



Communications Daily

THE AUTHORITATIVE NEWS SERVICE OF ELECTRONIC COMMUNICATIONS

MONDAY, DECEMBER 6, 2010

VOL. 30, NO. 233

TODAY'S NEWS

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Title I Litigation Risks Abound, Say Copps, Law Professors

The FCC faces a risky day in court if it adopts net neutrality rules without reclassifying broadband as a telecom service, as Chairman Julius Genachowski proposes, the commission's senior member and communications law professors watching the order's development but not privy to internal deliberations told us. Commissioner Michael Copps and some professors said Genachowski's plan, made public Wednesday, to keep broadband under Title I of the Communications Act appears to pose more risk than does reclassification of being thrown out in an appeal that many industry and commission officials believe is inevitable. While not relying solely on ancillary authority (CD Dec 3 p1) may help the regulator's prospects in any case before the U.S. Court of Appeals for the District of Columbia Circuit, it's unclear whether that will be enough for the FCC to win any lawsuit, said law professors we asked. Commission officials have said reliance on both ancillary and direct authority may make for a stronger order.

"The chances of it surviving a court challenge are much, much less under Title I than under Title II," Copps said. "I think it's more vulnerable legally. I think it's less well founded on the statute." He said he doesn't get the arguments of those who say Title I is the better approach. "I just don't see that at all," Copps said. "It just strikes me that you are much better off going down the route of Title II. Yes, there will be a court case, but if you go down Title I," an appeal "will tie up our whole ability to build up broadband infrastructure, which is such an urgent priority for the country," he predicted.

"I am looking forward to discussions with all the stakeholders and with my colleagues to see how we can make this a credible network neutrality item, and at this point I cannot tell you if that is achievable or not," Copps said. "My preference remains Title II," he said: "That being said, we have an opportunity now in the next three weeks to have an exchange of opinion now that we have an item, to go meet with the parties who were party to putting it together, to meet with all stakeholders and to see if there is sufficient flexibility to improve" the item — which Copps considers necessary.

Title II "gives them a far better shot in the D.C. Circuit," said Professor Adam Candeub of Michigan State University, a former Media Bureau staffer. "That's what seems strange to me in the FCC's apparent decision. If they're worried about being sued by cable [or] DSL providers, then they rely on Title II." Reclassification would increase both "the chance of being sued" and "the chance of winning," he said. "And, as Julius doesn't have to pay for his legal fees, simply avoiding litigation shouldn't be the goal. Winning should."

"They'd have to come up with something pretty good" for the FCC to prevail in the D.C. Circuit under Title I, said Professor Donna Gregg of Catholic University, who led the bureau for several years under Chairman Kevin Martin. "There are real questions about the commission's jurisdiction to do the things it proposed," she said. "It's on shaky ground to begin with on the jurisdictional issue, and that will probably impact the outcome of any appeal." Reclassification is "less risky" legally, "but I really don't think it's a good idea" from a policy viewpoint, Gregg said.

A leader of FCC review for the administration's transition team in 2008 supports sticking with Title I. "There is certainly no guarantee of success before the D.C. Circuit, but I don't see a good ancillary jurisdiction theory as substantially more risky than a Title II approach," said Professor Kevin Werbach of the University of Pennsylvania's Wharton business school, who has a law degree. "The legal risk is roughly comparable under Title II or ancillary authority," he said. "There are good legal arguments why the FCC would win the case under Title II, but it's not a slam dunk." And there's "a greater likelihood of litigation against reclassification," Werbach said.

The commission could apply "a streamlined version of Title II," as Genachowski earlier had sought, said Professor Rob Frieden of Penn State University. "It provides the direct statutory authority a reviewing court requires and before changed circumstances provided the basis for its abandonment, Title II required nondiscrimination, transparency and the other Internet freedoms. But the political impracticality of re-regulation and the Supreme Court's *Brand X* decision affirming the FCC's functional abandonment of Title II, by classifying cable modem Internet access as an information service, makes reliance on Title II a sure loser on appeal."

Title I has the benefit of likely not drawing major ISPs behind an appeal (CD Dec 2 p1), several law professors said. "Maybe it's slightly stronger, but that's certainly going to draw the biggest attack from parties affected," said Brad Bernthal of the University of Colorado. "So I don't think there is any surefire route." Frieden's bottom line: "It looks like the commission loses either way, should some aggrieved party appeal." — *Jonathan Make*

'Pragmatic Proponent'

Matsui Seeks Cooperation on Net Neutrality, USF Overhaul

Rep. Doris Matsui, D-Calif., hopes to bring certainty to industry next year on long-brewing telecom issues like net neutrality and Universal Service Fund reform, the House Communications Subcommittee member said in an interview last week. Providing subsidies to make broadband more affordable for low-income Americans and addressing fears about lack of privacy online are two important ways to motivate more people to embrace fast Internet service, she said.

Most telecom issues don't divide the political parties, "so we can probably find areas of agreement" between Democrats and Republicans next year, Matsui said. That political dynamic could raise telecom's profile in a

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split Congress, she said. Broadband should be important for many members because it's "the base of many things," including revamping healthcare, education and energy, Matsui said.

The 111th Congress "really didn't get started" on many of the big telecom issues until late in the session because healthcare and climate change took priority, Matsui said. Her own bill to update the USF Lifeline program (HR-3646) didn't make it out of the committee. "I certainly would have hoped we'd made more progress," but "we didn't have a lot of time," Matsui said. "The groundwork's laid now for us to move forward in the next Congress."

Matsui called herself "a pragmatic proponent" of net neutrality. "I believe it's something we're going to have to address," but it's important to find compromise rather than indulge in unproductive fights, she said. "It's necessary to move forward on this." Matsui has said she supports the FCC's plan to move ahead on a net neutrality rulemaking at its Dec. 21 meeting, and she plans to monitor the proceeding closely. Matsui said she doesn't think the agency should wait for Congress, and she would back a Title I approach if that's where there is consensus. Matsui was involved in net neutrality negotiations in September run by outgoing Commerce Committee Chairman Henry Waxman, D-Calif. They were very close to a compromise when it fell apart, she said. Industry supported the deal, but "I think it became more political at the end," she said.

Matsui "can work with" Rep. Bobby Rush, D-Ill., if he becomes ranking member of the Communications Subcommittee, she said. "But I can certainly work with almost anybody." Some have raised concerns that Rush is not a strong enough supporter of net neutrality, but Matsui seemed unworried. "As long as people don't have a hard line in the sand, I think we can move forward," she said.

Matsui "will reintroduce" her USF Lifeline bill next year, she said. No changes are planned since the current version has broad support, she said. The measure, which aims to make broadband more affordable for low-income people, "has to be part and parcel" of broader universal service reform legislation, she said. Comprehensive USF legislation should address both rural and urban areas, she said. Matsui said she thinks USF reform will still be a priority

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next year — even without one of its most vocal proponents, House Communications Subcommittee Chairman Rick Boucher, D-Va., who lost his re-election bid — because broadband is so critical to the country's prosperity.

Rep. Lee Terry, R-Neb., hasn't asked Matsui to cosponsor his comprehensive USF bill, which he plans to reintroduce early next year without Boucher, Matsui said. Terry has said he's looking for a new Democratic cosponsor (CD Nov 23 p5). "Certainly there's no one like Chairman Boucher, but I know if [Terry and I] can work together, it's something I might consider," she said.

Congress could also spur broadband adoption by addressing privacy, Matsui said. "The thing that stops people the most from really embracing all this technology is the privacy concerns, and yet we have to keep it flexible enough so that we don't stop innovation." She's still reviewing separate bills by Boucher and Rush. Matsui acknowledged she hasn't focused closely on privacy before, "but I'm looking at it even more now because I think that's going to be something that could slow things down unless" Congress can write laws to make people feel more comfortable online.

Matsui is also working on smart grid legislation that would encourage broadband providers and electric utilities to partner on smart grid projects nationwide, a spokeswoman said afterward. The projects would allow consumers to monitor their real-time home energy usage on their PC and wireless devices. — Adam Bender

First Amendment Concerns

Copps Still Hopes FCC, Industry Will Engage on Broadcast Licensing

Commissioner Michael Copps is hopeful broadcasters and the FCC itself will engage with him in a dialogue on the types of requirements radio and TV stations should meet to renew their licenses, he told us after pro-

Communications Daily

(ISSN 0277-0679)

PUBLISHED BY WARREN COMMUNICATIONS NEWS, INC.

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Warren Communications News, Inc. is publisher of Communications Daily, Warren's Washington Internet Daily, Consumer Electronics Daily, Green Electronics Daily, Washington Telecom Newswire, Telecom A.M., Television & Cable Factbook, Cable & Station Coverage Atlas, Public Broadcasting Report, Satellite Week and other special publications.

Send news materials to: newsroom@warren-news.com

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posing a seven-point public value test. The senior commissioner on the FCC acknowledged he hasn't yet gotten the momentum to move forward that he'd like from his agency or from the industry in his quest to shorten license terms and make broadcasters do more to get them. "I think we have the potential vote to do something," Copps said Friday. He's long sought beefed-up licensing procedures for broadcasters, and when he was interim chairman he wanted to reduce license terms to three years from eight (CD May 15/09 p1).

"I will continue to try to engage my colleagues" on the subject, said Copps, who now seeks a four-year broadcast license term. "We haven't had much success with this since I've been there in 2000, with the first two commissions I dealt with. I am more optimistic about the potential of this commission. But to be perfectly frank, I would have to say that it's mostly potential thus far, and I continue to believe that by this time, almost two years into a new commission, we should have made at least a down payment on media reform and done some of these things on licensing. And I intend to push this very hard during the remainder of my tenure." His term ended June 30, but he is allowed to serve until the first session of the 112th Congress adjourns in 2011. Copps might not be reappointed.

The current license term of "eight years is too long" to go without having the benefit of some kind of public benefit test ... it's not too much to ask," Copps said. Given proposals to reallocate TV spectrum for wireless broadband, he thinks broadcasters "would be interested in trying to maximize their position or strengthen the position they have, and one way to do that" is to make better use of the digital spectrum from last year's DTV transition, Copps said. "Had they heeded that advice and really put on some public interest programming and diversity, I don't think anybody would have gotten within 500 miles" of the current proposals, he added. "It seems to me now that they're under quite a lot of pressure" and "ought to be willing to talk to people who are friendly with broadcasting," Copps said. "I've been willing to do that a long time, but I think other counsels have prevailed." There "are a lot of small and independent broadcasters, people who have had it in the family for years, that strive to serve the public interest," he said: "But with the consolidation" of recent years, "that is not always the mantra of management these days, which is why I think we should go back to having some guidelines."

The public value test includes a "meaningful commitment" to news and public affairs shows that would be "quantifiable and not involve issues of content interference," Copps said at the Columbia University School of Journalism in New York (<http://xrl.us/bh96zd>). The enhanced disclosure proceeding before the commission for two years, which would put public inspection files online, may need some minor "reworking" and could be completed in three months, he said. A commission spokeswoman declined to comment on Copps' proposal.

On more disclosure of funding for political ads, with about \$3 billion spent in the run up to the Nov. 2 mid-term elections, "I think we need to figure real fast whether we have the authority to do something, and I have urged that we do that" at the FCC, he told us. "I certainly would hope we have that authority" and if agency staffers "can make a convincing argument that we don't, then we should go about getting that," he said. "This is not at all partisan." In his speech, he sought "community discovery" where stations ask their audience for feedback, more local and independent programming and a public safety plan in place at every station, in case of disaster.

Some of Copps' plan would be a return to the past, before the industry was deregulated in the 1980s, and other parts could violate the First Amendment, said broadcast lawyers who reviewed his proposal. The NAB is happy Copps sees broadcasting's value, but disagrees with some of his proposals, a spokesman said. "Radio and TV stations have cycled out of the worst recession in 50 years and are poised to provide consumers with a robust digital future on mobile devices. Much of that programming will be free and local, which ought to count for something. Rolling back license renewal terms to a nearly pre-Internet era and adding new regulatory burdens would only create uncertainty."

"I don't think across-the-board, one-size-fits-all standards" will get industry buy-in," said lawyer David Oxenford of Davis Wright. "It would have to be very broad categories of ways of demonstrating the public interest to cover the myriad ways that broadcasters across the country" do that, he said. "There has been engagement

at various times in the past between broadcast groups and the FCC," such as several years ago during the localism proceeding, he said. Harry Cole of Fletcher Heald said he's "very skeptical" about Copps's suggestions. "As I see them, they're just another in a series of efforts — dating back to the earliest days of broadcast regulation — aimed at insinuating the commission into the business of content control, notwithstanding the First Amendment and Section 326" of the Communications Act, he said: That section bars the FCC from depriving broadcasters of free speech.

"Commissioner Copps' idea will only lead to easy circumventions and more dominance of information dissemination than we have today, both of which are the opposite of what he is trying to" do, said Peter Tannenwald, also of Fletcher Heald. "He cannot achieve his goal in a country that has freedom of speech, a large number of outlets and easy tuning, which has accelerated specialization and allows the public to change stations or channels with a button push." Trying to require all stations to air news will accelerate a growing trend, in which a few stations with the biggest newsrooms serve as news operations for smaller stations in their market, Tannenwald said. "The largest newsrooms then get access to multiple outlets, which keeps static the number of diverse news voices in the market or even reduces news voices as smaller stations give up trying to compete where they can't win." — *Jonathan Make*

'Stop the Bleeding'

Pay Phone Companies Ask FCC for Emergency USF Cash

The American Public Communications Council will ask the FCC for an emergency subsidy from Universal Service Fund cash to help keep its pay phone company members from collapsing, the group told us. The emergency petition will be accompanied by a petition for rulemaking asking the commission to consider using its Lifeline program to subsidize pay phones. The petitions could come as early as Monday afternoon, APCC President Willard Nichols said.

The number of pay phones in the U.S. has declined precipitously since the mid-1990s. The pay phone companies will claim in their petitions that the collapse has been accelerated by the commission's 2008 decision to subsidize wireless phones for the poor. "The commission did so without considering the devastating and unforeseen impact on payphone deployment nationwide that its actions could have," the APCC said in a draft petition. There were about 700,000 pay phones in the U.S. in 2008 and about 475,000 now, the APCC said. In recent years, major telecom companies have exited the pay phone business.

With big companies out of the market, independent pay phone operators have to rely on LECs to collect on calls not made using coins, said APCC lawyer Bert Carp of Williams & Jensen. "They're not going after this the way they would have if they owned the pay phones," he said of the LECs. "And you can't blame them for that. They don't go after marginal users." Despite the decline of the industry, pay phones are still the only link to modern telecommunications for millions of poor Americans, the APCC said. Pay phone operators need about \$60 million to "stop the bleeding," said Bert Carp of Williams & Jensen, representing the APCC before the commission. In the long run, the FCC should take "a thoughtful look here," Carp said.

Currently, two wireless companies are subsidized with Lifeline — Virgin Mobile and TracFone, APCC said. The Lifeline subsidy is worth about \$385 million per year, Nichols said. Several other companies have cleared regulatory hurdles to obtain the subsidy, APCC claimed in its draft review. "APCC does not take issue with the commission's decision to subsidize mobile phone service," the group said in its draft petition. "Having done so, however, the commission must act immediately to ameliorate the unintended impact that decision has had on payphones and payphone users."

APCC misunderstands the purpose of USE, said TracFone attorney Mitchell Brecher of Greenberg Traurig. "The purpose of the Universal Service Fund is to provide support for people who need telecom support," he said. "It's not to subsidize manufacturers or service providers." A lawyer for a Lifeline-subsidized wireless company said APCC's petitions were "like the buggy-whip guys suing General Motors." — *Bill Myers*

TerreStar Voices Support

LightSquared Application Deserves Rulemaking Treatment, Says Wireless Companies

What was initially filed at the FCC International Bureau as a routine license modification request by LightSquared has drawn significant attention and complaint from major wireless companies and associations. Carrier interests including CTIA, Verizon Wireless and AT&T said LightSquared's request for mobile satellite service/ ancillary terrestrial component authority modification seeks what amounts to a major policy change for MSS/ATC and should be handled through a rulemaking. The filings are at <http://xrl.us/bh969f>.

LightSquared filed with the International Bureau part of its business plans that it said would fulfill the mobile satellite services/ancillary terrestrial component dual-mode criteria — requirements for handsets to communicate with terrestrial and satellite networks (CD Nov 29 p2). LightSquared, which plans to lease out its spectrum wholesale, said that though its retailer customers would have to pay for the both terrestrial and satellite spectrum use, they would have the choice not to offer a dual-mode phone. Opponents of the plan say it marks a major departure from the current MSS/ATC framework. "They are wrong on the process and wrong on the substance," said Jeff Carlisle, LightSquared executive vice president for regulatory affairs, in interview. "But I'm glad to give [the commenters] something to do." He said the MSS/ATC issue often stirs disagreement and one "can't do anything on ATC without someone saying something about it." LightSquared plans to file within a week a reply saying a full proceeding isn't necessary for the change.

LightSquared's modification proposal "has merit" but should be taken up in an open proceeding aimed at increasing terrestrial broadband use in MSS/ATC spectrum, CTIA said. Several filings on the MSS/ATC proposed rulemaking and notice of inquiry support loosening tests for using the band, making LightSquared' request "directly relevant to the larger MSS proceeding," the association said. Adding the request to the FCC's MSS proceeding would give "all similarly situated entities" an opportunity to comment on the relief sought by LightSquared, CTIA said. Regardless of how the FCC handles the LightSquared application, it should first deal with worries over interference from terrestrial L-band services to GPS receivers used by public safety and commercial licensees for wireless networks, it said.

The argument that any retail offering of ATC-only service would fall outside the dual-mode requirement is unsupported by the FCC, said Verizon Wireless. The requirement was intended to ensure that the public receives the benefit of the MSS/ATC service, the company said. Basic secondary spectrum-market principles treat the rights of a lessee as "merely derivative" of the rights of the licensee, making any retailers subject to the same criteria as wholesalers, Verizon said. The carrier also said it doubts LightSquared's statement that customers would be paying for satellite capacity whether or not they use it, given the small amount of satellite use sold with terrestrial spectrum use. LightSquared's proposed sale of 500 kB of satellite use for each gigabyte of terrestrial use amounts to a 1:2000 ratio of satellite to terrestrial capacity, meaning "one cannot reasonably assert that wholesale customers" are really paying for satellite service, Verizon said. The proposed change has implications for MSS/ATC flexibility and could affect possible incentive auctions, as it would reduce the incentive to give back spectrum for use in an auction, said Verizon.

LightSquared's wholesale provider plan is a "novel interpretation" of the integrated service requirements" that marks a "departure in spirit and intent" from the FCC's requirements, said AT&T. The commission has "repeatedly stressed" that ATC rules are meant to support a satellite-based service, AT&T said. The International Bureau's issuance of a public notice on LightSquared's request giving only 10 days for comment was "at best unorthodox" and may conflict with agency rules, the carrier said. The FCC should take up this issue by "expediting" the MSS proceeding, rather than creating a situation where the commission "must choose between causing potentially significant competitive harm to the MSS industry, or prejudging an important issue from the rulemaking on an insufficient record," AT&T said. If it does decide to take up the request as is, LightSquared should be required to submit a formal waiver request, the opponent said. AT&T said the commission should also take up AT&T's petition for reconsideration of Harbinger Capital Partner's purchase of SkyTerra, which created LightSquared.

The FCC should provide MSS licensees with "substantial flexibility regarding the means by which such licensees demonstrate compliance with the MSS/ATC integration gating criterion," said MSS/ATC licensee TerreStar. The company said it supports LightSquared's application, and "under an appropriately flexible view" of the gating criteria, "LightSquared's approach is simply one way of demonstrating integration that may not be applicable to other MSS/ATC licensees given their disparate business plans." Open Range Communications offered its support for LightSquared, saying the application offers advantages for rural deployments. The FCC ruled in September that Globalstar could no longer lease its terrestrial spectrum to Open Range, because Globalstar hadn't obeyed the ATC rules (CD Sept 16 p6).

However the FCC handles LightSquared's application, it shouldn't serve as a precedent in the Big Low Earth Orbit band, said Iridium. Any agency action on the application that would effect outside interests could impair business plans and the FCC's allocation of satellite spectrum, Iridium said. The commission should take up the modification of ATC rules in a rulemaking proceeding where a "more open and equitable opportunity" exists for the FCC to examine arguments and enact rules, Iridium said. — *Tim Warren*

'One Less Daily Annoyance'

Bill to Turn Down Loud Commercials Goes to Obama

Congress shushed loud TV commercials. In a voice vote Thursday night, the House passed the CALM Act (S-2847), which would require TV ads to be set at the same volume as regular programming. "It's a simple fix to a huge nuisance," said Rep. Anna Eshoo, D-Calif., who sponsored the original House bill (HR-1084). Associations for advertisers and broadcasters said they don't believe the new requirement will be onerous.

The House approved the Senate version of the CALM Act, which was sponsored by Sen. Sheldon Whitehouse, D-R.I. Lawmakers passed the bill under suspension of the rules, which meant a two-thirds majority was required. Debate on the bill occurred Tuesday, but the House postponed the vote because a quorum wasn't present. The Senate passed the bill Sept. 29, and the bill now moves to the president's desk. If Barack Obama signs the bill, advertisers will be required by the FCC to adopt industry technology within one year that modulates sound levels to prevent excessively loud ads.

"Consumers have been asking for a solution to this problem for decades," said Eshoo. "The CALM Act gives consumers peace of mind, because it puts them in control of the sound in their homes." Rep. Lee Terry, R-Neb., supported the bill on the floor Tuesday. Some say there are more important matters for Congress to deal with, but the Act does solve a problem families face every day, he said. In a written statement, Whitehouse agreed that it's "far from the biggest issue we face," but said "it will mean one less daily annoyance in our lives."

The CALM Act shouldn't create "any insurmountable problems" for major advertisers, said Dan Jaffe, executive vice president of the Association of National Advertisers. The legislation took into account self-regulatory

efforts of the ad community, he said. “Obviously, we will have to see how this plays out in the marketplace, but it is likely to cause greater problems for small local advertisers than for the larger and technology sophisticated companies that comprise our membership.”

“Broadcasters have been working on this issue voluntarily for the last two years,” said an NAB spokesman. “Given the time frames for implementing the legislation, we don't think the costs will be exceedingly onerous for most stations.” An NCTA spokesman said that the cable industry will “work closely” with the FCC as the agency makes rules over the next year to implement the legislation. — *Adam Bender*

Mixed Analyst Views

Clearwire Still Pursues Other Funding Options Beyond \$1.3 Billion Debt Sale

Other funding options for Clearwire, including spectrum sales and equity financing, are still on the table in addition to the \$1.3 billion debt the company is trying to raise, Chief Financial Officer Erik Prusch said Friday. Sprint Nextel, which owns 54 percent of Clearwire, has about a month to decide if it plans to buy into \$760 million of convertible debt Clearwire gave it rights to buy. Sprint declined to comment on whether it will participate.

Clearwire is exploring different options on a possible spectrum sale, Prusch said at a JP Morgan Chase investor conference in New York. That includes a potential spectrum sale in regional or market-by-market chunks, he said. It's still too early to tell how the auction process will turn out, he said. There has been strong interest in the spectrum portfolio, he noted.

The debt market was “hot” and the company had to pull the trigger on its offering, Prusch said. The company had planned to complete debt financing at the same time as a spectrum sale and new equity financing, he noted. Clearwire disclosed the debt offering Thursday. It's still searching for more money to continue its WiMAX buildout and expects to have some clarity on its funding issues by the end of Q4 or the beginning of Q1 next year, Prusch said. The money would provide some much-needed flexibility, he said. Clearwire recently warned that without additional funding, it could run out of cash next year. Meanwhile, Clearwire's \$45 unlimited monthly plan is better than Verizon Wireless' LTE \$50 plan with a 5 GB cap, Prusch said. Verizon's LTE service, which was set to have gone live Sunday, would raise consumer interest in 4G service, he said.

Analysts had mixed views. It's positive that Clearwire was able to complete the financing, though the debt is expensive, some said. There's still considerable risk Clearwire doesn't have enough funding to complete the rollout, Gimme Credit David Novosel said. Sprint's expected deployment of WiMAX capable base stations starting mid-2011 as part of its network upgrade would reduce the amount of capital that Clearwire needs going forward, Credit Suisse's Jonathan Chaplin said. He said that Sprint may wait until it finalizes plans for its network build out before making a funding commitment related to Clearwire. — *Yu-Ting Wang*

NIST Encouraging

Experts Group Spanning Standards Bodies Is Sought to Advise Government, Industry on Cloud Interoperability

A wide array of communications technology standards groups is being asked to create a combined brain trust to ensure that cloud systems can work together, an organizer said. Robert Marcus, a consultant on telecom-cloud standards to Chinese equipment vendor Huawei, said he will propose to the representatives of more than 20

organizations Tuesday at the Telecom Cloud Information Workshop in Santa Clara, Calif., creation of a Cloud Experts Working Group. It would advise industry and particularly government, in aid of cloud interoperability. The group would offer advice on cloud technology, open source and reference architecture, he said.

A "critical mass of Cloud experts and NIST," the National Institute of Standards and Technology, "will participate in the Conference, so this is probably the best opportunity for the foreseeable future to put together an interactive information exchange structure across government," standards development organizations (SDOs) and open-source projects, Marcus told us by e-mail. NIST held a cloud workshop last month in Gaithersburg, Md., at which it asked for the formation of this kind of body, he said, and the experts group may take part in a follow-up NIST event that the agency has mentioned. It's unclear whether a decision to create the group will be made as soon as Tuesday, Marcus said. He's scheduled to be the moderator of a four-hour session that day on strategy for developing a roadmap for cloud standards collaboration. It's to include discussion of the proposed experts body. Earlier in the day, Lee Badger of NIST is set to make a presentation on its Standards Acceleration to Jumpstart Adoption of Cloud Computing effort and Cloud Working Group.

The workshop, and informational presentations Monday, have been organized by the Object Management group, a computer industry standards-setting organization. The more than 20 bodies listed as expected to be represented include ITU-T, the Alliance for Telecommunications Industry Solutions, IEEE, ISO SC38, OASIS and the Cloud Security Alliance. Marcus said he and Jenny Huang, in strategic operations and IT standards at AT&T, are the event's organizers.

The experts group would "provide vendor-neutral high quality information (e.g. on standards) to government and industries developing Cloud Roadmaps," said a message that Marcus has sent conference participants. "This proposal is a direct result of a recent NIST Workshop recommendation 'to set up a Working Group composed of SDOs, industry, academia, and others to assist NIST in developing its Cloud Roadmap.'" He added, "A respected, international, neutral organization could provide hosting support for the Working Group."

The General Services Administration "recently approved 11 suppliers of Cloud resources to government agencies," Marcus wrote. "OpenStack and Salesforce.com will also be part of the mix. In the near future, all 13 of these suppliers will probably be running government Cloud applications. To prevent the creation of disjoint 'Cloud silos', it is necessary to begin planning for interoperability, portability, and security across multiple Clouds. Based on your knowledge of Cloud standards, open source, and available tools what steps should enterprises and governments take in the next 1-2 years to avoid future costly system integration challenges across Cloud silos? Answering this question is an important generic problem and will provide immediate value to NIST planning and government Cloud deployment.

"One important first step is the development of Reference Architecture (e.g. NIST goal) for different types of Cloud Brokers and Federations," Marcus continued. "This is an extension of the Cloud Reference Architectures posted by vendors." He offered a "rough first cut at capabilities and possible standardizations" for three categories of operations, which he labeled arbitrage, mediation and aggregation. — *Louis Trager*

'Flexible Harmonization' Sought

European Spectrum Policy Proposal Raises Several Sovereignty Issues, Government Officials Say

Telecom ministers Friday preliminarily rejected a European Commission call for all EU members to make the 800 MHz band, freed by digital switchover, available for wireless broadband by 2013. The proposal is part of the EC's first multiyear radio spectrum policy program (RSPP). Government officials — who discussed the plan

but didn't vote on it during a Telecommunications Council session in Brussels — said they generally favor the EC effort, but the timetable for rollout of "digital dividend" spectrum is one of several provisions that raise national sovereignty concerns.

The EC unveiled the draft RSPP in September as part of a broadband package aimed at helping Europe meet its commitment to give every resident access to basic broadband by 2013 and to ultrafast broadband by 2020, the council said in a briefing document. The program proposed a five-year policy path toward efficient spectrum management, not only in e-communications services but also in other realms dependent on spectrum, such as transport and environment, the paper said.

Belgium, which holds the EU Presidency until year-end, asked officials four questions: (1) Whether they believe spectrum should contribute to economic growth and to gaining a competitive advantage in innovative wireless technologies. (2) Whether the EC should be asked to produce, in cooperation with member countries, an inventory of current spectrum use. (3) Whether governments want to agree on early common deadlines for making spectrum available for wireless broadband. (4) Whether the EC should play a larger role in defending and promoting European spectrum policies in international negotiations.

Setting a policy course is very important to European citizens and businesses and to Europe's position in the world, said Digital Agenda Commissioner Neelie Kroes. The EU's digital agenda, which covers e-health, e-communications and many other services, is tied up with spectrum issues, she said. Services relying on spectrum account for 2-2½ percent of Europe's gross domestic product, she said.

The RSPP sets ambitious targets to achieve a single digital market, but it raises sensitive issues, Kroes said. One of her concerns is that as spectrum quickly runs out for new wireless broadband developments, at least 14 EU countries still haven't made available frequencies that have been harmonized at the European level and should have been freed in January 2012, she said. She urged governments to have the courage to make all 800 MHz spectrum available by January 2013.

All government officials agreed that spectrum is necessary for Europe's economic welfare and that the RSPP should be given top priority. Several backed the 2013 timetable for the 800 MHz band. But many — particularly those sharing borders with non-EU countries such as Russia, Ukraine and Belarus — said the proposal was too ambitious and the EC must take national circumstances into consideration. Several said the EC shouldn't set a deadline different from the January 2015 date recommended by the Radio Spectrum Policy Group.

The U.K. called the schedule unrealistic. Lithuania asked for "flexible harmonization" to give countries time to negotiate spectrum clashes with neighbors. Malta said it can't free space in the 800 MHz band, because there's already a network transmitting general interest content there. Cyprus said two-thirds of its band is used illegally for high-power analog transmissions in part of the country.

The EC proposal for a spectrum inventory also raised a few hackles. Most thought it was a good idea, but not if it involved a lot of time and money. Portugal warned that a database could raise questions about the confidentiality of certain information. A complete inventory would be a significant administrative burden and not the best way to make other spectrum bands available, the French representative said.

There are also fears about possible EC efforts to impose spectrum permit requirements, a spectrum usage monitoring system or communications coverage requirements on national governments, ministers said. Some officials said they don't want EU bodies butting in on international negotiations they take part in as sovereign nations. Others said they would welcome help in overcoming border interference issues.

Kroes said the RSPP merely offers countries a tool, leaving it up to them to decide how to take advantage of the opportunities that additional spectrum offers. She rejected a request for EU financial support to help clear up interference problems, saying "we don't have funds" for it.

Kroes urged governments to stick with the 2013 deadline for making the 800 MHz band available. That tight timing might actually help in resolving interference problems, but the EC would listen to arguments on the matter, she said. Kroes promised not to spend a great deal of time and money on an inventory but said it won't hurt to have a little information on current spectrum usage. She also said the EC won't impose coverage obligations and it's up to governments to decide whether they want to apply the RSPP beyond e-communications.

The European Telecommunications Network Operators' Association stressed the importance of opening the 800 MHz band to prevent digital divide and handle the huge increase in mobile data traffic. It urged the incoming Hungarian Presidency to cooperate with the European Parliament and governments on speedy adoption of the RSPP. The parliament's industry committee starts its examination of the proposal Thursday. — *Dugie Standeford*

Comm Daily® Notebook

The FCC omitted comments critical of its net neutrality plan from a document that it circulated last week, Ranking Member Joe Barton, R-Texas, of the House Commerce Committee complained in a letter Friday to commission Chairman Julius Genachowski. The FCC document included favorable reviews from AT&T, CTIA and others. "I look forward to gaining a fuller understanding of what has happened and why," Barton said. "I hope you can take a moment to deal with the underlying issue, then update me on the outcome. Would that be possible to do by December 8, 2010?"

There are 2,163 FCC proceedings that have been pending more than five years, according to statistics that the commission released Thursday in a letter from Chairman Julius Genachowski to Sen. Olympia Snowe, R-Maine. The Wireline Bureau, with 400 proceedings open five years or more, has the most of any FCC bureau or office. Two bureaus that have been dissolved ranked second and fourth. The Common Carrier Bureau has 386 and the Mass Media Bureau, at 344, was fourth. The Media Bureau, which has taken over Mass Media's work, has 361, and the Wireless Bureau has 234, for fifth place. The rest of the languishing proceedings are pending in various other bureaus and offices. "The large number of open proceedings on the attached list demonstrates the importance of ongoing efforts to address the issue of outdated, inactive proceedings remaining open indefinitely," Genachowski wrote. He cited work, in a rulemaking on agency procedures, on an order that could allow staff to kill inactive dockets (CD Feb 19 p2).

Level 3 on Friday repeated claims that it was being strong-armed into an agreement that helps Comcast eliminate competition for on-demand video. In a frequently asked questions post, Level 3 said Comcast had "mischaracterized" the controversy as "a peering dispute." Level 3 has claimed that Comcast demanded extra money for access to the cable company's lines within days after an announcement that Level 3 would be the main content delivery network for Netflix. Net neutrality advocates have seized on the allegations as proof that the FCC must expand rules to keep the Internet open. Comcast dismissed Level 3's accusations as an attempt to shake down the cable company while its proposed merger with NBC-Universal is being reviewed at the commission. A Comcast spokeswoman Friday called Level 3's post "nothing new." She said by e-mail, "The fact remains this is a business dispute regarding traffic ratios, commonly referred to as peering, between Comcast and Level 3 which we are committed to resolve fairly and consistently with established industry principles."

It's important to "pour new energy" into the FCC Diversity Committee, which will be reconstituted next year, "because it labors on legally complex issues that may require more than just one term to resolve," Commissioner Robert McDowell told the panel Thursday. The agency took 13 steps under a 2007 diversity order, and more can be done, he said. "This includes consideration of a stronger incubation program with more significant incentives." A "substantial step ahead for the commission would be the potential replacement of the 'eligible entities' definition with a new concept that more directly addresses race and gender classifications," McDowell continued. He hopes the commission will order studies on how the definition could comply with the *Adarand* decision, in which the Supreme Court limited set-asides for groups. Commissioner Mignon Clyburn said a committee decision to create a new category of designated entities for those who have overcome adversity was "well thought-out" and

sets the stage "to usher in many new entrants to our bidding process." It "makes perfect sense to broaden our guidelines to include those who have coped with a physical disability and endured, those who have experienced trauma and recovered, and those who have been in the depths of poverty only to climb out," she said in a written statement Thursday night. Earlier that day, the Media and Wireless bureaus sought comment on the Diversity Committee's recommendation on bidding credits (CD Dec 3 p7).

Capitol Hill

Rep. Anna Eshoo, D-Calif., said "more work needs to be done" before the FCC finalizes its net neutrality order. But Eshoo is pleased Chairman Julius Genachowski is moving forward with a rulemaking, she said. Rules should apply equally to wireline and wireless services, and consumer protections should not depend on how people connect to the Internet, she said. The order should not allow traffic to be divided into fast and slow lanes, either by banning paid prioritization of traffic or by exempting those like the Kindle service which carry only "partial Internet traffic," she said. And the FCC must have power to "enforce not only the letter of the order, but any attempts to evade the spirit of the order," Eshoo said.

The federal government would have to install Wi-Fi hotspots and femtocells "in all" newly built, "publicly accessible federal buildings" and retrofit existing federal buildings no later than the close of 2013 under a new bill introduced by Sens. Olympia Snowe, R-Maine, and Mark Warner, D-Va. The Federal Wi-Net Act would set aside \$15 million to outfit federal buildings with modern Wi-Fi. The bill "will dramatically improve coverage" for the nation's 276 million wireless subscribers, Snowe said. Warner said he co-sponsored the bill because he saw "a great opportunity to leverage federal buildings in order to improve wireless broadband coverage."

President Barack Obama was expected to sign a 15-day extension to the Continuing Resolution expiring Friday. The extension would keep the government operating through Dec. 18. The Senate passed the measure by unanimous consent Thursday night. The House passed it Wednesday.

Wireline

A suicide-prevention hotline may get its 800 number back. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled that the FCC had acted "arbitrarily and capriciously" in re-assigning the numbers. The Kristin Brooks Hope Center lost a grant in 2005 and found itself struggling to pay its phone bills, according to a nine-page decision Friday. The commission temporarily reassigned one of its hotline numbers, 1-800-SUICIDE, to a Department of Health and Human Services unit. In 2009, despite the center's protests that it had shored up its private funding and could manage its affairs, the FCC Wireline Bureau permanently assigned the SUICIDE line to HHS. The center appealed, arguing that the reassignment was an unconstitutional taking, violating the center's Fifth Amendment rights. Writing for the panel, Judge Stephen Williams said the commission had taken "quite a leap" in guessing that the center's past financial problems were an omen of things to come. Center founder Reese Butler said the new ruling was long overdue. "A 1st grader or even a child in kindergarten could have figured out what the feds did was wrong, unfair, hurtful, damaging, and except for lining the pockets of a few people with millions of dollars no one was served by the taking of our number/program," he said in an e-mail.

Wireless

Sprint, T-Mobile and 11 other wireless companies and industry groups Friday asked Sen. Jay Rockefeller, D-W.Va., to help them extend automatic data-roaming requirements. "In the end, automatic data roaming is pro-

consumer, pro-competition and pro-investment,” they said by letter. The groups are opposed by AT&T and Verizon Wireless. In a Nov. 23 filing with the FCC, AT&T said the market could take care of the matter better than burdensome regulations could. Commission Chairman Julius Genachowski’s staff considered putting a proposed data-roaming rule on the December FCC meeting agenda but decided against it.

The FCC should reserve the 700 MHz public safety spectrum for narrowband voice applications instead of broadband, the Telecommunications Industry Association said in comments posted in docket 06-229. The narrowband voice allocation “is and will be critical for ... first responders for at least another decade,” TIA said in its filing, and there still isn’t adequate broadband technology for public safety. There could also be interference problems “that will degrade both broadband and narrowband capabilities,” and that problem will be compounded by public safety agencies’ need to spend extra money to reduce interference, TIA said.

Internet

YouTube founders knew “that vast quantities of infringing videos were attracting traffic to the site,” Viacom told the 2nd U.S. Circuit Court of Appeals. The company seeks to overturn a ruling rejecting allegations by Viacom that YouTube unlawfully used copyrighted material on its site. It was copyrighted videos “that people flocked to YouTube to see,” the appeal said. YouTube fails to satisfy any of the safe harbor requirements under the Digital Millennium Copyright Act, its adversary said. “Viacom is entitled to summary judgment on its vicarious liability claim.”

Any FCC net neutrality order should reclassify broadband as a Title II telecom service, the Media Access Project (MAP) said in a filing in docket 09-191. It reported on a conversation that officials including President Tyrone Brown, a former Democratic commissioner, had with Dave Grimaldi, chief of staff to Commissioner Mignon Clyburn. “There are significant litigation risks in proceeding under Title I,” and “an adverse result in judicial review of such an order would leave the Commission powerless to act in the event of future problems,” said MAP, which supports net neutrality rules. With FCC members considering a proposed order from Chairman Julius Genachowski that would stick with Title I, Commissioner Michael Copps takes a view like the group’s. (See the separate report in this issue.) The commission should “ensure that wireless applications are protected from discriminatory and improper practices by wireless providers,” Consumers Union said. Meeting with aides to Copps and Clyburn, the group, which seeks net neutrality regulations, asked that the commission ensure ISPs can’t “circumvent any rules that are applicable to broadband Internet access service.” Reporting on a meeting with Senior Counsel Josh Gottheimer, Qualcomm said it strongly supports Genachowski’s efforts to “resolve what has been a contentious issue.” Genachowski’s proposal seems to be “a good middle ground compromise,” the company said. It “should be workable for the mobile industry and beneficial for consumers by recognizing that mobile broadband networks, unlike fixed broadband networks, operate on limited spectrum,” and so carriers “need to be able to manage their networks to encourage the conservation of scarce bandwidth,” Qualcomm added.

State Telecom Activities

The Public Service Commission of Wisconsin (PSC) named another four Regional Planning Teams to assist in broadband planning efforts under way statewide in connection with stimulus funding that Wisconsin has received. The new teams will cover four regions of 41 counties total. The PSC and broadband mapping contractor LinkAMERICA Alliance this year divided the state into nine planning regions and with the newly named teams have appointed planners for six of the nine regions. A final three regional teams will be named later. LinkAMERICA and PSC staff worked mainly with regional economic development groups including Momentum West in Region 3, New North in Region 5, BEST in Region 7 and Thrive in Region 8 to identify team members in those regions. Regional planning teams are multisector groups from each region that will provide input for

developing regional broadband plans. Planning teams will provide coordination with on-going existing planning initiatives in each region; share data on counties, communities, demographics, economy and broadband needs; provide feedback on accuracy of current broadband maps and other regional data; identify sectors that could benefit from increased broadband access and adoption; determine priorities around which the region's broadband investment plan should focus at first to have the greatest effect for the region; help identify data, resources and leadership needed to make priority investments; and provide guidance to the LinkWisconsin staff in drafting regional broadband investment plans.

International Telecom

The massive invasion of privacy arising from EU Internet and telephony traffic data storage laws needs "profound justification," European Data Protection Supervisor Peter Hustinx said Friday. The data retention directive is under review to see how it's working and its impact on businesses and consumers, and Hustinx said the European Commission should use the evaluation to prove its necessity. Without such proof, the measure should be withdrawn or replaced by a less privacy-intrusive one, he said. Hustinx also said the directive has clearly failed to harmonize national laws, creating legal uncertainty for citizens, and has resulted in a situation where use of the stored data isn't strictly limited to fighting very serious crimes. The scope of any new or revamped directive should be clearly defined, and governments barred from using the data for other purposes, he said.

Broadcast

FCC Auction 91 of FM broadcast construction permits was pushed back to April 27 from March 29, to accommodate the NAB's annual convention in Las Vegas, a public notice released Friday said. If the auction were to begin March 29 as planned, it might not conclude before the convention, which "could present a challenge for some auction applicants ... who may be planning to attend the convention," the notice said.

Broadcast TV networks "fail Latinos" in the diversity of their employment and of the characters portrayed, the National Latino Media Council said Friday ahead of a news conference on the subject this week. At the briefing, the council said, it "will summarize the shortfalls of the networks' efforts to diversify their Latino workforce and increase Latino vendor contracts" during 2010.

Entravision said it will run public service announcements about a congressional bill to give immigrants who were brought to the U.S. as children a chance to become legal residents and eventually citizens. The PSAs promoting the DREAM Act will run through a partnership with Reform Immigration for America, the company said.

Cable

Some key House Democrats complained about problems with CableCARDS in the weeks leading up to an October FCC vote to improve them before possible gateway video connector rules take effect (CD Oct 15 p4), correspondence released by the commission Thursday shows. Among those who wrote letters to Chairman Julius Genachowski were Communications Subcommittee Chairman Rick Boucher of Virginia, whose reelection campaign failed last month, and Ed Markey of Massachusetts. Genachowski's reply said the commission is examining proposals outlined in a notice of inquiry, and it didn't show his hand about how he might handle what are called AllVid rules. The National Broadband Plan envisions that gateway devices will enable increased "interoperability between a consumer's pay-TV programming stream and the consumer's broadband stream of data," he wrote.

If the FCC's AllVid rules don't require video gateway devices to include separable security, along the lines of current CableCARD rules, there will be no competition among makers of the devices, Nagravision told commission officials in meetings last week, ex parte filings show. "As the CableCARD regime is phased out in favor of an AllVid system, it is vital that some provisions be continued that allows for separating conditional access system vendors and AllVid/receiver vendors," the company said. It said Simulcrypt — which allows use of multiple key management systems — could be the technology to achieve this. Without such rules, AllVid devices could have limited functionality and high prices, possibly dooming them, according to talking points attached to the filing.

Cable company Shaw said it will raise about \$509 million from new 5.5 percent notes due 2020 and will reopen an offering of about \$407 million in 6.75 percent notes due 2039. The company said it will use the proceeds to refinance other debts and to pay for its purchase of Canwest's broadcast assets.

Home Shopping Network's sales grew while those of conventional retailers dropped during the recession, Citi analyst Jason Bazinet wrote in a note recommending that investors buy shares in the company. Share buybacks are possible and so is a tender offer from Liberty Media, which already owns about 32 percent of HSN, he said. Both could boost the price of HSN shares, Bazinet said. Liberty could benefit from adding full ownership of HSN to its QVC operation, he said. And there might be tax benefits to an HSN deal, Bazinet said. HSN shares gained 4.7 percent Friday.

Virgin Media said it bought back 400,000 of its shares Thursday and will cancel them, under authorization announced previously.

Mass Media Notes

Because Sky Angel hasn't demonstrated that it's a multichannel video programming distributor, as defined by the Cable Act, it isn't entitled to program access rights, Discovery Communications said in a letter sent to the FCC Friday. "By contrast, there is no question that Dish is an MVPD," it said. "Discovery's decision to not license Sky Angel while licensing Dish is therefore not discriminatory." Discovery responded to a Sky Angel assertion that Discovery's inclusion in the TV Everywhere service of Dish Network belies the programmer's claims in a program access dispute with Sky Angel that it doesn't allow any online distribution (CD Dec 3 p10). The innovations of Dish's TV Everywhere doesn't "somehow convert Sky Angel into an MVPD or in any way equate Dish and Sky Angel," that cable programmer said. Issues related to copyright raised by Dish's new products are beyond the scope of the FCC's program access rules and the FCC's jurisdiction, Discovery said.

Satellite

Boeing said it's having trouble fully opening the antenna on LightSquared's recently launched satellite, Sky-Terra-1. The satellite, which launched last month, "is stable and healthy, and we are proceeding with post-launch checkout processing," Boeing said. "As of Dec. 2, the L-band antenna reflector on the SkyTerra 1 satellite has not been fully deployed. Boeing, in close partnership with its LightSquared customer, has assembled a team of experts to assess progress and continue deployment of the antenna. As with any post-launch checkout, it's not unexpected for minor delays to occur, and we are proceeding to complete in-orbit testing and hand over the satellite and its Space Based Network to LightSquared in early 2011."

Eutelsat will replace its damaged W3B satellite with a new craft from Thales Alenia Space, Eutelsat said Friday. The replacement, W3D, is expected to be commercially available by 2013 and will be positioned at 7 degrees east to expand capacity in the region, Eutelsat said. The W3B satellite was found to be completely unusable soon after it was launched last month, due to a problem with its propulsion system (CD Nov 1 p4). The W3B satel-

lite is fully covered by insurance, Eutelsat said. An inquiry board is looking into the cause of the problem, and Eutelsat is "already implementing measures to tighten control of the industry's manufacturing processes," the company said. It said the new W3D satellite will include Ka- and Ku-band service over 56 transponders total.

Sirius XM said its XM-5 satellite was placed in orbit and is ready for service. The satellite was launched Oct. 14 by International Launch Services and will be an in-orbit spare at 85.2 degrees west, Sirius said Friday.

Communications Personals

Cox Communications names **Don Hallacy**, a consultant who used to work at Sprint, interim chief technology officer ... **Ben Sherwood** to return to ABC as president of ABC News ... McGraw-Hill hires **John Berisford**, ex-PepsiCo, as executive vice president of human resources starting Jan. 3, replacing **David Murphy**, retiring ... Samsung Mobile hires **Brian Rosenberg**, ex-Ericsson North America, as senior vice president of sales ... New Brightpoint vice presidents-business development, Americas, both ex-ModusLink: **Dana Hicks** and **Tom Cherryhomes**.

Communications Daily Calendar

- Dec. 6 FCBA Broadband and Wireless committees brown bag on USF Mobility Fund, 12:15 p.m., Wiley Rein, 1776 K St. NW, Washington — kerry@fcba.org
- Dec. 6 FCC information meeting on programmatic environmental assessment for antenna structure registration, 1:30 p.m., Commission Meeting Room, Washington — www.fcc.gov/pea
- Dec. 6 Georgetown Center for Business & Public Policy seminar on wireless as change agent, 8:45 a.m., National Press Club, Washington — cbpp@msb.edu
- Dec. 6-10 IEEE Globecom, Hyatt Regency Miami — www.ieee-globecom.org/2010
- Dec. 7 ATIS webinar on energy challenges in telecom networks, 11 a.m. — www.atis.org
- Dec. 7-8 International Institute of Communications telecom and media forum, Verizon offices, 1300 I St. NW, Washington — www.iicom.org
- Dec. 8 Fiber-to-the-Home Council broadband workshop, Arizona Biltmore, Phoenix — www.ftthcouncil.org
- Dec. 8 Georgetown Institute of Law and CyberSecurity Seminars symposium on Digital Pearl Harbor, 10:15 a.m., Gaston Hall, Georgetown University — www.e-pearlharbor.eventbrite.com
- Dec. 9 FCBA Chairman's Dinner, 6 p.m., Washington Hilton — www.fcba.org
- Dec. 9-10 PLI Telecom Policy & Regulation Institute, Omni Shoreham Hotel, Washington — www.pli.edu
- Dec. 13 FCC Communications Security, Reliability and Interoperability Council meeting, 9 a.m., FCC headquarters, Room TW-C305 — jeffery.goldthorp@fcc.gov
- Dec. 13 FCBA Foundation Scholarship Committee, 12:15 p.m., Google, 1101 New York Ave. NW, Washington — aaronrobinson@google.com