



Washington Communications & Media Policy Update – August 31, 2006

I. Legislative Branch Activity

A. Senate Fails to Pass Telecom Bill Before August Recess.

The Senate shut down for August recess without passing the telecom bill (HR-5252), despite Commerce Committee Chairman Stevens' (R-AK) week-long drive to round up the 60 votes needed to avoid a filibuster. Sen. Sununu (R-NH) was helping Stevens to round up votes. According to Sen. Sununu, technology is moving so quickly that the bill will be obsolete by next Congress.

The next step for Sen. Stevens is a move to a slimmed-down bill that deals only with video franchise relief and Universal Service Fund reform -- a formula that Hill sources say has a more reasonable chance of passage. House Commerce Committee Chairman Barton (R-TX) is expected to be amenable to some type of compromise on USF in the interest of striking a deal on a telecom bill.

B. Democrats Block Vote on Specter Surveillance Bill.

On August 3, Senate Judiciary Committee Chairman Specter (R-PA) failed to bring his electronic surveillance bill (S-2453) to a vote after Democrats voiced strong objections in a markup session. No further action can occur until after the August recess. Sen. Specter's bill, endorsed by the White House, is opposed by several powerful committee Democrats. The bill's future is uncertain.

C. Legislative Calendar.

On July 31, the House entered its summer recess and will resume business on September 5. The Senate remained active for an extra week, before recessing on August 7. It too will reconvene on September 5.

II. Federal Communications Commission (FCC) Activity

A. FCC Meeting.

The Commission held an open meeting on August 3, 2006. At the meeting, the Commission adopted two items: A Notice of Proposed Rulemaking regarding the rules governing wireless licenses in the 698-746, 747-762, and 777-792 MHz Bands, and an Order in response to petitions for reconsideration of the rules applicable to Broadband over Power Line systems.

1. FCC Seeks Comment on Possible Modifications to Rules Governing Wireless Licenses in Portions of

the 700 MHz Spectrum Band.

The Commission adopted a Notice of Proposed Rule Making (released on August 10) that seeks comment on possible changes to the rules governing wireless licenses in the 698-746, 747-762, and 777-792 MHz spectrum bands. These portions of the 698-806 MHz band, which is commonly referred to as the "700 MHz Band," have been allocated for commercial wireless services and do not include the 700 MHz Guard Bands nor the portions of the 700 MHz Band that have been allocated for public safety services. Under the Digital Television and Public Safety Act of 2005, which was signed into law earlier this year, the FCC is required to commence an auction of previously unauctioned spectrum in this Band no later than January 28, 2008.

2. FCC Adopts Memorandum Opinion and Order on Broadband Over Power Lines to Promote Broadband Service to All Americans.

As part of its ongoing efforts to promote access to broadband services for all Americans and to encourage new facilities-based broadband platforms, the FCC generally affirmed its rules for Access Broadband over Power Line (Access BPL) systems while maintaining safeguards against harmful interference to existing radio services.

B. Other FCC Activity.

1. Commission Seeks Comment on Proposal to Revise Rules for Direct Broadcast Satellite Service. (Docket 06-160)

The FCC released a NPRM on August 18 seeking comment on licensing procedures and service rules for satellites providing Direct Broadcast Satellite (DBS) service. The Notice seeks comment on proposals that will apply to any application for authority to provide DBS service in the United States using the 12.2-12.7 GHz band and associated feeder links in the 17.3-17.8 GHz band. This includes both unassigned channels at orbit locations assigned to the United States under the ITU Region 2 BSS and feeder-link Plans, and applications for DBS service from space stations located at orbital locations not assigned to the United States in the ITU Region 2 BSS and feeder-link Plans. The Notice also seeks comment on new licensing procedures, including the use of the first-come, first-served process for all DBS applications, regardless of the proposed orbit location.

2. Bidding Begins in AWS-1 Auction (#66).

On August 9, bidding on Advanced Wireless Spectrum (auction #66) began. Applicants are hoping to acquire some of the 1,122 licenses in the 1710-1755 MHz and 2110-2155 MHz band. The auction has garnered nearly \$13.6 billion in bids through round 63, though the number of bids per round has fallen by half to around 150. The three previous rounds had averaged 170 new bids per round, and the three rounds before those garnered 240 bids on average. Eighty-six licenses are still without a bid. Of licenses that have not received bids, about 100 are geographically small, A-block cellular market areas in Pennsylvania, Tennessee, Ohio, Kentucky and Florida. The other dozen or so licenses cover areas such as Guam, American Samoa, Puerto Rico and the Gulf of Mexico.

3. Verizon and BellSouth Remove Increased DSL Fees.

Responding to FCC letters of inquiry received on August 25, Verizon and BellSouth both agreed to drop newly added "cost recovery" fees from their DSL service. The surcharge began appearing in customer bills in mid-August, right after DSL providers were allowed to stop collecting a federal fee for the Universal Service Fund. The new fees were almost identical to the old USF fees, so customers saw little or no change in their bills.

C. Next Commission Meeting.

The next Commission meeting is currently scheduled for 9:30 AM on Thursday, September 26, 2006. The agenda for that meeting is not yet available.

D. Pending Proceedings.

There are several pending proceedings that may be acted upon in the near term, including the following:

| Proceeding | Issue(s) | Likely Timing of FCC Action |
|---|---|--|
| Broadcast Ownership FNPRM | The Further Notice opens the broadcast quadrennial review of all of the media ownership rules, as required by statute. | Comment Date: Sept. 22, 2006. Reply Date: Nov. 21, 2006 |
| Broadcast and Wireless Auctions | Digital LPTV Auction # 85 – LPTV stations can convert to digital operations on their analog channels or by obtaining a companion digital channel. Applications were due June 30. An auction seminar was held on June 12 and can be viewed via streaming video on the FCC's website. | Not yet scheduled; expected 4Q 2006 |
| Local Franchising NPRM | Rules would facilitate the franchise approval process for telcos seeking to enter the video market. | 4Q 2006 |
| Distributed Transmission System (DTS) Technologies | Allows broadcasters to use transmitters to fill-in service gaps caused by geographic barriers. FCC is considering rules for permanent DTS operation. | 4Q 2006 |
| DTV Second Periodic Review | Outstanding issue concerning upgrades to open v-chip. | 4Q 2006 |
| Plug & Play | One-Way: FCC action on reconsideration pending; Court of Appeals held in abeyance. Two-Way: Ongoing negotiations and reporting to FCC throughout 2006; potential NPRM. | 4Q 2006 |
| Cable Horizontal and Vertical Ownership Limits | May 2005 further notice seeks to update record. An earlier notice sought comment on how to address D.C. Circuit remand of cable ownership regulations. | 4Q 2006 |
| IP-Enabled Services | Will address the regulatory treatment of IP-enabled services, including video services. | 4Q 2006 |
| Program Access Rules | Rules governing MVPD access to certain programming owned by cable operators will sunset in October 2007. FCC to evaluate whether sunset date should be extended. | 4Q 2006 |

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|---------------------------|--|------------------------------------|
| "White Spaces" Proceeding | FCC proposes to allow unlicensed radio transmitters to operate in the broadcast television spectrum at locations where that spectrum is not being used; seeks comment. | 4Q 2006 |
| AT&T-Bellsouth Merger | Comments filed June 5; replies filed June 20. | 4Q 2006 or 1Q 2007 |
| Digital Must-Carry | Outstanding issues include: material degradation, program-related material, DBS carriage of DTV signals. | 2007 or 2008 |

III. Executive Branch Activity

A. NTIA: Market Research for Implementation of Digital to Analog Converter Box Coupon Program.

On July 31, 2006, NTIA published a Request for Information (RFI) to conduct market research for implementation of the Congressionally mandated Digital to Analog Converter Box Coupon Program. NTIA is seeking capability information from organizations with the experience, qualifications, solution approaches, and best practices necessary to implement and administer the Coupon Program. This RFI is for information and planning purposes only and does not constitute a Request for Proposal. Responses to the RFI are due September 15, 2006.

IV. Antitrust Agency Activity/Deal Announcements

A. Commissioner McDowell May Be Recused from AT&T-BellSouth Merger Vote.

FCC Commissioner McDowell may be excluded from voting on the AT&T-BellSouth merger because his former employer, CLEC association COMPTTEL, has participated substantially in the proceeding. If Commissioner McDowell is disqualified, only four commissioners would vote on the item, which could give Democratic Commissioners Adelstein and Capps more bargaining power to add conditions to any approval.

B. DOJ Turns Over Documents to Court on Telecom Mergers.

U.S. antitrust authorities on August 9 turned over additional documents to U.S. District Court Judge Emmet Sullivan in support of government settlements permitting two major telecommunications mergers. Judge Sullivan is overseeing a Tunney Act review of the DOJ's approval of the Verizon-MCI and SBC-AT&T mergers. The Tunney Act provides the judiciary with the authority to evaluate the effectiveness of consent decrees and whether those decrees will protect the public interest. The Act also directs judges to consider the impact of a transaction on "competition in the relevant market or markets." Judge Sullivan's review also could affect the manner in which the DOJ approaches its examination of AT&T's proposed purchase of BellSouth.

V. Litigation

A. Appeals Court Upholds FCC Interconnection Decision.

A 2-year-old FCC decision to limit CLECs' ability to opt into interconnection agreements negotiated by other

carriers was upheld on August 29 by the 9th Circuit Court of Appeals. Finding Sec. 252(i) of the Telecom Act "ambiguous," the court held the FCC's interpretation to be reasonable.

Sec. 252(i) provides that carriers must make interconnection agreements available to other carriers, the statute does not define the specific parameters of such availability. The FCC in 1996 adopted a 'pick & choose' interpretation that let carriers opt into parts of interconnection agreements negotiated by other carriers. It replaced that approach in 2004 with an "all or nothing" approach under which a carrier must adopt another carrier's agreement completely or not at all.

B. FCC Wants to Reconsider Indecency Ruling.

FCC lawyers announced on August 29 the Commission had rushed to judgment in concluding that "NYPD Blue" and three other television programs violated rules governing the broadcast of indecent and profane material. FCC lawyers therefore asked an appeals court to delay hearing a challenge to the FCC's findings for two months so that it may reconsider its rulings. The court has not yet issued an order on the motion.

C. EchoStar, Fox Square Off on Distant Networks.

The U.S. Court of Appeals for the 11th Circuit has previously found EchoStar in violation of the Satellite Home Viewer Act by regularly and unlawfully delivering out-of-market stations ("distant signals") in competition to local stations that carry the same network programming. The court has ordered the U.S. District Court with jurisdiction over the matter to issue an injunction that would prohibit EchoStar from retransmitting distant television broadcast signals. In an effort to head-off the pending injunction, EchoStar came to terms on August 25th with ABC, NBC, CBS and the Fox affiliates. The Fox Network and about 25 Fox stations, however, have objected to the proposed settlement. The U.S. District Court has given EchoStar until Sept. 12th to explain why the court should not issue the injunction.

D. Appeals Court Upholds FCC on CableCARD, Lets Integration Ban Stand.

On August 18, the D.C. Circuit upheld the FCC's "integration ban," which requires cable operators to separate encryption functions from basic decoding capabilities in their set-top boxes. Separating these functions allows cable customers to plug their cable line directly into a TV set without the need for a set-top box.

E. Judge Rules Warrantless Wiretapping Unconstitutional.

The National Security Agency is violating the U.S. Constitution by monitoring phone calls and e-mails without warrants, and must stop, a federal judge in Detroit ruled on August 17. U.S. District Judge Anna Taylor said NSA's program "violates the APA [Administrative Procedures Act], the Separation of Powers doctrine, the First and Fourth Amendments of the United States Constitution and the statutory law," including the Foreign Intelligence Surveillance Act. The DOJ immediately appealed the decision to the 6th Circuit Court of Appeals.

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