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AT&T, T-Mobile Withdraw Merger FCC Application, As FCC Issues Staff Report On Deal

At the request of AT&T, the FCC agreed on Tuesday to dismiss without prejudice the company's pending application to acquire control of T-Mobile USA, as FCC officials took the unprecedented step of releasing a 157-page staff analysis on the competitive concerns that induced FCC Chairman Julius Genachowski last week to seek an administrative law judge (ALJ) hearing on the $39 billion deal. Responding to news that Genachowski was circulating a draft order recommending an ALJ hearing at the conclusion of the ongoing Justice Department (DOJ) lawsuit against the AT&T/T-Mobile merger, AT&T and T-Mobile asked the FCC on Thanksgiving Day to approve withdrawal of the companies' merger application. In submitting their request, AT&T and T-Mobile stressed that they were not cancelling their merger plans but had decided to postpone seeking FCC approval until after U.S. District Court Judge Ellen Huvelle issues her ruling in the DOJ antitrust case. While confirming its intention to re-file the T-Mobile merger application "as soon as practical," AT&T said it would also take a charge of $4 billion during the final quarter of this year to account for the breakup fee due to T-Mobile if the deal falls through. As it approved the companies' request for voluntary dismissal on Tuesday, the FCC also published a heavily-redacted internal staff analysis concluding that the merger would "substantially lessen competition." Offering a summary of the staff findings to reporters, FCC officials noted that out of the 100 top markets, only one—Omaha, Nebraska—would be left with significant wireless competition upon completion of the AT&T/T-Mobile deal. FCC officials also explained that the merger would trigger the agency's spectrum screen in 71 of the top 100 cellular markets—a level which represents 66% of the U.S. population. Citing the "disruptive" market influence of T-Mobile as a key provider of low-cost wireless services, the staff report determines that the deal is likely to raise prices for both residential and business consumers. The report also rejects AT&T's claim that it requires the spectrum and network facilities of T-Mobile USA to deploy fourth-generation long-term evolution wireless broadband services to 97% of the U.S. population and also concludes that the deal will result in thousands of job losses. While welcoming the companies' decision to withdraw their application, FCC Commissioner Michael Copps voiced hope that "we will no longer be expending significant FCC resources to examine this paradigm-shifting and complex transaction." Characterizing as "troubling" the FCC's decision to release a staff report on the merger that "has never been voted on," AT&T senior vice president Jim Cicconi criticized the report as one that "has no force or effect under law, which raises questions as to why the FCC would chose to release it."

Verizon, Cable Firms Forge $3.6 Billion Wireless Spectrum Deal

As AT&T and T-Mobile turned their focus this week toward fighting the Justice Department lawsuit against their $39 billion merger, current wireless market leader Verizon Wireless took steps to further strengthen its position by agreeing today to purchase spectrum assets, valued at $3.6 billion, from cable firms Comcast, Time Warner Cable (TWC) and Bright House Networks. Covering 250 million persons that represent 85% of the U.S. population, the spectrum was acquired at auction by the cable operators in 2006 for $2.2 billion but has since remained unused. The decision by the cable firms to sell their spectrum parallels with Cox Communications' recent announcement that it will stop offering wireless services to its cable customers early next year. Verizon, meanwhile, will gain a significant boost in capacity as it continues to build out its nationwide, fourth-generation (4G) wireless network that is expected to reach 200 million Americans by year's end. (By contrast, AT&T's 4G wireless network is slated to reach a population of 70 million by the end of this year.) Under the agreement, Verizon will pay Comcast—the nation's largest cable system operator--$2.3 billion for its wireless spectrum assets, while TWC and Bright House will receive $1.1 billion and $189 million, respectively, for their FCC wireless licenses. As part of the deal, Verizon and the cable firms will resell each others' services and thus enable the cable firms to offer Verizon-branded wireless services to their customers as part of a package. The cable operators will also be permitted to market Verizon services under their own brand names in four years. Unlike the AT&T/T-Mobile merger, analysts predict the Verizon deal is likely to encounter few regulatory hurdles. Explaining, "it's really hard for a cable company to expect to compete in a highly competitive wireless market," a TWC spokesman told reporters that "an arrangement like this makes a lot of sense."

FCC Nominees Questioned At Senate Hearing On Merger Issues, Regulatory Classification Of Broadband

At a Senate Commerce Committee hearing on Wednesday, FCC commissioner-designates Jessica Rosenworcel and Ajit Pai earned positive feedback from lawmakers as they were questioned on a wide variety of issues. If confirmed by the Senate, Rosenworcel, a Democrat, would replace outgoing FCC Commissioner Michael Copps for a term to run through June 30, 2015. Pai, a Republican, would fill the seat vacated last June by former FCC Commissioner Meredith Baker and would serve through June 2016. Questioned by ranking Senate Commerce Committee member Kay Bailey Hutchison (R-TX) on the FCC's adoption of merger conditions that are sometimes "extraneous to the transaction and could be seen as attempts to achieve policy goals," Rosenworcel replied that any such conditions "should at least be rationally related to the transaction." Answering that his approach would be to "evaluate whether the merger would benefit competition," Pai said he would be "open to considering merger conditions that were . . . directly related to harm identified by the agency." With respect to the regulatory classification of broadband services—an issue currently under consideration by the D.C. Circuit Court—Rosenworcel cited the U.S. Supreme Court's decision to uphold the FCC's previous approach of treating broadband as a Title I information service. Pai, meanwhile, voiced concerns with reclassification "to the extent that the imposition of this type of common carrier regulation might dampen economic investment." In terms of Rocenworcel's and Pai's prospects for confirmation, Senate Commerce Committee Chairman Jay Rockefeller (D-WV) predicted that both nominees are "going to swim home," as Hutchison applauded "the professionalism and the experience we have in our nominees." Although Senate sources hinted that both nominations could be approved before the Senate's holiday recess, Senator Charles Grassley (R-IA) cited his displeasure with the FCC's handling of LightSquared's terrestrial wireless network plan as he confirmed his intention to place a hold on both nominations once they reach the Senate floor.

House Democrats And Republicans Draft Competing Bills Calling For Reallocation Of 700 MHz D-Block

Supporters of a nationwide, interoperable wireless broadband network dedicated to public safety found renewed cause for optimism this week as House leaders from both parties drafted competing draft bills that would reallocate the 700 MHz D-block to public safety. The Jumpstarting Opportunity with Broadband Spectrum (JOBS) Act drafted by House Republicans represents a major shift in previous GOP strategy that had called for an auction of D-block spectrum to commercial wireless carriers. In addition to reallocating 700 MHz

D-block spectrum for public safety use, the JOBS Act would provide up to $6.5 billion (consisting of taxpayer funds plus ten percent of net auction revenues above $25.5 billion) to construct a nationwide public safety network. Among other things, the JOBS bill would also (1) establish deadlines for auctions of 175 MHz of spectrum that would include the highly-coveted 1755-1780 MHz band paired with the 2155-2180 MHz "AWS-3" band, (2) authorize incentive auctions of broadcast television and other underutilized spectrum, and (3) establish a Public Safety Communications Planning Board at the FCC that would consist of government officials as well as representatives of the public safety, commercial wireless and wireless equipment sectors. Though similar in most respects to the Republican-backed JOBS Act, the new Wireless Innovation and Public Safety Act sponsored by House Commerce Committee Democrats would (1) reserve $11 billion for public safety network construction and maintenance, (2) direct the FCC to auction 250 MHz of spectrum that includes the 1755-1780 MHz and AWS-3 bands, and (3) create a private, non-profit Public Safety Broadband Corporation to manage the public safety network. While expressing disappointment "that we could not develop a bipartisan bill," House communications subcommittee chairman Greg Walden (R-OR) emphasized that, "for the sake of the economy and public safety, we need to take the best ideas which are represented in the JOBS Act and move forward with a subcommittee vote." Asserting that passage of 700 MHz D-block legislation "is long overdue," ranking House Commerce Committee member Henry Waxman (D-CA) said, "although we are still hoping for bipartisan action on this critical issue . . . we are laying out what we believe is the best path forward."

Cable Groups Urge FCC To Exempt Independent MVPDS From Program Carriage Requirements

Commenting on an FCC proposal that would extend program carriage rules that apply to vertically-integrated cable operators to all multichannel video program distributors (MVPDs), the American Cable Association (ACA) and the National Cable & Telecommunications Association (NCTA) urged the FCC to adhere to the intent of Congress in continuing to exempt independent MVPDs that are not affiliated with video programmers. To advance the program carriage goals of the 1992 Cable Act, and in hopes of clarifying and improving related FCC procedures, the FCC launched proceedings in August to consider revisions to the program carriage rules. The proposed rules, among other things, would (1) require the filing of program carriage complaints within one year of the alleged violation, (2) revise discovery procedures in carriage complaint proceedings, (3) permit damage awards in program carriage cases, and (4) require vertically-integrated MVPDs to negotiate in good faith with unaffiliated program vendors. Addressing the FCC's question of whether the program carriage rules should cover all MVPDs and not just MVPDs that are vertically integrated, ACA cited the legislative history of the 1992 Cable Act in arguing that "Congress intended that the program carriage rules apply to vertically integrated operators, not to all cable operators regardless of affiliation with programming vendors." Maintaining that the majority of its members are independent, unaffiliated MVPDs that have long supported independent video programmers, ACA thus advised the FCC to "avoid any outcome that would reverse nearly 20 years of settled law of excluding independent cable operators" from program carriage mandates. Observing that "only a handful of complaints have been filed" since 1992 and "not a single one has resulted in a finding that the rules were violated," NCTA declared: "there is, in short, no basis in policy or law for these efforts."

EU High Court Rules Against Blanket Filtering Of Illegal Content On ISP Networks

In a development with implications for the European Union's (EU's) ongoing debate concerning online copyright infringement, the European Court of Justice (ECJ) struck down a ruling, issued by Belgium's copyright management watchdog, that ordered Tiscali, a Belgian ISP, to monitor and block peer-to-peer (P2P) files that illegally contain copyrighted musical works. Handed down last Thursday, the ECJ ruling concerns Belgian copyright management society SABAM, which in 2007 ordered Tiscali (owned previously by Scarlet but now a subsidiary of Belgacom) to install blocking software on its network that prevents subscribers from sending or receiving P2P files that contain musical works found in SABAM's repertory. SABAM's decision was spurred, in turn, by an earlier Belgian court ruling that found evidence of illegal transmissions of copyrighted material through the Tiscali network. On appeal, Scarlet argued that SABAM had not proved the effectiveness of filtering and blocking technologies and that the installation of such

software on the Tiscali network would hinder network capacity. Scarlet also claimed that the directive violated EU laws on e-commerce. Acting at the behest of the Brussels appeals court, which requested a preliminary ruling on the legality of the SABAM order, the ECJ decreed that, while copyright owners are entitled to enforce their intellectual property rights, SABAM's order "would impose general monitoring . . . which is incompatible with the [EU's] e-commerce directive." The ECJ also determined that the "effects of the injunction would not be limited to Scarlet, as the filtering system would also be liable to infringe the fundamental rights of its customers" as specified by the EU's Charter of Fundamental Rights. As such, the ECJ concluded that SABAM "would not be respecting the requirement that a fair balance be struck between the right to intellectual property . . . and the freedom to conduct business."

AT&T Signs Network Sharing Pact With China Telecom

One week after agreeing to share its Internet protocol (IP)-based network infrastructure with America Movil, AT&T forged a similar pact with China Telecom (CT) under which the two companies will provide each other with access to their respective IP networks. Signed on Wednesday, the contract represents an expansion of the carriers' existing relationship which began in 2000 with the establishment of a joint venture among AT&T, CT and Shanghai Information Investment Co. Although the companies' current venture already provides AT&T with access to CT's network infrastructure and vice-versa, Wednesday's cooperative agreement is intended to enable AT&T and CT to boost efficiency and lower their respective costs in offering virtual private network, cloud computing, network integration and similar services to corporate customers who do business in both China and in the U.S. The agreement also follows on CT's announcement last month that it would seek to offer wireless services to Chinese nationals in the U.S. (Officials at AT&T, however, declined comment on whether AT&T's expanded relationship with CT will eventually include access to AT&T's wireless network facilities.) AT&T and CT are expected to roll out expanded IP-based services to their multinational customers starting next year, and sources report that the companies are also considering an expansion of the arrangement to other international markets such as Latin America.

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