

Patton Boggs TechComm Industry Update
April 25, 2012

FCC Meeting

The Federal Communications Commission (FCC) has released the tentative agenda for its next open meeting, scheduled for Friday, April 27. Items include: (1) an Order adopting enhanced online disclosure requirements for television broadcast stations and their local public files; (2) an Order creating a framework for channel sharing by television licensees in connection with the upcoming incentive auctions; (3) a Further Notice to reform Universal Service Fund contribution mechanisms; (4) an Order and Further Notice regarding "cramming" (the placement of unauthorized charges on consumers telephone bills; and (5) a Proposed Rulemaking regarding on-air fundraising by noncommercial educational broadcast stations.

Future of Video Programming

The Senate Commerce, Science and Transportation Committee held a hearing on the future of video programming on Tuesday, April 24. Witnesses at Tuesday's hearing including Barry Diller, Chairman and Senior Executive, IAC; Paul Misener, Vice President for Global Policy, Amazon.com; Susan Whiting, Vice Chairman, the Nielsen Company, and Blair Westlake, Corporate Vice President, Media & Entertainment Group, Microsoft.

House Science Subcommittee Hearing: Avoiding the Spectrum Crunch

On April 18, 2012, the House Science Subcommittee on Technology and Innovation held a hearing to review government and private industry efforts to foster efficient use of spectrum. The hearing, titled "Avoiding the Spectrum Crunch: Growing the Wireless Economy Through Innovation," included testimony from representatives of the National Institute of Standards and Technology, Information Technology and Innovation Foundation, CTIA-The Wireless Association, Cisco Systems, Inc. and Idaho National Laboratory.

Witnesses agreed that the U.S. will soon face a spectrum shortage which, if not remedied, will threaten the continued growth of the U.S. wireless industry. The remedy, witnesses testified, must include increasing available spectrum and investing in innovative technologies that utilize spectrum more efficiently. While the spectrum provisions in the recently enacted Middle Class Tax Relief and Job Creation Act of 2012 are a good start, witnesses told the Committee that more must be done to repurpose additional spectrum and fund private industry research and development of spectrum-sharing technologies.

This information is not intended to constitute, and is not a substitute for, legal or other advice. You should consult appropriate counsel or other advisers, taking into account your relevant circumstances and issues. While not intended, this Update may in part be construed as an advertisement under developing laws and rules.

This Update can be accessed at:
http://www.pattonboggs.com/newsletters/techcomm/2012_04_25_TechCommUpdates.htm

You may receive this Update from other people, which often occurs. To SUBSCRIBE or change your address, e-mail techcomm@pattonboggs.com. To UNSUBSCRIBE or OPT-OUT, simply e-mail techcomm@pattonboggs.com with "UNSUBSCRIBE" in the subject line.

Chairman Genachowski to Appear Before Senate Appropriations

FCC Chairman Julius Genachowski will testify before the Senate Appropriations Financial Services panel today. Chairman Inouye's office confirmed that he will participate in the hearing. The Committee website notes that possible topics include expanding broadband access, promoting innovation and protecting consumers in a communications revolution.

Incentive Auctions for Broadcast Spectrum – Rulemakings to Begin in Fall

On Monday, April 16, Chairman Genachowski addressed the National Association of Broadcasters convention and said that he plans to begin "major rulemakings" in the fall aimed at freeing up TV station airwaves for mobile broadband and wireless carriers. The FCC has appointed Ruth Milkman and Gary Epstein to co-lead an FCC task force to manage the incentive auction process. Ms. Milkman is the former head of the Wireless Bureau and currently special counsel to Chairman Julius Genachowski. Mr. Epstein returns to the FCC after serving most recently as the managing director and general counsel of an Aspen Institute project on cloud computing. Senator Chuck Grassley (R-IA) has raised concerns with Mr. Epstein's appointment because of his connection to LightSquared. Ms. Milkman and Mr. Epstein will be joined by Rick Kaplan, who now heads the Wireless Bureau; Julius Knapp, head of the Office of Engineering and Technology; FCC Chief Economist Marius Schwartz; Chief Technologist Henning Schulzrinne; and General Counsel Austin Schlick.

Bipartisan Group of Lawmakers to FCC: Provide LightSquared Alternative Regulatory Path Forward

A bipartisan and bicameral group of lawmakers has called upon the FCC to provide LightSquared an alternative path forward to launch the company's proposed wireless 4G network on a nationwide basis. Senate Commerce Committee members John Kerry (D-MA), the Subcommittee Chairman for Communications, Technology, and the Internet joined with senior committee Member Lindsey Graham (R-SC) and urged the Commission to work with the NTIA, other federal agencies and spectrum holders to identify alternative spectrum LightSquared could use to launch its network. Similarly, a bipartisan group of U.S. House Members, including Energy and Commerce Committee Members Brian Bilbray (R-CA) and Joe Pitts (R-PA) joined with defense appropriator Jim Moran (D-VA) and his fellow Commonwealth colleague Gerald Connolly (D-VA) in urging the Commission to "examine all potential paths forward" before revoking a conditional waiver the Commission issued in January 2011 that would permit LightSquared to build its proposed network.

Meanwhile, Senator Chuck Grassley (R-IA) announced that he remains unwilling to lift a hold on two pending nominees to fill open seats on the Commission until the agency turns over additional "internal" documents regarding the FCC decision-making with respect to the LightSquared matter. Senator Grassley's ongoing hold, combined with a letter he sent to the NTIA inquiring about how much funding the federal government directed towards testing for LightSquared's proposed network in 2011, indicates that the senior Judiciary Committee member will play an active and ongoing role in FCC oversight in the near future.

Public Safety Network Waiver Recipients and Applicants

The FCC is grappling with how to treat 21 jurisdictions that were granted waivers to deploy public safety networks in the 700 MHz band adjacent to the D Block. The FCC's Public Safety and Homeland Security Bureau is seeking the most efficient way to transition these jurisdictions to the anticipated FirstNet Public Safety Network. Comments on the issues were filed on Friday, April 20. The FCC is considering whether to rescind all of the waiver authorizations, even though it noted that two jurisdictions, the state of Texas and Charlotte, N.C., plan to turn their networks in the next 1-3 months. The FCC also is considering whether to adopt an order that would dismiss more than three dozen pending waiver requests to deploy 700 MHz public safety broadband networks in additional jurisdictions. FCC officials notified jurisdictions that have sought waivers that the action is under consideration.

At NTIA, recipients of Broadband Technology Opportunities Program (BTOP) grants that were intended to fund the early build out of public safety broadband networks were told to put some of their spending on hold. On April 3, NTIA Administrator Larry Strickling told BTOP recipients that NTIA was imposing a “temporary suspension” on the portion of BTOP grants that would fund “LTE equipment,” such as core servers, radio equipment, antennas and user devices. Strickling also said the suspension would not impact funding for site costs, backhaul acquisition, etc.

Technical Standards for the Public Safety Broadband Network

The FCC hosted a public workshop on April 23 to collect input on topics which the Technical Advisory Board for First Responder Interoperability (Interoperability Board) has determined are relevant to minimum technical requirements to ensure a nationwide interoperability for the public safety broadband network. The workshop consisted of four, 45-minute moderated panel discussions, including: (a) the scope of the Interoperability Board’s work; (b) relevant standards, interfaces and guidelines (e.g. 3GPP, OMA, etc.); (c) interoperability requirements associated with: Grade(s) of Service provided by the broadband network; and (d) network security.

Cybersecurity

House Speaker John Boehner (R-OH), Majority Leader Eric Cantor (R-VA), and Representative Mac Thornberry (R-TX), the chairman of the House GOP’s Cybersecurity Task Force, have announced that the House of Representatives will consider four bills designed to address cybersecurity this week. The bills aim to update existing cybersecurity laws to provide legal authorities to allow for information sharing among private companies and the federal government and among private companies alone. The four bills slated to come to the House floor are the following:

- **Cyber Intelligence Sharing and Protection Act** (H.R. 3523), introduced by Intelligence Committee Chairman Mike Rogers (R-MI) -- criticized by privacy advocates, is expected to be the vehicle to carry parts or all of the following bills:
 - **Federal Information Security Amendments** (H.R. 4257), introduced by Oversight & Government Reform Committee Chairman Darrell Issa (R-CA) -- would reform the Federal Information Security Management Act (FISMA).
 - **Cybersecurity Enhancement Act** (H.R. 2096), introduced by Rep. Mike McCaul (R-TX), would aim to improve coordination of research and education conducted across federal agencies to better address evolving cyber threats.
 - **Advancing America’s Networking and Information Technology Research and Development (NITRD) Act** (H.R. 3834), introduced by Science, Space, and Technology Chairman Ralph Hall (R-TX), reauthorizes the NITRD program, which represents the federal government’s central R&D investment portfolio for computing, software and cybersecurity.

The two prominent cybersecurity bills in the Senate are S. 2105, “Cybersecurity Act of 2012” sponsored by Senator Joe Lieberman, Chairman of the Senate Committee on Homeland Security, and S. 2151, “SECURE IT,” sponsored by Senator John McCain respectively. It is widely expected that Senate Majority Leader Harry Reid will bring S. 2105 to the floor in late April or early May. Majority Leader Reid (D-NV) is expected to offer an open amendment process during the consideration of the bill, and it is anticipated that changes will be made to the bill as a result of that process at that time.

Is Online Video Entitled to MVPD Protection?

The FCC’s Media Bureau is seeking comment on the terms “Multichannel Video Programming Distributor” (MVPD) and “channel.” The Public Notice arises out of a pending program access proceeding in which Sky

Angel U.S., an online video distributor (OVD), brought a program access claim against Discovery Communications and its affiliate Animal Planet, and petitioned for a “standstill” in order to continue delivery of the Discovery networks under the FCC’s program access rules. The Bureau denied the petition for a standstill on grounds that Sky Angel failed to meet the burden of showing that it is an MVPD entitled to avail itself of the rights and remedies under the FCC’s program access rules. The Bureau seeks comment on the conclusion that an MVPD includes only those entities that make available both the transmission path and the content. This Public Notice raises a critical issue for OVDs and potential OVDs. Comments on the Public Notice are due May 14; reply comments are due June 13.

Applications for New Top Level Domain Names

As previously reported in the Patton Boggs Industry Update (January 16, 2012), the Internet Corporation for Assigned Names and Numbers (“ICANN”) opened the process for acceptance of applications for generic top-level domain (or gTLD) names, such as .money, .shoes, .Toyota, etc. That application window was to close on Monday, April 16, but was extended due to a “glitch” in the system. On April 12, ICANN announced that it had suffered a security breach in its top-level domain application System, or “TAS” system, which allowed some applicants to see other applicants’ data. ICANN COO Akram Atallah released a statement on Monday, April 16, announcing: a) further delay of opening the TAS system for application input, and b) those affected by the “glitch” in security would be notified. There is no certainty as to when the TAS-application-entry system will reopen. On Friday, April 20, ICANN advised that the system will remain closed until they have identified applicants affected by the technical problems. Once reopened, the system will remain open for completion of applications for at least five business days. A further update has been promised for April 27. Once the application is processed, the public will have an opportunity to review the gTLD names applied for and to submit objections. It now appears, absent further delays, the window for objections will be sometime in the month of May.

FTC Workshop Focuses on Mobile Payments

The Federal Trade Commission (FTC) will examine a wide range of issues relating to mobile payments, including the technology and business models used and the consumer protection issues raised, at a workshop on Thursday, April 26. The one-day workshop will address the opportunities and challenges for businesses and consumers, the legal landscape and dispute resolution, mobile payments around the world, fraud mitigation and data security and privacy issues. Participants will include, among others, representatives from the FTC, Federal Reserve, European Commission and consumer groups here in the United States. Mobile payments are expected to generate \$215 billion by 2015 according to a recent estimate made by Congresswoman Carolyn Maloney (D-NY), the Ranking Member of the House Financial Institutions and Consumer Credit Subcommittee.

Tower Siting/Collocations

The FCC’s Wireless Telecommunications Bureau, along with the National Association of Telecommunications Officers and Advisors (NATOA), will host an educational workshop addressing collocations of wireless and broadband antennas on communications towers and other structures. The workshop will take place on May 1 from 9:30 a.m. to 4 p.m. EDT in the Commission Meeting Room at the FCC’s Washington, D.C., headquarters. The FCC also will webcast the workshop. The workshop will provide an overview of how collocations can promote the availability of mobile broadband, public safety, and other wireless services in a manner consistent with community priorities. Panelists will discuss the technical, structural, and business considerations underlying collocations on a variety of structure types, including wireless towers, AM radio/broadcast towers, public safety communications towers, utility infrastructure, rooftops, and water tanks. The workshop will explore examples of cooperative solutions that have facilitated wireless deployment while recognizing community interests. The FCC’s Nationwide Programmatic Agreement for the Collocation of Wireless Antennas also will be discussed.

Capitol Hill Concerned About Universal Service Implementation

Earlier this month, a bipartisan group of 19 senators sent Chairman Genachowski a letter asking the Commission to review its recent universal service and intercarrier compensation reforms and act “immediately” to address concerns regarding the impact of universal service reforms on rural carriers and investment in rural communications networks. The letter specifically requested clarification that (1) no additional reductions in USF or ICC support would be implemented until the implications of the reforms and reductions adopted in the November Order can be properly evaluated and understood; (2) lawfully incurred investments and operating expenses are not jeopardized by retroactive rule changes; (3) investments or expenses made in accordance with federal agency standards and mandates would not be deemed unlawful, imprudent or “not used or useful”; (4) a clear-cut and non-burdensome waiver mechanism allowing cost recovery for carrier investments made in line with federal standards and mandates would be adopted; and (5) a sustainable and predictable broadband-oriented Connect America Fund for rural areas served by smaller rural carriers would be adopted - as the Commission “did for those served by larger carriers.”

TV White Spaces Rules Modifications

The FCC has modified its rules regarding unlicensed use of frequencies in the TV spectrum bands where they are not used by licensed services (i.e., TV white spaces). The FCC's Third Memorandum Opinion and Order (a) increases the maximum height above average terrain where fixed unlicensed TV bands devices (TVBDs) may operate (b) modifies the adjacent channel emission limits to specify fixed rather than relative levels and (c) slightly increases the maximum permissible power spectral density for each category of TVBDs. The Commission expects that these changes will result in decreased operating costs for fixed TVBDs and allow them to provide greater coverage, thus increasing the availability of wireless broadband services in rural and underserved areas without increasing the risk of interference to incumbent services. The FCC also revised and amended several other rules to better effectuate its earlier decisions regarding use of TV white spaces and remove ambiguities.

Cellular Overlay Proceeding

The FCC has adopted a Notice of Proposed Rulemaking (NPRM) and Order proposing to modify cellular licensing. In Stage 1, an Overlay License would be issued via auction for all substantially licensed Cellular Market Areas (CMAs). Existing licensees would be protected from harmful interference within their Cellular Geographic Service Area (CGSA), but the Overlay Licensee would have the ability to provide service in unserved areas or areas that become available through relinquishment of licenses, reduction in CGSA, or permanent discontinuance of operations. For markets that do not meet the “substantially licensed” threshold, which the FCC calls Stage 2, the Commission proposes to retain the existing site-based licensing scheme for a period of seven years from the date on which the revised cellular rules go into effect. The Commission has suspended acceptance of cellular applications claiming unserved areas in markets that are substantially licensed and markets that are more than 90 percent but less than 95 percent covered. Comments and reply comments are due by May 15, 2012 and June 14, 2012, respectively.

Foreign Ownership

The FCC seeks comment on a request that the FCC find that all “indirect” foreign interests in a common carrier licensee be governed by Section 310(b)(4) of the Communications Act rather than Section 310(b)(3). Section 310(b)(4) allows investors to own more than 20 percent of the licensee in some cases. Parties claim that such a ruling would benefit innovation, economic growth and employment in the United States by facilitating more foreign investment. The FCC also asks, alternatively, for comments on forbearing from applying Section 310(b)(3) to certain indirect investment of common carrier licensees. Comments and reply comments are due May 15 and May 25, respectively.

Google Fined

The FCC issued a Notice of Apparent Liability for Forfeiture against Google as part of its investigation of Google's Street View project. However, the proposed \$25,000 fine is not related to Google's collection of consumer "payload" data (including e-mail and text messages, passwords, Internet usage history, and other highly sensitive personal information), but because it "willfully and repeatedly" violated FCC orders to produce certain information and documents requested by the FCC. Google reportedly plans to challenge the forfeiture and Representative Ed Markey (D-MA) reacted by issuing a statement saying, "The circumstances surrounding Google's surreptitious siphoning of personal information leave many unanswered questions. I believe Congress should immediately hold a hearing to get to the bottom of this serious situation."

Curbing Smartphone Theft

The FCC, with the support of major city police chiefs and the wireless industry, announced new initiatives, initially including the four carriers who cover 90 percent of U.S. subscribers, to deter theft of smartphones and secure customer data. The initiatives include implementing a database to prevent use of stolen smartphones, encouraging users to lock their phones with passwords, educating users on lock and wipe applications, and an educational campaign for users on how to protect smartphones and themselves. The wireless industry will report to the Commission quarterly regarding progress on these initiatives. In addition, Congress is expected to consider legislation which will make it a crime to take steps to avoid effective deployment of the stolen phone database.

Wireless Tax Moratorium

The tech coalition Mobile Future is urging Senators to move forward on legislation that would place a five-year moratorium on new taxes on wireless services. In a recent letter to Senate Finance Committee Chairman Max Baucus (R-MT) and Ranking Member Orrin Hatch (R-UT), Mobile Future urged the Committee to advance the Wireless Tax Fairness Act of 2011. The bill, which was introduced in March 2011 by Senator Ron Wyden (D-OR) and 12 co-sponsors, would ban the imposition of any new taxes on wireless services, and would hold the government's share of the average wireless bill at 14 percent — which is nearly double the average state sales tax.

Political Advertising

The Ninth Circuit ruled that the prohibition on public radio and television stations' carriage of public issue and political advertising is unconstitutional, clearing the way for campaign ads on the public airwaves. The Court's ruling could clear the way for the airing of "issue ads" that are political but do not identify specific candidates. In *Minority Television v. FCC*, the Court found that the ban on public broadcasters' carriage of public issue and political advertisements is unconstitutional because it did not meet the intermediate scrutiny standard for content-based restrictions on broadcast speech. The Court found that the record had no evidence, let alone the "substantial evidence in the record before Congress" when the statute was enacted, necessary to justify the advertising restrictions. The court upheld the ban on advertisements for goods and services on behalf of for-profit entities.

FCC Reconsiders Text-To-Speech Alerting Issue

The Commission, acting after requests filed by the Federal Emergency Management Agency, among others, has reconsidered its recent action on use of text-to-speech (TTS) technologies in delivery of Emergency Alert System (EAS) messages in conformance with the Common Alerting Protocol (CAP). The FCC had declined to mandate implementation of guidelines regarding use of TTS technology to generate the audio portion of an EAS message, in part because it felt that the accuracy and reliability of TTS had not been established. As a result, the FCC would not allow EAS participants to use TTS software to generate the audio portion of an EAS

message. The Commission reversed the ban after noting that it could have unintended negative consequences, such as compromising the ability of EAS participants to receive EAS messages from state and local governments that have implemented CAP-based alerting systems that rely on TTS. As a result, while use of TTS will not be mandated, it will be permitted pending further FCC consideration of the issues.

If you have questions regarding any of the items discussed above, or if you are interested in filing comments or receiving copies of filed comments in any of the FCC proceedings mentioned, please contact the Patton Boggs TechComm practice group. More information about our team can be found at www.pattonboggstechcomm.com.

If you have any questions about the foregoing or if you require additional information, please contact:

PATTON BOGGS TECHCOMM PROFESSIONALS - <http://www.pattonboggstechcomm.com/professional/>

Jennifer Richter
202-457-5666
jrichter@pattonboggs.com

Paul C. Besozzi
202-457-5292
pbsozzi@pattonboggs.com

Ryan W. King
202-457-5312
rking@pattonboggs.com

Janet Moran
202-457-5668
jmoran@pattonboggs.com

Monica Desai
202-457-7535
mdesai@pattonboggs.com

Cynthia Schultz
202-457-6343
cschultz@pattonboggs.com

Jennifer A. Cetta
202-457-6546
jcetta@pattonboggs.com

Mark C. Ellison
202-457-7661
mellison@pattonboggs.com

Gregory M. Louer
202-457-6418
glouer@pattonboggs.com

Maria C. Wolvin
202-457-6568
mwolvin@pattonboggs.com

Carly T. Didden
202-457-6323
cdidden@pattonboggs.com