



Washington Communications & Media Policy Update – September 30, 2006

I. Legislative Branch Activity

A. Port Security Bill Clears Conference.

In probably its last major action before the mid-term election recess, Congress approved the Security and Accountability for Every (SAFE) Port Act of 2006 by a vote of 409-2. The relevant FCC provisions are in Title VI. Section 602 directs the FCC to adopt a protocol to enable Commercial Mobile Radio Services (CMRS) providers to provide emergency alerts to subscribers. CMRS licensees may voluntarily elect to transmit emergency alerts to subscribers. If CMRS licensees elect not to transmit emergency alerts, they must provide clear and conspicuous notice at the point of sale of any devices with which its service is included that it does not do so. In addition, CMRS licensees that elect not to transmit emergency alerts also must notify existing subscribers of such election. Section 603 directs the FCC to establish a Commercial Mobile Service Alert Advisory Committee to make recommendations on CMRS emergency alert protocols.

B. House Passes Surveillance Bill.

The House passed the embattled electronic surveillance bill (HR-5825) 232-191 late on September 28. Thirteen Republicans voted against the bill, with 18 Democrats joining the Republican majority in approving it. The bill is a compromise worked out by the House Judiciary and Intelligence Committees, and sets rules for letting the President conduct warrantless electronic surveillance. The bill in effect would authorize an existing National Security Agency surveillance program, by setting rules for warrantless surveillance after an attack. The bill lets the government pursue targeted individuals up to 60 days.

C. Legislative Calendar.

The Senate and the House are targeting to adjourn before the elections on October 6.

II. Federal Communications Commission (FCC) Activity

A. FCC Meeting.

The Commission held an open meeting on September 26, 2006. At the meeting, the Commission adopted four items: the 11th Report concerning the annual report on the competitive market conditions with respect to Commercial Mobile Radio Services (CMRS), a Second Order on Reconsideration and Second Report and Order concerning children's television obligations, an Order concerning how the rural health care funding mechanism

can be used to enhance public and non-public health care providers' access to advanced telecommunications and information services, and a Public Safety and Homeland Security Bureau report regarding the launch of the new Bureau.

1. FCC Adopts 11th Annual Report on State of Competition in the Wireless Industry.

The report examined the conditions prevailing in the CMRS marketplace in 2005. The FCC concluded that there is effective competition in the CMRS marketplace based on its analysis of various measures of competition, including: the number of competing carriers providing service in an area, market shares, pricing behavior and trends, technological upgrades and product innovations, subscriber growth, usage patterns, churn, and service quality.

The report shows that competition among wireless carriers continues to afford many significant benefits to consumers. During 2005, the number of mobile telephone subscribers in the United States rose from 184.7 million to 213 million, increasing the nationwide penetration rate to approximately 71 percent. The amount of time mobile subscribers spend talking and texting on their mobile phones has also increased and the volume of text message traffic grew to 48.7 billion messages in the second half of 2005, nearly double the 24.7 billion messages in the same period of 2004.

2. FCC Revises Children's Television Obligations for Broadcasters.

The FCC approved a Second Order on Reconsideration and Second Report and Order resolving issues regarding the obligations of television broadcasters to protect and serve children in their audiences.

The Order approves the following modifications or clarifications of the children's television rules:

- The website rule – The Order adopts two clarifications to the rule: 1) the rule applies only when Internet addresses are displayed during program material or during promotional material not counted as commercial time; and 2) if an Internet address for a website that does not meet the four-prong test is displayed during a promotion, in addition to counting against the commercial time limits, the promotion will be clearly separated from programming material.
- The host-selling rule – The Order permits the sale of merchandise featuring a program-related character in parts of the website that are sufficiently separated from the program itself to mitigate the impact of host selling.
- The promotions rule – The Order revises the definition of "commercial matter" adopted in 2004 to provide additional flexibility for broadcasters and cable operators.
- The preemption rule – The Order eliminates the cap on the number of preemptions and returns to a case-by-case approach.
- The multicasting rule – The Order clarifies the limit on the repeat of core programs under the digital processing guideline adopted in 2004.
- The Order clarifies that certain public service announcements, which are not commercial matter, are not subject to the restriction regarding the display of website addresses. It also clarifies that station identifications and emergency announcements are not subject to the website rules.

3. FCC Adopts Pilot Program Under Rural Health Care Mechanism.

The FCC adopted an Order that establishes a pilot program to help public and non-profit health care providers build state and region-wide broadband networks dedicated to the provision of health care services, and connect those networks to Internet2, a dedicated nationwide backbone. The construction of such networks will bring the benefits of innovative telehealth, and particularly, telemedicine services to those areas of the country where the need for those benefits is most acute.

4. FCC Announces Launch of the Public Safety and Homeland Security Bureau.

The Commission announced the launch of the Public Safety and Homeland Security Bureau. The new bureau will build on the Commission's desire to meet the needs of public safety by promoting robust, reliable and resilient communications services in times of emergency. The bureau is responsible for the combined public safety-related functions that were previously dispersed among the other bureaus and offices. It is organized into three divisions: Policy, Public Communications Outreach & Operations, and Communications Systems Analysis.

B. Other FCC Activity.

1. FCC's Advanced Wireless Services Spectrum Auction Concludes.

The FCC's first auction of Advanced Wireless Service (AWS) spectrum licenses ended on September 18. A total of 1,122 licenses were offered in the auction, and 104 bidders won 1,087 licenses. The AWS licenses can be used to provide any of a wide array of innovative wireless services and technologies including voice, data, video, and other wireless broadband services offered over Third Generation ("3G") mobile networks. Auction No. 66 began on August 9, 2006, and closed after 161 rounds of bidding, raising total gross bids of nearly \$13.9 billion. The top five winning bidders based on the net amount of their winning bids include: T-Mobile License LLC; Cellco Partnership d/b/a Verizon Wireless; SpectrumCo LLC; MetroPCS AWS, LLC; and Cingular AWS, LLC.

2. FCC Denies Fones4All Petition to Expand Network Unbundling Obligation Through Forbearance.

The FCC denied a petition filed by Fones4All Corporation requesting that the Commission expand incumbent local exchange carriers' unbundling obligations by forbearing from specific aspects of the FCC's unbundling rules under section 251(d)(2) of the Communications Act of 1934. The FCC concluded that forbearance from rule 51.319(d) would not give Fones4All the relief it seeks, and therefore denied the Petition as procedurally defective. The FCC also concluded that the Petition did not meet the three prongs of the section 10 forbearance test.

C. Next Commission Meeting.

The next Commission meeting is currently scheduled for 9:30 AM on Thursday, October 12, 2006. The agenda for that meeting is not yet available, although FCC action on the AT&T/BellSouth merger is possible.

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: Oct. 23, 2006. Reply Date: Dec. 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 |

| Proceeding | Issue(s) | Likely Timing of FCC Action |
|--|---|------------------------------------|
| 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 |
| "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

NTIA: Comments received on Digital Television Converter Box Program.

The federal government must allow every U.S. household to seek financial aid to pay for digital-to-analog converter boxes after analog TV transmissions are halted in early 2009, top broadcasting and electronics trade groups said last week. The industry groups — led by the National Association of Broadcasters and the Consumer Electronics Association — said that in designing the converter program, Congress included every household and did not give the executive branch authority to add to, or subtract from, the eligibility pool.

NTIA has more than a year to put the final touches on the converter-box program. The agency is planning to issue coupons on a first-come, first-served basis from January 1, 2008 to March 31, 2009.

IV. Antitrust Agency Activity/Deal Announcements

Date Set for FCC Vote on AT&T/BellSouth Merger.

Chairman Martin has set the stage for a vote on the AT&T/BellSouth merger at the October 12 FCC public meeting. The FCC's action was unusual in that it came before the Justice Department had reached a decision on whether or not the deal would adversely affect competition and possibly harm consumers. Chairman Martin stated he recommends the merger be approved without any conditions.

Both the scope and timing of the merger has stirred controversy in Congress. Two influential senators urged the FCC and Justice Department to consider imposing conditions on the proposed merger. In a letter to both agencies, Sens. Mike DeWine, R-Ohio, and Herb Kohl, D-Wis., said divestitures of company assets may be needed, along with curbs on the ability of the merged parties to "warehouse" spectrum, thus restricting it from competitors.

Meanwhile, two House members, Judiciary Committee Chairman James Sensenbrenner, R-Wis., and John Conyers of Michigan, the panel's top Democrat, urged the Justice Department to refrain from ruling on the merger until a court review of two previous telecom deals is complete.

U.S. District Judge Emmet Sullivan is currently reviewing the mergers of Verizon Communications with MCI as well as the former SBC Communications takeover of AT&T, under expanded power Congress gave the courts in the Tunney Act of 2004 to more closely scrutinize Justice Department antitrust pacts with companies.

V. Litigation

A. 2nd Circuit Remands Indecency Case Back to FCC, Commenters Weigh In.

On September 7, a three-judge panel for the 2nd Circuit Court of Appeals agreed to remand the cases to the FCC for 60 days. The decision, which also put on hold rulings that four television programs from 2002 to 2004 contained foul language, was seen as temporarily stopping the FCC's "fleeting expletive" policy, under which broadcast stations could be fined for airing profanities, even if used only once.

The FCC had asked the court to allow it to reopen the decision so that it could respond to complaints by the major broadcast television networks. Comments were due on September 21st. In a combined filing at the FCC, CBS, Fox, and NBC took aim at the entirety of the FCC's indecency enforcement regime, saying they wanted the Commission to "rescind its radical new interpretation of indecency rules." In their filing, the networks asked the FCC to "reverse its radically expanded efforts to regulate through punitive forfeitures what it considers to be "indecent speech." They argue that the FCC's previous "cautious and limited" enforcement is the "centerpiece" of its defense of having the power to regulate broadcast speech. It is this regime that the Supreme Court narrowly upheld, expressly excluding "isolated" uses of "potentially offensive" language, which the FCC is now punishing.

Petitions for review and reply briefs must be filed in the 2nd Circuit by December 11.

B. EchoStar, Fox Square Off on Distant Networks.

The U.S. Court of Appeals for the 11th Circuit 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. In an effort to head-off the pending injunction, EchoStar came to terms 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 gave EchoStar until September 12 to explain why the court should not issue the injunction.

In its court filing, EchoStar told a Florida district court that it should not have to pull the distant network signals of 800,000 subscribers because circumstance have changed dramatically since a court ordered it to, and consumers would be unduly and unfairly hurt by the move. Also, they say, competitor DIRECTV would directly benefit from the move. EchoStar says that the August 25, \$100 million settlement—with all but the Fox affiliates—is a “substantial” change in circumstance since the injunction was ordered. It also says that in light of the settlement, a permanent injunction would be “unjust, particularly to consumers.”

EchoStar also asked for at least 120 business days to comply if ordered by a federal judge to terminate Big Four network programming largely located in rural areas. EchoStar told the court it would need at least four months to help consumers find alternatives for receiving network programming, including purchase of a local TV-signal package in the 165 markets where EchoStar makes that option available.

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