Wireless Spectrum Constraints

New 'Social Contract' for MVPDs Sought by Glist

A prominent cable lawyer seeks consideration of a new "social contract" — and of an entertainment tax — for companies competing with traditional multichannel video programming distributors. Paul Glist, co-chairman of Davis Wright's communications practice, told an FCBA event that traditional "video platforms typically come with a social contract. So we should be thinking of what might be a better social contract." Public Knowledge lawyer John Bergmayer, speaking on the same panel Tuesday night, told us later that Glist's comments have merit in considering how to apply old rules to newer, Internet-based firms. A veteran wireless lawyer said it may be too soon to regulate new Web video technologies.

The prospect of such a figurative contract brings up the issue of what to do with legacy rules, Glist said. They include some that are "inexplicable," such as the FCC having to process case-by-case cable operator requests for local deregulation from video rate setting, he said: "Why are we doing this" is something that could be said to apply "for a whole host of legacy rules." Local cable franchising authorities are "scared to death that everything is going to migrate onto the Internet" and the communities won't be able to impose franchise fees on the cable providers, Glist said. "We should face facts" that franchise fees don't have much to do with the costs to use municipal rights of way and many localities "have balanced their budgets" with the fees, he said. "How else do you sustain that" Glist asked. "Is it time for edge providers of video to step up to an entertainment tax?"

Glist's "plea" is not to let net neutrality "swallow up" the issue of whether it make sense for content owners, such as websites, to pay network operators, he said. "Verizon is going to fight the good fight over how far you can stretch Title I" rules, with its challenge to last year's FCC net neutrality order, but the question is how to sustain investment on the edge of and at the core of networks, he said. "I would much rather we explore what economic sense it makes to forbid the edge from ever paying a network for distribution when we want distribution to ... continue to expand," Glist said. He sought to allow experiments with deals, saying, "don't get hung up on who is paying who in that transaction" and "let that creativity flourish."

It's "ironic" that cellular phone service, earlier expected to carry "minimal amounts of data," is carrying "lots of data and video" and in so doing becoming a viable competitor to wireline broadband, said wireless attorney Michele Farquhar, head of Hogan Lovells' communications practice. "Of all the platforms that the FCC tried to create, that's the one that emerged" to challenge facilities-based wireline services, but it's "not the right platform" in terms of the amount of spectrum allotted to it, Farquhar said. "That's led to the tension between wireless and broadcasters" over spectrum, she said.

"If you're going to maintain this system where there are certain benefits you get as a cable system and certain duties, I agree with him [that] how do you extend that to an online system" is a valid question, Bergmayer told us, referring to Glist. "We're not saying Netflix should be sucked in by the FCC" and be regulated by it under Title VI rules, he added. "But we are saying if someone chooses to become a cable system, they opt into the regulatory rights of a cable system, then there should be some duties that come along with that. I think it's premature to say what they should be."

"If you're a cable system for one purpose, you should be a cable system for every purpose" to the extent that the newer companies use their facilities to serve as an MVPD, Bergmayer said. "The same [rules] ought to apply to an online system as with a traditional cable system" when it comes to paying TV stations for the retransmission consent rights to carry their programming, he said. "Ultimately, the retrans consent system needs to be adapted to deal with" newer providers, said Bergmayer, whose group has backed online streamer ivi in its legal battle with programmers over rights to carry their video online. "Among those reforms could be a way to accommodate online systems like ivi," he said. "We don't think they should get a free ride and then cable systems and DBS" do pay retrans fees, the attorney said. "There should be a platform-neutral approach that allows an online system to operate as an MVPD if it chooses to." — ***Jonathan Make***

'Deliberate Ambiguity'

Closely Watched TerreStar Auction Pushed Back

TerreStar is in "active discussions" with interested bidders, the company said in a court notification of a bankruptcy auction delay filed late Tuesday. Bids for TerreStar's assets were originally due Wednesday. TerreStar's filing pushes the bid deadline back a week to June 15 and the auction to June 22. The TerreStar bankruptcy is one of several moving parts involved in what will happen in the S-band.

TerreStar representatives, "consistent with their fiduciary duties to maximize value for their estates, are currently in active discussions with various interested parties regarding potential bids, including, without limitation, potential stalking horse bids," the filing said.

It's unclear who TerreStar is in discussions with and the company declined to comment, though there are several names that have been consistently raised as possible suitors. Dish Network and EchoStar has long been viewed as the most likely to end up with TerreStar's assets (CD April 15 p3), given EchoStar's existing stake in TerreStar and Dish's efforts to buy DBSD, which has 20 MHz of S-band spectrum next to TerreStar's 20 MHz of spectrum. Harbinger Capital Partners has also been discussed as a potential suitor. Harbinger, which owns LightSquared, also has some ownership in TerreStar and previously showed interest, bidding to buy both TerreStar and DBSD out of bankruptcy. A Harbinger takeover of TerreStar might please the GPS industry, which would like to see LightSquared move its terrestrial broadband service out of the L-band.

What happens in the TerreStar bankruptcy process is expected by many to have a big impact on how, and if, the FCC moves forward on efforts to increase terrestrial broadband in the spectrum, satellite executives said. "There are a number of paths available — incentive auctions, combining the licenses to build a new broadband network with or without satellite service, flipping the spectrum to an existing operator to augment its spectrum holdings, or holding it with the expectation that the value of the asset will increase," said Stifel Nicolaus analysts in a note to investors. "We believe the FCC has maintained a posture of deliberate ambiguity regarding what possible permutations would be approved." For instance, the FCC hasn't issued a public notice on EchoStar's DBSD buy, possibly a way for the FCC to "retain its full set of options" until "the outcome of the TerreStar auction is known," said the analysts.

The FCC recently issued a public notice (CD May 24 p18) on various scenarios for pairing the S-band with other spectrum. The docket has received filings from only CTIA and Sprint Nextel — both were comments extension requests — perhaps indicating how closely the wireless players are watching. The FCC's recent public notice on the scenarios may have a cooling effect on some of the more speculative bids, said Tim Farrar, an analyst at TMF Associates. By adding the different possibilities, "the FCC introduced more risk into the process," possibly discouraging purely financial speculators, he said. "It makes it harder to take a chance."