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FCC ACTS ON BROADBAND ISSUES

Yesterday, the FCC acted on two important items related to broadband, as it granted a BellSouth petition that sought relief from network unbundling requirements with respect to fiber-to-the-curb (FTTC) facilities, and as it adopted interference standards for broadband over power line systems. BellSouth's request was included in a petition for reconsideration and clarification of the Triennial Review Order (TRO), adopted last year by the FCC, which stated that unbundling requirements applicable to most Bell network facilities should not apply to the high-speed portion of those networks, including fiber-to-the-home (FTTH) loops. Responding to BellSouth's petition and to a similar request filed by SureWest Communications, the FCC decided that unbundling exemptions applicable to FTTH should also apply to FTTC facilities that extend fiber to within 500 feet of customer premises. Calling its action "consistent" with TRO rules that relieve the Bells and other local exchange incumbents from having to lease FTTH facilities to competitors at regulated rates, the FCC said the ruling is intended to "free companies to choose between FTTH or FTTC networks based on marketplace characteristics, rather than disparate regulatory treatment." As SBC Communications pledged to "dramatically accelerate" its deployment of broadband services via fiber in response to the FCC's order, a victorious BellSouth proclaimed that, "because of this ruling, we will have the flexibility to redirect our investments to provide the next generation of speeds and services to more customers, more quickly." AT&T and the competitive local exchange industry, however, were less than pleased. A spokesman for the Association for Local Telecommunications Services lamented: "the FCC has now immunized the Bell companies from competition for residential and small business customers over existing loops." Dissenting from the majority's vote, FCC Commissioner Michael Copps condemned the order as "yet another in a series of prescriptions this Commission is willing to write to end competitive access to last mile facilities."

In another broadband action, designed to facilitate the deployment of new broadband over power line (BPL) services, the FCC adopted BPL technical standards intended to eliminate or mitigate potential interference to amateur, aeronautical radio, and other radio operations. While BPL is viewed as a promising new service platform for the broadband market, questions concerning interference, in part, have hindered investment by power companies and others who have expressed interest in BPL technology. Aiming to resolve these concerns, the FCC unanimously adopted rules that require BPL systems to (1) incorporate certain capabilities that would enable BPL providers to modify operations upon discovery of harmful interference, (2) avoid operating entirely in "excluded frequency bands" or avoid operating on certain frequencies within specified "exclusion zones," and (3) notify state and public safety officials before commencing operations. BPL equipment manufacturers would be required to undergo a certification process at the FCC before marketing their products. The FCC's order also calls for the establishment of a public database that would allow users to identify BPL systems within a given zip code and to ascertain any potential interference from those systems. Applauding the FCC's actions, a spokesman for the Power Line Communications Association said that the agency's order "removes any clouds of doubt regarding the viability of [BPL] services."

SUPREME COURT DECLINES TO REVIEW UNE-P DECISION

In another victory for the Bell companies, the DC Circuit Appeals Court decision last March that invalidated the FCC's unbundled network element platform (UNE-P) rules was allowed to stand by the U.S. Supreme Court, which without comment refused to consider appeals submitted by AT&T and representatives of the competitive local exchange (CLEC) industry. This week's decision, although considered a major blow to the CLEC industry, was nevertheless widely anticipated; the Supreme Court

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had earlier rejected the petitioners' request for stay of the DC Circuit order, which went into effect on June 15. Experts had also given AT&T and the CLECs slim odds of success before the high court after the U.S. Solicitor General decided last June not to pursue an appeal on the FCC's behalf. As a consequence of Tuesday's action, the focus now shifts toward the DC Circuit--which, last week, decided to hold in abeyance an appeal, filed by the Bells, of the interim UNE-P rules adopted by the FCC in August--and toward the FCC, which has pledged to issue permanent replacement UNE-P rules by the end of this year.

FOX TV STATIONS HELD LIABLE FOR \$1.2 MILLION INDECENCY FINE

Responding to numerous complaints about a Fox TV reality show that aired last April, the FCC proposed holding television stations owned by and affiliated with the Fox network liable for fines of \$1.18 million for broadcasting sexually explicit material at a time when children were likely to be included in the viewing audience. The proposed fine, which breaks down to \$7,000 for each of Fox's 35 owned and 134 affiliated stations, constitutes the largest indecency penalty against a television broadcaster in the FCC's history and far eclipses the \$550,000 fine assessed three weeks ago against CBS-owned stations that aired the Super Bowl halftime display of Janet Jackson. Unlike the Super Bowl incident (which was broadcast live), the Fox incident involves a pre-recorded six-minute segment of the "Married by America" reality show. Although nudity during the segment was digitally obscured, the FCC deemed the material (featuring whipped cream-covered actors) to be "gratuitous, vulgar, and clearly intended to pander and titillate," proclaiming: "even a child would have known that . . . sexual activity was being shown." Noting that Fox affiliates could have blocked the airing of the pre-taped episode on their stations, the FCC said that, in contrast to the CBS decision (which targeted only network-owned stations), it would hold all but one Fox affiliate liable for forfeiture. (A single Fox affiliate, located in North Carolina, that refused to broadcast the program was exempted from the proposed fine.) A spokesman for Fox, which has 30 days to pay or to challenge the proposed fine, said "we disagree with the FCC's decision and believe the content was not indecent."

FCC APPROVES FORBEARANCE PETITION ON ISP-BOUND CALLS

Bell companies and other incumbent local exchange carriers (ILECs) that have long complained of receiving inadequate compensation for calls bound for Internet service providers (ISPs) gained some limited relief this week, as the FCC approved in part Core Communications' request for forbearance from "growth cap" and "new market" provisions of intercarrier compensation rules promulgated in 2001. While defining ISP traffic as an "information access service" exempt from reciprocal compensation requirements applicable to ILECs-interexchange traffic, the FCC in April 2001 created a "transitional" intercarrier cost recovery mechanism for traffic between ILECs and ISPs. At that time, the FCC capped compensation rates for ISP-bound calls and required ILECs to exchange non-ISP traffic (covered by the reciprocal compensation provisions of the 1996 Telecom Act) at the same rate paid for ISP-bound calls. In addition to the rate cap and "mirroring" rules, the FCC also adopted (1) a cap on growth that, on a year-to-year basis, limits the number of ISP-bound minutes for which ILECs may be compensated, and (2) a rule that bars ILECs from importing old reciprocal compensation agreements covering ISPs into "new markets." Noting that competitive concerns surrounding the adoption of the 2001 order "have been eased by market developments," the FCC, at the behest of Core Communications, agreed to forbear from enforcing the growth cap and new market rules. The agency, however, turned down Core's request for relief from the rate cap and mirroring provisions, asserting that these rules "remain necessary to prevent regulatory arbitrage and to promote efficient investment in telecommunications services." Declaring that the FCC's action "ensures that consumers in rural areas . . . can continue to access the Internet via dial-up services," the Association for Local Telecommunications Services praised the ruling.

GERMANY REDUCES DEUTSCHE TELEKOM STAKE, AS DT LAUNCHES OFFER FOR T-ONLINE

Following the lead of France, Germany's government further reduced its stake Monday in former state phone monopoly Deutsche Telekom (DT), selling shares (constituting a 7% interest) to institutional investors for €4.45 billion (U.S.\$5.5 billion). The sale, conducted via state-owned development bank KfW, mirrors a similar move by the French government, which announced plans last month to raise €5.75 billion (U.S.\$7.1 billion) through the sale of shares constituting a 10% stake in France Telecom (FT).

Sources indicate that, for both governments, the partial divestiture of telecom stakes is intended to offset budget deficits that exceed established European Union limits. KfW, which had been holding 16.7% of DT on the government's behalf, conducted the offer from that share allotment. As a result of Monday's transaction, the government's total DT stake--held directly and through KfW--was reduced from 42.8% to 35.8%. News of the sale came as DT moved to reestablish full control over T-Online--the Internet unit floated by DT four years ago--through a €3 billion (U.S.\$3.5 billion) buy-out offer targeted to minority T-Online shareholders. The DT offer also follows a similar action by FT, which unveiled plans earlier this year to repurchase minority shares in its former online unit, Wanadoo. Under the offer, minority shareholders that collectively hold 26% of T-Online would be able to exchange their T-Online shares for cash or for DT stock. Upon completion of the deal, T-Online would be transformed into a wholly-owned subsidiary of DT.

HOUSE PASSES DTV TRANSITION MEASURE

As Congress prepared to adjourn for the November elections, the House approved a measure, adopted as part of homeland security legislation, to mandate a non-binding December 31, 2006, deadline for the completion of the digital television (DTV) transition and the return of analog TV spectrum. Introduced by House Energy and Commerce Committee Chairman Joe Barton (R-TX), the measure was attached as an amendment to the intelligence and homeland security bill (HR-10) that passed the House by voice vote last Friday. Unlike pending Senate legislation that would provide public safety agencies with access to 24 MHz of analog TV spectrum in the 700 MHz band by January 1, 2008, the Barton amendment would require TV broadcasters to surrender all analog channels (not just those earmarked for public safety entities) by December 31, 2006, regardless of whether 85% or more of TV households in corresponding TV markets have access to DTV channels. (Current law requires broadcasters to return analog channels by December 31, 2006, or whenever 85% of TV households in their respective markets are capable of receiving DTV signals.) Fearing that the Senate bill could force off the air up to 75 TV stations operating in public safety bands, Barton asserted that his plan would "[lay] out the path to finalize the digital transition, provide spectrum for public safety in a timely manner, make spectrum available for new users such as wireless broadband, and prevent TV sets from going dark." Although the transition schedule outlined by the amendment is non-binding, Barton confirmed plans by his committee during the next Congressional session to tackle legislation prescribing firm deadlines for the completion of the DTV transition and the return of 700 MHz analog channels earmarked for the public safety industry.

DIRECTV TO PAY \$579 MILLION FOR SKY LATIN AMERICA STAKES

DirecTV and News Corp. took steps this week to consolidate their respective direct-to-home (DTH) satellite TV platforms in Latin America, as DirecTV agreed to acquire equity stakes, held by News Corp. and Liberty Media, in Sky Brazil, Sky Mexico, and Sky Multi-Country Partners (SMCP) for \$579 million in cash. The deal announced Monday follows last year's \$6.6 billion union of News Corp. and DirecTV's parent company, Hughes, that gave News Corp. a 34% stake in and *de facto* control of DirecTV through the Fox Entertainment Group. In addition to acquiring News Corp./Liberty stakes in Sky Brazil and Sky Mexico, DirecTV will also purchase interests, held by Globo and Televisa, in SMCP, the operator of DTH platforms in Columbia and Chile. As a result, and upon receipt of required regulatory approvals, DirecTV will emerge with full ownership of SMCP, a 72% controlling stake in Sky Brazil, and 43% of Sky Mexico. (The deal also gives News Corp. the option to purchase up to 15% of Sky Mexico, depending on the number of customers who switch from News Corp.'s platform to DirecTV's platform in that country.) Together, DirecTV's and News Corp.'s Latin American DTH operations serve approximately 3.4 million customers.

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