



Washington Communications & Media Policy Update – October 31, 2006

I. Legislative Branch Activity

A. Surveillance Bill Stalls in Senate.

There was little activity in Congress this month as most members were out on the campaign trail. The Senate did not address the surveillance bill (HR-5825) passed by the House in September, 232-191. The bill, in effect, would authorize an existing National Security Agency surveillance program by setting rules for warrantless surveillance in certain circumstances.

B. Legislative Calendar.

The Senate and the House adjourned for the elections on October 6. Legislators in both chambers will return to the Hill for a "lame duck" session after the election.

II. Federal Communications Commission (FCC) Activity

A. FCC Meeting.

The Commission held an open meeting on October 12, 2006. Although the Commission did not address the AT&T/BellSouth merger, it did adopt three items: a Notice of Inquiry that seeks comments and information for the Thirteenth Annual Report on the status of competition in the market for the delivery of video programming; an Order concerning a request for declaratory ruling regarding the interference protection requirements applicable to the 700 MHz Band; and a First Report and Order and Further Notice of Proposed Rule Making concerning new wireless operations in the TV broadcast bands.

1. FCC Issues Inquiry for Annual Report to Congress on Video Competition.

The Notice of Inquiry, which seeks comment and information on competition in the video programming market, is designed to assist the FCC with its annual Video Competition Report. In this report, the FCC expects to recount changes in the competitive environment over the last year. The Notice seeks information that will allow the FCC to evaluate the status of competition in the video marketplace, changes in the market since the 2005 Video Competition Report, prospects for new entrants, factors that have facilitated or impeded competition, and the effect these factors are having on consumers' access to video programming.

The Notice also requests:

- Data that will allow the FCC to evaluate horizontal concentration in the video marketplace, vertical integration between programming distributors and programming services, and other issues relating to the programming available to consumers.
- Information on technical issues, including equipment and emerging services.
- Comments regarding developments in foreign markets, which may contribute to the FCC's understanding of domestic markets and provide insight into factors affecting video competition.
- Comments on digital content protection measures currently in use and how the Commission can encourage the development of digital rights management technology that will promote access to high value digital content.
- Comments on whether MVPDs that offer Internet access service are giving subscribers a choice of Internet service providers and whether any MVPD offering high-speed Internet service has blocked access to certain kinds of Internet content or applications.

2. FCC Acts on Qualcomm Petition Regarding Interference Protection Requirements in the 700 MHz Band.

The FCC granted in part and denied in part a Petition for Declaratory Ruling filed by Qualcomm Incorporated regarding the requirements for interference protection in the 700 MHz band. Qualcomm is a Lower 700 MHz Band licensee and is seeking to deploy a mobile multimedia service called MediaFLO using this spectrum. Because Qualcomm's licenses cover TV/DTV Channel 55 of the 700 MHz Band, the company must protect broadcasters on Channels 54, 55 and 56 from interference using the criteria set forth in the FCC's rules.

The FCC acted on Qualcomm's petition seeking relief from certain provisions of these interference protection rules. First, the FCC declared that Office of Engineering and Technology Bulletin No. 69, with certain modifications, is an appropriate methodology for demonstrating whether the MediaFLO system complies with the FCC's rules on interference protection in the 700 MHz Band. Additionally, the FCC and its licensees have substantial experience with its implementation, particularly as it relates to predicting interference to television service from transmitters located both outside and inside another station's service contour.

Second, the FCC declined Qualcomm's request to declare that predicted interference to not more than two percent of the population served by a TV/DTV station is de minimis and therefore acceptable. However, the FCC granted Qualcomm a limited waiver using a measured approach where the allowable predicted interference to a TV/DTV station's service caused by the MediaFLO system will increase incrementally each year from the release of today's Order until the end of the DTV transition in February 2009.

Finally, Qualcomm had requested that the FCC establish streamlined processing procedures for any OET-69 showings, including a rebuttable presumption that such showings are sufficient when no objections are filed with the FCC. Because Qualcomm's request for a de minimis interference exception was granted solely to Qualcomm through a waiver, rather than declaratory ruling, the FCC declined to establish streamlined processing of applications.

3. FCC Takes Steps to Allow New Low Power Devices on Vacant TV Channels.

The Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking taking the first steps toward allowing new low power devices to operate in the broadcast television spectrum at locations where channels in that spectrum are not in use by television stations or other authorized services.

In the First Report and Order, the Commission concluded that fixed low power devices can be allowed to operate on TV channels in areas where those frequencies are not being used for TV or other incumbent licensed services. The Commission declined to permit operation on TV channel 37, which is used by radio astronomy and wireless medical telemetry services; and on TV channels 52-69, which have been reallocated for public safety and other mobile services. It also declined to permit the operation of personal/portable devices on TV channels 14-20, which are used by public safety service in 13 cities, leaving for further consideration the issue of whether fixed devices might be used in that band. Marketing of such devices may commence on February 18, 2009, after the digital television (DTV) transition is complete and all TV stations are in operation on their permanent DTV channels.

In the Further Notice, the Commission invited further comment on a number of issues that were raised in response to the Notice of Proposed Rule Making. It solicited additional information that is needed to determine whether personal/portable devices can operate in any of the TV channels without causing harmful interference. It also invited comment to explore whether low power devices should be permitted on TV channels 2-4, which are used by TV interface devices such as VCRs, and whether fixed low power devices can be permitted on TV channels 14-20.

B. Other FCC Activity.

1. FCC Consents with Conditions to ALLTEL Acquisition of Midwest Wireless Licenses and Authorizations.

The FCC consented to the applications filed in connection with the proposed acquisition of Midwest Wireless by ALLTEL, subject to certain conditions. In analyzing ALLTEL's proposed acquisition of Midwest Wireless, the FCC examined the market for mobile telephony services and concluded that the companies had demonstrated that the merger, with the conditions described below, will serve the public interest, convenience, and necessity. Further, the FCC concluded that the likely public interest benefits of the merger outweigh any potential public interest harms and that competitive harm is unlikely in most mobile telephony markets involved in the proposed transaction. In four Cellular Market Areas, however, the FCC determined that likely competitive harms exceed the likely benefits of the transaction and, in these areas, imposed conditions that will effectively remedy the potential for these particular harms. The conditions imposed with respect to the cellular systems in the markets listed below mirror, in large part, the terms of a settlement agreement between the applicants and the Department of Justice.

C. Next Commission Meeting.

The next Commission meeting is currently scheduled for 9:30 AM on Thursday, November 3, 2006. The agenda includes: a Report and Order regarding changes to the process for community of license changes and the process for amendments to the FM Table of Allotments; a Notice of Proposed Rulemaking on whether it should adopt certain measures to mitigate migratory bird collisions with communications towers; a Memorandum Opinion and Order concerning the classification of broadband over power line Internet access service; and a Memorandum Opinion and Order regarding the transfer of control application of AT&T and BellSouth.

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
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
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
AT&T-Bellsouth Merger	Comments filed June 5; replies filed June 20.	4Q 2006 or 1Q 2007
DTV Second Periodic Review	Outstanding issue concerning upgrades to open v-chip.	1Q 2007
Local Franchising NPRM	Rules would facilitate the franchise approval process for telcos seeking to enter the video market.	1Q 2007
IP-Enabled Services	Will address the regulatory treatment of IP-enabled services, including video services.	1Q 2007
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.	1Q 2007
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.	2007
Digital Must-Carry	Outstanding issues include: material degradation, program-related material, DBS carriage of DTV signals.	2007 or 2008

III. Antitrust Agency Activity/Deal Announcements

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

The Federal Communications Commission delayed a vote on the proposed buyout of BellSouth by AT&T until November 3 after the two Democratic Commissioners asked for time to study last-minute proposals.

In comments filed after the delayed vote, critics of the merger called for stronger net neutrality requirements and performance metrics and pricing guidelines for special access.

IV. Litigation

Permanent Injunction Sets December 1 Deadline for EchoStar.

On October 20, US District Judge William P. Dimitrouleas in Florida issued a permanent injunction against EchoStar to stop delivering distant signals to out-of-market subscribers by December 1. The Court refused to honor the previous settlement agreement reached between EchoStar and the networks, excluding News Corp. EchoStar likely will ask the 11th U.S. Appeals Court, Miami, to stay and overturn the order. The likelihood of success of such an appeal is, however, extremely low. EchoStar also is seeking legislation to reverse the Court's order. Action in Congress on this issue is also thought to be unlikely.

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