**WIRELESS**


Pursuant to the Communications Act of 1934 ("1934 Act") and the rules of the Federal Communication Commission ("FCC"), number portability has been defined as the "ability of users of telecommunications services to retain at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." On November 24, 2003, wireless telecommunication providers will be required to provide wireless local number portability ("LNP"), which will allow consumers to switch between wireless carriers, but retain the same local telephone numbers. Wireless carriers petitioned the FCC for guidance as to whether wireless carriers would be able to impose certain restrictions to wireless LNP. For instance, the wireless carriers asserted that a wireless carrier should be allowed to deny a consumer the ability to transfer a telephone number to a different carrier ("portability") if the consumer owed an early termination fee or breached the minimum contract terms. The Wireless Telecommunications Bureau had previously issued a letter stating that under the 1934 Act and FCC rules, wireless providers could not impose any restrictions on portability once a consumer requested a telephone number transfer beyond necessary consumer validation requirements.

The FCC held that wireless carriers may not impose any restrictions on wireless portability once a valid request to port a telephone number to another carrier has been made, even if the consumer making the request is in arrears or a provision exists in the contract with the consumer that prohibits porting a number prior to the consumer settling the account. The FCC stated that this rule does not interfere with the contractual rights of the wireless carriers because the wireless carriers remain free to seek compensation or legal remedies for any breach of contract terms. The FCC believes that the rule will be beneficial to consumers because it will prevent carriers from establishing barriers to portability, thereby encouraging competition among wireless carriers.

*Summarized by: Robert James*

**MEDIA**


The impetus for the FCC's proceeding is a recognition that the current lack of digital broadcast copy protection, which would prevent the unauthorized reproduction and redistribution of digital media, might be keeping content providers from allowing the digital broadcast of high quality programming. Without programming, consumers may be reluctant to buy DTV receivers and equipment—resulting in a delay in the transition to DTV.

Foreseeing this obstacle, private industry negotiations produced a general agreement on the need for creating a technical "broadcast flag" standard for protecting digitally broadcasted content. This standard would use a "Redistribution Control Descriptor" to mark digital broadcast programming and limit copying of such programming.

The *Notice* first asks whether a DTV "copy protection regime" is even necessary. It also asks to what extent content providers are concerned with piracy, and whether such concerns would cause them to withhold content from broadcast channels. If so, the FCC seeks comment on how the regime should be structured, and what challenges would accompany such regulations. The comment also questions what impact a "broadcast flag" would have on consumers. Finally, the FCC sought comment on its authority to adopt rules related to digital broadcast copy protection. The record in this proceeding is still under review.

*Summarized by: Leslie Gallager*

The FCC recently reviewed 141 applications submitted by commercial television stations to extend the May 1, 2002 deadline for construction of their digital television ("DTV") facilities in compliance with Section 73.624(d)(3)(iii) of the Rules. Of the 141 applications, the FCC extended the construction deadline for 104 stations to six months from the release of this Order. Seven other stations were admonished for their failure to comply, and will be subject to the remedial measures for DTV construction. The final thirty "satellite" stations' applications were deferred, pending the outcome of the DTV periodic review proceeding.

The FCC adopted an aggressive DTV construction schedule in 1997, determining that television stations affiliated with the ABC, CBS, FOX and NBC television networks would need their DTV facilities completed in the ten largest markets by May 1, 1999. To date, there are 1,258 stations currently broadcasting a digital signal, with 563 of these stations operating under a licensed facilities or program test authority. The remaining stations run their digital signals pursuant to special temporary authority.

Seven stations who applied for an extension were denied and admonished for their lack of an adequate justification for the delay in the construction of their DTV facilities. The FCC announced in its Remedial DTV Report and Order what measures it would undertake in response to these failures. These stations have six months to comply with the DTV rule, and each must submit a report within thirty days of the Order’s release date describing their plan to complete construction and an estimated timeline. The remaining stations run their digital signals pursuant to special temporary authority.


The FCC has adopted the following technical, encoding and labeling rules in an effort to further the digital transition, ensure consistency in manufacturing, and facilitate a broader availability of digital cable services to consumers. Section 629 of the 1994 Act requires the FCC to offer consumers the ability to purchase digital "navigational devices" or customer premises equipment from manufacturers and distributors other than their multichannel video programming ("MVPD") service provider. The FCC has established compatibility parameters for these set-top boxes to ensure that consumers will be purchasing boxes that are usable on any system and in furtherance of establishing a competitive market for the design, manufacture, and retail sale of such devices.

Since the cable and consumer electronics industries have long disagreed over a "plug and play" standard for digital cable television, the FCC set out industry-wide guidelines in this proposed rulemaking, incorporating various groups' comments where appropriate. Consumer protection efforts include the FCC establishment of a labeling regime, called "Digital Cable Ready," which prohibits manufacturers from marketing products as such unless a set of technical specifications are met, with compliance certified through an independent test facility. More specifically and pursu-
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ant to this industry-wide compatibility, the FCC has adopted rules to standardize digital cable systems transmissions with an activated channel capacity of 750 MHz or greater to support operation of unidirectional digital cable products; uniform point of deployment ("POD") modules access, including a POD-Host interface requirement; and additional technical support requirements. Additionally, the FCC has ordered all cable operators to replace or upgrade subscriber-leased high definition set-top boxes by April 1, 2004, to ensure interfaces with the appropriate level of software support. Some smaller cable systems may be granted waivers on a case-by-case basis from these obligations if they can prove an economic hardship would result. Furthermore, the FCC specified certain encoding rules and restrictions for MVPDs, including a prohibition on selectable output control—meaning the ability to remotely shut off a specific output on a program-by-program basis—as a tool to address piracy concerns. The FCC recognizes the MVPDs concern; however, it is more concerned with the potential service interruptions that the "early adopters" may experience and as a result, have determined that consumer satisfaction outweighs the MVPDs interests on this issue.

Further comment is sought as to whether "transmission standards applicable to digital cable systems with an activated channel capacity of 750 MHz or greater should be extended to digital cable systems with an activated channel capacity of 550 MHz or greater," with a focus on the potential costs of such extension. In addition, further comment is sought on the content providers' assertion that down-resolution of non-broadcast MVPD programming as a means of spurring the "retirement of component analog outputs" should be allowed and if permitted, its impact on consumers.

Summarized by: Dionne McNeff


The Media Bureau received three requests for temporary suspension of the Digital Television simulcasting requirements codified at 47 C.F.R. Section 73.624(f). Section 73.624(f) requires DTV licensees to simulcast 50% of their analog programming on their DTV channel by April 1, 2003. Section 73.624(f) is a graduated provision that increases this requirement to 75% by April 1, 2004 and 100% on April 1, 2005.

A temporary suspension request was made by the Public Broadcasting Service ("PBS"), on behalf of all Noncommercial Educational Television Licensees ("NCE stations") collectively. The Milwaukee Area Technical College ("MATC") and the Paxson Communications Corporation ("Paxson") each sought temporary waivers of their requirement under Section 73.624(f).

The FCC in their Second DTV Periodic Review, Notice of Proposed Rulemaking, adopted on January 15, 2003, sought comment on whether to retain, revise, or remove the simulcast requirements.

PBS requested a temporary suspension of the DTV simulcast requirements, pending FCC action on the issues raised in the Second DTV Periodic Review NPRM. Their argument was based on the fact that some NCE DTV stations would not have completed the necessary digital interconnection facilities in time to comply with the requirements. PBS notes that commercial stations had a minimum of eleven months between their construction deadline and the start of the simulcasting requirements. Conversely, the NCE stations were required to complete construction and meet the simulcasting requirements at the same time. Finally, they argued that as the FCC was reconsidering the simulcast requirement, it was logical to suspend the same until the FCC made a decision.

The FCC acknowledged the points made by PBS and found that good cause existed to grant NCE stations a six-month waiver of the simulcast requirements in Section 73.614(f). The FCC found that a blanket waiver for an indefinite period until resolution of the issues was unnecessary. The six-month waiver expired on November 1, 2003, but the FCC stated that other requests would be considered on individual merit. The waiver did not affect NCE stations' obligations re-
COMMLAW CONSPECTUS

regarding the minimum number of hours NCE stations were required to broadcast a digital signal.

MATC is a licensee of two NCE stations in Milwaukee, Wisconsin. They requested a temporary waiver to permit simulcasting the analog programming of both of its stations on one of its DTV stations and to use their other digital station to air high definition programming full-time. The FCC granted MATC’s waiver request, citing the fact that MATC’s proposal serves the purposes underlying the rule as well as MATC’s commitment to provide simulcasting, while allowing MATC to experiment with digital programming on its second DTV station. The MATC waiver did not affect either station’s minimum hours of operation on digital channel requirements.

Paxson, a corporate holder of twenty-eight licensed commercial stations, requested a one-year waiver of the simulcast requirements in Section 73.624(f) and in particular the minimum digital signal operating hours requirements. Paxson, stating that regulatory uncertainty remained with DTV must-carry and DTV simulcasting requirements, argued that without cable carriage for its DTV stations, compliance would not further the transition, or improve service to television viewers, while imposing an undue burden on Paxson’s stations. The FCC found that it was “neither appropriate nor necessary to waive or reduce the minimum operation hours.” The FCC found that such action would slow the transition and noted that all stations had been on notice of the requirements since November 2001.

In sum, the Order granted a six-month waiver to all NCE stations, a temporary waiver to the Milwaukee Area Technical College and denied the request for temporary waiver for Paxson Communications Corporation.

Summarized by: Armstrong Robinson

SPECTRUM


Spectrum policy and regulation involves the use and parameters of bandwidth assignments for radio transmissions known as the electromagnetic spectrum. The first regulation dealing with these issues was the Radio Act of 1912 which mandated that the United States (through the Radio Commission) control and provide use of interstate and international channels. When the FCC was created in 1934 they assumed responsibility for spectrum policy. The FCC approached issues of Spectrum Policy concern mostly on an “ad hoc” basis. Thus, spectrum policy remained virtually unchanged until the late 1990s and early 2000 when advances in technology, mainly the growth of the wireless industry and an increase in satellite services, mandated review of current policy regarding usage rights of these so-called “secondary markets.” The FCC recognized the struggle in creating spectrum policy as coming from the need to balance the investment and reliance of current spectrum users with policy concerns like national security and emergency preparedness.

In June of 2000, the Spectrum Policy Task Force (“Task Force”) was created by FCC Chairman Powell to investigate the efficiency of the then-current management of the electromagnetic radio spectrum. The goals of the Task Force were twofold. First, to recommend how to transform the enforcement of spectrum policy to provide for greater certainty with less regulatory intervention in the future. Second, to aid the FCC in tackling the most difficult spectrum issues, including interference protection, spectral efficiency, public safety communications and international spectrum policy.

In response to the Public Notice seeking comments about spectrum policy, released by the Task Force on June 6, 2002, over 200 comments were received from numerous industries. These comments spanned the entire subject matter of spectrum policy. To effectively review all of the comments, four smaller “working groups” were created based on major areas of concern: Interference Protection, Spectrum Efficiency, Spectrum Rights and Responsibilities, and Unlicensed and Experimental issues.

After thorough review of the comments, the Task Force outlined several areas of spectrum policy in need of attention by the FCC, including key elements of new spectrum policy, interference avoidance, spectrum usage models, and promoting access to the spectrum. Each general area was followed by a detailed list of recommendations for the FCC—totaling 39 recommendations in all.

The majority of recommendations relating to key elements of new spectrum policy concerned steps to be taken to ensure a more efficient use of
the spectrum which would evolve with changing technology. For example, one recommendation suggested grouping spectrum allocations based on technical characteristics that are shared by all in that allocation in an attempt to decrease interference over time. Perhaps the most important recommendation in this area was the suggestion by the Task Force that spectrum rights be reviewed every 5-10 years to ensure an evolutional policy.

In the area of interference avoidance, the Task Force issued a variety of recommendations addressing the need for better data and definitions regarding some of the key components of interference. For example, the Task Force suggested that the areas of interference temperature, noise floor measurement, and receiver performance need additional factual information prior to making a long term policy. The Task Force also recommended that the FCC educate the public about interference issues.

The Task Force recommended that the current spectrum usage model, the command and control model (which allocates frequencies to a limited number of users for “government-defined uses”) be largely replaced with newer models which have less restrictions. Additionally, the Task Force suggested several ways to ease the transition into these different models, including Congressional amendments to Sec. 3090 of the Balanced Budget Act of 1997 that would give the FCC more options to fund “relocation expenses.”

To promote access to the spectrum, the Task Force made several technical recommendations related to both licensed and unlicensed spectrum bands. Additionally, the Task Force suggested that technical rules be promulgated with the “most congested” and “demanding” areas (namely urban areas) in mind to avoid current interference problems without hindering rural areas.

Finally, the Task Force advised that Spectrum Policy is ripe for reform for three reasons. First, there is a current consumer demand for spectrum products. Second, there are significant recent developments in industry that will allow for efficient changes in the current policy. Finally, despite a general notion that the spectrum is “tapped,” in reality there is a large portion of the spectrum that is under-used. Therefore, the Task Force proposed that the time for Spectrum Policy reform is now.

Summarized by: Treasa Chidester

In re Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, Notice of Inquiry, WT Dkt. No. 02-381, FCC 02-325 (Dec. 20, 2002).

In this proceeding, the FCC sought public comment on “the effectiveness of current regulatory tools in facilitating the delivery of spectrum-based services to rural areas.” More specifically, the FCC wanted information on the opportunities rural telephone companies (“rural telcos”) have in acquiring spectrum and providing wireless services under the Communications Act. To effectuate the regulatory goal of providing greater coverage of wireless services in rural areas, the FCC requested input on whether it would be appropriate to revise existing policies or adopt new policies.

Pursuant to Section 309(j) of the Communications Act, the FCC has adopted policies to encourage increased wireless services in rural areas. Specifically, the FCC sought comments on four distinct areas: (1) the availability of small business bidding credits; (2) the designation of various sizes of geographic service areas for spectrum licenses; (3) the opportunity to obtain licenses through service area partitioning and spectrum disaggregation arrangements with existing licensees; and (4) the adoption of construction benchmark performance requirements.

Small business bidding credits were implemented to encourage broader participation in the spectrum bidding process by “designated entities” (i.e., “small businesses, rural telcos, and women- and minority-owned firms”). Comments in this area will aid the FCC in carrying out Congress’ mandate to ensure diversity in the ownership of spectrum licenses, despite the fact that the FCC has previously declined to adopt a bidding credit specifically for rural telcos.

Another manner in which the FCC has sought to increase rural telcos’ participation in spectrum
actions is by adopting varying sizes of geographic service areas. In fact, the FCC “license[s] areas of varying sizes, ranging from small to large, in order to attract a diverse group of prospective bidders,” including rural telcos. Such variances are made depending on the type of services offered in the particular area.

To enable rural telcos to bid on spectrum without bidding on areas they do not need, the FCC has implemented systems to allow for post-auction divestiture of spectrum. The most notable mechanisms for this are partitioning and disaggregation.

Finally, the FCC sought comments on the best ways to refine the current performance requirements incumbent on winning bidders of spectrum licenses. Many of these requirements mandate that auction winners meet certain construction requirements in order to discourage “stockpiling” of spectrum, and to encourage expanded service in rural areas.

Summarized by: Cordell Hull

WIRELINE


The FCC reconsidered rules previously adopted pursuant to its authority under Section 258 of the Telecommunications Act of 1996 (1996 Act”) pertaining to the unauthorized change of a customer’s telephone exchange or telephone toll service, a practice known as “slamming.” These rules seek to prevent anti-competitive behavior and remove obstacles to consumer choice. In this proceeding, the FCC amended the “drop off rule” requiring sales agents to drop off a third party verification call; removed the sixty-day limitation for consideration of a letter of agency verification for certain multi-line or multi-location businesses; narrowed the information a subscriber must provide to a third party verifier of a carrier change order; expanded the scope of information a carrier contacted with slamming allegations must convey to the subscribers; and modified its verification mandates pertaining to inbound calls to local exchange carriers (“LEC”). Finally, the FCC deleted Section 64.1180 of its rules which had required carriers to periodically report complaints received about unauthorized carrier changes.

The FCC’s “drop off rule” requires a carrier’s sale agent to exit a call when it is transferred to the third party verifier responsible for confirming the consumers’ decision to change carriers. The FCC reaffirmed the importance of minimizing the potential for undue influence during the verification process, but exempted carriers that lack the technological ability to drop a call after the verification has commenced. Carriers qualifying for this exemption must certify to the FCC their inability to comply with the rule, and must re-file this certification after two years if they remain unable to comply. The FCC continued to mandate that if the consumer receives information from any carrier’s sales agent after the verification has begun, a new verification process must be initiated at the conclusion of the correspondence. The FCC also determined that when a third party verification process is employed, a subscriber no longer needs to identify the carrier displaced by the change request because a subscriber often lacks this information, and the data is not necessary to advance a significant purpose.

The FCC declined to clarify that action taken subsequent to a verification by a letter of agency would not toll the sixty-day limit imposed for consideration of the carrier change verification request. However, the FCC removed the time limit as applied to multi-line or multi-location business customers that have negotiated for presubscribed lines over and established term as the restriction would invalidate the negotiated letters of agency without presenting additional consumer benefits.

Carriers that are contacted by a subscriber charging a slamming violation are required to advise the subscriber of their right to file a complaint with either the FCC or state commission. This advisory was expanded to require carriers to inform subscribers that they may also contact both the unauthorized carrier to state they will not pay any charges that accrue and the authorized carrier to ensure the preferred service. Furthermore, the subscriber must be informed that if they file a complaint with the appropriate govern-
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In regard to LECs that effect unauthorized carrier changes, the FCC stated they are to be held to the same standard of liability as an interexchange carrier committing a slamming offense. Because of the increase in LECs offering long distance service, the FCC found it necessary to modify its verification rules when a LEC receives a direct inbound call from a customer. The FCC was careful to clarify that requiring verification of a carrier change request when a customer contacts a LEC in no way impacted its prohibition on re-verification by executing carriers.

The FCC eliminated its requirement that carriers providing telephone exchange and/or telephone tolls service report the complaints they receive regarding unauthorized carrier changes. It determined that the content of these reports had not proved to be useful in slamming investigations and that the preparation costs of filing the reports appear to be greater than the benefit.

In its Second Further Notice of Proposed Rulemaking, the FCC sought comment on the following verification questions: (1) whether third party verifiers should state the date during the taped verification process; (2) whether the verifier should explicitly state that if a customer wishes to speak with a carrier sales agent after the verification process had begun, the verification would be terminated and would not be reinitiated until after correspondence with the sales representative ended; and (3) whether verifiers should be required to tell a customer that they are not verifying an intention to keep existing service, but rather that they are verifying an intention to change carriers.

Summarized by: Elizabeth Drogula

BROADBAND


Broadband over Power Line ("BPL") systems are new types of carrier systems that are potential alternatives to Digital Subscriber Lines ("DSL"), cable modem services, and other high-speed Internet mediums. BPL systems currently exist on an unlicensed basis under Part 15 of the FCC's rules, which in part limits the amount of conducted Radio Frequency ("RF") energy a building may receive via any device that receives power from a commercial power source. Such sources include those that couple RF energy onto Alternate Current ("AC") wiring for communication. While devices such as AM radio, intercom systems and remote controls employ similar carrier technology that couples RF energy into AC electrical wiring, these media have relatively low transmission speeds and are currently regulated by Part 15 rules for low-power, unlicensed equipment.

BPL systems could play an important role in providing broadband access to rural areas. BPL could also be used to improve the efficiency of energy management, power outage notification, and automated meter reading. The main focus of the Inquiry is to seek comment on what changes, if any, should be made to the FCC's Part 15 rules in order to facilitate the development of BPL while at the same time maintaining regulations that will prevent BPL systems from interfering with existing systems. The FCC also encourages present deployment of BPL that will comply with existing rules, noting that if it determines the rules should be changed, these rules will only compliment existing efforts to facilitate BPL deployment.

BPL systems are divided into those that operate inside of a building ("In-House BPL") and those that operate over utility poles and medium voltage power lines ("Access BPL"). Regarding Access BPL systems, the Inquiry seeks comment on questions such as the following: what spectrum and bandwidth will it use; is it necessary or even feasible for Access BPL to share a spectrum with In-House BPL; what types of speeds will Access BPL systems achieve; what will ensure the security of data; what types of products and services will be required for BPL to work correctly; what is the anticipated timeline for marketing deployment of Access BPL equipment?

Regarding In-House BPL systems, the Inquiry asks what systems beyond those currently in operation (which operate in a frequency range of 4.5 to 21 MHz) are designed to work in other parts of the spectrum and at what bandwidth they will operate, what is the highest data transmission speed that can be achieved and what speeds can be sus-
tained under normal use, what will ensure the security of the data, would products designed under one standard be compatible with those created under a separate standard without additional equipment and what standards work has been done domestically and internationally and what is the result of such work?

Additionally, the Inquiry seeks comment on numerous, in-depth questions regarding potential interference problems presented by both Access and In-House BPL, and questions as to viable solutions to such interference. In accordance with Sections 1.415 and 1.419 of the FCC's rules, interested parties may file comments on or before forty-five days from the date of publication in the Federal Register, and reply comments on or before seventy-five days from the date of publication in the Federal Register.

Summarized by: Robert Salzer