SELECTED FCC DOCKET SUMMARIES, 2004

WIRELESS

In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control Licenses and Authorizations, WT Dkt. No. 04-70; Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses, WT Dkt. No. 04-254; Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses, WT Dkt. No. 04-323 Memorandum Opinion and Order, FCC 04-255 (rel. Oct. 26, 2004).

AT&T Wireless Services, Inc. ("AT&T Wireless") and Cingular Wireless Corporation ("Cingular") submitted applications for consent to transfer control of all licenses and authorizations held by AT&T Wireless and its subsidiaries to Cingular. The transfer of control sought would result from a proposed merger whereby AT&T Wireless would become an indirect, wholly-owned subsidiary of Cingular.

AT&T Wireless is the second largest provider of wireless communication services in the United States based on revenues. As of 2003, AT&T Wireless has 22 million customers. Their year-end revenues were $16.7 billion. Cingular is the second largest provider of wireless voice and date services in the United States in terms of subscribership with 24 million customers. In 2003, they reported $15.5 billion in revenues.

AT&T Wireless and Cingular assert that approval of the proposed merger is in the public interest. Specifically, they assert that the increased network and spectrum capacity in areas where they are both already providing service will greatly improve service quality and coverage. AT&T Wireless and Cingular allege that the merger will create economies of scale and scope that will allow Cingular to be a more effective competitor, and that the merger will improve homeland security and public safety. They further argue that the merger will not harm competition. They indicate that the competitive effects of this transaction should be evaluated based on its nationwide impact.

The Antitrust Division of the U.S. Department of Justice has reviewed the proposed merger and has consented to the merger. The Antitrust Division issues its consent subject to AT&T Wireless and Cingular divesting business
units in certain markets divesting bare spectrum in other markets, and either selling or making passive certain of their minority investments in other wireless telecommunications carriers.

The Commission must review the application to determine whether AT&T Wireless and Cingular have demonstrated that the proposed transfer of control will service the public interest, convenience, and necessity. Essential to the Commission's public interest analysis is an analysis of any competitive harms of the proposed transaction.

The Commission determined that the proposed transaction would pose significant competitive harms in a number of local mobile telephony markets. In these markets, the Commission imposed conditions on the merger. The Commission has condition their consent on the divesture of AT&T Wireless operating units in sixteen markets. In addition, in two highly populated markets, the Commission conditioned their approval on divestures of 10 MHz of PCS spectrum in each market in order to enable competing carriers to acquire sufficient bandwidth to compete effectively against the combined entity. Furthermore, the Commission conditions approval on divesture down to no more than 80 MHZ of cellular and Broadband PCS spectrum in forty-three counties.

Overall, the Commission has determined that competitive harm is unlikely in most telephony markets because of the merger, primarily because of the presence of multiple other carriers who have the ability to act as effective competitive constraints. The Commission cautions that there is clearly a point at which further consolidation would not be in the public interest. Therefore, in the future, the Commission's determination on similar transactions may require a different result.

Summarized by Jennifer O'Brien

SPECTRUM

In re Improving Public Safety Communications in the 800 MHz Band, Report and Order in WT Dkt. No. 02-55, Fifth Report and Order in ET Dkt. No. 00-258, Fourth Memorandum Opinion in RM-9498, Order in RM-10024, and Order in ET Dkt. No. 95-18, FCC 04-168 (rel. August 6, 2004).

On August 6, 2004, the FCC unanimously approved a plan to eliminate cellular phone interference with hundreds of public safety communication systems around the Nation that operate in the 800 MHz band. The plan allows Reston, Virginia based Nextel Communications to acquire 1.9 GHz in spectrum band rights valued at $4.8 billion. In return, Nextel is required to give up all of its 700 MHz band, certain licenses in the 800 MHz band, and pay to reconfigure the airwaves it presently occupies so that public safety communica-
Selected FCC Docket Summaries

After two and a half years of work, the Commission settled on a compromise between Nextel’s original plan balanced against their competitor’s demands and the public good. The plan allocates 4.5 MHz of 800 MHz band spectrum (the equivalent of ninety additional two-way channels) to public safety workers and private wireless users, including ten channels for public safety/critical infrastructure interoperability. To ensure the successful completion of reconfiguration, the FCC required Nextel to open an escrow account and line of credit totaling $2.5 billion. This will primarily cover relocation costs for the other 800 MHz incumbents. Since Nextel is acquiring 1.9 GHz band, it is obligated to fund the transition of incumbent users to comparable facilities. The Commission, however, will credit Nextel for the value of the spectrum it is returning for public safety purposes.

Acutely aware of the Herculean task before Nextel, the FCC provided for an independent “Transition Administrator” to oversee the administrative and financial aspects of the band reconfiguration. An independent administrator will ensure both the integrity of the process and that band reconfiguration is achieved with minimal disruption to licensees, specifically public safety outfits. Any decisions made by the Transition Administrator will be subject to de novo Commission review. The Administrator is also empowered to seize the guaranteed funds held in escrow to ensure successful band reconfiguration if Nextel’s financial situation materially changes.

While controversial, this plan was ultimately deemed necessary because there is “no matter within [the FCC’s] jurisdiction more crucial to Homeland Security and the overall general safety of life and property than assuring that public safety communications systems are free from unacceptable interference and have adequate capacity.” Recognizing the plan is very similar to the one Nextel originally submitted that was later objected to by competitors, the Commission concluded that “[u]nderlying the policies we enunciate today is the tenet put forth by many of the commenting parties in this proceeding: parties must work together to abate interference and endure occasional hardship as a necessary concession to the nation’s overall Homeland Security obligation.”

Summarized by Craig Trainor

BROADBAND

In re Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), WC Dkt. No. 01-338; SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c), WC Dkt. No. 03-235; Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Dkt. No. 03-260; BellSouth Tele-
In the Triennial Review Order, the Commission determined that based on the impairment standard of section 251(d)(2) of the Telecommunications Act of 1996 and the section 706 requirement of providing incentives for carrier investment in broadband facilities, new fiber network elements could be distinguished from all network elements. The Commission found that incumbent local exchange carriers (LECs) are not required to unbundled four fiber network elements: FTTH loops in greenfield situations; broadband services over FTTH loops in overbuild situations; the packetized portion of hybrid loops; and packet switching. This Memorandum Opinion and Order grants the petitions of Verizon, SBC, Qwest, and BellSouth, collectively referred to as the Bell Operating Companies (BOCs), requesting that the FCC forbear from enforcing the section 271 unbundling obligations of the Triennial Review Order concerning the four specific broadband elements from section 251. The SBC and Qwest petitions sought forbearance from section 271 independent access obligations for all network elements not unbundled under section 251, but their petitions were granted only as to the four above mentioned broadband elements. The Commission declined to address the forbearance request for the other network elements in this Order.

Summarized by Casey Strosnider


In its August 4, 2004 Notice of Proposed Rulemaking (NPRM) regarding the Communications Assistance for Law Enforcement Act (CALEA) and Broadband Access and Services, the FCC has tentatively concluded that CALEA extends to providers of broadband Voice over Internet Protocol (VoIP). This conclusion came after a careful consideration of a proposal issued by the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Drug Enforcement Administration (DEA).

In their proposal, the three agencies, hereinafter referred to collectively as Law Enforcement, requested that the FCC identify what services and entities are subject to CALEA. CALEA was adopted in 1994 with the goal of balancing the need for law enforcement agencies to be able to carry out their duties with the promotion of the development of new technologies and protection of privacy among citizens. Law Enforcement suggested in its proposal that its
capacity to perform surveillance were being hampered by providers of new technologies that have failed to implement the interception provisions in CALEA. Law Enforcement contends that a declaration by the FCC that certain technologies must comply with CALEA will ease efforts of law enforcement agencies.

The FCC, in its NPRM adopted on August 4, 2004 and released on August 9, 2004, seeks to relieve the confusion surrounding CALEA and its application. The FCC begins by reaffirming that CALEA does apply to those services that use packet-mode technology, but not all of these services will in fact be governed by CALEA. The primary factor in determining which packet-mode technologies are subject to CALEA is whether or not a service is considered a "telecommunications carrier." The FCC tentatively concluded that providers of VoIP services characterized as "managed" or "mediated" are to be classified as telecommunications carriers, and therefore subject to CALEA. Managed or mediated VoIP services are those in which the provider of the services acts as a mediator between the end points of a communication. The FCC is seeking comment on whether these mediated services should be distinguished from so-called "non-managed" or "peer-to-peer" communications, in which VoIP providers have little or no involvement in the transmission of "packets" during communication. The FCC tentatively concluded that CALEA should not extend to these non-managed communications. The FCC based its conclusions on an analysis of CALEA's wording and its legislative history, noting that the definition of "telecommunications carrier" under CALEA is broader in scope than the definition offered in the Communications Act.

In addition, the FCC tentatively concluded in its NPRM that any type of broadband Internet access service would be treated as a telecommunications carrier, and therefore subject to CALEA. The FCC denied Law Enforcement's request that the FCC adopt rules that would allow for the easy identification of future services and entities covered under CALEA. The FCC believes that such rules would impede the development of new technologies, and therefore conflict with CALEA's legislative intent.

*Summarized by Tracy DeJesus*


On October 14, 2004, the FCC adopted a series of proposals amending current rules concerning Broadband Over Power Line ("BPL") devices in order to
increase the distribution of broadband services over electric power lines. Originally proposed in February 2004, the adopted changes will effectively amend Rule 15 to allow broadband technology to be carried over traditional electric power lines. Because of the reach of power lines into practically every home and business across the country, this has the potential of expanding broadband services to practically every American. Increasing public access to broadband, including to those in rural or underserved areas, has long been a stated goal of the FCC and this proposal goes a long way towards achieving that end. The new BPL systems couple radio frequency energy onto existing electric power grids, resulting in enhanced delivery capabilities. BPL systems can operate both inside a building ("In-house BPL") and outside on electric power lines ("Access BPL"). Access BPL provides access to high speed broadband using the previously unrealized abilities of the nation’s electric grid. The introduction of a new medium for broadband delivery will also likely introduce competition into the market of existing information delivery services, such as DSL and cable.

In the Report and Order, the Commission took into consideration the concerns of RF operators who complained that Access BPL would become a harmful source of interference to their systems. The American Radio Relay League (ARRL), which represents the interests of amateur radio operators, was one of many constituencies that claimed Access BPL would significantly interfere with radio frequencies. To allay the fears of such operators, the Commission took special care to show through extensive analysis that Access BPL would not interfere with their frequencies. The Commission mandated specific technical and administrative requirements for Access BPL to ensure that interference does not occur, and if it should occur, the new requirements set forth guidelines for timely resolution of the interference to minimize disruption time for Access BPL subscribers. They also proposed to require BPL to employ adaptive interference mitigation techniques to prevent harmful interference to amateur radio operators. In the event of interference, these techniques would allow BPL devices to cease their operations, reduce their power transmittals, and avoid operating on certain frequencies to prevent the interference from occurring.

The FCC is taking other steps to reduce or eliminate the effects of BPL devices on harmful interference. One such move is to develop a public database that would store information on location, operational frequencies and modulation type of BPL devices, in order to resolve interference issues quickly. Another such step is the adoption of radio frequency measurement guideline for BPL devices that would help ensure that emission levels for these systems are consistent.

Summarized by Brendan Holloway