
SELECTED FCC DOCKET SUMMARIES, 2005–2006

INTERNATIONAL

In re Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands, Order, FCC 05-204 (Dec. 8, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-204A1.pdf

Pursuant to 47 U.S.C. § 316, the Federal Communications Commission (“FCC” or “Commission”) is responsible for evaluating licensing assignments and ensuring their consistency with the public interest. In 2001, the International Bureau of the FCC assigned licenses to eight satellite companies to operate in the 2 GHz mobile satellite service (“MSS”) spectrum band. The Commission, however, made these assignments contingent on the companies meeting certain milestone obligations. By early 2005, six of the eight MSS satellite operators lost their licenses due to either cancellation or surrender. This situation left only two MSS operators in the 2 GHz band: TMI Communications and Company Limited Partnership (“TMI”) and ICO Satellite Services (“ICO”). Deciding what to do with the canceled and surrendered bandwidth, the Commission initially expressed an intent to increase the assignments to TMI and ICO so that each would have 1/3 of the total 2 GHz spectrum. The Commission also invited comments on what to do with the other 1/3 of the spectrum unassigned under this proposed plan. In this Order the Commission reviews several reallocation options and ultimately distributes the entire 2 GHz spectrum, not just 2/3, evenly between TMI and ICO.

The Commission began this order by clarifying that its *Third AWS Order*¹ and *First Space Station Licensing Reform Order*² affecting 2 GHz bands did

¹ *In re Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; The Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500–2520/2670–2690 MHz Frequency Bands for the Mobile-Satellite Service; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service, Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order*, 18 F.C.C.R. 2223 (Jan. 29, 2003).

² *In re Amendment of the Commission’s Space Station Licensing Rules and Policies; Mitigation of Orbital Debris, First Report and Order and Further Notice of Proposed Rulemaking*, 19 F.C.C.R. 10,760 (Feb. 20, 2004).

not limit its ability to determine if and how 2 GHz MSS bands should be redistributed at the present time. The Commission recognized its only limitation in forming a reallocation decision is that it must be in the public interest pursuant to § 316. The Commission then considered three options for reallocating the canceled and surrendered 2 GHz spectrum. The first option was to assign the remaining 2 GHz spectrum to TMI and ICO, the second was to assign it to new MSS licensees, and the third was to make the spectrum available to another service. The Commission found no reasons in the record supporting an assignment to other services. The Commission declined to divide the spectrum amongst new licensees, preferring instead to rely on market forces under the milestone requirements to efficiently determine the optimal number of licensees.

Finally, having eliminated other options, the Commission determined that a division of all unassigned spectrum between TMI and ICO would be the best solution and in the public's interest. The Commission stated that its decision would: (1) allow ICO and TMI to better provide crucial communications services to first responders in an emergency such as the recent September 11, 2001 terrorist attacks and hurricanes Katrina, Rita, and Wilma; (2) facilitate delivery of broadband services to rural areas; (3) promote competition of MSS technology with other mobile telecommunications services; and (4) facilitate international service offerings. The only possible reevaluation of this decision anticipated by the FCC is if the pending appeal from Globalstar, who had its 2 GHz MSS license canceled, is successful.

Summarized by Justin P. Hedge

MEDIA

Further Report on the Packaging and Sale of Video Programming Services to the Public (Feb. 9, 2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf

In February 2006, the Federal Communications Commission ("FCC") issued a Further Report on the Packaging and Sale of Video Programming Services to the Public ("Further Report"). This report reexamines a November 2004 Report ("2004 Report") submitted to Congress on the à la carte model of delivering video programming. Report on the Packaging and Sale of Video Programming Services to the Public (Nov. 18, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf. The Further Report concluded that consumers would benefit from an à la carte model and discusses several options under this model which would give subscribers the ability to increase their choices in purchasing programming.

The 2004 Report relied on a study conducted by Booz Allen Hamilton (“Booz Allen”) which concluded that the à la carte model is not economical. The Further Report describes the errors in the Booz Allen study which rendered the conclusions in the 2004 Report incorrect. Additionally, the Further Report identifies impracticable assumptions and biased analysis in the conclusions of the 2004 Report.

The first error the Further Report assigns to the Booz Allen study is the underestimation of the number of programming channels available to the subscriber at a more affordable rate under the à la carte model compared to the current costs of a multichannel video programming distributor (“MVPD”). The Booz Allen study failed to recognize that under the à la carte model subscribers could maximize the benefits they receive from cable television by choosing to purchase a small number of high priced channels or a large number of less expensive channels. Once this error was corrected in the Further Report the FCC found consumers’ bills could decrease by 3% to 13% in three out of four of the Booz Allen study scenarios.

Additionally, the Further Report finds the Booz Allen study may have further overestimated the costs of the à la carte model by assuming that a shift towards the à la carte model would reduce the amount of television consumers watch and impact advertising revenues. The Further Report rejects this assumption and finds no reason consumers would reduce their television consumption given the ability to choose the channels they receive. The Further Report believes the introduction of the à la carte model would not change overall audience levels and therefore there is no reason to conclude consumption levels would drop. The Further Report also finds advertising revenues may increase because strong à la carte sales will indicate popularity and advertisers will no longer need to rely on the cable operator’s guess about a network’s popularity.

The final error the Further Report discusses is the overstatement by the Booz Allen study regarding the average price per cable channel. This mistake has been acknowledged by Booz Allen and confirmed by other economists. The error results from the failure of the Booz Allen study to net out the cost of broadcast stations when calculating the average cost of a channel under the à la carte model. The Further Report finds that even with this error if the à la carte model is only implemented on digital cable systems consumers’ could expect a 1.97 % decrease in their cable bills. This finding was not included in the 2004 Report.

In addition to discussing the above errors the Further Report examines several options under the à la carte model. The first option, mixed bundling, would give consumers the choice to purchase channels individually at a set price or to purchase the bundles provided by a MVPD. The Further Report

recognizes MVPDs already have some experience selling channels à la carte or in smaller bundles with purchase premium channels, pay-per-view programming, and Video-On-Demand programming. The benefits of mix bundling would include an increased choice for consumers—allowing consumers who are not interested in the bundles offered to participate in the à la carte model and purchase only the channels they want. The Further Report recognizes this option will alleviate many concerns expressed by the networks about their costs under a pure à la carte model.

Another option discussed by the Further Report is a themed-tiers model under which MVPDs would offer a number of tiers of digital programming with a particular theme. This model would allow a consumer to subscribe to the genre of programming that appeals to him or her. The Further Report finds this option would allow consumers to benefit from some of the economic advantages of bundling while still only paying for networks they find interesting.

Finally, the Further Report suggests subscriber-selected tiers as an option under the à la carte model. This option differs from the themed-tier model because subscribers are not restricted to the networks MVPD bundles together. Each tier would contain a prescribed number of channels for a set price and the consumer is able to fill the tier with the channels he or she prefers and would be smaller than the MVPD's bundles, which would also be available for purchase. The Further Report notes this option is already being offered by a few Canadian cable operators. Subscriber-selected tiers would allow consumers to avoid paying for networks they do not watch and would provide feedback to MVPDs and advertisers as to the popularity of each network.

The Booz Allen study, upon which the 2004 Report relied, contained many errors leading the FCC to inaccurate conclusions. Upon reexamination of the issue the Further Report concludes an à la carte model would benefit consumers by increasing consumer control over video programming. The Further Report's discussion of mixed-bundles, themed tiers, and subscriber-selected tiers offers potential benefits to consumers when compared to pure bundling and merits further consideration.

Summarized by M. Megan McCune

In re Children's Television Obligations of Digital Television Broadcasters, Order Extending Effective Date, 20 F.C.C.R. 20,611 (Dec. 16, 2005)

On December 16, 2005, the Federal Communications Commission ("Commission") adopted an Order that extended the effective date of the rules adopted in an earlier Report and Order and Further Notice of Proposed Rule-making ("Report and Order") a 2004 proceeding. *See* 19 F.C.C.R. 22,943 (Sept. 9, 2004). The extension comes in response to several petitions for recon-

sideration and for judicial review of the adopted rules.

The rules, adopted in the September 2004 Report and Order, addressed the obligations of digital television (“DTV”) broadcasters with respect to providing educational and informational programming for children. Six rules were promulgated in that Order. The first rule increased the children’s television obligation of DTV broadcasters’ choosing to multicast on their digital spectrum. The second rule limited the number of preemptions of children’s television allotted quarterly to both analog and digital broadcasters. The third rule required both analog and digital broadcasters to identify children’s programming on screen with an “E/I” symbol in order for the programming to count toward the broadcaster’s core children’s television obligation. The fourth rule obligated digital broadcasters to comply with commercial limits and policies in programming directed at children twelve and under. The fifth rule related to whether displaying Internet websites during children’s programming counts toward commercial time limits. The last rule defined “commercial matter” to include promotion of non-children’s educational and informational programming.

Opposition to the rules as adopted in the Order were opposed both by advocates for children’s television programming and by broadcast and cable industry members. Their disagreements led to the petitions for reconsideration and the judicial review currently underway. Since filing their petitions, those parties have notified the Commission that they are working together to reconcile their differences and may jointly recommend rules that would satisfy their respective concerns.

In response to this notification, the Commission found that postponing the effective date of the rules previously adopted would facilitate the rulemaking process. The extension would give the Commission time to consider any forthcoming joint proposals, prevent resources wasted by the industry in complying with rules that may no longer be valid, and render further litigation of the rules moot. In light of the efficiencies arising out of postponing the effective date of the rules, the Commission moved the rules’ effective date to sixty days after publication in the Federal Register of the Commission’s Order on Reconsideration.

Summarized by Gaetano Parrinello

In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Notice of Proposed Rulemaking, 20 F.C.C.R. 18,581 (Nov. 3, 2005)

On November 3, 2005, the Federal Communications Commission (“Commission”) adopted a Notice of Proposed Rulemaking (“Notice”) regarding the implementation of § 621(a)(1) of the Communications Act of 1934 as amended. The Notice comes in response to allegations that the current practices of cable local franchising authorities (“LFAs”) serve as a barrier to entry for potential competitive multichannel video programming distributors (“MVPDs”).

In the Notice, the Commission recognized that most consumers have considerable choice as to the source of their video services, but also noted that additional MVPD choices are beneficial to consumers. Of particular interest to the Commission in this proceeding is the ability, in light of the advances in broadband services, of companies traditionally viewed as telephone companies to enter and compete in the video market.

The Notice explains that traditional telephone companies seeking entry into the video market are faced with the initial regulatory hurdle of obtaining a cable franchise from the LFA. Telephone companies such as Verizon complain that the franchising process is an unreasonable delay and a barrier to their competitive entry to the MVPD market. Verizon specifically asserts that the process impedes widespread cable competition by requiring separate, time-consuming negotiations with thousands of LFAs. In addition, Verizon claims the process gives incumbent MVPDs the opportunity to prolong the franchise approval process for competitors and entrench themselves in the market by forcing build-out requirements upon potential competitors, and by subjecting competitors to LFA demands unrelated to the deployment of video services.

According to the Commission, however, many new entrants have been able to obtain cable franchises, and several states have or are considering laws allowing for expedited statewide franchising. Moreover, the Commission recognizes the importance of franchises, and seeks to balance the legitimate policy objectives of LFAs against the federal policy objective of fostering competition in multichannel video programming and broadband deployment.

The Commission, with this proceeding, endeavors to reconcile the alleged barriers to competitive entry faced by competitive MVPDs with the importance of LFAs in light of the overall federal policy objective of competition and broadband deployment. To this end, the Commission sought comment on how to implement § 621(a)(1), which prohibits LFAs from unreasonably refusing to award competitive MVPD franchises. In particular, the Commission is inter-

ested in comments regarding the current ability of competitors to obtain franchises, the Commission's authority to adopt rules in this regard, and the steps the Commission should take to prevent the franchising process from unreasonably interfering with competitive cable entry and rapid broadband deployment.

Comments in this proceeding were originally due January 17, 2006 and reply comments due February 16, 2006, however, due to a voluminous record, the Commission extended the date for filing reply comments to March 28, 2006.

Summarized by Clare Liedquist

WIRELESS

In re Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order, 20 F.C.C.R. 15,866 (Sept. 29, 2005)

In its September 29, 2005, Eighth Report and Order ("Order"), the Federal Communications Commission ("Commission") examined ongoing efforts to promote spectrum utilization and efficiency with regard to the provision of new services, including Advanced Wireless Services ("AWS"). The Commission previously proposed that the 2155–2175 MHz band should be designated for AWS use because of its adjacency to the 2110–2155 MHz band and because the allocation would complement the international allocation for a terrestrial component of advanced services at the 2110–2170 MHz band. The Commission noted considerable support for its proposal and cited propositions that the tentative 2155–2175 MHz band could be best used to promote new technologies, such as AWS in paired or unpaired configurations. As a result, the Commission decided that an additional spectrum was needed for AWS use. The Commission allocated the 2155–2160 MHz band to Fixed and Mobile Services to allow AWS services in the band. The Commission explicitly left open how the assignment of this new AWS service at 2155–2175 MHz would operate for further consideration in separate services rules proceedings. It also highlighted the possibility for negotiating new or modified agreements to provide for more flexible use of the 2155–2175 MHz spectrum with Canada and Mexico.

In the Fifth Notice, the Commission also sought comment on two specific relocation procedures. First, the FCC sought comment the applicable procedures relating to the relocation of Broadband Radio Service ("BRS") opera-

tions in the 2150–2160/62 MHz band. The Commission noted that any BRS relocation procedure must account for the unique circumstances facing the current operations and the new AWS licensees. As a result, the Commission proposed to require new AWS entrants to relocate BRS operations on a link-by-link basis allowing each entrant to determine its own schedule. Where that link-by-link basis would prove infeasible for certain operations, the Commission proposed requirements mandating that the AWS licensee relocate all incumbent BRS operations affected by the new AWS operations providing BRS operators with comparable facilities. The Commission further projected to apply the current relocation policies regarding stations with primary and secondary status to the BRS. The licenses of 2.1 GHz licensees would be modified and assigned 2.5 GHz spectrum in the same geographic areas. Because of current leasing arrangements between BRS-licensees and commercial operators, the Commission offered to allow incumbent BRS licensees to rely on the throughput, reliability, and operating costs of licensees in negotiating comparable facilities. In situations where BRS licensees continue to lease their spectrum to third parties after relocation, the licensee may include the lessee in negotiations, but the lessee would be barred from a separate right of recovery. The right of relocation for licensees in need of license renewal is contingent upon having the license renewed.

Second, the Commission sought comment on the procedures applicable to Fixed Microwave Service (“FS”) operations in the 2160–2175 MHz band. The Commission proposed to generally follow its relocation policies explained in *In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Second Memorandum Opinion and Order*, 9 F.C.C.R. 7797 (Nov. 28, 1994), *aff’d*, *Ass’n of Public Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) (“*Emerging Technologies*”), as modified by subsequent decisions. The Commission also weighed whether it should apply the single mandatory negotiation period applied to new technology entrants to FS relocation by AWS in the 2160–2175 MHz band. Alternatively, the Commission additionally sought comment as to whether each FS incumbent in the 2160–2175 MHz band should be afforded a separate, individually triggered, negotiation period in contrast with the existing relocation rules. With regards to incumbent Part 22 services, the Commission considered whether and how to harmonize the relocation rules for Part 22 point-to-point microwave links and Part 101 fixed services described in *Emerging Technologies*.

In the Order, the Commission required BRS licensees in the 2150–2160/62 MHz band to provide information on the construction status and operational parameters of each incumbent BRS system subject to relocation. The Commission cited the essential nature of providing reliable, public data of each incum-

bent system subject to relocation prior to planned auction of the 2150–2160 MHz band in 2006. BRS licensees will be required to submit information on: (1) the location and operating characteristics of BRS systems in the 2150–2160/62 MHz band; (2) other system characteristics of BRS incumbents (e.g., subscriber numbers and equipment types used); and (3) categories of services provided (e.g., one-way or two-way service, point-to-point or point-to-multipoint operations, data or analog video service). BRS licensees will be required to submit this information even if leasing the spectrum to third parties. Because the relocation is proposed on a link-to-link basis, the Commission will mandate BRS licensees to provide the number of links within the system for point-to-point and point-to-multipoint systems. BRS services will be forced to note the extent that BRS channels 1 and 2 are used as part of the same service. That information will be collected and made publicly available through the Commission’s Universal Licensing System. The Commission delegated authority to the Office of Engineering and Technology and the Wireless Telecommunications Bureau to issue public notices of the specific data required of the BRS licenses including the filing date and filing procedures for specific information.

Summarized by Michael Lang

***In re* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers; Automatic and Manual Roaming Obligations Pertaining to commercial Mobile Radio Services, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 15,047 (Aug. 24, 2005)**

The Federal Communications Commission (“FCC” or “Commission”) released this Memorandum Opinion & Order (“MO&O”) in an effort to revisit their policies on roaming for commercial mobile radio service (“CMRS”) providers. The MO&O closes WT Docket No. 00-193, which had been open since the release of a Notice of Proposed Rulemaking (“NPRM”) in 2000. The FCC used this docket to solicit comments regarding what the Commission’s role should be in terms of roaming regulations. The MO&O closed this document because the landscape of the CMRS marketplace has changed significantly since the comment period ended and the Commission viewed the comments in the docket as stale.

In order to refresh the roaming record, the Commission issued a new NPRM that focusing on the current state of roaming. The NPRM addressed two specific types of roaming: manual and automatic. With regards to manual roaming, the FCC sought comment on whether manual roaming is still used and to what extent automatic roaming has rendered it obsolete. The Commission also

sought input as to whether the mandatory roaming rule should be eliminated, either with or without an automatic roaming regulation in place, or, in the alternative, kept as a fallback provision for those situations when automatic roaming is unavailable.

The NPRM focused heavily on the need for an automatic roaming rule, soliciting comments from both those who would support such a measure and those who would oppose it. The Commission noted that recent mergers have changed the marketplace considerably and that these changes have had an impact on small and rural carriers. In framing the debate, the Commission endeavored to keep consumers at the forefront, inquiring as to the effect that the current roaming environment has had on the availability, quality, and price of roaming for consumers. The Commission also focused on how an automatic roaming requirement would affect businesses, especially whether a roaming regulation would add administrative costs or hamper developments in roaming technology or in the development of a CMRS provider's network generally.

The remaining questions were broken down into three main categories: roaming agreements; small and rural carrier concerns; and technical considerations. Under the roaming agreements category, the FCC framed its questions with a focus on avoiding discrimination in the marketplace. The Commission inquired whether there were sufficient roaming anti-discrimination policies and remedies in place and whether it is discriminatory to permit CMRS providers to offer roaming agreements to affiliates with different terms and conditions than non-affiliates. With regards to small and rural carrier concerns, the FCC voiced concern that recent mergers will allow large CMRS providers to use their market power to adversely affect roaming negotiations. As a result the Commission questioned whether asymmetrical roaming rates were discriminatory against smaller providers and whether it was acceptable to have rules that apply only in a regional or local basis. Finally, from a technical standpoint, the Commission queried how technological differences and upgrades between carriers will affect a roaming requirement and whether providers should only be mandated into roaming agreements with other providers using similar technology.

Summarized by Michael Saperstein

WIRELINER

***In re* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information; Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, Notice of Proposed Rulemaking, 21 F.C.C.R. 1782 (Feb. 10, 2006)**

On February 14, 2006 the Federal Communications Commission ("Commission") released this Notice of Proposed Rulemaking seeking comments on what steps, if any, it should take to further protect Customer Proprietary Network Information ("CPNI") from unauthorized disclosure to third parties. The Notice responds to a petition from the Electronic Privacy Information Center ("EPIC") expressing concern that current telecommunication carrier practices are insufficient in protecting CPNI.

The Commission defines CPNI as highly-sensitive personal information obtained by a telecommunications carrier in the course of providing service to its customers. Specifically, CPNI includes "information such as phone numbers called by a consumer; the frequency, duration, and timing of such calls; and any services purchased by the consumer, such as call waiting."

The Commission acknowledges its statutory obligation under 47 U.S.C. § 222 to protect CPNI from improper use and dissemination, and notes that it has already imposed rules and restrictions on telecommunication carriers in pursuance of such obligation. For example, the Commission already requires telecommunication carriers to obtain a customer's knowledge and consent before using or disclosing CPNI. The Commission also currently requires telecommunication carriers to instruct and train their employees about all the circumstances under which they are and are not allowed to disclose CPNI. In addition, the Commission stipulates that telecommunications carriers must maintain records of all instances in which CPNI was disclosed, and they must certify annually and publicly their compliance with the carrier's CPNI requirements.

But, in light of the petition from EPIC, the Commission seeks comments on whether its current rules and restrictions protecting against improper use of CPNI are sufficient. EPIC asserts that CPNI is not adequately protected despite the Commission's current rules. Namely, EPIC points out that numerous websites advertise the sale of personal telephone records. These websites claim to be able to provide phone call records without the caller's knowledge or consent.

If its current CPNI rules and restrictions are insufficient, the Commission seeks comments on what additional steps it can take to adequately protect

CPNI. Specifically, the Commission seeks comments about the feasibility and advisability of the five forms of security measures EPIC suggests requiring of telecommunication carriers: (1) using consumer-set passwords (as opposed to common biographical data that are readily available through public records); (2) maintaining a record of all instances when a customer's records have been assessed; (3) encrypting all personal records; (4) limiting data retention; and (5) notifying customers when their CPNI may have been improperly disclosed. In addition to comments on these suggestions, the Commission seeks additional proposals to enhance security and authentication standards for access to CPNI.

The Commission finds extremely disturbing the possible availability of CPNI for a price and seeks a solution that sufficiently protects CPNI. The Commission, however, also acknowledges its responsibility to telecommunications carriers and does not want to unduly burden them with regulations that are unnecessarily broad. Therefore, the Commission requests that proposals submitted assess the burdens as well as the benefits of any specific measure suggested. Lastly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2000), the Commission seeks comments on how additional measures may affect small entities economically.

Summarized by Clare Liedquist

In re Federal-State Joint Board on Universal Service; High-Cost Universal Service Support, Notice of Proposed Rulemaking, FCC 05-205, CC Docket No. 96-45, WC Docket No. 05-337 (Dec. 9, 2005)

In this Notice of Proposed Rulemaking (“NPRM”), the Federal Communication Commission (“FCC” or “Commission”) seeks comment on a number of issues remanded by a federal appeals court earlier in the year regarding the mechanism for distributing universal service support for non-rural carriers serving high-cost areas. In response to the Tenth Circuit Court of Appeal’s decision in *Qwest II v. FCC*, 398 F.3d 1222 (10th Cir. 2005), the Commission seeks comment on how to define the terms “sufficient” and “reasonably comparable.” Initially, the FCC defined the term “sufficient” as enough federal support to enable states to achieve reasonable comparability of rural and urban rates in high-cost areas served by non-rural carriers, and defined “reasonably comparable” in terms of a national urban residential rate benchmark. In *Qwest II*, the Tenth Circuit found the Commission’s definitions inadequate. On remand, the court directed the Commission to consider the range of principles in § 254 of the Communications Act and define the terms in a manner that advances universal service.

In addition, the Commission seeks comment on the non-rural high-cost support mechanisms. The current mechanism must be invalidated because it rests on an inadequate definition of “reasonably comparable.” A significant objective of a newly developed mechanism is to induce state action to preserve and advance universal service. Finally, the Commission also seeks comment on a proposal from the Puerto Rico Telephone Company, Inc. (“PRTC”) for the Commission to adopt a non-rural insular mechanism.

In attempting to define the term “sufficient,” the court directed the Commission to consider all of the principles of § 254(b). However, the court found it permissible for the Commission to give greater weight to one principle over another. The Commission was also to take into account whether any principles conflicted with each other and, if so, how to balance the principles in order to resolve the conflict. The Commission should justify any approach it takes.

The court’s rejection of the Commission’s definition of “reasonably comparable” was based on the finding that the Commission erred when premising its consideration of the term “preserve” on the disparity of rates existing in 1996 while ignoring its concurrent obligation to advance universal service—a concept that included a narrowing of the existing gap between urban and rural rates. In defining the term “reasonably comparable,” the Commission seeks comment on whether to obtain additional data on rates; if additional rates are to be obtained, comments regarding the source of the data; and comments regarding whether reasonably comparable rates should be defined in terms of local rates only.

The Commission also seeks comment on the non-rural high-cost support mechanism. The *Qwest II* court found the current mechanism invalid because it rested on the inadequate definition of “reasonably comparable.” The FCC seeks comment regarding a rate-based universal service support mechanism. In particular, the Commission wants comment on how a rate-based support mechanism would be designed; what elements should such a rate mechanism include; and whether such a rate should include other mandatory fees and taxes.

Finally, PRTC requests high-cost universal service support through a non-rural insular support mechanism. PRTC requests, pending the Commission’s review of its high-cost support program, that the Commission adopt, on an interim basis, a non-rural insular mechanism based on embedded costs. PRTC claims that high-cost support is essential for maintaining and expanding affordable telephone service in Puerto Rico. The Commission seeks comment on its tentative conclusion that it has authority to establish a new interim support mechanism for non-rural insular areas based on embedded costs. The Commission seeks comment on what impact the mechanism would have on the Universal Service Fund. The Commission also seeks comment on the comparison

between the proposed mechanism and the one currently in force.

If the Commission adopts the tentative conclusion to establish a non-rural insular mechanism it will need a definition of “insular areas.” The Commission proposed defining “insular areas” as “islands that are territories or commonwealths of the United States.” The Commission seeks comment on whether the definition should exclude sovereign nations that are not subject to the laws of the United States. The Commission tentatively concluded that Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands are properly included in the definition of insular areas. Carriers currently serving these areas receive support based on embedded costs under the rural high-cost mechanisms and would not be affected by the tentative conclusion.

Summarized by Raymond Milani

In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 F.C.C.R. 18,290 (Oct. 31, 2005)

On October 31, 2005, the Federal Communications Commission (“FCC” or “Commission”) released a Memorandum Opinion and Order (“Order”) approving the merger of SBC Communications Inc. (“SBC”) and AT&T Corp. (“AT&T”) collectively (“Applicants”). In so doing, the Commission analyzed the effects the merger might have upon competition in the relevant communications marketplaces; examined the potential public interest benefits resulting from the merger that may flow to consumers; and, conditioned upon compliance with a Department of Justice (“DOJ”) consent decree and other voluntary concessions, concluded that the transfer of control would serve the public interest, convenience, and necessity.

According to the Order, two reviews were conducted prior to approval of the merger. The DOJ’s, Antitrust Division first reviewed the merger on the limited issue of whether it would substantially lessen competition. The DOJ concluded that where SBC and AT&T were the only direct connections to a particular building, the merger would have such an effect. A consent decree was entered between the Applicants and the DOJ wherein the Applicants agreed to divest assets in the form of Indefeasible Rights of Use (“IRUs”) to those buildings, thus alleviating the anticompetitive effects and allowing DOJ approval of the merger.

The Commission reviewed the merger on the broader issue of whether approval would serve the public interest, convenience, and necessity. Essentially, this entailed determining whether the transaction would harm the public interest through anticompetitive effects, and weighing those harms against potential

public interest benefits flowing from the transaction.

The Commission began their competitive analysis review by identifying key services provided by the Applicants to include special access, retail enterprise, mass market, Internet backbone, wholesale interexchange, and international services. Next, the Commission identified the relevant markets and market participants, and analyzed the likely competitive effects of the merger upon each of the key services *seriatim*. Like the DOJ review, the Commission analysis found that where SBC and AT&T had sole access to special access lines, competition would be harmed and thus the public interest not served by approval of the merger. Save special access, the Commission found that the transfer would not produce anticompetitive effects in the remaining key services.

This is not to say that the Commissioners were in unanimous agreement regarding the merger's potential harm to the public interest. Rather, while Chairman Martin and Commissioner Abernathy viewed there to be little potential harm, Commissioners Adelstein and Copps expressed, in separate concurring statements, their reservations regarding approval of the transaction. Seemingly predicting the latter Commissioners' apprehensions, the Applicants set forth a set of voluntary concessions with which they would comply upon approval of the transfer of control. The concessions focused primarily on issues related to the Commission's Internet Policy Statement, such as making "naked" stand-alone DSL available to consumers as an unbundled network element ("UNE") and maintaining open network peering policies, but also encompassed short-term rate freezes and input caps in the areas of special access and UNEs respectively. The Commission deemed these commitments to be in the public interest.

The Commission found the approval of the merger would likely result in several merger-specific benefits that would be in the public interest. Specifically, the Commission identified enhanced national security and government services, efficiency related to vertical integration, economies of scope and scale, and cost synergies as likely benefits to the public interest flowing specifically from this merger. Although the Commission found it difficult to precisely quantify the magnitude of some of the benefits, they nonetheless held that the merger-specific benefits flowing to the public were likely to be significant.

Having identified the potential public harms and benefits of the proposed merger, the Commissioners were divided as to the outcome of the balance. Chairman Martin and Commissioner Abernathy viewed the benefits as outweighing the harms, while Commissioners Adelstein and Copps found it to be a closer call. After postponing the decision for several days, the Commissioners were able to reconcile their differing viewpoints. The resulting agreement imposed the aforementioned DOJ consent decree, along with the Applicants'

voluntary commitments, as express conditions for the approval of transfer of control. With these conditions in place, the Commission voted to approve the applications.

Summarized by Gaetano Parrinello

In re Verizon Communications Inc. and MCI, Inc.; Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 F.C.C.R. 18,433 (Oct. 31, 2005).

In this Memorandum Opinion and Order, the Federal Communications Commission (“FCC” or “Commission”) evaluated the merits of the applications for the proposed merger of Verizon Communications, Inc. (“Verizon”) and MCI, Inc. (“MCI”). Under the proposed agreement, MCI would become a wholly-owned subsidiary of Verizon. The agreement calls for MCI to merge with and into Verizon, leaving Verizon as the surviving company. Coming off the heels of high profile mergers such as SCB with AT&T and Sprint with Nextel, this merger would continue an apparent trend of ongoing change in the industry. In their review, the FCC focused on the effects the merger would have on competition in a range of communications markets, as well as on the effects on public interest, convenience, and necessity. The Commission concluded that the proposed transfers would not only benefit the public interest, but that they were unlikely to result in anticompetitive effects in relevant markets. As a result, the Commission approved the transfer applications.

MCI offers mass markets and business customers a range of services within the communications industry, including local voice services, domestic and international long-distance services, data services, and IP virtual private networks (IP-VPN), among others. Further, they provide managed services including network design, maintenance, security, and web hosting. MCI holds a number of Commission licenses and authorizations both domestically and internationally, with facilities throughout parts of North America, Europe, Africa, and the Asia-Pacific region. Formerly known as WorldCom, Inc., the company filed for bankruptcy in 2002, and emerged in 2004 as MCI, rearranged into three new business segments—Enterprise Markets, U.S. Sales and Service, and International and Wholesale Markets.

Verizon, a holding company, provides communication services in the United States and abroad through subsidiary companies. It offers local, long-distance, high-speed Internet and wireless services, either alone or in various packages, throughout twenty-eight states and the District of Columbia. It also has a stronghold over the wireless market as a majority owner of Verizon Wireless, which boasts 43.8 million voice and data subscribers throughout the United States. For the year ending December 31, 2004, Verizon reported \$71.3 billion

in operating revenues and a net income of \$7.8 billion.

The merger of Verizon and MCI would combine one of the largest regional Bell Operating Companies with one of the largest providers of interexchange and competitive local service. More specifically, it would unite Verizon's broadband, wireless, and local wireline networks with MCI's Internet backbone and global reach to the benefit of the public. The application contends that this will benefit large businesses by creating a much stronger competitor with broader network reach and competitive financial resources. It would also benefit both government and national security through enhanced investment in national and international communications infrastructure used by the Departments of Defense and Homeland Security. In addition, mass market consumers would benefit from the establishment of the nation's most advanced broadband platform, able to deliver next-generation multimedia services throughout the nation. The transaction would also generate synergies that would save costs and enhance revenue opportunities, yielding a net present value of \$7 billion. The Commission agreed that, pursuant to §§ 214 and 310(d) of the Communications Act, the merger would indeed provide numerous public interest benefits that outweigh any limited public harms.

In addition to examining the effects the merger would have on public interest, the Commission must also consider how it would affect competition, both horizontally and vertically. In terms of relevant product markets, the Commission evaluated the effects on "Type I" special access services (those which are offered wholly over a carrier's own facilities) and "Type II" special access services (those offered using a combination of the carrier's own facilities for two segments, with the third segment being provided for by another carrier). It also took into account relevant geographic markets and market participants, ultimately concluding that the merger is not likely to have anticompetitive effects in any relevant markets. While it recognizes that there will be an increase in market concentration in several areas (including mass market services and special access services), the Commission finds that any possible harms that may arise from the merger do not justify its denial.

Overall, the Commission gives significant weight to the positive benefits that will arise from the proposed merger when taken as a whole. It further accepts the commitment the Applicants offered regarding special access, stand-alone DSL, Internet backbone services, and the Commission's Internet Policy Statement.

With the acceptance of the proposed merger of Verizon and MCI, the Commission appears to favor the ongoing changes pervading throughout the communications industry.

Summarized by Jennifer K. Valentin

***In re* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order*, FCC 05-170, WC Docket No. 04-223 (Sept. 16, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-170A1.pdf.**

In 2005, Qwest Corporation (“Qwest”) petitioned the FCC for forbearance from certain required regulatory and statutory obligations based on its status as an incumbent local exchange carrier (“ILEC”) in the Omaha Metropolitan Statistical Area (“MSA”). Qwest had filed the petition pursuant 47 U.S.C. § 160(c) of the Telecommunications Act of 1996 (“the Act”) which allows telecommunication carriers to petition the FCC requesting forbearance from regulatory obligations if there is evidence of competition in the telecommunications marketplace where the carrier is providing services.

Qwest requested forbearance from dominant carrier regulations related to its mass market services and enterprise services, as well as forbearance from obligations enunciated under §§ 251 and 271 related to its provision of services in the Omaha MSA. In particular, Qwest requested forbearance from requirements under §§ 271(c)(2)(B)(i)–(vi) and (xiv).³ In a September 2005 decision, the FCC granted Qwest’s request for forbearance from dominant carrier obligations in relation to its provision of mass market exchange access services and its mass market broadband Internet access services in the Omaha MSA. It also granted Qwest’s request for forbearance from certain obligations under §§ 251(c)(3) and 271 of the Act.

The FCC must forbear from applying any provision of the Act if it determines that “(1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to

³ Section 271 requires telecommunications providers that offer interLATA services to satisfy fourteen “Competitive Checklist” requirements enunciated in § 271(c)(2)(B) of the Act prior to gaining authorization from the FCC to provide access or interconnection services to other telecommunications carriers. After the providers obtain § 271 authority, the initial requirements become ongoing obligations. The requirements that Qwest requested forbearance from were: (1) § 271(2)(B)(i), Interconnection in accordance with the requirements of §§ 251(c)(2) and 252 (d)(1); (2) § 271(2)(B)(ii), Nondiscriminatory access to network elements in accordance with the requirements of §§ 251(c)(3) and 252(d)(1); (3) § 271(2)(B)(iii), Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of § 224; (4) § 271(2)(B)(iv), Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services; (5) § 271(2)(B)(v), Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services; § 271(2)(B)(vi), Local switching unbundled from transport, local loop transmission, or other services; and (6) § 271(2)(B)(xiv), Telecommunications services are available for resale in accordance with the requirements of §§ 251(c)(4) and 252(d)(3).

protect consumers; and (3) forbearance is consistent with the public interest.” 47 U.S.C. § 160(a). In determining whether or not to grant a request, the FCC must consider whether forbearance would promote competitive market conditions.

The FCC applied the forbearance criteria to each of Qwest’s requests in order to determine whether it was a dominant or non-dominant carrier in the Omaha MSA. The FCC determined that dominant carrier regulations for mass market exchange access and broadband Internet access services were unneeded due to the competitive nature of the marketplace. In particular, it granted Qwest relief from regulations concerning dominant carrier price caps, rate of return, tariffing, and rate averaging because they were no longer necessary to ensure that prices in the marketplace are just and reasonable. The FCC conditioned its grant of forbearance on Qwest’s compliance with competitive carrier regulations. The FCC did not grant Qwest’s request for forbearance from regulations in connection to its enterprise services because it determined that Qwest failed to provide enough area-wide information about enterprise services in the Omaha MSA.

The FCC also granted Qwest’s request for forbearance from its obligations under §§ 271(c)(2)(B)(i)–(vi) and (xiv). It found that Qwest had satisfied the § 160(d) mandate that all regulatory requirements be “fully implemented” within the marketplace based on Qwest’s § 271 authority in Nebraska and Iowa. Subsequently, Qwest’s petition for forbearance was granted. The FCC also found sufficient facilities-based competition in the Omaha MSA and therefore granted Qwest’s petition for forbearance from § 251(c)(3) requirements. It did not find that Qwest satisfied any other criteria for forbearance from obligations under §§ 251(c)(1), (2), (4), (5), and (6). Finally, the FCC rejected Qwest’s petition for forbearance from regulation as an ILEC. The FCC determined that Qwest failed to sufficiently identify the objects of its request or provide support for how the request would serve the public’s interest.

Summarized by Stefanie Zalewski

