Paul|Weiss

Current Telecom Developments

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IN THIS ISSUE:

McCaw Steps Down As Clearwire Chairman, As Sprint Passes On Clearwire Debt Option

Clearwire Corp. has confirmed in a Securities & Exchange Commission (SEC) filing that its chairman, Craig McCaw, resigned his position on the company's board last Friday. Meanwhile, Clearwire partner Sprint Nextel declined to exercise its option to purchase an additional $200 million in debt as part of a $1.3 billion debt offer that was completed by Clearwire last month. Long regarded as a pioneer of the U.S. cellular telephone industry, McCaw originally established Clearwire as a provider of third-generation wireless broadband services before forming the current Clearwire venture with Sprint. Clearwire is building a nationwide wireless broadband network based on the fourth-generation (4G) WiMax standard. Although McCaw did not comment on his future plans or the reasons for his departure, company officials stated that McCaw's move did not reflect any disagreement with the company over its operations, practices or policies. Although the Clearwire WiMax network now reaches in excess of 110 million U.S. residents, the heavily-indebted company continues to pursue its strategy of expanding that network to reach 120 million potential customers throughout the country. In 2011, Clearwire will also face competitive challenges from newer 4G market entrants that include Verizon Wireless's recently-deployed long term evolution (LTE) network and AT&T's upcoming LTE system. Eagle River Holdings, an investment vehicle led by McCaw that holds a 4% stake in Clearwire, has indicated that it will name former CEO Benjamin Wolff as McCaw's successor. News of McCaw's resignation came as Sprint allowed a January 2 deadline to pass without exercising its right "to acquire up to its pro-rata share of exchangeable notes" in Clearwire that are tied to Clearwire's recently-completed debt offering. Sprint—which committed nearly $1.2 billion in 2009 to fund construction of the Clearwire network through 2010—will be left with a slightly smaller stake in Clearwire although it will still retain a holding of more than 50% in the venture. A spokesman for Sprint noted, however, that the carrier is continuing discussions with Clearwire regarding "further investment in the company."

Appeals Court Allows Class Action Suit On Text Message Rates To Proceed

The four major U.S. wireless operators have been handed a legal defeat by the U.S. Court of Appeals for the Seventh Circuit, which ruled in favor of a lower district court decision allowing a class action lawsuit against the companies' text messaging services to proceed. The complaint, filed originally with the U.S. District Court for the Northern District of Illinois, alleges that Verizon Wireless, AT&T Mobility, T-Mobile USA, and Sprint Nextel have colluded since 2005 to fix industry-wide pricing in the market for text message services. Noting that text message prices prior to 2005 ranged anywhere from five cents to fifteen cents depending on the carrier, the class action plaintiffs claim that the four carriers agreed to set a common price of ten cents per message that year. The rate was later increased to 20-cents per message across the board. (At the same time, statistics show that text message transmission costs declined industry-wide by 65%.) Adding that the carriers' membership in wireless association CTIA and in the Wireless Internet Caucus (WIC) leadership council provided them with the opportunity to engage in collusive behavior, the plaintiffs told the court: "it is implausible to think that each defendant was able to independently arrive at the same exact price increase to the same exact penny within similar timeframes considering the extensive exchanges of information engaged in by the defendants pertinent to messaging revenue, billing and delivery." While admitting that the case lacks a "smoking gun," Seventh Circuit Judge Richard A. Posner disagreed with the carriers' argument that the circumstantial evidence presented by the class action litigants is insufficient under the standards set by the U.S. Supreme Court in Bell Atlantic Corp. v. Twombly. Observing that, like Twombly, the case at hand concerns "parallel behavior" and "alleges facts that are equally consistent with an inference that the defendants are conspiring and an inference that the conditions of their market have enabled them to avoid competing without having to agree not to compete," Posner decreed that the class action complaint "alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of Twombly." As such, Posner concluded that the district court "was right to rule that the . . . complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery." A spokeswoman for the class action litigants applauded the ruling as "significant" and as one that "will help keep the courthouse doors open to plaintiffs in well founded antitrust and other federal suits."

Fairpoint Wins Approval Of Vermont Regulators For Amended Reorganization Plan

Regional landline network operator Fairpoint Communications is finally poised to emerge from Chapter 11 bankruptcy as a result of the decision of the Vermont Public Safety Board (VPSB) to approve the company's amended reorganization plan. Vermont had been the lone holdout among Maine, New Hampshire and 15 other states that had previously endorsed the plan. The reorganization was precipitated largely by the financial burden of FairPoint's $2.3 billion purchase of New England landlines from Verizon Communications in 2008. Declaring that Fairpoint had failed to prove it was capable of meeting its financial obligations upon emerging from bankruptcy, the VPSB last June rejected the company's original reorganization plan as unrealistic. In hopes of assuaging VPSB concerns, Fairpoint filed revised versions of its credit agreements and other new financial data with the VPSB in October. Agreeing with Fairpoint's contention that the revised agreements will provide the company with greater flexibility in amortizing its long-term debt, the VPSB concluded that the agreements, combined with revised financial projections provided by Fairpoint, are "more realistic and more accurate" and "demonstrate a reasonable likelihood that Fairpoint will be financially capable . . . of meeting its public service obligations." The plan endorsed by the VPSB also allows Fairpoint to delay the implementation of broadband service commitments in the state for six months and forgives $12 million in state-assessed penalties that concern service quality between 2008 and 2009. Praising the VPSB order, Fairpoint Vermont Vice President Mike Smith proclaimed: "we will return to the U.S. bankruptcy court shortly and my expectation is that we will emerge from bankruptcy shortly as well."

Vizio To Enter Smart Phone And Tablet PC Markets

At the Consumer Electronics Show in Las Vegas on Monday, Vizio, Inc., a top supplier of LCD television sets to U.S. customers, announced plans to enter the fourth-generation (4G) wireless device market with the introduction of smart phones and tablet PCs later this year that will operate on the Google Android platform. Touted for its low-cost flat panel TVs, Vizio—which was founded in 2002—has emerged as a powerful competitor against Korean electronics giant Samsung in sales of digital TV sets, accounting for 19.9% of North American shipments during the third quarter of 2010, as opposed to Samsung's tally of 17.7% during that same period. Vizio's smart phone device, dubbed the Via Phone, will feature a four-inch screen, front- and rear-facing cameras, and both video calling and video recording capabilities. The company's new Via Tablet device, meanwhile, will boast an eight-inch high-resolution screen, Wi-Fi (but not 3G or 4G cellular) connectivity, three speakers, and video conferencing features. Although details on pricing were not disclosed, Vizio Chief Technology Officer Matthew McRae promised that the new devices would be "very aggressively priced," as he observed: "there's a huge gap in the market for people who can't afford the iPad or whatever else." The devices will also be sold through WalMart and Costco outlets, and a carrier for the devices will be disclosed immediately prior to their anticipated debut this summer. Sources say that Vizio's entry in the tablet PC market comes at a most opportune time as tablet PC sales are expected to soar to 61 million during 2011 in sharp contrast to last year's tally of 18 million. While Vizio will be entering an increasingly crowded tablet PC field that includes the likes of Acer, Dell, and Samsung as well as Apple, one technology analyst predicted that, because Vizio will be able to leverage its current strong position in the retail market and existing base of digital television customers, the company will prove to be "a real disrupter" in the tablet PC sector.

Qualcomm Strikes $3.1 Billion Deal For Atheros

In another key development that impacts the fourth-generation (4G) smart phone market, wireless chip maker Qualcomm agreed on Monday to purchase Atheros Communications, a top manufacturer of 4G wireless chipsets, for $3.1 billion in cash. The transaction stands as the largest acquisition to date for Qualcomm, the San Diego-based pioneer of the CDMA standard and other technologies that largely support second- and third-generation (3G) wireless voice services. As smart phones, tablet PCs and similar devices that support WiFi and 4G wireless broadband have gained in popularity, Qualcomm has looked to diversify and to shift its focus towards such products. As such, one analyst observed that the Atheros acquisition "would fill a rather gaping hole in Qualcomm's 3G-only product portfolio and grant the company access to markets they currently miss." Prior to Monday's announcement, San Jose, California-based Atheros had been a partner with Qualcomm in the latter company's effort to develop its own Wi-Fi technologies for smart phones. At $45 per share, the price of the deal represents a 29% premium over Atheros' average stock price over the last month. Contingent upon receipt of shareholder approvals, the parties aim to complete the transaction during the first half of this year. Declaring, "what we're going to . . . do is put investment into other kinds of connectivity and spread it across a broader set of products," Qualcomm CEO Paul Jacobs told reporters: "we're using the [Atheros] acquisition to put the accelerator down on the plan we already had." Pointing to the companies' "long history of collaboration," Atheros CEO Craig Barratt promised that "the Atheros team will build upon Qualcomm's strengths and leadership to bolster our customers' ability to deliver innovative and differentiated products in the increasingly connected world."

AT&T Highlights 4G Plans At CES

Facing the end of its exclusive hold on the Apple iPhone, AT&T showcased a line of new smart phones this week at the Consumer Electronics Show in Las Vegas as Ralph de la Vega, the chief of wireless and consumer businesses at AT&T, detailed his company's plans to launch advanced third-generation (3G) HSPA+ and fourth-generation (4G) LTE network services this year. Manufactured by Motorola, HTC Corp., and Samsung, AT&T's fleet of 20 new smart phones are based largely on the Google Android operating platform. Three of those devices, the Motorola Atrix, the HTC Inspire, and the Samsung Infuse, will appear in retail outlets during the first quarter and will operate on the AT&T HSPA+ network that is slated to debut early this year. (Despite being marketed by AT&T as "4G," HSPA+ is technically a bridge between the carrier's current 3G network and the 4G LTE broadband network platform that AT&T intends to introduce later this year.) De la Vega also told reporters that AT&T will roll out a 4G tablet PC this summer, produced by Motorola, and operating on the company's HSPA+ network. Although Verizon Wireless is expected to launch the iPhone within a matter of weeks, de la Vega proclaimed that his company is the "clear leader when it comes to offering a variety of handsets and choices," as he predicted that "our . . . plan will deliver a faster, more consistent network for our customers and an experience that our competitors will not be able to match."

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