



## Gridlock at the FCC

*Critics cite partisan logjam, smut complaints and more*

By Elizabeth Jensen and John Eggerton -- Broadcasting & Cable, 5/29/2006

For Qualcomm, the future is on hold. The wireless-services company has sunk more than \$800 million into MediaFLO, a national video service for cellphones to be carried over abandoned broadcast spectrum. It is even paying broadcasters to go digital three years ahead of the mandated conversion and free up channels for MediaFLO, set to go live in October.

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But until the FCC rules on the thorny and complex issue of interference on adjacent broadcast channels, the company's plan is stalled.

Qualcomm isn't the only media company stuck in a regulatory holding pattern these days. Thanks to partisan deadlock in a divided commission, the growing volume of broadcast-indecency complaints, and a protocol that allows only the chairman to set agendas, the FCC is contending with significant gridlock on a number of issues.

The delays have left major media companies and small broadcasters alike unable to plan long-term as long as ownership rules are unsettled or license renewals are snagged by indecency complaints. But with the Senate threatening to pass a massive telecom bill on a host of issues—from cable franchising to Internet commerce—that will require FCC action, the backup could become far worse.

For its part, the FCC denies that there is any logjam, noting that media issues are only part of its purview and pointing to several telephony-oversight actions that have been taken.

"I think the commission has been busier and more productive in the past year than any other time in the five years I've been here," says Catherine Bohigian, chief of the commission's Office of Strategic Planning and Policy.

Spokesperson Tamara Lipper enumerates several accomplishments from the past year, including deregulating DSL services, opening a discussion on cable franchising, and responding to safety and industry needs following Hurricanes Katrina and Rita.

But frustration among those in the media industry, many of whom won't discuss their complaints on the record for fear of exacerbating the delay, is beginning to boil over.

"Increasingly, you hear it," says Gloria Tristani, a former FCC commissioner and president of the Benton Foundation, which advocates for public-interest concerns on digital policy. "Many proceedings are stalled, from all over the spectrum of things that the FCC regulates."

One industry official dismisses the FCC's claims that it is tending to non-media cases. "They may be getting things done on other issues," the official says. "But telephone issues aren't as controversial and partisan as media issues. And it doesn't excuse the fact that they are not doing media issues."

## YET TO SET AGENDAS

Commissioner Michael Copps acknowledges that things are not moving as quickly as he'd like. At an informal press conference last week, he noted that the commission had yet to set agendas for ruling on several key issues.

"We don't have a proceeding on ownership; we don't have a proceeding on the Comcast/Adelphia merger; we don't have a lot of things in front of us right now," he said, adding, "I would like to see some of these items move. I think it's time for them to move."

Much of the blame for the holdup has been due to a deadlocked commission made up of two Republican and two Democratic commissioners. In February, President Bush nominated telecom lobbyist Robert McDowell to fill the fifth, Republican seat, but an unidentified senator had placed a hold on his confirmation, which finally went through late last Friday.

"When you've got a 2-2 commission, a lot of things are dysfunctional," says Richard Wiley, a telecom lawyer and lobbyist and former FCC chairman. Kevin Martin, the current chairman, "just can't get together a working majority," Wiley says.

Copps, a Democrat, acknowledges that "the place operates better when it's at full complement and maybe there is a disposition to bring the items forward." But Republicans question whether the stalemate doesn't serve Democrats' interest in forestalling a debate on the divisive issue of media-ownership rules.

Indeed, the stalemate has been particularly costly for companies with deals in limbo while they wait for ownership rules to be resolved. It has been nearly two years since the Third Circuit Court in Philadelphia bounced the last set of guidelines back to the commission for recrafting. Martin attempted to get the ball rolling last summer, but the effort got bogged down in the debate over provisions for public hearings and surveys.

An FCC official says that, as recently as January, there were additional conversations on the issue between the chairman and the commissioners' offices. But the talks went nowhere.

Says Lipper, "Chairman Martin attempted to start the rulemaking process on media ownership in a neutral fashion but was unable to do so with a 2-2 commission. If any of the other commissioners have changed their positions on the issue, he is ready to try again at any time."

Still, even with McDowell's confirmation—which Martin hails as an opportunity to "address the important issues before us"—it's unclear whether the ownership issue will be raised again before this fall's midterm elections. That means that it could be another 18 months to two years before anything is resolved.

"I am not a practitioner of the blame game," Copps says, "but I think folks are waiting for answers on media ownership." And yet, he says, he doesn't expect the matter to come up before the end of the year, adding that, if he could bring an item on ownership to the floor tomorrow, he would. "I don't control the agenda," he says.

But Martin does, and many say that has contributed to the bottleneck, citing the chairman's seeming preoccupation with broadcast indecency in particular. Since he took over the chairmanship from fervent indecency critic Michael Powell, the commission has only hardened its stance on what constitutes objectionable content, levying a record \$4 million in fines in March.

The explosion in indecency complaints has threatened to hold up license renewals for TV and radio stations. Traditionally, the FCC will not process renewals until a complaint has been cleared. (The commission would not disclose the number of renewals and transfers pending.)

#### **“SENSITIVE TO THE BUSINESS NEEDS”**

But an FCC official, who declined to be named, says the commission has offered licensees a way around the delays. If they are “willing to hold that complaint in abeyance, the FCC has signaled we're willing to process their application,” the official says. “We're sensitive to the business needs of these stations.”

The official says that setting a priority on indecency doesn't mean that other issues aren't important as well. But Andrew Jay Schwartzman is not convinced.

Schwartzman, president/CEO of Media Access Project (MAP), a non-profit public-interest law firm that concentrates on telecommunications issues, says Martin runs a “tightly top-down—controlled” commission. MAP is awaiting action on a number of issues that are “not indecency related and not fifth-vote related,” he says, including license renewals, use of the digital spectrum and low-power FM. “Those don't seem to be high-priority issues.”

Tristani concedes that occasional backlogs are “a fact of life at the FCC” when the commission is focused on a single issue, like indecency or phone-company slamming, which preoccupied the commission during her tenure, from 1997 to 2001.

But she calls it “a disgrace” that the commission is six months past due in responding to recommendations submitted by the FCC's Consumer Advisory Committee (CAC). On May 18, 14 of the committee's 55 members (including Tristani's Benton Foundation) complained in a letter to Martin that the CAC had yet to receive an acknowledgement of the recommendations it had made in November regarding public-interest obligations of digital broadcasters.

“What is the point of having a federal advisory committee if you are going to ignore them?” Tristani asks, adding that it is “very lamentable that legitimate consumer concerns are not being addressed.”

The FCC declined to comment on why it has failed to respond to the CAC, but Copps agrees that action is needed.

“When we ask people to devote their energies and talents to an advisory committee,” he says, “the least the commission can do is pay heed to the recommendations they develop.”

More-pressing matters, however, demand action, such as the Comcast/Time Warner deal to acquire assets of bankrupt Adelphia Cable. A midsummer deadline is looming on the \$17.6 billion deal.

Copps expects that the deadline will inspire the commission to move things forward “with or without a fifth commissioner.” An FCC official, who declined to be named, says, “We're trying to push it through” before the deadline, just extended to Aug. 31.

And with Senate Commerce Committee Chairman Ted Stevens (R-Alaska) all but guaranteeing that the Senate will pass, within the year, an omnibus telecom bill that would require the FCC to study Internet commerce and file five annual reports, the commission's plate will be full.

A deadline on the Qualcomm case is approaching, too. In a follow-up letter to a recent meeting at the commission—one of numerous the company has sent in the past year—Qualcomm VP of Government Affairs Dean R. Brenner pleaded for “an expeditious ruling on the petition.”

An FCC official calls the issue “a technically difficult proceeding,” saying the commission has “put a lot of time into it, and certainly we're taking it very seriously. It's not an easy solution.”

Unfortunately, nothing much comes easy with the FCC.

*Additional reporting by John M. Higgins*

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