

TELECOM LAW REPORT



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FCC Amends Rules to Allow More Unlicensed Wideband Devices

The FCC has amended the rules governing certain wideband devices in order to facilitate the introduction of new operations, such as vehicular collision avoidance systems, and tracking systems that could be used either to locate persons, such as hospital patients and emergency rescue crew, or for such functions as inventory control. **Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems (Second Report and Order and Second Memorandum Opinion and Order), FCC 04-285, 12/16/04.**

The rules changes affect unlicensed Part 15 devices that use wide bandwidths but are not classified under the rules as ultra-wideband (UWB) devices. Among other things, the changes allow the use of higher peak emission levels, similar to the levels applied to UWB devices, for wideband emissions in the 5925-7250 MHz, 16.2-17.7 GHz and 23.12-29.0 GHz bands.

Higher Peak Emission Levels Are Coupled With Restrictions on Permissible Uses. The Commission concludes that higher peak emission levels can be permitted in the 5925-7250 MHz band because the fixed, fixed-satellite, and mobile systems in this band are not vulnerable to interference from such operations. In order to be cautious, however, the revised rules restrict unlicensed operations in the 5925-7250 MHz band to terrestrial and maritime applications and, as with UWB devices, prohibit the use of these devices onboard aircraft or satellites or for the operation of toys. In order to prevent the establishment of wide-area communication systems, the rules also prohibit the use of fixed outdoor infrastructures in the 5925-7250 MHz band, except for operation onboard a ship or within a terrestrial transportation vehicle. Commenters had also requested that higher limits be allowed in the 5460-5925 MHz band, but the FCC declines that request, at least for now, because the Amateur Radio Service and the Intelligent Transportation Systems could be operating in close proximity to, and susceptible to interference from, unlicensed devices in this band.

While the FCC also concludes that higher peak emission levels can be permitted in the 16.2-17.7 GHz band, it is concerned about the possibility of interference to radiolocation and Earth Exploration Satellite Systems operating in this band. It therefore limits operation in the 16.2-17.7 GHz band to vehicular back-up assistance radars that operate only when the vehicle is in reverse. The agency also warns potential equipment manufacturers that the 17.3-17.7 GHz portion of the band has been allocated in Region 2 and the United States for the Broadcast Satellite Service, effective April 1, 2007. Once this allocation becomes effective, there is a possibility that the GHz band may become designated as a restricted band and that Part 15 fundamental emissions will be prohibited in this portion of the spectrum.

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The revised peak limit for the 5925-7250 MHz and 16.2-17.7 GHz bands is equal to 20 log (RBW/50) dBm EIRP with the resolution bandwidth (RBW) being 1 to 50 MHz. This peak level is consistent with the peak limit applied to UWB operation, and as with UWB devices, the peak limit applies to the 50 MHz band centered at the frequency at which the highest average emission level occurs. An RBW not wider than the -10 dB bandwidth of the emission will be permitted, instead of an RBW based on 10 percent of the -10 dB bandwidth as the FCC had previously proposed. If frequency hopping or stepped frequency modulation is employed, the frequency hop or step function must be disabled and the transmitter must operate continuously on a fundamental frequency to measure the -10 dB bandwidth that is used to determine the maximum RBW that may be employed for the peak emission level.

Because these rule revisions are expected to increase the proliferation of unlicensed devices, the FCC also will require that emissions from unlicensed transmitters operating within these bands comply with the same average emission limit and measurement standards that were established for UWB communication systems. In addition, the -10 dB bandwidth of the transmission must be contained within the 5925-7250 MHz or the 16.2-17.7 MHz band, as appropriate, under all conditions of modulation and effects from frequency stability. Finally, the -10 dB bandwidth of the transmission must be at least 50 MHz for systems operating in the 5925-7250 MHz band and at least 10 MHz for systems operating in the 16.2-17.7 GHz band.

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Meg Hargreaves
PUBLISHER

Robert E. Emeritz
MANAGING EDITOR

Sue W. Bladek
LEGAL EDITOR

Michael M. Eisenstadt
Michelle Powers
DATABASE MANAGERS

Mary Ann Nyamweya
PRODUCTION MANAGER

New Rules Allow Non-UWB Vehicular Radar Systems in the 22-29 GHz band. The current UWB rules permit the operation of vehicular radar systems in the 22-29 GHz band, but such systems must operate with a minimum instantaneous bandwidth of 500 MHz. The rules preclude the operation of swept frequency systems, stepped frequency systems, and frequency hopping systems unless the transmissions comply with the minimum bandwidth requirement and the emission limits when measured with the sweep, step function or hopping sequence stopped. In 2003 the FCC granted Siemens VDO Automotive AG a waiver of the requirement that frequency hopping systems to be measured with the frequency hop stopped in order to allow Siemens to introduce its vehicular radar system. A condition of the waiver required that the -10 dB bandwidth of the system be located between 24-29 GHz, avoiding all restricted bands, and Siemens' system has successfully met that condition.

The FCC had asked whether it should revise the definition of a UWB device to cover frequency hopping systems such as Siemens', but it is concerned that "changes to the UWB definition at this nascent stage in its development would be disruptive and could further delay the introduction of devices." Instead, the revised rules accommodate vehicular radar systems, regardless of the type of modulation that is employed, as non-UWB Part 15 devices operating at 23.12-29.0 GHz, exclusive of the restricted band at 23.6-24.0 GHz, under similar emission limits that are applicable to UWB vehicular radar systems. These vehicular radar systems must be used only for ground-based applications. The revised rules permit frequency hopped, swept frequency, and gated systems operating within these bands to be measured in their normal operating mode.

FCC Dismisses Challenges from Cellular and Satellite Industries. Cingular asked the FCC to reconsider its entire decision to authorize UWB devices on an unlicensed basis, arguing that the decision violates Section 301 of the Communications Act. Section 301 requires that any person who uses or operates "any apparatus for the transmission of energy or communications by signals by radio" must do so by virtue of a "license granted under the provisions of the Act." The FCC had previously rejected such arguments by Cingular, and does so again here.

The Commission reasons that Cingular's interpretation of Section 301 "ignores the practical realities that inform any reasonable reading of the

statute and the nearly 70 years of 'unlicensed' operations authorized by the Commission under Part 15. Congress is entirely familiar with this regulatory structure and for many years has indicated its acceptance of the Commission's approach." The agency adopts what it believes to be a more reasonable interpretation of Section 301, *i.e.*, that the statute's licensing requirement is applicable only to "any apparatus that transmits enough energy to have a significant potential for causing harmful interference." Because of the operating limits imposed by the rules on UWB devices, they do not have such a potential and are therefore properly authorized on an unlicensed basis.

Cingular's real complaint, however, is that UWB devices do have the potential to interfere with cellular and PCS operations. The FCC, however, says that its previous decisions clearly show that the agency fully considered the interference analyses and views submitted by all commenting parties, and properly concluded that harmful interference was not likely to occur.

The agency also rejects Cingular's claims that the UWB orders undermine the exclusivity rights of cellular and PCS licensees, by failing to include these licensees in a coordination process with UWB operators, and by failing to lower the emission limits in the PCS and cellular frequency bands for indoor UWB devices. The Commission explains that, with the exception of ground penetrating radar and wall imaging systems, UWB devices do not operate within the PCS or cellular bands, although they may produce emissions within these bands. "Cingular's claim of exclusivity would prohibit the Commission from allowing any emissions to fall within a licensee's cellular or PCS bands, even if those emissions are sufficiently attenuated to not cause harmful interference to the operation of the cellular or PCS systems, the agency continues, "Thus, Cingular's interpretation of the exclusivity provided to a cellular or PCS license also would preclude the Commission from licensing additional PCS or cellular stations, as well as public safety and other radio operations, in different frequency bands since those stations produce emissions outside of their licensed band of operation. Clearly, this is not the case." Finally, the Commission notes that the operation of unlicensed devices in the PCS and cellular bands has been permitted under Part 15 at higher emission levels than those produced by UWB devices since before the allocation of the cellular and PCS services.

The FCC also rejects the satellite industry's claims of interference to C-Band Fixed Satellite Service (FSS) from UWB devices. The Coalition of C-Band Constituents contracted with Alion Science and Technology to determine the interference potential to FSS reception from UWB operation. Alion submitted a study to the FCC concluding that FSS receivers will experience "complete reception failure at currently regulated UWB power levels assuming emitter densities currently found in the environment of common wireless-based consumer units." The FCC, however, found that the Alion study was based on "multiple worst-case assumptions, most of which simply are not realistic," and that the Coalition "further exacerbated the worst-case results from the Alion study by applying unsupported and unreasonable projections with respect to UWB device proliferation." The agency said it was able to duplicate the Alion study, obtaining similar results when using the same assumptions Alion employed, and then recalculated the analysis "based on more realistic operating conditions." Relying on its recalculated analysis, the agency finds no justification to reduce the UWB emission levels in the FSS frequency band. It says, however, that it will continue to monitor the situation, and will take all appropriate action necessary to ensure that UWB operation does not result in harmful interference to FSS receivers.

Legislation

Senate Passes Package of Bills Affecting Spectrum, E-911, Universal Service Fund

The Senate late December 8 passed by unanimous consent a package of three communications measures (H.R. 5419) that will establish a spectrum relocation trust fund, a grant program for states to upgrade their emergency 911 call centers, and a one-year accounting exemption for the universal service fund.

The package now goes to the White House, where the president is expected to sign it into law. The bill, which passed in the House November 20, had encountered "holds" in the Senate and was considered dead until the last few hours that the Senate was in session. The measure was the last bill that the Senate considered prior to adjourning for the year.

House Energy and Commerce Committee Chairman Joe Barton (R-Texas), who sponsored the package, said he looked forward to the president signing the bill.

"With this passage we continue to expand our telecommunications universe, while protecting archetypal consumer rights," Barton said in a statement. "We have produced a package which will help schools, libraries, health centers, businesses, emergency personnel, and consumers—it's an accomplishment of which we can be proud," he said.

FCC Chairman Michael Powell said the legislation will bring needed changes to promote homeland security and increase wireless broadband opportunities. "I look forward to working with the NTIA and administration to implement this vital legislation and advance E-911, promote wireless broadband, and secure universal service for America's schools and libraries," he said.

Overcoming Obstacles. Since November 20, the House-passed package had been stopped in the Senate by two obstacles.

First, Sen. John McCain (R-Ariz.), the chairman of the Senate Commerce, Science, and Transportation Committee, wanted to attach unrelated legislation establishing a U.S. Boxing Commission, which was opposed by Barton.

The second obstacle for the bill was Sen. Robert Byrd (D-W.Va.), the ranking minority member of the Senate Appropriations Committee, who objected to the administration's control of the spectrum relocation trust fund. Byrd was seeking an amendment to put the fund under the purview of appropriators.

A spokesman for McCain said late December 8 that the chairman had received assurances from House Speaker J. Dennis Hastert's (R-Ill.) office that boxing legislation similar to that passed by the Senate in the 108th Congress would receive fair and prompt action by the House in the 109th Congress, prior to the August recess. "Sen. McCain takes this offer in good faith and has always taken Speaker Hastert at his word," he said.

Separately, a spokesman for Byrd said December 9 that Byrd had received assurances from Senate Appropriations Committee Chairman Ted Stevens (R-Alaska), who shared his concerns about control of the trust fund.

Stevens is slated to become chairman of the Commerce, Science, and Transportation Committee in the 109th Congress, Byrd's spokesman said. "As such, he has a central role in the administration of the

new fund that is created in the spectrum relocation bill, and he has pledged to work closely with Sen. Byrd to ensure that Congress's constitutional prerogative is protected as this fund moves from its infancy into its further development," he said.

Administration Sought Spectrum Fund. Of the three measures in the bill, the Bush administration was the most supportive of the creation of a spectrum relocation trust fund. The administration's NTIA had long sought its passage. In addition, CTIA—The Wireless Association was behind the measure.

"Last night's vote will accelerate the arrival of the broadband digital wireless age in the U.S.," said Michael Gallagher, assistant secretary of commerce and head of NTIA. "Streamlining the relocation process is a significant step in meeting President Bush's call to remove regulatory roadblocks to rapid deployment of broadband. The bill will speed much-needed consumer access to spectrum—rocket fuel for economic growth," he said.

Generally, the bill would authorize the use of spectrum auction proceeds to pay for the relocation costs of federal users of the spectrum. The goal of the bill is to clear up valuable spectrum for commercial use, while protecting government agencies.

"I believe yesterday's action will further enable the wireless industry to deliver meaningful, sought-after services to consumers at affordable prices," said Steve Largent, president and chief executive officer at CTIA. "The wireless legislative package that passed last night will start the process leading to an auction of 90 MHz [of] spectrum that is currently occupied by the Department of Defense and other government users," he said.

"Wireless carriers plan to bid on the vacated spectrum for the purpose of providing advanced wireless services to consumers. The proceeds of the auction will be used to finance the relocation of the public sector spectrum users," Largent said.

Burns Pushes E-911 as Urgent Measure. The second part of the bill would provide up to \$250 million annually for five years to states in the form of matching grants to upgrade their public safety answering points (PSAPs).

Under FCC rules, wireless providers are required to transmit the precise location of callers dialing 911 from a wireless phone, known as enhanced 911 or E-911 service. However, few call centers have the technology available to receive this location information.

The push to get states to upgrade their public safety answering points was spearheaded by Sens. Conrad Burns (R-Mont.) and Hillary Rodham Clinton (D-N.Y.). The effort also was supported by associations representing public safety officials.

"Momentum for this bill has been building and building—it's incredibly important for the improvement of public safety in our country, and I refused to let the final gavel drop before passing E-911," Burns said in a statement.

The bill also will discourage states from diverting their 911 surcharge revenues for non-911 purposes, according to the statement from Burns' office. States that divert funds will be ineligible for E-911 grants under the bill and will be publicly identified in biannual reports to the Congress.

"The National Emergency Number Association is thrilled with the passing of this important measure," Bill McMurray, president of NENA, said in a statement. "We have fought long and hard on the principle that the same 911 service should be available to every citizen, any time, anywhere," he said.

According to NENA, approximately 95 percent of the nation's PSAPs have E-911 capability for wireline callers, which means automated systems can identify the caller's number and physical location and route the call to the PSAP designated for that location. But fewer than 40 percent of the nation's call centers are capable of determining the precise location of wireless callers, the organization said.

Telcos Wanted Exemption. Last but not least, the package included a one-year exemption for the universal service fund from the Anti-Deficiency Act. This provision was sponsored by Sens. Olympia Snowe (R-Maine) and John Rockefeller (D-W.Va.), and backed by a wide range of telephone companies and associations, educational and health care associations, and others.

At issue is an accounting change ordered by the FCC that subjects the schools and libraries program of the universal service fund—also known as the E-Rate program—to the government's accounting standard, which is subject to the Anti-Deficiency Act. The new standard treats the program's commitment letters as "obligations" and requires the program to have cash on hand to cover its obligations.

According to Snowe and Rockefeller, more than \$400 million in requests from schools and libraries have not yet been met because of the new accounting standard. Without the exemption, the FCC could have

been forced to significantly increase the contribution factor for telephone companies, which would have translated into an increase in consumers' bills.

"Last night, the Senate put politics aside in passing legislation to help schools and libraries around the country to stay connected Internet service while preventing potential increases in consumer and business phone bill fees," Snowe said in a statement. "This bipartisan bill ensures that until a permanent fix is crafted, the status quo is preserved allowing schools and libraries to receive their Internet funding, and keeping consumers' telephone bills from rising," she said.

Various telephone companies also issued statements of support of the legislation, as well as associations such as the United States Telecom Association. Walter McCormick, president and chief executive officer of USTA, applauded passage of the bill, but also noted that more work needed to be done.

"This legislation highlights the many challenges facing the nation's universal service system and the entire telecom industry. We look forward to working with Congress to address and resolve these critical issues early next year," McCormick said.

Rate Hikes Still Expected Next Year. Mary Henze, assistant vice president for federal regulatory affairs at BellSouth, said the company was pleased that the Congress acted to resolve the immediate funding crisis for the E-Rate program.

"However, the new Congress will need to take a hard look at all of the funding and distribution problems that changes in the marketplace have brought to bear on the federal goal of telephone service that is available and affordable for all Americans," Henze said. "The current universal service system is in great peril. The schools and libraries issue is just the tip of the iceberg," she said.

Analysts with Medley Global Advisors also noted that even with the last-minute action by the Senate, universal service fund reform will be a top priority when the Congress returns in January. "The E-rate program's funding shortfall has highlighted a host of other issues that do not bode well for rural [telephone companies], which are already seeing mid-single digit declines in USF income," they said.

The focus on this issue now shifts back to the FCC, which must set a new contribution factor by December 15, the Medley analysts said. Even with the legislation, the Commission is likely to raise the contribution factor for telephone companies from the current 8.9 percent of interstate revenues to slightly less than 11 percent, they predicted.

"Since August, the program has maintained a negative cash balance, which coupled with accounting changes, forced it to halt its funding commitments, leaving schools, libraries, and phone companies in a funding crunch," the analysts said.

Observers expect the funding shortfall to be paid back next year through revenues generated by an increase in consumers' bills, but no one is able to say with any certainty how long it will take before all of the money is restored to the program, the Medley analysts said.

President Signs Internet Tax Ban Measure, Ending Struggle to Pass Extension

President Bush December 3 ended a year-long struggle to extend an expired moratorium on Internet access taxes, signing legislation (S. 150) to reinstate the ban for another three years.

His signature puts back in place a prohibition on both Internet access taxes and new, multiple, and discriminatory taxes, although access taxes will continue to be protected in states where they already exist. The ban now will remain in place through November 2007.

The most recent extension may be only a respite in an ongoing political battle between those who want to make the moratorium permanent and those who say it unjustly preempts state taxes and hurts state coffers. The question of how states or whether states should be able to tax telephone calls over the Internet also promises to raise controversy in the coming year.

White House spokeswoman Claire Buchanan said December 3 Bush believes the measure is a step forward for technological innovation. "The president was pleased to sign the Internet Tax Nondiscrimination Act, which is important to helping ensure that America stays on the cutting edge of innovation," she said. "By ensuring that Internet access remains affordable, we will help build on America's economic leadership for decades to come."

Sen. George Allen (R-Va.), who was present at the signing along with several other lawmakers who worked on the bill, said the action signifies a victory for taxpayers. "The Internet is one of our country's greatest innovations for individual empowerment," he said in a December 3 statement.

Also attending the signing ceremony were Treasury Secretary John Snow, Commerce Secretary Don

Evans, Sens. John Sununu (R-N.H.) and Ron Wyden (D-Ore.), and Reps. Chris Cox (R-Calif.) and Mel Watt (D-N.C.).

Nearly Identical to Compromise. The bill signed by the president is nearly identical to a compromise version of S. 150 passed by the Senate in April, providing four years of grandfather protection for Internet access taxes in several states and two years of protection for taxes on digital subscriber line (DSL) Internet service.

It also includes a carve-out saying the new law is not intended to affect state tax policy for Voice over Internet Protocol (VoIP). The measure includes a broad definition of exempt Internet access to which state and local governments have been opposed, but Allen said he viewed that change as necessary.

“This definitional change was essential to stop the eighteen states that began imposing burdensome taxes on broadband service derived from DSL and wireless providers,” Allen said in the statement. “This new law will help bridge the ‘economic digital divide’ particularly allowing more people with lower incomes as well as those in small towns and rural areas to have access to the commercial, educational, medical and informational empowerment of high speed broadband.”

Disagreements over that definition, the length of the moratorium, the treatment of Internet telephony, and other issues derailed efforts to extend the moratorium last November. The Senate called a truce in April, passing a compromise version of S. 150 to extend the moratorium through 2007.

The four-year ban won support in both houses only with difficulty. At the time it passed, it was a last-minute compromise proposed by Sen. John McCain (R-Ariz.) that rescued nearly six months of difficult negotiations from a near-breakdown. How long that compromise holds remains to be seen.

Permanent Internet Tax Ban Sought. Allen and House Judiciary Committee Chairman James Sensenbrenner (R-Wis.) already have said they plan to begin working toward a permanent Internet tax ban.

Sensenbrenner was a strong advocate of the House-passed Internet tax bill (H.R. 49), which would have made the moratorium permanent and immediately axed all existing Internet access taxes. He was a major opponent of the grandfather clause in the Senate bill.

Under the bill signed by Bush, that four-year grandfather clause is retained with the single exception of Wisconsin. At Sensenbrenner’s request, the Senate approved changes to the bill November 19 that provided

only two years of grandfather protection for Wisconsin’s online access tax. After two years, the Wisconsin state Legislature would have to affirmatively act to reinstate the tax.

Senators approved a second small change to the measure that would grandfather in a Texas utilities tax. The House passed the modified Senate bill two days later.

Internet Telephony Looming Issue. While both sides of the debate claimed victory with passage of the final changes to the Senate version of the bill, they also said Internet telephony may dominate the telecommunications tax policy landscape for the future.

Allen said November 19 he views VoIP as “the next battle,” while Sen. Lamar Alexander (R-Tenn.), who worked to craft a shorter moratorium bill, has also said he believes a concerted effort needs to be made to develop good policy in this area.

Stakeholders were swift to praise Bush’s action.

“By signing S. 150 into law, President Bush brings the nation one step closer to his ambitious goal of deploying broadband in all communities by 2007,” US Telecom Association President Walter B. McCormick said in a statement. “This administration understands the critical role that communications plays in connecting the world.”

Steve Largent, president of the Wireless Association, said the president’s action “is further evidence that our federal government recognizes the extreme harm that tax increases can have on the development and deployment of high-tech service offerings.”

Omnibus Bill Sent to President Contains Funding, Directives for FCC

The massive omnibus appropriations bill (H.R. 4818) for fiscal year 2005 that was received by the White House December 7 contains funding and several directives for the Federal Communications Commission, including language intended to protect prepaid calling cards such as those offered by AT&T.

Although the president has not yet signed the measure into law, he is expected to do so. In addition to the bill’s legislative provisions, the bill also refers to report language that is not legally binding, but that expresses the intent of the Congress.

Rep. John Sweeney (R-N.Y.), a member of the House Appropriations Committee, wrote to FCC Chairman Michael Powell on December 2, reminding

him of the report language on prepaid calling cards. “The Commission should not take any action that would work to the detriment of those who depend on these cards,” he said.

The conference report states that, “The conferees are aware that members of the armed services and their families make extensive use of prepaid phone cards to stay in contact. The FCC is considering subjecting these cards to increased regulation. The conferees direct the FCC not to take any action that would directly or indirectly have the effect of raising the rates charged to military personnel or their families for telephone calls placed using prepaid phone cards.”

The language drew complaints, however, from the United States Telecom Association. In a December 6 letter to Senate leaders, USTA complained that the report language inserted “at the request of certain corporate interests” will allow them to escape paying more than \$500 million in universal service and access fees.

Funding for FCC. Generally, the bill provides the FCC with a spending level of \$281.098 million for FY 2005, of which \$280.098 million must be raised from regulatory fees. The measure also includes an \$85 million spending cap for spectrum auctions.

The FCC had requested \$292.958 million for FY 2005, with a direct appropriation of \$20 million and \$272.958 million to be raised through fee collections. The Commission also requested that the Congress not set a spending cap for auctions.

The spending level is a compromise between the House proposal of \$279.8 million and the Senate proposal of \$282.3 million. The spending level is \$7.15 million above the agency’s FY 2004 level, and \$11.86 million below the agency’s FY 2005 spending request.

Of the FCC’s total appropriation, only \$1 million in direct appropriations is subject to the final across-the-board rescissions contained in H.R. 4818.

The bill does not include a proposal to divert \$33.2 million in funds from the universal service fund to pay for audits of the schools and libraries program by the FCC’s Office of Inspector General. The proposal was included in a package of budget requests that the Office of Management and Budget sent to the House in June.

Other FCC Requirements. In addition to funding, the bill includes three other legislative requirements. One section requires the FCC, along

with several other agencies, to provide the appropriations committees with a “quarterly accounting of the cumulative balances of any unobligated funds that were received during any previous fiscal year.”

Another section prohibits the FCC from using any of its funds to “modify, amend, or change its rules or regulations for universal service support payments to implement the February 27, 2004, recommendations of the Federal-State Joint Board on Universal Service regarding single connection or primary line restrictions on universal support payments.”

A third section authorizes the FCC to sell its monitoring facilities in Honolulu, Hawaii, and Livermore, Calif.

Eye on Travel Expenses. In addition, the report accompanying the bill contains several recommendations for the Commission.

The House added language cautioning the Commission about its travel expenditures, following a report released last year showing that FCC staff had accepted \$2.8 million worth of travel paid for by industry and trade associations.

“The committee is pleased that the Commission voluntarily examined its travel practices and has modified its procedures for accepting payments from non-governmental sources,” the language states. “However, the committee encourages the Commission to extend its prohibition on non-government-sponsored travel to apply to all FCC employees.”

The House also included language related to broadcast applications and public notice. The committee urged the FCC to revise its public notice rules “to require that all local public notices must clearly indicate, in plain and reasonable terms that are understandable to the general public, the impact of the application filed” and “how the public can participate in the FCC process regarding the application.”

Finally, the House added language requesting the FCC to refine its accounting system so that auction costs can be clearly distinguished from the costs of other Commission activities.

The Senate added language directing the FCC to continue reporting to the Congress on efforts to resurrect a broadcast industry code of conduct designed to protect against indecency and the further erosion of broadcasting standards.

Local Competition

FCC Adopts New Telephone Rule, D.C. Circuit to Review Once More

The Federal Communications Commission December 15 adopted by a 3-2 vote a new local telephone competition rule that the three GOP Commissioners hope would finally pass judicial muster, but that the two Democratic Commissioners said would end competition in the industry.

The new rule, the full text of which was not released, is scheduled to be reviewed January 4 by the U.S. Court of Appeals for the District of Columbia Circuit. In March, the court overturned key portions of the Commission's local telephone rules, finding that the Commission had not justified its order that incumbent local exchange carriers continue "unbundling," or offering their network elements to competitors at wholesale prices.

Under its new rules, the Commission eliminated unbundling for mass market local circuit switching and provided a 12-month phase out for this network element. More controversial, however, were the new rules governing high-capacity (DS1) loops and transport.

In looking at the unbundling obligations of incumbent carriers for DS1 loops and transport, the Commission adopted a "test" for each element to determine whether there is enough competition to eliminate the obligation. In each case, competition will be determined based on the number of lines to a wire center and/or the presence of competing carriers in a wire center.

For DS1 loops, an incumbent carrier must continue to provide unbundled access to its DS1 loops in any wire center with fewer than 60,000 lines and fewer than four "competitors" or fiber-based co-locators.

For DS1 transport, an incumbent carrier must continue to provide unbundled access to its DS1 transport lines between wire centers with fewer than 38,000 lines or fewer than four fiber-based co-locators.

The rule also makes clear that special access services provided by the incumbent local exchange carrier do not count as a competitive alternative when considering whether there is enough competition in a market. This aspect of the rule, as well as the requirement for "actual" competition rather than "potential"

competition in a market, drew concern from GOP Commissioners Kathleen Abernathy and Kevin Martin.

Legality Questioned. The concerns raised by Abernathy and Martin were some of the same raised by the regional Bell operating companies, who interpreted the court's mandate more strictly than their competitors.

Abernathy said she was most concerned about the tests that focused exclusively on actual competition and excluded potential competition, "that are flatly inconsistent with the D.C. Circuit's decision in *USTA II*."

Martin also expressed concerns about the legality of the order. "I think that there's a concern about the potential of insufficient recognition of special access," he said.

Susanne Guyer, senior vice president of regulatory affairs at Verizon, said "The Commission should do what courts have repeatedly said the law requires and acknowledge the many ways competitors can serve their customers without forced special terms."

James Smith, senior vice president-FCC at SBC Communications, said that in the highly competitive business market, the FCC had once again ignored clear direction from the court. "It has disregarded the tens of thousands of miles of fiber that our rivals have deployed in virtually all major metropolitan areas and cavalierly dismissed alternatives, such as special access, that multiple carriers currently use to compete."

Herschel Abbott, vice president of governmental affairs at BellSouth, said the company was extremely disappointed in the new tests to assess impairment in the areas of transport and high-capacity loops. "These rules do not appear to follow the court's order to take into consideration potential competition as well as actual competition," he added.

Managed Competition or End of Competition?

Walter McCormick, president and chief executive officer of the United States Telecom Association, said, "Unfortunately, instead of resolving all of the issues once and for all, as the courts have ordered, the Commission continues to perform a regulatory two-step, which at the end of the day leaves the industry right back where it started, with government-managed competition."

In sharp contrast, Democratic Commissioners Michael Copps and Jonathan Adelstein lamented the elimination of certain unbundling obligations, saying competitors would be cut off and consumers would suffer.

Still, both Commissioners expressed gratitude that the chairman had moved in their direction when developing the competition tests. Still, as a result of the Commission's decision, there will be less competition, less choice, and higher rates, they said. "The people who pay America's phone bills deserve better," Copps said.

The Commissioners' concerns were echoed by several competitive local exchange carriers and consumer organizations, who said the tests did not go far enough.

Mark Cooper, research director at the Consumer Federation of America, said "The FCC today continued its practice of chipping away at telecommunications competition while strengthening the Bell monopoly. And consumers will be the ones paying the price through diminished choices and higher rates."

Russell Frisby, chief executive officer of CompTel/ASCENT, which represents competitive local exchange carriers, said the association's members remain resolute in their mission to bring cost-effective services to their customers. "However, today's FCC actions may potentially place unnecessary obstacles in front of further investment and economic development."

Richard Whitt, vice president for federal law and public policy at MCI, said, "Unfortunately this order flies in the face of the FCC's stated commitment to maintaining and promoting facilities-based competition in those markets where there are no viable commercial alternatives."

Jason Oxman, general counsel at the Association for Local Telecommunications Services (ALTS), said, "The FCC's action today only partially delivers on its promise to develop network unbundling rules that ensure consumers and small businesses continue to benefit from the innovative broadband services facilities-based competitors have brought to the market."

Len Cali, vice president of law and director of federal government affairs at AT&T, said the order eliminates access to facilities where they are often needed the most by facilities-based competitors that serve business customers. "For example, our initial estimates indicate that the FCC's decision could deny competitors access to roughly 6.7 million business lines and up to 20 percent of all business lines in the top 50 MSAs [metropolitan statistical areas]. While the FCC attempted to portray this as insignificant, the reality is much more grave," he said.

Marilyn Showalter, president of the National Association of Regulatory Utility Commissioners (NARUC), said, "Our Association remains concerned about small business customers in areas that are not covered by the FCC's impairment finding, as well as other important issues, including linesharing, that still require the FCC's immediate attention."

Inevitable Challenge. At the center of the maelstrom was FCC Chairman Michael Powell, who continued to insist that this latest set of rules—the Commission's fourth attempt since 1996—was legally sound. "So in this holiday season, we can only hope that the fourth time is the charm," he said.

Speaking to reporters after the meeting, Powell said the Commission had every right to be concerned about the litigation risk, because it has had such a miserable showing over such a long period of time.

"It's important to remind ourselves, the D.C. Circuit has an open *mandamus* proceeding that restarts on Jan. 4. We're going to find out real fast where we stand," Powell said. "And I just think that this institution, the market, just could not withstand another [remand]," he said.

It is also not surprising that there are a "range of opinions" about the new rules across the political spectrum, Powell said. "That makes me feel like we probably drove it in the middle where it belongs," he said.

Moreover, Powell said that while he could not go as far as his Democratic colleagues wanted, he did not want to harm facilities-based competition. "We did significantly move in a direction to try to gain their support," he said. "But I wasn't willing to have a Pyrrhic decision that felt good but wasn't going to succeed," he said.

Still, as proof of their commitment, GOP negotiators did not take provisions out in retribution once it became clear that they were not enough to win their colleagues' support, Powell said. "There have been a number of very significant improvements, both toward competitors and consumers. Transitions have been significantly lengthened, thresholds have been raised, [and] tests have been set at levels that are very significant," he said.

Powell asserted that nearly 99.9 percent of facilities would remain unbundled, which is hardly "pulling out the rug" on competition.

Separately, Michael Gallagher, director of the administration's National Telecommunications and Information Administration, said he appreciated the FCC's adoption of new competition rules. "In June,

we called for an end to the litigation and for adoption of legally sustainable rules that preserve appropriate competition,” Gallagher said. “The FCC has now acted. The focus of all stakeholders should now be on meeting President Bush’s call for universal, affordable access to broadband by 2007 through investment, innovation, and competition.”

Looking at the Numbers. Jeffrey Carlisle, chief of the FCC’s Wireline Competition Bureau, said he could not give a precise number of wire centers where unbundling would be eliminated.

There are approximately 11,000 wire centers in the United States, Carlisle said. Approximately 0.5 percent of those wire centers will be excluded from DS1 unbundling. “So we’re not talking about MSAs or whole cities or anything like that; essentially, we’re talking about wire centers serving the densest telecommunications markets to the densest parts of the country,” he said.

Carlisle calculated that 0.5 percent of 11,000 wire centers comes out to about 47 wire centers. “The closest that we can get in terms of our statistical analysis, is you’re talking about perhaps 7 percent of the switched business lines in the country,” he said.

SBC, in its statement, said that the test for DS1 loops would force it to continue unbundling in Houston, as well as in other large areas such as Detroit, St. Louis, San Antonio, San Diego, and Milwaukee.

BellSouth said it has central offices in Charlotte, N.C., Miami, Atlanta, and Ft. Lauderdale, Fla., that house a dozen or more competitive fiber networks that apparently would not meet the new test, thus requiring BellSouth to continue unbundling.

Separately, Carlisle also said that the order does not address the issue of market definitions, and that talks are still under way. The “mass” market is generally defined as the residential and small business market, while the “enterprise” market is defined as the large business market.

Also not included in the order is any revision of the Commission’s previous rules on linesharing, although a spokesman said the order indicates the Commission’s intent to address this issue in the future.

FCC Asks Court to Dismiss Petition; Bells Ask for Expedited Review of Rules

The Federal Communications Commission January 4 asked a federal appeals court to dismiss a challenge

to its interim rules on local telephone competition, arguing that it recently adopted permanent rules that will supersede the interim rules.

In contrast, the four regional Bell operating companies and their chief trade association, the United States Telecom Association (USTA), said the FCC’s new rules do not comply with the court’s mandate and that the court should retain jurisdiction and review the new rules on an expedited basis.

At issue is the third rewrite of rules governing local telephone competition and the extent to which the Bell companies are obligated to offer their competitors unbundled access to their network elements at wholesale prices. In March, the U.S. Court of Appeals for the District of Columbia Circuit overturned key portions of the FCC’s second rewrite of the rules, again sending them back to the agency [**31 CR 1221, 359 F3d 554**].

In August, the Commission adopted interim rules that essentially froze all existing interconnection agreements in place for six months, keeping rates and terms the same until March 13 or until permanent rules were adopted [33 CR 861]. Two of the Bell companies and USTA immediately challenged the interim rules, filing a *writ of mandamus* with the court asking it to enforce its mandate.

Instead, the court notified the parties that it would hold the *mandamus* petition until January 4, to give the Commission time to adopt permanent rules that complied with its mandate. On December 15, the Commission voted 3-2 to adopt permanent rules on the unbundling obligations of the Bell companies.

Text Still Not Available. Although the new rules were outlined by Commission staff and described in a press release, the full text of the new rules has not yet been released. Indeed, in its filing with the court, the FCC said it expected to release its order promulgating the new rules “within approximately one month.”

In its petition to dismiss the pending *mandamus* petition, the Commission stated that when its new rules take effect (usually 30 days after publication in the *Federal Register*), its interim rules will have no continuing force. “Any legal challenges to the interim requirements (including both the instant *mandamus* petition and the overlapping petition for review) will become moot if they are still pending at that time,” it said.

In contrast, a joint petition filed by the four Bell companies and USTA said that the new rules adopted by the Commission in December will only be made

clear when the agency releases its order, which could still take some time. Thus, the court should retain jurisdiction over the pending *mandamus* petition and establish a schedule for an expedited review of the order.

The Bell companies proposed that initial briefs be filed within 10 calendar days after the FCC issues its order, with replies due five calendar days after that. Such an expedited schedule is appropriate in light of the Commission's failure after eight years to develop lawful unbundling rules and its apparent unwillingness to adhere to the court's prior mandates, they stated.

Jason Oxman, general counsel for the Association for Local Telecommunications Services (ALTS), said his organization fully supports the Commission's motion and agrees that the *mandamus* petition is moot and should be dismissed.

"Once the Commission releases its new rules, all parties will have a renewed opportunity to challenge the Commission's action in court. ALTS looks forward to reviewing the new rules to determine the impact they will have on facilities-based competition," Oxman said.

Sununu Says Unbundling Rules to Be Addressed in Legislation

Sen. John Sununu (R-N.H.) said December 16 that he expects comprehensive telecommunications legislation that will be considered next year to address incumbent local exchange carriers' obligations to offer their network elements to competitors at wholesale prices.

In a keynote address at an annual telecommunications symposium hosted by the Phoenix Center for Advanced Legal and Economic Public Policy Studies, Sununu—an advocate for facilities-based competition—said the Congress needs to craft legislation that also creates a clearer regulatory environment for Internet Protocol-enabled services. Without that clarity, he said, there will be an enormous deterrent to capital investment.

Sununu was critical of new rules adopted by the Federal Communications Commission December 15 that would ease some of the unbundling obligations of the Bell companies. He criticized the FCC's order for going "market-by-market to decide what is competition and what isn't."

The FCC order eliminated unbundling for mass market local circuit switching and provided a 12-month

phase out for this network element. But for high-capacity loops and transport, the Commission said competition would be determined by the number of lines to a wire center and/or the presence of competing carriers in a wire center.

"That kind of granularity and fragmentation will be hard to sustain in the long term," Sununu said. "It's good the FCC put this ruling out now," he added. "It gives us more time to react to it and come up with ways to address it in the bill."

The order is scheduled to be reviewed January 4 by the U.S. Court of Appeals for the District of Columbia Circuit.

Plans to Reintroduce VoIP Bill. Sununu—who serves on the Senate Commerce, Science, and Transportation Committee—was the architect earlier this year of a bill designed to give the federal government, rather than states, jurisdiction over Voice over Internet Protocol (VoIP) services. The goal of the bill was to prevent a variety of state regulations from stifling innovation in IP-based services.

The committee adopted Sununu's bill in July, but with an amendment that would restore some regulatory power to state public utility authorities. Sununu had urged defeat of the amendment. He has said he expects a version of his original legislation to be included in the larger telecommunications reform bill that will be taken up in the next Congress.

Sununu said he believes that the House and Senate would each pass a comprehensive telecommunications bill in 2005.

Sununu also said that his views about VoIP are supported by Sen. Ted Stevens (R-Alaska), the incoming chairman of the Senate Commerce Committee. Stevens plans to have up to eight public meetings across the country to garner grassroots input on telecommunications law reform.

"The goal is to solicit as much information as possible from outside Washington," Sununu said, adding that special interest groups may not be invited. "The intention is to conduct these sessions over the first five to six months of the year and then begin crafting legislation. We need to get the bill off of the floor of the House and Senate by the end of the year. That will help us get a conference report out by June of 2006."

But Sununu added that no other telecommunications regulatory issue can be resolved until Congress reforms the universal service system. He said the universal service fund (USF) was originally designed to ensure that telecommunications services reached

underserved populations with the greatest economic need, but has come to be viewed as an entitlement. "I don't think there's a constitutional right to 30 megabit broadband," he said.

Commission Rules in AT&T's Favor in Access Charge Dispute with BellSouth

The Federal Communications Commission released an order December 9 finding in AT&T's favor in its dispute with BellSouth over allegations that the Bell company engaged in anticompetitive behavior by requiring competitors to "lock in" to its network to receive the best price.

AT&T filed a formal complaint at the Commission in July, alleging that BellSouth was attempting to prevent the development of facilities-based competition by requiring wholesale special access customers to commit at least 90 percent of their traffic to the BellSouth network.

According to the order, AT&T alleged that two of BellSouth's optional tariff discount plans for special access services, its Transport Savings Plan (TSP) and Premium Service Incentive Plan (PSIP), violated the nondiscrimination sections of the communications statute.

"We find that BellSouth's TSP discriminates in favor of BellSouth's interexchange affiliate, BellSouth Long Distance, Inc., in violation of section 272," the order stated.

Len Cali, vice president of law and director of federal government affairs at AT&T, said the order confirms that BellSouth's special access tariff is unlawful and anticompetitive. "BellSouth tried to force its wholesale customers to keep nearly all their special access traffic on the BellSouth network in order to receive so-called 'volume discounts' from its obscenely high rack rates," Cali said. "This lock-in requirement would prevent the very facilities-based competition that the Bells have long claimed is the only meaningful competition."

Cali commended the FCC for its order, which he said would help curb BellSouth's anticompetitive wholesale policies. "The Bells' special access rates and practices are imposing enormous costs on the information economy. The FCC should promptly begin the long-delayed proceeding to review special access rates generally and the state of competition in the wholesale telecom market," he said.

BellSouth Could Challenge. According to BellSouth, the company discontinued its two plans in June 2004, before the complaint was filed by AT&T. Customers who were on the plan when it was discontinued were "grandfathered" in and allowed to keep their terms and conditions under the tariffs, the company said.

Under the FCC's order, BellSouth may not allow their grandfathered customers to renew their subscription to TSP and must completely terminate its TSP tariff by June 9, 2005. The FCC did not find that the PSIP tariff violated any discrimination statutes, it added.

James Harralson, assistant general counsel and vice president regulatory at BellSouth, said the company still does not believe that its TSP tariff is discriminatory in favor of BellSouth Long Distance.

"BellSouth's TSP tariff has been in place since 1999. Many of BellSouth's wholesale customers, including AT&T and AT&T's smaller competitors, have subscribed to the TSP tariff and received hundreds of millions of dollars of discounts over the nearly six years of its existence. These discounts have helped make our customers, no matter where they are in their life cycle, more competitive and demonstrated BellSouth's commitment to competition," Harralson said.

"It is unfortunate that the FCC has made this determination in the face of a very competitive marketplace for special access services," Harralson said. "BellSouth will closely review the Commission's decision and evaluate all of its legal alternatives."

BellSouth's Ackerman Urges Phaseout of Most Rules Affecting Telephone Firms

With an eye toward reopening the 1996 Telecommunications Act next year, Duane Ackerman, chairman and chief executive officer of BellSouth, urged December 14 that only the narrowest of regulations should remain after a few short years.

Ackerman said new legislation should allow for a simple, market-based approach with only minimal retail regulation of basic local telephone service, a requirement that nonrural telephone companies unbundle their copper loops at negotiated rates for a few years, and social obligations such as E-911, federal wiretap authority, and consumer protections.

Ackerman made his remarks to a forum hosted by the AEI-Brookings Joint Center for Regulatory Studies.

Earlier in the day, Walter McCormick, president and chief executive officer of the United States Telecom Association, said no other industry in the country is saddled with as many regulations as local exchange carriers.

Industry after industry is coming forward and asking regulators not to regulate them as a telecommunications service, McCormick said. This includes cable, wireless, Voice over Internet Protocol (VoIP), and broadband over power lines, he said.

Government Should Withdraw. In every other sector of the economy, the government has withdrawn when competition emerged, McCormick said. "They did that with railroads, they did that with trucking, they did that with inner city busing, they did that with airlines. They didn't do it with communications," he said.

Still, there are more wireless phones today than wireline, McCormick said. Consumers can choose among technologies that make every market contestable. Yet, regulators continue to apply to the communications industry what can only be termed government-managed competition, he said.

Even today, the FCC is struggling with what kind of appropriate central planning it should undertake with regard to the telecommunications industry, including a building-by-building review of DS1 access, McCormick said.

"I ask, in what other industry in America do we engage in this kind of tortured analysis," McCormick asked. It is time for telecommunications reform and for free markets to take over, he urged.

Crandall Doubts Social Benefit. Robert Crandall, a senior fellow at the Brookings Institution, argued that competitive local exchange carriers had grown through the use of the unbundled network element-platform (UNE-P). However, contrary to the expectations of the 1996 Telecommunications Act, they have not been migrating over to their own networks and facilities, he said.

There is little evidence that local competition significantly reduces consumer prices for local telephone service, Crandall argued. Moreover, there is little evidence that competitive local exchange carriers have produced innovation, he said.

According to his calculations, consumers have benefited from lower prices as a result of local competition, but only by about 15 percent or about \$45 per year per consumer, Crandall said. The total savings to consumers is about \$1.5 billion per year, he said.

These gains, however, have been achieved at a huge cost, he said. Competitive local exchange carriers have invested about \$55 billion between 1996 and 2003 in facilities, which results in \$8.25 billion in costs for \$1.5 billion in savings, he said.

Crandall also argued that the forecast for the competitive local exchange carrier industry is bleak, and that fixed-wire narrowband telecommunications services are on the decline worldwide.

The 1996 Telecommunications Act did not create lasting, meaningful competition, and its benefits have been "swamped" by its costs, Crandall said. Moreover, the competition that has emerged, such as VoIP, was unanticipated in the act, he said.

Ackerman Urges Limited Rules. In his remarks, Ackerman said the FCC's interconnection and unbundling rules were some of the most complicated in FCC history. Eight years after the 1996 Telecommunications Act, the Commission still had not adopted a legally sound set of rules, he said.

Instead, regulation should be limited to three small areas, Ackerman said. Price regulation should be limited to basic telephone service, without any additional services or features. If the customer upgraded, the bundle would not be regulated, "simple as that," he said.

Among carriers, regulation should be limited to a requirement that nonrural local exchange carriers unbundle their local copper loops at negotiated rates, Ackerman said. This obligation, however, should sunset in a few short years, he said.

"But at the end of a date certain, the FCC and state regulators would be out of the business of fixing interconnection terms and rates," Ackerman said.

Finally, there should be equitable regulation among all carriers to fulfill social obligations such as access to emergency 911 services, the ability of federal law enforcement to conduct wiretaps, access for disabled consumers, and certain consumer protections, Ackerman said.

Ackerman also stressed the importance of universal service reform, which should be preserved as a policy goal. However, stresses on the system have resulted in the need for changes, including an increase in the contribution base to include all service providers.

General tax revenues also should be used to fund at least part of the universal service fund, Ackerman proposed.

Real Competition. In terms of competition, telephone companies are facing instant messaging, e-mail, two-way paging, text messaging, and cable,

Ackerman said. BellSouth is experiencing losses to this competition, which are very real, he said.

“The competition that is emerging is facilities-based,” Ackerman said. “These are real competitors and they are bringing everything they have to the game,” he said.

The environment was so different in the early 1990s, that the act was focused on wireline rules, Ackerman said. But the competition today is not wireline, he said. Instead, it is from cable modem, from wireless carriers, and from other wireless technologies that will develop greater capabilities.

“So what I see as developing as the real facilities-based competition just doesn’t seem to be in anything that was even envisioned when the act was developed,” Ackerman said. “So those rules are just no longer applicable to this era, and this era is off and running.”

VoIP

8th Circuit Upholds FCC’s Assertion of Federal Sway Over VoIP

A November order of the Federal Communications Commission preempts the Minnesota Public Utilities Commission from regulating Voice over Internet Protocol services offered by Vonage Corp., and therefore has mooted the PUC’s appeal of a district court injunction barring such regulation, the U.S. Court of Appeals for the 8th Circuit held December 22. **Vonage Holdings Corp. v. Minnesota Public Utilities Commission**, 8th Cir, No. 04-1434, 12/22/04).

The appeals panel did not rule on the merits of the lower court’s 2003 holding that VoIP providers are not telecommunications service providers subject to state regulation. In enjoining Minnesota from regulating Vonage, the lower court had concluded that such regulation was preempted by federal law. The MPUC appealed, but the appellate panel’s order focused on the jurisdictional impact of the FCC’s assertion of exclusive authority over VoIP.

According to the court, the FCC in November had concluded that the interstate and intrastate components of Vonage’s service were not severable; that is, that it was not possible for MPUC to regulate the intrastate component of the service without impermissibly regulating the interstate component.

Because the FCC order was binding on the court and could not be challenged in the case appealing the lower court’s independently based decision, the panel “affirmed the judgment of the district court on the basis of the FCC order.”

In order to challenge the FCC’s administrative order, the MPUC would have to petition for review in an appropriate court of appeals naming the United States as a party pursuant to the Hobbs Act, the court said. “No collateral attacks on the FCC order are permitted,” the per curiam opinion explained.

“The FCC’s order preempting MPUC’s order dispositively supports the District Court’s injunction,” the opinion said. “In the event that MPUC or another aggrieved party prevails in a Hobbs Act petition for review, MPUC remains free to challenge the injunction at that time.”

Cable TV/Broadband

Supreme Court Agrees to Hear Case on Classification of Cable Modem Service

The Supreme Court December 3 announced that it would review a decision [30 CR 637, 345 F3d 1120] of the U.S. Court of Appeals for the Ninth Circuit finding cable modem service is partially a “telecommunications service” (*FCC v. Brand X Internet Services*, U.S., No. 04-281, review granted 12/3/04).

The court also granted review in a similar case filed by the National Cable and Telecommunications Association (Docket No. 04-277) against Brand X Internet Services, which also takes issue with the appeals court’s finding that cable modem service is in part a telecommunications service.

In both cases, the petitioners argued that the Ninth Circuit ignored a 2002 decision by the Federal Communications Commission that cable modem service is an “information service” only. NCTA especially said that the appeals court failed to defer to the expert agency as required under the *Chevron* doctrine.

A three judge panel from the Ninth Circuit ruled in October 2003 that cable modem service was both a telecommunications and an information service. However, the panel made its decision based on a previous decision, rather than on the merits.

How a service is classified, either a telecommunications service or an information service, has significant regulatory implications. Telecommunications service providers, such as local exchange carriers, are heavily regulated under Title II of the Communications Act. Information service providers, such as Internet service providers, are lightly regulated under Title I of the act.

Grave Consequences. FCC Chairman Michael Powell, in a statement, said he was glad that the Supreme Court had agreed to take the case. “The Ninth Circuit’s decision would have grave consequences for the future and availability of high-speed Internet connections in this country,” he said. “As the Commission is uniquely charged with the task of promoting the deployment of such advanced services to the public, we look forward to our opportunity to present our case before the high court,” Powell said.

SBC Communications also was pleased that the court had decided to hear this “critically important” case. “While the FCC had taken an important first step in establishing a consistent, forward-looking policy framework for all broadband providers, the Ninth Circuit’s monkey wrench threatens to tie up the country’s broadband future in 19th-century rules,” it said.

Matthew Flanigan, president of the Telecommunications Industry Association, predicted success. “We believe the appeal will be successful and ultimately will lead to enhanced competition among a wide variety of advanced communications platforms, bringing lower prices and better services to consumers. This case presents an opportunity for the highest court in the land to acknowledge that the Internet networks of today and tomorrow are vastly different from the old telephone world.”

BellSouth called it a positive step. “The high court’s resolution of the cases in favor of the FCC’s previous determination will clear the way for the Commission to finish work on modernizing regulations to allow all Internet service providers—phone companies, cable companies, satellite companies and independents—to compete under the same rules as they bring high-speed Internet services to their customers,” it said.

Contrasting Views. In contrast to the Bell companies, Internet service providers, backed by consumer advocates, favor the telecommunications service classification because it would require cable companies to open up their networks to competition.

In a joint statement by Consumers Union and the Consumer Federation of America, the consumer

advocates said the Supreme Court could finally remove a barrier to competition by upholding the Ninth Circuit’s decision.

“We are confident that when the court examines the facts, it will decide to uphold the Ninth Circuit Appeals Court ruling that affirmed the critical principle of open, non-discriminatory networks as the cornerstone of competition in communications markets,” the consumer advocates said.

“The original Brand X court finding, which was first entered four years ago, held that the advanced telecommunications network in the cable system should be available to Internet service providers on a non-discriminatory basis, leading the way to increased competition and the lower prices and greater choice that competition would bring,” the advocates said.

The principle of non-discrimination in communications has been a cornerstone of the nation’s democracy and economy since its founding, the consumer advocates said. “We are confident that the Supreme Court will uphold the principle, as the Ninth Circuit Court of Appeals has done twice, and put an end to the legal gymnastics at the FCC that has denied consumers choice and slowed the spread of broadband.”

Cable TV Sparring with Broadcasters over Digital Television Transition Plans

The National Cable and Telecommunications Association (NCTA) December 13 released its response to a plan by the National Association of Broadcasters to end the nation’s transition to digital television, calling the broadcasters’ proposal unlikely to facilitate the return of the analog spectrum. “Instead, the broadcasters’ plan amounts to an attempt to embargo return of that spectrum unless the FCC imposes significant costs and regulatory burdens on the cable industry,” the NCTA filing stated.

On October 29, a coalition of broadcasters led by NAB submitted a plan to the FCC that it said would complete the transition to digital and protect consumers. Generally, broadcasters are opposed to a plan circulating at the Commission, known as the Ferree Plan after Kenneth Ferree, chief of the FCC’s Media Bureau.

At issue is how to interpret a 1997 law that requires broadcasters to return the additional 6 MHz of spectrum that was loaned to them under the 1996

Telecommunications Act to begin the transition to digital television. The statute requires them to return their analog spectrum by Dec. 31, 2006, or when at least 85 percent of television households in the United States are capable of receiving a digital signal, whichever comes later.

The Ferree Plan was intended as a way to measure when the 85 percent threshold had been reached, in part by counting cable and satellite television subscribers toward the threshold. Under the plan, cable and satellite operators could convert broadcasters' digital signals into analog at the head-end, ensuring all subscribers could receive the signal.

With the 85 percent threshold met, the Ferree Plan would give broadcasters until January 1, 2009, to vacate and return their analog spectrum. FCC Commissioner Michael Powell said in October that he hoped to vote on the plan by year's end, but that timetable has slipped.

Cable v. Broadcast. Broadcasters, on the other hand, have a different idea about how the transition should be handled, starting with a requirement that cable operators transmit their digital signals from the head-end. Cable operators also would have to provide a way to convert the signals to analog at the subscriber's home, if necessary.

"[N]either cable nor satellite operators should be permitted to downconvert (i.e., degrade) a digital signal at the head-end, as the Ferree Plan proposes both immediately prior to (in order artificially and we believe unlawfully to achieve the 85 percent statutory benchmark) and after the transition," the broadcasters said.

The broadcasters also want a requirement that cable operators not be allowed to degrade or eliminate broadcasters' digital signals. In addition, the FCC should not allow unlicensed wireless services to operate in the "white spaces" or areas in-between broadcasters' channels, which could result in unanticipated interference.

"If all these steps are accomplished, it could be possible to set a hard date for completion of the digital transition, except where the FCC grants waivers due to factors beyond licensee's control, as in the case of New York City, and where the issues may have technical consequences in neighboring markets or other external circumstances," the NAB filing stated.

'Back Door' Strategy. Cable operators, in response, said the plan was merely a "back door" attempt to require dual carriage of broadcasters' transmission signals. By requiring cable operators to

transmit their digital signals as well as provide a way for subscribers with analog sets to receive their signals, the plan would force cable operators to carry broadcast signals in both digital and analog formats.

"The broadcasters try to make it sound like this scheme provides cable operators with a real choice, and suggest that carriage of both a digital and analog version of the same signal would not be a requirement but an exercise of cable operator 'preference,' " the NCTA filing stated.

But the lack of choice is apparent when the costs of providing a digital-to-analog converter box for every customer's analog television set is taken into account, NCTA stated. In 2006, there will be approximately 141 million analog sets connected to cable. With cost estimates ranging from \$50 to \$200 per converter box, the cost to cable operators could run \$7 billion to \$28 billion, it said.

Such a "consumer-unfriendly step" is not necessary, because the owners of digital television sets will not lose access to digital signals if cable is permitted to downconvert "must-carry" digital signals to analog, NCTA said. Under current rules, broadcasters either force cable operators to carry their signals under "must-carry" rules, or negotiate for access under "retransmission consent" rules.

"More than 450 different local television stations' mostly HD [high definition] digital signals are being carried on cable today," the NCTA filing stated. "There is no reason to expect these choices to diminish over time and every reason to expect that competition will spur cable operators to add more HD programming if capacity allows," it said.

Broadband Deployment Up 15 Percent in First Half of 2004, FCC Says

The number of high-speed Internet connections in the United States grew by 15 percent during the first half of 2004, according to a report released December 22 by the Federal Communications Commission.

For the full 12-month period ending June 30, 2004, broadband lines increased by 38 percent, the FCC said. The Commission previously reported an increase of 45 percent for the 12-month period ending June 30, 2003.

"You are dealing with a higher base, so that would tend to make the rate look slightly lower," said Commission spokesman Mark Wigfield.

President Bush has called for universal, affordable broadband service throughout the United States by 2007. He has called on the FCC to set the appropriate regulatory framework to help achieve that goal.

In a November report to Congress on the state of advanced telecommunications capabilities in the United States, the FCC found that since its last report subscribership to advanced broadband services increased from 5.9 million lines in June 2001 to 20.3 million lines in December 2003.

According to the Commission's latest report, high-speed lines connecting homes and businesses to the Internet increased from 28.2 million to 32.5 million lines during the first half of 2004, compared with an increase of 23.5 million to 28.2 million lines during the second half of 2003.

Twice a year, facilities-based broadband providers must report the number of high-speed connections in service, to the FCC. In the Commission's report, data are broken down by speed of service. High-speed lines are defined as those that provide speeds exceeding 200 kilobits per second (kbps) in one direction, while advanced services lines provide speeds of 200 kbps in both directions.

In this reporting period, the FCC found that of the 32.5 million high-speed lines in service, 30 million served residential and small business subscribers. For the full 12-month period, high-speed lines for residential and small business subscribers increased by 46 percent.

Meanwhile, the Commission also released new data on local telephone service competition in the United States. Among other things, the Commission reported that mobile wireless telephone subscribers increased 7 percent during the first half of 2004, from 157 million to 167.3 million. For the first full 12-month period ending June 30, 2004, mobile wireless subscribers increased by 13 percent.

Reports from the Industry Analysis and Technology Division of the FCC's Wireline Competition Bureau are available at <http://www.fcc.gov/wcb/iatd/stats.html>.

New Pennsylvania Law Puts Limits on Municipal Broadband Networks

A bill passed by Pennsylvania lawmakers in the final days of the two-year legislative session has drawn new attention to the debate over the need to restrict

the provision of telecommunications services by local governments.

The sparring between telephone and cable service providers against consumer advocates first emerged when the municipal electric utility in Glasgow, Ky., rolled out the nation's first community-owned broadband network to provide cable television service and data transfers in 1989.

H.B. 30, which Gov. Edward G. Rendell (D) signed November 30, added Pennsylvania to the ranks of states that limit the ability of municipalities to set up their own telecommunications networks.

The others are Arkansas, Florida, Missouri, Minnesota, Nebraska, Nevada, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin, according to the American Public Power Association (APPA), whose members include 621 public power systems that offer "some kind of community broadband service."

Private cable and telephone service companies have lobbied over the years for the restrictions, which range from outright bans on government provision of telecommunications services to procedural hurdles that discourage local governments from moving into the market.

Business Sees Unfair Competition. Municipal competition with the private sector is "patently unfair," said Daniel Tunnell, president of the Broadband Cable Association of Pennsylvania. Unburdened by the taxes and fees imposed on private telephone and cable service providers, local governments "start out of the gate with a substantial advantage," Tunnell said.

But consumer advocates say rural areas where the potential market is too small to attract investment by private telecommunications companies will be left behind if local governments are barred from stepping in.

Broadband services in the 21st century are as essential to communities as electricity, roads, and water and sewer service, according to Beth McConnell, director of Pennsylvania Public Interest Group.

"In today's society, the Internet has replaced the town hall as a way people communicate with each other and participate in society," McConnell said. Control of what and when broadband services will reach communities should not be left in the hands of for-profit corporations, many of which have no private sector competition in certain markets, she said.

Sonny Popowsky, who heads the Pennsylvania Office of the Consumer Advocate, said lack of high-speed broadband access for businesses and schools

“can really be a hindrance” to economic development and education efforts. “Every school, library, and rural health center ought to have access to broadband,” Popowsky said. Nonetheless, he added, “I don’t treat it the same as basic telephone service,” which he views as essential enough to deserve subsidies so even the poorest residents of the most rural areas of the state can have it in their homes if they want it.

Telephone and cable service providers do not dispute that some communities are underserved, but say the solution does not lie in a municipal telecommunications network.

Public-Private Partnerships Pushed. “What we’d rather see is those communities seek a private partner that would provide those services,” Tunnell said. Public money should be made available in a public process, with private contractors bidding to build and operate the broadband network, he said.

Verizon spokesman Eric Rabe echoed that view. “We’re not averse, particularly in an area where the business case is questionable, to partnering with a public agency,” Rabe said.

Pennsylvania’s 1993 telecommunications deregulation statute required local exchange carriers to provide all their customers with high-speed broadband service by 2015.

In light of that mandate, Pennsylvania communities clamoring for more rapid deployment should give local exchange carriers the opportunity to provide the advanced services before forging ahead with a municipal system that the telephone company eventually will be forced to duplicate, Rabe said.

“If the local exchange carrier is willing to provide the service, that’s the way to go,” Rabe said. “We think it’s a better policy to let the private sector do it.”

H.B. 30, which originally prohibited municipal broadband networks altogether, was amended in the face of opposition from consumer groups to permit such networks only if the local exchange carrier declines to provide the desired service and data speeds within 14 months of the community’s request.

The legislation also provides for more rapid deployment of broadband service in areas designated by the state Department of Community and Economic Development under a business attraction or retention program and advances the state’s goal of getting broadband service into every classroom.

“I thought the final bill was a reasonable compromise,” Popowsky said.

Lack of Private Interest Lamented. But critics say the restriction merely creates further delays for

communities whose economic futures may hinge on their ability to access an advanced telecommunications infrastructure. “I’m not aware of any public power provider that didn’t contact the incumbent local exchange carrier” before proceeding with development of its own network as a last resort, APPA Director of Broadband Services Ron Lunt said.

Dianah Neff, chief information officer for the City of Philadelphia, said giving Pennsylvania’s local exchange carriers the right of first refusal has the potential to slow the development and spread of broadband wireless across the state. A local telephone carrier “could hold a community hostage for 26 months,” including the 12-month extension provided for under the bill, before fulfilling its request for advanced telecommunications services, Neff said.

Because of the extensive planning required to set up a municipal broadband network, a provision in H.B. 30 grandfathering any networks in existence as of January 1, 2006, benefits only the Borough of Kutztown, she said. Kutztown provides cable television, high-speed Internet access, and telephone service to residents through a municipal fiber-optic network.

Neff said Philadelphia won written assurance from Verizon that the company would give up its right to scuttle an ambitious plan announced by the mayor in August to deploy a citywide wireless network.

Rabe, Verizon’s spokesman, said the company does not oppose municipal WiFi networks and “never opposed Philadelphia’s plan.” Rumors that Verizon tried to engineer a legislative roadblock to Philadelphia’s initiative are “just not true,” he said, noting that H.B. 30 was introduced long before the mayor proposed to make the city a 135-square-mile hot spot.

The proposed WiFi network, which would provide some level of free Internet access to everyone in Philadelphia and higher levels of service for a fee, is in the planning stages and is expected to be up and running in the summer of 2006, Neff said.

Spectrum Allocation

Nextel Entitled to Additional Credits Under ‘Spectrum Swap’ Plan, FCC Says

The Federal Communications Commission has concluded that Nextel should receive \$452 million in

additional credits for surrendering some of its licenses in the 800 MHz band, the Commission said in an order released late December 22.

The FCC found that data submitted by Nextel provided “credible support” for the company’s contentions about the amount and value of spectrum that it would relinquish under a plan adopted by the Commission in July. The plan was intended to clear up interference problems between Nextel and public safety communications systems in the 800 MHz band.

Nextel had argued that the Commission used sample markets and 2002 data in determining the value of its licenses.

The FCC’s supplemental decision means that Nextel can be credited a total of about \$2 billion.

“We believe it is in the public interest to base our valuation on the granular data provided by Nextel, rather than on the less precise information available to us at the time of the 800 MHz [report and order],” the Commission said.

Under the FCC’s plan, Nextel would give up some of its licenses in the 800 MHz band, pay to relocate public safety systems within that band, and pay additional relocation costs, for a total package worth at least \$4.8 billion. In exchange, Nextel would receive spectrum licenses in the 1.9 GHz band.

Anti-Windfall Provision. The order provides that if the combined credits and costs related to the 800 MHz band are less than the value of the 1.9 GHz spectrum, Nextel will pay the difference in the form of a “anti-windfall” payment to the United States Treasury.

FCC officials told reporters December 23 that the supplemental order must still undergo a 30-day public comment period, after it is published in the *Federal Register*. A Commission spokeswoman said the agency had no control over how soon this would happen.

While concurring with the order, Democratic Commissioner Michael Copps said he was “uncomfortable” with the decision to change the valuation of Nextel’s spectrum by close to half a billion dollars.

“While I believe that Nextel has demonstrated that its spectrum holdings are different than the assumption we made in the original order, I am concerned that the process that the Commission has used here to determine value has become too imprecise,” Copps said. “Given the short time available, I do not believe that the Commission had the capacity to independently

pinpoint the exact nature of Nextel’s holdings, as we do here but did not do in the previous order.”

A Nextel spokesman said the company was still reviewing the decision.

President’s New Spectrum Initiative Helps Fill Wireless Providers’ Needs

President Bush’s recently issued memorandum to all federal agencies to report on their use of spectrum works to address commercial wireless providers’ need for spectrum, a spokesperson from CTIA—The Wireless Association said December 6. “Spectrum is the lifeline of the wireless industry, and many of the measures that were in the plan introduced in June will help not only the wireless industry, but other telecommunications sectors as well in continuing to provide services for their customers,” she said.

On November 30, the president issued a memorandum to the executives of all federal agencies noting that the existing legal and policy framework for spectrum management has not kept pace with the dramatic changes in technology and spectrum use. “Under the existing framework, the federal government generally reviews every change in spectrum use. This process is often slow and inflexible and can discourage the introduction of new technologies,” the memorandum said.

In June, the National Telecommunications and Information Administration (NTIA) released a two-part report in response to the president’s call for improved spectrum management policies. The report contained 24 recommendations for federal agencies, including the creation of an advisory committee to increase private sector input into policy decisions.

Rep. Fred Upton (R-Mich.), the chairman of the House Energy and Commerce Subcommittee on Telecommunications and the Internet, said he would be closely monitoring agencies’ progress. “President Bush’s spectrum initiative is exactly the right prescription at the right time for our nation,” Upton said. “It is essential that we have the proper spectrum management plans and policies in place for our economic well-being and so that we can continue to see further growth and development of wireless technologies,” he said.

Reporting Requirements. The president’s memorandum contains several deadlines for agencies to report on their spectrum use. For example:

- Within six months the Office of Management and Budget must provide guidance to agencies to better identify their spectrum requirements and the costs of investments in spectrum-dependent programs and systems.
- Within one year, executive departments and agencies must develop specific strategic spectrum plans that include their spectrum requirements, including bandwidth and frequency location for future technologies or services; their planned uses of new technologies or services requiring spectrum; and suggested approaches for meeting their requirements.
- Agency heads must update their spectrum plans biennially, as well as implement a formal process to evaluate their proposed needs for spectrum, the president's memorandum stated.
- Within one year of the date of the memorandum, the secretary of commerce, in coordination with other relevant federal agencies, must develop a plan for identifying and implementing incentives that promote more efficient and effective use of the spectrum while protecting national and homeland security, critical infrastructure, and government services.
- Within six months, the secretary of commerce must establish a plan for the implementation of all other recommendations included in the reports it issued in June, the president's memorandum stated.

Advisory Committee Hailed. In a separate statement, CTIA-The Wireless Association applauded the memorandum, which directs federal agencies to fulfill the reports' recommendations.

"CTIA and its member companies are particularly encouraged by the recommendations suggesting the formation of a Spectrum Management Advisory Committee that would increase private sector input into spectrum policy issues and the development of a National Strategic Long Range Planning Process that would address the wireless industry's calls for long-term spectrum planning," the association said.

Steve Largent, president and chief executive officer of CTIA, said that the president's memorandum was the "next crucial step in developing a sound spectrum policy, not only for today's information age, but for years to come."

The recommendations put forth in NTIA's reports provide the necessary roadmap for how the wireless industry, along with appropriate government bodies and industry segments, can work together to develop an efficient long-term spectrum plan, Largent said.

Michael Gallagher, head of NTIA, noted that federal agencies had unanimously supported the recommendations made in its reports. "We are looking forward to working with the congressional leadership on Capitol Hill and with the Federal Communications Commission to implement the 24 recommendations," he said.

"The next steps will be the development of a Federal Strategic Spectrum Plan, the creation of incentives to promote efficient and effective spectrum use for federal agencies, as well as new IT applications and the development of a spectrum sharing and innovation test bed," Gallagher said.

Universal Service

FCC Substantially Increases Factor for Contributions to Universal Service

The Federal Communications Commission on December 13 proposed a substantial increase in the amount of money that telephone companies must pay into the universal service fund, despite last-minute legislation exempting the fund from the Anti-Deficiency Act.

In a public notice, the FCC proposed a contribution factor of 10.7 percent of interstate revenues, up from the current 8.9 percent. The Commission calculates the quarterly contribution factor based on the ratio of total projected quarterly costs of the universal service programs to interstate revenues.

The increase marks the first time the Commission has proposed a contribution factor above 10 percent. The new rates will go into effect in January.

In November, the Universal Service Administrative Co., which administers the various programs under the universal service fund, proposed to recover \$550 million in the first quarter of 2005 to partially restore monies to the schools and libraries program that were lost due to an accounting change mandated by the FCC.

The FCC had ordered USAC to comply with government accounting standards, which are subject to the Anti-Deficiency Act. Under this statute, the commitment letters sent out to schools and libraries notifying them that their applications had been approved had to be treated as “obligations,” and the program had to have cash on hand to cover its obligations.

The legislation, however, will allow the program to send out commitment letters in advance of actually having the funds on hand. Thus, the FCC noted that it had not included the recovery of any additional funds proposed by USAC as part of its projected program demand for first-quarter 2005.

Instead, the increase in the contribution factor is due largely to growth in the high-cost program of the universal service fund, an FCC spokesman said. There are more eligible carriers participating in the program, which drives up costs.

Generally, however, interstate revenues for telecommunications companies have remained stable or have declined, which combined with the increased growth in programs such as the high-cost fund, lead to higher contribution rates, the spokesman said.

Of the four major programs that make up the universal service support system, the high-cost program is expected to cost \$1 billion in first-quarter 2005, compared to the schools and libraries program, which is projected to cost \$547 million. The low-income program is expected to cost \$195 million, and the rural health care program should cost \$11.8 million.

Telephone companies are allowed to pass on their universal service contribution charges to consumers but may not charge an amount that exceeds their contribution factor for that quarter.

Aviation Services

FCC to Proceed on Two Rules on Services for Airline Passengers

The Federal Communications Commission on December 15 agreed to move forward on two broad proceedings aimed at easing the restrictions on cellular phone use while flying on an airline, and to provide airline passengers with a broadband connection for their computers or other devices.

The actions the Commission took are just the first steps in the process, and final rules and services could be a year or more away. The Commission also cautioned that use of cellular and wireless devices aboard aircraft are also subject to Federal Aviation Administration rules, which currently prohibit the use of such devices during flights.

In one action, the Commission adopted a notice of proposed rulemaking to relax its current ban on the use of cellular phones during flights. FCC rules currently require that cellular handsets be turned off once an aircraft leaves the ground to avoid interfering with ground-based cellular systems. The FAA's rules are in place to ensure that cellular signals do not interfere with onboard communications and navigation equipment.

FCC officials said that the two agencies are coordinating their policies, and that information collected during their proceedings would be shared.

The FCC is seeking comment on its proposal to allow the use of most wireless handsets and other wireless devices during flights as long as the device operates at its lowest power setting under the control of a “pico cell” that would be located on the aircraft. This would prevent signals from interfering with ground-based cellular systems, the Commission said.

Auction for Broadband Spectrum. Separately, the Commission also adopted a new rule that would provide 4 MHz of spectrum in the 800 MHz band to provide broadband capabilities to passengers aboard an aircraft.

The Commission proposed three possible band configurations that would accommodate different types of technologies and business plans. The spectrum will be offered at auction, with the final band configuration determined by the winning bidders.

However, in an effort to prevent a single entity from monopolizing this new service, the Commission adopted eligibility requirements for the auction, including a limitation that no one entity could own licenses for all 4 MHz of spectrum.

The new service that would have to be provided under the license could include voice, data, and broadband Internet, and may be provided to any or all aviation markets, including commercial and military. The same interference rules that currently protect public safety systems in the 800 MHz band would also apply to this new service, the Commission said.

Currently, Verizon Airfone is the only company left that is providing service in this band, the Commission said. It will receive a nonrenewable five-year license.

Democratic Commissioner Michael Capps dissented in part from the order, arguing that the proposed band configurations would result in a single, dominant provider of this new service. “The order creates an auction where one company can lock up the only license that can support a true broadband air-to-ground service,” he said.

Advisory Committees

FCC Advisory Committee Process Could Be Improved, GAO Reports

The Government Accountability Office (GAO) issued a new report December 10 examining the Federal Communications Commission’s seven federal advisory committees and how they operate, concluding that the process for obtaining advice from those committees could be improved.

The report was conducted at the request of Rep. Thomas Davis (R-Va.), chairman of the House Committee on Government Reform. The FCC often calls on its federal advisory committees, which are governed under the Federal Advisory Committee Act.

According to the GAO’s report, FCC officials, committee members, and other stakeholders generally believe that the FCC’s advisory committees operate effectively. However, to better ensure that advisory committee members are fully informed about the type of advice they are being asked to provide, the GAO recommended that the FCC establish a process for determining and documenting the type of advice that members are expected to contribute.

Committee members who are not representing a specific viewpoint may be more appropriately appointed as special government employees, the GAO said.

According to a summary of its report, while the FCC is not required to implement the advice or recommendations of its advisory committees, the FCC has taken action based on its committees’ recommendations, GAO said.

Among committee members who responded to the GAO’s survey, just 54 percent were satisfied with the extent to which the FCC takes its committees’ advice

into account when developing policy, GAO said. In addition, three industry groups contacted by GAO said that advisory committees’ advice and recommendations had little influence on FCC actions, it said.

A full copy of GAO’s report (GAO-05-36) “Federal Advisory Committees Follow Requirements, but FCC Should Improve Its Process for Appointing Committee Members,” may be found at <http://www.gao.gov>.

Telemarketing

Beginning on January 1, Telemarketers Must ‘Scrub’ Phone Lists Every 31 Days

Starting January 1, telemarketers must access the national do-not-call registry and ‘scrub’ newly-registered consumer phone numbers from their existing call lists every 31 days instead of every three months, according to the Federal Trade Commission and the Federal Communications Commission.

The requirement that telemarketers scrub their lists more frequently means that “the lag time between a consumer’s putting a number on the do-not-call list and cessation of telemarketing calls to that consumer’s number has been cut by two thirds,” according to an FCC press statement.

The change was announced in the December 30 *Federal Register* (69 Fed. Reg. 78,339).

Telemarketers must renew their subscriptions to the national do-not-call registry annually, at a fee of \$40 per area code, with a maximum fee of \$11,000 for any entity accessing 280 area codes or more. Companies are able to access the first five area codes of data for no cost. Monthly updates for telemarketers will be available at <https://telemarketing.donotcall.gov> at no cost.

According to the FTC, this Web site will inform telemarketers when their subscription account numbers expire and will provide renewal instructions.

To date, the FTC has reported that approximately 81 million telephone numbers have been registered on the federal no-call registry by consumers. Those who want to register home and cell phone numbers can do so online at <http://www.donotcall.gov> or by calling 1-888-382-1222 from the telephone number they wish to register.

Windshield Repair Message Violated TCPA

An unsolicited pre-recorded telephone message offering free windshield repair services violated the federal Telephone Consumer Protection Act, according to a decision by the Ohio Court of Appeals, Sixth District. **Reichenbach v. Chung Holdings**, Ohio Ct. App., No. L-04-1049, 11/5/04). Judge Mark L. Pietrykowski, reversing a lower court decision, held a recipient of the call was entitled to judgment as a matter of law.

First, the message was an “unsolicited advertisement” within the meaning of the TCPA and implementing regulations, the court ruled. Second, the defendant violated the TCPA and the regulations by failing to provide the plaintiff with a copy of its “do-not-call” policy. The message at issue, the court ruled, was an unsolicited advertisement because it advertised the “commercial availability” of services and was the type of message defined as an unsolicited advertisement by the Federal Communications Commission.

The case was remanded for a determination of damages.

FCC Proposes First Ever Fine for Sending Pre-recorded Message

The Federal Communications Commission December 8 for the first time has proposed to fine a company for making multiple pre-recorded telephone messages to consumers. The agency issued a notice of apparent liability against Warrior Custom Golf Inc., in Irvine, Calif., and proposed a fine of \$23,500 for the violation of the 1934 Communications Act.

In this case [*Warrior Custom Golf*, DA 04-3834, 12/8/04], a consumer complained that he had received three unsolicited pre-recorded advertisements on his voicemail from Warrior Custom Golf, offering him the opportunity to try its custom golf clubs and asking him to call a toll-free number to take advantage of the offer.

Section 227 of the act prohibits any person from initiating “any telephone call to any residential telephone line using an artificial or pre-recorded voice

to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order of the Commission.”

The current exemptions to the rule include calls made for emergency purposes, noncommercial purposes, commercial purposes that do not include an unsolicited advertisement, calls to persons with whom the caller has an established business relationship, and calls made by or on behalf of a tax-exempt nonprofit organization.

Citation Sent. The Commission sent a citation to the company, and the company later apologized to the consumer, but denied that it had violated the Commission’s rules. The company said it did not send pre-recorded messages to consumers unless they had an established business relationship with the company.

“Despite the citation’s warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission has received additional consumer complaints indicating that WCG apparently continued to send illegal pre-recorded, unsolicited. The Commission also noted that the company provided no argument nor submitted any evidence to prove an established business relationship with the consumers.

Warrior Custom Golf has 30 days in which to either pay the fine or notify the Commission in writing why it should not be held liable for the forfeiture.

Tower Siting

FCC Issues Effective Date of NPA

The FCC’s Nationwide Programmatic Agreement, issued with the Report and Order in Docket 03-128 (FCC 04-222) on October 5, 2004, was published January 4 in the Federal Register.

The FCC’s amendment to section 1.1307(a)(4) of its rules, which incorporates and attaches to Part 1 both the NPA and the Nationwide Collocation Programmatic Agreement (“NCPA”), will go into effect March 7, 2005.

FCC Forms 620 (NT) and 621 (CO) are not yet effective as they have not been approved by the office of Management and Budget.