

March 5, 2010

Lawmakers Enact Second Temporary Extension Of Satellite Compulsory License

After being put in the awkward position of offering service illegally for the first half of this week, DirecTV and DISH Network breathed a sigh of relief as House and Senate members passed a second temporary extension of the 2004 Satellite Home Viewer Extension and Reauthorization Act (SHVERA) on Wednesday. Lawmakers had allowed the direct broadcast satellite industry compulsory retransmission license to lapse on Monday. The Temporary Extension Act (TRA) grants a four-week extension of retransmission rights that were last granted to the direct broadcast satellite industry under SHVERA. The additional time should enable lawmakers to finish work on the Satellite Television Extension and Localism Act (STELA), which was introduced as part of a Senate jobs bill last month and mandates renewal of the satellite compulsory license through December 2014. Among other things, STELA would also amend the definition of an “unserved household” that is deemed eligible for the receipt of distant broadcast networks via satellite to cover digital multicast streams. Fearing that the STELA provisions would slow progress on the jobs legislation, the Senate leadership dropped STELA from the jobs bill but later added the measure to a second pending jobs bill. That bill also provides temporary extensions to unemployment, Medicare, and other programs. Owing to the objections of Senator Jim Bunning (R-KY), who protested the proposed extension of unemployment benefits, a motion for unanimous consent to the TRA was blocked last week, resulting in the expiration of SHVERA provisions on Sunday. Early on Wednesday, the deadlock was broken as Bunning abandoned his objection, enabling Senate members to pass the TRA later that day. Following on the TRA’s adoption, lawmakers must pass STELA by March 28 to avoid yet another extension.

Wireless Carriers Answer FCC Inquiry On ETF Practices

Responding to an FCC letter, all four national wireless carriers defended their early termination fees (ETF) as a valid means of recouping at least a portion of the substantial cost of wireless devices that are provided at steep discounts. Although the FCC questioned Verizon’s ETF policy late last year in the wake of the company’s decision to double its ETF for “advanced devices,” the FCC again delivered a letter of inquiry to Verizon as well as to AT&T, Sprint Nextel, T-Mobile USA, and Google, after Google disclosed in January that it would slap a \$350 “equipment recovery fee” on customers who terminate their service contracts with T-Mobile for the Google Nexus One phone. (T-Mobile also confirmed it would collect a separate ETF of \$200 from Nexus One subscribers who terminate their contracts.) Emphasizing that it “offers consumers many choices for equipment and service plans, including whether or not to sign a term contract with an ETF,” Verizon told the FCC late last week that ETFs “benefit consumers by enabling them to obtain access to devices at a significantly lower up-front cost, while enabling Verizon Wireless to recoup the extraordinarily expensive investment required to

IN THIS ISSUE:

- **Lawmakers Enact Second Temporary Extension Of Satellite Compulsory License** [read more](#)
- **Wireless Carriers Answer FCC Inquiry On ETF Practices** [read more](#)
- **Appeals Court Upholds Contempt Ruling In Dish Network-TiVo Case** [read more](#)
- **EchoStar To Acquire Mexican Satellite Operator** [read more](#)
- **European Commission Approves Orange-T-Mobile Venture** [read more](#)
- **EC Launches Consultation On Universal Broadband Access** [read more](#)

©2010 Paul, Weiss, Rifkind, Wharton & Garrison LLP.
In some jurisdictions, this brochure may be considered attorney advertising. Past representations are no guarantee of future outcomes.

support its wireless network and operations and the cost of providing the devices at a substantial discount.” Since responding to the FCC’s initial inquiry in December, Verizon added that it has reduced the number of devices that are subject to the \$350 ETF and has alerted prospective customers by including the ETF on price cards displayed with each device. Asserting that Nexus One customers “always have the option of buying an unlocked device” for \$529, Google replied that it has attempted to be “as transparent and straightforward as possible with consumers about the terms and conditions associated with purchasing a Nexus One, both with and without a T-Mobile service plan.” Noting that it charges an ETF of \$175 for all the devices it sells, AT&T argued, “the meager (and steadily declining) number of complaints from wireless subscribers regarding ETFs indicates that the vast majority of consumers understand what ‘2 year commitment required’ means and make informed decisions when they enter into such a commitment.” While denying that it is “actively pursuing plans to have different ETFs for different devices,” Sprint Nextel—which charges an ETF of \$200 for all subsidized handsets—told the FCC: “we will continue to evaluate the market.”

Appeals Court Upholds Contempt Ruling In Dish Network-TiVo Case

DISH Network suffered yet another defeat in its quest to fend off patent infringement charges levied by TiVo, Inc., as a three-judge panel of the U.S. Court of Appeals for the Federal Circuit upheld a lower court ruling that digital video recorder (DVR) technology workarounds developed by DISH affiliate EchoStar in response to an earlier court ruling violate a permanent injunction barring DISH from using TiVo-patented technologies. Yesterday’s ruling clears the way for TiVo—the pioneer of DVR “time warping” technology that enables viewers to pause, rewind and replay live television programs—to collect from DISH at least \$300 million in contempt sanctions, damages and interest that were awarded to TiVo last year by the U.S. District Court for the Eastern District of Texas. Although two members of the appellate panel determined that the district court applied the correct standard in concluding that the DISH workaround continued to infringe TiVo patents, the lone dissenting judge proclaimed that the majority’s ruling punishes a company that had made a good faith effort at redesigning its DVR product to comply with earlier court directives. Seizing upon that dissenting opinion, DISH said it would seek an *en banc* hearing before the full panel of appellate judges as it added that it would also propose “a new design-around to the district court for approval.” Noting that the \$300 million award only covers DISH infringements through July 1, a TiVo spokesman said his company would pursue additional damages for infringements after that date.

EchoStar To Acquire Mexican Satellite Operator

On Monday, EchoStar—the sister company of U.S. direct broadcast satellite provider DISH Network—teamed up with MVS Comunicaciones to acquire all of the outstanding stock of Mexican fixed satellite services operator Satmex for US \$267 million in cash. Established in the 1980s as a government-owned entity, the now privatized Satmex operates three in-orbit satellites and two uplink facilities that will be included in the transaction. A current partner of EchoStar in the companies’ DISH Mexico direct-to-home satellite TV venture, MVS ranks as one of the top media and telecommunications firms in Mexico. As Satmex CEO Patricio Northland observed that his company and the EchoStar-MVS venture share “common goals in delivering satellite communications services across the Americas,” EchoStar Satellite Services president Dean Olmstead proclaimed that the Satmex deal “provides us with a footprint over Mexico and presents us the opportunity to serve a growing global demand for satellite services.” In addition to the purchase of all of Satmex’s outstanding stock, the agreement also provides Satmex with up to \$107 million on its balance sheet at closing that, combined with the stock purchase price, would free more than \$374 million for distribution to Satmex shareholders. Contingent upon receipt of required regulatory approvals and verification of operational capabilities of Satmex’s satellite fleet, the transaction is slated for completion early in the third quarter of this year.

European Commission Approves Orange-T-Mobile Venture

T-Mobile and Orange received European Commission (EC) clearance for their British wireless joint venture on Monday after the partners agreed to concessions intended to resolve concerns over their joint control of GSM spectrum and the ability of smaller

competitors to access the companies' combined network. Through the 50-50 joint venture, Orange and T-Mobile (which rank respectively as the third and fourth-largest wireless carriers in the United Kingdom) would leapfrog O2 as the largest mobile telephony operator in the U.K. with a 37% share of the market. The companies maintain that the merger will give them the scale needed to compete effectively in a saturated British market in which a large number of wireless resellers operate. Opponents have, however, voiced concern over the venture's unfettered control of GSM spectrum in the 1800 MHz band, claiming that, in years to come, that spectrum could give the combined entity a choke-hold over the U.K. market for high-speed mobile data services. To alleviate these fears, Orange and T-Mobile told the EC they would voluntarily divest two 15 MHz paired blocks of 1800 MHz spectrum by the end of 2011, representing a 25% chunk of the parties' combined holdings in that band. In consenting to the joint venture, the EC conditioned approval on that commitment as well as upon a further condition that requires Orange and T-Mobile to work out a network infrastructure sharing agreement with Hutchison Whampoa's 3, the smallest of the U.K. national wireless operators. The concessions were enough to convince the U.K. Office of Fair Trading to withdraw the request it recently filed with the EC to conduct its own investigation into the deal. Consumer groups in the U.K., however, were not satisfied, as they accused the EC of clearing the transaction with "indecent haste." Officials of Orange and T-Mobile said they would begin to integrate their operations immediately, with closing of the transaction anticipated this spring.

EC Launches Consultation On Universal Broadband Access

Questioning whether current European Union (EU) rules on universal service are sufficient in the digital age, the European Commission (EC) initiated a consultation this week to determine if or how EU universal service rules should be updated to cover broadband access. Adopted in 2002, the EU universal service rules now in effect guarantee public access to dial up Internet services as well as to basic telephone services. The consultation document released on Tuesday seeks public input on (1) whether the current concept of universal service, which is designed for traditional voice telephony, remains valid in today's digital environment, (2) whether universal service principles should be used to promote the EU's goal of extending broadband to all citizens, (3) what balance should be struck between a coordinated EU-wide approach and a more flexible approach that recognizes the needs of individual EU member states, and (4) the extent to which public funding sources should be used in expanding broadband universally. The EC is slated to close the consultation process on May 7 and to draft related legislative proposals by the end of the year. EC Digital Agenda Commissioner Neelie Kroes said the consultation "will help us . . . to ensure that all EU citizens have access to essential communications services, including fast Internet."

* * *

For information about any of these matters, please contact Patrick S. Campbell (e-mail: pcampbell@paulweiss.com) in the Paul, Weiss Washington office. To request e-mail delivery of this newsletter, please send your name and e-mail address to telecom@paulweiss.com.

(No. 2010-9)