

Patton Boggs TechComm Industry Update
March 30, 2012

FCC Undertakes Review of Program Access Rules

The Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) seeking comment on whether to sunset or relax the prohibition on exclusive contracts involving satellite-delivered, cable-affiliated programming. Perhaps of broader interest to competitive multichannel video program distributions (MVPDs), the NPRM also seeks comment on potential revisions to the program access rules to better address alleged violations, including potentially discriminatory volume discounts and uniform price increases. The FCC asks whether the program access rules adequately address potentially discriminatory volume discounts and uniform price increases and, if not, how these rules should be revised to address these concerns. Competitive MVPDs have, in various proceedings, raised issues about the time, expense, and difficulty of bringing and maintaining program access complaints under the Commission's rules.

The Communications Act of 1934 and FCC's program access rules generally prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor. Under the Act, Congress provided that the exclusive contract prohibition would cease to be effective on October 5, 2002 unless the Commission found that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." In past actions, the Commission found that the exclusive contract prohibition continued to be necessary to preserve and protect competition and diversity, and retained the exclusive contract prohibition until October 5, 2012. This NPRM is the third review to determine whether the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

Comments and reply comments are due 60 days and 90 days, respectively, after publication of the NPRM in the Federal Register.

FCC Seeks Comment on Clarifying Key Condition of Comcast-NBCU Merger Approval

The FCC's Media Bureau has sought comment on whether a key condition to the Commission's approval of the Comcast-NBCU (C-NBCU) merger needs clarification. The condition involves the requirement that C-NBCU provide access to comparable programming to online video distributors (OVD) who enter into programming access agreements with C-NBCU programming peers (e.g., Sony Pictures Television). C-NBCU wants the FCC to clarify that OVDs who seek access to C-NBCU programming pursuant to this "Benchmark Condition" must disclose the full and unredacted terms of these peer agreements. Further, C-NBCU wants the Commission to allow, subject to a revised protective order, its inside counsel and certain "essential business people" to have full access to the documents, access currently not permitted under the original Model Protective Order approved by the FCC as part of the merger approval.

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Even before the Public Notice, the request was opposed by an OVD seeking comparable programming and by C-NBCU peers, such as The Walt Disney Company, CBS Corporation and News Corporation. The peers opponents contend that the C-NBCU request is overbroad, appears to be counter to relevant competition laws, and, if granted, would have a chilling effect on future online video distribution. The OVD noted that the Commission understood the highly confidential nature of the peer agreements and expressly limited disclosure to outside counsel and experts, in a Model Protective Order that C-NBCU agreed to, but now seeks to re-litigate.

Comments are due April 3 and reply comments by April 17. The Media Bureau has confirmed that the request for comments is not intended to displace the current approved process or interrupt any ongoing arbitrations proceedings under the conditions attached to its approval of the C-NBCU merger.

FCC Revises FCC Forms 499-A and 499-Q

The FCC released a revised annual Telecommunications Reporting Worksheet, FCC Form 499-A, and accompanying instructions for 2012, as well as revised instructions for the quarterly Telecommunications Reporting Worksheet, FCC Form 499-Q. Many of the changes are not substantive, such as changing references from “2011” to “2012.” However, the Form 499-A has been updated to require non-interconnected VoIP providers to participate in and contribute to the Telecommunications Relay Service Fund (TRS Fund). In addition, revised Form 499-A implements a recent decision by the FCC to require that TRS Fund contributions be based on collected revenues, rather than billed revenues. This means that carriers may now subtract uncollectable revenues/bad debt expenses from the base amount used to calculate their contribution to the TRS Fund. Carriers must file a completed FCC Form 499-A by April 2, a completed FCC Form 499-Q containing revenue information for January 1 through March 31, and projections for July 1 through September 30 is due by May 1.

FCC Seeks More Information on SpectrumCo License Transfers

A cable consortium is seeking Federal Communications Commission approval to sell Advanced Wireless Services (AWS-1) spectrum to Verizon. The license application, however, is gaining attention because of several other agreements signed at the time the application was filed, including agreements through which Verizon Wireless and the cable companies would sell each other's products.

SpectrumCo, LLC (SpectrumCo), a joint venture among Comcast Corp. (Comcast), Time Warner Cable Inc. and Bright House Networks, LLC (Bright House) filed the application with the Commission to assign more than one hundred 20-megahertz or 30-megahertz AWS-1 licenses from SpectrumCo to Verizon Wireless in December 2011. Additionally, Cox TMI Wireless, LLC (Cox), a former member of SpectrumCo, filed an application to assign thirty 20-MHz AWS-1 licenses from Cox to Verizon Wireless. Together, the licenses cover 662 CMAs and 290 million people (approximately 94 percent of the country's population). Verizon Wireless, Comcast, Time Warner and Bright House have also formed a joint venture, which Cox expects to enter, to develop technology to better integrate wireline and wireless products and services.

Reply Comments in the proceeding were due on March 26. Earlier, however, on March 8, the FCC asked Verizon and the cable companies to provide more information regarding their proposed spectrum transaction and underlying commercial agreements, including redacted material from their original submissions. In seeking the information, the FCC noted that the agency and outside parties need full access to the commercial agreements to assess whether the spectrum deals and partnerships are in the public interest. In addition, the FCC wireless chief sent lengthier letters to Verizon, the cable companies, and SpectrumCo (the consortium of Comcast, Time Warner Cable, and Bright House) asking them to respond by March 22 to a series of questions and information requests regarding the deals they struck as well as related business plans.

FCC Seeks Interoperability and Efficiency in Lower 700 MHz Band

The FCC has issued a much anticipated Notice of Proposed Rulemaking (NPRM) to promote interoperability and encourage the efficient use of spectrum in the commercial Lower 700 MHz band (698-746 MHz). The rulemaking is designed primarily to examine the interference concerns should the Lower 700 MHz band utilize a single band class for devices operating across the Lower 700 MHz A, B, and C Blocks.

The FCC focuses on two interference concerns that can result with use of a single band class: (1) reverse intermodulation interference (i.e., unwanted signals entering an output port) from adjacent DTV Channel 51 operations; and (2) blocking interference from neighboring high-powered operations in the Lower 700 MHz E Block. The NPRM also explores possible next steps that the FCC should take to promote interoperability in the Lower 700 MHz band should it find that there is limited or no harmful interference, or such interference can be reasonably mitigated through industry and/or regulatory measures. The FCC considers various options to help achieve the ultimate goal of interoperability.

At present, Verizon's and AT&T's LTE networks are not compatible. Verizon's network runs largely in the 746-787MHz range; AT&T's operates in the 704-746MHz range. There is minimal overlap between the two bands and, as a result, devices cannot be ported from one carrier to another. Additionally, most small carriers operate in Band Class 12 while AT&T operates in Band Class 17. Smaller carriers have argued that without interoperability rules, handset makers will serve only the large carriers. The NPRM will pursue possibilities for significantly improving 4G / LTE operations as it seeks to substantiate any adverse effect to making the 700 MHz A, B, and C blocks of spectrum interoperable and allowing roaming among the bands.

Comments and reply comments are due 60 days and 105 days, respectively, after publication in the Federal Register.

FCC Adopts Rulemaking to Change Part 22 Wireless Licensing from Site-based to Geographic-based

The FCC released a Notice of Proposed Rulemaking (NPRM) seeking comment on a proposal to transition Part 22 spectrum licenses from site-based licensing to geographic-licensing in order to enable these licensees to adapt to technological and marketplace changes and to conserve staff resources. Part 22 licenses include public mobile services such as the 800 MHz cellular services. The proposed rules eliminate the requirement that Part 22 licensees submit applications with significant technical data and maps showing proposed transmitter locations and obtain prior FCC approval before any changes are made to a system that would extend the licensed boundary for the license. Most other commercial wireless licensing rules, such as those for broadband PCS, the 700 MHz Service and the Advanced Wireless Service, are more flexible and do not require FCC approval for changes that do not result in an expansion of the licensed service area. The NRPM also proposes performance benchmarks and competitive bidding procedures for geographic-based Part 22 licensees, and to preserve direct access to Unserved Areas through the existing site-based application process for an appropriate period in Cellular Service markets that are less substantially built out.

Comments and reply comments are due by May 15 and June 14, respectively.

FCC Proposes 40 MHz of Additional S-band Spectrum for Mobile Broadband, Spectrum to be Renamed "AWS-4"

The FCC has released a Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI) to increase the nation's supply of spectrum for mobile broadband by removing barriers to flexible use of 40 megahertz of spectrum currently assigned to the Mobile Satellite Service (MSS) in the 2 GHz band. This proposal would carry out a recommendation in the National Broadband Plan that the Commission enable the provision of stand-alone terrestrial services in this spectrum. In the NOI, the FCC seeks comment more broadly on

potential ways to free up additional valuable spectrum to address the increased demand for mobile broadband spectrum.

The proposed rules are designed to provide for flexible use of this spectrum, to encourage innovation and investment in mobile broadband, and to provide a stable regulatory environment in which broadband deployment can develop in the 2 GHz band. The notices directly follow on last year's *2 GHz Band Co-Allocation Order*, in which the Commission set the foundation for full terrestrial use of this band.

The NPRM also comes as a result of a waiver request from Dish Network, which recently acquired 2 GHz spectrum in a license transfer from TerreStar, seeking the right to use this spectrum for terrestrial communications. The FCC proposed that Dish Network build out to at least 70 percent of the population within seven years in each of the geographic areas in which it is licensed to provide terrestrial service. The NPRM also seeks comment on alternative band plans for the spectrum – to be renamed as “AWS-4” – which would make use of nearby spectrum.

Comments and reply comments are due 30 days and 45 days, respectively, after publication in the Federal Register.

Implementation of the Middle Class Tax Relief and Job Creation Act

Now that the Middle Class Tax Relief and Job Creation Act has been signed, the FCC and the Commerce Department's National Telecommunications and Information Administration have spent recent weeks focusing on implementation of their various statutory obligations with respect to the anticipated public safety network and voluntary incentive auctions for broadcast spectrum. For example, the FCC recently announced that it retained auction and technology experts from Auctionomics, Power Auctions, and MicroTech to advise the agency on incentive auction design and implementation. In addition, the FCC announced the membership of the Technical Advisory Board for First Responder Interoperability and established a docket through which outside parties can submit information for the board's consideration. Members of the board include:

- Bob Azzi (Senior Vice President, Network, Sprint Nextel Corporation);
- Diane C. Wesche (Director, Government Network & Technology, Verizon Wireless);
- Ed Chao (Senior Vice President, Corporate Engineering and Network Operations, MetroPCS Communications, Inc.);
- Ron Strecker (Chief Executive Officer, Panhandle Telephone Cooperative, Inc. and Panhandle Telecommunications Systems, Inc.);
- Kenneth C. Budka (Senior Director, Advanced Mission-Critical Communications, Bell Labs Chief Technology Office, Alcatel-Lucent);
- Dennis Martinez (Chief Technology Officer, RF Communications Division, Harris Corporation);
- Paul Steinberg (Senior Vice President and Chief Technology Officer, Motorola Solutions, Inc.);
- Steve Proctor (Executive Director, Utah Communications Agency Network);
- Colonel Kenneth C. Hughes, Jr., (Ret) (Regional Communications Coordinator, New Orleans Urban Area Security Initiative);
- Brian Shepherd (Deputy Director, Adams County (Colorado) Communication Center);
- Todd Bianchi (Firefighter Paramedic, Washington, District of Columbia Fire and EMS Department);
- Bill Price (Director of Broadband Programs, Department of Management Services of the State of Florida);
- Brenda L. Decker (Chief Information Officer, State of Nebraska);
- Charles L. K. Robinson (Director, Business Support Services, City of Charlotte, North Carolina);
- and Dereck Orr (National Institute of Standards Technology).

The board must submit technical requirements to ensure a national level of network interoperability to the FCC for review by May 22. Meanwhile, NTIA must establish a First Responder Network Authority (FirstNet) by August 20, 2012 that will oversee that creation of the national public safety broadband network. Also within six

months, NTIA in consultation with FirstNet must create a grant program to assist states, regional, tribal and local jurisdictions for network build out.

Revisions Announced to TV Renewal Procedures and Application

Revisions to the FCC's television renewal procedures and to FCC Form 303-S were recently announced. Unlike in the past, the FCC will not send postcards to stations notifying them of the upcoming renewal deadlines. Instead, courtesy emails will be sent to the licensee and contact representative for each station using information from the FCC's Consolidated Database System (CDBS). Television stations therefore need to confirm and update the licensee and contact representative information in CDBS. Failure to receive a notice does not excuse a licensee from filing a late application. The renewal application also has been revised to require applicants to certify that their advertising and sales agreements do not discriminate on the basis of race or ethnicity and that all such agreements held by the licensee contain nondiscrimination clauses. Television stations licensed to communities in the District of Columbia, Maryland, Virginia and West Virginia (the first renewal group) must be filed by June 1, 2012.

FCC Acts to Implement Certain Provisions of Local Community Radio Act

The FCC issued two decisions implementing certain provisions of the Local Community Radio Act (LCRA), which Congress passed to enhance low power FM radio licensing opportunities. The Commission revised its rules to reflect legislative mandates regarding elimination of third-adjacent-channel spacing requirements and maintenance of spacing requirements to protect radio reading services. It also adopted certain market-specific processing and dismissal policies for 6,500 pending FM translator applications. The policies are designed to effectuate the licensing directives set forth in the LCRA while also taking into account the constraints of limited spectrum and technical licensing requirements. The result will be the dismissal of significant numbers of translator applications in spectrum limited markets. The FCC further set a national and market-based cap on the number of translator applications per applicant, and modified certain restrictions on the use of FM translators to rebroadcast AM radio signals to allow authorizations arising from pending translator applications to be used as cross-service translators.

In an accompanying notice, the FCC further proposed (a) changes to technical rules as required by the LCRA, including dealing with certain interference complaints and remediation and (b) other rule changes designed to promote the low power FM service's localism and diversity goals, reduce the potential for licensing abuses and clarify certain other rules. Comments and reply comments on the notice are due 30 days and 45 days, respectively, after publication in the Federal Register.

FCC Proposal Regarding LightSquared's ATC Authority, Parties File Comments

LightSquared and members of the GPS community recently filed comments in response to the FCC's Public Notice that it intends to vacate the conditional Ancillary Terrestrial Component (ATC) authority the agency preliminarily granted to LightSquared to operate its wholesale wireless broadband network. LightSquared argued that the FCC's decision is "legally impermissible, arbitrary, and capricious" because neither the Communications Act nor Commission rules or precedent protect GPS receivers that search for signals across a spectrum band that is licensed to LightSquared. Conversely, LightSquared's network technology will not interfere with GPS signal transmission in the designated, unlicensed GPS spectrum band. LightSquared therefore concludes that the Commission's Public Notice lacks a proper foundation because its network operation does not meet the legal standard for "harmful interference."

Independently, on March 13, the Commission initiated a two-day review of receiver standard technology at the heart of the legal dispute in the Public Notice by hosting a workshop focusing on spectrum efficiency and receiver standards. During the workshop the Commission led a discussion with industry experts to discuss the

characteristics of receivers and how their performance can affect spectrum efficiency, in addition to creating new opportunities for broadband technology and wireless services. Doug Smith, LightSquared's Chief Networking Officer, participated in the workshop and described the company's experience in a regulatory landscape without clearly defined receiver performance standards. Accordingly, Mr. Smith asserted that "clearly defined receiver performance standards are a critical ingredient in enabling spectrum to be efficiently deployed and consumer benefits to be realized."

Meanwhile, LightSquared and members of the GPS community, both filed reply comments with the FCC in the matter of LightSquared's Petition for Declaratory Ruling. In the Petition, LightSquared requested clarification from the FCC regarding the regulatory status of commercial GPS receivers relative to the spectrum rights of receivers authorized to operate in the mobile-satellite service (MSS) spectrum bands, including ATC operations. LightSquared asserted that it is not seeking for the FCC to change its existing policy, but instead to clearly define LightSquared's spectrum rights.

Both proceedings relate to the FCC's decision in January 2011 to conditionally grant LightSquared's request for modification of its ATC authority. That authority included the requirement that LightSquared resolve all interference concerns with GPS users and obtain a letter from the National Telecommunications Industry Administration (NTIA) stating that the interference resolution process was successfully completed. On February 14, 2012, NTIA filed a letter with the FCC stating that the interference resolution process could not be completed and there are no mitigation techniques that prevent harmful interference to GPS operations and provide LightSquared with access to enough spectrum to launch a commercial wireless network.

FCC Extends Network Outage Reporting Rules to Interconnected VoIP Providers

Facilities and non-facilities-based interconnected Voice over Internet Protocol (VoIP) service providers are now required to report significant network outages that meet certain criteria and thresholds to the FCC. It is estimated that almost one-third of residential telephone subscribers use interconnected VoIP service instead of traditional copper wire telephone service, which means that interconnected VoIP networks carry a substantial amount of 9-1-1 traffic. As a result, according to the FCC, the rules help fulfill the agency's "core mission" of public safety by helping to ensure that interconnected VoIP service is available during an emergency or crisis.

The new rules require interconnected VoIP providers to submit electronically a notification to the FCC within either 4 or 24 hours depending on the type of outage. Specifically, service providers must file notifications within either (1) 240 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration that potentially affects a 9-1-1 special facility, in which case detailed procedures must be followed to mitigate the effect of the outage; or (2) 24 hours of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration that potentially affects (a) at least 900,000 user minutes of interconnected VoIP service and results in complete loss of service; or (b) any defined special offices and facilities. Providers also must submit a Final Communications Outage Report to the Commission not later than 30 days after discovering the outage. The FCC further clarifies that the existing reporting requirements apply to all non-wireline providers of voice services, including those operating in the new Advanced Wireless Services and 700 MHz spectrum bands.

The new rules will become effective 90 days after approval from the Office of Management and Budget. The date will be announced by the FCC in a public notice.

If you have any questions about the foregoing or if you require additional information, please contact:

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