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Communications Law Bulletin, April 2009

May 2009

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The Month in Brief

As the new communications policy teams continue to take shape in Washington, important nominations to the Federal Communications Commission ("FCC" or "Commission"), National Telecommunications and Information Administration ("NTIA"), and Rural Utilities Service ("RUS") continued to advance.

On the FCC nomination front, Democratic Senate Commerce Committee Chairman Jay Rockefeller (D-W.Va.) expressed his desire to move on the nomination of Julius Genachowski as Chairman before the Memorial Day recess. However, Senate Republicans prefer to move the Genachowski nomination in tandem with that of a Republican nominee, but have not announced a candidate or confirmed that a decision has been reached on one. The picture was further complicated on the evening of April 29, 2009, when the White House announced the nomination to the FCC of Mignon Clyburn, a Democrat who presently serves as a commissioner on the South Carolina Public Service Commission.

In the meantime, on March 31, 2009, the White house advised the Senate officially of the nomination of Larry Strickling to head NTIA. Jonathan Adelstein, the FCC commissioner who was picked to head the RUS, will reportedly remain at the Commission until his successor is appointed and confirmed.

Supreme Court Upholds FCC's "Fleeting Expletives" Indecency Rule

On April 28, 2009, the Supreme Court issued a plurality opinion in *Federal Communications Commission v. Fox*, reversing a decision of the U.S. Court of Appeals for the 2nd Circuit that the FCC's policy of punishing broadcasters for airing "fleeting expletives" violated the Administrative Procedures Act ("APA"). In a string of FCC enforcement actions going back to around 2002, the Commission had begun levying forfeitures against broadcasters like CBS and Fox for failing to "bleep out" fleeting utterances of certain obscenities during live, unscripted broadcasts. The court below had concluded that the FCC failed adequately to explain the policy shift to this new, stricter enforcement regime.

The Supreme Court's decision reverses and remands the case to the 2nd Circuit. According to the majority opinion, the FCC's decision to start cracking down on single instances of profane language did not, in its view, violate the APA. Specifically, the Court reasoned that a federal agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." In other words, agencies are not subject to a higher standard of justification (even where First Amendment issues are involved) when they depart from prior precedent than when they create a new rule from whole cloth. The dissent disagreed, arguing that although independent agencies like the FCC have broad policy-making authority, they cannot "make policy choices for purely political reasons nor rest them primarily upon unexplained policy preferences."

The Court decided the case on the APA issue alone, and did not address whether the FCC's "fleeting expletives" indecency rule runs afoul of the U.S. Constitution. This leaves the door open for the 2nd Circuit to consider First Amendment issues on remand. The majority opinion notes, "[i]t is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution" and whether this is so "will be determined soon enough, perhaps in this very case." A concurrence by Justice Thomas tees up the Constitutional questions, noting that the technological justification (*i.e.*, scarcity of spectrum suitable for analog broadcasting) for the FCC's authority to regulate broadcast content is obsolete. Because most Americans subscribe to cable and satellite service, rather than rely on over-the-air programming, broadcast television is no longer the "uniquely pervasive" medium that it used to be.

Acting FCC Chairman Michael Copps lauded the Court's decision as a victory in the fight to protect children from indecent material. Contrary to Justice Thomas' view, Copps maintains that broadcasters are subject to "enforceable public interest obligations" because they are "granted free and exclusive use of a valuable public resource."

Progress on EU Regulatory Reforms

The European Union ("EU") has taken another step toward finalizing a package of regulatory reforms that has the

potential to reshape the communications market in the EU.

The reforms were first proposed in November 2007 following a consultation process that started in June 2006. In the latest developments, the three main EU institutions have reached agreement on a number of key elements of the reform proposal, which has been hotly debated within the EU. In particular, if ratified, the recent agreement will:

- give the European Commission ("EC") new powers to veto certain actions by national communications regulators. Under the scheme, veto recommendations by the EC would become binding if supported by a majority of members of a new pan-EU supervisory agency (the Body of European Regulators in Electronic Communications, or BEREC). This represents a step back from the original proposal to give the EC broader veto powers, which was been strongly criticised by a number of the larger EU member states;

- allow national regulators to enforce functional separation on incumbent integrated telecommunications providers where necessary as an "extraordinary measure" to promote competition. Again, this is a step back from the original proposal, which would have given regulators far broader powers to enforce separation. The original proposal was opposed by key member states such as Germany and Spain who spoke out in support of their domestic communications giants. Other member states, such as Britain (where the former national operator has already been split into separate wholesale and operations businesses), were advocates for separation;

- empower companies that build new generation telecommunications networks to take the risk of their investment into account when setting the terms on which they allow other operators to access their new networks. As such, other operators wishing to access those networks may be required to pay a "risk premium." However, they will not need to contribute to the initial investment required to build the networks; and

- extend universal service obligations to cover broadband as well as existing fixed telephony services. The aim is to ensure EU-wide access to high-speed Internet, which is seen as an essential service for the future.

There are a number of live reform issues on which member states are yet to agree. These include:

- the reallocation of radio frequency that has been freed up due to the efficient use of spectrum by new digital services (sometimes referred to as the "digital dividend"); and

- issues relating to net neutrality and Internet security and privacy concerns.

The aim is to finalize the reform package and put it to a vote by the European Parliament by the middle of this year. We will continue to monitor and report on any further developments.

Denial of Complaint Against MetroPCS Spells out CMRS Interconnection Rules

On March 30, the Enforcement Bureau released a Memorandum Opinion and Order denying a complaint brought by North County Communications Corp. ("North County") against MetroPCS California, LLC ("MetroPCS") for failing to pay North County for its transport and termination of intrastate calls originated by MetroPCS customers. North County, a competitive local exchange carrier ("CLEC") primarily serving chat-line providers and telemarketers, alleged that MetroPCS, a commercial mobile radio service ("CMRS") carrier, refused to pay for the termination of intrastate traffic in violation of FCC Rule 20.11(b) and refused to negotiate an interconnection agreement with North County in violation of Section 251(b)(5) of the Communications Act and related FCC rules as well as Sections 201(b) and 202(a) of the Act.

In cataloguing the flaws in North County's allegations, the Bureau reviewed the interconnection regime governing CMRS providers. North County argued that, by failing to compensate North County, MetroPCS violated Rule 20.11(b), which requires CMRS carriers to "pay reasonable compensation" to local exchange carriers ("LECs") for terminating CMRS-originated traffic. The Bureau rejected this claim because the states have the authority to establish intrastate rates for the termination of CMRS-originated traffic, and the FCC has not preempted such authority. The Bureau accordingly dismissed the Rule 20.11(b) claim without prejudice in order to allow the

California Public Utilities Commission ("PUC") to determine a reasonable intrastate termination rate, after which North County may seek whatever recovery is appropriate under that rate at the FCC.

The Bureau also explained that allowing the PUC to establish a reasonable termination rate would not violate Section 332(c)(3)(A) of the Act, which preempts state regulation of CMRS rates, because North County's termination charge to MetroPCS is not a CMRS rate. The Bureau also rejected contentions that the 2005 *T-Mobile Order* precluded PUC establishment of a reasonable termination rate. It explained that the *T-Mobile Order* allows incumbent LECs ("ILECs"), but not CLECs, to invoke the state arbitration procedures of Section 252 of the Act to reach interconnection agreements with CMRS carriers but does not address the states' authority to regulate intrastate rates.

The Bureau rejected North County's claim that MetroPCS's failure to negotiate an interconnection agreement violated Section 251(b)(5) because that provision imposes a duty to establish reciprocal compensation arrangements only on LECs, not CMRS carriers. The Bureau also rejected North County's claim that MetroPCS's failure to negotiate an interconnection agreement, while continuing to send traffic to North County, constitutes an unjust and unreasonable practice under Section 201(b). The Bureau found that the parties' inability to reach an agreement stemmed from a good faith dispute over the reasonable rate, not "illegitimate posturing by MetroPCS."

Finally, the Bureau rejected North County's claim that MetroPCS's refusal to enter into an interconnection agreement with North County, while entering into such agreements with other carriers, for the termination of its traffic, constitutes unreasonable discrimination under Section 202(a) of the Act. The Bureau explained that although Section 202(a) prohibits discrimination by a carrier between two customers, North County complains that MetroPCS, as a customer, is treating one provider of service differently from others. The upshot of this order may be increased CLEC complaint activity at state commissions to seek termination rate determinations.

FCC Seeks Comment on Broadband Programs Under the Recovery Act and Seeks Comment on Broadband Mapping

The FCC, NTIA, and RUS all began in earnest the planning and fact gathering needed to implement the various broadband-related sections of the stimulus package passed earlier in the year, the American Recovery and Reinvestment Act of 2009 ("ARRA" or "Recovery Act").

National Broadband Plan Under the Recovery Act
At the April 8 Open Meeting, the FCC officially launched the process of developing the National Broadband Plan ("NBP"), required by the Recovery Act. The NBP's goal will be to ensure that every American has access to broadband capability. The NBP must be delivered to Congress by Feb. 17, 2010. It will provide a roadmap toward achieving the goal of ensuring that all Americans reap the benefits of broadband. The FCC's Notice of Inquiry on the NBP is very broad, and seeks input on, among other things:

- Establishing benchmarks and goals in deploying broadband to all areas of the U.S.
- What mechanisms (*i.e.*, Universal Service Fund, wireless service policies, open network rules) will best promote broadband build-out.
- Measures that will make broadband affordable to all U.S. consumer and other strategies that will increase broadband adoption in underserved populations.
- Current status of broadband availability and broadband mapping.

Comments are due June 8 and replies are due July 7, respectively, in GN Docket No. 09-26.

FCC's Consultative Role on the Recovery Act Broadband Programs
In addition to Congress's directive to create a National Broadband Plan, the FCC was also charged with a "consultative role" to NTIA and RUS in the two agencies' implementation of broadband loans and grants under the Recovery Act. In a March 24, 2009 Public Notice, the FCC sought comment on its specific recommendations to NTIA and RUS. The FCC was not given charge of any funds for broadband loans or grants, but is to offer expert, technical advice to NTIA as it establishes the Broadband Technologies Opportunities Program ("BTOP").

Congress directed NTIA to consult with the FCC on five specific terms and concepts:

1. the definition of "unserved area,"

2. the definition of "underserved area,"
3. the definition of "broadband,"
4. the non-discrimination obligations that will be contractual conditions of BTOP grants, and
5. the network interconnection obligations that will be contractual conditions of BTOP grants.

Comments were due April 13, after which the pleading cycle was closed. Approximately 100 formal comments were filed. In general, the proposed definitions of "unserved" and "underserved" areas tended to track the commenters' interests (*i.e.*, wireless broadband providers wanted the definition of broadband to be flexible enough to reflect the fact that wireless transfers speeds are often slower than wireline). Many suggested that "broadband" be defined using the FCC's current speed and service tiers as used in its recently updated Form 477 Reports. Most commenters urged the FCC and NTIA not to adopt additional or new non-discrimination and interconnection obligations as contractual obligations for the Recovery Act funds, due to concerns about their chilling effect on participation in the various stimulus programs, but several parties supported a non-discrimination obligation. Also of interest to many parties was the importance of "middle mile" and backhaul facilities to the goal of bringing universal broadband coverage.

Comment Cycle for Broadband Data Improvement Act Implementation
In a March 31 Public Notice, the FCC sought comment on requirements for international broadband comparisons and consumer surveys in the Broadband Data Improvement Act ("BDIA"), which was enacted last year. The Commission sought comment on two specific areas:

- Congress instructed the FCC to examine "relevant similarities and differences in each community" in its analysis of international broadband service capabilities, which include the following criteria: population size, population density, topography, demographics, market structures, number of competitors, number of facilities-based providers, types of technologies deployed by broadband providers, types of applications and services enabled by broadband, technologies deployed, regulatory models, types of applications and services used by customers, business versus residential use of services, and other media available to consumers.

- Congress also directed the FCC to make public periodic surveys of consumers in urban, suburban, and rural areas in the large business, small business, and residential consumer markets to determine the types of technology used to provide the broadband service capability to which consumers subscribe; the amounts consumers pay per month for such capability; the actual data transmission speeds of such capability; the types of applications and services consumers most frequently used in conjunction with such capability; for consumers who have declined to subscribe to broadband service capability, the reasons given by such consumers for declining such capability; and other sources of broadband service capability which consumers regularly use or on which they rely.

Comments were due April 10 and replies were due April 17, respectively. Responses to the BDIA Public Notice were slim, with a total of only 14 formal comments and reply comments. As the National Association of Telecommunications Officers and Advisors ("NATOA") noted on reply, the BDIA comment cycle overlapped with public comment timeframes for the Recovery Act broadband grants and loans programs. Of the few parties that filed, cable companies (including Comcast, NCTA, and Time Warner Cable) were the most represented sector. Several parties criticized the international data collected and reported by the Organization for Economic Co-operation and Development ("OECD"). All parties seem to agree that the FCC will require the assistance of expert third parties in order to conduct consumer surveys in sufficient numbers to come up with statistically significant data. Most parties argued that broadband providers already provide ample data through the FCC's recently enhanced Form 477 reporting.

Digital Television Transition Funds
NTIA provided to the FCC $65.7 million from its Recovery Act appropriation for Digital Television ("DTV") transition activities, including consumer education. The Recovery Act provided about $90 million overall for DTV-related expenditures.

Legislative Developments: Congress's Universal Service Fund Investigation Returns; Proposed Legislation on Wireless Spam and In-Flight Calling

- **USF Investigation.** In early April, House Commerce Committee Chairman Waxman (D.-Cal.) wrote to acting Chairman Michael Copps seeking an update on Congress's prior requests for data on Universal

Service Fund ("USF") disbursements. The letter revives a USF investigation began during the last Congressional session. Rep. Waxman indicated that the Commerce Committee is considering USF reform legislation. The FCC must submit data that include an updated list of the top-ten USF recipients in the high-cost program for 2006, 2007, and 2008; a state-by-state list of total disbursements to the top-ten recipients; an updated list of the ten largest per-line subsidies for each study area; a list of competitive eligible telecommunications carriers and the total support they receive in the study areas from 2006 to 2008; a state-by-state list of total USF high-cost support payments; and a state-by-state list of ETCs and the names of the carriers. The Commission was required to respond to the Waxman letter by April 23.

- **Wireless SPAM.** Also in early April, Senators Snowe (R.-Me.) and Nelson (D-Fla.) introduced the m-SPAM Act of 2009, a bill providing heightened authority for the FCC and Federal Trade Commission ("FTC") to regulate unsolicited text messaging, including a prohibition on sending commercial text messages to wireless numbers listed on the Do-Not-Call registry.

- **In-Flight Call Ban.** In mid April, Rep. DeFazio (D.-Or.) added language buried in the Federal Aviation Administration ("FAA") reauthorization bill that would prohibit telephone calls over mobile devices by passengers on all U.S. domestic commercial flights. The bill must clear the Ways and Means Committee before going to the House floor for a vote. The ban would include not only conventional wireless calls over cell towers, but would also cover Voice Over Internet Protocol (VoIP) calls made using Wi-Fi Internet access being installed by a number of U.S. airlines. Flight crews, flight attendants, and federal law enforcement officers acting in an official capacity would not be subject to the ban.

- **DTV Coverage Bill:** Senators Snowe and Collins, both Maine Republicans, introduced the DTV Cliff Effect Assistance Act on April 27, a bill to allocate new funding for DTV translators that will help boost coverage of digital signals. The proposed bill would provide $125 million for local governments to build digital translators that expand signal coverage to "dead spots." The funds would come from NTIA's Digital Television Transition and Public Safety Fund. Digital translators are needed because some viewers who have always been able to receive a local station's analog signal are not able to receive the new digital signals. Digital broadcasts are more easily degraded when they pass through land masses and tall structures.

White House Memorandum Addresses Communications with Lobbyists

On March 20, the White House issued a Memorandum for Ensuring Responsible Spending of the Recovery Act Funds. The Memorandum prohibits executive departments or agencies to consider the views of registered lobbyists concerning particular projects, applications, or applicants for funding under the Recovery Act unless those views are in writing. If an executive department or agency official communicates orally with a lobbyist on general Recovery Act policy issues, as opposed to particular projects, applications, or applicants, the official must document in writing: (1) the date and time of the contact; (2) the names of the registered lobbyists and officials among whom contacts took place; and (3) a short description of the substance of the communication.

The FCC has posted, on its website, required written lobbyist submissions and staff summaries, along with links to *ex parte* presentations related to lobbyists' communications.

FCC Release NPRM to Promote Rural Radio Stations

On April 20, 2009, the FCC released a Notice of Proposed Rulemaking ("NPRM") opening a proceeding to consider rule changes affecting rural and tribal land radio broadcast licenses to ensure that such licenses are awarded in a fairer and more transparent manner. The NPRM seeks comment on procedures currently used to award commercial broadcast spectrum in the AM and FM broadcast bands. The NPRM suggests rule changes that would impose restrictions on stations to make it more difficult to leave less populated markets and would give licensing priority to new stations planning to serve such markets. Among other proposals, stations would not be able to change their town of license if the market would be left without at least one "reception service." Comments will be due 60 days after publication in the Federal Register, and replies will be due 30 days later.

Recent Enforcement Activity Covers a Wide Range of Violations

Since the last Bulletin, the FCC's enforcement activity has covered a wide range of alleged violations.

Intel Corp. Consent Decree
On March 27, 2009, the Spectrum Enforcement Division of the Enforcement Bureau ("Bureau") released an order adopting a consent decree with Intel Corp. settling an investigation of Intel's compliance with the regulations governing possible interference caused by radio frequency devices. Intel voluntarily disclosed to the Bureau last year that it had discovered that it had marketed certain equipment not meeting the FCC's technical, administrative, and labeling requirements, and that it had undertaken corrective action. It also disclosed that it had recently discovered compliance issues regarding equipment marketed by a medical device company it acquired last year. Intel reported the matter to the Food and Drug Administration ("FDA") and worked with the FDA on a recall plan and instructions for healthcare providers for units already deployed.

In order to settle the investigation, Intel agreed to implement a two-year compliance plan supervised by a designated compliance official, under which Intel would establish and periodically review compliance procedures and file periodic certified compliance reports. Intel also agreed to make a voluntary contribution to the U.S. Treasury of $25,000.

Omniat International Telecom NAL
On March 31, 2009, the FCC released a Notice of Apparent Liability for Forfeiture and Order ("NAL") against Omniat International Telecom, LLC d/b/a OMNIAT Telecom, for violating multiple FCC reporting, contribution, and regulatory fee obligations. In 2007, the Universal Service Administrative Company ("USAC"), which administers the universal service fund and various telephone numbering administration programs, received an anonymous tip that Omniat had not filed its Telecommunications Reporting Worksheets ("TRWs"), upon which carriers' USF contribution obligations are based, or paid its USF contribution obligations, for the last five to ten years. Omniat ignored USAC's follow-up inquiry as well as the Bureau's letter of inquiry ("LOI") after USAC referred the matter to the Bureau.

The NAL alleges that, for the past several years, Omniat apparently has been providing international service without a Section 214 authorization, has failed to file required TRWs, has failed to pay USF contribution obligations, regulatory fees and telecommunications relay service ("TRS") and numbering administration contributions, and has also failed to respond to a Bureau directive to provide information. In the case of the failure to file TRWs, the FCC calculated a proposed forfeiture for only one year prior to the date of the NAL, consistent with its prior practice. In the case of Omniat's failure to make TRS and numbering administration contributions and regulatory payments, however, the FCC proposed a forfeiture based on the four-year period from 2005 to 2008. In calculating a proposed forfeiture for Omniat's failure to respond to the LOI, the FCC noted that Omniat's "[m]isconduct" "warrants a substantial increase" to the base forfeiture of $3,000 for failure to file required forms and $4,000 for failure to respond to an FCC communication. Accordingly, the FCC proposed a forfeiture of $20,000 for failing to respond to the LOI, for a total proposed forfeiture of $330,000.

The FCC also ordered Omniat, within 30 days, to submit a Section 214 authorization application, all TRWs that should have been filed to date, and a report supported by a sworn statement setting forth its plan to come into compliance with all of the obligations discussed in the NAL, and to respond fully to the LOI. The Omniat NAL is further confirmation of the importance of responding to USAC and FCC requests and keeping current on all FCC obligations.

Hawking Technologies, Inc. Forfeiture Order
On March 31, the FCC released a Forfeiture Order against Hawking Technologies, Inc., for its marketing of radio frequency power amplifiers in a manner inconsistent with its equipment authorization and FCC regulations. Because Hawking never responded to the FCC's NAL alleging these violations, there was no discussion of the issues in the Forfeiture Order, which requires Hawking to pay a $50,000 penalty.

Hughes Communications, Inc. Consent Decree
Also on March 31, the Bureau's Investigations and Hearings Division released an order adopting a consent decree with Hughes Communications, Inc. terminating an investigation of the possible unauthorized transfer of control of various licenses and authorizations held directly and indirectly by Hughes, in violation of Section 310(d) of the Act. In July 2007, as part of a multi-step transaction, control of Hughes and its indirectly held subsidiaries, which controlled 17 non-common carrier earth station licenses and four Experimental Radio Service authorizations, was transferred to BRH Holdings GP, Ltd. One week later, Hughes discovered that no application for FCC approval had been filed in connection with the transaction and disclosed this lapse to the FCC. Hughes and its indirectly held subsidiaries filed applications requesting approval of the license and authorization transfers, which were granted in 2008. In response to a Bureau LOI, Hughes provided information about the unauthorized transfer and requested the Bureau to resolve the matter with a consent decree.

In the consent decree, Hughes agreed to develop an internal compliance plan regarding the assignment and transfer of FCC licenses and authorizations, including a training program for employees involved in transactions affecting assets subject to FCC regulation, coordination with all parent companies to ensure that Hughes management is involved in any transaction contemplating a change in control of Hughes companies, and an annual report to the Bureau verifying Hughes' compliance with the consent order. The compliance plan is to be in operation for two years. Hughes also agreed to make a voluntary contribution to the U.S. Treasury of $12,000.

WorldNet, L.L.C. NAL

On April 3, the Bureau's Spectrum Enforcement Division ("Division") released an NAL against WorldNet, L.L.C., for its failure to respond to an LOI from the Division. The LOI addressed WorldNet's compliance with the network outage reporting requirements. Although the base forfeiture for failure to respond to FCC communications is $4,000, the Division found that a significant increase was warranted in these circumstances. The Division stated that WorldNet's "[m]isconduct . . . exhibits contempt for the [FCC's] authority and threatens to compromise the [FCC's] ability to adequately investigate violations of its rules." The Division accordingly proposed a forfeiture of $20,000 and directed WorldNet to respond fully to the original LOI or face additional liability for further penalties.

Hauppauge Computer Works, Inc. NAL

On April 15, 2009, the FCC released an NAL against Hauppauge Computer Works, Inc. for its apparent interstate shipment of television-receiving devices that do not have the capability to receive DTV signals, in violation of the FCC's DTV reception capability requirement. In 2007, the Bureau received a complaint that Hauppauge was marketing TV broadcast receivers without associated viewing screens, to be used with personal computers, that were capable of receiving only analog broadcast signals. In response to a Bureau LOI, Hauppauge admitted that it imports and sells TV boards for personal computers that include only an analog TV tuner, but argued that such products should not be covered by the DTV tuner rules because they are not stand-alone TV receivers with associated viewing screens and are designed to be used with personal computer systems that may not have the capability to support DTV reception. The Bureau issued a follow-up LOI to Hauppauge, notifying it that its response to the LOI was insufficient and directing it to respond fully to the LOI. When Hauppauge failed to respond within the allotted time, the Division issued an NAL proposing an $11,000 forfeiture for failing to respond to the LOI. Hauppauge has since paid that fine and further responded that it shipped seven models of analog-only TV tuner boards designed to be installed in personal computers.

The NAL rejected Hauppauge's contention that its products are not covered by the DTV tuner rules, noting that those rules cover any device "designed to receive television pictures that are broadcast simultaneously with sound" on over-the-air television channels. The listing of the types of products covered by the regulations are intended only as examples of any "similar device" that includes "the capability to receive TV programming" and are not exhaustive. In calculating a proposed forfeiture amount, the FCC applied a per-model forfeiture of $25,000, based on proposed forfeitures in other DTV-related equipment orders. The FCC did not, however, increase the proposed forfeiture based on the number of units shipped, as it does in the case of non-compliant stand-alone TV receivers, because receivers intended to be used with personal computers are not as likely as stand-alone TVs to be used as the customer's primary TV viewing device. Applying the per-model forfeiture amount of $25,000 to seven tuner models, the FCC proposed a total forfeiture of $175,000.

Tip Box

The FCC issued new fee filing guides for each of its bureaus. The new fees are effective on April 28, 2009. Links to the guides can be found at the Commission's Application Processing Fees website: http://www.fcc.gov/fees/appfees.html.

Wireless Developments

DC Circuit Rejects Challenge to Designated Entity Rules

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit rejected one of Council Tree Communications, Inc.'s ("Council Tree") pending challenges to the revised designated entity ("DE") rules the FCC adopted in 2006. The panel issued a two-page order, even before holding oral arguments, concluding that the appeal was not filed in a timely manner and that, therefore, the court did not have jurisdiction to consider it. Council

Tree had technically appealed a 2007 FCC order applying the DE rules to the 700 MHz band auction. The court, however, found that the FCC had not reopened the DE issue in 2007 and, therefore, could not be challenged.

A challenge to the DE rules brought by Council Tree, along with Bethel Native Corporation and the Minority Media and Telecommunications Council is still pending in the U.S. Court of Appeals for the Third Circuit. The Third Circuit case concerns the FCC's 2006 decision to apply the then new DE rules to the advanced wireless service auction. The Third Circuit is expected to schedule oral arguments soon.

Four Largest U.S. Wireless Carriers Agree to Mobile Marketing "Best Practices"

Verizon Wireless, AT&T, Sprint, and T-Mobile have agreed to incorporate the Mobile Marketing Association's ("MMA") "best practices" into each of their mobile marketing guidelines. Each carrier is a member of the MMA. The carriers agreed that they would integrate their existing mobile marketing guidelines into one document, to be maintained by the MMA, that will represent a unified best-practices approach. According to the MMA, the unified guidelines will have five key benefits: (1) promoting a consistent consumer experience, including standardizing key consumer disclosures; (2) enhancing efficiencies of running short code programs; (3) accelerating the time-to-market for mobile campaigns; (4) ensuring monitoring programs and audit results are more consistent; and (5) reducing operational costs across the mobile marketing landscape. The MMA anticipates finalizing the guidelines by the end of June.

FCC Revises Its 4.9 GHz Rules to Assist Public Safety Users

The FCC issued a report and order ("R&O") and further notice of proposed rulemaking ("FNPRM") regarding the modification of its 4.9 GHz band rules to enhance public safety's use of broadband services in the band. Among other things, the new rules should make it easier for public safety entities to share time-sensitive data and streaming video.

Specifically, the new rules adopted in the R&O grant primary status to:

(1) 4.9 GHz stand-alone, permanent fixed links that are used to deliver broadband service (such as a fixed video surveillance link used to monitor high-risk facilities or environments), and (2) permanent fixed links that connect 4.9 GHz base and mobile stations used to deliver broadband service (for such uses as supporting broadband communications at "hot-spots" and other fixed public safety broadband networks), as well as connect other public safety networks using spectrum designated for broadband use.

In addition, the R&O retained site-based licensing procedures for permanent fixed stations and revised the procedures for measuring output power to conform with the procedures for digital modulation devices.

The FNPRM seeks comment on whether the FCC should reinstate a rule exempting 4.9 GHz band applications from certified frequency coordination requirements and other frequency coordination issues, as well as other technical proposals. Comments and replies on the FNPRM are due 60 and 90 days, respectively, after the FNPRM is published in the Federal Register.

FCC Initiates High Cost USF Inquiry Following the 2005 "Qwest II" Remand

The FCC issued a Notice of Inquiry ("NOI") to refresh the record on certain issues concerning the universal service high cost support mechanism that the U.S. Court of Appeals for the Tenth Circuit raised in its 2005 *Qwest II* remand. The Tenth Circuit had concluded in *Qwest II* that the FCC's rules regarding high cost support in non-rural areas were unlawful. The NOI could lead to wide-ranging modifications to the high cost support mechanism. The FCC stated its intent to release a final order by April 17, 2010.

The NOI seeks comment on several high cost reform proposals that were previously submitted by Qwest Communications, Embarq Corporation, CostQuest Associates, and the Vermont Public Service Board as well as the Maine Public Utilities Commission. Qwest urges the FCC to target high cost support to the highest cost wire centers served by non-rural incumbent carriers and reduce the current non-rural high cost support benchmark. Embarq proposes that the FCC replace all non-rural high cost support in study areas subject to price cap regulation with a new support mechanism called "Broadband and Carrier-of-Last Resort Support," which would be available in each area to the incumbent and one competitor. Embarq's plan would allocate to $1 billion annually, conditioned on recipients making broadband seervices available to at least 85 percent of consumers in a wire center. CostQuest suggests a new cost model by which all high cost support mechanisms would be funded. The Vermont and Maine regulators propose that the FCC "use 'net subscriber cost' as a proxy for rates in its reasonable comparability rate

standard and in its support calculation." Vermont and Maine also support reducing the current non-rural high cost support benchmark.

The NOI also asks commenters to address the definitions of "reasonably comparable" rates to satisfy Section 254 of the Communications Act, which requires the FCC to ensure consumers in high cost areas have rates that are reasonably comparable to those available in urban areas. The NOI further asks how to define "sufficient" under Section 254's requirement that the FCC establish "specific, predictable and sufficient" support universal service support mechanisms. In addition, the NOI seeks comment on if and how its efforts to reform the high cost support mechanism may affect the government's broadband development and deployment plans.

Comments and replies are due May 8 and June 8, respectively.

Alabama and Tennessee Closer to Deregulating Basic Telephone Services

A bill (SB 373) deregulating telephone services in Alabama is close to approval by the state legislature. AT&T, Inc., the largest telephone company in the state, has been lobbying strongly for the bill. Under the legislation, as of December 31, 2010, the Alabama Public Service Commission would no longer have oversight over basic residential telephone service and business services with four or fewer landline phones. In short, the bill would put traditional landline telephone services on the same regulatory footing as mobile and voice-over-Internet-protocol services. The Alabama Senate approved the bill 19-8, and the House Government Operations Committee approved the bill 8-1. The full House must now vote on the bill.

The legislature in Tennessee is facing similar pressure from AT&T to deregulate basic telephone services. The state senate passed a bill (SB 1954) 22-7 to deregulate services and will be considered next by the House Commerce Committee. To respond to rural concerns, the bill includes an amendment preventing AT&T from raising rates in most rural areas for one year. Thereafter, AT&T could only increase rates in those areas if the Tennessee Regulatory Authority makes a finding of sufficient competition. Without such a finding, pricing flexibility in those areas would be delayed until no later than 2015.

Orbital Collision Prompts U.S. Military to Track More Spacecraft

The United States Air Force announced that the government will begin tracking all 800 maneuverable satellites and other spacecraft following a collision in February between a satellite owned by Iridium Satellite LLC and a defunct Russian military satellite. Currently, the government tracks approximately 300 spacecraft. The additional tracking measures should be implemented by October 1, 2009. According to government officials, the U.S. government will have to enter into legal arrangements with satellite companies to obtain expanded tracking data, but the exact form and scope of the arrangements has not yet been determined. The Air Force is also examining the possibility of tracking 500 other non-maneuverable satellites.

U.S. Eases Restrictions on Telecom Services to Cuba

In mid-April, 2009, President Obama issued a press release outlining plans to ease existing restrictions on commerce and travel between the U.S. and Cuba. In particular, President Obama directed the Executive Branch agencies to begin authorizing U.S. companies to provide telephone, cable, and satellite services to and from Cuba. Among other things, this initiative hopes to encourage the establishment of fiber-optic cable and satellite links to Cuba, roaming agreements between U.S. and Cuban wireless companies, and the provision of satellite radio and television services to customers in Cuba.

Cuba's response to this new policy, however, remains uncertain. If Cuba is not open to U.S. investment in its telecom infrastructure, the new policy might only result in direct exchange of traffic with Cuba's existing monopoly (government-owned) telecom provider. If Cuba does open itself to foreign investment, Cuba's very low penetration rates for landline, wireless and Internet services could create opportunities for U.S. companies.

Free Press Urges Application of Internet Policy Statement to Wireless

In a recent letter, Free Press urged the FCC to confirm that the Commission's Internet Policy Statement applies to wireless networks. Free Press alleged some instances of restrictions imposed by wireless carriers on certain applications, services or devices, and also raised concerns about relationships between carriers and equipment

vendors that appear to hinder customer choice. In one example, Free Press noted reports that the Skype iPhone application works over Wi-Fi networks, but not over AT&T's 3G network.

Free Press therefore asked the FCC to resolve any ambiguity regarding the application of the Internet Policy Statement to wireless providers that offer broadband Internet access service. In addition, Free Press urged the FCC to request more information regarding such restrictions and the wireless providers' roles and justifications for such restrictions, and to investigate whether these practices violate the Internet Policy Statement.

Upcoming Deadlines for Your Calendar

Note: Although we try to ensure that the dates listed below are accurate as of the day this edition goes to press, please be aware that these deadlines are subject to frequent change. If there is a proceeding in which you are particularly interested, we suggest that you confirm the applicable deadline. In addition, although we try to list deadlines and proceedings of general interest, the list below does not contain all proceedings in which you may be interested.

May 8, 2009	Comments due on **USF NOI**.
May 15, 2009	Comments due on **competitive bidding procedures for Auction No. 86 (Broadband Radio Service)**.
May 18, 2009	Reply comments due on **Child Safe Viewing Act NOI.**
May 27, 2009	Reply comments due on **CUT FATT petition for rulemaking and declaratory ruling regarding DTV patent licensing**.
May 29, 2009	Reply comments due on **competitive bidding procedures for Auction No. 86 (Broadband Radio Service)**.
May 29, 2009	Comments due on p**etition for rulemaking regarding migratory birds**.
June 8, 2009	Reply comments due on **USF NOI.**
June 8, 2009	Comments due on **National Broadband Plan NOI**.
June 15, 2009	Reply comments due on **petition for rulemaking regarding migratory birds**.