FCC's methods leaves public in the dark

By JOHN DUNBAR, Associated Press Writer

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WASHINGTON - It's odd for an agency that has the word "communications" as its middle name, but the Federal Communications Commission routinely leaves the public in the dark about how it makes critical policy decisions.

That secrecy was on display during the recent debate over how the government should auction off the rights to billions of dollars worth of publicly owned airwaves.

For three weeks, potential bidders such as AT&T Inc. and Google Inc. and a coalition of public interest groups waged a war through the media over proposed rules, prepared under FCC Chairman Kevin Martin, that would guide the auction.

The debate advanced largely on rumor and speculation, because Martin's draft, as required by agency rules, was never made public. In fact, even when commissioners approved the auction rules at an open meeting on July 31, they still hadn't been made public.

That didn't happen until 10 days later, after the FCC staff had a chance to proofread and fine-tune the language.

The auction rules experience is not unique. It is how the agency has conducted the public's business for at least a decade, some observers say. The FCC is auctioning a large swath of spectrum being made available thanks to a transition by TV station owners to digital broadcasting. Old-style analog broadcasting must cease by Feb. 18, 2009. Anyone who does not have a digital-ready television or converter by then won't
Anyone who does not have a digital-ready television or converter by then won't be able to receive a picture.

The transition will be long, expensive and painful, but ultimately worth it. More efficient use of the spectrum will lead to billions of dollars deposited in the U.S. Treasury from auction proceeds and more advanced services for wireless customers. The government estimates the auction, scheduled to begin Jan. 16, 2008, will raise between $10 billion and $15 billion.

Before the auction can be conducted, the FCC must work out hundreds of technical details regarding the licenses that will be granted for use of the spectrum. These include what the spectrum can be used for and the size of the geographic areas the licenses will cover.

On April 25, the agency issued a "notice of proposed rulemaking" that laid out the general framework for what would be included in the rules and it requested comment from interested parties.

Flash forward to July 10: In a front-page newspaper story, Martin previewed his proposal for the auction rules. He said his proposal would promote a "truly open broadband network — one that would open the door to a lot of innovative services for consumers."

Martin said the rules would require winning bidders on the spectrum to let wireless customers use whatever phone and whatever kind of software they want on the network — something that would be new to the largely closed wireless industry.

Similar stories followed, some quoting Martin. But the writers were forced to rely on the chairman's characterization of what was in his proposal rather than being able to read the proposal itself.

FCC rules say the "content of agenda items" — such as draft proposals — are "nonpublic information" and "shall not be disclosed, directly or indirectly, to any person outside the Commission."

Employees who break the rule can be terminated.

Martin made his media push before his proposal was circulated among the other four commissioners, a move criticized by former FCC General Counsel Henry Geller.

"In my day you couldn't treat the other commissioners that way," Geller said. "It's kind of a fait accompli."

Industry reaction to the media reports was swift and fierce.

Verizon Wireless described the proposal as a "Google Block" on the auction, favoring the giant search engine company over other potential bidders. AT&T said the proposed restrictions would "devalue this spectrum, thereby robbing the U.S. Treasury and taxpayers of its full worth."

Their wrath was short-lived.

On July 16, James W. Cicconi, AT&T's chief of government affairs and general counsel, visited Martin and his chief of staff, Daniel Gonzalez. Two days after the visit, AT&T dropped its opposition to the plan, with Cicconi describing Martin's open-access model in a publicly released statement as "an experiment."
Verizon also tempered its criticism, following a visit with Martin by Verizon Wireless CEO Lowell McAdam and former Rep. Tom Tauke, R-Iowa, Verizon's public policy chief.

It became clear that the companies, which run the nation's two largest wireless networks, were initially under the impression that Martin's proposal went further than it actually did.

In fact, despite the pro-consumer spin that Martin put on his idea, some industry analysts concluded the auction rules would do little to encourage the emergence of a new wireless competitor to challenge the incumbents.

While draft proposals are not made public, Martin could have made public the text of the rules he was pushing in an earlier proceeding. That's how many other federal regulatory agencies operate, and how the FCC has operated in years past, Geller said.

"You have to set out what it is you're proposing to do," he said. "If you really are proposing open access, you should have it out there. If you don't, it's flawed rulemaking."

Geller served in several positions with the FCC from 1949 through 1973. He also was President Carter's top telecommunications adviser.

Longtime FCC observers told AP that rule proposals became less specific after telecommunication laws were rewritten in 1996, when the commission had to approve thousands of pages of extremely dense regulations in a very short time period.

So why not put the proposed rule out for comment?

In response to that question, FCC spokeswoman Tamara Lipper provided this statement:

"The FCC's procedures balance the need for deliberation and the open and candid exchange of ideas and information with conducting its business in an open and transparent fashion. Through the comment cycle and the ex parte process, members of the public are able to participate in and have access to information regarding pending items."

The agency's ex parte rules require that communications with agency personnel regarding issues before the commission be made public.

On July 24, Martin made his first public presentation regarding his plan to the House Subcommittee on Telecommunications and the Internet and took some heat from Republican lawmakers who objected to his plan.

By then the issue was largely decided, with three of the five commissioners publicly supporting it.

On July 31, in a carefully scripted open meeting, the commission approved — something — 4-to-1. (Commissioners also unanimously approved a plan designed to lead to the creation of a national public safety broadband network.)

A press release was distributed, as were written statements of the commissioners. The rules, however, were not. The 352-page package wouldn't be released until Aug. 10.
Actually, 10 days is a relatively quick turnaround for the agency.

"This proceeding is in line with existing culture," said Phillip J. Weiser, a professor at the University of Colorado School of Law, who co-authored a book on telecommunications issues. "Many people would say '10 days? That's nothing, that's great.'"

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On the Net:

FCC: http://www.fcc.gov/