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**UPDATE ON RECENT HILL, FCC
AND COURT DEVELOPMENTS**

by

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The Network Economy

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I. THE HILL.

A. Legislation.

1. Renewal of the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”).
 - Must pass this year.
2. FCC Reform.
 - HR 2183 – Barton/Stearns bill would (among other things) require text of proposed rules to be subject to 30-day comment and 30-day reply comment period, and would require FCC to publish decisions within 30 days of adoption.
3. Broadband Conduit Deployment Legislation.
 - HR 2428 and S. 1266.
 - Would require broadband conduit installation in new federally-funded highway projects.
4. State and Local Taxes.
 - a. Cell Tax Moratorium Legislation.
 - HR 1521 – House Subcommittee hearing on 6/9.
 - S. 1192.
 - b. Permanent ITFA Legislation.
 - HR 1650 and S. 43.
 - c. SSTP Legislation.
 - Not yet introduced.
 - Issue: whether telecom/cable taxes and fees will be included.
 - d. BAT Legislation (HR 1083).
 - e. DBS Tax Preemption Legislation.

- HR 1019.
 - Would require “non-discriminatory” state and local taxation of DBS and cable.
5. Federal Spectrum Audit Legislation.
- S. 649 (Kerry).
 - H.R. 3125 (Waxman).
6. Wireless Consumer Protection Legislation.
- Preemption and unfunded mandate concerns.
7. “Connecting America Act of 2009.”
- S. 1447 (Hutchinson).
 - Would preempt local zoning authority over collocation or changes to existing towers.
 - Would transfer \$1 billion of the ARRA’s \$7.2 billion in broadband grant funds into private sector tax credits.
8. Other Possible Cell Site Zoning Preemption Legislation.
- Would set shot clock on applications.
9. Possible PEG Reform Legislation.
10. USF Reform.
- B. Hearings & Other Issues.**
1. Confirmation Hearings.
- FCC, RUS and NTIA nominees have been confirmed.
2. FCC and ARRA Oversight.
- Will be ongoing.
- II. THE FCC.**
- A. DTV Transition.**

- Occurred 6/12.
- Relatively few problems.
- Clean-up issues.
 - Signal coverage and reception.
 - Low-power TV transition.

B. ARRA and Broadband.

1. *Broadband Data Collection,*
WC Docket No. 07-38
2. *FCC's Consultative Role in the Broadband Provisions of the Recovery Act,*
GN Docket No. 09-40
3. *International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act,*
GN Docket No. 09-47
4. *Notice of Inquiry, A National Broadband Plan for Our Future,*
GN Docket No. 09-51

On September 1, the Commission released a Public Notice in GN Docket No. 09-51, entitled "The Commission Welcomes Responses to Staff Workshops," encouraging anyone interested to respond "to the facts and reasoning asserted during [the FCC's broadband] workshops, or to raise facts and reasoning that should have been discussed." The notice sets deadlines as follows:

Responses to workshops held from August 6 to August 20 should be filed with the Commission by September 15.

Responses to workshops held from August 25 to September 15 should be filed with the Commission by October 2.

Responses to workshops held from September 16 to October 20 should be filed with the Commission by October 30.

5. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket 09-137.

Comments were filed on September 4. In their comments, CTIA and PCIA raised issues of interest related to CTIA's pending petition to place a "shot clock" on local cell tower site zoning decisions (WT DN 08-165) and CTIA's pending efforts to persuade Congress to enact a cell tax moratorium.

CTIA argued at some length, complete with supporting data, that "wireless broadband is growing exponentially faster than any other category of broadband service," that "mobile broadband usage is skyrocketing" and "will grow at a rate about one hundred times faster than [wireless] voice traffic over the next ten years," and that the number of cell sites is growing apace, with an average of "one cell site for every 1,116 estimated wireless subscribers in the United States." PCIA argued the same. This data would seem to strongly support local governments' positions that local zoning requirements are *not* impeding wireless broadband deployment, and that state and local wireless taxes are likewise *not* impeding wireless broadband deployment. (The data also suggest that, unless wireless broadband data services are included in state and local wireless tax bases, state and local government tax revenue budgets will be denied the benefit of almost all future wireless industry revenue growth.)

Not surprisingly, however, CTIA and PCIA seek to have their cake and eat it too. Thus, although CTIA and PCIA claim that wireless broadband is enjoying rock-star subscriber and deployment growth, they nevertheless argue that the FCC "can facilitate wireless broadband infrastructure deployment" by granting CTIA's pending "shot clock" preemption petition, and by "clarify[ing] and affirm[ing]" its pole attachment rules to make clear that they require pole owners to allow pole-top attachment of wireless facilities, and at rates that are "as low as possible."

C. *Fostering Innovation and Investment in the Wireless Communications Market, GN Docket No. 09-157.*

On August 27, the FCC released a new Notice of Inquiry on "Fostering Innovation and Investment in the Wireless Communications Market" (new DN 09-157). This new NOI is also a part of the FCC's pending National Broadband Plan proceeding (DN 09-51). The NOI makes for interesting reading, and asks a lot of intriguing questions about spectrum policy. But some of the questions asked in a few paragraphs – primarily ¶¶ 11 & 52-53 – could, and may well, be construed by the wireless industry as an opening to continue their attack on local wireless antenna/tower zoning practices.

Comments are due September 30, and reply comments are due October 15.

- D.** *The PEG Declaratory Ruling Petitions*, MB Docket No. 09-13, CSR-8126 (ACM *et al.*), CSR-8127 (Lansing), and CSR-8128 (Dearborn *et al.*).
1. The ACM and Lansing petitions challenge AT&T's PEG product.
 2. The Dearborn petition, a referral from Mich. Dist. Court, involves Comcast's "digital slamming" of PEG channels.
 3. A related "sleeper" proceeding: *IP-Enabled Services*, WC Docket No. 04-36, where SBC (now AT&T) has pending a petition for declaratory ruling, filed on Feb. 4, 2004, that all "IP platform services," including video services, are subject to Title I but are exempt from other Communications Act titles, including Title VI.
- E.** *CTIA's Wireless Siting Preemption Petition*, WT Docket No. 08-165.
- F.** *FCC's Annual Wireless Competition Report*, WT Docket No. 09-66.

On August 27, the FCC released an NOI, as well as the Commissioners' separate statements, seeking comment for the FCC's annual report to Congress required by the Omnibus Budget Reconciliation Act of 1993. This NOI seeks to expand the scope of the FCC's previous annual wireless competition reports, both in the scope of the types of commenters who might participate, and in the scope of wireless-related markets it addresses. Thus, the FCC

"invites new stakeholders and interested parties – those who might not otherwise have participated with the prior, narrower analytic scope – to provide further input [via this NOI]. Such parties may include application providers, equipment and device manufacturers, consumer groups, new content providers, software developers, analysts, and academics."

The NOI also for the first time seeks comment and data concerning markets "adjacent" to the wireless service market itself, including "upstream" markets for wireless inputs (such as cell towers, backhaul and transport facilities) and "downstream" markets (such as handset devices, mobile applications, content and online commerce).

The good news is that the NOI doesn't appear to mention explicitly either local zoning requirements or state and local taxes and fees as barriers to wireless deployment or growth. The bad news is that the NOI does ask sufficiently broad questions – concerning any structural or other problems in the markets for cell sites, towers and backhaul facilities and information and data concerning "barriers to entry or growth" in the wireless market, including any "regulatory barriers to entry or growth" – that industry can, and likely will, construe them as an invitation to continue its assault on local zoning requirements and fees and taxes.

Comments are due September 30; reply comments are due October 15.

- G.** *Consumer Protection and Disclosure, Truth-in-Billing and Billing Format, and IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, & WC Docket No. 04-36.

On August 28, the FCC released an NOI on Consumer Information and Disclosure and Truth-in-Billing (“TIB”). This NOI is broad-ranging, asking for comment on a variety of consumer protection issues relating to communications services of all kinds, including broadband and IP-enabled services. The FCC currently has TIB rules only for landline and wireless telecom carriers, and their application to wireless service is more limited. Moreover, the adequacy of those TIB rules has been questioned.

The FCC seeks comment on whether any changes should be made to the TIB rules. Of perhaps even more interest, the FCC also asks whether the TIB rules should be extended to VoIP, broadband, subscription video services (*i.e.*, cable and DBS) and bundled services.

The NOI doesn’t appear to directly ask about whether provider practices in the itemization of state and local taxes and fees are misleading or a problem, but it does note the FCC’s prior tentative (but as yet unadopted) proposal to impose point-of-sale requirements about disclosure of “non-mandated line items” and “government mandated surcharges.” The NOI also notes apparent “consumer confusion” about “line-item charges associated with federal regulatory actions, such as universal service, local number portability, 911 and access charges.” The state and local tax/fee itemization issue is likely to arise in the comments, however, and local governments should make sure that any FCC proposals on that issue are accurate (*e.g.*, they don’t confuse charges imposed on the provider with charges imposed on the subscriber but collected by the provider) and do not have any preemptive effect on how providers must calculate what they owe in local fees or taxes. (This is an analogue to the “Dallas” franchise fee issue.)

You can expect industry in its comments to take the position that no new TIB rules are necessary, but that if they are, they should be preemptive – *i.e.*, that they preempt any state or local deceptive trade practice or other law. That will need to be challenged.

Comments are due October 13; reply comments are due October 28.

- H.** *Level 3 Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted under Section 253*, WC Docket No. 09-153.

On August 25, the FCC released a Public Notice announcing the comment and reply dates on Level 3’s petition for declaratory ruling that certain right-of-way rents imposed by the New York State Thruway Authority (“NYSTA”) are preempted under Section 253.

This is a troubling petition for local governments. To date, the FCC has steered clear of assessing what is fair, reasonable, and non-discriminatory ROW compensation under § 253(c).

Local governments have consistently taken the position that the courts, not the FCC, have jurisdiction over § 253(c) issues. Moreover, local governments have also argued that even if the FCC did have concurrent jurisdiction with the courts on § 253(c) issues, courts, rather than the FCC, are better positioned to make the inherently fact-bound determination of what is fair and reasonable, and non-discriminatory ROW, compensation in a particular instance.

This petition would pose the risk of the FCC once again intervening in § 253 ROW compensation disputes. Level 3's "broadband" angle raises the stakes, in two different ways. First, the petition's "broadband" angle could prove appealing to many who would view state and local government ROW fees as an easy scapegoat for delays in broadband deployment and thus a convenient target for federal "broadband plan" preemption. Second, § 253 only applies to "telecommunications services," and the FCC has ruled that broadband is not a "telecommunications service." Thus, Level 3's petition will raise the issue of whether § 253 can be expanded to broadband.

The Petition appears to be the culmination of a long-simmering dispute between Level 3 and its predecessors-in-interest and NYSTA. Level 3 seems to have learned the lesson of the 9th Circuit's *Sprint Telephony* and the 8th Circuit's *Level 3* decisions and has supplied lots of facts ostensibly supporting its § 253(a) claim of "prohibitive" effect.

Moreover, Level 3 has cleverly weaved into its petition an argument clearly designed to appeal to the new FCC's broadband agenda, arguing at some length about how NYSTA's actions frustrate its ability to apply for a broadband grant in upstate NY under the Recovery Act broadband grant programs and, more generally, how NYSTA's actions are contrary to both the Recovery Act's broadband goals and the FCC's broadband goals. Equally troubling is that Level 3 seeks to broaden the reach of the FCC ruling it seeks beyond the NYSTA issue, ominously claiming that, "Establishing that there is a federal limit on right-of-way fees will also help facilitate broadband deployment and investment nationwide, not just along the New York State Thruway."

Level 3's petition presents a host of critical legal issues for local governments. While by no means an exhaustive list, the following leap to mind immediately: (1) whether the FCC has any jurisdiction over § 253(c) ROW compensation issues (local governments have always argued not, courts are split, and the FCC has never squarely answered the question); (2) whether § 253 even applies to broadband at all (local governments would argue not, since broadband is not a "telecom service", and providers can't have it both ways by avoiding Title II "telecom service" regulation yet gaining the protective Title II benefits of § 253); (3) whether ROW compensation must be related to the costs of ROW use (again, courts are less than clear on this issue); and (4) whether a § 253 claim can be waived by a party's (here, Level 3's predecessor-in-interest) signing of an agreement releasing any such claims (if Level 3's argument to the contrary is accepted, no local ROW agreement will be worth the paper it's written on).

Comments are due October 15, and reply comments are due November 5.

- I. Public Safety 700 MHz D-Block Re-Auction Proceeding, WT Docket No. 06-150 & PS Docket No. 06-229.
- J. Broadband “White Spaces” Proceeding, ET Docket No. 04-186.
- K. Video Franchising Proceeding, MB Docket No. 05-311.
 - Petition for recon. of 2d R&O (applying some, but not all, of the 1st R&O to incumbent cable operators) still pending.
- L. Forthcoming Inquiry Into Wireless Handset Exclusives.
- M. Other Carrier-Related Issues.
 - USF reform.
 - Overhaul of inter-carrier compensation.
 - Special access rates.
 - VoIP state USF Fee issue.

III. THE COURTS.

- A. The Supreme Court.
 - 1. Appeal of FCC *Video Franchising Order – Alliance for Community Media et al. v. FCC*, No. 08-1027 (U.S. filed Feb. 10, 2009).
 - Cert. was denied on 6/15.
 - 2. Section 253.
 - *Level 3 Communications LLC v. City of St. Louis*, No. 08-626 (U.S. filed Nov. 7, 2008).
 - *Sprint Telephony PCS v. County of San Diego*, No. 08-759 (U.S. filed Dec. 10, 2008).
 - Cert. was denied in both on 6/29.
 - 3. Indecency – *FCC v. Fox Television Stations*, No. 07-582 (U.S. filed Apr. 28, 2009).
 - The “fleeting expletive” case.

- Supreme Court reversed and remanded on APA grounds, holding that the FCC's change in policy with respect to "fleeting expletives" was consistent with the APA.
- Court did not reach First Amendment issue, but teed that issue up for remand to the Second Circuit and, perhaps ultimately, for the Supreme Court itself.
- On May 4, Court granted cert. in and remanded *FCC v. CBS*, No. 08-653 (U.S. filed Nov. 18, 2008) (a/k/a, the Janet Jackson "wardrobe malfunction" case), to the Third Circuit in light of the *Fox* decision.

B. The Courts of Appeal.

1. *Comcast c. FCC*, No. 08-1114 (D.C. Cir. filed Aug. 28, 2009).

The court granted Comcast's petition and vacated the FCC's cable system ownership rule that capped at 30% the market share of all cable subscribers nationwide that any single cable television operator may serve. The outcome was expected. Back in 2001, the DC Circuit rejected and remanded the FCC's first attempt to justify the 30% cap. *Time Warner Entertainment v. FCC*, 240 F.3d 1126 (DC Cir. 2001). In that decision the court had found the FCC's 30% cap arbitrary and capricious because the FCC had failed to take into account the effects of DBS in its market analyses, and instructed the FCC to do so on remand. Importantly, however, the court left the FCC's 30% cap in effect during the remand.

On remand, the FCC made a few adjustments to its formula, retained the 30% cap, and offered new justifications for that cap. On appeal, the court was clearly irritated with the FCC, finding that the FCC's remand decision was again arbitrary and capricious because, at least in the court's view, the FCC had only come up with reasons why DBS growth wasn't relevant rather than taking into account DBS growth as the court had instructed it to do back in 2001. And the court found the FCC's reasons for not giving much weight to DBS wanting, both factually and logically. (The opinion is an excellent example of how courts, if they don't like an agency's decision, recite, but largely ignore, *Chevron* deference. And when it comes to regulation vs. deregulation, the DC Circuit almost never likes any "regulatory" agency decision.)

The most interesting aspect of the decision is perhaps the relief ordered by the court. The panel was so ticked off by what they perceived as the FCC's refusal to follow its earlier instructions that they agreed that the FCC's ownership rule should be vacated, rather than left in place while the

FCC considers the matter again on remand. (Judge Randolph wrote separately to set forth his view that he thought vacating the rule entirely was mandatory rather than discretionary on the court's part.)

As a result of the court's decision, there now is no longer any FCC cable ownership cap at all. While the FCC may attempt to create a new ownership cap, the DC Circuit's rulings will make that very difficult for the FCC to justify. At a minimum, any new rule would have to take DBS and telco-provided video into account, meaning that to have any chance of being defensible in court, any new cap would have to be substantially larger than 30% – at least 40% and probably higher, leaving plenty of room for new cable industry consolidation. Whether and when the FCC will make the effort, and with what new cap, are too early to predict.

Of course, antitrust review, and potential challenge, of any such new cable industry mergers would also still be available, and the Obama Administration's Antitrust Division has indicated a willingness to be more aggressive than its predecessor in looking into mergers generally, and communications-related ones in particular. But even in the antitrust, rather than the FCC arena, antitrust enforcers would likely encounter courts that, based on years of recent merger-friendly precedent, would not be overly receptive to antitrust challenges to cable industry mergers. That's not to say that such challenges won't occur or that they won't be successful, but it does mean that turning the giant ship of years of lax antitrust enforcement will not be an easy or fast endeavor. Patience and persistence (and perhaps some judicial turnover) will be required.

2. *T-Mobile USA, Inc. v. City of Anacortes*, No. 08-35493 (9th Cir. July 20, 2009)

The City of Anacortes (the "City") appealed the district court's determination that the City's denial of an application by T-Mobile to erect a 116-foot monopole antenna at a particular location violates 47 U.S.C. § 332(c)(7)(B). The district court found that T-Mobile's proposal was the least intrusive means to close a significant gap in its wireless service in the City, and that the City's denial was not supported by substantial evidence. The Ninth Circuit affirmed but on somewhat difficult grounds. It reasoned that, although the district court did not have the benefit of the court's opinion in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*) ("*Sprint II*"), and therefore failed to recognize that the City's denial of the application was supported by substantial evidence, the district court nevertheless properly concluded that the City's denial of the application violated § 332(c)(7)(B) because the City failed to rebut T-Mobile's showing that the denial of the application amounted to an effective prohibition of wireless services.

A few notes about this case: (1) In light of *Sprint II*, T-Mobile dropped its § 253 claim and relied only on § 332(c)(7); (2) the case provides a good example of the limits of the protection that *Sprint II* offers local governments – if the wireless applicant submits information showing the lack of available and feasible alternative sites, the burden of rebutting that showing shifts to the City, a burden the City failed to carry in this case; (3) the City seems to have been done in, in no small part, by the statements of its own consultant and its own Police Chief and school district undermining the City’s claim of the feasibility of alternative sites; and (4) the court’s apparent discounting of those alternative sites that were outside the City limits seems, to me at least, to be contrary to the statute.

3. *NCTA v. FCC*, Nos. 08-1016 & 08-1017 (D.C. Cir. filed May 26, 2009).
 - Upheld FCC’s decision in *Exclusive Contracts*, 22 FCC Rcd 20235 (2007), prohibiting exclusive contracts between cable operators and MDU owners and preempting preexisting exclusives.
 - Read 47 U.S.C. § 548(b), which industry claimed was intended to be directed only at programming access and agreements, more broadly to apply to any practice that hinders MVPD competition.
4. *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. petition for rev. filed Sept. 4, 2008).
 - Petition for review of *Complaint of Free Press and Public Knowledge*, 23 FCC Rcd 13028 (2008).
 - FCC found Comcast’s broadband “network management” practices violated the FCC’s *Internet Policy Statement*, 20 FCC Rcd 14986 (2005).
 - Briefing to be completed on November 23. Oral argument will occur shortly thereafter.
5. *Time Warner Telecom et al. v. City of Portland*, Nos. 06-36023, 06-36024 & 06-36061 (9th Cir. filed Apr. 8, 2009).
 - Based on the its earlier *en banc* decision in *Sprint Telephony v. County of San Diego* (for which a cert. petition is pending, see Part III(A)(2) above), the 9th Circuit upheld against § 253 challenge Portland’s per-foot ROW fees, as well as Portland’s in-kind telecom franchise requirement, and also found that Portland’s gross revenue-based ROW fee fell within the TIA, meaning that

the district court lacked jurisdiction over TWT's § 253 challenge to those fees.

- On September 8, TW Telecom filed a petition for cert. seeking review of this decision. *TW Telecom v. City of Portland*, No. 09-309 (U.S. filed Sept. 8, 2009).
6. *Global Network Communications v. City of New York*, Nos. 07-5184-cv & No. 08-0802-cv (2d Cir. filed Apr. 8, 2009).
- Based on § 253(c), the 2d Circuit upheld NYC's denial of Global's application for a public payphone franchise.
7. *S. New England Tel. Co. v. Office of Consumer Counsel*, No. 09-0116 (2d Cir. appeal filed Jan. 9, 2009).
- This is AT&T's appeal of a district court decision holding that AT&T's U-verse video service is a "cable service," and thus AT&T is a "cable operator," within the meaning of the Cable Act. In the appeal, AT&T is primarily trying to get the lower court decision vacated as moot due to a change in state law.
 - Oral argument is scheduled for the week of November 2, 2009.

C. Other Cases.

1. *City of Eugene v. Comcast of Oregon II, Inc.*, No. 16-08-03280, Amended Opinion and Order (Ore. Cir., Lane County, filed August 7, 2009).
- Court upholds, against all Cable Act and most Internet Tax Freedom Act ("ITFA") claims, application of Eugene Ordinance's 7% license fee on all communications service providers using city ROW and its 2% registration fee on all communications service providers in the City, to Comcast's cable modem service.
 - The court found that factual disputes remained as to whether the 2% registration fee was "generally collected" within the meaning of the ITFA, and whether both fees were consistent within the Oregon Constitution.
2. *City of Los Angeles et al. v. Pacific Bell Tel. Co.*, No. BC414272 (Cal. Super., L.A. County, complaint filed May 21, 2009). This lawsuit challenges AT&T's PEG product as violating the PEG provisions of DIVCA, California's state video franchising law.

3. *City of Chicago v. Comcast Cable Holdings*, 231 Ill. 2d 399, 900 N.E. 2d 256 (Ill. 2008). Court holds that (1) Chicago's cable franchise agreement with Comcast was preempted by 47 U.S.C. § 542 to the extent that it required Comcast to pay a 5% cable franchise fee on cable modem service; & (2) Chicago had no alternative avenue under Illinois' home rule law to impose a fee on cable modem service.