



Washington Update — Confidential & Privileged — March 28, 2006

I. Legislative Branch Activity

The Senate Commerce Committee has nearly completed an aggressive schedule of hearings on rules and policies governing media and telecommunications. As the hearings wrap up, we get closer to seeing what action the Committee likely will take. Chairman Stevens has indicated plans to unveil a comprehensive telecommunications legislative reform proposal by mid-April.

- Update on Earlier Hearing Issues -

There have been no significant legislative developments on Decency (Jan./Feb. Updates), Broadcast and Audio Flags (Jan. /Feb. Updates), or Video Content (Feb. Update). Phone Record Privacy/Pretexting legislation is moving forward (Feb. Update). Debates concerning the need for regulation to promote Net Neutrality remain active, but we still do not expect Congress to take an aggressive position to promote neutrality in the near term (Feb. Update). Video Franchising (Feb. Update) continues to generate significant interest. Now that a draft bill has been revised to eliminate provisions opposed by the cable industry, we believe that there is a better than 50% chance of federal legislative relief. The House has announced plans to hold a hearing on a draft national video franchising bill on March 30. The proposal circulating in the House will make it easier for telecommunications carriers to enter the video marketplace by offering a national franchising option. Cable operators also would be able to take advantage of national franchising. The draft also contains a very limited net neutrality provision which explicitly gives the FCC authority to enforce the neutrality principles it adopted last summer. It is uncertain whether the neutrality provision will remain in the bill. Because the provision is closely tracked to the existing FCC policy, it is relatively non-controversial. On the other hand, advocates of neutrality may find this a weak substitute for the protections they are seeking. The draft also contains a provision requiring localities that set up Municipal Networks (Feb. Update) to apply competitively neutral regulations to their networks. To maintain a level playing field, cities may not grant preferential legal/regulatory relief or otherwise give competitive advantages to their own networks.

In the last update, we noted reports that legislation might be introduced to address

outstanding digital television (“DTV”) transition issues, including cable's downconversion of broadcasters' DTV signals, and allowing unlicensed wireless devices in the “white spaces” between broadcasters' DTV channels. Currently, a draft bill is circulating and another bill has been introduced on the unlicensed use of white space. Both proposals would require the FCC to complete its white spaces proceeding (see chart in Section II below) within six months, and stipulate that the FCC's final order must permit unlicensed use within the broadcast television bands. The white space bill drafted by Sen. Allen (R-VA) would leave the FCC broad authority to adopt technical parameters to avoid interference. The bill introduced by Sen. Stevens (R-AK) anticipates that the FCC will adopt interference regulations, but provides additional guidance to the FCC for such rules by directing the FCC to: adopt complaint procedures for licensed users of the band; require unlicensed device manufacturers to file plans for interference remedies where the FCC finds interference with licensed users; and require unlicensed devices to certify compliance with technical criteria. These white space proposals are being opposed by broadcasters.

- Recent Hearings -

Tuesday, February 28, 10:00 AM – Universal Service Fund (“USF”) Contributions/ Thursday, March 2, 10:00 AM - USF Distributions. Some people are concerned that the pool of contributors to the universal service fund needs to be expanded to ensure that the fund is adequately supported. They argue that universal service fees should be assessed on all broadband services. Others believe that the pool of contributors should at least be expanded to include VOIP service. USF distribution methodology also is a target for reform. The largest segment of universal service is the high cost program, which helps to ensure that rural telecommunications services are available at rates that are comparable to the rates charged in more densely populated areas. The vast majority of funds distributed for this program go to incumbent local exchange carriers (“ILECs”). At the hearing, witnesses presented views on whether changes to the distribution methodologies are needed to ensure that all providers of voice and data services receive a fair share of funds from the program so that these carriers can help bring new services to underserved areas.

Because of the complexity of USF, the adoption of any legislation to change to the program will be time consuming. Nonetheless, USF reform is a high priority item for many in Congress, including Senator Stevens. We anticipate that the FCC will institute USF reforms (to the extent possible within the current statutory scheme) and that ultimately, Congress will reform the USF program.

Tuesday, March 7 10:00 AM - Rural Telecommunications. Witnesses discussed the importance of reform to universal service and intercarrier compensation mechanisms for the achievement of more robust and ubiquitous communications services in rural areas. Rural telecommunications issues are a high priority for Senate Commerce Committee leadership. We expect several reforms to be advanced in the legislative proposals that emerge from the hearings, although it is not clear whether consensus can be reached this year.

Tuesday, March 14, 10:00 AM Wireless Issues/Spectrum Reform. At the hearing, the Government Accountability Office proposed a two part plan for the future of spectrum use,

under which the Secretary of Commerce and the FCC would jointly develop a national spectrum plan to guide decision making, and Congress would create an independent commission to conduct a comprehensive review of current spectrum management. NTIA encouraged Congress to investigate allowing federal agencies to lease out unused spectrum to third parties. Another witness proposed to radically alter U.S. spectrum policy by “proportizing” spectrum, arguing that entities could hold property rights in spectrum just as they do in land or real estate. Senator Stevens expressed cautious interest in this idea but emphasized the need for further study.

Tuesday, March 14, 2:30 PM - Wall Street's Perspective on Telecommunications. Some analysts cautioned that legislative/regulatory intervention to promote network neutrality could thwart investment in high-speed networks, resulting in serious negative consequences for broadband service offerings, the economy, and society. Another emphasized that regulatory instability discourages investment. To remedy instability, the analyst urged Congress to strive for three things in reforming telecommunications law: simplicity (complexity contributes to instability), flexibility (anticipating new services can avoid the regulatory uncertainty that arises when a new service enters the market), and technological consistency.

Thursday, March 30, 10:00 AM- Full Committee Markup of S. 2389, the Protecting Consumer Phone Records Act. As we noted in a past Update, interest in protecting the privacy of consumer phone records has been on the rise due to reports that data brokers were accessing consumer cell phone records under false pretenses and then offering the records for sale (a practice known as “pretexting”). Bills to illegalized pretexting have been introduced in the House and Senate. They differ somewhat, but we anticipate that consensus will emerge in conference and a bill will be passed this year.

Other Hearings:

Thursday, March 30 2:30 PM - Competition and Convergence
Date TBA - FCC Activities and Policy
Date TBA - Voice-over Internet Protocol (VoIP)

Subsequent updates will address these hearings and related legislative developments.

II. Federal Communications Commission (FCC) Activity

A. Prospective Commissioner McDowell

On February 3, President Bush nominated Robert McDowell to the available Republican seat at the FCC. A hearing on McDowell's nomination was held on March 9, and he was confirmed by on Senate Commerce Committee on March 16. McDowell's nomination was recently placed on hold by one or more members of the Senate. Although the hold itself is public, the Senator(s) initiating a hold may remain anonymous and the reasons for the hold need not be disclosed. Holding a nominee often has no relationship to any concerns about the nominee's fitness or qualifications for his/her intended appointment. A hold is often used as leverage in negotiations concerning other nominees or entirely different issues. Assuming McDowell

proceeds successfully through full Senate confirmation, McDowell's appointment will last until June 30, 2009.

A prospective Commissioner's past experience and public statements rarely offer much insight into the positions (s)he will take on issues after being sworn in. That said, we anticipate that McDowell's confirmation is likely to make the Commission slightly more market-oriented than it is today. McDowell may also show less interest than some current Commissioners in policies concerning media content (e.g., heightened indecency enforcement; encouraging the offering of "family tiers" by multichannel providers or "family hours" by broadcasters). However, because a majority of the Commission will still favor such policies, we do not anticipate that the McDowell's arrival will significantly impact Commission decision-making in these areas.

B. Meetings and Actions

1. March 17, 2006 FCC Meeting

Comment Sought on Proposed Changes 700 MHz Band Plan – The FCC adopted a item that seeks comment on whether certain channels within the 24 MHz of spectrum in the 700 MHz band allocated for public safety use should be modified to accommodate broadband communications. This spectrum is presently being used by broadcasters, but will be available for public safety use by February 18, 2009, when the DTV transition is completed. The item seeks comment on three specific proposals to modify the 700 MHz band plan submitted by the National Public Safety Telecommunications Council, Motorola, Inc., and Lucent Technologies, Inc., and invites additional proposals. The current band plan for the public safety portion of the 700 MHz band provides narrowband (voice and low speed data) and wideband (image/high speed data and slow scan video) communications channels. The item also seeks comment on the FCC's tentative conclusion not to alter the narrowband portions of the 700 MHz public safety band.

Comment Sought on Children's TV Compromise - The FCC also adopted an item seeking comment on a joint proposal for modifications to the FCC's rules governing children's programming. Changes to the FCC's children's programming rules that were adopted in September 2004 were opposed by both broadcasters and children's television advocates. Several months after appealing the decision, the various parties negotiated a joint proposal that, if adopted, will address their concerns and will result in the withdrawal of their court appeals.

2. Indecency Enforcement. On March 15, the FCC released several decisions resolving over 300,000 consumer complaints about the broadcast of purportedly indecent, profane, and/or obscene television programming. In the decisions, the FCC addressed complaints concerning nearly 50 television programs broadcast between February 2002 and March 2005.

The FCC upheld its earlier \$550,000 fine against CBS for the broadcast of indecent material during the February 1, 2004 Super Bowl XXXVIII halftime show. The FCC found episodes of "Without a Trace" and "The Surreal Life 2," which contained numerous sexual images, to be impermissible under its indecency standard. In the same decision, the FCC also found indecent

the broadcast of a movie containing a rape scene and a talk show featuring a female guest who appeared in an open front dress. Finally, the FCC found indecent and profane several television programs containing repeated use of the "F-word" and/or the "S-word." The FCC denied viewer complaints regarding 28 other television programs, concluding that although the complained-of material may offend many people, the programming in question was not indecent.

The recent decisions depart from FCC indecency precedent in significant ways. First, the FCC held that only television stations that receive viewer complaints about indecent programming will be fined. Previously, the FCC fined all stations airing the programming in question, regardless of whether a viewer complaint had been sent to the stations. Second, the FCC held that the pixilation, or blurring out, of nudity does not necessarily insulate a station from indecency liability. This ruling raises the possibility that the "bleeping" out of profanity may not necessarily be a defense for indecent language.

Several of the television broadcasters subject to the indecency fines have signaled their intention to challenge the FCC's decisions in court.

Alert: We urge our clients in the broadcasting industry to take a close look at their programming content and consider whether changes are needed in light of these decisions.

3. Verizon Files Program Access Complaint. On March 20, Verizon filed a complaint under the FCC's program access rules when negotiations failed to yield an agreement for carriage of sports programming networks owned by Cablevision. Verizon wants to offer the programming to its FiOS TV subscribers in Massapequa Park, Nyack, and South Nyack, N.Y. FCC rules require cable operators to make certain affiliated programming available to competitors.

The Commission has long demonstrated a strong interest in promoting telecommunications entry into the video market. In light of this, we anticipate that action on this complaint will be a priority for the FCC and that Verizon is likely to secure a favorable outcome. This is the first program access complaint filed by a telecommunications carrier offering video service over its new fiber network.

4. Verizon Forbearance Petition Granted. On March 19, a petition for forbearance from common carrier regulation filed by Verizon was granted by operation of law. Forbearance petitions must be acted upon by the FCC within a specified number of days or they are deemed granted. Grant of the petition means that Verizon need not comply with common carrier regulation for certain high capacity broadband services offered to business customers.

In February, Verizon narrowed its original petition to specify that it did not seek forbearance of universal service obligations for the services at issue in the petition. Republican Commissioners supported grant of the petition, but when no agreement could be reached, relief was automatically granted without a written decision. Many anticipate an appeal.

5. New Bureau. At the March meeting, the FCC unanimously adopted an item establishing a new Public Safety and Homeland Security Bureau. The new bureau will focus on public safety, homeland security, national security, emergency management and preparedness, disaster

management, and related issues. Like other FCC bureaus, it will be managed by a chief with “front office” staff. Leadership and staff have not yet been named. The new bureau will consist of three divisions. Other than union approval and notification to Congress, no other approvals are required for the establishment of the bureau.

C. Pending Proceedings. There are several pending proceedings that are likely to generate FCC action in the near term, including the following. New items are in red:

| Proceeding | Issue(s) | Likely Timing of FCC Action |
|--|---|---|
| Broadcast and Wireless Auctions | <p>Full Power TV Auction #64 (11 permits)</p> <p>800 MHz Air-Ground Radiotelephone Service Auction #65</p> <p>1710-1755 and 2110-2155 MHz Advanced Wireless Services Auction # 66</p> <p>Digital LPTV Auction # 85 – LPTV stations can convert to digital operations on their analog channels or by obtaining a companion digital channel. LPTV stations seeking a companion digital channel must file applications between May 1 and May 12, 2006.</p> | <p>Began 3/15/06</p> <p>Begins 5/10/06</p> <p>Begins 6/29/06</p> <p>Not yet scheduled; expected summer 2006</p> |
| Time Warner/Comcast – Adelphia | Proposed conditions would ensure: MVPD access to merged entities' regional sports networks (RSNs); carriage of unaffiliated programming content; and net neutrality on Comcast and Time Warner broadband platforms | 2Q 2006 |
| Local Franchising NPRM | Rules would facilitate the franchise approval process for telcos seeking to enter the video market. | 2Q 2006 |
| Designated Entity (DE) Rules for FCC Auctions | Proposed new rules may restrict the permitted relationships between incumbent carriers and DEs. FNPRM released 2/3/06. | Order expected 2Q 2006 |
| Cable Horizontal and Vertical Ownership Limits | May 2005 further notice seeks to update stale record. An earlier notice sought comment on how to address D.C. Circuit remand of cable ownership regulations. | 4Q 2006 |

| Proceeding | Issue(s) | Likely Timing of FCC Action |
|---|--|-------------------------------------|
| 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 |
| 2006 Quadrennial Review of Broadcast Ownership Rules | FCC must respond to Prometheus remand and reconsideration petitions and begin 2006 review. | By statute, NPRM must issue in 2006 |
| "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 |
| Digital Must-Carry | Outstanding issues include: material degradation, program-related material, DBS carriage of DTV signals. | 3Q or 4Q 2006 |
| Digital Television 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. | 3Q or 4Q 2006 |
| DTV Second Periodic Review | Outstanding issue concerning upgrades to open v-chip. | 3Q or 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 | 3Q or 4Q 2006 |

III. Executive Branch Activity: The National Telecommunications and Information Administration (NTIA)

On March 14, 2006, NTIA released a report: "Spectrum Management for the 21st Century: Plan to Implement Recommendations of the President's Spectrum Policy Initiative." The plan outlines several projects, describes various tasks that NTIA already has completed within each project area, and details additional tasks to be completed in 2006 and 2007. The project areas are as follows:

- improve public participation and maintain high qualifications of spectrum managers
- reduce international barriers to U.S. innovations in technologies and services
- modernize spectrum management processes with advanced information technology
- satisfy public safety communication needs and ensure interoperability
- enhance spectrum engineering and analytical tools
- promote efficient and effective use of spectrum
- improve planning and promote use of market-based economic mechanisms in spectrum

IV. Antitrust Agency Activity/Deal Announcements

A. Pending Transactions

We previously described the Intelsat-PanAmSat transaction pending before the US Department of Justice ("DOJ"). This transaction remains pending before the DOJ. As we noted before, the Federal Trade Commission ("FTC") investigation into the Comcast/Time Warner-Adelphia transaction is closed. FCC review of both transactions remains pending.

B. Deals Announced

AT&T-BellSouth. On March 5, AT&T Inc. and BellSouth Corporation announced an agreement to merge the two companies, in a stock swap worth approximately \$67 billion. The merging parties expect the deal to close within 12 months, noting that the approvals of shareholders as well as FCC and antitrust authorities are required. The parties believe that the combination will create a more effective competitor in the wireless, broadband, video, voice and data markets.

IV. Litigation

CALEA – More Court Briefing. We previously noted that several VoIP providers and organizations concerned with consumer privacy have appealed the FCC's decision to extend the lawful intercept obligations of the Communications Assistance for Law Enforcement Act

(CALEA) to VoIP services. Appellants contend that the Commission's extension of CALEA obligations to VoIP providers is contrary to Congress' intent and the FCC's own regulatory treatment of information services, which include IP-enabled services like VoIP. Since the last update, reply briefs were filed, but no date has been set for oral argument.

COPA – Partial Google Win. We previously noted that in August 2005, the DOJ issued

subpoenas for search records from Google, America Online, Microsoft's MSN and Yahoo in preparation for litigation to defend the constitutionality of Child Online Protection Act (COPA). Google resisted the request, while the other companies complied, reportedly without releasing individual information. In late January, the DOJ filed a motion to compel Google to comply with the subpoena. On March 17, Google secured a partial victory when the court ordered it to produce 50,000 web addresses from its search engine index. Google does not have to provide sample of user search queries, which was the aspect of the subpoena that most privacy advocates were concerned about.

AT&T IP Forbearance Petition – FCC Presents Oral Arguments March 7. In February 2004, AT&T (then SBC) filed a petition requesting the FCC to forbear from traditional common carrier regulation of its IP offerings. More than one year later, the FCC rejected the petition, primarily because the FCC lacked sufficient information about the services and regulations at issue in the petition. The FCC held that forbearance could not be granted when it is not clear whether the obligations even apply to the services at issue. The FCC also determined that the request was overbroad.

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