

Patton Boggs TechComm Industry Update – November 25, 2009
November 25, 2009

House Panels Examine Privacy, E-Commerce Concerns

Advocates of protecting individual privacy and those favoring “e-commerce” offered differing views at a Nov. 19 hearing of two House Energy and Commerce subcommittees. [Six witnesses](#) appeared before the Commerce, Trade and Consumer Protection Subcommittee and the Communications, Technology and Internet Subcommittee. The witnesses were George Pappachen, chief privacy officer for Kantar/WPP; Jennifer Barrett, global privacy and public policy executive from Acxiom; Chris Hoofnagle, director of information privacy programs at University of California, Berkeley; Zoe Strickland, vice president, chief privacy officer for Wal-Mart Stores Inc.; Michelle Bougie, senior Internet marketing manager for LearningResources.com and EducationalInsights.com; and Pam Dixon, executive director of World Privacy Forum.

The witnesses agreed that the Internet has vastly expanded the ability to gather detailed information on economic, social and medical status and other personal information. Business and privacy proponents also agreed that online consumers should be able to know what data is being collected and how it is used.

George Pappachen, chief privacy officer for London-based Kantar Group, an international market research firm, and its parent company, WPP, whose holdings include marketing and public relations firms, spoke about the value of collecting consumer information. Several of Kantar companies collect consumer data for governmental agencies worldwide. “Whether in determining if post mail is reaching its recipients in a timely manner, sometimes in rural areas, or understanding if publicly funded healthcare organizations are delivering the goods, we help ensure that products and services live up to their promise,” Pappachen said.

At the same time, Pappachen noted the need to protect consumer data and building consumer trust. “Getting it right with regard to our interaction with consumers – and the points of contact that stand as proxy for their express or implied opinion – is an essential element of business success for us. Our brands and the client brands that we represent have spent decades building trust with consumers and within the marketplace.”

Energy and Commerce Chairman Henry Waxman (D-CA) said in a statement that consumers “have few rights with respect to the collection and use” of their personal data. Waxman said he was eager to work with colleagues “to give consumers tools to protect their privacy without unduly burdening industry or stifling innovation.”

Communications Subcommittee ranking member Cliff Stearns (R-FL) said consumers should have access to the information collected about them and have the right “to opt in or opt out” of its distribution. Stearns also cautioned that getting “too far down in the weeds” in regulating the collection and use of consumer data could restrict growth of Internet-based businesses.

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

This industry update can be accessed at:

http://www.pattonboggs.com/newsletters/techcomm/2009_11_25_TechCommUpdates.htm

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

Draft legislation to address the issue is being prepared by the chairmen and ranking members of both subcommittees.

NTIA and RUS Third Quarter Progress Report to Congress Confirms Funding Award Delays

In its third quarter [report](#) to Congress, the National Telecommunications and Information Administration (NTIA) and the Department of Agriculture's Rural Utilities Service (RUS) reported that broadband stimulus funding awards for Round 1 would slip into February 2010 and all remaining Broadband Technologies Opportunities Program (BTOP) and Broadband Initiatives Program (BIP) stimulus funding would be awarded in a single round. The agencies originally planned to complete the first round of funding by the end of 2009. NTIA continues to develop program-specific post-award compliance and monitoring requirements and guidelines. The Round 2 Notice of Funding Availability (NoFA) is expected to be released early next year. RUS and NTIA are presently seeking comments from all interested parties about how the Round 2 funding process can be improved. Comments are due Nov. 30. Please contact us if you are interested in filing.

Round 1 applicants are beginning to receive notice from RUS or NTIA that applications are moving to Phase II processing. Per the NoFA, the Agencies will be seeking additional financial, technical and environmental information within 30 days. Awards will be made on a rolling basis. At this time, RUS and NTIA have not released a list of applications moving to Phase II processing.

FCC Announces Timeframe for State and Local Review of Wireless Tower Applications

The FCC recently adopted most components of CTIA – The Wireless Association's "Shot-Clock" proposal, to speed the time frame within which states and localities must review and act upon tower requests. The rollout of next generation wireless services across the country in the next three to five years will require the deployment of thousands of new towers. Historically, however, states and municipalities have been slow to approve towers, stymying wireless broadband development.

CTIA filed a petition in July 2008 requesting that the Commission issue a Declaratory Ruling clarifying provisions in Sections 253 and 332(c)(7) of the Communications Act regarding state and local review of wireless facility siting applications. In the recently adopted [Declaratory Ruling](#), the FCC set the time period for states and localities to review tower requests. Jurisdictions are to complete their review within 90 days for collocated tower requests and within 150 days for all other tower siting applications. The FCC hopes that specifying processing timelines will speed the deployment of next generation wireless networks. If the jurisdiction fails to act during the prescribed time period, the applicant may file a claim for relief in court within 30 days of the end of the deadline. The court will then decide what action to take based on all the facts of the case.

The FCC decision defines achievable timeframes for state and local governments to act on zoning applications, but does not dictate a substantive outcome on any case or otherwise limit state and local governments' authority over local land use. The Declaratory Ruling also finds that it is a violation of the Communications Act for a state or local government to deny a wireless service facility siting application because service is available from another provider. Finally, the FCC decision denied CTIA's request to find that it is a violation of the Communications Act for a state or local regulation to require a variance or waiver for every wireless facility siting. In reaching its conclusion, the FCC noted that the trade association failed to present the FCC with any evidence of a specific controversy. The findings in the Declaratory Ruling are effective upon the FCC's release of the item, which was Nov. 18, 2009.

Wireless Carriers Suggest Excess DTV Spectrum Could Be Used for Broadband

In a [letter](#) to the FCC, the Consumer Electronics Association (CEA) and CTIA – The Wireless Association's asked the FCC to open a proceeding to investigate re-allotting DTV spectrum for wireless broadband. CEA and CTIA argue that such a proceeding is overdue because the Communications Act requires the FCC to investigate alternate uses for DTV spectrum within 10 years of issuing the first DTV license, and the FCC issued the first DTV license in 1999.

Separately, House Energy and Commerce Chairman Emeritus John Dingell (D-MI) sent a letter to the FCC stating that television broadcasters have returned enough spectrum and wireless carriers should look elsewhere for spectrum to support broadband operations. Dingell is concerned that the loss of additional spectrum will hinder broadcasters' ability to deliver free, over-the-air broadcasts.

In statements to the press, FCC Chairman Julius Genachowski confirmed that finding all of the spectrum wireless carriers needed for future broadband operations will be a challenge. He said the FCC may not be able to identify the needed spectrum before the Commission is required by Congress to announce a National Broadband Plan in February 2010.

FCC Seeks Comment on USF, Intercarrier Compensation

The FCC is seeking comment on reforms to the Universal Service Fund (USF) and intercarrier compensation (ICC) as part of the National Broadband Plan. **Comments are due Dec. 7.** In the [Public Notice](#), the FCC seeks comment on various options, including reforms to universal service and ICC, that will further the goal of making broadband universally available.

Among the key questions posed by the FCC relating to USF and the four support programs (high-cost, low-income, schools and libraries (the E-rate program) and rural health care), are the following:

- Is the relative size of funding for each support mechanism appropriate to achieve the universalization of broadband?
- To the extent commenters believe funding should be significantly increased for one or more of the support mechanisms, such as e-rate, should funding be reduced in other mechanisms? If so, how would such changes advance the goal of universalization of broadband?

The FCC also seeks input on expanding the use of USF funds to include broadband. Specifically, the FCC asks:

- If the high-cost support mechanism is reformed to support deployment of broadband, how should the new mechanism be structured, e.g., a single fund or multiple funds (for mobility and/or fixed, middle mile, last mile)? Through what mechanism or criteria should funding be awarded? What would be the impact of designing a broadband support mechanism so that a provider's competitive loss of a subscriber results in the loss of associated funding?
- Would the size of any broadband funding mechanism differ if support were calculated based on a forward-looking cost model designed to calculate the lowest total cost of ownership on a technology-neutral basis, as opposed to individual provider submission of actual costs?

Please contact us if you have views to contribute to this proceeding.

House Subcommittee Weighs Draft USF Reform

On Nov. 17, the House Subcommittee on Communications, Technology and the Internet held a hearing to review a discussion draft of the Universal Service Reform Act of 2009. Among those testifying were representatives of NARUC, Verizon, Cellular South, Inc., DTC Communications, AT&T Services, Inc., National Cable & Telecommunications Association (NCTA), the University of Virginia Office of Telemedicine and Windstream Communications, Inc.

[Draft legislation](#) was circulated on Nov. 6 by Subcommittee Chairman Rick Boucher (D-VA) and co-sponsor Rep. Lee Terry (R-NE). The legislation seeks to reform the Universal Service Fund (USF) in the following ways:

- Capping the total amount of universal service support, other than support for schools, libraries, rural health care, lifeline, linkup and toll limitation programs;

- Expanding use of the fund for buildout of broadband lines, requiring USF recipients to offer broadband service with downloads of 1.5 mbps or greater within five years of the law's enactment;
- Expanding the contribution base of the fund and directing the FCC to choose a contribution methodology based on revenues, numbers or a combination of the two; and
- Ensuring that universal service high-cost support is available to carriers that rely on it to provide service, and adopting a competitive bidding process for determining whether mobile wireless service providers are eligible for support.

The draft also addresses intercarrier compensation, phantom traffic and traffic pumping.

Boucher said the draft “bridges the divide on universal service issues between large carriers such as Verizon and AT&T that are net contributors into USF and the smaller rural carriers that are net recipients of universal service funding.”

Energy and Commerce Committee Chairman Henry Waxman (D-CA) said he also hoped members would consider additional questions such as: should obligations be imposed upon USF supported networks similar to those that were imposed on networks supported by American Recovery and Reinvestment Act dollars?

Witnesses generally supported the Boucher-Terry discussion draft. Kyle McSlarrow, president and CEO of the NCTA, suggested that high-cost funding should no longer go to carriers in areas where there is another wireline competitor or where the state has deregulated the service. Chairman Boucher asked witnesses from small, rural telcos to seriously consider that suggestion.

Meanwhile, Eric Graham, vice president of government relations for Cellular South who represented the Rural Cellular Association, said that USF support is often the difference between high quality wireless service and no service at all. He said that handset exclusivity and data roaming issues must be resolved in order to provide rural consumers with the same service options as consumers in urban areas.

Energy and Commerce Committee Ranking Member Joe Barton (R-TX) and Subcommittee Ranking Member Cliff Stearns (R-FL) expressed concern about the size of the fund increasing.

Senate Panel Approves Satellite Reauthorization Bill

A five-year renewal of a law governing retransmission of broadcast television signals over satellite moved closer to enactment on Nov. 19 when the Senate Commerce Committee passed its version of the reauthorization bill. The bill, sponsored by Commerce Chairman John (Jay) Rockefeller (D-WV) and Commerce Communications Subcommittee Chairman John Kerry (D-MA) was noncontroversial. Both lawmakers worked closely on the measure with Commerce Ranking Member Kay Bailey Hutchison (R-TX).

The Satellite Home Viewer Act sets copyright royalty fees for “local-into-local” service and the delivery of network signals to customers who can’t receive over-the-air broadcasts. Under local-into-local service, local broadcast signals are redelivered to their respective markets via satellite. The law is set to expire on Dec. 31, 2009.

Commerce and Judiciary committees in both chambers have approved four bills reauthorizing the law. Floor action is next. The four measures will be merged into two before a House-Senate conference produces the final language.

The Senate Commerce bill includes language added by Sen. Claire McCaskill (D-MO) that requires the FCC to study whether capacity or cost issues are preventing satellite carriers from offering local broadcast signals in all 210 markets they serve, particularly rural areas. Satellite providers have blamed capacity constraints while critics accuse them of making room for profitable channels instead.

House Panel Passes Bill to Lower Volume on TV Ads

A bill that would require broadcasters to turn down the volume of television commercials easily passed the House Energy and Commerce Committee on Nov. 19. The Commercial Advertisement Mitigation Act, sponsored by Rep. Anna Eshoo (D-CA) now heads to the House floor. Under the bill, the FCC would devise recommended volume standards. Broadcasters would then have a year to acquire the equipment they need to bring loud commercials in line with those standards.

Senators Seek FCC Review of Multiple Station Ownership

Two Senators are asking the FCC to review the impact of multiple station ownership and management in a single market when it reviews its ownership rules. Senate Communications Subcommittee Chairman John Kerry (D-MA) and Sen. Charles Grassley (R-IA) wrote to FCC Chairman Julius Genachowski on the matter. "Our most immediate concern is with the number of cities hosting 'duopoly' broadcast stations," the letter said, adding that, "examples abound" of stations absorbing one another and merging their news operations, resulting in fewer local voices on the airwaves and reduced consumer choice.

They said examples of newscasts on competing stations produced by the same staffers and anchors can be found from "Honolulu to Cedar Rapids to Baltimore." Honolulu has come under scrutiny after Raycom struck a shared services agreement to run stations there. Media activist groups complained to the FCC about the deal, and the Commission sought more information on the contracts.

At a recent FCC workshop to spur the congressionally-mandated review of the agency's media ownership rules, broadcasters argued that the FCC needs to allow more combinations so that broadcasters may move to a multi-platform model. Broadcasters argue this would help them achieve economies of scale even as ad dollars shrink and the Internet becomes a competitive delivery model.

FCC Extends Biennial Media Ownership Report Form Filing Deadline to Jan. 11, 2010

The new media ownership form (Form 323) continues to undergo testing at the FCC and is still unavailable. Due to unexpected delays and new information to be collected in the new form, the Media Bureau, on its own motion, further extended the reporting deadline to Jan. 11, 2010. The FCC has not released a new estimate of when the electronic form will be available for filing. Reporting entities are expected to ask for waivers of certain of the FCC's new reporting requirements, such as a requirement to obtain an FCC Registration Number (FRN) for all reporting entities, because FRN registration requires individuals to disclose their Social Security Numbers to the FCC.

[INDUSTRY CALENDAR](#)

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

Jennifer Cetta

202.457.6546

jcetta@pattonboggs.com

Carly Didden

202.457.6323

cdidden@pattonboggs.com

Rebecca Murphy

202.457.5312

rlmurphy@pattonboggs.com