SENATOR WARNS REGULATORS ABOUT THE “DIGITAL CLIFF,” AS MARTIN DISCUSSES DTV COVERAGE ISSUES AT HOUSE HEARING

Writing to the FCC and the National Telecommunications and Information Administration (NTIA), Senator Amy Klobuchar (D-MN) said results obtained so far from the ongoing digital TV (DTV) transition trial in Wilmington, North Carolina confirm concerns raised previously about the “digital cliff” effect, through which certain TV viewers who rely on over-the-air broadcasts could be left without access to DTV signals despite the purchase of DTV sets. Because of differences in the propagation of DTV signals as compared to their analog counterparts, experts have warned that some TV viewers on the fringes of analog broadcast service areas who possess digital sets may be unable to access DTV signals without subscribing to cable or satellite TV or without purchasing an upgraded antenna system. Last week, Wilmington became the first U.S. television market to switch entirely to DTV service as part of an FCC-sponsored test program that is intended to highlight problem areas in advance of the nationwide DTV transition next February. Confirming that antenna and other technical issues are involved in a large percentage of consumer complaints received in Wilmington since last week, Klobuchar said the digital cliff “continues to be a looming issue in connection with the DTV transition about which I fear that consumers . . . are not adequately prepared.” Warning that, come February 2009, “many consumers may be surprised to suddenly find themselves on the other side” of the digital cliff, Klobuchar asked FCC Chairman Kevin Martin and acting NTIA director Meredith Baker to provide details on (1) what their agencies have done to make consumers—especially those in rural areas—aware of their vulnerability to the digital cliff effect, (2) the extent to which TV viewers in Wilmington were informed about digital cliff issues prior to last week’s switch-over, and (3) what contingencies are under consideration for DTV viewers who are most likely to be affected by the digital cliff. Meanwhile, at a hearing Tuesday before the House Energy and Commerce Committee, Martin confirmed that digital cliff problems could impact upwards of 23,000 viewers who live in the estimated 15% of TV markets nationwide that could experience “significant” shrinkage in signal coverage as a result of the DTV transition. Martin pledged to “work with the broadcasters to make sure we’re filling in those holes,” as he noted that the FCC will ask licensees in those areas to build out their antenna facilities to extend digital coverage.

HOUSE COMMITTEE DEBATES 700 MHZ D-BLOCK PROVISIONS

During a hearing Tuesday, members of the House Homeland Security subcommittee on emergency, communications and preparedness questioned provisions of the FCC’s draft rulemaking proposal on the upcoming 700 MHz D-block reauction, as panelists and public safety officials debated the pros and cons of allocating the D-block channels directly to cities and states. Next week, the FCC is expected to issue a further notice of proposed rulemaking that, among other things, would recommend (1) licensing of a hybrid commercial-public safety D-block broadband network on a nationwide or regional basis, (2) reduction of the D-block reserve price from $1.3 billion to $750 million, and (3) extension of the D-block construction period from ten years to fifteen. Voicing support for positions advocated by the New York City Police Department (NYCPD) and other public safety entities, Representative Nita Lowey (D-NY) suggested that, in lieu of an auction, the FCC should consider assigning D-block spectrum directly to cities and states that could decide how to use those channels to best serve local needs. Because the FCC “appeared to be caught off guard” when the D-block went unsold at the 700 MHz auction last spring, Lowey also questioned whether the FCC has any back-up plan in place should the D-block fail
to sell again. Responding to Lowey, Derek Poarch, the chief of the FCC’s Public Safety and Homeland Security Bureau, said the FCC lacks the authority to award spectrum to public safety entities outside of the auction process, as he added that the plan advocated by NYCPD could prove detrimental to rural areas that lack the financial wherewithal to deploy broadband infrastructure. Meanwhile, House Homeland Security Committee Chairman Bennie Thompson (D-MS) stressed the importance of interoperability, as he declared: “the public-private partnership is crucial in a successful reauction of the public safety spectrum.” Noting that the FCC’s proposal accounts for the incorporation of legacy systems into a nationwide network, Poarch told the subcommittee: “our goal is a nationwide system that states can be a part of.”

FCC, INTERVENORS URGE COURT TO UPHOLD AWS, 700 MHZ AUCTION RESULTS

In supplemental briefs filed with the Third Circuit Court of Appeals, the FCC and intervenors CTIA and T-Mobile USA defended amendments to the designated entity (DE) rules that were adopted in advance of the 2006 advanced wireless service (AWS) auction, as they urged the court to uphold the AWS auction results regardless of whether the amended DE rules are remanded to the FCC. The briefs respond to the latest legal challenge against the DE rules filed by Council Tree Communications, Bethel Native Corp., and the Minority Media and Telecommunications Council. Claiming that the FCC’s decision to extend the unjust enrichment period and impose new leasing and resale restrictions on DEs effectively blocked DE participation in the AWS and 700 MHz auctions, Council Tree and the other petitioners are again seeking to have the DE rules and the results of both auctions overturned by the Third Circuit. Last year, the Third Circuit dismissed the petitioners’ initial appeal on jurisdictional grounds, noting that the FCC had yet to act on the parties’ pending petition for reconsideration. Last March, the FCC denied reconsideration, thus clearing the way for the appellants to renew their earlier legal challenge. As CTIA and T-Mobile labeled the petitioners’ latest appeal as “meritless,” the FCC shot back at the petitioners’ claims regarding DE participation, arguing that “DE performance in Auctions 66 and 73 was robust by any reasonably objective standard and does not suggest a defect in the Commission’s rules.” Adding, “there is even less merit to the petitioners’ request for nullification of the auctions,” the FCC told the court that “a finding that the rules . . . were invalid thus does not provide a basis on which to reach back and unwind the auction results.” While proclaiming it “settled law that any invalidation of the rules would not affect proceedings already final” such as the AWS auction, CTIA and T-Mobile further warned that any decision to overturn the auction results “would inflict severe harm on federal government agencies, wireless carriers and consumers throughout the nation.”

NINTH CIRCUIT REVERSES WIRELESS TOWER RULING

The wireless industry was dealt a legal setback late last week by the Ninth Circuit Court of Appeals, which overturned previous district and appeals court rulings that prohibited local zoning authorities in San Diego County, California from limiting the design, placement, and size of mobile phone transmission towers. Addressing a petition for rehearing brought by San Diego County in a case involving Sprint Nextel, the en banc opinion reverses findings reached by the same court last year in which a three-judge panel concluded that zoning guidelines covering wireless cell sites in the county contravene Section 253(a) of the 1996 Telecommunications Act. Under Section 253(a), the federal government may preempt any local government regulation that effectively bars the entry of telecommunications providers into the local market. Upholding the district court last year, the appeals court relied upon a 2001 decree handed down by the Ninth Circuit that concerns a zoning dispute pitting the city of Auburn, Washington against Qwest Communications. In that case, the Ninth Circuit determined that wireless permit rules enacted by Auburn officials contradicted Section 253(a) because they “may” have had the effect of prohibiting the provision of telecom service. In reversing itself last week, however, the Ninth Circuit pointed to a recent pronouncement of the Eighth Circuit Court in St. Louis rejecting the “Auburn” standard on grounds that a plaintiff must show that a local ordinance actually prohibits market entry instead of the mere possibility that it may bar such entry. Admitting, that “our previous interpretation of the word ‘may’ as meaning ‘might possibly’ is incorrect,” the en banc panel decreed: “we therefore overrule Auburn and join the Eighth Circuit in holding that a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition.” As such, the court determined that none of the requirements imposed by San Diego authorities “individually or in combination prohibits the construction of sufficient facilities to provide wireless services.”
COURT REFUSES TO DISMISS SUIT AGAINST SPRINT NEXTEL-CLEARWIRE VENTURE

Efforts by iPCS, Inc. to block the Sprint Nextel-Clearwire WiMax venture will continue as a result of a ruling, handed down Monday by an Illinois court, that rejected Sprint’s request to dismiss or stay the iPCS suit. The complaint at the center of the case represents the latest chapter in a long-running legal dispute between Sprint Nextel and iPCS, a regional wireless operator and affiliate of Sprint Nextel. In a separate lawsuit triggered by the 2005 merger of Sprint and Nextel, the Circuit Court of Cook County, Illinois ruled in favor of iPCS’s claim that the merger violated exclusivity provisions contained in iPCS’s affiliation agreement with Nextel. Earlier this year, Sprint Nextel lost its appeal of that court order, which bars Sprint Nextel from owning, operating and managing its iDEN network facilities in areas served by iPCS. Anticipating further legal battles with iPCS, Sprint Nextel—on the day of the announcement of the Clearwire venture in May—asked the Delaware Chancery Court for a declaratory ruling that the Clearwire deal does not breach affiliation agreements signed with subsidiaries of iPCS. Arguing that the Sprint Nextel-Clearwire venture would violate exclusivity provisions contained in the agreements, iPCS sought its own declaration from the Delaware court as it asked the Cook County Circuit Court to block the deal. Observing that Monday’s ruling “was not unexpected,” Sprint Nextel said, “we’re confident that both the Illinois Circuit Court and the Delaware Chancery Court will render reasonable rulings.”

REPORT CLAIMS SUBSCRIBERS WON’T BENEFIT FROM CUTS IN EU MOBILE TERMINATION FEES

A study compiled by consultancy firm Frontier Economics concludes that drastic reductions in mobile termination rates (MTRs) proposed by the European Commission (EC) would prove of little benefit to European wireless subscribers who are likely to be hit with higher retail prices as a consequence of MTR rate cuts. Commissioned by Deutsche Telekom, Orange, Telecom Italia and Vodafone, the study highlights the alleged pitfalls of European Union (EU) Media and Information Society Commissioner Viviane Reding’s recent proposal to mandate a 70% reduction in MTRs (i.e., the rates that wireless carriers charge each other to complete calls on each others’ networks) with the goal of lowering wireless calling costs for EU consumers. Noting that MTRs account for as much as 20% of EU operator revenues, the report claims that, if the proposed MTR rate cuts are implemented, carriers are likely to raise tariffs in other areas to recoup the lost revenues. Along that vein, the study predicts that a 10% reduction in MTRs would lead to a 10% increase in retail prices. While EU wireless customers generally pay only for those calls that they make under a “calling party pays” regime, the study further warns that MTR cuts could induce some carriers to charge for calls received as is done in the U.S., which could lower wireless penetration rates to levels resembling that of the U.S. (In Europe, wireless penetration rate currently exceeds 100%, while in the U.S., the penetration rate stands at 85%.) Dismissing the report as one that is “one-sided” and lacks “intellectual strength,” Reding observed, “there are fundamental flaws in the analysis,” which therefore “cannot be taken seriously.”

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