



Washington Update — Confidential & Privileged — April 28, 2006

I. Legislative Branch Activity

Legislative activity in April was dominated by progress on Video Franchising legislation and debates over Net Neutrality. In the March update, we discussed a draft bill circulating in the House that would facilitate local exchange carrier (LEC) entry into the video marketplace by creating a national franchise option. During the past month, the draft became a bill introduced by Rep. Joe Barton (R-6-TX), Chairman of the House Energy and Commerce Committee. The “Communications Opportunities Promotion and Enhancement Act” was approved by the House Subcommittee on Telecommunications and the Internet on April 12. It was approved in substantially the same form by the House Energy and Commerce Committee in a 42-12 vote on April 26. Key aspects of the bill are as follows:

- Definitions of “cable operator” and “cable service” are revised to include video offerings by telecommunications carriers.
- LECs offering video service and traditional cable operators facing competition may apply for national franchises which last for ten years.
- Pursuant to an amendment approved during committee deliberations, traditional cable companies can seek a national franchise rather than a local franchise in any market in which they face any form of terrestrial competition (in earlier versions of the bill, cable could only qualify for a national franchise if it faced competition from a LEC offering video service).
- National franchise holders cannot discriminate based on the income levels of a group of residences. Discrimination based on income carries a penalty of up to \$500,000 per day.
- A VoIP provision strengthens the rights of cable and other operators of networks that carry digital voice traffic to interconnect with existing telephone networks.
- The FCC is given explicit authority to enforce its net neutrality principles. It must act on complaints of violations of the policy within 90 days and may impose fines of up to \$500,000 per violation.
- States are prohibited from interfering with the establishment of municipal networks. Localities establishing such networks must apply competitively neutral regulations to their networks.
- Cable and other broadband service providers must allow consumers to purchase high-speed Internet service without having to buy any other cable or telecommunications service.

An amendment offered by Rep. Ed Markey (D-7-MA) that would have provided significantly stronger net

neutrality requirements was rejected 34-22 (a similar amendment was rejected during consideration of the bill at the Subcommittee level). The amendment was supported by some of the biggest Internet brands, including Amazon.com Inc., eBay Inc., Google Inc., InterActiveCorp, Microsoft Corp. and Yahoo! Inc., as well as a newly formed coalition of organizations and individuals known as SavetheInternet.com.

An amendment offered by Rep. Hilda Solis (D-32-CA) that would have permitted local franchising authorities to impose build-out requirements also was rejected. Rep. Nathan Deal (R-10-GA) was expected to offer an amendment that would have permitted cable operators to require broadcasters to enter arbitration during retransmission consent disputes, but Deal declined to offer this amendment.

II. Federal Communications Commission (FCC) Activity

A. Nominations

On April 25, President Bush nominated Chairman Kevin Martin to serve a second five-year term. Chairman Martin's current term began in 2001 and ends on June 30. Assuming that Chairman Martin is confirmed, his new term will expire on June 30, 2011.

The nomination of Robert McDowell to the available Republican seat at the FCC remains on hold. As we previously noted, such holds are sometimes used as leverage in negotiations concerning other nominees or entirely different issues. Sen. Mary Landrieu (D-LA) placed a hold on the nomination of McDowell and several other nominees in order to secure a firm commitment from the White House to fully fund reconstruction of damaged levees in Louisiana, but this hold was released on April 27. This may not be the only hold on McDowell's nomination. Unconfirmed reports indicate that Sen. Jay Rockefeller (D-WV) placed a hold on the nomination because of universal service-related concerns.

B. Meetings and Actions

1. April 12, 2006 FCC Meeting

FCC Adopts AWS-1 Relocation Procedures and Cost Sharing Rules. This summer, the FCC will commence an auction of 1,122 Advanced Wireless Services (AWS) licenses in the 1710-1755 MHz and 2110-2155 MHz bands. Because other spectrum has been allocated for AWS, this spectrum is often referred to "AWS-1." It is anticipated that AWS-1 licensees will offer next generation mobile wireless services, including wireless Internet access and other high-speed information and entertainment services. At the April 12 meeting, the FCC established procedures by which AWS-1 licensees may relocate incumbent Broadband Radio Service (BRS) licensees in the 2150-2160/62 MHz band and Fixed Microwave Service (FS) licensees in the 2110-2150 MHz and 2160-2200 MHz bands. The procedures provide that: (a) as the new AWS entrant builds out its network, it will relocate BRS and FS incumbents; (b) a new AWS entrant does not begin operations in a particular geographic area before relocating the BRS and FS incumbents with which it would cause interference; and (c) new AWS entrants and BRS and FS incumbents are allowed a period of time to negotiate the terms of the incumbents' move to comparable facilities and, if the parties are unable to reach an agreement, the new AWS entrant may involuntarily relocate the incumbent. The Commission also established cost sharing obligations for AWS and Mobile Satellite Service (MSS) entrants that benefit from the relocation of FS and BRS operations in the bands.

On the date of the meeting, the FCC also released a public notice announcing procedures for the AWS-1 auction, which begins on June 29. Bidding credits will be available for small businesses and Tribal entities. The auction is expected to generate over \$2 billion in total winning bids.

FCC Modifies Rules for BRS/EBS Spectrum Band. The FCC modified its rules and policies governing BRS and Educational Broadband Service (EBS) licensees operating in the 2496-2690 MHz band. Specifically, the FCC modified the BRS/EBS band plan by adopting licensing areas consisting of 493 Basic Trading Areas nationwide. The FCC also held that EBS licensees are permitted to enter into excess spectrum capacity leases with third parties for a maximum of 30 years, but leases with terms of 15 years or longer must include a right to review the educational use requirements of the leases every five years starting at year 15. BRS spectrum will be used for new communications technologies, including wireless broadband systems. EBS spectrum will be used by educational institutions to bring wireless technologies into classrooms.

2. New Designated Entity Rules in Place for AWS Auction. On April 26, the FCC adopted an item revising its rules governing designated entities (DEs). The revised DE rules will apply to the upcoming AWS-1 auction.

The DE rules are designed to promote small business participation in competitive bidding for spectrum licenses through a system of bidding credits. To be eligible, a DE must meet specified financial criteria based on its gross revenues as well as those of its controlling interests and affiliates. The recent rule modifications are designed to enhance the FCC’s ability to ensure that companies that are ineligible for DE benefits cannot circumvent the rules through relationships with DEs. The modifications restrict the ability of applicants and licensees that have certain types of spectrum leasing or resale agreements to qualify for DE benefits. Specifically, an applicant or licensee that has agreements permitting lease or resale of more than 50% of its spectrum capacity will be deemed to have an “impermissible material relationship” with a non-DE, making it ineligible for DE status in future auctions and subject to unjust enrichment payments. An applicant or licensee that has agreements permitting lease or resale of more than 25% of its spectrum capacity will be deemed to have an “attributable material relationship” with a non-DE, and this will be factored into a determination of its eligibility for DE status. The FCC also strengthened its unjust enrichment rules, provided clarification on rules governing audits of designated entities, and refined the designated entity reporting requirements. A further notice in the item sought comment on whether additional safeguards should be adopted.

3. FCC Releases Data on High Speed Internet Connections. On April 3, the FCC released its annual report on broadband Internet connections. The report finds that “advanced services” lines (those that deliver service at speeds over 200 kbps in both directions) increased by 60% between June 2004 and June 2005, for a total of 37.7 million lines. “High-speed” lines, which encompass advanced services lines and lines that deliver services at speeds exceeding 200 kbps in one, but not both, directions, increased by 13% during the first half of 2005, from 37.9 million to 42.9 million lines in service. As a nationwide average, high-speed DSL connections were available to 76% of the households to whom local phone companies could provide local telephone service, and high-speed cable modem service was available to 91% of the households to whom cable system operators could provide cable TV service.

4. FCC Amends Rules on Junk Faxes. The FCC amended its rules implementing provisions of the Junk Fax Prevention Act of 2005. The amended rules create an exemption to allow fax advertisements to be sent to parties with whom the sender has an established business relationship, but require that, even in the case of an established business relationship, the person sending the fax advertisement must obtain the fax number directly from the recipient or ensure that the recipient voluntarily agreed to make the number available for public distribution. The amended rules also require the sender of fax advertisements to provide clear and conspicuous notice and contact information on the first page of a fax that allows recipients to “opt-out” of future fax transmissions from the sender.

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 | <ul style="list-style-type: none"> • Full Power TV Auction #64 (11 permits). • 800 MHz Air-Ground Radiotelephone Service Auction #65. • 1710-1755 and 2110-2155 MHz Advanced Wireless Services Auction # 66. • 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 June 19 and June 30, 2006 (window originally scheduled to open on May 12). | <p>Auction complete Begins 5/10/06</p> <p>Begins 6/29/06</p> <p>Not yet scheduled; expected 3Q 2006</p> |

| Proceeding | Issue(s) | Likely Timing of FCC Action |
|---|---|-------------------------------------|
| 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 | FCC has adopted new rules governing the permitted relationships between incumbent carriers and DEs. | Order released April 27, 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 |
| 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 |
| 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 |
| AT&T-Bellsouth Merger | Comments due June 5; replies due June 20. | 4Q 2006 or 1Q 2007 |

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

Interference Protection for Federal Incumbents in AWS-1 Spectrum. On April 20, the NTIA and FCC released a joint public notice establishing procedures that will allow AWS-1 licensees to begin implementing service during the transition of federal operations in the 1710-1755 MHz band. The coordination procedures in the notice are intended to ensure that AWS-1 licensees provide interference protection to incumbent federal government operations until they have been relocated to other frequency bands or technologies.

Test of Spectrum Sharing. NTIA recently commenced a demonstration project to test the effectiveness of sharing spectrum among commercial, federal and local public safety operations. The project will test both operational and cost effectiveness of spectrum sharing. NTIA plans to issue a report on its findings later this year.

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.

AT&T-BellSouth. On April 25, the FCC formally announced receipt of the application of AT&T, Inc. and BellSouth Corporation for approval to merge the two companies. The April 25 public notice sets a deadline of June 5 for the filing of comments and petitions to deny, and a reply deadline of June 20.

V. Litigation

1. Broadcasters Challenge FCC Indecency and Profanity Orders. Two separate appeals of the FCC's recent indecency/profanity decisions (March Update) were filed in mid-April. In the U.S. Court of Appeals for the Second Circuit in New York, CBS Broadcasting, Inc., and News Corp.'s Fox Television Stations, Inc. are seeking review. They contend that the decisions are "unconstitutional, contrary to the relevant statutes, arbitrary and capricious and contrary to law." General Electric Co.'s NBC filed to intervene in the Second Circuit litigation. Disney's ABC, Inc. and Hearst-Argyle Television Stations, Inc. filed similar appeals in the D.C. Circuit. We anticipate that other parties may intervene or file amicus briefs in the weeks to come.

2. COMPTEL Challenges Grant of Verizon Forbearance Petition. A prior update noted that Verizon's petition for forbearance from common carrier regulation of its high capacity broadband services was granted by operation of law (March Update). COMPTEL, a trade association that represents competitive local exchange carriers, appealed the default grant to the D.C. Circuit Court of Appeals.

3. TiVo Wins Patent Lawsuit Against EchoStar. A jury in Marshall, TX ruled in favor of TiVo in its patent dispute with EchoStar on April 14. The jury found that the satellite operator had willfully infringed on TiVo's "time warping" patent and awarded TiVo \$74 million in damages. "Time warping" allows a viewer to pause live TV and to play one TV show while recording another. TiVo said it will seek a permanent injunction against EchoStar's DVR-equipped set-top boxes.

4. AT&T Loses to City of Walnut Creek on Franchising. Several months ago, AT&T challenged a local mandate that it secure a franchise before offering video service. On April 14, a federal court dismissed AT&T's claim that the franchise requirement was preempted by federal legislation. For jurisdictional reasons, the court did not address several other claims raised by AT&T; these claims may be re-filed in state court.

5. Suit Seeks Delay of AWS-1 Auction on Health/Environmental Grounds. On April 27, a suit was filed in a federal district court to halt the AWS-1 auction until the FCC completes an environmental study. The action contends that the FCC unlawfully failed to prepare an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act of 1969 (NEPA). NEPA requires all agencies to include in every recommendation or report on proposals for legislation and “other major Federal actions significantly affecting the quality of the human environment” a detailed statement delineating the impacts of the proposed action.

6. Other Pending Cases. Prior updates have covered an appeal of the FCC’s decision to extend the lawful intercept obligations of the Communications Assistance for Law Enforcement Act (CALEA) to VoIP services; discovery issues in litigation concerning the Child Online Protection Act (COPA); and AT&T’s appeal of the FCC’s denial of its IP forbearance petition. There were no significant developments in these cases in April.

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