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Current Telecom Developments

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IN THIS ISSUE:

FCC Makes No Ruling Of Effective Wireless Competition In Annual Report

Issuing its fifteenth annual report to Congress on the state of competition in the U.S. wireless market, the FCC has once again declined to take a stance on whether the market is effectively competitive in spite of continuing gains in the overall number of subscribers and in the availability of mobile broadband offerings. The report, released on Monday, marks the second consecutive year in which the FCC has refused to draw conclusions on the competitive state of the national wireless sector. (In reports issued prior to last year, the FCC affirmed consistently that the U.S. wireless market was effectively competitive.) Citing the "complexity of the various inter-related segments and services within the mobile wireless ecosystem," Monday's report, according to the FCC, focuses on "the best data available on competition . . . and highlighting several key trends in the mobile wireless industry." Among those trends is the surge in growth of mobile broadband services. According to the report, between 2009 and 2010, census blocks served by four or more wireless broadband providers grew by ten percent, from 58% to 68%. Although the FCC also found that total subscribership to mobile voice services grew by five percent, a comparison of statistics on the census block level showed disparity between wireless voice and broadband coverage, with the percentage of the population served by at least one mobile voice or broadband operator tallied at 99.8% versus 98.5%, respectively. While 68% of census blocks reported four or more broadband providers, Monday's report cites a wide gap between that figure and the number of census blocks served by four or more mobile voice providers (94.3%). In a finding with potential implications for AT&T's proposed acquisition of T-Mobile USA, the report also notes that the weighted Herfindahl-Hirschman Index (HHI) average across 172 economic areas stood at 2811 at the end of 2009. According to the report, markets with HHIs above 2500 are classified by antitrust authorities to be highly concentrated. Commenting on the report's findings, wireless association CTIA maintained that the report "reflects the tremendous innovation and investment that occurred in the wireless ecosystem in 2009." Hinting that the report failed to account for competitive platforms apart from the wireless sector, Verizon Wireless senior vice president Kathleen Grillo asserted that her company's competitors "aren't just other wireless network providers" as "competition [also] comes from cable companies, Wi-Fi and satellite service providers . . . and many others."

Supreme Court To Review FCC Indecency Rules

At the behest of the FCC, the U.S. Supreme Court agreed on Monday to review last year's ruling of the Second Circuit, which determined that FCC regulations against broadcast indecency, as applied to the utterance of "fleeting expletives" on live telecasts, are vague and hold a chilling effect over broadcast free speech. A decision in the closely-watched case is anticipated to be the Supreme Court's most significant pronouncement on the subject of broadcast indecency since the high court's landmark Pacifica ruling in

1978. In Pacifica, the Supreme Court affirmed the right of the FCC to ban as indecent the "seven dirty words" uttered in a famed radio monologue by comedian George Carlin. Unlike Pacifica, which involved repeated and deliberate utterances of curse words over broadcast airwaves, the case at hand involves momentary, unscripted profanity that occurred on live awards shows aired by the Fox television network in 2002 and 2003. Although the Supreme Court determined in 2009 that the FCC was procedurally correct in invoking its ban against expletives with respect to the incidents in question, several justices hinted that the FCC's current enforcement regime might not withstand a First Amendment challenge. In reviewing the decision of the Second Circuit, the Supreme Court will assess whether the FCC's recent application of the indecency rules (which punished fleeting utterances of certain expletives on live awards shows yet allowed usage of that same language during a broadcast of the Hollywood film Saving Private Ryan) violates the free speech and due process clauses of the U.S. Constitution. Although an FCC spokesman voiced hope that the justices "will affirm the Commission's exercise of its statutory responsibility to protect children and families," Fox predicted that the high court "will ultimately agree that the FCC's indecency enforcement practices trample on the First Amendment."

Lawmakers Question Revised LightSquared Spectrum Plan

Fearing that LightSquared LLC's latest proposal to operate its hybrid satellite/terrestrial wireless broadband network on lower L-band frequencies may not be enough to prevent interference to global positioning system (GPS) users, lawmakers and government officials gathered at a House subcommittee hearing said the FCC should require additional testing before LightSquared commences operations pursuant to its revised plan. Conducted last Thursday by the House Transportation and Infrastructure subcommittees on aviation and on Coast Guard and maritime transportation, the hearing came as members of the House Appropriations Committee adopted an amendment to financial services legislation that prohibits the FCC from removing conditions attached to its January waiver permitting terrestrial usage of LightSquared's mobile satellite services spectrum, "until the Commission has resolved concerns of potential widespread harmful interference . . . to commercially available [GPS] devices." Seizing on LightSquared's acknowledgement that up to one percent of GPS users could still be impacted by the company's latest proposal to launch downlink operations in the 1526-1536 MHz band, aviation subcommittee chairman Tom Petri (R-WI) stressed that the LightSquared system "must not interfere with aviation safety" systems that depend upon GPS. As Petri further argued that LightSquared's revised plan "should be independently and thoroughly tested to ensure that the FCC does not approve plans that would introduce unacceptable risk in the aviation system," Rep. Daniel Lipinski (D-IL) suggested that the Departments of Defense and Transportation should be given a more prominent role in discussions with the FCC. Although LightSquared executive Jeffrey Carlisle said filters could offer a solution to potential interference from lower L-band operations, an official of the Air Transport Association countered that filters "could interfere with the precision of the GPS signal, thus limiting the usefulness of GPS receivers." While emphasizing that his company "has no intention of conducting its operations in a way that interferes with government or commercial aviation or maritime operation," Carlisle warned the panel: "if there is extraordinary regulatory or legislative action taken, if we aren't allowed to work this out on a cooperative basis, certainly our spectrum and the valuation of spectrum will be severely undermined."

House Democrats Tout Potential Benefits Of AT&T/T-Mobile Deal

Seventy-six Democratic members of the House of Representatives wrote last Friday to FCC Chairman Julius Genachowski to urge the FCC to "give important consideration" to potential benefits of the proposed union of AT&T and T-Mobile USA. The letter, signed by House Energy and Commerce Committee members G.K. Butterfield (D-NC), Frank Pallone (D-NJ), John Barrow (D-GA) and Donna Christensen (D-VI), was also delivered to U.S. Attorney General Eric Holder. Though stopping short of endorsing the deal, the letter touts "good paying union jobs" and the expansion of wireless broadband coverage to rural and other underserved areas among the benefits of the AT&T/T-Mobile transaction. Proclaiming that the merger "represents an opportunity to deliver a better wireless product that will benefit all," Butterfield told reporters: "we are encouraging the FCC and the [Justice Department] to consider a number of important factors during the review process." Although none of the telecom "heavyweights" on the House Energy and Commerce Committee signed the letter, Randolph May, the president of the Free State Foundation, argued the letter could prove significant,

observing, "the fact that so many Democrats signed a letter that, in essence is supportive of the merger certainly makes it difficult to turn the merger into a partisan issue."

Reciprocal Compensation Rules Apply To CLEC-To-CLEC ISP Traffic, Says Ninth Circuit

Handing AT&T a victory, the U.S. Court of Appeals for the Ninth Circuit decreed last week that Internet service provider (ISP) bound traffic exchanged by competitive local exchange carriers (CLECs) is governed by FCC rules that cap rates at $0.007 per minute. The case at hand pits AT&T in its capacity as a California CLEC against PacWest, another CLEC in that state. In contrast to incumbent local exchange carriers (ILEC) that offer network access to CLECs pursuant to interconnection agreements, there is no such agreement in place between PacWest and AT&T. As such, PacWest asserted with the backing of the California Public Utilities Commission (CPUC) that, in accordance with its state-filed tariff, AT&T owed PacWest more than $7 million for ISP-bound traffic that originated with AT&T and terminated on the PacWest network. Challenging the CPUC ruling, AT&T argued that PacWest's state tariff was preempted by the FCC's 2001 ISP remand order, which capped intercarrier rates for ISP-bound traffic at much lower levels. A California district court, however, disagreed and upheld the CPUC order on grounds that tenets of the ISP remand order applied to traffic exchanged between ILECs and CLECs. Reversing the district court order, a three-judge panel of the Ninth Circuit concluded that, while the ISP remand order did not clearly specify whether CLEC-to-CLEC traffic was covered by the FCC's rate cap, the FCC's intent was "to exercise its jurisdiction over local ISP-bound traffic exchanged between two CLECs." Pointing to FCC briefs in support of that position, the court observed that, in adopting a compensation regime for ISP traffic, the FCC "was primarily concerned with arbitrage opportunities created by traffic of a particular nature," instead of by the types of carriers that exchange such traffic. Adding that the FCC's concern over opportunities that ILECs "were uniquely positioned to exploit was a corollary to the FCC's overriding concern for the arbitrage opportunities created by ISP traffic generally," the court found that "arbitrage related to ISP-bound traffic in no way depends on the participation of an ILEC."

Telstra, Australia Forge $11.6 Billion Deal For NBN Access

In a milestone that impacts the development of Australia's national broadband network (NBN), dominant state phone service provider Telstra signed an agreement with the government through which Telstra will contribute its fixed line network infrastructure to the NBN. Currently in the second year of a decade-long deployment, the NBN is intended to reach 93% of Australia's population with download speeds of up to 100 Mbps and to provide the remaining 7% of population with speeds of 12 Mbps delivered through wireless or satellite technologies. The pact with Telstra is expected to reduce the government's cost of deploying fiber-optic lines for the US$37.94 billion network. The deal is also expected to pave the way for the structural separation of Telstra's wholesale and retail businesses—a step that communications minister Stephen Conroy described as "the Holy Grail of microeconomic reform in the telecommunications sector." For the next 35 years, Telstra will provide the government with access to its existing network infrastructure over which the government will lay fiber-optic lines that will form the backbone of the NBN. Over time, Telstra will also disconnect its legacy copper-based lines and migrate its customers and services onto the NBN. Telstra and its competitors will also be permitted to invest in the NBN although individual stakes will be capped to ensure that access to the NBN remains open. The agreement is subject to both regulatory and shareholder approval.

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