (Grain) to waive the bright-line application of one of the FCC's attribution rules to allow Grain and similarly-situated entities to participate in spectrum auctions with the benefits of designated entity (DE) status, even though they lease some of their existing spectrum to large entities such as Verizon and AT&T. This Order generated a lot of controversy, with vigorous dissents by two commissioners, and accusations by others of political pay-offs. It may have a significant impact on whether and how some smaller entities participate in the upcoming AWS-3 and TV Band Incentive Spectrum auctions.

In order to receive certain discounts on bidding prices in auctions, DE's must demonstrate that their revenues are below certain financial levels set in the FCC's rules. The FCC's rules also attribute to DE applicants the revenues of affiliated entities that the applicant controls, or that control the applicant. The attribution rules include the attributable material relationship rule (AMR), which establishes a bright line trigger to attribute to the applicant the gross revenues of any entity with which it has an agreement for the lease or resale of more than 25 percent of the spectrum capacity of "any one of the applicant's or licensee's licenses." The FCC enacted the AMR because it was concerned about "the potential to significantly influence" the DE applicant. It also noted "the potential" for the relationship to impede a DE's "ability to become a facilities-based provider," and sought to avoid a relationship that is "ripe for abuse."

Prior to filing its waiver request, Grain had entered into a deal in which it purchased 700 MHz B Block and AWS-1 licenses from AT&T and Verizon Wireless, and leased back all of that same spectrum to AT&T and Verizon. Then, in apparent anticipation of the upcoming AWS-3 and TV Band Incentive Spectrum auctions, Grain filed its request for clarification or waiver of the AMR. Grain acknowledged that under the AMR, its

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Well, that clears that up

Wireline Competition Bureau Clarifies (?) That You Do - or Do Not - Need Agency Approval Before Transferring Control of Some ETCs

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On July 24, the FCC's Wireline Competition Bureau (WCB) issued a public notice "reminding" carriers of prior approval requirements when certain Eligible Telecommunications Carriers (ETCs) plan to undergo a transfer of control. ETC status is granted by state public utility commissions in most cases, but the FCC itself handles this function in the 20% or so of the states that have chosen not to regulate in this area. ETCs receive millions of dollars from the Universal Service Fund (USF) to support the services they provide, so the administering agency, whether it be the FCC or a comparable state agency, reviews the identity and commitments of proposed ETCs carefully before granting them that status and thus making them eligible to receive the USF support. It would not be surprising, therefore, for the pertinent regulatory agency to require ETCs to seek approval before control of the entity is transferred to a new entity.

The problem is that there is nothing in the FCC's rulebook that requires such approval.

The WCB seems to have stretched a bit to find support for the policy it's "reminding" us of.

The July 24 release "reminds" ETCs that if you have an approved Lifeline compliance plan, you have to get FCC approval before your control can be transferred. The newly announced policy appears targeted at a relatively small subset of ETCs: those which are Lifeline-only and which also do not operate over their own facilities or a combination of their own facilities and resold facilities. We keep putting "remind" in quotes because it is doubtful that this requirement really existed prior to the July 24 release. Of course, all common carriers, including ETCs, must obtain prior FCC approval for a transfer of control, but the federal requirements do not end there. In addition to obtaining the FCC's approval of a transfer of control, the transferee may also need to obtain separate FCC approval of the transferee's ETC status even though the transferor is already an approved ETC.

The WCB's source for its "reminder" is a single sentence in footnote 1000 in the Commission's 2012 Lifeline Reform Order. That 299-page tome (which drastically revised the Lifeline program as we used to know it) nowhere addressed the issue at hand here. The footnote cited by the release does say that if a Lifeline-only, non-facilities-based ETC received its designation before Dec. 29, 2011, any company which later acquires that ETC must submit its own compliance plan in order to receive USF support. This doesn't quite stand for the proposition that prior approval of the transfer of control is required; in fact, it seems to imply exactly the opposite – that an acquiring company may file a compliance plan and get approval after the transfer of control of the acquired ETC takes place. So the WCB seems to have stretched a bit to locate a Commission-level basis for the unwritten policy it is now "reminding" us of. But there are other problems with the articulation of this unwritten policy.

First, why does the prior approval for transfers of control only apply to this one limited category of ETCs? If the logic behind the new policy is sound, why shouldn't it apply to all ETC transfers of control?

Second, the policy apparently applies only to Lifeline-only ETCs which are not facilities-based and have therefore filed compliance plans which are personal to them. But the Bureau routinely required facilities-based Lifeline-only ETCs to also file compliance plans. At one point in the release, the application of the rule is expressly limited to compliance plan filers who are not facilities-based, but elsewhere it is said to apply to any Lifeline-only ETC which has filed a compliance plan. Are these latter entities which are facilities-based covered by the new policy or not?

Third, what about Lifeline-only non-facilities-based ETCs who received their designation after December 29, 2011? These seem to have been exempted by the footnote on which this whole new policy is founded, but there doesn't seem to be any reason for differing treatment from pre-December 29 filers.

And, finally, how come the Wireless Bureau is not heeding this policy? As recently as March of this year, AT&T's acquisition of Leap Communications was challenged on the ground that AT&T had not requested

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Hearing aid compatibility shortfall draws big fine

FCC Spanks T-Mobile for $819,000

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More than two years ago we reported that the FCC had proposed to fine T-Mobile a whopping $819,000 for violations of hearing aid compatibility (HAC) requirements. (Under those requirements both manufacturers and mobile carriers must offer a broad range of handsets that (a) don't cause interference to hearing aids and (b) do work with the telecoil add-ons that many hearing aid wearers use.) As is customary, T-Mobile was given a chance to respond to the proposed fine, which it did (in May, 2012), arguing not that it hadn't violated the rules, but rather that the fine was "unduly punitive" and should be sliced in half.

The FCC was not convinced. We know this because the Commission has now finalized the fine, leaving it at $819,000 – no reduction for effort, good behavior, or anything else.

The FCC changed its way of calculating the penalty.

This case is unusual for a couple of reasons.

First, unlike many carriers facing a possible fine because of an HAC shortfall, T-Mobile declined to sign a "voluntary" consent decree. Instead, it fought back, arguing among other things that it has been an industry leader in advancing the HAC cause, and this kind of punishment doesn't make it feel very good about all the work it has done. The FCC was unconvinced. It rejected T-Mobile's various arguments and took the occasion to explain why it tightened the screws in this case … and why we can expect more of the same in the future.

Second, there's the size of the fine – nearly a million bucks. While fines for HAC violations have increased dramatically since the requirements were imposed in 2008, T-Mobile's whammy was still a record amount for this time of violation.

Since its fine was seriously bigger than fines meted out to others for similar violations, T-Mobile argued that it was being treated unfairly. Sorry, the FCC responded. Those earlier, lower, fines were issued by the Enforcement Bureau, not the full Commission. The full Commission, being the boss of the Bureau, is not bound by the Bureau's decisions.

And anyway, the Commission's T-Mobile decision didn't differ with any staff interpretations of the HAC requirements themselves, so whether the Commissioners have interpreted the rules differently from the Bureau isn't an issue here. Everybody agrees what the requirements are; the only significant difference here is in the amount of the fine. And the Commission believes that it is plainly permitted to issue stiffer sentences if it wants, with or without warning, particularly it does so as part of a "dynamic enforcement approach".

And anyway, T-Mobile couldn't really show that it had relied on earlier decisions when it violated the HAC rule. It knew what the rules required. Any claim of reliance on the Bureau's earlier decisions would have meant, in essence, that T-Mobile knew that it was violating the rules but figured that the likely penalty would be small enough that the company's bottom line could tolerate it. Since T-Mobile presumably expected that at worst it would get a slap on the hand, or even a kick in the shin, it won't be heard to complain when it gets hit with a sledge hammer for the violation.

Making matters worse for T-Mobile, the FCC changed its way of calculating the penalty. Since the multiplier function previously used hadn't seem to generate the level of compliance the FCC had in mind, the Commission jiggered with that formula in a way designed to get everybody's attention.

And then there's the matter of T-Mobile's size. Given that T-Mobile is obviously a large company, the FCC wanted to be sure that any fine it issued would not be so low as to be treated as a mere cost of doing business. The Commission's willingness to consider the size of the violator in this connection is ironic because it doesn't consider size when it comes to smaller entities. That is, when the violator is a small entity whose business would likely be seriously damaged (if not destroyed) by a "standard" fine, the FCC generally doesn't see fit to reduce the penalty except when the violator can prove inability to pay by submitting in-

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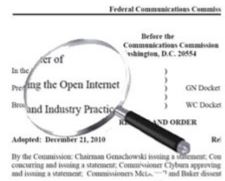
Simply imposing Title II won't work

Regulating the Internet "Like a Utility" Won't Yield an Open Internet - Unless ...



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[*Editor's note: The views expressed below are those of the author, not necessarily shared by FHH colleagues and clients.*]

Many of the three million (or so) comments in the net neutrality proceeding, based on our own small sample, urge the FCC to impose net neutrality rules by regulating the Internet "like a utility."

Sorry. It won't work.

"Regulating like a utility" means bringing Internet service providers (ISPs) under Title II of the Communications Act, which is the statutory basis for common carrier regulation. Title II prohibits "unjust or unreasonable discrimination." Preventing discrimination is also the purpose of net neutrality. That looks like a good fit. Why isn't it enough?

A simple rule saying nothing more than ISPs "shall not discriminate" would be meaningless.

Congress enacted Title II in 1934 primarily to regulate telephone service. Telephones of that era delivered exactly one functionality: real-time voice transmission. Non-discrimination meant that everybody got a dial tone on equal terms. That was easy to regulate. Enforcement was easy, too, since one company handled local service in nearly every city and town, and was also the country's only long-distance provider.

The Internet is vastly more complicated, with astronomical numbers of providers and services. A simple rule saying nothing more than ISPs "shall not discriminate" would be meaningless. An ISP's capacity is, after all, finite. At peak times it may not be able to accommodate 100% of all potential content – email, Facebook posts, Netflix video, VoIP calls, people working from home, casual browsing. At those times, some discrimination must necessarily occur in allotting access to providers. The question, then, is how to ensure that the discrimination is "fair". An effective non-discrimination rule would give an ISP managing a traffic overload clear guidance on which bits to send on and which to hold back in every possible situation. More than that, a proper rule would let the ISP program in algorithms that make these decisions automatically, on the fly.

Here at the law firm we spend much time reading and analyzing rules, identifying their weaknesses, and sometimes proposing improvements. It's part of what regulatory lawyers do. But even supposing Title II applies, we can't find a way to write a net neutrality rule in a manageable number of words, and still leave only minimal discretion to the ISP. The discretion part is important. The purpose of net neutrality is to fairly prioritize various providers' and customers' competing needs. Any element of vagueness that lets the ISP make its own decisions – in particular, any recourse to "reasonable" behavior – fails as a guide and becomes instead a source of litigation.

The currently proposed rule intended to curb discrimination (meant to function outside Title II) reads like this:

> A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.

Everybody clear on what this prohibits? Not unless we know what the term "commercially unreasonable practice" means. And we cannot know that with any precision because "commercially unreasonable practice" is not defined in the rules. An ISP with a good lawyer – and they all have good lawyers – could plausibly argue that the rule allows almost any activity at all.

There is a way to solve this problem, one that regular CommLawBlog readers have seen before. It entails applying Title II to the ISPs, plus one step more: a rule that requires the ISP to open its channels (cable or phone line or fiber) to competing ISPs. Those competitors would have to pay for use of the channel. Under this approach, a consumer dissatisfied with the performance of one ISP could easily switch to another with no change to the household wiring – an impossibility

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3,000,000+ comments? Let's do the numbers!

Fast Lane for Net Neutrality Comments?

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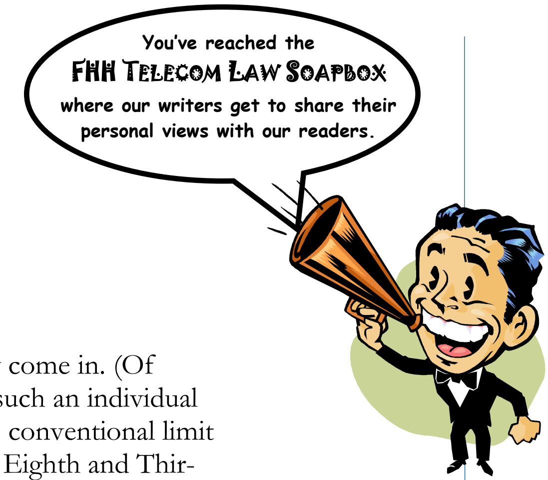

When we took a sounding of the rising floodwaters of net neutrality comments back in August, they were 1.1 million deep and more were pouring in. By the September deadline for reply comments, the levees apparently held. At least we assume that to have been the case because, with only a few days left before the deadline for reply comments, the FCC announced, in effect, that it was opening the dam upstream in an apparent effort to increase the flow of incoming comments.

In a blog post on the FCC's website, the Commission's Chief Information Officer advised that

> [i]n the Commission's embrace of Open Data and a commitment to openness and transparency throughout the Open Internet proceedings, the FCC is making available a Comma Separated Values (CSV) file for bulk upload of comments given the exceptional public interest.

So the Commission appeared to be offering an express lane for the simultaneous submission of multiple comments (i.e., "bulk uploads") to get them in the door even faster than might otherwise have been the case. The need for that express lane wasn't immediately obvious: a quick spot-check in ECFS indicated that, since mid-August, comments had been flowing in smoothly, generally several thousand (occasionally more than 10,000) a day. The bulk upload option would only increase that – and sure enough, by the time the deadline came and went, more than three million comments had made it in the door.

But necessary or not, this development brought us back to something we had addressed before.

We had previously observed that it would take more than 40 years for an individual – working 52 40-hour weeks per year, and processing one comment every five minutes – to review the 1.1 million comments that had already come in. (Of course, even if such an individual could be found, conventional limit imposed by the Eighth and Thirteenth Amendments make that scenario unlikely in the extreme.)

But it now occurs to us that, in addition to being unrealistic, our calculation came at the problem all wrong.

That's because we were assuming an open-ended time frame for completing the review. But as we all know, Chairman Wheeler would like to wrap up the Open Internet proceeding before the end of the year. So the variable to solve for is not the total time it would take; rather, the variable is the number of people it will take to complete the review in time to get an order adopted and released by December 31.

The Commission has expressly assured that all comments will be reviewed.

Time to bring out the *FHH Telecom Law* abacus!

Let's assume that review of the comments has to be completed by November 30, which would leave a month for the FCC's wordsmiths to crank out the item and for the Commission to adopt it by year's end. Let's also assume that review of the comments began on June 1, a couple of weeks after the Open Internet NPRM was released. And finally, let's assume a total of 3,000,000 comments will need to get reviewed, indexed, catalogued and contemplated, with each comment requiring an average of five minutes to process.

With 183 days from June through November, there would be just under 88,000 minutes during which 3,000,000 comments would need to get processed at our estimated five minutes per. (Yes, we know that the inflow of comments was not evenly distributed over the entire period – but bear with us. This is just for illustrative purposes.) No problem – all it would

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R U rdy 4 txt 2 911?

Update: Text-to-911 Rules Now in Effect

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Sure, text-to-911 capabilities by December 31, 2014 is now the law, with mandated implementation by June 30, 2015 at the earliest. But your best bet, in an emergency, is still to make a voice call to 911, if possible.

R U rdy 4 txt 2 911? For the texting illiterate, that's text-speak (somewhat similar to Newspeak from George Orwell's Nineteen Eighty-Four) for "Are you ready for text to 911?" If you're a commercial mobile radio services (CMRS) provider or "interconnected text provider", you've got fewer than three months: the FCC's rules now require all CMRS (CMRS) providers and "interconnected text providers" to support text-to-911 by the end of 2014.

What do you think, will this be doubleplusgood or doubleplusungood?

Don't expect text-to-911to be working everywhere for a while yet.

Followers of our blog will recall that last year the major CMRS carriers voluntarily agreed to make text-to-911 services available by May 2014. As we reported earlier this year, in January the FCC proposed rules mandating that all texting providers support text-to-911. And now those rules have been finalized, adopted and published in the Federal Register. Most took effect earlier this month (although some, involving new information collections, are still subject to Office of Management and Budget approval).

While the rules may technically be effective now, don't expect text-to-911 to be working everywhere for a while yet.

That's because, among other things, not all Public Safety Answering Points (PSAPs – the folks who field the 911 requests) are set up to receive text messages. Moreover, PSAPs are not required to accept text messages – although the FCC believes all will choose to eventually – and your cell carrier doesn't have to deliver your text-to-911 if your cell phone plan doesn't include texting capabilities (yes, you're expected to pay for sending texts, even to 911).

However, once a PSAP chooses to accept text messages and is ready to do so, it will have to notify the covered texting providers (more below on who's covered). The texting providers then have six months to work with the PSAPs to make sure that the texts get routed to the right place. For those PSAPs that are ready before the end of 2014, covered texting providers will have until June 30, 2015 to get everything set up.

To make sure covered texting providers know when a PSAP is ready, the FCC plans to establish a centralized registration database with this information. Nobody knows when that database will be available (a Public Notice will be released when it is). But PSAPs can advise that they are ready by directly contacting texting providers or filing notifications with the FCC in PS Docket Nos. 10-255 and 11-153. If a covered texting provider runs into problems setting up the service for a particular PSAP, it can agree with the PSAP on an implementation timeframe beyond the required six-month period. In such situations, the covered provider must file a notification in PS Docket Nos. 10-255 and 11-153.

[Consumer tip: For the time being, in any emergency your best bet is still to make a voice call to 911, if possible.]

There are a lot of ways to send text messages, so who exactly are these covered texting providers?

As we reported previously, the text-to-911 requirements cover all CMRS providers (i.e., your cell phone carriers) as well as all providers of "interconnected text messaging services." The latter includes anyone that enables text messaging service, even via "over the top" (OTT) applications, that can send texts to and receive texts from all or substantially all text-capable U.S. telephone numbers. The new rules do not apply to in-flight text messaging providers, mobile satellite service providers, Internet Protocol Relay service providers, 911 text messages that originate from Wi-Fi only locations or that are transmitted from devices

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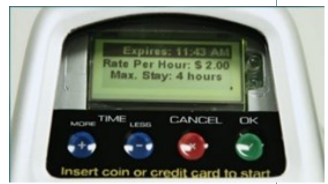
Oh, the irony …

Parking Meter Company Fined for Poor Timing



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IPS Group, Inc. (motto: "Smarter parking for smart cities"), manufactures wireless parking meters. (The wireless feature enables credit card authorization, among other functions.) Like most small wireless devices, the meters are subject to detailed FCC technical rules and require certification for compliance with those rules.

The IPS meters complied with the technical rules and were duly certified. But ironically (since the purpose of its products is keeping careful track of time), there was a problem with IPS's timing.

The FCC rules specify that devices requiring certification must have completed the FCC's certification procedure ***before*** the devices are marketed. For FCC purposes, "marketing" includes "sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease." IPS had its meters certified only after, not before, undertaking some of these activities.

The slip-up resulted in a consent decree that cost IPS a $14,000 civil fine and some administrative headaches.

We hope other manufacturers will take the case as a warning: make sure the marketing people and the compliance people stay in touch and work from the same calendar.

There is another warning here as well: the FCC knew about the violation because a competitor of IPS's turned them in. This is how the FCC learns about many, perhaps most, equipment violations. If you have a competitor, the FCC has a free-lance enforcement agent watching you.

*(**Text-to-911** - Continued from page 8)*

that cannot access the cell phone network. (Companies unsure of whether they're providing a covered text messaging service should consult with their regulatory attorneys.)

For OTT providers of interconnected text messaging services, there are some other noteworthy peculiarities in the new rules. In order to route texts to the right PSAP, some location information must be gleaned from your mobile device. Thus, OTT providers (and all covered texting providers) must clearly inform consumers that the right permissions must be granted to the texting application in order for this location information to be accessed. If a consumer does not permit this access, a bounce-back message must be provided when the consumer tries to text 911. (And let's not forget that, as we've also reported previously, the rules already adopted by the FCC require that a bounce-back message be provided anytime text-to-911 isn't available.)

OTT providers that typically deliver texts via data connections (rather than through the more traditional Short Message Service, or SMS) also have to contend with how to get text messages to the PSAPs. While there are other methods, the FCC envisions that most of these providers will initially transmit text-to-911 by tapping into the SMS capabilities of the cell phone provider. The new rules require cell phone carriers to permit access to SMS for 911 texts originated from OTT applications. But OTT providers availing themselves of this method must clearly inform consumers that text-to-911 may not work in this situation if the consumer does not have an SMS plan with their phone carrier (and again, yes, you still have to pay for sending texts to 911).

Even before these basic capabilities are fully available to the public, the FCC is already exploring new requirements for text-to-911 in a Third Further Notice of Proposed Rulemaking (Third FNPRM). Among other things, the Third FNPRM seeks comment on issues related to adding enhanced location data and roaming capabilities to the text-to-911 playbook.

Parties interested in filing reply comments in this proceeding have until November 17, 2014. In the meantime, check back with CommLawBlog.com for updates, and remember, Big Brother is watching.

(*DE Attribution Waiver* - *Continued from page 3*)

leases with AT&T and Verizon would require attribution of those companies' gigantic revenues to Grain, thus making Grain ineligible for DE status. Grain argued, however, that the rationale of the AMR was not intended to apply to licenses that were acquired without DE benefits, as was the case with the licenses that Grain had acquired from and leased back to AT&T/Verizon.

In granting a waiver to Grain, the Commission looked to the potential impact of the waiver on the underlying purposes of the AMR: preventing unjust enrichment of DE applicants, preventing "undue influence" of large entities on DE applicants, and promoting the provision of facilities-based service by DE applicants. The majority of the Commissioners concluded that these purposes of the AMR rule would not be served by applying it as a bright-line test to applicants holding spectrum leases where (1) the licenses were acquired prior to an application for DE status, 2) the licenses were not acquired using DE benefits, and 3) the applicant holds no other licenses subject to DE benefits. Applying an up-front, bright-line test for leases of existing licenses such as these is not necessary to preserve the Commission's ability to determine whether the leases in question would be inconsistent with the policies underlying the AMR, according to the majority.

However, while the Commission waived the application of the AMR as an automatic barrier to applying for DE status prior to an auction, it did not waive the Commission's right to review whether such leases serve the purpose of the AMR after Grain wins licenses at an auction (assuming that it does make winning bids). Rather, the Commission held when it files its long-form application, Grain will be required to demonstrate that the specific facts and circumstances of its spectrum lease agreements do not demonstrate a level of control that requires attribution of the lessees' gross revenues to Grain. So, while Grain may participate in auctions as a DE, there is no guarantee that it will be able to get authorizations for its winning bids. We suspect that while Grain will take what the Commission has given it here, this is less that Grain was hoping for.

The impact of the Commission's waiver Order is potentially broad. It applies not just to Grain, but to all similarly situated applicants: any entity whose leased licenses were not subject to DE benefits and which, at the time the leases became effective, held no other licenses subject to DE benefits. The presence of this potential waiver may shape whether and how some smaller entities participate in future auctions.

Commissioner Pai objected to the majority decision with a vigorous and detailed dissent. He argued that the situation that Grain is in, leasing spectrum rather than using it to provide its own service, is precisely the situation that the AMR was designed to address. Commissioner Pai also noted that using a long form case-by-case approach instead of a bright line contradicts policy choices the Commission made in the recent Mobile Spectrum Holdings Order, as well as in the Commission's recent order on broadcast joint sales agreements. Commissioner O'Rielly penned a similar, though less vigorous, dissent.

The grant of a waiver by three Democratic Commissioners, over the dissent of the two Republican Commissioners, raises the specter of partisan politics. That specter was raised even more by press reports questioning whether a political pay-back occurred here, since Grain is owned by David Grain, who donated tens of thousands of dollars to the Democratic National Committee and to President Obama's two election campaigns, according to FEC records. However, those records also apparently indicate that Grain has been an active contributor to Republican candidates as well, and there do not appear to be facts sufficient to support a theory that grant of the waiver involved any improper considerations.

This is not the last that we will hear about this issue, as the Commission has promised to initiate a proceeding in the near future to look at revising the DE rules, including the AMR rule. In light of the minimal success by small entities in recent years in auctions for the most commercially attractive spectrum, a betting person might well place a wager on the FCC liberalizing the DE rules generally, and the AMR specifically. We will keep you informed as that proceeding advances. In the meantime, potential spectrum auction applicants should contact their communications counsel if they need detailed advice on DE status and the leasing of spectrum.

This is not the last that we will hear about this issue.

*(**Tariff Rejection -** Continued from page 3)*

from IXCs. Because the FCC has repeatedly declared that the FCC has no jurisdiction to entertain a collection action by a LEC against an IXC, arbitration that is limited to issues outside the FCC's jurisdiction cannot interfere with the FCC's authority to resolve complains brought under Section 208. Furthermore, prior to the detariffing of IXC tariffs, the FCC permitted IXCs to include binding arbitration clauses in their tariffs. Just as IXCs have enjoyed the lower costs and greater efficiencies made possible through arbitration, LECs may also be able to reduce the burden of collecting from delinquent IXCs by adding to their access tariffs an arbitration clause that does not violate section 208.

The FCC's staff also concluded that a proposed tariff provision that would have enabled IXCs to avoid constructively ordering access service by blocking calls was unlawful because call blocking is unlawful except under limited circumstances. The decision in this regard does not appear to depart from prior FCC precedent holding that an IXC constructively orders access service unless the IXC takes affirmative steps to discontinue routing calls over a LEC's facilities. The FCC expects the procedures for an IXC to discontinue constructive ordering of access service to be lawful. For example, the FCC may accept tariff provisions stating that an IXC continues to constructively order access service by using it until the IXC obtains approval from the FCC pursuant to section 214 of the Communications Act to discontinue service to a particular local exchange.

This FCC staff decision should not impact the lawfulness of access service tariffs that have become lawful by Section 204(a)(3) of the Communications Act. If the FCC does not reject or suspend the effective date of a filed tariff under section 204(a)(1) during the 15-day statutory period, the tariff's terms are "deemed lawful." In this case, the FCC rejected the GS Texas Ventures tariff before it could become effective and, therefore, before it could become lawful under section 204(a)(3).

While this FCC decision notes in dicta that a lawful tariff can become unlawful, the courts have consistently held that such a change can only occur through an FCC decision and only prospectively. A lawful tariff cannot be rendered unlawful retroactively because tariff provisions made lawful by statute – Section 204(a)(3) – remain lawful so long as they are effective and on file with the FCC. *Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 671, 673 (D.C. Cir. 2006). The FCC lacks the statutory authority to award refunds and retroactively declare unlawful such tariff terms made lawful by section 204(a)(3). Id. (holding that the remedy for over-earnings due to a violation of an FCC order is a prospective change to the rate, rather than a retroactive refund, when a tariff rate is made lawful by section 204(a)(3)). Furthermore, a tariff provision can be retroactively stripped of its lawful status and rendered void ab initio only when the FCC has expressly made "mandatory detariffing a retroactive punishment." *Paetec Communications, Inc. v. MCI Communications Services, Inc.*, 712 F. Supp. 2d 405, 421 (E.D. Pa. 2010), appeal withdrawn, No. 11-2268 (3rd Cir. 2012). As the FCC has never made mandatory detariffing a retroactive punishment for tariff terms and conditions, such as an arbitration clause, the FCC could only make prospective changes to such tariff provisions after they have become effective and lawful under section 204(a)(3).

The FCC lacks the statutory authority to award refunds.

This FCC decision leaves open the opportunity to include access tariff provisions that facilitate collection of unpaid invoices. If such tariff provisions are written carefully to avoid violating the Communications Act, the FCC should allow them to become effective. Once effective under Section 204(a)(3), an access tariff should remain lawful and enforceable unless the FCC subsequently issues a decision making a prospective change to the tariff's terms.

*(**ETC Transfers of Control -** Continued from page 4)*

approval for the transfer of control of Leap's Lifeline-only ETC-holding subsidiary. In other words, AT&T had not requested the very approval that the WCB's public notice indicates is required. The Wireless Bureau ignored this problem and granted the transfer of control anyway, thus very emphatically taking the stance that the policy enunciated by the WCB does not exist. Maybe that's why the WCB felt moved to issue this "reminder", as much to its fellow Bureaus as to the general public. When Bureaus squabble, all their regulatory children suffer. But meanwhile, which Bureau are we supposed to believe?

We applaud the WCB for its effort to bring some clarity to a small area of communications law which certainly needed clarity, but we are not sure the recent public notice quite accomplishes the purpose. Maybe resort to an old-fashioned rulemaking, as contemplated by the Administrative Procedure Act, would help.

(Antenna Structure Rules - Continued from page 1)

proval; and its gear is set up to receive notifications of any failure of the monitoring system. (If you've got a system that has not yet been approved by the Commission, you can still ask the Wireless Communications Bureau to bless it. The existing standards for such systems will apply.)

Note that the use of NOC monitoring is optional, not mandatory. A data field will be added to the FCC's online Antenna Structure Registration (ASR) system to allow registrants to report that they have chosen to monitor their tower lights through an approved NOC system. Those of you who do not use a NOC-based system will still be subject to the quarterly inspection requirement.

Changes in Tower Height/Location. The FCC has amended its rules to require modification of a tower's FCC Antenna Structure Registration (ASR) for any change or correction of one foot or more in tower height or one second in latitude or longitude. This conforms to the FAA-imposed triggers requiring the filing of a new notice and obtaining a new Determination of No Hazard. Practically speaking, you'll need to get the FAA's No-Hazard Determination first, as that will have to be submitted with the FCC Form 854 to update your previous ASR.

The coordinates in an ASR will still have to match those submitted to the FAA.

The text of the Commission's Report and Order says that prior FCC "approval" for such modifications is now required for this kind of change. The newly-adopted rules, however, require only that FAA approval be obtained and the existing FCC ASR be modified. Such modification may generally be secured online automatically – that is, conventional notions of "prior approval" may not really be involved, at least on the FCC side of things, although you do get "approval" in the sense that if you don't fill out the ASR form correctly, your registration will be rejected by the online system.

Some FCC licensing rules allow changes involving larger variations (i.e., more than one foot, more than one second) without an FCC construction permit, but those rules do not override the ASR requirements. Thus, if the changes would result in modification of the overall structure by one foot and/or one second or more, prior approval from the FAA and modification of the ASR are now required.

The FCC decided not to dictate a uniform method of determining geographic coordinates. In any event, though, the coordinates submitted to the FCC in an ASR will still have to match those submitted to the FAA. (Remember that while the FAA and all non-broadcast FCC services use NAD83 coordinates, broadcast licenses are still based on NAD27 coordinates, so an appropriate conversion may need to be made, depending on what you are applying for and to whom.)

Another amendment intended to harmonize overlapping FCC and FAA rules: when a tower under construction reaches its maximum height, or when the height of an existing structure is changed or the structure dismantled, the owner must now notify the FCC (as well as the FAA) within five days. Previously the Commission's rules required notifications either within 24 hours (in the case of construction or dismantlement) or immediately (in the case of height changes).

Voluntary Registrations. Not all antenna structures require FCC tower registration. Rather, only towers more than 200 feet in height (regardless of location), and some shorter towers located close to airports, are required to obtain FAA no-hazard determinations and FCC ASRs. But owners of some towers that don't require registration nevertheless register voluntarily for various private business reasons – maybe to make it easier to show compliance with environmental requirements, to get their towers listed in directories that may be consulted by prospective tenants, etc. The FCC will continue to allow voluntary registration. In fact, it's going to add a data field to its ASR system for owners to specify that their registration is voluntary. Registrants who have already signed up voluntarily will not have to modify their registrations to report them as voluntary. The FCC will not require painting and lighting of voluntarily registered towers, and voluntary registrants are free to cancel their registrations at any time.

ASR Displays and Notifications. Tower owners with ASRs are required to display their ASR number, but confusion has occasionally arisen about just what that requirement entails. The simple statement of the rule is that the required information must be displayed on a permanent sign "in a conspicuous place readily visible near the base of the antenna structure." But some towers are enclosed by perimeter fences, and a sign at the base of the tower is too far away for someone outside the fence to read. The Commission has now clarified that the ASR and contact information must be posted at the place, nearest the tower, which is accessible by persons seeking to find out the ASR number. If a perimeter fence has two or more locked entrance gates, the ASR information must be posted at each gate. If one perimeter fence surrounds more than one tower (such as in an AM broadcast directional array), ASR information for each tower must still be posted at

(Continued on page 13)

*(**Antenna Structure Rules -** Continued from page 12)*

the base of that tower, with information for all of them at the fence entry points. (Multiple towers in an array are each supposed to be separately registered in ASR.)

While the ASR display requirement may just have gotten a bit tougher, there is a bit of compensating good news. The rule requiring owners to provide each tenant with a paper copy of the tower ASR has been dragged into the 21st Century: in lieu of a paper copy, owners may now provide their tenants with link to the ASR's location in the FCC's database.

When the Lights Go Out. When tower lights fail, it's not time for romance; rather, it's time for immediate notice to the FAA, so that the FAA can in turn issue a Notice to Airmen (NOTAM) of the unlit hazard to air navigation. Ditto for when failed lights are repaired (so the FAA can cancel the NOTAM). But NOTAMs have expiration dates, so the FCC has now clarified that, in addition to those notifications, tower owners must also keep the FAA apprised of the anticipated repair timetable at the time each NOTAM expires. Thus, when an you notify the FAA of a light failure, you should (a) be sure to find out when the ensuing NOTAM will expire and then (b) enter that date into a calendar or tickler file so you'll be sure to get back to the FAA with the required progress reports.

How long do you have to fix a lighting outage? The FCC's rules have historically been a bit inconsistent, with different language in different rules. But now a uniform (but still less than precise) requirement has been imposed: repairs must be completed "as soon as practicable" (the FCC has not specified any exact deadline). Owners must retain records of extinguished or improperly functioning lights, and of their repair, for two years.

Lighting failures aren't the only occasion for corrective action.

When Colors Fade. Lighting failures aren't the only occasion for corrective action. Those towers which are required to be painted with aviation orange and white stripes must keep the orange paint in good condition, so that it is readily visible. The FAA publishes an "In-Service Aviation Orange Tolerance Chart" which shows degrees of fading and specifies the point when repainting is required. This chart must be compared to orange bands on the top half of the tower, because the top half usually weathers faster. The FCC requires use of the FAA's chart but hasn't specified how close to (or far away from) the tower one must stand when comparing tower color to the chart.

Odds and Ends. While digging through the overgrowth that had thrived in Part 17, the Commission also noticed that its rules made repeated references to various FAA Advisory Circulars that were ever so slightly out of date. Bring out the regulatory weed whacker! The FCC has now removed references to specific outdated FAA Advisory Circulars and, going forward, will simply require adherence to FAA rules and publications as adopted from time to time. Towers must be painted and lighted according to the terms of the FAA's Determination of No Hazard, although the FCC reserves the right to impose additional or different requirements on a specific tower. When the FAA adopts new requirements, the FCC will not require existing towers to comply with those requirements, absent modification or reconstruction of the tower, unless the FAA makes its own changes retroactive. The FCC has also made clear that it claims jurisdiction over any tower intended to support antennas that will transmit and/or receive radio energy. That jurisdiction runs from the start of construction to dismantlement, regardless of when radio transmission actually starts from the tower.

Loose Ends Still Loose. One longstanding question that the FCC has not answered involves the FAA's proposal to take interference between FM radio broadcast signals (in the 88-108 MHz band) and aircraft communications (in the 118-136 MHz band) into account when issuing Determinations of Hazard or No Hazard. The extent to which the FAA might regulate RF-related matters has been a bone of contention between the FCC and the FAA for decades: the FCC tends to view itself as the final word with respect to regulating spectrum use, and the FAA's repeated efforts to impose its own interference standards through its tower regulation program have led to some tension between the two agencies. Most recently – that would be four years ago – the Commission got the FAA to back down, at least for the time being; but the issue remained open while the FAA pondered the question some more. The pondering has apparently not yet been completed, as the FAA has not yet resolved its own rulemaking on this issue. Accordingly, the FCC's rules for now will specify that notice to the FAA is required only with respect to possible physical obstruction. When and if the FAA revises its rules to include

(Continued on page 14)

(**AWS-3 Auction -** *Continued from page 1)*

wallets, so maybe $10 billion is not out of the question after all. If the FCC is right, this auction, along with the already completed AWS-4 auction, will have garnered all the money needed to fund FirstNet, the new public safety network, without needing anything else from the Incentive Spectrum Auction. The FCC sweetened the deal for AT&T and Verizon by lifting all spectrum screen restrictions for this auction. For once they are unshackled from the chains that limit the quantity of spectrum they can acquire in any given market. Having been handed a big freebie in the form of a pass on the usual anti-competitive considerations that attach to spectrum acquisitions, they can be expected to frolic like kids in a candy store.

But the big guys were not the only recipients of FCC largesse. Grain Management asked the FCC to waive the Attributable Material Relationship (AMR) rule – the rule that requires designated entities (DEs) to be charged with the revenues of anyone who leases at least 25% of any license they own. Grain wants to claim DE status but, having leased some spectrum acquired outside the auction process to AT&T, it would have failed to qualify under the AMR rule. No problem, said the FCC – we'll waive the rule for this auction only and apply the waiver to any other similarly situated DEs. (See the related story on Page 3.)

The big guys were not the only recipients of FCC largesse.

In addition, the FCC agreed to waive the former defaulter rule, which normally requires anyone who has in the past defaulted on a debt owed to the FCC (or any other federal agency) to put up extra money at the upfront filing stage. DIRECTV and Echostar argued that the rule was unnecessary in situations where the default amount was small (under $100,00), the default occurred a long time ago (more than seven years), the debt had been paid promptly (within two quarters of the default notice), and the payment resolved a legal proceeding associated with the debt. The FCC agreed that in those limited circumstances, former defaulters would be absolved of their sins and would not have to fork over an extra 50% in upfront money. We should note that the FCC has promised to revisit many of its auction rules that discourage or limit participation by smaller players. That rulemaking, just released, will apply to the Incentive Spectrum Auction and may make permanent some of the "waiver" actions taken here.

Still pending in the goody bag is whether providers to certain tribes which have not been federally recognized as such can nevertheless qualify for special provisions covering service to tribal lands. If things run as they have, we can expect another grant to come out shortly.

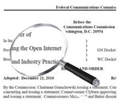
At the same time, prospective bidders must be evaluating a stream of information flowing out of the federal government regarding where and when it intends to vacate the spectrum that is about to be auctioned. A good chunk of this spectrum is being reclaimed from federal government users who have been squatting on it for years, often very inefficiently because the spectrum is effectively free to them. This encumbrance obviously colors how much people are going to be willing to bid for the encumbered spectrum, so the FCC has, to its credit, tried to make the federal government users make their plans and timetables transparent. It does seem to some observers that private participants in the industry group that is coordinating with NTIA and the federal agencies may be getting a bit of inside information in this regard, but we hope not, because that would be unfair. Not only do bidders have to weigh the timetables that the federal government is projecting, but they must also weigh the extent to which the federal government is way over- or under-estimating the time it will take to clear the spectrum. So it is a difficult calculation.

Except for the tribal matter, all of these various factors are now in place with the auction less than a month away. Gentlemen, start your engines.

(**Antenna Structure Rules -** *Continued from page 13)*

RF interference considerations, the FCC will decide whether or not to change its own rules to conform.

While the changes adopted by the Commission spread across a wide range of tower regulations, the fact is that none of the changes is particularly complicated or particularly controversial. And yet, it's taken nearly a decade for the FCC to get the job done. As Commissioner O'Rielly bemoaned, "why did it take nine years to get this item before the Commission for a vote?" (Noting that one of the rules being amended called for notification of lighting outages "by telephone or telegraph", Commissioner Pai deadpanned that "our modernization effort is long overdue.") As with many questions, O'Rielly's can't really be answered.



*(**Title II Internet Regulation?** - Continued from page 6)*

in today's system. That would fix the net neutrality problem overnight with no further regulation. A customer unhappy that his cable-company ISP was slowing down Netflix, for example, would simply go online to change over to a different ISP that used the same cable connection. Done in ten minutes; no service call needed.

We know this approach works because it did work, very well, all through the Internet's dial-up days. Back then nearly all Internet access was over the telephone lines. A set of FCC rules called Computer III required just the kind of shared access to those lines that we propose here. Thousands of small ISPs and a few larger ones, including the phone companies themselves, fought to outdo each other in serving their customers. A big-city resident had dozens of ISPs to choose from. The phone company ISPs' advantage, if any, was small. No one talked about net neutrality. No one had to, because any ISP that messed with the content would soon be out of business.

In the early 2000s, following the advent of broadband, the FCC interrupted this regime with a colossal two-part error. First, it declined to apply Title II and Computer III shared access requirements to cable broadband delivery. Second, a few years later, it removed those same requirements from telephone company broadband. The result today is Internet monopolies, or duopolies at best, in nearly every U.S. market. Most of us get wired Internet service from very large cable and telephone ISPs. These companies have both the means and (arguably) the incentive to discriminate among content providers, so as to protect their own offerings and services. Even in a duopoly, the cost and inconvenience of changing providers are so great as to keep customers effectively locked in.

The cable and telephone ISPs like the present arrangement. They hate Title II, and they have the political clout to fight it. The last FCC chairman said flatly that he would not re-impose Title II; the current chairman has said the option is open if needed, but no one thinks that overcoming the well-funded objections of the cable and telephone companies would be easy. Even if the FCC were to adopt the Title II approach, the reinstatement of a Computer III-type access regime on top of it would arouse even stronger opposition. Much as the wired ISPs would dislike becoming regulated monopolies, we suspect they would like a truly competitive environment even less. Sadly, though, that is the only practical way to bring about net neutrality. Simply reclassifying the ISPs as Title II carriers will trigger a vast flood of litigation, but bring little relief to consumers who simply want unfettered access to the Internet.

*(**T-Mobile Fined** - Continued from page 5)*

come tax returns (including those for affiliated entities) for the last three years.

[On a related sidenote, readers should be aware that in the past few months, the FCC has changed the characterization of payments made pursuant to voluntary consent decrees. Historically, such payments have been euphemistically referred to as "voluntary contributions" to the U.S. Treasury. Recently, however, the FCC has opted for the term "civil penalty" instead of "voluntary contribution". The Chief of the Enforcement Bureau confirmed this change in policy in an appearance before the Federal Communications Bar Association. This seemingly inconsequential language tweak can, and is intended to, have a serious impact on the party paying the "civil penalty". That's because "voluntary contributions" can normally be deducted as business expenses on tax returns, but the Internal Revenue Code expressly forbids deduction of penalties. The FCC's wording change in its consent decrees did not affect T-Mobile, though: T-Mobile declined to enter into a consent decree, so no matter how you slice it whatever it ends up paying will be a "forfeiture" which is not deductible.]

There is one more wrinkle in this case. A group of rural carriers – mostly small businesses quaking in their boots as the FCC swings its enforcement battle axe – asked for a ruling clarifying, if not stabilizing, the rules of the game, so that the small carriers can avoid committing any fouls. Sorry, the FCC said – you guys aren't parties to this case, so you knocked on the wrong door. If you want us to clarify something, file your own independent petition for a declaratory ruling.

So the Commission marches forward, demanding ever greater amounts from those who cross to the wrong side of the regulatory line. Interestingly, the FCC never reports what percentage of the forfeitures (or "civil penalties") it sends out is actually collected in full, in part, or even at all. One might legitimately wonder whether the forfeiture-based cash flow running into the Commission might ease the agency's supposedly urgent need to maximize auction revenue.

Rise of the Planet of the Machines: It Begins

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It's not every day that the phrase "machine-to-machine revolution" makes its way into an FCC release. Fortunately, it's not about some kind of *Terminator*-style revolution; it's about the "Internet of Things." You've probably heard about the "Internet of Things" and the potential it has to change the way we interact with everything from toasters to electric meters to pacemakers, but so far it has largely failed to come to pass. But a set of license applications filed by Spectrum Networks Group (SNG) seeks to change that, looking to create a nationwide machine-to-machine data network. But it is facing opposition from those who currently use the spectrum near what it wants (896-901 and 935-940 MHz), and the Wireless Telecommunications Bureau has asked interested parties to weigh in. (A listing of SNG's 111 applications is included in the Bureau's public notice requesting comments.)

So far, the "Internet of Things" movement has largely focused on the home: smart thermostats that you can control with your phone, a fridge that tells you when you're out of milk, that sort of thing. But discussions have included medical devices, increasing agricultural efficiency, and of course a slew of industrial applications. A world where devices can communicate with one another without human involvement is full of potential, but it will clearly be one where lots of data transmission spectrum is needed. All of the apps and videos on cell phones are already straining the country's CMRS spectrum, which has led to things like the upcoming Incentive Auction; when your pacemaker and toaster and dog collar also need to get online, will there need to be even more spectrum available?

An applicant seeks to create a nationwide machine-to-machine data network.

SNG thinks so, and its applications (and a related waiver request) attempt to make that happen, by carving out a nationwide network that would be exclusively used by these machine-to-machine communications. This would be instead of trying to cram all the new devices onto existing cellular data and Wi-Fi connections, something which SNG characterized as "inefficient" (a characterization which the objectors strenuously object to). The two bands that it hopes to use are currently in the Industrial/Business Pool, meaning that they are used by lots of different actors on the basis of individual site licenses, coordinated by entities called "frequency coordinators" who are responsible for making sure that a new use doesn't conflict with existing uses.

And some commenters, like the Enterprise Wireless Alliance, which filed the initial oppositions which sparked the proceedings, want to keep it that way. They think that SNG has failed to adequately explain why it deserves a waiver of the Commission's rules against this kind of network in the bands it's proposing to use, and also why it cannot deploy its network elsewhere (they suggest 217-220 MHz and 3.65 GHz in particular) or use existing CMRS systems. Most comments filed in support of the waivers come from potential customers of SNG's network, while the opponents are industrial users who don't want to compete for expansion within the spectrum.

Whether SNG's proposed network can usher in the much heralded "Internet of Things" is unclear. But what is clear is that this fight, as with others like the Incentive Auction, shows that the FCC will have a hard time balancing the interests of existing spectrum users with those who want to pave the way for future, "revolutionary" uses.

Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
November 27-28 (Thanksgiving weekend),
December 25 and January 1.
We will be open on Tuesday, November 11 (Veterans Day).

Wilkommen, Bienvenue, Welcome

Another New Addition to the FHH Family

Fletcher Heald is pleased to welcome a new attorney to our ranks. Laura Stefani, late of Goldberg, Godles, Wiener and Wright, joined our Technology and Innovation practice group as of October 1. Laura has more than a decade of experience in satellite, wireless, and technology regulation at the FCC and will add considerable depth to our team in those areas. We expect Laura to be a regular contributor to *FHH Telcom Law* in the days to come.

***(Net Neutrality Comments -** Continued from page 7)*

take would be to assign 150+ staffers to do nothing but review comments, full-time, eight hours a day, seven days a week (no weekends, no holidays) from June through November.

Let's put that in context. If you assemble all of the staffs of all of the Commissioners – including the Commissioners themselves – you've got about a fourth of the people necessary. If the Eighth Floor doesn't want to get its hands dirty (or isn't inclined to commit the requisite holidays and weekends), it could simply assign more than 25% of all the attorneys in all the FCC's various offices and bureaus to take on the chore. Any way you slice it, the Commission would have to make a substantial commitment of staff to get the job done – and that's assuming that that that substantial commitment was made five months ago. We're reasonably sure it hadn't been back then. Has it made that commitment since then? We don't know. Even though we raised that question a couple of months ago, the Commission hasn't bothered to clue us – or anybody else, as far as we know – in as to the process it's using to review all the comments that were then rolling in. The Commission touts its commitment to "transparency", and has expressly assured that all comments will be reviewed. Given that commitment and those assurances, we figure that the Commission should be more than happy to describe how it's reviewing all the incoming comments so that they will all be considered in the Commission's final decision. We'll let you know if we hear anything.

***(Unlocking Cell Phones** - Continued from page 2)*

the courts, or even the bloggers could do. The only practical recourse lay with Congress. And Congress did not look like a good bet. Paralyzed by partisan gridlock and the upcoming November elections, it has recently managed to pass very little substantive legislation.

But Congress surprised us. Both houses recently passed a bill that overrules the Librarian of Congress, undoing his rule change and reinstating the previous exception, quoted above, to allow unlocking handsets for the purpose of changing providers. The President signed the bill into law on August 1, so it's all official.

The bill also directs the Librarian of Congress to conduct a rulemaking on whether the exemption should expand to include "any other category of wireless devices in addition to wireless telephone handsets" – presumably tablets and the like. In the meantime, you can be researching other carriers' coverage and pricing plans.