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'Jigsaw Puzzle'

Broadcasters, Public Interest Groups Lose Fight To Keep TV Stations out of Duplex Gap

Broadcasters and public interest groups lost their fight to keep all TV stations out of the duplex gap between uplink and downlink frequencies bought by carriers in the upcoming broadcast incentive auction. That was as expected (see 1507300042), though it left both broadcasters and the public interest groups upset. The FCC approved 3-2 the "procedures" for the auction, after a contentious debate. Commissioners Ajit Pai and Mike O'Rielly said the rules could set the auction up for failure.

The FCC issued a news release on the auction procedures, saying TV stations will be placed in the downlink, uplink or duplex gap "in a limited number of geographic areas where necessary to accommodate market variations in broadcaster participation." The FCC also established a formula for calculating opening price offers for each eligible TV station based equally on its interference and population characteristics while killing the dynamic reserve pricing formula that would have reduced opening bids for stations that can't be repacked in the TV band, the agency said.

The rules promote transparency for broadcasters and potential wireless licensees, the FCC said. They ensure that broadcasters "receive information about channel vacancies from round to round so that they can assess whether to drop out of the auction based on the likelihood that the current price will continue to decrease," the FCC said. The rules also ensure wireless companies "receive detailed information on 'impaired' licenses in a given area, including the source and location of any interference; and progress reports on the prices of each block, quantity demanded, and how close forward auction bidding is to confirming that the auction can close at the selected clearing target."

Pai accused the FCC majority of playing politics. "To scrounge up the votes to pass today's item, the members of the majority made a deal among themselves, leaving Commissioner O'Rielly and I, as well as the bipartisan leadership of the House Energy and Commerce Committee, out in the cold," Pai said. "The FCC is making it substantially more difficult than it needs to be to have a successful auction." Pai also said the order puts too many TV stations in the duplex gap. "Under the procedures adopted today, broadcast stations will be sprinkled throughout the wireless portion of the 600 MHz band," he said. "This will lead to permanent adjacent channel and co-channel interference."

O'Rielly said the rules approved could doom the auction before it starts.The FCC "continues to proceed down a path, both substantially and procedurally, that I feel places the success of the auction at risk," he said. "At this point, I can see only one way for success—if the insatiable need for licensed spectrum far exceeds the roadblocks imposed by wrong-headed decisions."

O'Rielly said his biggest concern is the market variation rules. The permitted impairment levels "are still too high, especially for the most likely clearing thresholds," he said. The rules place TV stations in the duplex gap first, downlink spectrum next and then uplink, he said. "Placing stations in the downlink, and even in the duplex gap, will cause significant impairments to the downlink spectrum," which is the most valuable to wireless carriers, he said. Commissioners were told only late in the game that protecting the downlink spectrum could "tank" negotiations with Canada, he said.

Pai closed with a scathing critique of how the Wheeler FCC does business. Throughout its work on the auction, the FCC has been plagued by the same problem, he said. "It has been absolutely convinced that

it has all the right answers," he said. "As a result, there has been a stunning unwillingness to listen to what anyone else, from Republican commissioners to Democratic congressmen, has to say." O'Rielly said every attempt he made to offer a compromise on the rules was rejected by FCC staff.

Chairman Tom Wheeler said the order essentially launches the world's first two-sided spectrum auction, with initial applications from broadcasters and wireless companies expected in about 60 days. Wheeler said he has been involved in spectrum auctions since the first one in 1994 and slammed the "impending doom" predictions on the auction. People have always focused on "worst case" scenarios before an auction even starts, he said.

"We have moved from considering the concept of a spectrum auction to implementing a spectrum auction with this decision today," Wheeler said. "This is like a very complex jigsaw puzzle except for the fact that nobody has ever put the puzzle together before. You don't have the advantage of the picture on the top of the box."

Commissioner Jessica Rosenworcel also defended the order. The FCC was forced to make tough decisions as it moves forward on the auction rules, she said. "We announce the date the auction will begin," she said. "We delve into the configuration of the 600 MHz band, covering everything from the placement of stations to the dynamics of the duplex gap to the assignment of impaired spectrum. Each issue is novel, packed with consequences, and the product of hard-fought compromise."

The fight over the rules made some strange bedfellows. "Am sympathetic to @AjitPaiFCC and @mikeofcc on wanting more data and more simulations," tweeted Public Knowledge Senior Vice President Harold Feld. "I do not think this was handled well." "@AjitPaiFCC is absolutely right that sprinkling TV in Duplex Gap … is bad policy: a recipe for ongoing interference," tweeted Michael Calabrese, director of the Wireless Future Project at New America Foundation's Open Technology Institute.

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NAB called the order "a major setback for stakeholders eager for a successful incentive auction." It "undermines certainty for reverse and forward auction bidders and irresponsibly undercuts the ability of broadcasters to keep" communities informed, an NAB spokesman said. "Despite releasing data designed to demonstrate how only a handful of markets would have TV stations in the duplex gap, the order fails to conform to the Commission's own numbers."

House Republicans Concerned

House Commerce Committee Chairman Fred Upton, R-Mich., and Communications Subcommittee Chairman Greg Walden, R-Ore., slammed the order. Congress put its faith in the commission to get the auction rules right, they said. "As Chairman Wheeler derides critics as focusing on the worst-case scenario, our concern is far more troubling—that the plan adopted today loses sight of producing the best-case scenario." Wireless carriers and broadcasters are rarely on the same page, they said. "Yet here, where we need both to be not just willing, but enthusiastic, participants, the FCC has chosen to elevate its own political desires above the engineering and economic expertise of the industries expected to contribute spectrum and capital to this auction. While the problems with this approach are many, in short, it prioritizes quantity over quality."

An AT&T executive said decisions on the auction were a mixed bag. "the FCC has finally resolved the protracted debate on the reserve and its triggers, putting to rest at last T-Mobile's never-ending quest to expand the favors it will receive at auction," Joan Marsh, vice president-federal regulatory, said in a blog post. "On the other hand, some of the auction framework proposals adopted today raise significant questions about the value and utility of the spectrum that will be made available at auction."

CTIA is disappointed the FCC "appears to have ignored the Spectrum Act's mandate to protect licensed services from harmful interference," said Scott Bergmann, vice president-regulatory affairs. "By failing to meet this requirement or provide an effective mechanism for resolving complaints, today's decision potentially exacerbates the uncertainty that forward auction bidders will experience. Congress recognized that certainty and protection from harmful interference are vital to a successful Incentive Auction, which in turn is essential to meeting our nation's spectrum needs and encouraging the next generation of mobile innovation and investment that will benefit consumers."

"Based on a remarkably open and fair process, the FCC has adopted compromise auction rules that make no stakeholder, including our Coalition, 100 percent happy," emailed Preston Padden, executive director of the Expanding Opportunities for Broadcasters Coalition. "As a concession to the shortness of life, it is time to end the debate and get on with the auction." **— *Howard Buskirk***

CLECs Happy, ILECs Not

FCC Adopts IP Transition Orders on Wholesale Competition, Backup Power

The FCC adopted two IP transition orders that appeared to track Chairman Tom Wheeler's recommendations and industry officials' prognostications (see 1507100050, 1508040061 and 1508050067). Commissioners Thursday voted 3-2 along party lines to approve an order to ensure competitors continue to have affordable access to wholesale broadband and voice services as incumbents migrate to IP-based services over fiber networks. It pleased competitive LECs while disappointing incumbent LECs. FCC members

voted 5-0 to approve an order to require fixed providers to notify consumers about service changes and give them backup power options.

The competition order requires providers to notify customers of plans to retire copper networks and to offer competitors IP-based wholesale replacement services that are "reasonably comparable to those of legacy services," said an FCC release. The replacement requirement covers both special-access (broadband) services and "commercial wholesale platforms" (providing voice-grade service), and will stay in effect until new special-access rules are implemented, said an FCC staffer at the meeting. ILECs resisted the requirements and sought a two-year sunset. Asked about Wheeler's proposal to tee up five factors—with questions derived from pricing safeguards and other principles proposed by Windstream, a CLEC/ILEC—in reviewing reasonable comparability disputes, a senior staffer told us the factors were in the order. The FCC also approved a Further NPRM intended to clarify criteria for reviewing discontinuance applications under Section 214 of the Communications Act.

The Republican minority dissented. They said the FCC was focused on protecting competitors and preserving legacy networks, not on speeding the IP transition and broadband deployment. "Why is the FCC dead set on slowing it down?"asked Commissioner Ajit Pai. "It appears that Chicken Little rules the roost," he said, referring to arguments "the sky will fall" if fiber replaces aging copper lines: "The FCC has put the interests of these corporate middlemen over the welfare of consumers." Commissioner Mike O'Rielly said the FCC's "reasonably comparable" factors left ILECs little flexibility in upgrading their networks and services. He was particularly troubled by the requirement that ILECs continue to offer commercial wholesale platforms they voluntarily negotiated as successors to the FCC's UNE-P (unbundled network element platform) discount regime, which was overturned in court.

The Democratic majority said it was upholding basic competitive and consumer protections, not discouraging IP/broadband advances. Wheeler suggested some saw the IP transition as an opportunity to erase basic responsibilities of providers to users. "Rather than erasing, we are reaffirming everlasting principles in a compact between those who build and operate networks, and those who use them," he said. "Changing technology doesn't change responsibilities." Commissioners Mignon Clyburn and Jessica Rosenworcel said the order struck an appropriate balance between facilitating IP-based improvements and protecting competition and consumers.

CLEC officials and allies lauded the FCC action. Comptel President Chip Pickering said, "Upholding competition policy, regardless of network technology" will spur "new network deployment, better customer service and continued innovation." Windstream Senior Vice President Eric Einhorn said in an emailed statement that the order would "accelerate the IP transition" by ensuring it "isn't misused to raise prices and inhibit competition." Public Knowledge and the Broadband Coalition, which includes CLECs, also lauded the FCC actions (here and here).

ILEC officials and allies took a dimmer view. AT&T Vice President Frank Simone said in a blog that the order "threatens to stifle [the IP] transition by erecting new regulatory obstacles" that benefit "select companies" not consumers, investment, and competition. "The FCC cannot call on the industry to invest in more fiber deployment, raise the bar for what qualifies as a broadband service and then make it more difficult to retire services that do not even qualify as broadband," he said. USTelecom Senior Vice President Jon Banks suggested the FCC's tech transition orders will "handicap" his members delivering on a compact to invest in better services—and "in the name of keeping a regulatory structure under which Fax machines provide a communication service of such importance that they must be preserved." In emailed statements,

the Free State Foundation offered similar criticism while voicing concern about tying the interim rules to the protracted special access review, and the Internet Innovation Alliance lamented the FCC actions as a "missed opportunity."

The consumer-oriented order will require facilities-based fixed residential voice providers lacking independently powered systems to offer new customers an option to buy and have installed at least eight hours of backup power capability that can be used during outages, rising to 24 hours within three years, said FCC staffers and a release. Providers will also be required to notify customers every year of the systems' power limitations and their backup power options. Rosenworcel said the FCC needs to encourage longer backup power capability. O'Rielly concurred in approving, saying he had concerns about industry burdens, the lack of cost-benefit analysis and the commission's hesitation to set a clear federal standard that would pre-empt differing state mandates.

The FCC's provided other details about the competition order. It requires providers for the first time to notify retail business and residential customers of their plans to retire copper networks at least three months in advance, and also requires providers to increase the notice for interconnecting competitors from three months to six months. "This requirement covers all parts of the copper network essential for providing service," the competition order release said. It didn't expressly address Wheeler's proposal to include "de facto" retirement in the definition of copper retirement, but it said carriers can retire copper in favor of fiber without prior FCC approval, "so long as no service is discontinued, reduced, or impaired."

Pai said the agency was opting for "command-and-control regulation instead of permissionless innovation." Clyburn said she was concerned some consumers would remain unaware of service changes, particularly if carriers are required to notify them only through "one neutral statement." But she said she was pleased the order would encourage providers to work with their states and communities on outreach. ADT Security Service Vice President Paul Plofchan told us his company welcomed the "one neutral statement" requirement because it believed telco service-change notifications should be separated from marketing pitches to upsell products.

The Further NPRM to codify discontinuance standards tentatively concludes the criteria should include: "support for 911 services and call centers; network capacity and reliability; quality of both voice service and Internet access; interoperability with devices and services, such as alarm services and medical monitoring; access for people with disabilities, including compatibility with assistive technologies; "network security in any IP-supported network that is comparable to the legacy network; coverage throughout the service area, either by the substitute network or via service from other provider and a plan for outreach to affected consumers." ***— David Kaut***

Hospitals Concerned

Wireless Telemetry Advocates Score Late Win as FCC OK's Revised Part 15 Rules

The FCC approved updated Part 15 rules, which provide additional protections for hospitals that use wireless telemetry in channel 37. In an usual development, the rules include a proposal by Commissioner Ajit Pai that allows hospitals to apply for a waiver giving them expanded protection zones upon the filing of a waiver request. The agency approved the order on a 5-0 vote Thursday.

The Wireless Medical Telemetry Service Coalition (WMTS) and GE Healthcare had pushed the FCC to rethink proposed technical rules to protect wireless telemetry from TV white spaces (TVWS) devices (see 1507290060). Wednesday, three Democratic senators asked for a three-month delay to a decision on channel 37 (see 1508050074). Instead, the FCC adopted the Pai-sponsored compromise.

Pai said he had proposed that hospitals could get protection zones three times as large as normal upon the filing of a waiver request: "With this mechanism in place, the order now creates the right incentives for both the WMTS and unlicensed communities to negotiate in good faith and reach a consensus-based approach to sharing the spectrum while at the same time protecting WMTS from harmful interference."

The American Hospital Association said the technical rules don't go far enough to protect medical telemetry. The rules adopted still allow white spaces devices to operate in close proximity to hospitals, AHA said in a news release. "These unlicensed devices may cause interference with wireless monitoring, preventing doctors and nurses from receiving vital information," AHA said. "There are more than 360,000 WMTS patient monitors in hospitals today, many of which are used for women and infants during labor and delivery and critical heart surgery patients." The group said that many hospitals lack the "staff expertise and resources" to comply with the rules that allow them to file a waiver request to get enhanced protection.

The Part 15 rule changes update unlicensed rules in other areas as well. They're designed to "permit more robust and efficient operation of fixed and personal/portable white space devices in television broadcast bands without increasing the risk of interference to broadcast services," the FCC said in a news release. They allow fixed and mobile white spaces devices to operate in the 600 MHz TV band, including the duplex gap and guard bands and channel 37 and allow sharing of spectrum between white space devices and unlicensed microphones in the 600 MHz band, the FCC said. It said the rules also update the rules for the white spaces databases and "adopt transition periods for the certification, manufacturing and marketing of white space devices and wireless microphones that comply with new rules." The agency said the unlicensed world has changed markedly "from basic garage door openers and cordless phones to Wi-Fi and Bluetooth technologies" to the IoT.

Congress required the FCC to auction the 600 MHz band, said Chairman Tom Wheeler. "That means that the people who are in the 600 Mhz band are going to be affected," he said. "They're going to have new operating parameters and that's what we do today."

Commissioner Mignon Clyburn said the Part 15 rules do a good job of balancing various interests and are based on engineering. Clyburn said at one point she had urged the Office of Engineering and Technology to kick the lawyers out of the room and listen to the engineers, and it did just that. Wireless telemetry provides "real-time lifesaving information to medical professionals," she said. "Wireless microphones allow for broadcasters to report the news in an untethered manner and for performers to entertain us on stage without the worry of tripping over cords." The TV white spaces "offer low-cost ways to bring mobile broadband to unserved and underserved areas, such as rural and lower income urban communities," Clyburn said.

Most people don't know about the importance of the Part 15 rules, but the rules support the unlicensed technologies they use everyday, said Commissioner Jessica Rosenworcel. "We expand the spectrum available to unlicensed devices," she said. "We increase the power levels for unlicensed devices serving rural areas in order to broaden their service range. At the same time, we bolster the amount of information in white space databases to help alleviate interference concerns.

Commissioner Mike O'Rielly urged the agency to take a broader look at antenna height limitations. The issue is important in particular to wireless ISPs, he said. O'Rielly also said the commission should continue its work to open up the 5.9 GHz band for unlicensed use. "We can come to successful resolution" of remaining interference issues in that band, he said. "We're finding ways to make things work."

The FCC "wisely adopted incentive auction rules that ensure at least three channels for enhanced Wi-Fi access in every market nationwide," said Michael Calabrese, director of the Wireless Future Project at New America's Open Technology Institute. "Preserving public access to unlicensed spectrum in the prime TV band frequencies is more important to the public interest than more one-time revenue from an auction." — ***Howard Buskirk***

T-Mobile Positive

FCC Rejects Competitive Carrier Push for Revised Trigger, Larger Incentive Auction Spectrum Reserve

The FCC rejected the push for a larger spectrum reserve in the TV incentive auction that was sought by T-Mobile and other competitive carriers. T-Mobile, Sprint and other competitive carriers also lost their fight for a revised trigger for when the reserve spectrum blocks are made available in the auction. Neither item received substantial discussion during Thursday's meeting. FCC Chairman Tom Wheeler said during a news conference that in the end it's up to carriers whether they will bid in the incentive auction.

The FCC rejected the larger spectrum reserve in an order voted by the commission electronically before the meeting. It rejected a revised trigger in the order approving procedures for the auction. Industry and agency officials said earlier this week that Sprint and T-Mobile appeared likely to lose on both fronts (see 1508040057). Wheeler noted that for the first time in an FCC auction competitive carriers will benefit from set-aside, which remains at 30 MHz in each U.S. market.

Commissioner Mignon Clyburn released a statement saying she favors a larger reserve. She dissented in part because of her concerns. "I am disappointed that we did not circulate an Order that adopts the Public Knowledge proposal which asked the Commission to change the amount of reserve spectrum from 30 to 40 MHz when we recover 114 or more MHz from broadcasters," she said. "Such a change would have greatly incentivized competitive wireless carriers, particularly those who are reserve eligible in the vast majority of the markets, to bid more in the forward auction. It also would have created greater certainty that we could recover more spectrum from broadcasters."

"As representatives of the competitive wireless industry and its stakeholders, we are pleased that the Commission locked in an unprecedented spectrum reserve, but are obviously disappointed it was not expanded to 40 MHz and a single, simplified reserve trigger was not adopted," the SaveWirelessChoice Coalition said in a news release. Members include T-Mobile, Dish Network and Sprint, according to its website.

Wheeler noted during the news conference that T-Mobile CEO John Legere had been positive on the approval of the reserve. "It's unprecedented, will benefit consumers & encourage competition," Legere tweeted earlier on Thursday. "This is a #victory."

Wheeler said it's up to major carriers whether they will participate in the auction. Top executives from AT&T, Verizon and, most recently, Sprint (see 1508040054) have suggested they could still sit out the auction. "This is their call," Wheeler said. "This is a once in a lifetime opportunity. They don't make spectrum like this anymore and they can decide what they want to decide." Wheeler was asked why the FCC didn't approve a larger reserve. "The decision has been made," he said. "That's water under the dam."

Commissioner Ajit Pai concurred with the order, though he said he still opposes the notion of a reserve spectrum set aside. "Our record in the proceeding, as well domestic and international experience, shows that spectrum reserves do not produce long-term benefits for wireless competition," he said in a statement. "Set-asides also impose severe costs, including significant delays in the deployment of spectrum for consumers' benefit and substantially less revenue for critical national priorities."

"Clearly, the unnecessary and improper interference of reserve spectrum will unfairly skew the auction outcome, thereby producing less revenue for the American people who entrust the Commission to protect and maximize the value of their spectrum assets," said a statement by Commissioner Mike O'Rielly, who voted for the item. "I won't be a party to this—not now, not ever." **— *Howard Buskirk***

'Not Helpful'

FCC Puts Wireless Mics in Three New Bands

Wireless mics will be able to use new bands and share spectrum in the TV band, said a Wednesday FCC order issued with the support of four members and a partial dissent by Commissioner Mike O'Rielly. The order, which was deleted from Thursday's meeting agenda, allows all licensed users in the TV band to use the reserved 4 MHz in the duplex gap and allows wireless mics to operate in TV bands even within the contours of TV stations as long as the TV signals are at a low enough threshold, an FCC release said. The order also allows wireless mics to operate in portions of the 900 MHz band, the 6875-7125 MHz band and the 1435-1525 MHz band at specified times and places, coordinated with aeronautical mobile telemetry, the release said.

The order is "not very helpful," said Fletcher Heald broadcast attorney Peter Tannenwald, who represents several companies in the wireless mic industry. The new spectrum bands are unlikely to be useful homes for wireless mic use, he said. The requirement to coordinate with aeronautical telemetry in the 1435-1525 MHz band makes it impractical because such coordination efforts generally require too much time, he said. Some of the new spectrum is also prone to being interfered with by human bodies, he said, making it particularly problematic for use by wireless mics worn on clothing. Relaxing the rules on sharing space with TV stations is more effective, but doesn't address the new interference problems likely to face wireless mic users, Tannenwald said. Many wireless mic users already illegally operate their mics on TV bands inside buildings or large arenas where interference to outside signals is unlikely—the commission order relaxes the rules against something that is already being done, Tannenwald said.

Getting manufacturers to build mics to take advantage of the new bands will also be a challenge, Tannenwald said. A wireless mic that can use multiple bands is likely to be more expensive than a mic that only uses one, Tannenwald said. The rules also leave a lot of uncertainties for the wireless mic industry, he said. Since it's not yet clear how many TV stations will go off air in the incentive auction and where they will be repacked, it's impossible to know where wireless mics will be able to operate, he said.

There may have originally been a different compromise in the works for wireless mics. In a news conference after Thursday's meeting, Commissioner Ajit Pai said broadcasters told him they had been promised a 4 MHz chunk of spectrum would be reserved for wireless mics in the 600 MHz band. "That promise wasn't born out in the item they adopted," Pai said of the FCC Democrats.

The spectrum the order gives to wireless mics is already being eyed by the wireless industry, O'Rielly said in his dissent. "The demand for licensed spectrum is high and it is going to have to come from somewhere." He also objected to the order directing staff to inform consumers that future wireless mic use must be confined to the guard bands and duplex gap. "Industry should be allowed to create disclosures that they feel will best inform their consumers," O'Rielly said. Requiring companies to post this consumer information on their websites, and encouraging them to offer discounted buyback programs for wireless mic equipment rendered useless by the rule change is an FCC overstep, O'Rielly said. "I will not be supportive of any actions by the Enforcement Bureau to penalize manufacturers who were unable to make contact with past customers."

Rules for unlicensed services operating in the TV band adopted by the commission Thursday also applied to wireless mics, according to an FCC news release. The rules allow white space devices and unlicensed mics to share spectrum in the 600 MHz band and adopt transition periods for new devices complying with the rules to be built, certified and marketed, the release said. — ***Monty Tayloe***

Pai Predicts Negative Finding

FCC Opens Broadband Deployment Inquiry, Asks About Mobile, Satellite Services

The FCC kicked off its annual inquiry into whether broadband is being deployed in a reasonable and timely fashion to all Americans, pursuant to Section 706 of the Telecom Act. The notice of inquiry approved by commissioners Thursday contemplates retaining the agency's 25/3 Mbps broadband definition for terrestrial fixed services while seeking comment on whether the commission should include terrestrial mobile and satellite fixed services in its broadband assessment, FCC officials and a release said.

The FCC asked whether fixed satellite service should be subject to the 25/3 Mbps broadband speed definition and whether mobile service should be subject to a lower broadband speed definition, agency officials said. The NOI seeks comment on whether broadband (technically, "advanced telecom capability") should include access to both mobile and fixed services, and whether the FCC should develop technical standards on "latency" and "service consistency," a staffer said at Thursday's commission meeting.

The new focus on mobile and satellite fixed service wasn't a surprise (see 1507230054). Chairman Tom Wheeler said there's an old corporate maxim that applies: "If you can measure it, you can manage it. That's what this is all about."

If the FCC finds broadband isn't being deployed fast enough—as it has concluded in recent years under Democratic control—it's statutorily mandated to take immediate steps to remove barriers to deployment. In approving its net neutrality order earlier this year, the FCC cited its most recent negative Section 706 finding.

"There is much more work left to do," Commissioner Mignon Clyburn said, noting 25/3 Mbps broadband isn't available to 53 percent of rural Americans and 63 percent of Americans on tribal lands

and in U.S. territories. Commissioner Jessica Rosenworcel called extending broadband across the country America's "new manifest destiny."

But Commissioner Ajit Pai, who partially dissented, said he couldn't support the "kabuki theater" aspect of recent Section 706 inquiries that he said promise to continue this time. "Here is the sad reality: It doesn't matter what the public says or what the data show," he said. "When this proceeding ends, the FCC will issue a negative finding about the state of broadband deployment. And that's because such a finding is necessary to maintain the limitless regulatory authority over Internet service providers, and perhaps other online entities, that the Commission thinks it has under the Telecommunications Act of 1996." Commissioner Mike O'Rielly, who partially concurred, said he wasn't quite ready to make the same prediction, but said he expects he "will be run over when we issue the final report." The FCC report is expected by early February, staffers say. **— *David Kaut***

Exemption Needed

Associations, Companies Widely Support Small ISP Exemption to Net Neutrality Transparency Rule

Associations, ISPs and others urged the FCC Consumer and Government Affairs Bureau (CGB) to extend or make permanent the small-provider exemption to the updated transparency rules adopted in the 2015 net neutrality order, in comments posted Wednesday and Thursday in docket 14-28. Some of the filers told us that they are optimistic CGB will keep the exemption.

Filings responded to the commission's request for comment (see 1506220037) on the exemption—set to expire in December—for providers with fewer than 100,000 broadband connections. The updated rules require companies to further disclose to consumers and others information on its performance characteristics and network practices.

Groups including the American Cable Association, CTIA, NTCA, USTelecom and the Wireless Internet Service Providers Association suggested the CGB should continue the exemption due to significant burdens they said would be placed on the small providers if the exemption ended. The groups also urged the FCC to permanently extend the exemption and said the costs far outweigh the benefits that could come from eliminating the exemptions. That sentiment was also echoed in comments submitted by Alaska Communications Systems Group and Gogo, two ISPs potentially affected by the CGB's decision.

USTelecom warned the CGB that "the costs associated with the new enhanced transparency obligations will overwhelm small broadband providers," and said the small companies could be required to hire additional counsel and employees to cope with and implement the programs if the exemption is removed. It also said the commission "has failed to explain how its new transparency requirements will have any practical utility that justifies the immense burden it will impose on all, but especially smaller broadband providers." Some trade groups also suggested bumping up the small-provider threshold to a larger number of broadband connections, or completely abolishing it.

Ross Lieberman, ACA senior vice president-government affairs, said in an interview that he is hopeful the CGB will extend the small provider exemption and feels it's warranted. If the exemption isn't

extended, Lieberman said, the transparency requirements will cause companies to divert time and funding from reinvesting in their businesses, or will drive up cost of services for consumers. Joshua Seidemann, NTCA vice president-policy, said in an interview that costs to businesses if the exemption is removed would be "quite expensive and burdensome." Seidemann also said he thinks that "the FCC took a clear and logical course" in implementing the exemption, and extending it is justified. **— *Jacob Rund***

Lags in Hiring, Spending

FirstNet Finance Committee OK's $126 Million Obligations Budget

The FirstNet board's finance committee Thursday approved the proposed FY 2016 budget of $126 million, sending it to the full board for approval at an Aug. 17 meeting. FirstNet Acting Executive Director TJ Kennedy said the organization spent less than it thought it would this year because projects took longer to complete. It wants more for the coming year than it was budgeted for the fiscal year ending Sept. 30.

Kennedy said he still believes the nationwide public safety broadband network request for proposal is on track to be released on Dec. 31 as previously expected. As a part of the development of the NPSBN, FirstNet will employ a grant program to clear remaining incumbents from band 14, or the 700 MHz band, he said.

The budget includes $11 million obligated to go toward FirstNet's corporate services, $29 million toward consultations and $86 million toward acquisitions, Kennedy said. The projected expenses are set at $99 million. Projected expenses for corporate services are about $11 million. The projected expenses for consultations are expected to be $29 million, with the expected expenses for acquisitions $59 million, Kennedy said.

In FY 2015, the budget obligations were approved at about $86 million, but the total expenses are forecast to reach only $51 million, Kennedy said. Overall, FirstNet hit many of the milestones it expected to hit in FY 2015, he said, despite some of the lag time on procurements and hiring. "Procurements took longer than expected in relation to almost every procurement and because of that, those actual expenses hit ou[r] books later than expected," Kennedy said. "On the hiring front, although we've been very focused on improving hiring and we have improved our speed of hiring significantly over fiscal year 14, it still continues to take a fair amount of time. Because of that, our expenses on our staff continues to hit the books later than expected."

The budget resolution recommends the board authorize management to establish and implement the spectrum relocation grant program. The board should also authorize management to enter into the necessary agreements to meet the FY 2016 FirstNet milestones, it says. The resolution also allows management to relocate up to 10 percent of the funds from any of the three major activity categories—acquisitions, consultations and corporate support—to another major category. Management also could exceed the approved obligation level by no more than 10 percent in the aggregate or by 15 percent for any of the three major activity categories, the resolution says.

FirstNet is working with the entities that need to relocate from band 14 to allow the organization to turn that band into the nationwide public safety broadband network, Kennedy said. Establishing the spectrum grant program will facilitate that relocation to make sure that band 14 is available for use by public

safety officials, he said. It will also enable public safety entities to continue to operate their public safety communications systems uninterrupted in the FCC-allocated spectrum assignments, Kennedy said. The funding has already been budgeted as a part of the FY 2016 budget, he said. "It's really critical that this activity moves forward in this fiscal year, and completes in the next fiscal year." — ***Samantha Madison***

Most Expensive CP $714,000

Auction 98 Complete, Raises Over $4 Million for 102 FM CPs

FCC Auction 98 ended Thursday after 10 bidding days and 51 rounds, generating just over $4 million and selling 102 FM radio construction permits (CPs) out of 131 that were up for bid, the auctions website said. The amount of money generated and the level of participation were at the levels largely expected by the radio industry, several attorney experts said. Though the numbers for this auction were down from previous ones, that decline is consistent with the quality of the permits offered in auction 98, they said.

"These permits are in isolated markets," said Wilkinson Barker broadcast attorney David Oxenford. "Most of the stuff in larger markets was sold off long ago." That Auction 98 could draw 88 bidders, generate several bidding competitions and over $4 million in revenue shows great interest remains in the FM band, said Fletcher Heald broadcast attorney Harry Cole. The last FM auction, No. 94 in 2013, raised $4.12 million in net winning bids (see 1305080034).

The biggest sale in Auction 98 is a Class A FM permit in Westfield, New York, that sold to Erie Radio Co. for $714,000, after a multiround bidding war with Westfield Broadcasting. Much of the bidding in FM auctions typically comes from interests local to the permit being bid on, said Fletcher Heald auction attorney Raymond Quianzon. Since it can take years for the FCC to put an FM CP up for auction, it's hard for new entrants to get into the business through buying permits at auction, broadcast lawyers said. Instead, purchasers are often already in the radio business, and using the auction to increase their radio holdings or wall off a rival, they said.

The $714,000 is less than the largest bid in the 2013 FM auction, which was just over $2 million, a blog post by Quianzon said, but that auction generated an amount of total revenue very similar to that in Auction 98. FM auction revenue and bids have been on a steady decline since the first one in 2004, Quianzon told us. That 2004 auction generated over $150 million, he said.

The 29 unsold permits likely will be auctioned the next time around, Cole and Quianzon said. Auction 98 had 11 permits that had gone unsold in the last auction; all of them sold this time around, they said.

Nearly half the permits in Auction 98 sold for below $10,000, eight for less than $1,000, Quianzon said. Eleven permits, including Westfield, sold for over $100,000 each. "The results of the latest auction are in line with previous auctions and indicate that there are still active and well-funded players in the FM radio market," Quianzon wrote.

Though the FM industry got a boost recently from news that AT&T would push for activated FM chips in its newest smart phones (see 1507280054), that information is probably too new to have affected Auction 98, Cole said. Bidders in the auction have four weeks to pay the FCC, Quianzon said. — ***Monty Tayloe***

Acting IG Recused

FirstNet Oversight Depends on Obama Nominating Commerce Department IG, Say Thune, Johnson

David Smith, acting inspector general of the Commerce Department, recused himself from dealing with FirstNet, which worries two powerful Senate Republicans. Sens. John Thune, R-S.D., who chairs the Commerce Committee, and Ron Johnson, R-Wis., who chairs the Homeland Security Committee, wrote the White House Wednesday demanding the administration nominate a permanent IG for Commerce.

Smith recused himself "from decision making regarding our team's effort due to the fact that a family member is on detail to FirstNet," he told us in a statement. "My recusal is to ensure there is no appearance of undue influence in the OIG's [Office of Inspector General] ongoing and future oversight work of FirstNet." OIG didn't identify the role of the family member.

"Oversight of FirstNet is one of the most important priorities for the OIG and the Commerce Committee, as was evidenced at a Commerce Committee hearing earlier this year," said Thune and Johnson, who's also a member of Commerce, in their letter. "We are therefore concerned that this recusal will result in insufficient focus on ensuring that the FirstNet organization has strengthened its project and contract management processes and guaranteeing good stewardship of taxpayer funds. This development provides additional impetus for a permanent Inspector General to be nominated as soon as possible."

OIG "is continuing its oversight work of FirstNet," Smith said. "That effort is being led by the Principal Assistant Inspector General for Audit and Evaluation," Andrew Katsaros. "I assure the Senate Committees on Commerce, Science and Transportation and Homeland Security and Governmental Affairs that FirstNet is a priority for our office and our oversight work will continue," Smith said.

Smith was named acting IG June 8 after the resignation of Todd Zinser, who was sworn in as IG in 2007. Smith had worked within OIG since December 2012, and his positions included deputy IG and assistant IG for intellectual property and special program audits. The Commerce OIG is responsible for oversight of FirstNet in addition to the programs of NTIA, including in recent years the many broadband stimulus grant projects. Commerce's OIG has scrutinized FirstNet's operations before. In June, the OIG began an audit into FirstNet's "effectiveness in addressing federal agency challenges with respect to the development and planned operation," which a FirstNet executive called routine oversight (see 1506160058).

Capitol Hill leaders have worried about the state of Commerce's OIG in the past. In July, the Republican and Democratic leaders of the House Commerce Committee cited a GAO report to argue that the office under Zinser wasn't "up to the task," and they were hopeful that new leadership would improve OIG (see 1507100031). "There is a sustained pattern of misconduct and malfeasance that would be unacceptable in any senior federal official but is particularly troubling for an Inspector General," said Rep. Eddie Bernice Johnson, D-Texas, ranking member of the House Science, Space and Technology Committee, in a March statement of Zinser.

Smith testified before the Senate Judiciary Committee Wednesday on how the Justice Department makes records available to IGs. Smith "is here because his office is having trouble accessing documents from the Department of Commerce," said Judiciary Committee Chairman Chuck Grassley, R-Iowa, in his

opening statement. "In June, the Department of Commerce cited the then-pending [Justice Department Office of Legal Counsel] OLC opinion as the reason why it would not share certain materials with his office." That incident involved a trade inquiry, Smith told lawmakers. Thune and Johnson said this hearing "highlighted the fact that a sustained absence of a permanent, Senate-confirmed Inspector General at an agency creates the potential for conflicts of interest, diminishes independent oversight, and causes instability within the ranks of the Inspector General's office." They referred to past problems at Commerce OIG. Within that office, "past management concerns and reported morale issues" are grounds to "further underscore" the need for a new, permanent IG, said the two lawmakers.

President Barack Obama should nominate a permanent IG "as soon as possible," Thune and Johnson said, promising "a prompt and thorough vetting" of the nominee. "Senate confirmation of a qualified candidate will bolster confidence in Congress and among the public in the ability of the OIG to act independently and produce credible investigations and audits." The White House didn't respond to request for comment. A FirstNet spokesman declined comment and referred us to OIG. **— *John Hendel***

NAB, EFF Support

Pro-Sirius XM Amicus Briefs Question Existence of Pre-1972 Performance Right in New York Common Law

NAB, Pandora and other groups sided with Sirius XM in amicus briefs posted by Wednesday urging the U.S. Court of Appeals for the 2nd Circuit to reverse earlier U.S. District Court rulings in New York that the company owed performance royalties to Flo & Eddie, who own the copyright to The Turtles' "Happy Together" and the rest of that band's music library, and other artists for the performance of pre-1972 recordings. U.S. District Judge Colleen McMahon ruled against Sirius XM in November, saying then that "general principles of common law copyright dictate that public performance rights in pre-1972 sound recordings do exist" (see 1411170043). McMahon later largely affirmed that decision in a January ruling.

Parties that filed amicus briefs in Sirius XM's appeal to the 2nd Circuit have uniformly backed the company, with many questioning McMahon's ruling that New York common law includes a performance right for pre-1972 recordings. Her ruling "contravened decisions of this Court and the New York Court of Appeals recognizing that common-law copyright protects only against the unauthorized reproduction of sound recordings," NAB said in its brief. "Although the district court stopped short of holding that common-law copyright in the performance of pre-1972 sound recordings is 'broader than the right legislated by Congress' for post-1972 recordings, so as to encompass over-the-air broadcasting," the 2nd Circuit can eliminate any doubt by reversing the ruling.

New York's common law related to sound recordings applies only to unauthorized reproduction, the New York State Broadcasters Association (NYSBA) said. State courts "never envisioned the grant of performance rights in sound recordings, and no analogous legislative guideposts even suggest the existence of such a right," the group said. "Such recognition would have disrupted two organically developing, interrelated industries to the detriment of all parties. This is not how the common law operates." Determining performance royalties for pre-1972 recordings would itself be "a monumental task given the age and multitude of the recording contracts at issue," NYSBA said. "There is no state registry of copyrights to consult for guidance, and the courts cannot fashion one."

McMahon's ruling also "all but ignored the extensive history of efforts by the recording industry to secure a federal performance right for sound recordings, precisely because there was no such right available under state law," Pandora said. Record companies have pursued performance rights for recordings as far back as the 1920s. Congress has limited the scope of performance rights conferred so it "does not empower the rights-owners to preclude performances of the works by noninteractive Internet radio services like Pandora," that company said. The performance right McMahon envisioned with New York state law "lacks any visible definition or detail," reflecting Flo & Eddie's argument that "a common law public performance right is a natural property right that admits of no exceptions," Pandora said.

It's "inconceivable that the New York courts would not look to the extensive work of Congress and the federal courts in defining and limiting performance rights in post-1972 sound recordings to inform their interpretation of state common law," the Electronic Frontier Foundation said. The federal Copyright Act doesn't mandate limits on state law protections on pre-1972 recordings, but "in the absence of recent state precedent, New York courts should apply the principles of limited, empirically justified expansion of copyright from federal law. More generally, federal law counsels deference to the legislature in expanding copyrights, particularly for existing works."

A separate New York state law on pre-1972 performance rights would "directly" conflict with the federal statute "because it requires digital streaming services that qualify for the federal compulsory license to negotiate separate licenses with individual owners of pre-1972 sound recordings based on a patchwork of differing state laws, for performances that are not specific to any one state but that are available everywhere that a satellite radio or Internet connection exists," said a group of IP law professors led by American University Washington College of Law professor Brandon Butler. Proponents and opponents of past legislative efforts to enact a federal pre-1972 performance right have uniformly agreed that "there was no existing public performance right in sound recordings under either state or federal law," said a second group of IP law professors led by University of California-Los Angeles School of Law professor Eugene Volokh. "If such a right was thought to exist under state law, why were so many people wasting so much effort lobbying for and against a public performance right under federal law?"

It's not surprising that supporters of Sirius XM's appeal are uniformly citing the issue of federal pre-emption of state IP laws since that's the strongest argument they can make in advocating for the court to overturn McMahon's ruling, said Fletcher Heald copyright attorney Kevin Goldberg. It's also not surprising that Sirius XM has drawn support from fellow broadcasters since they're "very concerned about the implications of this because there's always been an assumption that the federal pre-emption doctrine would protect over-the-air broadcasters" from the performance rights issue, Goldberg said. McMahon's decision leaves "a little uncertainty" in the market, he said. **— *Jimm Phillips***

Intelsat Leading Charge

Satellite Operators Jousting Over Two-Degree Spacing Changes

Proposed elimination of the two-degree spacing policy is creating degrees of separation among some satellite companies. While operators want higher power satellite services than the policy allows, "such services should not come at a cost of increased uncertainty of the interference environment," EchoStar said in a filing in FCC docket 12-267 posted Tuesday. It responded to Intelsat, which has been the leading proponent of eliminating the two-degree spacing rules. "The mere existence of the policy creates a

licensing imbalance that favors non-U.S. operators who do not face similar constraints from their licensing administrations," Intelsat said in a filing early this year. "Worse yet, the two-degree spacing policy can be leveraged to impair the United States' priority spectrum rights" at the ITU.

The 32-year-old orbital spacing rule sets a variety of technical requirements, including earth station antenna diameter and power restrictions, on fixed-satellite service satellites in geostationary orbit (GSO), ensuring they operate without signal interference on other FSS GSO satellites operating as close as two degrees away. The International Bureau in 2014 as part of proposed updates to the Part 25 rules on the licensing and operation of satellite communications services sought comment on an Intelsat recommendation to do away with the two-degree spacing rule and go with ITU filing priority as the basis for coordination requirements.

The existing two-degree policy "makes the most efficient use of the orbit/spectrum resource and creates certainty as to what level of service operators are able to provide at a particular orbital location," EchoStar said. The very robustness of the U.S. satellite communications market shows the policy's success, EchoStar said. The company said that abandoning or modifying it would mean licensees trying to start or deploy a satellite service "would have no certainty on whether they could coordinate their space station." Intelsat hasn't explained in its opposition what incentives satellite operators would have to reach an agreement "with a lower priority new entrant," EchoStar said. "Experience tells us that the operator with the priority is incentivized to maintain status quo, which means new entrants are kept out and consumers suffer."

Intelsat's assertion that two-degree spacing blocks high-powered services is incorrect, EchoStar said, pointing to its own blanket licensed operations on high-powered satellites operating in two-degree spacing. If operator coordination agreements are the only route for allowing orbital and spectrum access, EchoStar said, "it is likely that more" not less "abuse will occur, resulting in actual limits on high-power services." EchoStar also said it opposes the Intelsat/DirecTV idea: "U.S.-licensed operators who fail to operate in a manner consistent with two-degree requirements should not be rewarded at the cost of new entrants."

Pointing to the growing array of national satellite operators in the developing world and that most operators outside the U.S. work under ITU coordination procedures and not the FCC two-degree policy, EchoStar's argument "that reliance solely on the ITU's procedures will stifle new entry" has no basis, Intelsat said in a statement to us Thursday.

The idea of changing the two-degree spacing power limits has some support. Such a revision—raising the effective isotropic radiated power downlink levels to 13 dBW/4kHz for the Ku band and 3 dBW/4kHz in the C band—would mean "reasonable" operational guidelines for allowing new operations to start while coor-

dinating talks go on, SES Americom said in a filing last month. SES also has pushed that two-degree spacing be expanded to other fixed-satellite service bands beyond conventional C and Ku. — ***Matt Daneman***

Privacy Rights After Death

Federal, State Laws Needed To Address Access to Deceased Individuals' Online Communications

With everything from wedding photos to videos of a child's first steps to banking information online, individuals need to designate what they would like to happen to their digital assets after they die, experts said. Although some online companies like Google and Facebook have created tools that allow individuals to share what they would like to happen to their data and who can access their accounts after their passing, not every user has made a plan. When a plan isn't in place, it's against the Electronic Communications Privacy Act (ECPA) for an online service provider to share information. *(Editors' note: In this story we describe digital decedent problems. Part 2 will be about Internet companies' efforts to address the situation.)*

When Congress passed ECPA in 1986, the goal was to protect the privacy of emails and other electronic communications, said NetChoice Policy Counsel Carl Szabo. Title 18 U.S. Code 2702 allows service providers storing electronic communications to disclose information only if the company has the lawful consent of either the sender or recipient, Szabo said. If an individual were to die without telling Google what the person wanted to happen to his or her Gmail, Google can't just turn over the information, Szabo said.

Any kind of private communication including the body and subject line of an email, a text or a chat message, remains private unless an individual grants another access to that content, said a spokesman for the Uniform Law Commission, a nonprofit dedicated to uniformity of state laws. Files stored in an iCloud or DropBox aren't protected by privacy laws, meaning a fiduciary would have access unless an individual forbade others to access an account or made it a private account, the spokesman said. Most people don't make plans for their digital assets, so there's a need for a default rule, he said.

The Privacy Expectation Afterlife and Choices Act, or PEAC Act, is one solution proposed by NetChoice. The law would allow authorized fiduciaries to access select contents of accounts, like the "To" and "From" lines of an email so the fiduciary knows which bank or organization may need to be contacted to close an account. Fiduciaries wouldn't be allowed to see the content of any emails or text messages unless they had authority to do so from the deceased. "Electronic communications are wildly different from a box of letters," and are treated more like a phone call than a handwritten letter, Szabo said. The PEAC Act was created with input from groups including the American Civil Liberties Union, Electronic Frontier Foundation, Center for Democracy & Technology and Consumer Action, Szabo said.

The ULC proposed the Uniform Fiduciary Access to Digital Assets Act. UFADAA says unless an account holder says otherwise, a legally appointed fiduciary will have the same access to digital assets as tangible assets and must comply with the account holder's instructions. Groups like NetChoice and CDT originally opposed UFADAA, citing privacy concerns. In July, the ULC updated UFADAA making it more similar to the PEAC Act, and groups like NetChoice now support UFADAA, Szabo said.

The industry is "creating user choice mechanisms to help fiduciaries find an account or money," Szabo said. The goal with PEAC Act and UFADAA is to create a default law that says once a fiduciary can prove an account belongs to a deceased individual, the fiduciary can obtain access to communication records, Szabo said. In July, the ULC updated the UFADAA law in a way that better resembles the PEAC Act, allowing groups like NetChoice that once opposed UFADAA to now support the law, he said.

ECPA should be updated and states should pass laws, preferably one uniformed law, to address what's considered a digital asset and what kind of access an individual's family has to the assets, said the ULC spokesman. Once state legislatures begin to pass the PEAC Act and UFADAA, there will be some relief provided to those who are trying to access assets of a deceased relative or friend, Szabo said.

Best Practices

Experts' recommendations can point up some best practices surrounding digital decedent issues.

Each company has its own rules when it comes to dealing with digital assets, said end-of-life planning company Everplans' Editorial Director Gene Newman. When dealing with death, people don't want to go from company to company to obtain access to an account, he said. People don't often think about how many digital assets they have, Newman said. But if the account, such as an Uber account, isn't closed, an identity thief may impersonate a deceased individual and charge rides to the deceased's account, he said. Szabo disagreed, saying an account is more likely to be hacked while an individual is alive via an email phishing scam.

Gray Plant's James Lamm was one of the first estate planning attorneys to consider digital assets. Digital assets like emails, Facebook posts or Flickr photos don't necessarily have any financial value, it's more sentimental or an administrative convenience to access these accounts after an individual dies, Lamm said. But some digital assets, such as digital currencies, have financial value. If individual owned Bitcoins but didn't give instructions for digital wallet location or password, that money is unrecoverable, Lamm said. The differs from a local bank where a fiduciary could obtain a court order to require a bank to turn over the money to next of kin of the deceased, he said. Other digital assets with financial value include domain names, valuable blogs, websites and content created by writers, photographers and musicians that may be saved on a hard drive or in the cloud, Lamm said.

Instructions for something as simple as how to unlock a tablet or phone can be very helpful after a person dies, Newman said. So many services and accounts—bank accounts, credit card statements and online investments—are online that no one thought would be online, he said. The one person who can share how to get into an account isn't around, Newman said. If a company like Apple were to share a password with someone who called and said his or her grandmother died and the person wanted to access her iPad, people would question the company's security policies, Newman said.

More than 70 percent of Americans agree their private communications and photos should remain private after they die, according to a survey of 1,012 U.S. adults conducted in January by Zogby Analytics for NetChoice. Sixty-five percent said their privacy is violated if their private communications and photos are shared without their consent even after they die, which is why 75 percent said they either would make arrangements for friends and family to access private communications, or didn't want anyone to access them.

Companies don't want to grant access to an account, so they put up barriers to weed out nefarious individuals who are trying to unlawfully access an account, said CDT Consumer Privacy Project Policy

Analyst Ali Lange. Many times, a company doesn't know an individual's identity because not everyone uses a real name when signing up for an account, she said. If a computer isn't locked and an individual is still signed into his or her accounts, a spouse or anyone else trying to access those accounts could do so, Lange said. If not, the hoops an individual's personal representative will have to jump through to get access depends on where the individual lived and the circumstances, she said. **— *Katie Rucke***

Comm Daily® Notebook

FCC Chairman Tom Wheeler disputed criticisms of how the agency handled Dish Network's use of designated entities and bidding credits in the AWS-3 auction by Dish CEO Charlie Ergen. Ergen said during a financial call Wednesday that Dish did exactly what it understood it was entitled to do based on guidance from the FCC before that auction (see 1508050042). "I liked the part of his earnings call where he talked about the best FCC in 30 years," Wheeler said during a Thursday news conference. "The rules haven't changed. The rules were the rules when [Dish] went in and they made their decision based on knowing what the rules were." ***—HB***

Capitol Hill

The Senate will finish consideration of the Cybersecurity Information Sharing Act when Congress returns from the August recess after Labor Day, Senate Majority Leader Mitch McConnell, R-Ky., promised during a news conference Thursday. McConnell withdrew a planned cloture vote Wednesday on S-754 but reached a deal on a set of 22 amendments the Senate will consider when he brings the bill back up. The amendments include a compromise manager's amendment from Senate Intelligence Committee Chairman Richard Burr, R-N.C., and committee Vice Chairwoman Dianne Feinstein, D-Calif., along with 10 amendments from Senate Republicans and 11 from Senate Democrats (see 1508050070). "I would have loved to have finished cybersecurity," but the amendments deal "will allow us to finish it in September," McConnell told reporters.

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Senate Finance Committee Chairman Orrin Hatch, R-Utah, and Homeland Security Committee ranking member Tom Carper, D-Del., bowed the Federal Computer Security Act (FCSA) Wednesday in a bid to increase oversight of federal agencies' cybersecurity after recent data breaches at the Office of Personnel Management and other agencies. The bill would require every agency's inspector general to submit a report to Congress on their agency's cybersecurity practices, along with requiring a GAO report analyzing the economics of agencies' barriers to implementing updated cybersecurity measures. The FCSA "will shine light on whether our federal agencies are using the most up-to-date security practices and software to safeguard our nation's most sensitive information," Hatch said in a news release. The OPM data breach and other recent federal data breaches make FCSA "critical to getting our computer networks in order and to promoting good cyber hygiene across the federal government," he said. FCSA "builds on our ongoing efforts to bolster the federal government's cyber defenses by adding another important layer of oversight to make sure agencies are doing all that they can to protect their critical networks and to ensure that sensitive information is properly secured," Carper said. Carper also co-sponsored the Federal Cybersecurity Enhancement Act (S-1869), which Senate Homeland Security approved in late July (see 1507290036) and is now being considered as an amendment to

the Cybersecurity Information Sharing Act (S-754). "Congress needs a better understanding of the security-related practices and software currently in use by our agencies," BSA | The Software Alliance President Victoria Espinel said in a statement. "Ensuring that agencies and their contractors are using the best security practices, including using only genuine and fully licensed software on their systems, will help strengthen their cybersecurity efforts and keep sensitive information out of the wrong hands."

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Sen. Chuck Schumer, D-N.Y., introduced S-1949 Wednesday "to make it unlawful to alter or remove the unique equipment identification number of a mobile device," its title said. The three Democratic co-sponsors are Sens. Richard Blumenthal of Connecticut, Barbara Boxer of California and Amy Klobuchar of Minnesota. Schumer has prioritized issues of smartphone theft. The legislation is referred to the Judiciary Committee, and the text wasn't online or available from Schumer's spokesman.

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House Commerce Committee Chairman Fred Upton, R-Mich., and Oversight and Investigations Subcommittee Chairman Tim Murphy, R-Pa., released a report Thursday detailing "serious structural flaws" at the Department of Health and Human Services and HHS' operating divisions, including the Food and Drug Administration and the National Institutes of Health, a committee news release said. The report was released after the committee completed a yearlong investigation, it said. Murphy and Upton called the findings "alarming and unacceptable." Sensitive information is held by many in the public and private sectors, and Americans "should not have to worry that the U.S. government is left so vulnerable to attack," they said. As evidenced by the Office of Personnel Management breach, serious deficiencies in an agency's information security practices can become a large issue, they said. The report recommended making the chief information security officer the "primary authority for information security" and moving all information security functions to the general or chief counsel's office, "where reducing and mitigating risk is the primary function," the release said. "While it is impossible to fully protect against cyber attacks, we have a responsibility to approach these issues with necessary foresight and diligence to minimize vulnerabilities and maximize security," Murphy and Upton said. "Unfortunately, the bar has been set low and we have nowhere to go but up."

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Section 603 of the Senate Intelligence Authorization Act for FY 2016 (S-1705) requiring an electronic communication service or a remote computing service to report suspected terrorist activities to authorities is "fatally flawed" and should be removed from the legislation, CEA President Gary Shapiro told Senate leadership in a Thursday letter. The bill was introduced July 7 by Sen. Richard Burr, R-N.C. "While well intended, this provision will impose impossible to meet requirements on a range of America's technology companies," Shapiro said. "The real world impact of the requirements in this section could devastate the U.S. technology industry," he said. "Internet platforms could be burdened with reporting content that, in many cases, their employees, including lawyers, cannot accurately categorize or understand." The requirements would be "impossible to follow given that social networks may receive up to 500 million postings per day," he said. Content that's "potentially subject to the reporting requirement is written in a wide range of languages that service providers subject to this law are unlikely to be equipped to have the resources to understand," he said. "The burden of reviewing and interpreting hundreds of millions of postings in scores of different languages would cripple most companies." Section 603 also "appears to cover any company

with a blog, internet operation, or active bulletin board," he said. "The number of companies impacted goes far beyond the intent of the provision. In short, this is an ill-conceived but potentially far-reaching, chilling and debilitating proposal for American technology companies." The Internet Association, Internet Infrastructure Coalition and Reform Government Surveillance also wrote a letter to Senate leadership about concerns they have over the provision. "All of our members want to eliminate terrorist activity on their platforms, and they work tirelessly to ensure that Internet platforms are being used legally," IA CEO Michael Beckerman said. "Requiring Internet companies to provide law enforcement enormous quantities of data will not make us safer and would make it more difficult for law enforcement to find real threats." If the provision were to be adopted, there is a risk it would serve as a "global template for other countries to impose reporting requirements for activities those jurisdictions deem unlawful," the groups' letter said. "This would be particularly problematic with countries that regulate speech, including political speech, and with authoritarian regimes that would demand that Internet companies police their citizens' activities." Sen. Ron Wyden, D-Ore., put a hold on the bill, citing concerns with the provision (see 1507280048). Earlier this week, a coalition of digital right groups and trade associations wrote to Senate leadership urging the provision be removed (see 1508040049). Burr's representatives didn't comment.

The Department of Transportation needs to create a smartphone app, Democratic staffers said in a committee report on airline fees released Thursday. "Due to the increasing prevalence of mobile devices, Committee minority staff recommends that the Department also develop a smartphone 'app' that would allow consumers to easily file complaints from mobile devices."

Wireless

The 4th U.S. Circuit Court of Appeals said a warrant is required for police to access location information from a cellphone or other mobile device. The case involved the conviction of two men for armed robbery, a conviction that relied in part on cell site location information (CSLI) obtained from Sprint. The decision in *U.S. v. Aaron Graham* was written by Senior Judge Andre Davis for himself and for Judge Stephanie Thacker. But Thacker also issued a concurrence and Judge Diana Gribbon Motz partly dissented. "We hold that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI for an extended period of time," the court ruled Wednesday. "Examination of a person's historical CSLI can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user. Cell phone users have an objectively reasonable expectation of privacy in this information." The 4th Circuit said cellphone location information raises bigger privacy issues than data from tracking devices in an automobile. "Quite unlike an automobile, a cell phone is a small hand-held device that is often hidden on the person of its user and seldom leaves her presence," the court said. "Cell phone users regularly carry these devices into their homes and other private spaces to which automobiles have limited access at best." Motz disagreed with the majority that obtaining information from a voluntarily surrendered cellphone requires a warrant. The decision did the two defendants in the case little good, saying that since the government "relied in good faith on court orders" issued in accordance with Title II of the Electronic Communications Privacy Act, or the Stored Communications Act, "the court's admission of the challenged evidence must be sustained." Thacker wrote separately of her concern "about the erosion of privacy in this era of rapid technological development." The "tension between the right to privacy and emerging technology, particularly as it relates to cell phones, impacts all Americans," she wrote. "As the march of technological

progress continues to advance upon our zone of privacy, each step forward should be met with considered judgment that errs on the side of protecting privacy and accounts for the practical realities of modern life. At bottom, this decision continues a time-honored American tradition—obtaining a warrant is the rule, not the exception." The Center for Democracy & Technology said the decision is significant. "The government compelled the disclosure of 221 days of cell phone location information, which included 26,659 location data points for one defendant and 28,410 for another," a CDT news release said. "Unless reversed by the full 4th Circuit, the decision sets up a clear split in the circuits about the extent of protection of cell phone location information. As a result, this issue will likely require resolution by the Supreme Court." Rep. Suzan DelBene, D-Wash., said the case is "an important reminder that government should not have free rein to infringe on the constitutional right to due process" and called for overhaul of the Electronic Communications Privacy Act (ECPA). "More than 20 years after email became ubiquitous, our laws remain woefully outdated," she said in a statement. "I urge leadership to take up ECPA reform without delay." ***—HB***

SouthernLINC Wireless will offer mission-critical 4G LTE Advanced data services to parent company Southern Co. utilities and to local businesses and government in the utilities' service territories, a Thursday news release from the carrier said. The first offerings will be available in Atlanta, Birmingham and Tuscaloosa in mid-2016, it said. Ericsson is providing the radio access network and evolved packet cores, and Cisco is providing the multiprotocol label switching equipment, the carrier said. In 2017, LTE data services will expand to the greater Montgomery area and across all of Georgia Power's service territory, it said. In 2018, LTE data services will be available in all service territories of Southern Co.'s electric utilities, SouthernLINC said.

Internet

Cogent is beefing up legal spending as it prepares to go to court over ISP interconnection problems, CEO David Schaeffer said Thursday in a conference call on earnings results. Despite "active discussions ... we believe there's at least a couple [parties] that it appears possible that we may have to file litigation" on, Schaeffer said. "Hopefully ... they may understand the strength of our argument and come to the table. While we continue to remain hopeful that we will not have to file any litigation, we have prepared briefs and motions for litigation against several parties that have been unwilling to upgrade their interconnection capacity as required under the open Internet order." The "three problematic ISPs" are CenturyLink, Deutsche Telekom and Time Warner Cable, he said. While as much as 18 percent of Cogent's traffic at one time suffered interconnection problems with a variety of ISPs—particularly AT&T, Comcast and Verizon—"the largest three ISPs in the U.S. have understood this, understood their obligation under the law and have been good corporate citizens and opened up interconnections," Schaeffer said. Today, about 8 percent of Cogent's aggregate traffic is with providers experiencing congestion, he said. He has griped before about the likes of CenturyLink and TWC (see 1505010033). Those companies had no comment right away Thursday.

User names, email addresses and encrypted passwords for users of ICANN's website were "obtained" at some point in the past week via "unauthorized access to an external service provider," ICANN said Wednesday. The data breach didn't expose information related to the Internet Assigned Numbers Authority (IANA) functions or ICANN financial information, ICANN said. "There is no evidence that any

profile accounts were accessed or that any internal ICANN systems were accessed without authorization," it said. ICANN hasn't sought a law enforcement investigation of the breach but its own inquiry is "ongoing," a spokesman said. The nonprofit said it's requiring all users to reset their passwords and cautioned them to also reset passwords for other websites if they are the same as the one they used on ICANN's website. ICANN previously was the target of other data breaches, including a November spear phishing attack that affected its centralized zone data system (CZDS), which contained names, email addresses, phone numbers and other information of CZDS users. That breach also affected ICANN's Governmental Advisory Committee members-only wiki website (see 1412170037).

The Electronic Frontier Foundation released a browser extension, Privacy Badger 1.0, that blocks "some of the sneakiest trackers that try to spy on" an individual's Web browsing habits, an EFF news release said Thursday. More than 250,000 users installed the Privacy Badger during alpha and beta releases, it said. The new extension "includes blocking of certain kinds of super-cookies and browser fingerprinting—the latest ways that some parts of the online tracking industry try to follow Internet users from site to site," it said. Users can sometimes see evidence that they are being tracked by advertisers and other third-parties online with ads that "follow you around the Web that seem to reflect your past browsing history," said EFF Staff Technologist Cooper Quintin, the lead developer of Privacy Badger. The app will spot many trackers "following you without your permission, and will block them or screen out the cookies that do their dirty work," Quintin said. The browser extension works in tandem with EFF's new Do Not Track policy, the group said. Users can set the DNT flag or install privacy badger to signal they want to opt-out of online tracking, the release said. "Privacy Badger won't block third-party services that promise to honor all DNT requests," it said. "It's time to put users back in control and stop surreptitious intrusive Internet data collection," said EFF chief computer scientist Peter Eckersley, leader of the DNT project.

State Telecom

NTIA plans a one-day regional broadband summit, "Digital New England," Sept. 28 in Portland, Maine, a notice in Wednesday's *Federal Register* said. It's part of the BroadbandUSA program and is being hosted in conjunction with Next Century Cities, NTIA said. The summit will present best practices and lessons learned from broadband network infrastructure build-outs and digital inclusion programs from Maine and surrounding states, including projects funded by NTIA's Broadband Technology Opportunities Program and State Broadband Initiative grant programs funded by the 2009 American Recovery and Reinvestment Act, it said of the event at Holiday Inn by the Bay, 88 Spring St.

General Communication boosted its investment in cloud services in Alaska with the purchase of Network Business Systems, a news release from the company said Thursday. The purchase closed that day and GCI has offered all NBS employees positions, it said.

Level 3 received a contract with Pennsylvania, a news release from the company said. Level 3 will expand its current Master IT Services Invitation to Qualify program contract to include security, network

and telecom services, the company said. These services are in addition to the existing consulting services awarded under a previous master contract, it said.

Broadcast

Sinclair sees $2 billion worth of "substantial opportunities" in relinquishing some of its licenses in the incentive auction, CEO David Amy said on an earnings call Wednesday. Amy has expressed interest in the incentive auction before (see 1506250060), though a Sinlclair executive subsequently said it wouldn't be actively participating (see 1507230064). The $2 billion number was arrived at using the median numbers for specific Sinclair stations provided in the Greenhill estimates of auction prices, Chief Financial Officer Christopher Ripley said. "The ultimate outcome will depend on the many auction variables which are unclear at this time," Amy said. Ripley said Sinclair's view of the auction hasn't changed, but there's an industry view that the company won't participate. "So that's one of the reasons we put that statement in the earnings release here or call today, just to give some people a little bit more specifics around what the upside is for Sinclair," Ripley said. The earnings could even be improved with channel sharing, Ripley said. Sinclair is in "active discussions" on channel sharing, he said. ***—MT***

The deadline for biennial FCC ownership reports was extended from Nov. 2 to Dec. 2, said a Media Bureau order released Thursday. "The filing should still include information current as of October 1, 2015," the order said. "We are aware that some licensees and parent entities of multiple stations may be required to file numerous forms, and the extra time is intended to permit adequate time to prepare such filings."

Developers of the NextRadio smartphone app that lets listeners receive FM radio on their handsets are teaming with College Broadcasters Inc. on a sweepstakes competition to devise 60-second ad spots for the next phase of NextRadio's consumer awareness campaign launching in October, the partners said in a Wednesday announcement. The contest "is designed to offer college students an opportunity to conceive, create, and submit a commercial radio spot and compete within a real world context," they said. Three winners will be chosen, they said. Besides gaining national exposure, the first prize winner will get an expense-paid trip to the National Student Electronic Media Convention Oct. 22-24 in Minneapolis, they said.

Cable

American Cable Association's Ross Lieberman needs access to confidential deal information, and the FCC should clarify who qualifies as "outside counsel" to make that happen, ACA said in an ex parte filing posted Thursday in docket 15-149. ACA said clarification should come before the agency issues a protective order in Charter Communications' buying Bright House Networks and Time Warner Cable, as the phrase "outside counsel"—when used in other protective orders in recent reviews of multichannel video programming distributor transactions—has been "incongruent with the common usage of the term in the legal and corporate world," ACA said. Meanwhile, parties in different deals before the FCC over the past four years have objected three separate times to Lieberman's status as outside counsel, meaning ACA "has had

to expend its limited time and resources responding." Adding an addendum stipulating an in-house attorney employed by a noncommercial trade association representing commercial parties qualifies as "outside counsel" would leave the door open to objecting to Lieberman's access—or access of other similar attorneys—on other grounds, ACA said. Lieberman is ACA senior vice president-government affairs. The FCC has had on circulation a draft protective order on Charter/TWC/BHN (see 1508040060)

NCTA, seeking an administrator for a newer power efficiency pact for Internet gear (see 1506250038), said an audit found savings from a previous accord to cut the amount of electricity set-top boxes use. The so-called voluntary agreement (VA) among pay-TV providers, makers of consumer electronics and energy efficiency advocates saved $500 million-plus in energy, preventing 3 million metric tons of carbon dioxide emissions, said the association Thursday, citing a report released that day by an independent auditor. The VA saved consumers $336 million in 2014, a year when 90 percent of set-tops bought by pay-TV providers met the Environmental Protection Agency's Energy Star v3.0 efficiency levels, said NCTA in a Wednesday blog post. But progress toward the next tier of performance could be "challenging," because set-tops bought in January 2017 likely will have more functionality than products reported for last year, said the report dated July 31, the second annual one under the VA. It said Tier 2 requirements must be met by 90 percent of set-tops bought by participants starting Dec. 31, 2016. The pay-TV industry, "undergoing massive changes" including shifting to IP-based video that may cut set-top energy use, opens "up a realm of possibilities," wrote Senior Scientist Noah Horowitz of the Natural Resources Defense Council, a participant in the set-top VA, on the NRDC's blog. "We are hoping that the industry includes power-scaling technology in their next-generation devices so these devices only work as hard as the task at hand." Meanwhile, the steering committee for June's VA on Web gear issued a request for proposals for an independent administrator for that accord, which doesn't include energy efficiency advocates but does include pay-TV and CE companies. RFPs for that small network equipment initiative are due Sept. 16, said NCTA. The administrator "will annually assess each company's compliance, produce an annual report, and handle many other transparency and verification functions," said the association.

Turner Broadcasting is accelerating its VOD offerings, for the first time offering multiple upcoming episodes of a series online. The programmer said Thursday it would make multiple episodes of the drama *Public Morals* available through set-top video on demand, the Watch TNT mobile app and online at www.tntdrama.com/watchtnt one day after the Aug. 25 series premiere. Episodes of some truTV and TNT series also will be available on demand starting this week, Turner said.

Media Notes

FCC Chairman Tom Wheeler hopes the draft protective order (see 1508040060)) on the release of video programming confidential information (VPCI) in Charter's proposed purchases of Bright House Networks and Time Warner Cable is "voted real fast," he said in a news conference after Thursday's commission meeting. The shot clock for the deals can't start until the FCC has established the rules for VPCI, he said. Asked about when that clock would start, Wheeler said the media should ask "those who are voting on the protective order." Commissioner Ajit Pai said in his own news conference after Wheeler's that the

question of sharing VPCI should be separated from the transaction review and put out for public comment. His proposals along those lines to the chairman's office have received no response, Pai said. Commissioner Mike O'Rielly also said he disagrees with Wheeler's stance, and he hasn't voted on the protective order. FCC staffers weren't "sucking eggs" while waiting for the shot clock to start—they're reviewing Charter information already submitted, Wheeler said. ***—MT***

Satellite

Harris CapRock Communications seeks FCC International Bureau approval for C- and Ku-band sea tests and trials of its SpaceTrack ST5000-2.4 earth station onboard vessel terminal (ESV), as well as an Intellian v240M ESV. In an IB submission Wednesday, Harris CapRock said it expects to start testing Aug. 14 on a pair of Carnival cruise ships and to run up to 180 days. The company is developing ESVs to communicate with both geostationary and non-geostationary fixed satellite service satellites.

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OneWeb joined the Satellite Industry Association, SIA said in a Thursday news release. OneWeb earlier this year announced plans to launch 648 Ku-band low Earth orbit satellites, which would tie into Intelsat's geosynchronous satellite constellation and create a satellite-provided broadband network expected to go live in 2019 (see 1506260025).

Communications Personals

FCC Public Safety Bureau promotes **Lauren Kravetz** to chief of staff; she's succeeded as Cybersecurity and Communications Reliability Division deputy chief by **Theodore Marcus**, moving from Enforcement Bureau ... Discovery Communications moves **Marjorie Kaplan** to president-content, Discovery Networks International, new position ... Tribune Media Chief Financial Officer **Steven Berns** resigning to work as CFO at another company; **Chandler Bigelow**, chief strategies & operations officer, named interim CFO ... NAB Education Foundation elects board member **Larry Patrick**, Patrick Communications, chairman, and joining board are **Kevin Cuddihy**, Univision Local Media, **Julie Koehn**, Lenawee Broadcasting, **Kevin Latek**, Gray Television, and **Deb Turner**, E.W. Scripps ... Public Radio International adds to board **Michael Isip**, KQED San Francisco.

Media Financial Management Association 2015-2016 officers and newly elected board members are **Ralph Bender**, Manship Media, chairman, **Timothy Mulvaney**, Media General, vice chairman, **Robert Damon**, SFX Entertainment, secretary, **Cindy Pekrul**, Turner Broadcasting System, treasurer; regular directors for MFM-Broadcast Cable Credit Association **David Bochenek**, Sinclair, **John Giraldo**, AMC Networks, **Dawn Sciarrino**, Sciarrino & Shubert, **Jeana Stanley**, Hearst Television, **Sue Tuxill**, Salem Media, and **Bill Waters**, Swift; and **Scott Jenkins**, Disney Worldwide Services, named BCCA representative to the MFM-BCCA board ... Added to Trustworthy Accountability Group board are **Krishan Bhatia**, NBCUniversal, **Joan Gillman**, Time Warner Cable Media, **John Kosner**, ESPN, **Joe Marchese**, Fox, **Rob Master**, Unilever, and **Michael Rubenstein**, AppNexus ... Lobbyist registrations: Oracle, **The Nickles Group**, effective July 17 ... PayPal, **Thorn Run Partners**, effective July 20 ... Sirius XM, **K&L Gates**, effective June 15.