



WASHINGTON COMMUNICATIONS & MEDIA POLICY UPDATE – MAY 31, 2006

*by W. Kenneth Ferree, Rick C. Chessen
Erin L. Dozier, Christopher G. Tygh*

I. Legislative Branch Activity

To no one's surprise, this month Senate Commerce Committee Chairman Ted Stevens (R-AK) introduced comprehensive telecommunications legislation. Meanwhile, in the House, a jurisdictional battle intensified between the Commerce and Judiciary Committees over "net neutrality" provisions in the House bill. Time is growing short, however, for Congress to pass any communications legislation. Below we discuss the Senate bill and the jurisdictional tug of war in the House.

The Senate Commerce Committee's "Communications, Consumer's Choice, and Broadband Deployment Act of 2006" includes the following provisions:

Title I – Terrorism. An "Interoperable Emergency Communications" provision would establish a fund for interoperable communications system grants.

Title II – Universal Service. The bill contains substantial revisions to the current Universal Service regime.

USF Stabilization

- Communications providers, including providers of telecommunications service, broadband service, and IP-enabled voice service, would be required to contribute.
- The FCC can adjust the contribution downward for low volume service providers, and exempt providers whose contributions would be de minimis or are part of Lifeline Assistance.
- The FCC can base its contribution methodology on revenue, numbers, and/or network capacity.
- Contributions may be based on interstate and intrastate services.

Other USF Matters

- The bill redefines the schools and libraries eligible for support, and includes entities on tribal lands.
- The bill provides interconnection rights for VOIP providers equal to those for traditional voice service.

- Service providers would become ineligible for USF support if they do not offer broadband services at 3 Mbps or greater in one direction within five years.
- The bill sets up a "broadband for unserved areas account" which makes satellite broadband service and satellite CPE potentially eligible for support.

Title III – Video Franchising. The bill extends cable regulation to video services offered by local exchange carriers. The bill directs the FCC to create a national franchising application within 30 days and would require those applications to be acted upon by local franchise authorities (LFAs) within 30 days of receipt. Franchising disputes would be resolved by the FCC. Redlining would be prohibited.

Title IV – Video Content. The bill directs the FCC to adopt regulations mandating access by DBS and other cable competitors to cable-affiliated sports networks. Cable can maintain exclusivity for non-sports programming if such programming is currently exempt from program access requirements. The new program access provision would sunset in 10 years.

The bill would authorize the FCC to re-establish the "broadcast flag" to protect digital video content from piracy, and the FCC would be authorized, but not required, to adopt a digital audio flag based on recommendations from a "Digital Audio Review Board."

Title V – Municipal Broadband. The bill would permit local governments to offer high-speed-Internet service, but would forbid them from favoring their own offerings.

Title VI – Wireless Innovation Networks. Unlicensed devices would be allowed to operate in portions of the television broadcast spectrum not being used by TV stations, but must do so in a manner that protects TV stations from harmful interference.

Title VII – DTV. The bill establishes a comprehensive digital television ("DTV") consumer education campaign. The bill directs the FCC to establish a DTV Working Group on consumer education, which will include wide-ranging participation by federal agencies, state and local governments, broadcasters, consumer electronics retailers and manufacturers, MVPDs, and consumer organizations. The FCC would mandate the type of information to be broadcast or otherwise distributed to consumers.

The bill makes sales of sets without digital tuners unlawful after March 1, 2007. The bill also allows for "down-conversion" of broadcast signals between February 18, 2009 and February 17, 2014: Large cable operators would be required to make broadcast signals viewable on analog and digital sets, but they may carry the digital signal in standard definition rather than high definition; small cable operators would be required only to carry broadcast signals in analog format. After February 18, 2014, cable operators would be required to carry broadcast signals in digital without material degradation.

The bill would also reinstate video description rules and require reports to Congress on DTV international coordination issues.

Title VIII – Child Pornography. The FCC would be required to adopt rules preventing the distribution of child pornography by video service providers.

Title IX – Internet Neutrality. The bill directs the FCC to report annually on how changes in Internet traffic transmission affects the free flow of information over Internet, business relationships between providers of broadband and Internet applications, and the development of offerings.

Stevens plans to release a revised version on the bill on June 5 and plans to hold a Committee vote on the bill by June 20. The Senate held hearings on the bill on May 18 (various issues, including net neutrality) and May 25 (net neutrality; interconnection). A third hearing is set for June 13.

Stevens maintains that he is open to working with Democrats on the legislation. Senator Daniel Inouye (D-HI), however, has released his own draft bill. Inouye's draft preserves local authorities' control over communications franchising issues and includes deployment requirements. The Democratic version contains stronger language concerning net neutrality—instead of asking the FCC to study the issue, it would prohibit high-speed Internet providers from blocking or degrading any services on their networks.

The House also continues to struggle with the issue of net neutrality. On May 24, the House Judiciary Committee approved controversial net neutrality legislation by a vote of 20-13 (HR-5417). This legislation contains language restricting broadband providers from potentially blocking or degrading competing services on the Internet. The passage of HR-5417 sets up a jurisdictional debate with the House Energy and Commerce Committee and their own franchise-focused bill (HR-5252). Judiciary Chairman James Sensenbrenner (R-WI-5), who sponsored the bill along with Rep. John Conyers (D-MI-14), stated that he intends to bring the bill up to the floor for inclusion in the broader Commerce bill. This comes only a week after the Judiciary Committee was denied a referral of the Commerce bill.

It is yet unclear if the House leadership will allow the Sensenbrenner/Conyers bill to be offered as an amendment to the Commerce bill.

II. Federal Communications Commission (FCC) Activity

A. Nominations/Confirmation

On Friday, May 26th, the holds on Robert McDowell's nomination for the fifth FCC Commissioners seat were lifted and the Senate approved McDowell by unanimous consent. That gave the Commission a 3-2 Republican advantage for the first time in more than a year. McDowell fills out a term that ends June 30, 2009.

With a 3-2 advantage, activity at the FCC should increase on issues such as media ownership, the Comcast/Time Warner acquisition of Adelphia, must-carry rules, and USF reform.

We previously mentioned that the President nominated Chairman Kevin Martin for a second term. That nomination remains pending.

B. Meetings and Actions

1. May 3, 2006 FCC Meeting

FCC Adopts Order to Enable Law Enforcement to Access Certain Broadband and VoIP Providers. The Commission issued an order to ensure that law enforcement has all of the resources that CALEA authorizes to combat crime and provide for homeland security. The order intends to balance the needs of law enforcement agencies with the alternative claims of new developers of technology, as well as addressing privacy concerns.

FCC Declares Video Relay Service (VRS) Providers Must Provide Interoperability With Competing Providers. The Commission passed a declaratory ruling and Further Notice of Proposed Rulemaking stating that any VRS consumer must be able to place a call through any VRS system and, in turn, any VRS provider must accept any VRS call. The Commission also determined that restricting the use of a provider's VRS service so that consumers cannot access other VRS providers is inconsistent with the functional equivalency mandate, the public interest and the intent of Congress. It noted public safety as being a major concern with possible inoperability of varied equipment.

In the FNPRM, the Commission asked for comment on the creation of an open and global database of proxy numbers for VRS consumers, so that that a hearing person may call a VRS consumer more easily. The Commission also asked for comment on whether it should adopt specific internet protocols or standards to ensure interoperability.

FCC Addresses Issue of Internet TRS Fraud. The Commission also issued a FNPRM asking for comment on possible misuse of Internet Protocol (IP) Relay Service and VRS. This misuse includes using IP Relay Service to make telephone purchases with stolen or fake credit cards and using VRS as a substitute for in-person interpreters.

2. SHVERA Digital Signal Strength Testing Waivers Granted/Denied by Media Bureau

The Satellite Home Viewer Reauthorization and Extension Act (SHVERA) provides that a satellite subscriber whose household is predicted to be served by the analog signal of a local network station, and who is seeking a distant digital signal of another station affiliated with the same network as that local station, may attempt to demonstrate eligibility for reception of the distant digital signal via satellite based on a signal test. The

subscriber would be eligible to receive the distant digital signal if the over-the-air digital signal of the local network station does not meet the signal strength standard in the Commission's rules. A subscriber may request such a test beginning April 30, 2006, if the local network station at issue is within the top 100 television markets and has received a tentative channel designation on its allotted digital channel or has lost interference protection; or, beginning July 15, 2007, for any other full power local network station.

SHVERA also permits stations to seek waivers of the signal strength testing requirement. To be grantable, a waiver request must provide clear and convincing evidence that the station's digital signal coverage is limited due to the presence of one of several criteria specified in the statute. Last fall, 61 stations sought waivers of the signal strength testing requirement (one of these requests was withdrawn). In a May 1 order acting on the pending waiver requests, 23 requests were granted, 23 were denied, 12 were returned as prematurely filed because the stations aren't subject to the April deadline, and two were dismissed as late-filed.

3. FCC Seeks Comment on Measurement Standards for Digital Television Signals under SHVERA

On April 28, the FCC proposed to amend its rules to include measurement procedures for determining the strength of a DTV signal at any specific location. The procedures would be used as a means of determining whether households are eligible to receive distant DTV network signals retransmitted by satellite carriers under SHVERA.

The proposed measurement procedures are very similar to the procedures currently in place for measuring analog signal strength, although comment is sought on certain proposed modifications for the digital testing context.

4. FCC Denies Request For Reconsideration Of Super Bowl XXXVIII Halftime Show Forfeiture Order.

On May 27, the FCC rejected CBS's argument on reconsideration that the halftime show was not indecent. The Commission affirmed its finding that CBS's violation was willful and declined to reduce the forfeiture imposed upon CBS. The Commission also rejected CBS's argument that the FCC's indecency framework is unconstitutionally vague and overbroad.

5. FCC Looks at Stations' Use of PR Videos

The Commission is investigating allegations that dozens of television stations aired corporate advertisements masquerading as news stories. Federal regulations require that broadcast stations disclose the corporate backers of video news releases (VNR) or face a maximum fine of \$32,500 for each violation and possible revocation of their license. The FCC probe was initiated in response to a report by a nonprofit watchdog group that found that 77 stations broadcast video features about products from 49 companies, including General Motors Corp., Intel Corp. and Pfizer Inc., without disclosing that they were produced by public relations firms.

6. Chairman Martin Declines to Probe Alleged NSA/Telco Privacy Violations

In a May 23 letter to Rep. Ed Markey (D-MA-7) Chairman Martin stated that the FCC does not have the authority to review classified information. Markey, the ranking Democrat on a House telecommunications subcommittee, asked Martin last week to investigate reports that AT&T, Verizon and BellSouth shared phone call records with the National Security Agency.

7. Next Meeting

The next FCC meeting is scheduled for June 15, 2006. The agenda is not yet available.

C. 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 and Wireless Auctions	800 MHz Air-Ground Radio-telephone Service Auction #65. – Auction began on May 10 th and continues now. One of three companies still participating in the FCC's auction of 4MHz of spectrum in the 800MHz band allocated to ATG services, AC BidCo has placed a provisionally winning bid of \$31.3 million for an exclusive 3MHz license, says the FCC.	Begins 5/10/06
	1710-1755 and 2110-2155 MHz Advanced Wireless Services Auction # 66. – This has been rescheduled to begin August 9 th , 2006. Short-form applications are due between June 5 th and June 19 th .	Begins 8/9/06
	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	Not yet scheduled; expected 3Q 2006

	applications between June 19 and June 30, 2006 (window originally scheduled to open on May 12).	
Time Warner/Comcast – Adelphia	Proposed conditions would ensure: MVPD access to merged entities’ regional sports networks (RSNs); carriage of unaffiliated programming; 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	FCC adopted new rules governing the for FCC Auctions permitted relationships between incumbent carriers and DEs in April.FCC expected to release in the beginning of June a new ruling addressing controversial changes to small business bidding rules ahead of the scheduled Aug. 9 start of the advanced wireless services auction.	Order released April 25, 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	<u>One-Way</u> : FCC action on reconsideration pending; Court of Appeals held in abeyance. <u>Two-Way</u> : Ongoing negotiations and	3Q or 4Q 2006

	reporting to FCC throughout 2006; potential NPRM.	
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 <i>Prometheus</i> 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)

On May 19, the NTIA published a notice of its intent to award a sole source contract to ICANN to perform key technical functions supporting the Internet Domain Name System. ICANN (Internet Corporation for Assigned Name and Numbers) has been performing the Internet Assigned Numbers Authority (IANA) services since 2000.

They involve three technical coordinating functions for the Internet domain name and addressing system. These functions include coordination of the assignment for technical protocol parameters, administration of certain responsibilities associated with Internet DNS root zone management; and allocation of Internet Protocol Version 4 and Internet Protocol Version 6 address space.

IV. Antitrust Agency Activity/Deal Announcements

A. Pending Transactions

We previously described the Intelsat-PanAmSat transaction pending before the US Department of Justice (DOJ). On May 26, the DOJ cleared Intelsat's planned acquisition without requiring divestitures of any satellites. FCC approval is expected soon. As we noted before, the Federal Trade Commission (FTC) investigation into the Comcast/Time Warner-Adelphia transaction is closed. FCC is still reviewing this transactions as well.

V. Litigation

1. EchoStar No Longer Eligible to Carry Distant Network Signals.

On May 23, the Eleventh Circuit Court of Appeals held that EchoStar engaged in a pattern or practice of willful violations of its compulsory copyright licenses. The statutory copyright license permits satellite carriers to offer distant network signals to “unserved households”—households that are not predicted to receive local network signals over the air. The court held that by providing distant network signals to hundreds of thousands of households that could receive local station signals over the air, EchoStar had engaged in a pattern or practice of infringing the rights of local stations. The court remanded the case to the district court with directions to permanently enjoin EchoStar from providing any subscriber in the country with distant signals of stations affiliated with any of the four major networks.

2. Broadcasters Challenge Indecency and Profanity Orders in Court and at FCC.

Two separate appeals of the FCC's recent indecency/profanity decisions were filed in mid-April (April Update). These cases have been consolidated into one case in the U.S. Court of Appeals for the Second Circuit in New York. Several new parties have intervened in the case: Center for the Creative Community, Inc., CBS Television Network Affiliates, FBC Television Affiliates Association, NBC Television Affiliates, NBC Telemundo License Co., and NBC Universal, Inc. In addition, on May 5, public television station KCSM, San Mateo, CA filed an opposition to the FCC's March decision to fine the station for indecent content in its broadcast of a documentary series. KCSM contends that the decision was a departure from applicable FCC precedent permitting profanity in the context of program such as Saving Private Ryan.

3. America Channel Files Suit Against Time Warner and Comcast in Adelphia Deal

Time Warner and Comcast were accused, in Minnesota District Court on May 30, of antitrust violations in a lawsuit seeking to block their purchase of assets of cable TV operator Adelphia Communications Corp.

W. Kenneth Ferree
(202) 218-0008

kferree@sheppardmullin.com

Rick C. Chessen
(202) 218-0014

rchessen@sheppardmullin.com

Erin L. Dozier
(202) 772-5312

edozier@sheppardmullin.com

Christopher G. Tygh
(202) 218-6876

ctygh@sheppardmullin.com