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Busy Times Lie Ahead in Telecom as Pai Lays Out Modernization Plans

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Chairman Ajit Pai announced this month that he is planning to make some major overhauls at the FCC. Eight months into his term, Pai is specifically preparing to "modernize [the FCC's] rules to match the realities of today's marketplace." Pai's statements at NAB focused on broadcasting, while his statements via a blog post go into more detail on what's ahead outside of the broadcast industry. Plus, the September public meeting foreshadowed busy times ahead at the FCC for the foreseeable future.

At this year's National Broadcast Association's Radio Show, Pai announced he would present to his fellow FCC Commissioners at least one Notice of Proposed Rulemaking (NPRM) every month, starting this month.

These monthly NPRMs are intended to address concerns that Chairman Pai has assessed are part of those "outdated or unnecessary media regulations that should be eliminated or modified."

So what does this all mean for non-broadcasting entities? Quite a lot actually. First, Chairman Pai aims to address the outdated rules governing the satellite industry, where technology has outpaced the FCC's rules. The Chairman argues that current regulations covering non-geostationary-satellite orbit, (NGSO) and fixed-satellite services (FSS) systems reflect designs and rules from the early 2000s.

To meet the industry where it's at, the Commission adopted an NPRM that focuses on updating and streamlining several of the rules governing NGSO and FSS which Pai hopes will have the indirect effect of expanding satellite-based broadband access in rural areas.

Second, improving 911 calling in centralized communications systems such as schools, hospitals, and offices was also addressed. Chairman Pai circulated a Notice of Inquiry to seek information on the lagging 911 capabilities, which still require users to dial nine in order to place a call outside of a specified building.

Third, the Commission will look into providing relief for small and rural wireless service providers that are required by FCC rules to report the availability of wireless handsets are

(Continued on page 2)

Inside this issue

Busy Times Ahead — *(Continued from page 1)*

compatible with hearing aid devices. Pai believes that requiring providers, no matter how big or small, to make the current HAC reporting requirements is too burdensome. To address this, Chairman Pai put out an NPRM that seeks comment on whether we can eliminate or streamline the requirement for small carriers while continuing to preserve the benefits of collecting this information from industry."

Fourth, the Commission will outline how it intends to revisit rules for certain toll free numbers. The FCC issued a public notice to seek comment on whether or not it should use a public auction to distribute the currently available, unassigned toll free numbers. The proposal would set aside certain toll free numbers for public health and safety used by government and nonprofits.

Finally, the 20th Mobile Wireless Competition Report was released this month, the subject of dissent by the two Democrats on the Commission. The report reviewed facts, trends, and other factors that analyzed whether there is comprehensive competition in the marketplace for mobile wireless services. The report looked at data from 2016 from all mobile wireless services which included voice, messaging, and broadband. According to the report, competition continues to play an essential role in the mobile wireless marketplace. It also found that more and more wireless companies are expanding their unlimited data plans, wireless speeds are increasing, network coverage is expanding, and prices for consumers are falling.

All of this is to say, the lazy days of summer are definitely over. Chairman Pai and the rest of the FCC are gearing up for a big fall.

FCC Seeks Comment on Mid-Band Spectrum Opportunities

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Being in "the middle" has historically gotten a bad rap. There's the underappreciated "middle child," and of course no one wants to be the unneeded "middle man." This concept has even proven true with the Commission's wireless spectrum policies. While the FCC has made it a priority to promote industry access to wireless spectrum, these policies have largely focused on the bands below 3.7 GHz and above 24 GHz, leaving those in between crying "Marcia, Marcia, Marcia!"

The Commission finally seems poised to show some love to the "middle man" after years of promoting flexible access to the clowns to the left and the jokers to the right. The Commission released a Notice of Inquiry that seeks comment on potential opportunities for wireless broadband in spectrum bands between 3.7 and 24 GHz.

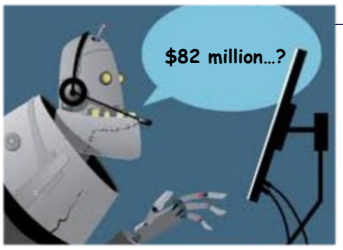
This particular NOI, however, represents a "wait and see" approach more than anything. The Commission will only be seeking comment on three specific bands: 3.7-4.2 GHz, 5.925-6.425 GHz, and 6.425-7.125 GHz. Importantly, these three bands are allocated for exclusive non-federal use and 3.7-4.2 GHz has already garnered interest from industry stakeholders for expanding wireless broadband, while the two upper bands are targets for possible unlicensed devices. By seeking comment on potential uses for just these three bands, the Commission is testing the waters and gauging interest, in hopes that commenters will identify other bands that might also be suitable for expanding wireless broadband.

Mid-band spectrum is currently used predominantly for satellite, point-to-point links, and radar, which begs the question: does middle-band spectrum actually have potential for expanding wireless broadband, a goal Chairman Pai touts often, or is it destined to the same fate as all the other "middles"? Commissioner O'Rielly believes that the answer is the former, going so far as to publish a blog post setting forth his vision for the allegedly-underutilized bands, which he claims will be essential for meeting "the insatiable growth of wireless services."

But before declaring mid-band spectrum the answer to our "insatiable" wireless appetites, the Commission needs to resolve key obstacles that have likely been the cause of the mid-band's having been overlooked for expansion.

The NOI seeks to do just that. For starters, the Commission will need to coordinate sharing federal spectrum with NTIA for many of the bands between 3.7-24 GHz. The Commission will also need to be cautious about disrupting existing and future operations in the Fixed Satellite Service and the Fixed Service, which operates about 95,000 links in the three bands identified for investigation. Many of these serve safety of life and property, and cannot readily relocate to other frequencies; and the Fixed Satellite Service's thousands of earth stations would be expensive to convert.

The Commission will attempt to resolve these issues, and others, with the NOI it adopted at the August Open Commission Meeting. In addition to seeking comment on the three specific bands mentioned above, the Commission is asking commenters to identify other bands between 3.7-24 GHz that might be suitable for expanded flexible use, as well as "long-term strategies" for promoting flexible use opportunities. Comments are due on **Oct. 2, 2017**, and reply comments are due on **Nov. 1, 2017** and may be filed at this website. Enter proceeding number 17-183.



Hello from the Other Side, I Must Have Called 21 Million Times… : To Tackle Robocalls From Illegally Spoofed Numbers, FCC Proposes Whopping $82M Fine

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In its war against illegal robocalling campaigns the Federal Communications Commission (FCC) proposed another hefty fine this summer. That is, a fine of 82 million dollars. Yikes!

The target of the FCC's wrath? Mr. Philip Roesel, who wasn't just calling a la Adele style.

Instead, Mr. Roesel is accused of both illegal robocalling in violation of the Telephone Consumer Protection Act (TCPA) (for a refresher on the TCPA and robocalls, take a look here) and illegal spoofing, which the FCC claims violated the Truth in Caller ID Act of 2009 (TCIA). For his 21 million illegal robocalls, Mr. Roesel received merely a sternly worded citation from the FCC (more on why later). Following a recent trend, the FCC's massive $82 million fine proposed against Roesel relied primarily on the TCIA's prohibition against the transmission of misleading or inaccurate caller ID information, commonly referred to as spoofing, "with the intent to defraud, cause harm or wrongfully obtain anything of value."

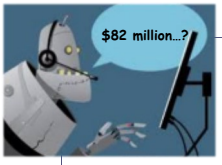
(Sidenote: The "intent" here is important under the TCIA, as not all manipulation of caller ID information is necessarily illegal. For example, the FCC allows telemarketers to transmit caller ID information that corresponds to the actual seller of the goods rather than the telemarketing company that has been hired to place the calls. Telemarketing companies often market goods or services for multiple clients, and different callback numbers could be transmitted depending on whose products or services the telemarketer is selling at that particular time. In these situations, assuming the telemarketing calls themselves are legit, the telemarketer's manipulation of caller ID information would not necessarily violate the TCIA.)

According to the FCC, Roesel spoofed telephone numbers that weren't even in service, rather than transmitting an actual number for himself or his company, to place millions of robocalls that particularly targeted the elderly, the infirm, and low-income families for purposes of selling dubious insurance products. The volume of the calls, the intent to aim his campaign at "unsophisticated consumers and consumers in precarious financial situations," and the violation of the TCIA prompted the FCC to propose the large fine.

What's unique about this proposed fine is two-fold.

First, the monetary value of the fine itself is one to write home about. While it doesn't match the record $120 million fine issued earlier this year in another TCIA case, $82 million isn't chump change. As with past TCIA penalties, the FCC set the base fine for each spoofed call at $1,000, which quickly adds up when there are millions of calls being made each month – though the FCC calculated the proposed fine on only the 82,000 calls verified to have come from spoofed numbers.

(Continued on page 5)



FCC Tackles Robocalls — *(Continued from page 4)*

Second, this fine is yet another instance where the TCIA has been used by the FCC to issue a penalty against illegal robocallers. It's a trend that the FCC started not too long ago but is likely to continue into the future for several reasons.

The obvious reason is, unfortunately, that spoofing and illegal robocalling continues to occur.

Efforts have been underway to develop regulatory and technological solutions to help mitigate the potential for such activity; but where there's a will, there's a way for those looking to make a quick buck. Thus, TCIA penalties are a way—and perhaps an easier way when compared to basing penalties on the TCPA—for the FCC to up the disincentive.

Which brings us to our final point.

As we mentioned earlier, Roesel was merely issued a citation, essentially a regulatory slap on the wrist, for the 21 million unwanted robocalls he placed over a three month period. A sternly worded, albeit official, letter isn't much of a deterrent, in our opinion. So why would the FCC do this? Well, because it has to.

Under the Communications Act, the FCC typically is required to issue a citation to certain persons (generally, anyone who does not hold an FCC license of some sort) as a prerequisite to a fine – if the person cited commits the same violations again afterwards, *then* the FCC can fine them.

So, if Mr. Roesel continues with his robocalling campaign, the FCC could then propose additional penalties for those TCPA violations. Not exactly the best scenario considering illegal robocallers could just pack up and move on after being placed under regulatory scrutiny. Here's where the TCIA comes into play. According to the FCC's interpretation, the wording Congress placed into the TCIA makes it such that the FCC ***does not*** need to issue a citation for TCIA violations as a prerequisite to issuing monetary penalties.

This means, assuming spoofing is involved, the FCC can and will, based on recent trends, continue to invoke the TCIA as its way of issuing penalties against illegal robocallers right out of the gate. And, as we see here in the case of Mr. Roesel, the FCC will also issue a corresponding citation for other violations (i.e., robocalls that violate the TCPA) to ensure it can assess additional penalties in the future if the prohibited activity continues.

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Tech Advisors to Assist FCC in Faster Approvals for New Devices

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The FCC's Technological Advisory Council (TAC) has initiated a Technical Inquiry into reforming the FCC's technical regulations. Comprised of very smart industry engineers, academics, and other technological leaders who provide technical advice to the FCC, the TAC aims to provide useful guidance to the FCC on its technical rules and the status of emerging technologies. The issue it aims to address in the Technical Inquiry is the FCC's constant struggle with the question of how to provide for fast regulatory approvals of new technologies, while still meeting its statutory obligation to protect the public interest, including the well-being of consumers and the efficient use of spectrum.

The Technical Inquiry is focused on obtaining feedback about technical rules that are obsolete or in need of updates or consolidation, and necessary changes to better reflect the current needs of the industry. It seeks general comment on how the FCC's regulatory process "can be made more efficient and timely," and poses specific questions on whether a mediation-type process could be created to more quickly address conflicts between parties. It also raises questions about how the FCC can better handle a growing issue of how to deal with the frequent changes in technical specifications made by private standards setting bodies. Many FCC technical rules specify compliance with particular industry standards, which often are updated soon after the FCC has adopted a rule specifying that standard, leaving the FCC rule "outdated" in that it requires compliance with an outdated standard.

The TAC is a federal advisory committee, which means that its work is only advisory in nature and the FCC does not need to accept its recommendations. But in this instance, the FCC, especially in recent years, has worked very closely with the TAC; both to set its agenda of issues to study, based on the areas where the FCC requires industry input, and to implement many of the TAC's ideas and suggestions.

We here at FHH are hopeful that this latest initiative will generate good ideas that truly will speed up regulatory approvals of new technologies.

FCC Tweaks Mic Rules, Microsoft Launches Spectrum Fight

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In late 2015, major wireless microphone manufacturers requested that the FCC "reconsider" various mostly-technical rules that it had adopted as part of a wide-ranging strategy to reallocate spectrum for wireless microphones. (We've written about recent regulatory changes for wireless mics here, here and here.)

The Commission now has responded via an Order aimed at fine-tuning the technical rules for wireless microphones.

One topic in this Order has stirred up controversy in what should have been an uneventful FCC proceeding: whether professional performing arts companies that use fewer than fifty microphones should receive interference protection from unlicensed white space devices. The Commission decided several years ago to allow those using fifty or more microphones to obtain a Part 74 license, a regulatory status that permits such users to register for protection in the white space database system, thereby preventing white space devices from turning on while in proximity to the performance location. At that time, the Commission thought that "fifty or more" microphones was a good proxy for "professional" productions.

Many performing arts organizations, as well as the microphone manufacturers, pointed out that this definition barred licensure for professional orchestras, playhouses and other performing arts groups that provided professional-quality performances yet use a smaller number of mics. The policy question for the FCC comes down to this: If you are attending a performance at the Shakespeare Theatre here in Washington, D.C., the Houston Symphony at Jones Hall, or the Steppenwolf Theatre in Chicago, do you want to hear the performance or do you want to have access to broadband to surf the web?

To resolve this situation, the Commission included in its Order a Further Notice of Proposed Rulemaking (FNPRM). The FNPRM proposes a path to Part 74 licensure if an entity can demonstrate both that it has "professional needs" and is capable of using the license correctly (a showing similar to what most other FCC licensees are required to make when first obtaining a license). Microsoft, which is looking to use white space spectrum to provide broadband, threw a wrench into this initial proposal, claiming that the rule change would burden the FCC staff and open the door to too many new licensees. As a result, Commissioner O'Rielly asked whether a different proposal, one that did not require a case-by-case review, wouldn't be better.

Comments on the FNPRM can be filed in Docket Nos. 14-165 and 14-166. All public comments are due by **Oct. 2, 2017** with reply comments due on **Oct. 16, 2017**.

(Continued on page 8)

FCC Tweaks Mic Rules — *(Continued from page 7)*

Meanwhile, for those interested in the actual revisions and clarifications to the technical rules, the Order is mostly a "win" for the wireless microphone community. Specifically, the Commission:

- Adopted the full ETSI (a European standards setting body) standard for out-of-band emissions, a must for future microphone design;
- Allowed microphone output power to be measured in EIRP or conducted power, increasing design flexibility for manufacturers (though the Commission declined to raise the power level for mics operating in the Duplex Gap);
- Provided for the use of standard antenna connectors by Part 15 (unlicensed) microphones;
- Set out procedures to modify existing equipment, whether via software or hardware changes, for continued use of mics after the repacking of TV stations that is part of the FCC's Incentive Auction;
- Revised the 169-172 MHz channelization plan to be more synced to the unique needs of wireless microphones;
- Left the 30 MHz limit on the use of the 1.4 GHz band, which requires specialized equipment and prior-coordination with the flight test frequency coordinator (AFTRCC), but provided that multiple users in the same area may each access up to 30 MHz so that the entire whole 90 MHz could be in use in aggregate so long as AFTRCC allows; and
- Spelled out coordination requirements for the new 941.5-944 MHz frequencies.

As always, check Commlawblog.com for updates on wireless microphone issues.

How to Find Renewal — for Wireless Licenses

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The FCC has rewritten the rules on renewing wireless radio licenses. Unlike renewing, say, a car registration, these require more than an application form and a check. The FCC also wants assurance that you have been using the license. Because if you haven't, they want to let it expire and make room for somebody else.

IMPORTANT: This is only a summary. Licensees should consult the details of the new rules, available here, starting on page 49.

In the past, dozens of wireless services and sub-services each had unique use-it-or-lose-it renewal requirements. Moving toward greater uniformity, the FCC has issued a single, blanket rule meant for all. But, because many services have different characteristics and serve different purposes, there are still differing provisions in the individual rule sections that help to determine renewal eligibility.

Past requirements sometimes combined a hard-to-apply renewal standard with more clear-cut "safe harbor" options that assured renewal if met. In a dozen or so services, for example, the general standard was:

> "service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal[.]"

It is hard to know what that means in any particular case. The accompanying safe harbors were easier to assess. For example, the safe harbor for auctioned, geographical-area, fixed-service licensees was the construction of four links per million population in the license area. Some licensees questioned the appropriateness of this criterion. Some may have built useless "links to nowhere" simply to qualify. But certainly, each licensee could know whether it had met the requirement.

The new rules retain the same bifurcation: general standard and safe harbor—but with a catch we'll come to shortly. The FCC expects safe harbors to be the more common route to renewal. These now come in a few different types, depending on the kind of license.

> *A site-based licensee* (one authorized at a specific location) need only certify operation in line with the most recently filed construction notification (or most recent authorization, if no construction notification is required).
>
> *A geographic-area licensee* must certify it has met the appropriate "performance requirement" set out on the rules for the particular service. These are different for licensees serving the public (like cell phone licenses) and those providing a business's internal communications needs.

(Continued on page 10)

Renewal for Wireless Licenses — *(Continued from page 9)*

> A party holding *partitioned or disaggregated licenses* must meet the appropriate performance requirement, if there is one, and otherwise must be providing service to the public or furthering the licensee's internal business or public interest/public safety needs.

Here's the catch: the safe harbor "performance requirement" for a few of the license categories is "a service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." Sound familiar? The safe harbor uses the same language as the previous general standard—which was so vague as to need a safe harbor.

A licensee unable to make use of a safe harbor must instead make a general showing that:

> "over the course of the license term, the licensee(s) provided and continue to provide service to the public, or operated and continue to operate the license to meet the licensee(s)' private, internal communications needs[.]"

These non-safe-harbor renewal applicants must provide a "detailed description" of their provision of service (or use of the spectrum for internal communications). They can expect additional scrutiny on: (1) the extent and quality of service provided; (2) the date service commenced and the duration of any interruptions; (3) service to rural areas; (4) service to qualifying tribal lands; and (5) any other factors associated with service to the public. It is unclear how these criteria would apply to licensees that use radios for their own internal business purposes.

In a new and controversial step, a renewing licensee—by safe harbor or otherwise—must certify it has substantially complied with all applicable FCC rules. This could be a problem for companies that routinely manage a lot of FCC licenses. Even the most careful licensee can have an occasional slip-up. In the past, errors in the paperwork and technical gear led to fines and, in egregious cases, loss of the license involved. But the new rules could go much farther. The existence of the requirement suggests that an error with respect to any one license could threaten the renewal of all of a licensee's wireless authorizations. Licensees unable to make the required certification are invited to explain the circumstances and say why the FCC should grant renewal anyway. Presumably the FCC can waive past rule violations, but as yet there are no standards or guidance on how this might work.

The new rules do not apply to services that are "licensed by rule," to certain public safety licensees, or to the Educational Broadband Service.

(Continued on page 11)

Renewal for Wireless Licenses — *(Continued from page 10)*

Implementation. Site-based licenses will have about a one-year transition period. For them, the new rules take effect on October 1, 2018.For geographic-area license renewals, the new rules do not take effect until January 1, 2023. Exception: licensees in 700 MHz, AWS-4, H Block, AWS-3, and 600 MHz services are already subject to the new general renewal standards, and remain so. They can take advantage of the new safe harbor provisions 30 days after publication in the Federal Register.

Competing applications eliminated. In the olden days, the FCC accepted and considered competing applications for many radio services at renewal time. These applications said, in effect, "The licensee did such a poor job as to have lost its right to renewal, so give me the license instead." The FCC has steadily cut back the right to file competing applications over the last few decades, and has now eliminated the last of them in the wireless services.

Discontinuance. A geographic-area license terminates automatically if operation ceases for 180 days; a site-based license or public safety license terminates if operation ceases for 365 days. Once terminated, licenses are ineligible for renewal. (These rules do not apply to Educational Broadband Service and certain common carrier fixed microwave licenses, which continue under their old rules.) Licensees can request an extension, but must do so at least 30 days before the end of the 180-day or 365-day period.

When to file. This is unchanged. Licensees must file renewal application**s** during the last 90 days of the license period. The license remains valid while the FCC considers the application. Parties that hold multiple wireless licenses can adjust the termination dates so that all of their renewal filings each year come due during the same 90-day period.

Further Notice of Proposed Rulemaking:

There may be still more changes to come. The FCC asks for comment on these issues:

- whether licensees should have to increase their service coverage in license periods after the initial license period, and whether any such requirements should apply only to new licenses or to existing licenses as well;
- whether licensees that met a quantitative safe harbor (such as service to a specified percentage of the population) should face increased quantitative requirements in successive license terms;
- whether renewal safe harbors should require coverage of a specific percentage of the rural population, or alternatively, whether the rules should require geographic licensees to provide service to a percentage of the license *area*, rather than a percentage of the *population*, and whether the percentage should depend on the size of the license area;

(Continued on page 12)

Renewal for Wireless Licenses — *(Continued from page 11)*

- whether license terms should become longer on renewal;
- whether services that are subject to atypical technical or regulatory constraints should have different renewal requirements;
- whether flexible-use licenses should have different renewal requirements for different uses;
- whether renewal applications should have to include reporting on broadband adoption and affordability; and
- whether a licensee whose coverage is insufficient to justify renewal could nonetheless retain a license for the areas it does serve, perhaps with a requirement that it offer other areas for licensing by another party.

The FNPRM also seeks comment on mechanisms for relicensing areas whose licensees were unable to achieve renewal.

Our advice, particularly as to site-based licenses, is to study the rules well before the next renewal filings come due. Geographic licensees will have another five years to learn the requirements.

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